THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other judges

Case no: JS 737/09

JS 778/09

In the matter between:

PAULOS NHLAPHO AND 941 OTHERS **First Applicants**

VICTOR MABUYAKHULU **Second Applicant**

PETROS LEMOANE AND 7 OTHERS **Third Applicants**

And

SASOL MINING LTD **Respondent**

Heard: 26 January - 3 February 2016; 12 - 30 June 2017; 1 - 11 August 2017; 10 - 13 October 2017, and 26 June 2018.

Delivered: 19 September 2019

Summary: (Unprotected strike – sit-in underground at end of shifts – mine safety prevented additional shifts going underground – mining safety risks unnecessarily raised by sit-in – strike not provoked – strikers surfaced promptly on advice of shop steward leadership following interdict – management making no effort to engage recognised leadership – dismissals inappropriate though strikers' misconduct serious)

JUDGMENT

LAGRANGE, J

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Introduction

[1] The subject matter of this trial concerns the alleged unfair dismissal of several hundred workers by the respondent, Sasol Mining (Sasol) in January 2009 arising from their involvement in an underground sit-in which took place on 22 and 23 of the same month.

[2] There was a long delay between the referral of the dispute in 5 August 2009 and the matter being ready for the greater part of the trial in 2017. The reasons for the delay appear to have been mainly the difficulty of the applicants in obtaining sustained legal representation and different groups of applicants being represented by different sets of attorneys or not represented at all.

[3] Apart from that, the trial proceedings were very truncated owing to logistical and administrative problems in securing appropriate court venues, which would allow a large number of the individual applicants to attend the court proceedings given that the nearest permanent seat of the Labour Court is Johannesburg, nearly 150 kilometres away from the Secunda area. Ultimately, it was through the assistance of the Chief Magistrate and Court Manager at Delmas Regional Magistrates Court that the matter was able to proceed at a venue more convenient for the parties. The court is indebted to them for their assistance in this regard. The court also appreciates that Sasol provided bus transport from Secunda to Delmas for those applicants near enough to Secunda to attend the proceedings.

[4] Considerable delays were occasioned between the first part of the trial which focussed mainly on the dismissal of the full-time shop stewards and the rest of the trial which dealt with events at each mine. The shop stewards had been able to obtain Legal Aid representation and were ready to commence proceedings. However, the vast majority of the applicants were either originally unrepresented or their attorneys of record withdrew. It took a while before this larger group were able to obtain the assistance of the Legal Aid Board (Legal Aid), with the support of the court. Without the Legal Aid's assistance, the trial would have been completely unmanageable as the individual applicants were no longer

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represented by the union to which they had belonged at the time of their dismissal, namely UPUSA, which was deregistered in October 2009[1]. Having obtained legal aid, the applicants' attorneys had understandable difficulties in obtaining instructions from such a disparate group of applicants. This was also complicated by the fact that separate instructions had to be obtained for the events at the ten different shafts located at the four mines (Middelbult, Bosjesspruit, Brandspruit and Twistdraai) where the sit-in took place. There was no sit-in at a fifth mine, Syferfontein, which is part of the same Sasol mining complex.

[5] Although there are similarities between what transpired at each shaft during the sit-in, at the initial stages of the trial, the applicants contended that the circumstances in each shaft warranted separate consideration. The court strongly urged the parties try and agree that evidence be led only in respect of a limited number of shafts and that agreement be reached that such evidence would be treated as representative of what transpired at all shafts, but the applicants could not agree to this. Accordingly, evidence had to be led on each of the nine shafts where sit-ins took place.

[6] Given these logistical issues and the prospect of an inordinately lengthy proceedings, the court directed the parties to file witness statements, in particular with a view to narrowing down the evidence that had to be led in relation to the events at each of the nine shafts where the sit-in took place. This assisted to some degree in curtailing the time spent on evidence in chief and undoubtedly reduced the number of trial days required for hearing evidence in relation to the events at each shaft. Nonetheless, the process of hearing evidence from 36 witnesses took seven weeks, with interruptions occasioned by unavailability of court premises and other litigation commitments of the parties' representatives and the arrangement of the Labour Court roll.

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[1] See: *Commission for Conciliation, Mediation and Arbitration v Registrar of the Labour Relations and Others*; (2010) 31 ILJ 2886 (LC) at para [6].

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[7] Evidence was concluded in early October 2017 and the matter was set down for argument in the last week of term in December 2017. However, the bundles of extracts of the record, which the court had directed to be prepared together with heads of argument were not filed early enough for the court to consider them and it was necessary to postpone the hearing of closing argument. Regrettably, the parties' representatives were then unable to agree on dates during the first term of 2018 when the court offered to reconvene. Consequently, closing argument were only heard on 26 June 2018.

[8] A total of 36 witnesses gave evidence in all. Their details appear as where their evidence is dealt with in the judgment.

[9] An issue which still remained unresolved by the time that closing arguments were heard was the final list of applicants represented by the applicant's attorneys, as Sasol disputed whether some of the applicants were ever employed by Sasol. By the time the matter was argued, the applicants claimed there were 661 of them. Also unresolved at the close of evidence was the question how the court was to deal with cases where dismissals were justified on grounds other than participation in an unprotected strike.

[10] The applicants and Sasol were directed to agree on the identity of all the applicants before judgment was handed down, but despite a number of directives and a meeting in chambers during the course of July and August this year they were unable to achieve complete agreement and accordingly were invited to make written submissions on this issue.

The consolidated cases

[11] The court was seized with two separate referrals at the commencement of the trial which were consolidated: the main dispute was a referral to the Labour Court by the majority of workers dismissed for participating in unprotected strike action (Case no 737/09); the other referral to court was a consolidation of two separate referrals to the CCMA. The first concerned the dismissal of shop stewards who were members of the Local Shop Stewards' Council (the LSC) and the second, a referral by

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the shop steward' coordinator, Victor Mabuyakhulu, (Mabuyakhulu) (Case no 778/09). The disputes were originally separate because of the different dates on which the dismissals of the applicants for participating in unprotected industrial action and the dismissals of the shop stewards took place. The shop stewards were charged and dismissed for their alleged misconduct in instigating, organising and participating in unauthorised marches which took place on Sasol premises on 19 January 2009 and which Sasol characterised as unprotected industrial action in breach of the recognition agreement and the Labour Relation Act, 66 of 1995 (the LRA). The shop stewards alleged the dismissals were substantively and procedurally unfair. Mabuyakhulu was also charged in addition with conduct which could blemish the company's image and lead to 'serious relationship disturbance' by 'allowing' the LSC members to conduct themselves as they did. The marches of 19 January preceded the sit-in on 22 and 23 January 2009, by which stage the shop-stewards had already been suspended.

[12] Despite the consolidation of the cases, after all the evidence relevant to the dismissals of the shop stewards had been led, but before commencing with the evidence relating to the dismissal of the bulk of the workers, the disputes concerning the shop stewards' dismissals were settled and the settlement agreement was made an order of court, shortly before the proceedings recommenced in June 2017. Accordingly, this judgment only concerns the dismissal of the individual applicants for their alleged participation in the sit-in of 22 and 23 January 2009.

[13] Nevertheless, the events which ultimately led to the dismissal of the shop stewards are closely connected to the subsequent underground sit-in although the shop stewards had not yet been dismissed when the sit-in occurred. Consequently, although the court is only required to determine the fairness of the dismissals of the applicants who were dismissed on account of their alleged participation in unprotected strike action on 22 and 23 January 2009, it is nonetheless necessary for the chronology of events and in order to understand some of the reasons why the applicants claim their dismissal was unfair to traverse the events leading

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to the suspension of the shop stewards, who were subsequently dismissed.

Background context

Physical layout of the mines

[14] The affected mines generally had one service and two production shafts. Access to and egress from each mine could also be achieved using an incline shaft, which was usually close to the service shafts. According to John Montgomery (Montgomery), who was a shaft manager at Bosjesspruit - Irenedale shaft at the time, and currently mine manager at Middelbult's iThembalethu Mine, an incline shaft is usually an excavation six metres wide and three metres high with an incline of 17 degrees or less which runs from the coal seam right to the surface. Normally coal is transported to the surface by a conveyor belt situated in the incline shaft.

[15] The service and productions shafts were serviced by lifts known as cages. Miners enter the mine and leave the mine using the cages, which vary in size. A cage operator (cage driver) stationed in the cage itself controls the cage. The operation of the cage can also be controlled by an artisan from the surface of the mine using a control panel on the shaft headgear. The cage itself has a solid roller door, which has to be opened first when the cage descends to the working level of the mine. Once that door is opened, a second external door must be opened by means of a handle to gain access to the working area. The external door is made of steel mesh. If the external cage door is opened while the lift is in motion, the cage will stop and cannot move unless the safety tripping mechanism is overridden. A recurrent theme in the events of the sit-in at various shafts was that some of the cages were immobilized when they were ascending to the surface because of alleged tampering with the external shaft door, which caused safety mechanism to trip. Although roof bolts, which are long steel rods used for roof supports, would have been difficult to push through the mesh of the external shaft door because the roof bolts are bigger than the gaps in the mesh, it is possible if some other instrument is used to open the external door from the outside.

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[16] The cage doors open underground into an open area known as the ‘shaft bottom’. It is large enough for shifts to gather before surfacing. Work teams often travel from this area in light delivery vehicles (LDVs) to their working areas which can be a few kilometres away from the shaft bottom. In a number of instances, it is possible after walking some distance to reach another shaft of the same mine. Adjacent to this area, sometimes just off the roadway leading to the shaft bottom, there is usually a separate waiting area where underground workers gather at the end of their shift or the beginning when they are waiting for the LDV transport. The shaft bottom area will be dealt with in more detail when mine safety is discussed.

[17] As mentioned, attempts were made to get agreement between the parties that evidence of what transpired at some of shafts could be taken as evidence of what took place at all shafts, but this could not be achieved. Accordingly, evidence was led on events at each of the following shafts:

17.1 At Middelbult Mine the service shaft was known as main shaft and the productions shafts were known as west shaft (where there were four production sections) and iThembalethu shaft (where there were five production sections).

17.2 At Brandspruit Mine the service shaft was also known as main shaft and the production shafts were known as No. 2 and No. 3 shafts, both of which had five production sections.

17.3 Twistdraai Mine had two shafts – one of which (Central shaft) doubled up both as a services shaft and a production shaft. At central shaft there were four production sections and at East shaft there were five production sections.

17.4 At Bosjesspruit each of the two shafts had its own support services section. The main shaft had two production sections and Irenedale shaft had nine production sections.

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[18] At each of the shafts there was one maintenance shift and two production shifts. The shifts rotated and production and maintenance shifts were not synchronised across the all the mines. For example, at Bosjesspruit Mine -Irenedale shaft, the night-shift of 21 January 2009 was a production shift, whereas at Middelbult Mine - iThembalethu shaft, the night-shift was a preparation shift. However, the scheduled shift hours were the same for all shafts on all the mines: the evening shift commenced at 22:00 and finished at 8:00 the next morning; the morning-shift commenced at 7:00 and finished at 17:00; and the afternoon shift commenced at 16:00 and finished at 23:00. There was always an overlap of an hour between shifts so that the next shift would go underground before the previous shift surfaced.

Safety precautions in the mines

[19] It was the applicants' contention that workers participating in the sit-in largely congregated at the shaft bottom close to the main cage at each shaft, which constituted an area of low risk compared to the risk of accidents near the working surfaces where mining operations were underway. At the time of the sit-in, Jean Pierre Jordaan (Jordaan) was the General Manager for the CTL Mines (being the Bosjesspruit, Brandspruit, Middelbult and Syferfontein Mines). He testified that there had been incidents in 1987 and 1993 at Middelbult when fatal methane explosions had occurred in the production sections and in a coved area where methane levels had exceeded 5%, but agreed no explosions had occurred at a shaft bottom at Sasol. Methane technicians were employed between November 2006 and October 2012 to monitor methane levels.

[20] Jordaan agreed that according to the safety regulations, the shaft bottom itself was not a hazardous area, a point which was also made by some of the applicant's witnesses like Hamilton Matwa (Matwa), an Emco Driver and an ordinary shop-steward. However, when explosions had occurred, people who were not in the production section where the explosion occurred were also killed. He explained that a methane explosion can

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propagate and that is why he said in his statement that the 2009 sit-in was very serious because of the grave safety implications it held.

[21] Although he was tested on the fact that no health and safety report was made during the two-day sit-in indicating that a safety risk existed, he stressed that even without knowing the methane levels that existed during the strike there was always a potential threat posed by possible rising methane levels, if for example a ventilation fan in a section was not working. Sasol had not convened a health and safety committee meeting during the sit-in because management's focus at the time had been trying to get the workers to surface owing to the potential risk they were exposed to by remaining underground. His focus at the time was dealing with the representatives of the applicants rather than the health and safety representatives, even though safety was a major concern.

[22] Jabulile Gumede (Gumede), an artisan and supervisor working on the night-shift of 21 January at Bosjesspruit – Irenedale shaft, stated in his written statement that the Tri Flow sensors in the mine, which monitor the presence and levels of methane gas, carbon monoxide and air, are monitored by the control room on the surface and the personnel in the control room would be alerted to any hazardous change in the gas levels and could take steps to ensure the safety of those underground such as shutting down the conveyor belt and ensuring workers moved to waiting areas. Jordaan had responded to Gumede's written statement by saying that the Tri Flow sensors only measured the volume and quality of air in the section but not in the different production phases [the sites where coal extraction takes place]. The sensors would not pick up a build-up of methane in a phase, which is where new sources of methane extrusion emanate. Gumede also testified that at the start of a shift, he and the miner on the shift go to each phase or branch of the ventilation system and test for methane. Moreover, the Tri flow sensors are only placed by the return air passage, where air pumped by jet fans out of each production phase is directed. Methane, being lighter, will be on the top level of the stream of air where the Tri Flow sensors are placed and will cause the sensors to go off if the methane concentration exceeds 1.4%.

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[23] Further, if a fan stops working in a production phase, the Tri Flow sensors would not detect that. In fact, there had been up to three methane ignitions a year from 2009 to 2013. Jordaan testified that these ignitions can occur when the methane concentration in the air reaches 1.4%. The ignitions that occurred had been contained within the area they originated because ventilation had prevented the methane concentration from reaching 5%. When the methane concentration reaches 5% then a methane explosion will occur if there is a methane ignition. Gumede could not comment on these incidents, nor could he comment on the claim that during the sit-in there were instances (at the Twistdraai shafts) where fire patrols could not be conducted and methane gas measurements could not be taken.

[24] Gumede also testified that, on the night-shift of 21 January 2009 at Bosjesspruit - Irenedale shaft tests would have been conducted every three hours because the night-shift was a production shift during which methane can be extruded from the coal face when it is being cut and coal is extracted. The morning-shift which followed was a preparation shift and the gas inspections are only conducted at the start and end of each shift, which was done. The reason testing was only done twice on a preparation shift was that no production work is done, so no new coal is being cut, which could give rise to methane seeping from the newly cut coal face.

[25] On the risk of a section of mine roof being unsupported, which entails the risk of a rock fall as well as a methane explosion, Jordaan's evidence was that:

> "The risk of collapse of an unsupported roof can be high in certain areas because of the long duration before it is supported. Typically, the respondent requires that a roof section not be left unsupported for longer than 48 hours to avoid a possible roof collapse. In this instance where there was no mining or supervision of mined areas for a period exceeding 24 hours, there was an increased likelihood of a roof being left unsupported for a period exceeding 48 hours. The significance of this is: this is not only the possible harm and damage caused by a roof

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> collapse, but the fact that this will cause an explosion in the course of a methane build-up."

Gumede responded by stating that:

> "The night-shift of 21 January 2009 (that is as regards Irenedale) was a production shift. This means that the morning-shift of the same day would have been a prep shift which would have, if it was necessary, ensured that any unsupported roofs are supported in preparation for the production teams of the afternoon and night shift. It is important to note that the supporting of roofs would only take place if more than three phases were unsupported. The morning-shift of 22 January 2009, which shift conducted their duties, would have again been a prep shift where unsupported phases would have been reinforced if same was necessary. Accordingly, given that the afternoon shift and night production shifts were not permitted to work, it is not likely that there would have been any unsupported phases for the duration of the sit-in."

[26] Jordaan, when asked whether he was aware if there were any unsupported roofs, indicated that there will always be unsupported roofs and the support will take place when a new area is cut. Gumede disputed this. He claimed when there is a preparation shift, they will do all the preparation in order that when there is a production, there is an early start to production on the next shift. That preparation would include putting in supports for early production.

[27] Gumede also emphasized that the main ventilation supply enters the mine and fresh air is supplied to the mine through a fan at the shaft bottom, as a result of which a build-up of methane gas or excessive coal dust in the shaft bottom area is highly unlikely to occur. He also alluded to an observation made during the *in loco* inspection, namely it was noticeable that the floor of the mine at shaft bottom was wet, so there was no dust. Owing to the absence of sunlight it could take two to three days for the roadway to dry up if it was not irrigated and particularly if there was not much movement up and down the roadway.

[28] He further mentioned that welding was done with a cutting torch in the boiler shop which is situated near the waiting area at the shaft bottom

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where the workers were gathered. That was only possible because of the good ventilation in the area. It was common cause, that the mine roof in that area was also sprayed with a flame retardant and supportive coating which enhanced fire safety and minimised the chance of a rock fall. Additionally, LDVs, which are not flameproof, are required to stop at least 100 metres from the waiting area and there was a minimal risk of one of them causing an explosion given the ventilation at the shaft bottom. All devices such as fans, switches and the like are all flame proof in areas where there is a risk of methane gas build-up.

[29] Another issue concerned whether or not it was customary or lawful for workers to spend longer than 12 hours underground when working a so-called '*Ilima*' or '*zama-zama*' shift, which is usually conducted after a long weekend off or on public holidays. According to Gumede, under this work system, workers essentially 'sell' the coal they recover from an operation like pillar extraction when coal pillars are being broken down. This sometimes involved miners starting to work at 14:00 and stopping work at 06:00 the following day. This specific example was not foreshadowed in Gumede's statement, nor was it put to Jordaan in cross-examination. Vuyisile Tyokolo (Tyokolo), an Emco driver, also testified that it was common for workers on an *Ilima* shift to work longer than 12 hours. Jordaan insisted that even an *Ilima* shift was constrained by the 12-hour rule and he was not aware of any *Ilima* shifts that were longer.

[30] Both Jordaan and Montgomery testified that standard company operating procedures required workers to leave the mine after 12 hours underground. Jordaan denied that any shift could extend beyond 12 hours, except in cases of emergencies, which the Mine Health and Safety Act[2] provided for by regulation 4.15 of the Minerals Act[3]. That regulation states:

> "4.15 No worker shall work, or be caused or permitted to work, two or more shifts at any mine during any continuous period of 24 hours: Provided that this restriction shall not apply –

[2] Act 29 of 1996.

[3] Act 50 of 1991.

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(a) to work necessitated by accident or other emergency; or

(b) to such repair work to equipment or such service as cannot be delayed without

causing serious interruption to the operation of the mine; or

(c) to a shift worker when he changes over shift times or where the shift worker for the succeeding shift fails to arrive and a replacement is not immediately available; or (d) in other cases of necessity permitted by the Principal Inspector of Mines and specified in writing to the manager of the mine"[4]

[31] An example put to him was set out in Gumede's statement where the latter referred to Emco drivers and artisans working underground even beyond 24 hours where there had been a rock fall or machine breakdown. Gumede's written statement cited a number of situations in which workers might be required to work longer than twelve hours: when a section is being moved workers in that section might work nearly 24 hours and then report back at the normal time for the next shift; in the event of a rock fall or machine breakdown, Emco drivers and artisans might remain underground for more than 24 hours and would be brought food; the *Ilima* shift could last for longer than 12 hours or even more than 24 hours. Tyokolo likewise cited an incident where a new cutting machine was introduced to the mine and could not be brought down in the cage, but had to be dismantled and reconstructed, which entailed parts being brought down other shafts and resulted in persons working underground for more than 24 hours.

[32] Nevertheless, Gumede did concede that ordinarily a shift would last 10 hours but an artisan may decide to stay underground longer if there was a valid reason for doing so, such as in the case of a machinery breakdown. Even so, the artisan still had to inform the foreman on duty who might countermand the artisan's decision to stay underground for more than ten hours. In any event, except in exceptional circumstances a shift would

[4] (Regulation 4.15 added by Regulation 6 of Government Notice R305 in Government Gazette 3397, dated 1 March 1972); (Regulation 4.15 amended by Regulation 26(h) of Government Notice R3083 in Government Gazette 13684,,dated 20 December 1991)

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never extend beyond 12 hours even if the foreman agreed it could extend beyond ten. The counter examples cited by Gumede mostly involved unusual circumstances such a vehicle breakdown requiring a worker to walk out the mine or where someone went missing.

[33] Bolae Khali (Khali), a full-time health and safety shop-steward, said that he was not contacted by Sasol about any health and safety issues during the underground sit-in, nor did management convey any health and safety concerns to him about the workers underground. It appears from his evidence that he would normally be called upon to intervene in cases of someone being injured at work.

[34] Khali also claimed that when the sit-in was agreed upon at the meeting on 21 January they did not expect to stay underground longer than 12 hours. As a health and safety representative he was aware that the Basic Conditions of Employment Act, Act 27 of 1997 (the BCEA) did not allow workers to "stay underground" for longer than 12 hours, but that it sometimes did happen if the company wanted workers to stay longer. At any rate that is how the proposition was somewhat inaccurately put to him under cross-examination. What the BCEA in fact prohibits is a rest interval between shifts of less than a twelve hour period.[5] Though the rest period may be reduced under certain conditions stipulated in s 15(2) of the BCEA, there was no evidence suggesting that s 15(2) applied to workers in this case.

[35] Jordaan and Montgomery both testified that company operating procedures require workers to surface within 12 hours in cases where work that has to be completed can be completed by a subsequent shift. George Hattingh (Hattingh), who at the time was a shaft manager at Brandspruit no 3E shaft, confirmed that even though the area at the shaft bottom near the cage was a safe area there was also a rule that personnel should surface as soon as possible after the end of their shift. Gumede said that he was not aware of the maximum time a worker is permitted to remain underground in terms of the company procedures but that it was

[5] Section 15(1)(a) of the BCEA

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not considered right that a subsequent shift should repair a breakdown which occurred on a previous shift and supervisors would show their appreciation towards their team for such extra effort.

[36] Gumede was tested on why the workers had remained underground rather than surfacing, but said he could not explain why they chose to remain underground. He agreed that from the time the morning-shift failed to surface on the afternoon of 22 January until all workers surfaced a day later (during which time none of the workers underground were on duty), he could not dispute that it was not possible for normal safety measures to be conducted.

[37] Additional detail relating to safety matters is canvassed further in the evaluation section of the judgment.

Chronology of events leading to the dismissals

Recognition of UPUSA and subsequent internal divisions

[38] Following a verification exercise in December 2006, during which UPUSA members also embarked on an unprotected strike, it was established that UPUSA had achieved majority representation in the bargaining unit and CEPPWAWU's representation in the bargaining unit had fallen to 27 %, which was below the 30% threshold which was required for bargaining rights. CEPPWAWU's bargaining rights were restored subsequently after they allegedly achieved the 30 % threshold during the course of 2008, but the threshold was subsequently lowered to 23 %. Strauss was adamant that the threshold was not lowered to accommodate CEPPWAWU but was the result of a Sasol wide discussion in which the unions participated and it was agreed that the threshold should be lowered. He was vague about when this occurred but it seems it must have been in the second half of 2008. In mid-July 2007, Luthuli wrote to Sasol complaining that it was still recognising CEPPWAWU and there was a lingering suspicion that Sasol favoured CEPPWAWU over UPUSA, and this suspicion had not been eliminated by January 2009.

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[39] On 23 January 2007, a further unprotected strike was called by UPUSA members at the Syferfontein mine. It lasted until 25 January 2007. The striking employees demanded the reinstatement of those employees that were dismissed for the December 2006 strike and demanded the immediate removal of certain employees (such as the HR Manager at the mine, Gabriel Morodi) and several CEPPWAWU shop stewards. In general, all employees who were found guilty of participating in the strike and who had final written warnings were dismissed.

[40] A recognition agreement with UPUSA was only concluded on 19 April 2007. UPUSA was eventually recognised as a bargaining representative of its members in April 2007. It participated in the next round of wage negotiations, during which it tabled, amongst other things, a minimum monthly wage of R 9000.00. A settlement was concluded with the other unions but negotiations with UPUSA deadlocked sometime in October 2007. UPUSA then embarked on a protected strike that lasted a few weeks. UPUSA eventually settled on 15 November 2007 on the basis that UPUSA members would receive the same increase as agreed with the other unions. Importantly, there was an undertaking given that the remuneration and benefit differentials between Wage Personnel (WP) and Monthly Staff Personnel (MSP) would be investigated and addressed. Clause 2.1 of the wage agreement, which initiated the wage gap reduction process, stated:

> "The parties agreed to engage in discussions to investigate the wage gap. As a starting point, the company and the union will compare, consider, address wage disparities amongst wage personnel workers who are currently doing the same job. It is also agreed that the parties will engage each other immediately after the wage negotiation and will establish a work group will start on 3 December 2007 and endeavoured to have a recommendation by 15 February 2008."

[41] This became known as the 'wage gap issue'. Another term of that agreement was that the annual service increment would be implemented in January 2008. According to Strauss it had previously been paid together with the general increases in July. Mabuyakhulu claimed that a demand for a minimum wage of R 9000.00 never resurfaced during the

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wage gap negotiations, but was an issue that was confined to the 2007 wage negotiations.

[42] Mabuyakhulu also testified that in November 2007 there had been a march to the Brandspruit HR office building by UPUSA workers demanding the de-recognition of CEPPWAWU. Mabuyakhulu claims he addressed the workers after being called by management to the scene and after he spoke to them they dispersed. Subsequently, Sasol and UPUSA entered into negotiations to create a position for him as a full-time shop steward coordinator. Up till then he had been employed as a store supervisor. On 8 November 2007, Sasol had written to UPUSA's Evander office about the unauthorised planned march on the following day, warning that it could de-recognise UPUSA. On 9 November, Mabuyakhulu persuaded the off-duty workers participating in the march to disperse and no disciplinary action was subsequently taken against them.

[43] Mabuyakhulu also stated that he had been asked to intervene in another march organized on 18 May 2008 and he was able to prevent it taking place. He claimed that this led to Strauss and he agreeing that if something of this nature happened Sasol would inform him so he could try and intervene. Strauss did not dispute that such an understanding was reached.

[44] The Wage Gap Work Group convened for the first time on 3 December 2007 and the Local Executive Leadership (LEL) group comprising Mabuyakhulu, and seven other full-time shop stewards formed part of the workgroup. The seven other members of the LEL were Morena P Lemaoana (Lemaoana); Abner Magagula (Magagula); Peter Mnguni (Mnguni); Andries Caka (Caka); Moshitoa Makoti (Makoti); Jonas Mofokeng (Mofokeng) and Joel Nkosi (Nkosi). Notably, even at this stage, no UPUSA officials were involved.

[45] Later, a smaller wage gap implementation team was formed. The UPUSA delegates to team were Lemaoana, Mofokeng and Mabuyakhulu. The Sasol representatives were Strauss, Ledson

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Tshikovhi, a Sasol ER consultant reporting to Strauss (Tshikovhi), and members of the Finance Department.

[46] On 24 June 2008 an agreement on the wage gap project was ultimately concluded between Sasol and UPUSA. In practice, the agreement had been negotiated by the Local Shop Stewards Committee (LSC) and not by the UPUSA officials who attended this meeting. Although the applicants maintained these deliberations were supposed to be confidential, their contents were leaked to CEPPWAWU, which angered UPUSA members because they felt it created the impression that the CEPPWAWU had been instrumental in negotiating the arrangement. Mabuyakhulu believed that management was responsible for leaking the information to CEPPWAWU because CEPPWAWU placed a copy of the agreement on the noticeboards at Bosjesspruit even though there were no CEPPWAWU representatives at the meeting. Furthermore, the notice could not have been placed on the noticeboards without management's permission. Strauss disputed the confidential nature of the communication saying that this was information that was available to everyone and the only things that were confidential were the mandates of the parties.

[47] UPUSA members were particularly angered about this because they felt that Sasol should no longer be dealing with CEPPWAWU after it was shown to have less than 30% representative of the workforce. Mabuyakhulu stated that the LSC had issued a notice for a march on 1July 2008 and Strauss contacted him to tell him that the march was not authorized and asked him to convey this to workers and the LSC, which he did. Strauss also agreed to send SMSs. The march never materialized.

[48] A meeting was convened on 23 July 2008 with UPUSA to try and resolve the issues arising from these events and Mabuyakhulu claimed that he was instrumental in getting Sasol to agree to increase the previously agreed wage gap increase in July from 3% to 3.5% as a gesture of goodwill following the leak, which he claimed Sasol also apologized for. Strauss denied this change had anything to do with the leak, but was

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merely something acceded to when Mabuyakhulu asked if Sasol could increase the 3 % to 3.5 % as 'a gesture of good faith'.

[49] Two days later, S'ne Mkhize (Mkhize), the Human Resources manager, issued the email circular which supposedly was the cause of some of the confusion about the wage gap implementation process.

[50] During 2008, a rift developed between the LSC and officials of UPUSA in the Johannesburg office and Evander branch. For various reasons, this division would ultimately have a significant impact on the events under consideration. On 25 to 27 September 2007, UPUSA held its National Congress in Durban. The congress became the subject matter of a court case seeking to invalidate the congress and the appointment of NEC members at the. The controversy arose arising from the alleged failure of the Johannesburg office, where the General Secretary of the union, Mr E Luthuli (Luthuli), was based to arrange transport for all the Sasol delegates to the Congress. In consequence, a dispute arose whether the national office bearers, including Luthuli, had been properly elected. UPUSA members at Sasol aligned themselves with the Durban branch of UPUSA and sought to invalidate the Congress. They also demanded that union subscriptions be remitted to the Durban branch of the union instead of sending them to the head office in Johannesburg.

[51] The division between the Sasol members of UPUSA, led by the LSC, and the union officials in Gauteng became so serious that Sasol had to adopt a pragmatic compromise so that it could deal with the Sasol leadership of UPUSA members in the workforce, without breaching the recognition agreement with UPUSA. Following a meeting on 6 October 2008, which had also been called to address the delays in implementing the medical scheme transfers, Sasol wrote to UPUSA stating that it would work with the local executive leadership until internal leadership matters had been resolved, viz:

> "Due to the conflictual nature of the communication we have received recently, this leaves us with no option but to work with the local executive leadership until we are assured that the internal leadership matters have been resolved".

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The meeting had also been convened to address the delays in the transfer of workers from one medical scheme to the other.

[52] In practice, even prior to that, Sasol had in fact been dealing mainly with the LSC on all matters affecting UPUSA members working for Sasol. Strauss testified that the objective of Sasol in deciding to work with the workplace leadership was to complete all the outstanding issues in the wage gap consultations, without getting involved in the internal dispute within UPUSA. He confirmed that he received no objections to this arrangement from Luthuli. Moreover, the dealings with the elected shop stewards at Sasol seemed to have been in keeping with the recognition agreement which acknowledged them as having negotiating capacity.

[53] The tussle between UPUSA head office and the LSC over the remittal of union membership subscriptions continued and the LSC persisted with demands that subscriptions be sent to the Durban branch of UPUSA. The LSC proposed an amendment to the recognition agreement with UPUSA to give effect to their demand. Sasol explained that it was bound to comply with the recognition agreement and to deal with the elected NEC leadership of the union as the legal authority of the union, until such time as a court declared their election invalid or they received official notification from UPUSA stating otherwise. Sasol was nonetheless willing to hold a meeting in December 2008 between the LSC and the officials in Evander and Johannesburg to attempt to resolve the impasse, but Luthuli refused to attend such a meeting and insisted Sasol continued to deal with the leadership elected in the contested Congress elections. The impasse remained unresolved by the end of 2008 and surfaced again in January 2009 as an issue causing discontent.

Negotiation of the transfer of wage personnel (WP) to monthly staff personnel (MSP) – The wage gap agreement

[54] The 2007 agreement led to the establishment of a wage gap team. By the first half of 2008 the investigation had established what the differentials between MSP and WP employees were. A gap of approximately 3% was identified between Sasol mining WP workers and the rest of the industry and in addition a differential of approximately 7%

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existed within Sasol mining between WP and MSP staff. These figures were determined after an independent consultancy, Blue Horizon, had been engaged to assist the parties in determining what the wage gap was.

[55] As mentioned, an alleged leak about the agreement concluded on the wage gap project had angered UPUSA members because they felt it created the impression that the CEPPWAWU had been instrumental in negotiating the arrangement. Initially, the two 'gaps' of 3 % and 7 %, were going to be bridged with effect from July 2008 and January 2009. As explained it was ultimately agreed that all wage personnel should receive a 3.5% increase with effect from July 2008 and that the distinction between the two categories would be done away with in January 2009, when a 6.5% adjustment would be made. The wage gap adjustments were determined quite independently from the ordinary general wage increases in July, which were determined by a collective bargaining.

[56] According to Mabuyakhulu, the difference of 10% increase was agreed and included the annual service increase of 0.5%. On his initial version, the 0.5 % increment had not been paid for a number of years and had played a huge role in the growing gap between the workers. He further claimed that, without the knowledge of workers, the annual 0.5% service increment, had not been implemented during the time that CEPPWAWU was the majority union. He clarified this when giving his evidence in chief, and explained that the reason why some workers were no longer receiving the 0.5% increase was because they had reached a ceiling. In elaborating further on this, Mabuyakhulu claimed that this resulted in disparities between WP personnel and it was decided that the gap had to be narrowed by paying such workers 0.5% for each year they had worked for Sasol. For example, in his own case, he had worked 23 years and therefore expected 0.5% increase for every year he had worked, which would effectively have increased his pay by 11.5%. He claimed that this had been agreed to.

[57] It was put to him that the joint proposal compiled by Blue Horizon recorded that "…the 0.5% year of service recognition scheme creates

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disparity in the pay levels of workers representing a lower versus higher-level position." Further, the joint proposal recommended replacing that model to avoid further disparity all of which suggested that WP personnel *were* previously receiving this increase, contrary to Mabuyakhulu's claims. However, Mabuyakhulu still defended his interpretation, that the 0.5% would be incorporated and paid to workers to increase their salaries based on their years of service on a retrospective accumulative basis.

[58] Strauss had testified that employees with 30 years' service would reach a ceiling and would not receive further 0.5 % annual service adjustments. Mabuyakhulu maintained that because black workers in the past had been employed as contract workers under the apartheid pass system in the past, they were not credited for all their years of actual service. According to him, this meant that none of the WP workers would have reached the 30 years ceiling. He contended that because of the problem this created it had been agreed that the notch of 0.5% would be included in the alignment process on an accumulative basis. Mabuyakhulu insisted that the sixth objective of the wage gap project stated in the joint proposal, namely to replace the "years of Service recognition model" to "avoid further disparities in pay levels between workers at different job categories" meant that "…the 0.5% it created the big gap on the narrow versus higher level position <u>on the same wage personnel</u>, because the 0.5% <u>was only paid to wage personnel</u> not to MSP's." (*sic* - emphasis added).

[59] He also disputed Strauss's evidence that the inclusion of the 0.5% in the wage gap discussions was considered but that it was decided it was not feasible to collapse it with the wage gap adjustments. Similarly, Mabuyakhulu contended that in Mkhize's email of 25 July 2008, she had not made an error by mentioning that the "0.5% annual service increment normally paid to Wage Personnel will be incorporated in the alignment process." Mabuyakhulu interpreted her email to be confirmation that a cumulative payment of the 0.5% service increment would be paid. However, he could not point to any other document in which this specific

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accumulative interpretation of the service increment adjustment was recorded.

[60] Mabuyakhulu testified further that the plan to collapse the salary bands from nine bands to four bands was due to have been implemented in January 2009. However, the technicalities of that task, had been assigned to financial experts to work out and to present the results to the project team, which had not happened. According to him the only issue that was outstanding was the criteria for progression between the specific wage bands. That was supposed to be implemented in January 2009 after the financial experts had presented the proposal to the project team for consideration. Strauss had claimed that it had in fact been agreed previously with the LSC that it would not be possible to implement the collapsing of the wage bands in January as originally intended. The dispute was declared because of the failure to establish the new bands and pay scales, together with new job titles and the failure to present a career path model. Mabuyakhulu was somewhat vague when it was put to him in his evidence in chief that Strauss had contended it was unreasonable to expect all those things to be achieved by January 2009. His response was simply that nothing had been presented to him as the leader of the of UPUSA representatives as it should have been if there had been a problem with implementing all the changes by the end of January 2009. Instead, according to him the implementation problem was only conveyed to LSC members on 15 January, which he interpreted to be provocative conduct on the part of Sasol and part of a deliberate strategy to get rid of UPUSA workers and protect the interests of CEPPWAWU.

[61] Another feature of the agreement was that WP staff would transfer from Thebe Med to Sasol Med medical scheme from 1 October 2008. Mabuyakhulu interpreted the failure to finalize this by 1 October 2008 as another act of provocation by Sasol. This process had been initiated as far back as April 2008, but it was a slow process because both funds had to approve giving workers the choice of transferring and presentations had to be made to workers by representatives from both schemes so workers could exercise an informed choice. As a result, workers who wanted to move to Sasol Med did not receive their new medical aid cards by 1

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October 2008 and this created a degree of frustration amongst UPUSA members. Strauss conceded they had received reports of unhappiness on the part of some workers because they still were waiting for the membership cards from Sasol Med, but they were not complaining that the anticipated deadline had not been met. Mabuyakhulu claimed that the difficulties in implementing the medical aid transfer were never conveyed to the LSC.

[62] The LSC eventually went to the ER department to try and get answers about this. Eventually, they got hold of Mkhize by phone and she had told them that she had forgotten all about the transfers. According to Mabuyakhulu, this caused members to be furious. Ultimately, even though the transfer process was slower than anticipated it was common cause that the transfers were completed by November 2008.

[63] Later in his evidence under cross-examination, Mabuyakhulu said that the financial team that was looking into the collapsing of the salary bands was expected to present its proposal to the working team for consideration after which it would still be implemented in January 2009. He insisted that even though he could only have attended such a meeting after 15 January there was ample time for the payroll to be altered to give effect to the new salary bands, because the payroll would already have been structured to give effect to the anticipated changes. Consequently, if the working team had had met on 19 or 20 January and agreed on the proposed structure it could still be implemented that month. Mabuyakhulu was adamant that everybody knew that the implementation of the wage gap would be done in January, because that was communicated to workers at all the different shafts by management as per the email from Mkhize. He did concede that if there had been any lack of clarity regarding the Wage Gap implementation he could simply have dropped in on Strauss and discussed it with him, given his office's proximity to Strauss's.

[64] It is common cause that there was an industry wide practice of paying MSP staff an additional 0.5% increase annually. Strauss and Tshikovi testified that workers with 30 years' service no longer received the

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increase. The practice was then to be extended to WP staff as well as part of the process of eliminating remuneration distinctions between the MSP and WP staff. In the much cited email circulated by Mkhize on 25 July 2008, it certainly appeared that there was a perception that this service increment would be included in the alignment of wage personnel conditions with those of monthly staff personnel. The email, which reported on the initial results of the wage gap project stated:

> "WAGE GAP
>
> Our investigation identified the following misalignment.
>
> A 3% base pay gap (on average) exists between Sasol Mining WWP level workers and the rest of the industry.
>
> A difference of up to 7 % exists (on average) between the remuneration of Sasol Mining WP workers and workers at the same level in other Sasol companies.
>
> To address the anomalies:
>
> The base pay rate of all WP workers will be increased by 3.5 % to align with the rest of the mining market with effect from the 1st July 2008.
>
> All WP workers will be moved to Monthly Salaried Personnel (MSP) category with effect from 1st January 2009. To facilitate this transition, a project team will be put in place to review and align the wage personnel job level structure (reduction from 9 job levels to 4), career paths, progression and related allowances. The 0,5 % annual service increment normally paid to Wage Personnel will be incorporated in the alignment process. The project team will communicate and consult with concerned worker representatives during this process.
>
> As part of the implementation of the transition from WP to MSP, a further alignment increase will be paid with effect from 1 January 2009.
>
> MEDICAL AID
>
> All our workers in the Wage Personnel category have belonged to Thebemed Medical Aid. Further to a consultation process with concerned parties, we will be giving all WP workers an opportunity to

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choose to move from Thebemed Medical Aid to Sasolmed Medical Aid with effect from the 1st October 2008". ….

(emphasis added)

[65] An important element of the applicants' case was that the emphasised portion of the email above, and in particular they claimed the Zulu version thereof created confusion about the effect of the 0.5 % service increment being implemented together with the alignment process, and this had been a contributory factor in raising workers' expectations. In the course of the evidence though, none of the applicants' witnesses made reference to the Zulu version of the document, and the argument that it exacerbated any ambiguity in the circular was not pursued in argument.

[66] Mabuyakhulu agreed with Mkhize's characterisation of the 3% and 7 % differential except that he said the figures should have been the other way round, namely that the 7 % referred to the difference between Sasol Mining and the industry and the 3 % to the internal disparities within the Sasol group. He also agreed that the 10% differential was addressed by the increases of 3.5% and 6.5% paid in July 2008 and January 2009 respectively.

[67] Strauss testified that even though it had been the intention that the annual service increase would simply be subsumed under the wage gap rectification process, management was advised that it had to be retained as a separate adjustment because otherwise it would 'disappear' if it was simply incorporated as part of the adjustment increase to bring WP in line with MSP. It was a standard practice in the industry and had to be retained. Accordingly, the 0.5 % service increment could not be 'incorporated' in the wage gap alignment process and this issue was discussed in subsequent consultations over the implementation of the wage gap process. He could not say if this alteration was communicated to workers but it ought to have been communicated by the unions and line managers when they held the daily 'toolbox talks' before workers went underground. For this reason, no further written communication like that of 25 July 2008 was issued. The 0.5 % increase was included as a

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term in the 2008/2009 wage agreement because it was an industry standard.

[68] Phillipus Degenaar (Degenaar), who was at the time the shaft manager at Middelbult West shaft, did not dispute receiving the 25 July email, but said it was not an issue which he paid much attention to as a shaft manager, even though he conceded that it would be of interest to the workers affected by it. He agreed that it would been the normal practice for such matters to be conveyed during safety meetings at each shaft. However he denied communicating promises of substantial increases WP could expect to receive in January 2009 to close the wage gap, contrary to statements by Hamilton Matwa, at the time an Emco driver on the Middelbult west shaft day shift and Johannes Malgas (Malgas)[6], a shuttle car operator on the night-shift at the same shaft. They claimed Degenaar had informed them in Zulu that they could expect a substantial sum of money. Degenaar did concede that, on the face of the July 2008 email, a WP worker would not have been unreasonable to expect an increase in January 2009.

[69] Enoch Zwane (E Zwane), who was a conveyor belt supervisor working on the morning-shift as a conveyor belt operator at Twistdraai Central shaft at the time, understood the pay gap between various levels would be closed, WP personnel would migrate to MSP and payment of monies would be based on workers' years of service'. He believed, even though he was an MSP employee, that he would also benefit because he would become a shift boss and shift bosses would become captains. This contention was not advanced by any other witness. Zwane did not know how much they would receive but believed it would be a substantial amount and said workers had told their families they were expecting a lot of money in January 2009. He said that management letters recorded 'that we would be paid in January 2009'. E Zwane claimed information about the wage gap had been relayed to them at Twistdraai Central by the shaft manager, Sekukwane. When he had addressed them he did not say that MSP's would not benefit and E Zwane assumed that if others moved up to his

[6] Malgas's statement was put to Degenaar but Malgas never testified.

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level, he would move to the next, despite the lack of any documentation supporting such an interpretation.

[70] In his written statement, Thulani Nxumalo (Nxumalo), who was the mine overseer at Bosjesspruit main shaft, disputed Khomoetsoeu Molise's claim that he had told workers during a safety meeting that they would be paid monies relating to the wage gap and had given them a document to that effect. Molise's statement asserted that it was these communications that led him and his colleagues to believe they would receive a substantial payment in January over and above their normal remuneration. At the time he was an engineer who was working on the night-shift at Bosjesspruit. However, under cross-examination, Nxumalo was slightly less emphatic. He said that he could not recall addressing workers as alleged, and was confident, if he had, that he would have remembered it.

[71] He conceded that he would have been aware of the wage gap implementation on account of receiving communications sent to all Sasol employees about the issue, but he had no knowledge of the details thereof. He agreed that the email of 25 July 2008 would have created an expectation that they would be paid certain monies in January 2009, but he would not have known what the actual amount would be arising from the alignment of wage personnel with monthly salaried personnel.

Wage gap implementation discussions in December 2008 and January 2009

[72] A meeting was held on 31 December 2008 between representatives of all unions and Sasol to clarify what payments were going to be made in January 2009. It was convened by Tshikovhi to clarify any misunderstandings concerning the implementation of the wage gap. He said the meeting was not intended to conduct any negotiations, which is why all unions and not just the UPUSA wage gap team were invited to the same meeting. During wage negotiations UPUSA had refused to participate in the same negotiation forum as CEPPWAWU. Mabuyakhulu

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was not at the meeting but was on leave from 24 December 2008 until 10 January 2009.

[73] It is common cause that the person representing Sasol at the meeting was its remuneration officer, Chris Motlaba (Motlaba), who had not been involved in the wage gap project or in any of the wage negotiations. Gabriel Morodi (Morodi) and Tshikovhi were also present. On UPUSA's side, members of the LSC were present. Strauss and Mabuyakhulu were not at the meeting, as Strauss was on leave and Mabuyakhulu claims he was also on leave in Durban attending the court hearing of the application to invalidate the UPUSA Congress. According to Tshikovhi, Motlaba advised the meeting that the increase payable in January 2009 would be 6.5%, plus the 0.5% service increase which constituted the annual service increment applicable throughout the mining industry.

[74] Tshikovhi claimed that in the December meeting he had already clarified that the 0.5% increase was an industry norm and would be implemented automatically in the January payroll. According to the applicants he only advised them of the 6.5% increase and that meeting was adjourned to get clarity on the 0.5% increase. Tshikovhi agreed that the LSC members were not happy and it was agreed to hold another meeting when everyone was back from leave and that the meeting should take place before the finalisation of the January payroll. The applicants gave no direct evidence of what transpired at the first meeting.

[75] Mabuyakhulu did give hearsay evidence that he was informed by Lemaoana, in the course of receiving feedback about the meeting, that Sasol was only going to pay the 6.5% increase and not the 0.5% annual increase. Mabuyakhulu was clearly piqued that he had not been invited to the meeting and regarded this as a breach an agreement that no wage gap meetings would take place without himself and Strauss being present. He also saw no need for the meeting. On his return he asked Strauss about the meeting and Strauss allegedly advised him that he would get more information as he was also not aware of the December meeting.

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[76] Mabuyakhulu said that there was no need for the December meeting as they had previously agreed that they would only meet to discuss communications to the workers about the implementation of the wage gap and that these communications were due to be sent out to workers in January 2009 before they were paid. Mabuyakhulu claimed that Strauss had agreed that he could leave Sasol on 12 January to assist the legal team in the court case concerning UPUSA's contested congress, and that he would only return on 20 January 2009. Strauss did not recall granting him leave.

[77] The follow-up meeting took place on 15 January 2009. Unlike the December meeting at which UPUSA, CEPPWAWU and Solidarity representatives were present, the only employee representatives present were LSC members. Strauss was also there, but Mabuyakhulu was still on leave. Strauss claimed that all LSC representative ought to have received an invitation to the meeting, including Mabuyakhulu, and could not say why he would not have received one. Tshikovhi claimed that Strauss had reiterated that the 6.5% increase would be implemented in January and so would the 0.5% increase which was an industry norm. Strauss was of the view that the 0.5% adjustment was not supposed to be part of the alignment process. The other issue which arose was the implementation of all the remaining wage gap items that needed adjustment in order to eliminate distinctions between MSP and WP staff. LSC representatives wanted everything to be implemented simultaneously as a package and not in a staggered fashion.

[78] Under cross-examination, Mabuyakhulu claimed that the meeting on 15 January had not even been convened with LSC members but with ordinary shop stewards who had never been part of the wage gap process, and he interpreted this as another attempt to provoke workers, even though it was incorrect. The people who should have been invited were himself, Mofokeng and Lemaoana. When it was pointed out to him that the meeting on 15 January was simply an information session and not to negotiate anything, Mabuyakhulu was insistent that he should nonetheless have been contacted because it was a meeting concerning

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the wage gap. He denied that he was the only person who was provoked by the meeting being held.

[79] When Morodi was cross-examined it was suggested that Strauss was incorrect in characterizing the 0.5% adjustment as being independent of the wage gap process. In this regard reference was made to the joint proposal between management and UPUSA on the expectations, objectives and issues on closing the wage gap dated 15 April 2008 which formalized the process. In that document, the objectives were set out thus:

> **"Objectives**
>
> The objectives can be summarized as follows:
>
> 1. To narrow the gap between the MSP and the Wage Category minima.
> 2. To replace the Wage category and integrated into the MSP category. In addition, to facilitate the eradication of categorizing/labelling certain worker groups.
> 3. To attain the principles of equity and fairness in basic pay and benefits.
> 4. To develop "new" job categories with new reference names based on grading terminology, hence replacing the current groupings. This will support objective 2.
> 5. To design a career progression model per job category/job family that will empower workers to take responsibility for self-development and provide the potential to increase remuneration in an orchestrated manner.
> 6. To replace the Years of Service recognition model [0.5% year], hence providing further disparities in pay levels between workers at different job categories. Incorporating this benefit into a career path structure/ladder may benefit both the employer and worker i.e. skills pool enhancement and personal growth. Although the 0.5% principle applies throughout the mining industry, an alternative should be considered, like building it into the competency matrix.

(emphasis added)

[80] In its analysis of the status quo at the time the same document said the following about the 0.5% adjustment:

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> "the 0.5% year of service recognition scheme creates disparities in the pay levels of workers representing a lower versus higher level position."

[81] Morodi could not comment on whether Strauss was correct in saying that the 0.5% adjustment was not part of the alignment process, but mentioned that the 0.5% annual service payment was still in existence when he testified in the trial.

[82] It was during the meeting that the LSC orally declared a dispute. UPUSA representatives demanded that increases be held back until all outstanding issues had been resolved and everything would be implemented as a package. Sasol would not agree to hold up the increases that had been previously announced. Strauss also recalled that they had said they had a problem with the 0.5% increase.

[83] Mabuyakhulu said that he did receive details of the meeting when he returned from Durban to collect more documents on 15 January 2009. On Mabuyakhulu's advice, the dispute was reduced to writing and submitted to Sasol the next day. Mabuyakhulu had advised them to do this because clause 8 of the recognition agreement required disputes to be recorded in writing. However, on his own testimony, Mabuyakhulu drafted the dispute letter early on 16 January based on his own understanding of the issues and without discussing the letter with other LSC members. Mabuyakhulu claims that he drafted the dispute letter with the blessing of the other LSC members based on information they had provided him with. When he was tested under cross-examination on the subject matter of the dispute, it became apparent that Mabuyakhulu's main concern was to ensure that a written dispute was recorded so that a meeting could take place where the issues in dispute could be clarified. He also anticipated that the interval between the dispute declaration and the meeting would give him time to deal with the UPUSA court case. He agreed that with the dispute meeting pending, holding the marches on 19 January was inappropriate, but at the time he was unaware that the marches were even being planned.

[84] He gave the dispute letter to Mofokeng and Magagula to submit to Sasol. The dispute letter signed by Mabuyakhulu stated:

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"As per our recognition agreement, clause 8.3 we would like officially to declare a dispute against the company referring to a meeting held on 15 January 2009.

The company has failed to resolve the wage gap as per our agreement. The parties have previously agreed that the implementation of the Wage Gap will be implemented in January 2009 however the company has failed and the union was excluded from the implementation process

The following agreement was not respected by the Company:

basic condition of employment

Incorporation of WP categories (9 wage groups) into 4 MSP bands A-D

establishment of new pay scales

new job titles per job

design a career path/progression model

implementation date of wage gap

allowances e.g. underground allowance as per our agreement

alignment of .5% service increment on wage gap process.

To resolve the dispute, the above-mentioned must be implemented immediately.

Yours faithfully

Union Coordinator

Mabuyakhulu"

[85] Mabuyakhulu claimed that by this stage he was frustrated and irritated with Sasol for not inviting him to either of the meetings concerning the wage gap in December 2008 or the meeting on 15 January. He was also equally frustrated with the other shop stewards for not notifying him about the meetings on the wage gap in December and January and for attending such meetings without him. In addition, he was angry with them for not advising him of the planned marches. What aggravated him further was that, on 16 January, Strauss replied to the dispute declaration which he had signed by sending a letter to Robert Lepheane (Lepheane) regional organiser at the local UPUSA Evander office. In the letter, which

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requested a “prompt response”, Strauss offered to arrange a special meeting between the company and the union in terms of clause 8.3.4 of the recognition agreement, even though the time periods for convening such a meeting in terms of clause 8 had not been exhausted.

[86] For the sake of clarification, clause 8 of the recognition agreement between UPUSA and Sasol was a dispute resolution provision. In terms of the provision either party could invoke the procedure either arising from a dispute in a negotiation process or in relation to a grievance, which had not been satisfactorily resolved after exhausting the grievance procedure, or an unresolved disciplinary dispute. The close provided for the declaration of the dispute to be made in writing stipulating the issues in dispute and the solution required. The procedure also provided for the other party to serve an answering statement to the dispute declaration within seven days and for the convening of a “special meeting” of the negotiating committee to be convened within 10 days of the service of the answering statement.

[87] Strauss’s letter also recorded the notice received from the UPUSA members of their intention to embark, as Strauss put it “on industrial action”, on 19 January at 10:00 and 17:00. He highlighted Sasol’s view that the action was contrary to clause 13.1 of the agreement and confirmed that Sasol proposed a meeting on 19 January 2009 at 08:00 to discuss matters. Clause 13.1 of the recognition agreement was a piece obligation provision obliging the union not to “support, instigate, encourage or organize any industrial action” and to ensure that union members did not take part in industrial action prior to the exhaustion of all communication procedures and the dispute resolution provisions of the agreement.

[88] Mabuyakhulu felt Strauss was reneging on the agreement to deal with local leadership and could not understand why Strauss had not phoned him as he had previously when such events occurred. In response, therefore, Mabuyakhulu sent an email to Strauss at 11:42 on 19 January stating tersely:

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> "You are welcome to have that meeting with Robert as the letter is directed to him. We are not willing to deal with Robert and Luthuli anymore."

[89] According to Strauss it had previously been agreed that eliminating the wage gap would be done in two phases. The monetary issues would be dealt with first in January. The second phase would address the type of issue identified in points 3 to 5 of the dispute notice. The issue of underground allowances had never been part of the wage gap discussions. Apart from that, all the other issues had been agreed and were due to be implemented in January, so it was not legitimate to make demands on these matters. Strauss also testified that some of these issues such as designing career paths and establishing new pay scales and identifying job titles were relatively complex matters. Strauss claimed that a notice was sent by his secretary to LSC members calling them to a meeting on 19 January at 08:00 to get clarity on the dispute, though there was no other evidence of a notice being issued for such a meeting. Under re-examination, he also confirmed that none of the LSC members or Mabuyakhulu complained that they never received any notice of the 08:00 meeting.

[90] Mabuyakhulu testified that he believed that his dispute letter would trigger a process of engagement in terms of the dispute procedure in the recognition agreement. The first step would be that the company would respond in writing within seven days and there after a meeting would be convened. For that reason, he was not too concerned about investigating the issues in dispute or discussing them.

[91] On the same day he submitted the dispute letter, the other shop stewards issued a written notice to Sasol of a marches to Sasol offices at 10:00 and 17:00 on 19 January 2009 to hand over a memorandum of their grievances. As with the initial oral dispute declaration, Mabuyakhulu had no hand in this initiative. Relations between Mabuyakhulu and the other LSC members were poor at this point. The LSC notice of the marches pre-dated a general meeting of UPUSA members which was held on Sunday 18 January 2009.

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[92] Montgomery claimed he was unaware of the dispute declaration at the time the sit-in commenced on 22 January 2009.

Workers' understanding of the wage gap and information available on monthly payslips and production bonus payslips

Workers' understanding of the wage gap

[93] Mvula Ketsekile (Ketsekile), a general worker, who had been employed since 1995 by Sasol, claimed that he understood that their earnings would be adjusted to bring the wages of WP staff closer to that of the artisans who and that they would move to MSP. Like other of the applicants' witnesses, a recurrent theme was that they would receive a 0.5% increase based on years of service which would make a "substantial difference" and would be paid in January 2009. Because of his years of service, he was expecting that the 0.5% together with the movement to MSP would amount to "good money". Significantly, he said that "we heard this information from the LSC during our meetings", and it was confirmed in the papers received from management regarding the 0.5% increase in January 2009. Later, under cross-examination, he explained that his understanding of the 0.5% would be that it would accumulate for every year of service, so that if someone had been employed for 20 years, "… It will be a lot of money: a very beautiful one…and if you move from wage personnel to MSP, I do not think there is any person who receive less than R 10,000.00".

[94] Tyokolo understood that, amongst other things, they would receive a 0.5% payment in January, which he had been informed of by the LSC and one of the shaft managers, Thabang Monyela. He was unsure how much would be paid but believed it would be a "satisfactory amount of money, given that the payment was to be calculated based on a worker's years of service. Gumede, who was an MSP, did not recall the exact details of what they were told about wage gap but simply that it was going to be close so that "there was not going to be much difference between us". He also heard of this through communications from Monyela. Tyokolo said that he only heard once from Monyela that they

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would receive the 0.5% in January, but it had been said and other meetings that there was going to be such a payment and it was mentioned that it was going to be paid according to years of service at the mine. Gqadu, also had a similar understanding and understood that WP workers would have their salaries 'uplifted' to match those of MSP workers. He had been employed in 1983. He said this information was originally relayed to them by Mabuyakhulu and that it was Mabuyakhulu who had told them that the wage gap agreement would result in a bigger improvement "than the one were engaging in during the year 2007."

[95] Molise (Molise), an engineer, had a similar understanding that with the transition from WP to MSP they would receive wage gap monies in January 2009 based on their years of service. He claimed to have learned this from Mr W Nxumalo, their mine captain, during safety/communication meetings. Nxumalo also showed them a document to that effect. Molise likewise believed he would receive a 'substantial amount' of money in January over and above his normal remuneration. He dismissed as a lie Nxumalo's claim that he was in no way involved in the wage gap issues and that he would not have informed workers in any manner about the payment of money relating to that scheme. It was suggested to Molise that there was no basis for workers to have believed that they were going to get a substantial amount of money, but Molise insisted that the employer promised them that. When pressed as to what he understood that amount to be, he said he expected about R 9,000.00. He insisted that Nxumalo had said they would receive a substantial amount, even though there was nothing in the letters that been issued by the HR department which expressed any specific amounts. Gumede, also said he recalled hearing that the discussion amongst workers was that they were going to get R8000.00 to R9 000.00.

[96] Matwa confirmed that workers were expecting the 0.5% would be backdated to the date a worker started working for Sasol. That, together with the movement to the MSP scales meant there would be a lot of money they would be paid. That is how they had interpreted the paragraph referring to the .5% annual service increment in the circular of 25 July 2008. He also claimed that Degenaar had told them in Fanakalo

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in a communication meeting that the 0.5% increase meant that "*wena ziyenza bomvu mbijan*", which they understood meant they were going to receive substantial payments. He realized that they were not going to get the increase expected when they got their bonus payment salary slips in the middle of January. The salary indicated on the bonus payslip was unchanged. When he took it to the HR section, the person there could not explain what it happened.

[97] Worker witnesses from Brandspruit shaft no 2 said they heard about the wage gap from Mkhize, their shaft manager, Du Preez, and from Mabuyakhulu. One of those, Jeremiah Bhembe (Bhembe), denied du Preez's claim that he had never spoken to workers about the wage gap and rejected du Preez's suggestion that he might have confused him with Pieter Strauss.

[98] Ketsekile claimed that the memorandum of 19 January was drawn up because after receiving their payslips they realized they were still considered to be WP workers rather than MSP. The most important issue on the memorandum they attempted to submit to management on 19 January was the first point on the list, namely the immediate implementation of the wage gap instead of a phased in implementation. Hamilton Matwa (Matwa), an Emco driver, also emphasized that workers wanted the wage gap implementation to be done immediately as they expected.

[99] By the time they received their bonus payslips by 15 January, they believed the wage gap benefits were not being implemented. He had also expected the wage gap program would have improved his bonus significantly. He claimed that the union was also confused that the bonus payslip did not reflect wage gap improvements. Moreover, when he received his payslip the letter attached to it explained that the wage gap monies would only be paid in April 2009. When it was put to him that no such letter had been admitted into evidence, he was not sure if he had told his attorneys about it. He claimed that by 20 January they had already received their monthly payslips, which they normally received about two days before they were paid. This, prompted workers to hold a

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meeting on 21 January 2009 in which it was decided not to surface after their shift until management had address them on the wage gap issue and why the LSC had been suspended.

[100] Khali testified that:

> "As regards my understanding of the wage gap, we had been advised that the respondent had agreed to pay workers wage gap monies. Although I did not know the amount that was to be paid, I understand that the amount would be calculated, taking into account a worker's years of service."

[101] He also claimed that the reduction of job levels from nine levels to four and the alignment of wage personnel with those new levels, which was expected to take place in January 2009 had still not occurred, nor had career paths progression and related allowances been reviewed as indicated in the memorandum of 25 July 2008.

[102] Matwa's understanding was based on feedback from the LSC that the gap would be closed and wage disparities eliminated in January 2009. He also relied on memos issued by Sasol, which he claims were explained during communication meetings. In particular, they were told they would receive the 0.5% payment "to be calculated based on years of service" and that Degenaar and another manager had explained in Fanakalo that "*wenza ziyenza bomvu mbijan*", by which they understood they were going to receive substantial payments.

[103] A similar sentiment was expressed in a statement by Alfredo Zunguse (Zunguse), a worker at Brandspruit 3E shaft who stated, but did not give evidence at the trial, that:

> "We were advised by our supervisors during safety meetings that we were going to receive a lot of money – "sizobabomvu", and that our circumstances would go to change in January 2009. We were advised by Vusi Mehlonkomo, one of our Mine Captains and one of the supervisors… Mention had also been made of percentage and payments being made based on our respective years of service."

[104] A few of the applicants' witnesses, such as Molise, also were aware of delay in transferring workers from Thebemed to Sasolmed, which caused dissatisfaction amongst workers. Gumede, though not personally

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affected also understood this to be one of the causes of discontent or dissatisfaction with the implementation of the wage gap project. He claimed to have been this from discussions amongst workers at the waiting places or in the LDVs while being transported to and from their workstations.

Payslip information

[105] Information available on salary payments.

105.1 Wages were paid to workers by the 23rd of each month according to Morodi. Before that date trial payroll runs are done. Semi-payroll runs are done between 11 and 19th of each month, the last being the final one.

105.2 Morodi explained: Semi payroll run is just to check whether everything owed to workers is booked on the system, and around the 15th supervisors are expected to have the timesheets given to workers to check whether overtime or callout worked is properly reflected before the payroll run.

105.3 Morodi had difficulty explaining the calculations on various payslips presented and a remuneration specialist Ms. G Venter from Sasol Group Services was called as a witness to clarify the payslips. Amongst other things she was able to clarify that in December 2018 the payday was altered from 25th of the month to the 23rd of the month, even though the period for which payment was made, namely from the 16th of each month to the 16th of the next, remained unchanged. McClelland agreed that it would not have been unreasonable for workers to have expected to see a change in their job descriptions on that payslip if they were expecting that.

105.4 Venter also explained that payslips were distributed to the mines on the 21st of each month by Sasol's Admin department, and in turn these would be issued to individual workers between the 21st and the 23rd of the month. McClelland agreed with these dates, and also agreed that by the time the night-shift began on 21

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January some of the salary payslips would have been received. Venter verified that in July 2008 they had been a general increase of 12% and a wage gap adjustment of 3.5% paid to WP personnel.

105.5 Venter was also under the impression that in January 2009 there had been a collapse of the various salary bands as part of the wage gap implementation, which was clearly wrong. Under cross-examination, it was clear that she really was not in a position to comment on that process or on the general progress of the wage gap negotiations and implementation.

105.6 Venter did confirm that in January 2009 there was an adjustment of 6.5% to each individual's salary, which was the second portion of the wage gap payment and a 0.5% service increase. Venter however clearly under the impression that the 0.5% adjustment was something which emanated from the wage gap negotiations, but really was not in a position to verify that, nor was she able to comment on the determination of production bonuses.

105.7 However, Venter did confirm that production bonus payslips were issued to workers on the 15th of each month.

[106] When Mabuyakhulu was asked to comment on one of the reasons for the strike given by some of the applicants in their statements was that they had not yet received their wage gap monies whereas they would not yet have received their payslips by the time they took the decision to sit-in at the meeting on 21 January 2009, Mabuyakhulu surmised that they were referring to what the shop stewards were told at the meeting on 15 January, namely that certain things would not be implemented.

[107] Hugh McLelland, currently head of Business Improvement at Sasol was personally responsible in his function of Information Management for putting together the Sasol Mining Production Bonus Scheme and in particular the scheme which prevailed from 1 July 2006 until 2009.

At the time of the sit-in, all workers received a production bonus payslip around the 15th of each month and a salary payslip about the 23 to 25th of each month. The salary payslip would include any increases in such remuneration.

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[108] The production bonus payslip would reflect what is termed as a "*base rate*", also referred to as a "*base salary*". This is a monetary figure, allocated to groups of workers in different salary bands and was used as the base for calculating that particular group of workers' production bonuses.

[109] He explained that an underground section would be set a production target to produce a predetermined number of tons in a particular production bonus month. If they exceeded that production level, then they will be remunerated at a percentage factor relevant to that production. If workers achieved the target they would receive a bonus calculated at 45% of the base rate. Beyond that, they would receive a further 20% of the base rate per ton of coal extracted.

[110] According to paragraph 5.11 of the production bonus scheme policy:

> "Bonuses are calculated monthly for the calendar production month. Payment occurs on the 15th day of the month following the month for which results were calculated."

When workers received an increase in their remuneration, this did not affect the base salary and would not appear in the production bonus payslip.

[111] McLelland gave an illustration using Bhembe's production bonus which showed his base was R3740.00, to which a percentage factor was applied depending on the production achievement for the month. The percentage factor was multiplied by the base rate to calculate the production bonus payable to him.

[112] At the time of the unprotected strike, the base salary used in calculating the production bonus had no impact on his normal salary payments for three reasons. Firstly, the base salary was a nominal base value for all workers within the same category, to ensure that their production bonuses were calculated from a common base and to achieve a fair and equitable calculation across a group of workers, even though actual salaries between them differed. Thus all workers in wage bands L01 to L08 had their production bonuses calculated on a base rate of R

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3740.00. These bands were the salary bands under which wage personnel were classified.

[113] Secondly, because the base salary used to calculate the production bonus, was not the same as each worker's actual salary, it ensured that production bonuses and the determination thereof, remained independent of the outcome of substantive wage negotiations. McClelland testified that the base salary for the purposes of determining production bonuses was decoupled from normal monthly salaries about 20 years previously. Any change in salary would not be reflected in a change of the base rate of the production bonus. The payroll runs for bonuses and salaries are also completely separate and changes to an individual salary or occupation would not be reflected on the bonus payslip. Lastly, it prevented a reverse calculation of an individual's salary using the production bonus percentage factor.

[114] For this reason, he did not think it was reasonable of workers to expect to see a change in their base salary if they were moved from WP to MSP. Even if the bands were collapsed from 1 January 2009 that would not have altered the base rate for the purpose of bonus calculations. In any event, as the production bonus was paid in arrears, the January bonus slip would not have reflected changes that only became effective from that month. Even though the bonus payslip referred to a "base salary", McLelland did not think that it was reasonable of workers to expect to see a change in the rate because they would have been aware that previously annual wage increases would not have affected the base rate, and the term "base salary" had been in use for a long time. He did agree that if workers moved from WP to MSP their base rate would have changed, but because the December 2008 production bonus was paid retrospectively in January 2009, no change would have effected in the base rate that month.

[115] By contrast, the salary payslip contained the worker's earnings and actual salary for each particular month. When an increase in salary was due such as the increase resulting from the wage gap agreement which affected salaries paid at the end of January 2009, the details of the new

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salary would be reflected in the pay slip received sometime from the 23rd to 25th of that month.

[116] Accordingly, a worker would not have been able to determine from the bonus payslip what their salary would be. Only when they received payslips from the 23rd onwards could they determined their salary payment.

Marches, memoranda, dispute declaration and meetings prior to the sit-in

Notices and letters of 16 January 2009

[117] On Friday, 16 January, the LSC sent Sasol a notice warning of planned marches to hand over a memorandum on 19 January. The same day, Mabuyakhulu sent Sasol the dispute letter he had drafted. Strauss replied forthwith to the notice of the marches, warning that the marches were regarded as unprotected industrial action and in breach of clause 13.1 of the recognition agreement.

[118] In the same letter, which was addressed to Lepiane, and only copied to Mabuyakhulu, Strauss proposed a meeting at 08:00 on Monday, 19 January to discuss "the issues of concern", and also undertook to arrange a special meeting under clause 8.3.4 of the recognition agreement to deal with the dispute.

Marches on Monday 19 January

[119] On Sunday 18 January, at the regular weekly meeting of UPUSA members, the issue of the implementation of the wage gap came up. It was at the meeting that Gqadu said he heard about the non-implementation of the wage gap. The following statement of Abraham Mankge was also put to Montgomery, who was unable to dispute it (though Mankge never testified to corroborate it): "On 15 January 2009, we noticed that the wage gap monies had not been paid. Workers were disturbed by this unfortunate turn of events. As a result, workers decided to march to Sasol's management office in Brandspruit to Strauss and Tshikovhi to enquire as to where the monies were and why they had not

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been paid. It was agreed that the workers would attend the march when they are off duty. I attended the march with the afternoon group, I recall Tshikovhi standing at the door and saying that he will not talk to crazy people or dogs. We subsequently dispersed."

[120] Gqadu, who worked at Brandspruit no 2 shaft and joined the march, also claimed that they were told by Mkhize and the shaft manager, Du Preez that salary adjustments would be made to close the gaps between other workers' salaries as well as adjusting Sasol salaries to industry level. He recalled workers were told that there would be a back payment of 0.5 % based on years of service, which "would amount to more than we had demanded in 2007". When there was "talk" in January 2019 that the wage gap would not be implemented as per the agreement, workers were angry and decided to hold a march to hand over a memorandum. He confirmed that this information emanated from the LSC. Enoch Zwane also said the march was prompted by news that the wage gap implementation would not occur as previously undertaken, which caused a lot of dissatisfaction. Under cross-examination it appeared he assumed workers would not have embarked on a sit-in if the implementation had occurred.

[121] Makoko, from Middelbult West shaft also said that he participated in the march because Sasol had not paid them what Degenaar had promised, namely that they would get '*izoba bovu'*, which would be enough money to pay off their debts and to tell their wives that they had a lot of money. He was expecting to receive any amount of R 3000 .00 or more on top of his existing earnings. The LSC had also said that they would receive their wage gap payments in January 2009. He added that he had expected to see the change in the bonus payslip which they received on the 14th or 15th of the month but did not mention the payslip as the source of his information in his written statement and could not recall mentioning it to the person who took his statement in preparation for trial.

[122] Ketsekile confirmed that weekly meetings of UPUSA members took place and that there was a meeting held on 18 January 2009 which was attended by the LSC members but Mabuyakhulu was not present. The

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decision to march was taken then, ostensibly based on the information of the bonus payslips that had been received, but he could not dispute that the LSC had already announced the intention to march to Sasol shortly after 13:00 on 16 January 2009, which was before the meeting. He was reluctant to concede that the only payslips which would have been issued at that stage were the bonus payslips as the monthly salary slips were only issued on the 20th of the month. He was also reluctant to concede that the LSC members would have known that the wage gap monies would not have been reflected in the bonus payslips and ought to have clarified that at the meeting of 18 January 2009, or that they could have corrected any misunderstanding he claimed might have existed amongst the members. He claimed that some workers already had received their monthly payslips by the time meeting was held even though he had only received his bonus payslip. He also alleged that the workers who had received payslips in advance advised the meeting that they had not been paid the 0.5% increment. He could not recall if they said anything about 6.5%.

[123] As mentioned, an email refusing permission for the march was sent to the UPUSA Evander office and was copied to Mabuyakhulu, but Mabuyakhulu claims he only saw the email when he returned to Sasol at mid-morning on 19 January 2009, the day of the march. Tshikovhi agreed that although the letter highlighted that the proposed march was in breach of clause 13.1 of the recognition agreement, it did not expressly state that no permission was granted for the march or that disciplinary action including possible dismissal would be taken if the march proceeded. He also agreed that it had been a practice in the past for SMS messages to be sent to workers advising them if permission to march had been refused. Although the first march had already taken place by the time Mabuyakhulu saw the email, he nonetheless replied to the email at 11:42. Lepheane of the Evander office never responded to the email.

[124] According to Tshikovhi, the marchers participating in the first march were not informed that the march was unauthorised but he did speak to Morena Lemaoana. He told Lemaoana that no one would “receive the

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march" and that if workers dispersed, a meeting with the shop stewards would be arranged for the afternoon. Lemaoana agreed to the meeting and asked the marchers to disperse.

The marchers' memorandum

[125] The memorandum that the marchers wanted to submit did not bear much resemblance to the contents of the dispute letter drafted by Mabuyakhulu. It read:

> "Implementation of wage gap with immediate effect not in phases
>
> Peter Strauss must go back where he came from
>
> We want Bosjesspruit (Irenedale) workers back to work
>
> Away with Roelf Schoeman away
>
> Away with three shift system away
>
> Take our subscription fees to Dbn branch not Jhb branch
>
> De-recognition of Ceppwawu with immediate effect."

[126] Matwa said that the second demand relating to Strauss arose because the union discussed financial matters with him and then he went and discuss them with CEPPWAWU, so they did not trust him. Similarly, they felt that Schoeman was fuelling conflict in the same way as Strauss. Workers did not see why it was so difficult for Sasol to send subscriptions to the Durban branch, since it was not Sasol's money but the members' money. The demand related to de-recognizing CEPPWAWU was because UPUSA was the majority union and accordingly CEPPWAWU should not have been entitled to organisational rights. None of these demands seemed unreasonable to UPUSA members because they were bearing the burden of these issues.

[127] Tyokolo did not understand what was meant by the 'immediate implementation' of the wage gap, but surmised that workers had demanded its implementation because they wanted to receive better wages. He believed that the dismissal of the Bosjesspruit workers had been unfair because they had knocked off early to complain about the three shift system which was in operation. Apparently, the outgoing shift

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was expected to wait at their work stations until they were relieved by the incoming shift and they had understood that they would be paid overtime for this which did not materialize.

[128] Under cross-examination, Strauss was questioned on the reasonableness of these demands, on the supposition that they were the real reasons why the sit-in took place. Strauss maintained that the staggered implementation of the wage gap measures was a matter that been previously agreed on with the LSC representatives in 2008 and accordingly was not a legitimate grievance. It was claimed that the workers only became aware of it after the shop stewards had declared a dispute demanding that the wage gap implementation be done as a package. In relation to the second demand concerning himself, Strauss could only say that no allegation against him of this nature was made at the meeting on 15 January but he could not account for what might have been reported to workers. Although he was not sure of the reason for the dismissal of workers mentioned in the third demand, his recollection of the feedback regarding the Bosjesspruit dismissals was that they were fair and reasonable and therefore the demand was an unreasonable one, but he conceded that he really had no direct knowledge of the fairness of the dismissals. The demand concerning Schoeman was linked to that on account of his involvement in the dismissals. The three shift system was something that had been discussed and agreed upon before it was implemented.

[129] Strauss was also adamant that the issue of CEPWAWU membership had been addressed in 2008 when CEPWAWU had increased its membership to meet the membership threshold required. UPUSA and the shop stewards where aware of this, but it is possible that they had not informed the members. He insisted that CEPPWAWU had complied with the previous threshold of 30% before it was reduced to 23% in 2008, which had been done with the agreement of all unions. Ketsekile said workers were advised by the shop stewards that CEPPWAWU was not a majority union.

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Meeting with management on 19 January 2009

[130] The arranged meeting between management and the LSC took place at 14:30 on 19 January. Mabuyakhulu was present at this meeting, having returned from Durban early that morning. The LSC members refused to engage with management unless Strauss left the meeting. They requested that Strauss should be 'excused' from the meeting due to his statement at the meeting on 15 January 2009, to the effect that nothing they could say would change the implementation of the wage gap in January 2009. Strauss was heading up the wage gap project team at that stage.

[131] The Sasol delegation refused the request and claimed that the LSC members left the meeting. According to Mabuyakhulu, it was Mkhize who refused the request of Strauss to be excused and then she stood up and told them: "I will meet you with the workers at the afternoon march", after which they left the room. As a result of her statement, the shop stewards claimed they assumed there was no problem with the afternoon march proceeding. Tshikovhi did not recall Mkhize making such a statement. According to him it was the LSC members who stood up when Mkhize said that no one would be asked to leave the meeting. In any event, the second march at 17:00 took place as previously announced. Mabuyakhulu claimed that before Mkhize said she would meet them at the afternoon march, he had requested an opportunity to caucus with the other LSC members but she refused to permit this. This version was not put to Strauss or Tshikovhi. Mabuyakhulu also understood Mkhize's comment to mean that the march was approved despite the letter which had been sent to the UPUSA office. In any event, as he understood the company had chosen to deal with UPUSA on the issue rather than with him as it had in the past, he felt no obligation to make any intervention regarding the impending afternoon march.

[132] Mabuyakhulu also said he had asked the LSC to meet him at his place that afternoon but none of them pitched up.

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Sasol's memorandum on the status of the Wage Gap implementation

[133] On the same day the marches took place, Sasol issued a memorandum to all workers explaining its understanding of the present status of the wage gap deliberations and implementation, setting out those issues which had been agreed and those which remained outstanding. The portion of the email describing what had been done and what would be implemented in January 2009 read as follows:

> "As communicated in July 2008 (Appendix A), in line with Sasol Mining's people strategy and in particular, our intent to normalise conditions of employment and migrate wage personnel to the MSP category, the following steps have been taken:
>
> 1. The base pay of all Wage Personnel was increased by 3.5% in July 2008 to align with the rest of the mining market.
> 2. With effect from 1 January 2009, all wage personnel migrated to the MSP category and a further alignment increase in base pay of 6.5% will be paid to all impacted workers.
> 3. The following conditions of service will be implemented:

Sick Leave	36 days
Health leave applicable to dusty areas	1 day vacation leave additional for ninety hours overtime worked
Acting allowance	0.2% per shift

> The wage gap working team will discuss the following outstanding issues and the implementation thereof with all relevant stakeholders during January 2009:
>
> 1. Unresolved standardization of conditions of service including: compassionate leave, family responsibility leave, living out allowance and food allowance.
> 2. New pay scales (min-max) per Salary Band
>
> As part of the next steps of the wage gap project, the working team with the cooperation of stakeholder representatives will design progressive

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career paths for each salary band. New job titles will also be discussed and finalized during phase 2 of this project which will be completed and implemented in April 2009.

Should you require more information, please contact your HR manager."

[134] Strauss confirmed that all Sasol Mining workers who had email facilities would have received the document. Those workers who did not have access to email would have been orally advised of the contents by their line managers and the HR department. According to Strauss, it was not necessary to mention the 0.5% increase as it was not part of the wage adjustment process and any misunderstanding arising in that regard from the communication on 25 July 2008 had already been rectified. Mabuyakhulu did not recall receiving the memorandum, but noting that the 0.5% was not mentioned in the letter, he argued that it supported his contention that there was indeed a dispute about the issue. Further, he denied that they had agreed that the wage gap working team would discuss the outstanding issues mentioned, because it had been agreed that everything would be implemented. Thereafter he changed his testimony to say that the issues mentioned as outstanding were simply some of the issues that were outstanding, but he also conceded that the table recording sick leave, health leave and acting allowances correctly reflected what had been previously agreed. Importantly, he also conceded that any issues outstanding which were not recorded in the document would not have had any impact on payments received by workers in January 2009.

[135] Nevertheless, he resisted the suggestion that the correct positioning of wage personnel in the new structure based on their existing job was the first step which would be followed by the implementation of a career advancement model, as indicated in paragraph 8 of The Principles Facilitating Design Decisions contained in the Blue Horizons proposal. Mabuyakhulu insisted that the proposal recorded in the Blue Horizon document dated 15 February 2008, which was signed was the final word on what had to be implemented. During this phase, only three LSC shop stewards were involved: himself, Mofokeng and Lemaoana. The Finance Department was given the mandate to implement the scheme and report

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back to them on how the wage personnel had been distributed in the new structure. When he was tested on anomalies such as the absence of any mention of the 10% rectification or the benefits which would accrue to workers such as sick leave or health leave which appear in the memorandum circulated by Sasol on 19 January 2009 he agreed that these could not be derived from the Blue Horizons document, but were issues that was subsequently agreed on. Eventually he conceded, albeit very reluctantly, that the Blue Horizons document was a recommendation and that it was the project team that discussed how those recommendations would be implemented.

[136] Mabuyakhulu resolutely maintained that the task of slotting wage personnel into the new salary bands was something which had been assigned to the Finance Department and that department was to report back to the project team to enable the team to check whether the Finance Department had done what it was supposed to have done. He insisted that this was supposed to have been done so that it could be implemented in January 2009, but he could not give an adequate explanation as to why he had omitted such an important benefit that was supposed to accrue to wage personnel from his written statement. The scenario sketched by Mabuyakhulu of an expected report back from the finance department on slotting WP workers into wages bands for final vetting by the task team was also not canvassed in evidence with either Strauss or Tshikovhi.

[137] Mabuyakhulu could not provide an explanation as to why he would not have raised the fact that such an important aspect of the wage gap implementation was not raised with Strauss in January 2009 and why it did not warrant mention in his written statement if he had raised it.

[138] On 19 January Strauss sent a letter to Lepheane, advising that the UPUSA members had “embarked on unprotected industrial action today (19 January 2009) at approximately 09:30” and had failed to follow the dispute resolution process and the recognition agreement. Sasol claimed that it was left with ‘no option’ but to take disciplinary steps against the full-time shop-stewards. Accordingly, it invited UPUSA to make

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representations in that regard. The letter was also copied to Luthuli, but was not copied to Mabuyakhulu, nor was any mention of the decision to embark on disciplinary action made to the LSC members who attended the meeting at 14:30, even though Sasol knew that a second march was planned for that afternoon.

The afternoon march on 19 January 2009

[139] No one was present at the HR building to receive the demands when the afternoon march arrived there and workers waited at the building until Mabuyakhulu was called to assist. He addressed the marchers and told them that a dispute had been declared, and that Sasol's response was awaited. If they could not reach an agreement, they would take the matter to the CCMA and obtain permission to embark on a protected strike. After Mabuyakhulu had addressed them and advised them to go home they then dispersed. In his statement, he had said that Mofokeng had communicated to him that the miners had intended to sleep at the premises because nobody was there to receive their memorandum.

Tuesday 20 January 2009

[140] The next day, 20 January 2009, the LSC members including Mabuyakhulu were suspended and charged with inciting unprotected industrial action, unauthorised marches and unruly behaviour; not following the recognition agreement, and participating in and organising an unauthorised march.

[141] According to Mabuyakhulu, Strauss asked to see him. Strauss wanted to know if he was aware of the marches on 19 January 2009 and another one planned for 22 January 2009. He explained that he knew nothing of the planned march and explained the circumstances under which he had learned of the marches on 19 January 2009. Strauss then handed him his suspension letter. Tshikovi testified that the decision to discipline the LSC members was taken because the shop stewards were identifiable as the instigators of the march, whereas in other instances it was usually

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ordinary workers who were involved. He could not explain why the company decided to take action in this form rather than complaining to UPUSA about the behaviour of accredited representatives as provided for in clause 7.9 of the recognition agreement.

[142] On the same day, Sasol addressed a second memorandum to all workers, similar to the one issued the day before. The memorandum confirmed Sasol's commitment to implementing the wage gap normalisation and warning them not to embark on un-procedural an unprotected industrial action. The memorandum also attempted to dispel alleged rumours that workers stood to receive salaries of R 9,000.00 as a result of the wage gap normalisation. Although the principal subject matter of the memorandum was the march the previous day, which Sasol continued to characterise as 'unprotected industrial action', it also dealt to some extent with the implementation of the wage gap. As one of the last formal communications from management prior to the sit-in, it is of some significance and reads:

> "Colleagues
>
> Further to communication yesterday about implementation of measures to address the wage gap normalisation process, we would like to make all Sasol mining workers aware of the following:
>
> 1. Sasol mining has and continues to honour its commitments with respect to implementing the normalisation of the wage gap as outlined in the communication distributed in July 2008 and the 19 January 2009. The 6.5% adjustment planned for January will therefore go ahead as will alignment of those conditions of service that had been agreed with the stakeholders thus far. We continue to be open to constructive resolution of all the outstanding issues.
>
> 2. The company would like to inform all the workers that the Labour Relations Act of 1995 as amended stipulates the process to be followed when a dispute arise. The company cannot allow any worker to embark on un-procedural and unprotected industrial action when perceived differences arise.

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3. The demonstration took place at the central offices on the 19 January 2009 was unprotected and serious disciplinary action will be taken against the union leadership that instigated it with immediate effect.

4. Employees who participate in or allow themselves to be influenced into participating in further unprotected industrial action will also undergo disciplinary action.

5. It is important for all our workers to be aware that any promises or references to an amount of R 9000 salary that would be the outcome of the wage gap normalisation process, are false and unfounded and have never been part of any discussions with the company.

We reiterate our commitment to continue to sit with the wage gap working committee around the table and finalise agreements around the following issues starting from January 2009.

1, Unresolved standardisation of conditions of service including: compassionate leave, family responsibilities leave, living out allowance and food allowance.

3. New pay scales (min-max) per salary band.

As part of the next steps of the Wage Gap project, the Working Team with the cooperation of stakeholder representatives will design progressive career paths for each salary band. New job titles will also be discussed and finalised during phase 2 of this project which will be completed and implemented in April 2009, provided all stakeholders cooperate.

Should you require more information, please contact your HR manager."

(emphasis added)

[143] Sasol contends that this was indicative of its *bona fides* in relation to the wage gap project and its implementation. Ketsekile denied seeing this memorandum as did Matwa. Mabuyakhulu disputed Sasol's assertion that it was acting in good faith. Mabuyakhulu and the other LSC members were the representatives on the Wage Gap Committee. He could not see how Sasol intended accomplishing anything if they were all

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suspended. The other shop stewards who were not part of the LSC could not take over the LSC's functions.

[144] Montgomery said that underground workers would not receive this kind of email because they had no access to emails. The communication of information about the wage gap would be done by the union and would be placed on notice boards by HR personnel. He conceded that, in the absence of the LSC members owing to their suspension, mine managers would have been one of the other channels of communication on such issues. Other channels were the notices placed on the communication boards and the ordinary shop stewards who were not members of the LSC. His own knowledge of progress in the wage gap project was limited to communications received from the ER department because he was not involved in negotiations. He had no direct knowledge of what the workers understanding of the project might have been.

Wednesday 21 January 2009

[145] On 20 January, Molefe had presented a memorandum to Sasol about marches that UPUSA members intended to hold on 22 January. Permission was refused by Strauss in a letter written on 21 January. This time it was addressed to Mabuyakhulu and copies addressed to Mofokeng and Lepheane.

[146] None of the applicants who testified claimed to have been aware of the abovementioned circular issued by management following the march or of the suspension of the LSC members by the time the meeting was convened at the eMbalenhle stadium late on 21 January 2009.

[147] In his written statement, Khali, who had participated in one of the marches to Sasol's management office in Brandspruit mine on 19 January 2009, stated that when he heard of the suspensions from another shop-steward on 20 January:

> "This did not sit well with me, given that these were our leaders and we were supposed to... This did not sit well with me, given that these were our leaders and was supposed to speak for us on the wage gap issue. This

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also made me nervous as an ordinary shop steward, because I was worried that we too, as leaders, might face suspension and later on dismissal."

[148] Bhembe, learned of the suspension of the LSC members at a committee meeting. It was that action which led to an urgent meeting being called at the stadium.

[149] Khali said that workers were "visibly upset" following the news of the LSC's suspension. At the meeting held at the stadium in the township of eMbalenhle on 21 January 2009, workers "were concerned about who would now speak on our behalf regarding the wage gap issue, given that our leaders have not been suspended." Even though he was also a shop steward, the ones who had been involved in the wage negotiations and the wage gap process were the full-time shop stewards and he would not have been in a position to assume a role in that process.

[150] They then discussed what could be done to get their leaders to speak to them and a decision was made that they would report for work, perform their duties, and then wait for management to address them. Likewise, Gqadu said that it was decided that all shifts would not surface and Sasol would then realise something was happening and would be forced to enquire what was going on. He claimed that it was a response to Sasol's failure to accept the memorandum and the decision was not taken by the LSC.

[151] Ketsekile testified that the meeting was held to discuss what could be done to draw Sasol's attention to the fact that it had not fulfilled its promises on the wage gap and also because the union leaders, who were negotiating the wage gap issues, had been "dismissed they felt "unprotected". He also said that he had neither seen nor heard about the memorandum issued by management on 20 January 2009 by the time the meeting was held on 21 January 2009, and implied that other workers had no knowledge of it either.

[152] Khali said that he could not recall who called the meeting, nor who took control of the meeting, but did remember other details of the meeting and acknowledged that it was a union meeting, which would be normally have been called by the full-time shop stewards. He had also personally

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summonsed other workers to attend the meeting and confirmed that hundreds of people attended it. He thought the LSC members were there but could not remember. He did not remember seeing Mabuyakhulu. Ketsekile also did not see Mabuyakhulu at the meeting. In any event, Khali was adamant that the LSC members could not have spoken because they no longer "had a voice" after their suspension. He even went so far as to say that even though the subject matter of the meeting was relevant to the LSC members, the meeting was for the ordinary members who did not ask for any advice or input from them. Somewhat ambiguously, he said did not know if the LSC members would have been allowed to speak because they did not say anything, which tends to confirm that he knew they were present. Under re-examination he revised some of his evidence. He became adamant that none of the LSC members were present at the meeting, which was an extraordinary one called by the members, unlike the ordinary meetings called by shop stewards. Ordinary meetings always took place on a Sunday, such as the meeting on 18 January 2009. He also testified that nobody saw the need to consult with the LSC, Mabuyakhulu or the Durban or Johannesburg branches of UPUSA before the decision was taken to sit-in.

[153] Ketsekile confirmed there was a meeting held on 21 January but he did not see Mabuyakhulu at the meeting. Contrary to one of the written statements of the individual applicants, Nelson Nciwa, who said that the entire LSC including Mabuyakhulu were present at the meeting, Mabuyakhulu denied being present and was ambivalent about what he would have advised workers to do if he had been, except in so far as they were contemplating a strike in support of a demand for a large payment such as R9000.00. He would have advised them to wait for information from the finance department and that it would be illegal to embark on a sit-in for that reason.

[154] Khali understood the purpose of the meeting to have been to discuss the suspension of the LSC members and what would happen because the LSC representatives were the ones who were negotiating over their remuneration. They were concerned how they could approach management to discuss this issue. Under cross-examination, he

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confirmed that the suspension of the LSC members was the main reason for the sit-in and the second reason was the wage gap issue. Ketsekile said that they felt that if they held a sit-in the employer might “come to us”. Matwa also understood the aim of the sit-in in similar terms, though in his written statement he had only referred to the suspension of the LSC members. Under cross-examination, he claimed that there were some outstanding issues that had to be discussed between the time of the LSC members’ suspension and the disciplinary inquiry and he denied that the only reason for the sit-in was to exert pressure on management over the suspensions.

[155] Khali readily agreed that he was not in a position to say what the problem was about concerning the wage gap implementation because he did not participate in those negotiations. He also agreed that workers were reliant on the LSC members for information about problems with the wage gap issue. He had difficulty explaining how the workers knew about problems with the wage gap issue if the LSC members had not addressed the meeting on 21 January 2009. He agreed that nobody at the meeting suggested asking the members of the LSC what the problems were about the wage gap before embarking on a sit-in over that issue. Nonetheless, workers were unhappy about the fact that the suspension of the LSC meant that there was no one who could negotiate on their behalf on the wage gap issue. Ketsekile recalled it being said at the meeting that the LSC members had been dismissed.

[156] It was suggested to Khali that the mere fact that the shop stewards had been suspended and that there was no imminent development concerning the wage gap which was going to require deliberations of the Wage Gap Committee between the time of the shop stewards’ suspension and their disciplinary inquiries, meant there was no reason for workers to be so concerned because at that stage none of the shop stewards had been dismissed. His response was that workers understood the suspension as merely a preliminary step before their dismissal. Even if that was not necessarily true, that was how workers perceived it. In addition, workers were aware that the wage gap negotiations were supposed to be proceeding in January 2009 and

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something was supposed to happen in that regard during that month. When it was further put to him that nothing would have happened between the suspension of the shop stewards and the first inquiry scheduled for 23 January 2009, Khali's response was that the workers did not know how long the suspensions would last and when the shop stewards might return to work. Nonetheless, he agreed that only the LSC members would have known if there were any wage gap discussions due to take place during the period they were suspended.

[157] Khali recounted that at the meeting held at the stadium, workers discussed what could be done "to get their leaders to talk to them". Accordingly, they decided "…that workers would report for work, execute their duties and then sit at the shaft station and wait for management to come and address us" (emphasis added). Initially he could not recall who had proposed this, but under re-examination remembered only that it was a woman. Ketsekile had a similar recollection. Under cross-examination, he said that workers wanted management to explain why the LSC members had been suspended and why the wages of WP workers were not being considered. According to him, buses had simply taken workers from work directly to the stadium and CEPPWAWU members on the bus joined them in the meeting at the stadium. As UPUSA members, he said they had no problem discussing the issue of the suspension of the shop stewards in the presence of CEPPWAWU members.

[158] When Khali initially testified he did not relate the wage gap issue to any expectation about money, but simply related that workers were concerned that their representatives who were dealing with that issue had been suspended so no one could represent them properly in such discussions. It was only after a tea adjournment that he started to talk about workers expecting to see a change in their salaries and in the payslips, which he claimed they had already received by the time the sit-in commenced. However, he conceded that the only payslip they would have received by that stage was the bonus payment slip which was issued on 15 January 2009, but he insisted that it would have reflected the changes that were supposed to take place in their remuneration in January. He also conceded that any shortfall in the expected bonus

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payment could have been raised with the LSC members at the general meeting on 18 January 2009 at which stage they had not yet been suspended. However, he could not confirm this because he said he was not at that meeting

[159] When it was suggested to Khali that workers would not have embarked on the sit-in if they had seen their payslips beforehand because those payslips would have reflected increases in their remuneration, his response was simply that the money reflected on the payslips was not the money they had expected. By implication, they would still have embarked on a sit-in despite knowing what the payslips revealed because the wage gap adjustment payment of 6.5 % was below workers' expectations. Personally he was expecting an increase of at least R 2000.00.

Sasol's attempts to address the strike immediately before and during the strike

- *Pre-strike warnings.*

[160] Memoranda issued by Sasol prior to the sit-in have already been mentioned above. How effectively these were communicated to underground workers is, for the most part, unclear. Nevertheless, there was evidence that, at more than one mine, it was anticipated that industrial action might be in the offing and attempts were made to warn workers against a sit-in before they started their shifts. Thus, according Montgomery, at Bosjesspruit-Irenedale shaft, the shaft manager services (Johan De Vries) and Mahlangu, communicated to the night-shift that there were rumours of unprotected industrial action and urged them not to engage in any such unlawful activity. This communication was translated by Mahlangu into Zulu. Strauss could not recall if this had been communicated to the ER department, though it would have been appropriate. Similarly, Prinsloo (a mine overseer at Middelbult west shaft) said that he was told to work night-shift by Degenaar as there had been rumours of an unprotected strike.

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- *Communications with UPUSA*

[161] Sasol communicated with UPUSA officials by phone and fax during the morning of 22 January 2009. It appears that an initial letter from Mkhize was sent to Luthuli, and possibly copied to Lepheane and Mpondo (at the Durban office of UPUSA), which refers to a telephonic conversation with Luthuli in which he had stated that the workers' action was not supported by UPUSA. The letter called on Luthuli to join forces with the company in resolving the "emergency" situation as required by the recognition agreement. The letter also asked if Luthuli could speak to Mabuyakhulu and "give us feedback on how you intend to address the situation from a union perspective". Strauss agreed that he had discussed with Mkhize the possible role that Mabuyakhulu could play but did not know why she had mentioned this in the letter to Luthuli. The letter proposed a meeting at 15:00 with Luthuli.

[162] From a letter sent at 10:24 to the Johannesburg office of UPUSA for Luthuli's attention, it appears that by then an arrangement had been made to meet with him at 15:00 that day. The letter recorded that it was not safe or hygienic for workers to stay underground longer than their shifts and that the sit-in constituted unlawful strike action "as it is coupled with a demand of a once off amount which is not due to them." The letter also warned of Sasol's intention to launch urgent proceedings in courts to declare the workers' conduct unlawful and to compel them to leave the mine.

[163] The written response of Luthuli to one of these letters was to the effect that UPUSA was not a party to the sit-in at the mine's operations and did not support the action. He stated: "This is a baby of those involved, not the Union". He then cryptically confirmed that "the meeting scheduled for 15:00 to discuss the situation is [in] respect of the signed recognition agreement."

[164] In spite of the poor relationship between Luthuli and UPUSA membership at the mine, Strauss believed that an intervention by officials would be good because they could give the "correct message" to members and in any event, the company was still bound by the recognition agreement

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with UPUSA, even if the company had agreed to work with the LSC on the wage gap project. He disclaimed any role in deciding to contact Luthuli, which he claimed was a decision of the HR department. He reluctantly conceded that the ideal persons to address the problem were the members of the LSC and acknowledged that Mabuyakhulu had the most influence over the workers. He also agreed that, at the time, nothing prevented the company from communicating with Mabuyakhulu. Further, Strauss conceded that if Mabuyakhulu had been allowed to go underground it was possible he could have persuaded workers to surface. However, he denied ever receiving any request for Mabuyakhulu to come and address workers underground, even though Degenaar recorded such a request being made at Middelbult at around 11:20 that morning.

[165] Strauss denied that the company had seized a tactical opportunity of breaking "the union within the company" by communicating with the discredited officials mentioned in the knowledge that they would distance themselves from the situation. However, Strauss could not provide reasons why the company only decided to communicate with the officials who were discredited in the eyes of the UPUSA membership at the mine. As far as he could remember, there was no consultation with the union on how to deal with the situation, and the union distanced itself from the matter.

- *Meeting of senior management shortly after night-shift workers failed to surface and steps taken by mine management.*

[166] When the night-shift of 21 January 2009 did not surface at 08:00 on 22 January 2009, the ER department issued an initial memorandum to mine managers and to the HR department on how to deal with workers participating in an unprotected industrial action contained guidelines as follows:

> "To Mine Managers and HR Business Partners:
>
> Subject

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Process to deal with workers who participate in unprotected industrial action including sit-ins, go slows and other acts.

Colleagues

Please follow the following guidelines in dealing with the unrest situation:

1. HRBP to keep record of all people taking part in the unprotected industrial action. A name list to be provided at the end of each shift to Pieter Strauss.

2. HRBP and HRC to prepare warning letters and start setting up disciplinary process immediately.

3. Line managers to give an ultimatum to workers participating in the sit-in underground to come on surface within one hour, thereafter they will all receive final warnings and those who are already on final warnings will be subject to disciplinary process which may lead to dismissal.

4. HR and security teams are on the way to affected areas to assist with managing the situation and will be there shortly.

Please keep the central ER team informed of all developments."

[167] Strauss's recollected that this memorandum had only been issued during the course of that morning after unsuccessful attempts had been made to communicate with the night-shift workers, who remained underground, and before any attempts were made to contact UPUSA. As he recalled, management had mandated taking disciplinary action. He was unclear if the memorandum had been issued before any ultimatum had been issued. Sasol regarded the action as unprotected strike action because no dispute resolution process had been followed. Montgomery could not specifically recall seeing the memorandum but conceded that the steps outlined in the document were more or less have been what had been done at Bosjesspruit mine, with the exception of the disciplinary steps mentioned. He agreed that if they had taken disciplinary action at that stage as suggested in the memorandum, it would have suggested that a sanction had been determined before the disciplinary process took place.

[168] Did Sasol expect managers to engage with workers underground about their demands or concerns? As Jordaan recalled, during a meeting with

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senior management, the mine managers were instructed to request workers to surface because they were engaged in an unlawful sit-in. The issue of the ultimatums was also discussed in a meeting of mine managers, which Jordaan attended. At that time, he said two things were of paramount interest: Firstly, the potential safety risk of the sit-in and secondly, how it could be ended as quickly as possible because of the risks posed to workers.

[169] This was consistent with Strauss's initial recollection of the meeting held with all mine managers and the managing director, Mr Wenhold, once the sit-in became known, though he seemed to think the decision to issue ultimatums had been taken later. Later in his evidence he recalled that managers had also been asked to determine what the reasons for the sit-in were. He insisted that his department did not issue instructions to managers but merely guidance. The guidance the department provided was that mine managers should request the miners to surface so that a discussion could be held with them to establish what the problems were and to give further guidance on how to deal with miners once they were on the surface and while they were still underground. It was the mine managers who issued instructions on what to do.

[170] As far as Strauss could remember, at the time the senior managers' meeting was held, the reasons for the sit-in were not known and it was recognised that there was a need to establish what the reasons were. It was agreed that managers should go underground with HR personnel and try and find out what the problem was. The need to persuade workers to surface for safety reasons and how to minimise immediate risks was also discussed. Strauss could not explain the fact that a strike diary kept at Middelbult Colliery's mine manager, van der Westhuizen, did not mention any attempt by management to ask workers why they were participating in the sit-in.

[171] At the managers' meeting, Strauss claimed feedback was obtained from the mine managers. He said they were not aware that workers wanted management to address them on the demands contained in the memorandum of 19 January, which marchers had sought to hand in, but

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he agreed that management was aware of those demands. Nevertheless, they did not know the specific reasons for the sit-in and they did not relate the sit-in to the memorandum.

[172] It was somewhat unclear from Strauss' evidence when feedback was received that workers refused to speak to management, but he seemed to think that it was only after receiving that feedback that the first ultimatum was issued. He denied receiving any feedback that workers wanted senior managers such as Nxumalo, Wenhold or himself to address them, which was the version put to him. He agreed that the ER personnel had not considered going to address workers on the wage gap issues, and management had not considered calling upon the LSC members to ask workers to surface.

- *Communication with LSC members*

[173] A major bone of contention between the parties was whether Sasol should have contacted Mabuyakhulu to intervene in the strike. Mabuyakhulu testified that once the LSC members were suspended they were not even required to come to the gates at Sasol and sign in with security, which was the normal practice. He did not have access to workers at the workplace after being suspended. Workers became angry about the suspensions and during the sit-in demanded that management allow him to come and speak to them. If Sasol had contacted him to intervene, the situation would have been normalised and workers would not have continued to sit underground. Once again he interpreted Sasol's failure to do so as intentional, just as it had failed to contact him about the march on 19 January 2009. Similarly, Sasol knew that there was no point in seeking the assistance of the Evander or Johannesburg branches, in which the UPUSA members at Sasol had no faith. Moreover, Sasol had agreed to deal only with the local shop stewards at Sasol. All Sasol needed to do was to contact him.

[174] Strauss denied receiving any reports from managers that workers had demanded to be addressed by Mabuyakhulu, but acknowledged that if he had received such reports he would have referred the issue to senior management and probably would have contacted Mabuyakhulu. He also

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conceded that he knew that Mabuyakhulu had influence over the workers and that he had discussed Mabuyakhulu's possible role in resolving the matter with Mkhize (discussed above). Strauss denied that the reason Mabuyakhulu was not contacted was because the company wanted to dismiss the applicants and had already decided that when it issued the first guidelines to Managers. In his opinion, management had done everything it could have done in the circumstances. Strauss's explanation for only attempting to contact Mabuyakhulu on 23 January 2009 was to advise him of the interdict. Mabuyakhulu denied hearing of the interdict from Strauss or that Strauss contacted him.

[175] It seems clear from the evidence of shaft managers such as Degenaar at Middelbult that, from the time workers were first told to surface, a number of workers had demanded that Mabuyakhulu address them. He could only speculate that Middelbult Mine Manager, van der Westhuizen had not conveyed this to Strauss. However, Degenaar was not convinced that Mabuyakhulu could have convinced the workers to surface given they were all in different shafts, which would have made it logistically impossible for him to address them simultaneously.

[176] Mabuyakhulu claimed that he only learned of the interdict declaring the strike unprotected from Mr M T Xulu, the general secretary of UPUSA, who phoned him on 22 January 2009 to tell him that an urgent interdict had been launched and that workers had been given an ultimatum to surface. Xulu asked him if there was anything he could do to intervene. At that time Mabuyakhulu was in Pongola. He drove back to Secunda early the following morning to ensure that workers knew about the interdict. On his way he started to contact the local shop stewards who began answering as the day progressed. He then asked them to give him phone numbers of the shafts so that he could tell workers that he was back and that they should surface. He could not recall exactly when he spoke to various people but after he spoke to one person at a shaft, that individual was expected to go to other workers and say "Hey, I have spoken really to Mabuyakhulu. He said we must surface". In some cases, people were reluctant to surface unless someone underground had personally heard him say that.

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[177] Mabuyakhulu vehemently denied that he only told workers to surface after the interdict was granted because they only surfaced in the afternoon, and that he was aware of the sit-in and was communicating with them before that but was not willing to intervene because he was frustrated by the way Sasol was treating him.

[178] For the sake of completeness, it must be mentioned that a further memorandum was issued by Mkhize, at 22:21 on Thursday night, 22 January, but it is unlikely it reached any of the workers who had embarked on the sit-in given that they were all underground by then and it is difficult to see what purpose it could have served at that stage. It contained update on the strike situation in which she referred to the communication of the previous day that industrial action was anticipated. The memorandum went on to emphasize that a salary of R 9000.00 was never promised to workers as a result of the normal possession of the wage gap process and that it appeared that union representatives had promised this to their members. She then alluded to the previous email of 25 July 2008 and recorded the following:

> "The base pay of all WP workers was increased with effect from 1 July 2008 and they had been moved to the MSP category with effect from 1 January 2009".

[179] Somewhat ambiguously, she stated,

> "To facilitate this transition, a project team will be put in place to review and align the wage personnel structure [reduction from 9 Job levels to 4] career paths, progression and related allowances. The 0, 5 annual service increment normally paid to Wage Personnel will be incorporated in the alignment process. The project team will communicate and consult with concerned workers' representatives during this process [on] progress for completion in April 2009 as part of the transition process."

[180] Lastly, Mkhize confirmed that a further 6.5% increase was being paid as part of the alignment process in January 2009. As mentioned, Strauss testified that the quoted portion of the circular concerned was simply not correct, because the 0, 5% service increase was not going to be paid later, as it had been paid in January.

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- *Ultimatums issued by Sasol:*

[181] The memorandum issued to mine managers and HR Business Partners on the morning of the sit-in has already been mentioned. That memorandum called on mine management to issue the first ultimatum.

[182] Strauss agreed that when the first ultimatum was issued at about 10:00 on 22 January the workers who would have been addressed on it would have been the night-shift workers who did not surface at 08:00. At the time it had not been foreseen that workers who had gone underground for the day shift would have been at their work stations at the time, but the ultimatum was directed at those who were participating in the sit-in at the time. Strauss agreed that the only ultimatum that was directed at workers who had reported for the morning-shift of 22 January and who had remained underground at the end of their shift, would have been the ultimatum issued on 23 January 2009. Strauss agreed that it was possible in the light of Morodi's statement in respect of Middelbult mine that the third ultimatum I have not been communicated to all workers who started work on the day shift on 22 January 2009.

[183] Morodi, who presently holds the position of senior HR manager responsible for all the Sasol mines, was the HR Business Partner at Syferfontein Mine during the sit-in. Because workers at that mine did not participate in the sit-in he was re-deployed during and after the sit-in to assist with HR functions at Middelbult mine.

[184] He was responsible for distributing the three ultimatums, all of which were prepared in English and Zulu by the ER department, to the three shafts of Middelbult mine.

[185] The first ultimatum prepared in English and Zulu was received in the morning on 22 January and was distributed to Middelbult, Brandspruit and Bosjesspruit mines. The ultimatum at Middelbult read:

"Memorandum

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To Middelbult Workers

Subject Mine Manager

Subject

Ultimatum with respect to participating in the unprotected action currently underway at Middelbult Colliery

You have embarked on UNPROTECTED industrial action by staging a sit-in and refusing to return to surface after your completed shifts that ended at 08:30 the morning.

By taking this action, you're putting your own safety as well as the safety of co-workers at risk.

You are hereby given an ultimatum to come to the surface from underground by 15h00 hours.

If you do not come out from underground: disciplinary action will be taken as follows:

You will be suspended pending disciplinary action that may also lead to dismissal in line with the Sasol Disciplinary code.

Gerritt van der Westhuizen

Mine Manager

Middelbult Colliery"

(original emphasis)

[186] The second ultimatum was received around lunchtime in the afternoon of the same day, having the following format.

"Memorandum

To Sasol Mining Workers

Subject Mine Manager

Ultimatum with respect to participating in the unprotected action currently underway at the mines.

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You have embarked on UNPROTECTED industrial action by staging a sit-in and refusing to return from you completed shift underground.

By taking this action, you're putting your own safety as well as the safety of co-workers at risk.

You are hereby given an ultimatum to come to the surface from underground by 15h00 hours

If you do not come out from underground: disciplinary action will be taken as follows:

You will be suspended pending disciplinary action that may also lead to dismissal in line with the Sasol Disciplinary code.

Signed

Mine Manager"

(original emphasis)

[187] The third ultimatum was received on the morning of 23 January 2009 and distributed to the three mines mentioned and Twistdraai was identical to the second ultimatum, save that it expired at 11:30.

[188] According to Potgieter, there were also SMS communications sent by the company to cellphones of workers that were registered with Sasol Mining, viz:

188.1 A message was sent at 16:23 on 21 January 2009 (prior to the commencement of the strike) to advise that "*Sasol Mining didn't grant permission for your planned action to hand over a memorandum on 22 January 2009*".

188.2 A message was sent at 17:21 on 22 January 2009 to advise that an "Expectation has been created that workers would receive a R9000,00. This is not true and was never discussed with the company".

188.3 A message was sent on 18:02 to advise that "Any 'sit-in', 'go slow' etc. is regarded as unprotected industrial action and will lead to serious disciplinary action". The same message was sent again at 2:19 in the morning.

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188.4 A message was sent at 18:33 on 22 January 2009 to advise that "Management is disappointed. After many discussions between UPUSA and Sasol Mining, this conflict has been instigated without following the agreed process".

188.5 A message was sent at 19:03 to the effect that "UPUSA head office does not approve of this unprotected industrial action".

188.6 A message was sent at 14:00 on 23 January 2009 to advise that "The union leadership who instigated the unprotected industrial action have been suspended and are undergoing disciplinary action".

[189] Enoch Zwane denied receiving any messages and pointed out he could not have received any when he was underground because cellphones could not be taken underground. Even after he surfaced, he claimed he did not see any SMS messages.

Events during the sit-in at different mines on 22 and 23 January 2019

Middelbult Mine – iThembalethu shaft

[190] Witnesses to events at this shaft were: Lars Steyn (Steyn), the shaft manager at iThembalethu shaft, Eric Zwane (Zwane), the underground manager, and Ketsekile, a general worker. To some extent, Morodi also testified in relation to events at this shaft.

[191] At this shaft, the production shifts were from 7:00 until 17:00 (the morning-shift) and from 16:00 until 2:00 (the afternoon shift). The maintenance shift was from 22:00 until 8:00 (the night shift).

[192] Steyn testified that on 22 January 2009, sometime after 8:30, Zwane reported to him that the night-shift workers did not surface at the end of their shift. Steyn reported this to Gerrit van der Westhuizen (Van der Westhuizen), the mine manager, and they decided that Steyn should go underground to request the night-shift workers to surface. He confirmed with reference to the lamp room records which workers had surfaced. Steyn's account of events was largely undisputed.

[193] Morodi said that shaft managers were delegated to address the workers underground as it was not feasible for Van der Westhuizen to deal with all

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the shafts simultaneously. The feedback received was that workers believed they had been promised money that had not been paid and were unhappy about the suspension of the fulltime shop stewards, who were negotiating on the wage gap issues with management. He also heard they wanted to speak to Mabuyakhulu. He saw nothing which could have prevented them from speaking to Mabuyakhulu even though he was suspended. The feedback was conveyed to Strauss or Tshikovhi. Morodi agreed his evidence was at odds with Strauss's testimony that the feedback received from mine managers was that workers simply refused to speak to them.

[194] In response to a suggestion that Middelbult mine management could have contacted Mabuyakhulu, Morodi pointed out that there were shop stewards at the mine but dealing with Mabuyakhulu would have to have been arranged through other channels. He was not prepared to agree that if Mabuyakhulu had been called out to Middelbult, the situation might have been "different".

[195] At about 9:15, Steyn descended to shaft bottom, where he found a group of about 50 night-shift workers in the shaft area. He was accompanied by Mr R Ngobeni (the shaft safety officer) who translated for him. He asked workers to surface and told them they should follow the grievance procedure if they had a problem they wanted to resolve. Under cross-examination, he indicated that workers had said there was a problem with the wage gap but he was not aware of the grievance that had been lodged about it at the time. Steyn further testified that he believed that he had relayed this feedback to Van der Westhuizen. His main concern was to get workers to surface because it was a dangerous situation to have workers gathered at the shaft bottom after their shift had ended. They were not supposed to be underground more than 12 hours and were exposed to more hazards while they remained underground, irrespective of whether a reportable health and safety incident had occurred. He and Ngobeni waited until 10:00 while keeping the cage doors open but none of the night-shift workers entered the cage by the time they surfaced.

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[196] At around 10:30, Steyn received a letter from Van der Westhuizen, which was the standard ultimatum from the ER department. He was requested to communicate it to the workers at the shaft bottom. He and Ngobeni went underground again at approximately 11:00 to communicate the ultimatum. Workers did not respond in any way to the ultimatum. He could not remember if he handed copies of the ultimatums directly to workers, but recalls leaving them on the bonnet of an LDV. As on the previous occasion, none of the workers accompanied them to the surface.

[197] Later, at about 12:20, Steyn telephoned Patrick Xotshana (Xotshana), an UPUSA shop steward, and asked him to come to the shaft to speak to the workers underground and to try and persuade them to surface. Xotshana agreed and Steyn, Ngobeni and the shop steward went underground at about 13:30, taking with them the second ultimatum which had been received by email shortly before that. Once again, it was communicated to the workers at the shaft bottom copies were left at the shaft bottom. Yet again no-one chose to surface with them. Steyn confirmed that workers were getting frustrated and agitated by that stage. No evidence to contradict this was presented by the applicants.

[198] Steyn was not aware that Xotshana was not part of the LSC and therefore was not well versed in the wage gap process. Nonetheless, in summonsing Xotshana to speak to the workers he felt he had acted responsibly. He doubted that if Mabuyakhulu had been called to address workers he would have managed to go to every shaft in a reasonable time. However, he did not dispute that it appeared from the strike diary kept at Middelbult that it was evident night-shift workers had requested that Mabuyakhulu should come and address them.

[199] Steyn cancelled the afternoon shift and requested the afternoon shift bosses, Messrs G. Kruger and H Barnard, to immobilise the continuous mining (CM) machines and to monitor the shaft area when the day shift personnel came out at the end of their shift. Zwane and Steyn testified that, except for the supervisors and members of Solidarity that surfaced, none of the day shift maintenance crew workers surfaced at the end of

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the morning-shift. At around 16:10 the UPUSA shop stewards (Xotshana and De Villiers) surfaced to fetch food for the workers underground, but Steyn did not allow them to go back underground. Although Zwane had originally suggested that afternoon shift was cancelled on account of violence, he retracted this version in his written statement and claimed that the shift was simply cancelled because management did not want more workers underground. However, he did say it had been decided not to serve a further ultimatum after the day shift ended because there had been reports of violence at certain shafts.

[200] Ketsekile, who was working on the morning preparation shift, denied anyone came to address them underground until 23 January when their shop stewards, Xotshana and de Villiers, came underground and told them they must surface because of the court order. When he was asked what would have happened if management had come and listened to their demands as they expected, he said that they would have been “very happy” if management had descended “coming with the money that we wanted”.

[201] He had arrived at shaft bottom at the end of his morning-shift and was surprised that the afternoon shift had not descended. He remembered that the miner he was working under, one Zanele, surfaced together with some UPUSA and CEPPWAWU members. Workers were singing and dancing, but did not prevent others from surfacing. There were also striking workers standing and sitting near the cage, but in his view there was no reason why anyone would have felt scared to pass through them to enter the cage. He also claimed not to have seen any of the copies of the ultimatums Steyn claimed had left underground.

[202] When he testified, Zwane modified the claims of violence he had made in his written statement, withdrawing allegations that stones were thrown at the cage when it descended. Steyn requested him to go down to shaft bottom to address workers, believing that because he had a good relationship with them and that they might well listen to him and be persuaded to surface. Although he toned down his allegations of direct acts of violence, he maintained that he had told the cage driver to surface,

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not because objects were thrown at the cage but because he heard some noise and thought that the same thing might happen as had happened at other shafts when objects were thrown at the cages. The noise he heard was people saying that they should not come out of the cage. This version is more consistent with the evidence he gave during one of the disciplinary inquiries. Ketsekile denied that there were any stones in the shaft which could have been thrown at the cage, though he would not have been at the shaft until the end of his morning-shift around 17:00 and he did say he was positioned in a place sheltered from the draught in the shaft.

[203] Why Zwane only chose to correct his statement regarding the threats of violence, when giving evidence at trial, despite having confirmed his original statement in his supplementary statement made in June 2017, was not satisfactorily explained. Though he was reluctant to concede the good communications he had with workers with workers, because he was still new at the mine at the time, he agreed with the statement of Nomyidi Awu that during the safety or toolbox meetings he had advised personnel who had reported for work on the morning of 22 January 2009 that they should not follow the example of what shift workers at Brandspruit who had refused to surface at the end of their shift.

[204] It is not in dispute that no further ultimatum was served on the workers on 22 January after Zwane's attempt to go underground and speak to the workers between 16:00 and 17:00. Thereafter it was not considered safe to send anyone down to communicate a further ultimatum. It is for this reason that no ultimatum was communicated after Ketsekile joined the strike at the end of the morning-shift some time after 17:00. At around 19:00, more of the dayshift maintenance personnel surfaced using the cage. Steyn testified that he cancelled the evening shift. Steyn stated that by 20:30 there were 90 workers who had not surfaced based on the lamp room records

[205] Steyn testified that, around 11:00 on 23 January, he received a phone call from Andries Thetha (one of the workers underground) who asked that the shop stewards (Xotshana and De Villiers) be sent underground to address the workers. Ketsekile claimed the phones were not working by then, but

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Steyn was not challenged about receiving the phone call. Steyn agreed to the request and the shop stewards went to speak to the workers at shaft bottom at around 12:15. However, it was only around 15h20 that the workers surfaced. Ketsekile stated that they had surfaced immediately when Xotshana advised them that there was an 'ultimatum' from the court, but Steyn disputed that. According to him, they only surfaced about three hours after the shop stewards went underground.

[206] Ketsekile did not speak to anyone that was part of the previous evening shift. He testified that Xotshana and de Villiers (his shop stewards) came underground on Friday afternoon to tell the workers about an urgent matter from court. Given the timing of the events that culminated in management's decision not to go underground after the incident with Zwane, Ketsekile was of little assistance on events prior to him joining the sit-in. No worker that was present during those events testified.

Middelbult Mine – West shaft

[207] Sasol's witnesses were Phillipus Degenaar (Degenaar), Billy Henderson, (Henderson) and Marthinus Prinsloo (Prinsloo). The applicants who testified were Matwa, and Francis Makoko (Makoko), a CM operator on the night shift.

[208] Degenaar was the shaft manager at Middelbult West at the time. He gave general evidence about the mine which was not disputed. The main shaft was a services shaft near to which was an incline shaft by which the mine could be entered and exited by foot. The production shifts were the morning and afternoon shifts and the night-shift did maintenance work. In the case of Middelbult West, production occurred between 6 and 7 km from the shaft, whereas at the iThembalethu shaft (which at that stage was a relatively new shaft) production occurred at a distance of no more than 3 km from the shaft. Because of the distance of the production faces from the shaft, workers were transported to and from the production areas using LDVs.

[209] The cage at Middelbult west shaft is capable of carrying approximately 120 people. Accordingly, all the production teams for a particular shift

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would descend simultaneously at the start of a shift and would all surface together at the end of a shift. The space at the bottom of the shaft is large enough to accommodate several hundred workers at once so that all of the production teams could congregate at the bottom of the shaft before dispersing to their various production sections.

[210] Degenaar was informed of the march on 19 January 2009 but was not sure about the details of what had happened. He was also aware that the wage gap issue had been raised by workers.

[211] Degenaar recalled that on 21 January 2009 at about 10:00 the HR manager had requested the mine to communicate the memorandum to workers, warning them not to participate in any further unprotected action and pointing out that disciplinary action was planned against those who participated in the 19 January 2009 march, but that Sasol remained committed to negotiating with the wage gap working committee on job bands and career paths.

[212] Degenaar communicated the memorandum using an interpreter. The mine manager had instructed all shaft managers to communicate the memorandum before the start of the night-shift on 21 January 2009. Degenaar was instructed to ensure that a mine overseer was on duty during the night shift. Makoko confirmed that the memorandum was indeed relayed to the night-shift by Degenaar and was interpreted by Mr N Delihlazo.

[213] Prinsloo was the mine overseer working on the night-shift preceding the start of the sit-in. In the morning of 22 January 2009 only one miner surfaced from underground at the end of the shift. The miner informed Prinsloo that the remainder of the shift were refusing to come out. Prinsloo relayed this to Degenaar and went home. Makoko said that the reason they did not surface was that they wanted a representative of Sasol, and not Degenaar, to address them on the promised monies and also to address them on the suspension of the LSC members, which left them not knowing who would represent them in further discussions. In his view, if the company representative in question had come underground

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and explained the issue of the wage gap to them, he and the other workers would have surfaced.

[214] The mine manager instructed Degenaar to address the night-shift workers who would not surface. By that stage, reports were being received from the other mines that night-shift workers were not surfacing.

[215] At about 09:15, Degenaar said he proceeded underground with an engineer, a mine overseer, the chief foreman and a communication facilitator. He told workers to come to the surface and that they did not have permission to stay underground after the shift was completed. He notified them that what they were doing was unlawful and against company policy. If they had grievances, those could be discussed on the surface. Initially, he testified there was no response from the workers he addressed to this communication. However, later he conceded that they had requested to speak to Mabuyakhulu because they wanted him to come and tell them when they would get their money to close the wage gap and said management should not return without him. Workers simply shouted this at the management delegation after the ultimatum had been communicated. It was repeated on further occasions when there were communications made to the workers underground. To Prinsloo it seemed the request was an unreasonable one because the situation was the same at all of the shafts and it would not have been possible for Mabuyakhulu to come and address them. Although he claimed that the workers did not say why they wanted to speak to Mabuyakhulu, he did not dispute entries in the strike diary for the mine which showed that they had wanted to speak to Mabuyakhulu about the wage gap. Later in his evidence he was less certain whether workers had specifically said Mabuyakhulu must come and address them on the wage gap issue. Nevertheless, he was adamant he had reported the workers' demands to Van der Westhuizen. He could not comment on whether the latter had conveyed this to senior Sasol management.

[216] Makoko testified he could not recall seeing any of the management delegation mentioned coming down the mine, but under cross-examination agreed he had been present when Degenaar addressed

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workers in the morning of 22 January and they had refused to surface. The reason they did not surface was because they had not received a response from the Sasol. He also conceded that he had heard about the disciplinary steps that could be taken against them, but it did not concern him enough to even discuss it with Matwa, his shop steward, who had joined the sit-in after his morning-shift. Makoko also recalled ultimatums being thrown from the shaft and landing at the shaft bottom area, but could not see who had thrown them.

[217] Henderson, the chief foreman at west shaft, also testified. In June 2017 he had provided two written statements. The first one he admitted he had written without having had the opportunity to refresh his memory by speaking to the artisans, C Truter (Truter) and Bheki Hadebe (Hadebe), who were also involved in the events in 2009. The two statements are largely similar except that when he made the first statement, Henderson surmised that it was the production shift which had commenced with the sit-in and that therefore he became aware of the sit-in when surfacing at 17:00 on 22 January 2009. He had forgotten that at the time it was actually the night-shift which was the production shift and had not surfaced. He stated that:

217.1 At about 06:00 on 22 January 2009, Hadebe and Truter went underground for the maintenance shift. He instructed them to surface as soon as he heard that the sit-in was in progress, but the workers' underground only permitted Truter to surface. Hadebe phoned Henderson and said he was not allowed to surface. Because he was concerned about Hadebe's safety, Henderson went underground to fetch him accompanied by Joe Monama (Monama). He could not recall the exact time but thought it must have been around midday that he descended for the first time. They found Hadebe at the LDV parking area together with about 25 other workers, who all wanted to surface. However, Hadebe did not surface with him because only white personnel were being allowed to leave and it was considered dangerous for him to attempt to do so. Henderson told them to go to the boiler shop and lock themselves in there and that food would be brought to them.

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Ultimately, Hadebe only surfaced the following day at around 13:00 or 14:00 when Henderson went underground to fetch another worker, Daniel Rakhota (Rakhota).

217.2 When Henderson and Monama surfaced they gave Degenaar feedback. They collected food and went back down to give it to the people in the boiler shop. They hid the food in their overalls so as not to attract attention as to why they had come down again. As far as Henderson could recall, that was the second time he went down the mine that day. He agreed that he did not witness any violence or intimidation but simply that "…the people were around the cage singing, dancing you know their normal things, but no threatening violence at that stage". He also agreed that up to that stage he had not seen any violence nor any assault on Monama.

217.3 They took the names of all the workers in the boiler shop so that they could identify those who were not willingly participating in the sit-in. Based on information at hand they believed none of the participants in the industrial action had gathered at the main shaft. Accordingly, if the workers at the boiler shop went there they could leave via the incline shaft, so he advised Hadebe to organise an LDV to drive to the main shaft and leave via the incline. Monama and Henderson then surfaced.

[218] It was put to Henderson that Hadebe could not have been underground because Degenaar said he was part of the team that was sent underground at 17:00 on 22 January 2009 to immobilize machines. Henderson could not explain why Degenaar would have said that, but he was certain that Hadebe was part of the group of workers at the boiler room.

[219] It was further put to Henderson that it was implausible that there were 26 persons at the boiler shop because Degenaar had identified 33 workers underground when he went to address workers and that correlated with the missing lamps in the lamp room. Henderson said that he could only assume that Degenaar took account of the workers at the boiler

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workshop and that they should not have been included in the 33 names of workers identified as having gathered at the shaft bottom. Under re-examination, Henderson was referred to his statement where he said that Truter and Hadebe had gone underground at 06:00 on 22 January 2009 for the maintenance shift and it was pointed out that the headcount done by Degenaar was of the night-shift workers who did not surface. Moreover, the lamp room records would not reflect that Hadebe had not surfaced because the morning-shift would not have been due to surface when Henderson met Hadebe at the boiler shop.

[220] In his evidence at one of the disciplinary inquiries, Henderson was recorded as saying:

> "Thursday 22 January 2009 at 17:00 I was asked to go down to disable section machines. We went underground and saw a lot of people but we were not obstructed. We could go in easily after immobilizing machines, we came back at boiler shop, we noticed the group of people at the boiler shop who did not want, who did not want to be… [and that] … workers were standing around the cage."

[221] It was suggested to Henderson that this was a more accurate reflection of what he recalls because he stated something similar in his initial written statement, eight years after the events, namely: "We came out from section 42 at 17:00 on 22 January 2009. We were later arrived at the cage; we then saw that there was a lot of operators at shaft bottom. While waiting at shaft bottom for the cage to arrive we then noticed that some sort of strike was going on. When the cage arrived and the cage driver opened the door to allow people into the cage, the striking people allowed myself and Joe Manama to enter the cage. They prevented any other people from entering the cage. Even my black artisans that was with me was not allowed to leave. Other artisans were allowed to leave with earlier cages that happened at shift change."

[222] Henderson admitted that it was a long time ago but said that the evidence recorded at the disciplinary inquiry was correct and it referred to the specific incident which occurred at 17:00 when he descended to immobilize mining machinery. He denied that his statement had been modified to exaggerate the levels of violence that occurred. However,

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though he might have forgotten some details he remembered very well the assault which occurred on 23 January 2009.

[223] After surfacing on the first occasion, a note was received from the ER department advising exactly what had to be communicated to the workers underground, so Degenaar went underground for the second time at around 10:30. Again he was accompanied by a number or workers, including Messrs Koortzen and Masina. He testified that he read the ultimatum in English and Mr Masina read it in Zulu. The ultimatum advised as follows:

> "You have embarked on UNPROTECTED industrial action by staging a sit-in and refusing to return from your completed shift from underground. By taking this action, you are putting your own safety as well as the safety of co-workers at risk. You are hereby given an ultimatum to come to the surface from underground… if you do not come out from underground, disciplinary action will be taken as follows: You will be suspended pending disciplinary action that may lead to dismissal in line with the Sasol Disciplinary code."

Makoko once again said he could not recall having seen this delegation either.

[224] Around 13:00 the second ultimatum was received and once again Degenaar went down the mine with three other workers and issued them with the ultimatum to leave by 15:00 failing which they would be suspended and disciplinary action would be taken which could result in their dismissal. On this occasion, Degenaar said the atmosphere was more tense with more workers having armed themselves with various metal objects. Again, some workers attempted to close the door to the store area where they were addressing the workers but they were prevented from doing so by one of the managerial staff. As in the two previous instances, Makoko had no recollection of this visit either. The only instance he could recall was that sometime between 12:00 and 14:00, Degenaar descended and on arrival asked those who wanted to surface to get into the cage, but no one did and he went to the surface alone. Makoko also did not see any of the workers armed with roof bolts.

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[225] Because of the atmosphere they did not attempt to leave ultimatums on the shaft bottom and when they surfaced, Masina, the interpreter, said he was too afraid to return underground after that and Degenaar communicated to van der Westhuizen that there was no point in attempting further communications because they were being ignored and the environment was becoming increasingly aggressive.

[226] By 14:00 management decided to cancel the afternoon shifts at Middelbult once the night-shift had not surfaced following the second ultimatum Security staff were told to prevent access to the premises by the afternoon shift. Degenaar clarified that the actual decision to cancel the shift was taken by HR and senior Sasol management. The workers on the afternoon shift were due to go down at 15:00 before commencing their shift. The morning-shift workers who were due to end at 16:00 and surface at 17:00 were still at their work stations at that stage.

[227] Degenaar addressed the afternoon shift at the security gates and advised them of conditions underground, that the shift was cancelled and they should return home. Further, at about 17:00, nine workers were instructed to go underground to demobilize the EMC machines, which they did. However, they could not exit from the west shaft so they travelled to the main shaft with the intention of exiting by the incline shaft. Initially, artisans who tried to exit the main shaft were assaulted and had to return underground but eventually all but the black artisans were allowed to surface at the west shaft, after forcing their way to the cage, together with Monama. Degenaar was confident that Monama was only sent down at 17:00, and could not explain how Thsivashe, the underground manager at Middelbult shaft, could have relied on the alleged assault which only took place at that time in taking the decision that is was unsafe for management to proceed underground again on 22 January 2009.

[228] Makoko agreed he had seen Monama and Henderson descending in the cage at some stage. On one occasion they simply arrived at the shaft bottom, looked at the workers, and then ascended. On the next occasion, Monama exited the cage and continued walking without communicating

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with anyone. Henderson ascended again with the cage and Monama was only seen again when the cage descended to allow him to surface. He was unaware of any member of the mine management being assaulted. Makoko was also unaware of the machines being immobilized or of the group of nine personnel arriving underground for that purpose.

[229] Degenaar did not experience any tampering with the cage mechanism to prevent the cage surfacing during his three underground visits, nor did he personally witness any assault. He claimed the interference only took place later. He was not concerned about artisans being sent to immobilise machinery because it seemed that from the behaviour of the workers sitting in, they would not interfere with supervisors going in and out of the mine.

[230] At about 19:00 that evening, Henderson said Hadebe called and told him that they managed to get to the main shaft using an LDV. However, when they got closer to it, people started “jumping out” of workshops and areas near the shaft bottom. He told Henderson they then abandoned the LDV and ran back along the travelling road towards west shaft and were being chased by the workers carrying roof bolts. Eventually, they walked back about 6 kilometres to the boiler shop and locked themselves in again.

[231] When Prinsloo returned for night-shift of 22 January, workers were still underground. He was informed that no production was taking place and was also aware that Degenaar had given instructions to Henderson and others to immobilize the continuous mining machines. However, he did not know if that was because it was anticipated the night-shift would resume work, when their next shift began, as Degenaar had testified. Degenaar testified that management had heard a rumour that the nightshift might resume working when the night-shift normally began. That would have been completely unacceptable as they had already been underground for 24 hours. Hence the decision was taken to immobilise the machinery.

[232] At around 22:00 that night, when Prinsloo went underground, workers were gathered at the shaft bottom and were not working. He testified that he had been instructed to monitor the night shift. He was unaware that the

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night-shift workers who had remained underground since their last shift intended to resume their duties, but was aware that the production machines had been immobilized.

[233] At about 02:00 on 23 January 2009, Degenaar received a phone call from personnel at the cable shop who wanted to surface. He descended with the cage and saw strikers singing and stamping roof bolts on the floor. Four female miners and two contractors entered the cage. Nobody else responded positively to his request to surface with them. Inasmuch as he was able to collect individuals on that occasion, he conceded that it would have been possible to leave ultimatums at the shaft bottom or to communicate with workers assembled there. However, he was reluctant to concede that this implied that an ultimatum could have been served on the day shift which ended at 17:00. He agreed that, apart from what he interpreted as intimidatory stamping of roof bolts against the floor, he did not see other violent or aggressive behaviour on that occasion. Once again, Makoko could shed no light on this because he was not near the cage at that time of the morning.

[234] About an hour later, at 03:00, Prinsloo received another call from an unknown individual who wanted to be collected from underground. When the cage arrived at the shaft bottom it appeared to him that the strikers were very aggressive in the way they were striking the roof bolts on the floor. He interpreted this as intimidating behaviour. On opening the cage doors for people to enter the cage some of the strikers pushed the doors closed thereby preventing him from opening them and consequently no one could enter the lift. He identified four individuals who had forced the cage door closed, namely one C Mahlatsi, Makoko, Paul and Matwa. Makoko denied even being in the vicinity of the cage at that time and claimed he was in the workshop with Matwa.

[235] Matwa agreed he had phoned the surface to send the cage down to fetch a sick worker. He denied that any person wishing to go to the surface required the permission of the strikers, or that the request had to go through him. He maintained that anyone who wished to go to the surface could summons the cage. He did admit that he played the role of

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communicating with certain members of management and keeping the workers informed of the status of the underground sit-in, but denied having been in contact with Mabuyakhulu or that he had received a call from him on 23 January 2009 instructing workers to surface. He also disputed Makoko's statement to the extent that it suggested that he had been there the whole day at the shaft. However, he did disclose that he had phone numbers of full-time shop stewards from Middelbult West on speed-dial who could be reached on their cell phones from the underground phone.

[236] On returning to the surface, Prinsloo said he received yet another call at his office from miners underground requesting to be collected, but he told them the situation was very tense and that he was afraid of his and their safety if he came down. He advised them to stay in a safe place. Even though there was no violence, the environment was intimidating and strikers were getting aggressive, such that the situation could turn violent at any time. He did not agree that simply because he was able to fetch some people on the first occasion that it would have been feasible to serve ultimatums on the workers gathered at the shaft bottom after the day shift ended.

[237] Henderson testified that at about 09:00 on 23 January 2009 Truter and a miner, J van Aswegen (van Aswegen), went underground to do fire a patrol in all the sections. Makoko confirmed this in his written statement in greater detail but at the trial could not recall seeing anyone except Monama. Henderson claimed the team were not allowed to surface and called him to fetch them.

[238] When Henderson got to the bottom of the shaft, the workers stopped him from opening the main gates of the cage. Some workers were pushing roof bolts through the cage gate to try and stop them from opening the cage door. The cage driver sustained scratches on his arm and they managed to grab some of the roof bolts which they took with them when they surfaced. Henderson asked workers blocking the exit to step away from the cage doors so that the gate could be opened. Some workers were willing to do so; others were not. Ultimately, after some tussling, the

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door was opened far enough for Truter and van Aswegen to enter the cage. Another worker tried to force himself in but other workers pulled him back by his jacket. He freed himself from the jacket and got into the cage. Later under cross-examination he was confronted with what he had said at the disciplinary inquiry namely that the worker's jacket got caught inside the cage door when the door was forced open by workers. Henderson conceded that there were a lot of things going on at the time he could not see precisely how the jacket got stuck but "the jacket went out without him". There appears to be a discrepancy between the typed minutes of the inquiry and the handwritten notes of the evidence. This was raised in re-examination. What was recorded in the handwritten minutes was that everyone was pulling the individual in question and his jacket had to be loosened to get him into the cage.

[239] After Truter and van Aswegen had left for the fire patrol, Henderson said he received a call from the personnel in the boiler shop who told him that there was an injured person, who had apparently sustained injuries when he had asked the workers holding the sit-in if the personnel in the boiler shop could surface. Henderson expressed his concern that an attempt to retrieve the injured person would be resisted by the workers sitting-in, but he was advised that the other workers had agreed that the injured person could be evacuated. Henderson then went down with the cage driver to fetch the injured worker. He was able to do so without any difficulty. Henderson could not remember if this was before or after he had gone down to assist the two artisans to surface. He was tested on this evidence because in a disciplinary inquiry he had said that one of the personnel who had been hiding in the boiler shop had sustained a bad leg injury when running away from workers at the main shaft exit. It was suggested in that evidence that the injury was caused by being hit by those workers, whereas in his later written statement he said that he was made to believe that the injury was sustained after leaving the boiler shop and asking if the boiler shop personnel could surface. It was put to him that these were two completely different versions. However, while it may be unclear whether the injury was sustained as a result of a direct assault or as a result of being chased, both versions are consistent with

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the unsuccessful attempt of the boiler shop staff to exit using the incline shaft where they were forced to turn back.

[240] Later Henderson was phoned a number of times by Daniel Rakhota (Rakhota), a roof bolt operator, who complained of being unwell and asked to be fetched. Henderson told him that management had issued an instruction that no one should go underground. Despite this, Henderson told Rakhota that he would fetch him based on "how he sounded". Due to the earlier incident, Henderson said he needed a clear undertaking that the strikers would allow him to surface. Once he got confirmation from Rakhota that such an agreement had been reached, Henderson descended with one Hinchcliff, the cage artisan, to fetch Rakhota. As the cage door opened at shaft bottom, the striking workers were not in front of the cage gate and Henderson got the impression that Rakhota would be allowed to leave. However, when the cage gate was opened, a large number of workers ran into the cage. Other workers outside the cage then told them to leave the cage but they refused. The workers outside the cage stood in front of the cage gate preventing it from closing. In his original statement he said that additional workers also came into the cage, and they also refused to leave, but when he testified, he said that was an error and should be deleted. Matwa said that he was present at the cage but focussing on the sick worker. He did not notice additional workers getting into the cage or hear other workers telling them to leave the cage. Nevertheless, he was confident that nobody had been prevented from surfacing. Makoko was aware of the sick individual and heard that Henderson fetched him, but he was not in the area at the time because he was sleeping in one of the LDV's

[241] According to Henderson, one of the workers who had entered the cage ran out of the cage shouting at those who were keeping the gate open. He was assaulted but broke free of his attackers. His face was bleeding. Henderson appealed to the workers who had entered the cage to leave so that the sick and injured workers could be taken to the surface, but they would not leave the cage. Henderson then phoned the shaft engineer, who contacted the OEM of the cage and instructed him to override the safety mechanisms on the cage gate to allow the cage to

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surface, which proved successful. The names of the workers that were brought up were taken. Matwa said that he did not see any scuffle.

[242] Degenaar also testified in relation to this event, namely that an agreement had been reached between the mine manager and the underground leaders who were communicating with him that workers who had been assaulted would be allowed to surface. Around midday Henderson was allowed to fetch 26 workers. However, he was told that the safety mechanism of the cage was tampered with and had to be overridden.

[243] Degenaar claimed the sit-in participants only surfaced around 16:00. Matwa said that he had received the call to surface from the full-time health and safety representative at the Middleburg main shaft. In turn, he had contacted the full-time shop steward Lemaoana to verify the information.

Middelbult Mine – Main shaft

[244] Godfrey Tshivashe (Tshivashe) was the underground manager at Middelbult Colliery main shaft (the services shaft at Middelbult) at the time of the strike.

[245] The cage at Middelbult main shaft is capable of carrying approximately 200 people. Accordingly, all the services teams for a particular shift would descend simultaneously at the start of a shift and would all surface together at the end of a shift. The space at the bottom of the shaft was large enough to accommodate several hundred workers at once so that all teams could congregate at the bottom of the shaft before dispersing to their various working areas. The underground services team on each shift is much smaller than the production teams, typically comprising: a miner or team leader; an artisan and artisan assistants; a few machine operators and a couple of general workers.

[246] The night-shift commenced at 22:00 on Wednesday, 21 January 2009 at Middelbult main shaft and ran normally. The Middelbult mine manager, van der Westhuizen instructed Tshivashe to communicate the

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memorandum issued by the HR department following the protests on 19 January to the night shift.

[247] On the morning of 22 January 2009, day shift workers also went underground at 7:00, and the night-shift started ascending at the end of the shift at 8:00 on 22 January 2009, as was normal practice. Soon after Tshivashe arrived at work 08:00 on 22 January 2009, either by Johan van der Bank (van der Bank), a mine overseer in services, or Dewald Labuschagne, a shift boss reporting to Johan van der Bank, advised him that certain night-shift workers had not surfaced.

[248] Tshivashe then checked the lamp room register to determine how many night-shift workers were still underground after their shift ended and found 12 lamps were missing. He tried to determine if the workers to whom the lamps belonged had remained underground owing to normal service activities like breakdowns or planned overtime. The relevant supervisors told him that the workers were not authorised to stay underground after the end of their shift. Ordinarily, incomplete work would be left incomplete at the end of a shift to be finished on another shift unless a particular task had to be completed because it was emergency work and the incoming shift could not deal with it. Even so, in such a case the supervisor would still have to authorise the overtime work.

[249] The three supervisors of the missing night-shift workers were sent underground once it was realised that the teams had not surfaced but they reported that they could not find any of them at the shaft bottom, so it was surmised that they were participating in the sit-in. The supervisors descended again to deliver copies of the following ultimatum to the workers who had not surfaced: it read:

> "You have embarked on UNPROTECTED industrial action by staging a sit-in and refusing to return from your completed shift from underground. By taking this action you are putting your own safety as well as the safety of co-workers at risk. You are hereby given an ultimatum to come to the surface from underground by ... If you do not come out from underground, disciplinary action will be as follows: you will be

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suspended pending disciplinary action that may lead to dismissal in line with the Sasol Disciplinary Code."

[250] The copies of the ultimatum were in English and isiZulu. The supervisors returned and reported they could not find the individuals in question either at the bottom of the shaft, or at their respective working areas. They also told him that they had left copies of the ultimatum at the shaft bottom for the workers in case they returned to the shaft area. The applicants pleaded that, after working the night shift, the teams assembled at the shaft waiting area, but nobody came to see them until 16:00. They also pleaded that the workers did not surface because they were participating in the sit-in. Tshivashe could not directly refute their claim that no one came to address them, because he never went down the shaft that day, but he expressed confidence in what the supervisors had told him. Tshivashe did concede that since a decision was taken not to go underground in the afternoon to address the day shift workers who had not surfaced, he could not say whether they might have been convinced to surface. He also agreed no attempt was made to engage with the workers participating in the sit-in to understand what the concerns might be.

[251] It was put to Tshivashe that he had been obliged to communicate the ultimatum to the day shift workers as well, but he insisted that the only instruction he received had been to communicate with the night-shift workers and he had never been instructed to issue the ultimatum to the day shift workers. For the reasons mentioned, management did not send anyone down the shaft for that purpose from the afternoon of 22 January 2009.

[252] The central HR office communicated to management that the afternoon shift workers should not be allowed underground, apparently based on information they would join the sit-in which would compromise health and safety. Consequently, the shaft manager instructed the afternoon shift workers, who arrived at about 15:00 for the commencement of their shift at 16:00, to go home. As in some of the other mines, some obeyed the instruction, but others refused to leave and gathered near the shaft entrance.

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[253] When the morning-shift ended a number of workers surfaced, but others did not. Of those who did surface, some joined the afternoon shift workers gathered on the surface in the shaft area and defied instructions to go home. Eventually, workers who refused to leave the premises after an hour were issued with an ultimatum by the shaft manager, Mr B Lourens (Lourens). The ultimatum was handed out and read to them in English and Zulu but they ignored it.

[254] A decision was taken not to send the fire patrol crews down the following morning to conduct their inspection because management was unsure how safe they would be with the other workers sitting in underground. When Sasol obtained the interdict in relation to the strike, Tshivashe was advised that an UPUSA 'representative' at Main shaft was shown a copy of the interdict, which he then conveyed to the workers participating in the sit-in. Thereafter, workers who had participated in the sit-in started surfacing around 15:30. In order to comply with mining regulations a practice was implemented throughout the mine to ensure that there was a shaft clearance process at the end of every shift to ensure that there were no people who were left underground without the requisite authorisation. This process is carried out by the lamp room personnel and verified by the shift boss.

[255] Tshivashe testified that, during the course of the afternoon of 22 January, management received reports of intimidation and threatening behaviour by the striking workers such as tampering with the cage conveying management personnel at West shaft and threatening them with roof bolts. Management was also told that a chief foreman at west shaft had narrowly escaped physical harm by workers participating in the sit-in. This led management at Main shaft to decide that it was unsafe to go underground again to communicate with the workers underground from the afternoon of 22 January 2009 onwards.

Brandspruit Mine – Main shaft

[256] Barend Osborne (Osborne) (Electrical/Mechanical foreman at Brandspruit main shaft – Production Services) and Salvador Manihque (Manihque), a Toro Operator at Brandspruit 2, testified on events relating

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to this shaft. It was common cause that this was a maintenance shaft at the time.

[257] Osborne only testified about the issuing of an ultimatum on 23 January to the workers who had gathered underground at the transport control room. Between 12:00 and 13:00, he and Bernard Hlatshwayo (Hlatshwayo) went underground. Workers were gathered in the transport control room and closed the door when they approached. However, after speaking to them, they allowed them to enter the control room. They read the ultimatum to them and it was also translated. The workers listened in silence and did not attempt to disrupt the process, but refused to accept written copies of the ultimatum which were then placed on tables in the control room.

[258] Osborne also mentioned that workers could have left via the incline shaft which was only about 400 m away if they had wanted to surface, but were unable to do so using the cage. He made further trips down the shaft with colleagues, every hour on the hour. They would exit the cage so that they were visible to the workers in the hope workers would surface with them but none did. It was only the last occasion that workers finally left the mine, which was some three to three and a half hour after the ultimatum expired.

[259] He did not dispute a statement on 22 January 2009 that no communications were made by management to workers at Main shaft, nor could he dispute a claim that the water supply to the taps had been cut and workers had to collect water from the workshop. Although he had stated that the ultimatum was delivered between 12:00 and 13:00, he agreed with a statement that they had descended between 10:00 and 11:00. He also did not specifically dispute a claim made in the same statement that workers were told to surface by 16:00, though this would have been at odds with the ultimatum issued by the ER department that morning.

[260] Osborne could not comment on the following portions of a statement by Manhique.

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> "We remained underground and were discussing amongst ourselves our disappointment at the fact that we were not addressed as to why it is that we were underground, but instead we were told that steps would be taken against us. To us this was an indication that the respondent was fighting back. We therefore remained underground."
>
> "At approximately 14:00 Mavula informed me that a call had come through from Brand-2 indicating that they had received a call from Mabuyakhulu that employees should gather in one place and wait for further communication. We then received feedback that we should surface before 16:00. Whilst busy discussing this, the cage descended and we immediately surfaced."

[261] Manhique testified that he simply arrived at the shaft bottom he found other workers waiting there and when he was told the reason they were waiting was because they were waiting for management to come and address them, he decided to join them.

Brandspruit Mine – Number 2 shaft

[262] Witnesses to events at this shaft were: Pieter Du Preez [Du Preez], underground manager at Brandspruit No. 2 shaft; Frans Schuller (Schuller), an artisan; Maliyephi Gqadu (Gqadu), a general worker; Jerry Mehlomakhulu (Mehlomakhulu), a cage driver on the morning-shift, and Jeremiah Bhembe, a shuttle car operator and an ordinary shop steward. Mehlomakhulu was also dismissed for intimidation and threatening violence and for participating in the strike.

[263] In his written statement, which he confirmed in most respects, Du Preez explained that at Brandspruit mine, the Main shaft was a services shaft, near to which was the incline shaft, and shafts two and three were the production shafts. The main shaft was approximately 10 kilometres from shaft number two underground. At shaft number two, the cage was large enough to hold all the production teams for a shift because it could carry 150 workers. Similarly, the area at the bottom of the shaft was large enough for all production teams to congregate around the cage.

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[264] Du Preez testified that, apart from supervisors, some artisans and a few miners, the night-shift workers on 21 January 2009 did not surface at the end of their shift at 8:00 on 22 January 2009.

[265] Du Preez said that, on that morning, he initially went down as part of a delegation to address the night-shift workers to ascertain why they had not surfaced. They told the night-shift that they should come up to the surface, to which they responded that they were not happy with the negotiations with the company and that was why they were staging a sit-in. In response, the management delegation advised them that they should nevertheless surface, even if they had a problem, otherwise disciplinary action would ensue. He agreed that senior management had issued the instruction that they should go and attempt to ascertain what the workers' problems were. However, as Mine Management they could not engage further with the workers because they did not want to talk to mine management. When clarifying this, he said the workers had actually asked to speak to Mkhize and Strauss.

[266] In any event, the issues that they raised were ones of a centralised nature that had to be dealt with by senior management and could not be dealt with at the mine management level. All he could do was to convey this to his mine manager. He admitted that he was aware of the protest action at the mine's offices and that there was unhappiness about 'negotiation issues', but could not remember being aware that shop stewards had also been suspended at that time.

[267] Du Preez said that he was instructed to read out and hand copies of the ultimatum distributed by the ER department at around 10:00 to the striking workers. He went underground, together with a few miners and artisans. They left the cage and read the ultimatum in English to the workers gathered there. The ultimatum was translated into isiZulu. They then left copies at the bottom of the shaft. No one else surfaced with them. He confirmed what appeared in a "strike diary" for Brandspruit, namely that workers continued singing and dancing and paid no attention to management's attempt to address them. Later in his evidence he said that

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when the first ultimatum was served there was no hostility or aggression directed at management.

[268] Mehlomakhulu was working on the morning-shift on 22 January 2009. He agreed that at about 10:00 he took management down after descending and surfacing twice with other workers. He testified that when he took management down, he only opened the cage door, not the shaft door. The managers merely observed the workers singing and then returned to the surface. He denied Du Preez read any ultimatum to the workers, or that they had any ultimatums with them. Gqadu, who had worked on the night shift, agreed the cage descended and the inner door opened but nobody left the cage. At that stage, workers were singing and dancing 'with sticks'. In his testimony, he said the workers were relieved because they thought they had come to explain the wage gap to them, but they just 'peeped' at them and left without speaking to them.

[269] Mehlomakhulu said that when he surfaced he was told by Phulane Mahaye, the shaft manager who was on duty after Du Preez left that day, to give him the keys to the cage, which he did. He claims this was because he was allegedly seen taking food to the workers underground, something he denies doing. Gqadu also amended his statement to reflect that he was told by sometime in the afternoon before the morning-shift joined the sit-in that his keys had been taken from him. Gqadu also claimed that Mehlomakhulu never came down again after ascending with the managers in the morning.

[270] Du Preez testified that some workers contacted shaft management and said that they were held underground against their will. When the cage was sent down for them, the workers were blocked from entering it and could not surface. He claimed that more than once the cage descended on the request of workers underground only to return empty. The only personnel permitted to leave were salaried personnel such as shift bosses, foremen and more senior workers. Du Preez indicated that he ultimately advised those workers that wished to exit to walk to the incline shaft (at Brandspruit main shaft) and exit there. Some of the workers did so and were able to exit the mine, notably two female workers who hiked

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to the main shaft. Du Preez said this entailed walking approximately 13 kilometres and then ascending the 800 metre incline shaft which had a gradient of 17 degrees. He conceded he did not personally witness any violence. Gqadu denied that anyone was prevented from leaving but could not dispute that the artisans left via the incline shaft nor provide an explanation why they might have felt it necessary to resort to such an arduous way of getting to the surface.

[271] Schuller was unable to comment on Mehlomakhulu's version of what transpired with Mahaye, but testified that between 15:00 and 16:00 on 22 January 2009, Mehlomakhulu had refused to open the cage when it descended at the end of their shift, thereby preventing himself and two other individuals from boarding the cage underground. From communications between workers outside the cage with Mehlomakhulu, he gathered that they instructed him not to open the cage for them to leave. He opened the inner door of the cage only. Other workers manhandled Schuller and pushed him away from the cage. After the cage had ascended, he phoned Mehlomakhulu again but when Mehlomakhulu brought the cage down he would not take them up because he then joined the other workers underground. He could not be sure whether Mehlomakhulu brought the cage down because he phoned or because he was bringing food and drinks to the workers underground. It was when he opened the cage doors to handover the food that they were able to enter the cage. Later, Schuller clarified that he was not sure whom he spoke to on the surface to summon the cage again. After waiting 10 minutes inside the cage, they left and eventually surfaced by driving an LDV to the incline shaft. Du Preez understood that Mehlomakhulu had been dismissed not simply because he had taken food down to workers participating in the sit-in but because he had indicated his support for the sit-in and at one stage had refused to take workers who wanted to exit the mine to the surface.

[272] Gqadu only recalled the cage coming down again in the afternoon and that again management had simply observed the situation and surfaced again without opening the cage. According to him nobody came to address them during the afternoon of 22 January 2009 either. He denied there was any violence and anyone who wanted to surface could do so.

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In particular, members of other unions who were not participating in the sit-in did leave.

[273] Bhembe could not comment on what transpired at the shaft bottom when management was there because he said he only arrived there when management was in the process of leaving. He testified, somewhat implausibly, that even though he would normally have surfaced at the end of his shift, he had remained underground to monitor the situation, ensure safety and, or alternatively, to protect company property, despite not being instructed to do so and despite it not being part of his duties as an Emco driver. He sought to explain that he had stayed underground to ensure safety during the industrial action, in his capacity as a shop steward and therefore he was not actually participating in the sit-in. Whilst acknowledging he had previously been warned for participating in unprotected industrial action in December 2006, he was reluctant to concede that he was aware of the relevance of that warning to the industrial action in January 2009. He had said in his statement that he was not in the vicinity of the cage when it descended at around 11:00 on 22 January 2009 because he was conducting safety patrols.

[274] Du Preez testified that when the second ultimatum was received around lunchtime on 22 January 2009 from the ER department, he told Frans Van Dyk (Van Dyk) to go underground to read the ultimatum to the workers underground and leave copies there. He remembered Van Dyk going underground, but could not remember who accompanied him to translate the ultimatum. When he returned, none of the workers underground surfaced with him, nor did any surface by the time the ultimatum expired. That ultimatum warned that if workers did not surface, disciplinary action will be taken against them, starting with their suspension pending disciplinary action which could lead to their dismissal in terms of the company's code. He later confirmed that the morning-shift workers were only served with an ultimatum on the second day at about 10:00.

[275] He agreed that workers told him that they were unhappy about the negotiations and the wage gap. Nonetheless he could not address them

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on these issues as they did not want to engage with him and he was not in a position to negotiate over those issues anyway. Nonetheless, he relayed what the workers had said to the mine manager, Nzama Baloyi.

[276] Gqadu agreed that management personnel came to the shaft bottom a number of times on both days of the sit-in. However, he said that he could not hear du Preez or any managers because he was wearing ear protection and there was a lot of noise.

[277] As at other mines, it was decided to cancel the afternoon shift. Similarly, workers arriving at the afternoon shift were advised that their shift was cancelled because the situation underground rendered their working conditions unsafe. They were also advised that the shift was cancelled without any loss of benefits and they should return home. As happened elsewhere, some of them refused to leave the shaft area until the workers underground surfaced.

[278] The morning-shift remained underground and, except for supervisors, did not surface at 17:00. Du Preez said that some artisans engaged on the morning-shift left the mine by driving to the incline shaft at the main shaft, when they were prevented from leaving at number 2 shaft. Although he claimed there were reports of workers at being threatened and pushed around, he could not supply any details of these. Gqadu denied anyone was threatened but suggested that the artisans decided to go to the incline shaft because they were threatened by what was happening: not that they were prevented from leaving. He could not say what might have made them feel threatened though.

[279] At around 10:00 on 23 January 2009, Du Preez went down in the cage to read a further ultimatum to the workers, telling them to surface by 11:30. He claimed this time that “the employees were more agitated were waving roof bolts and sticks in a threatening manner”. He said he managed to read most of the ultimatum (together with the translation thereof by a shift boss) before the singing and the noise became so loud that the employees could no longer hear him. He then left copies of the ultimatum (which was in English and in isiZulu) and ascended to the surface. As the cage was on its way up “there was a knocking noise

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against as it was being hit with roof bolts and thrown with stones". Gqadu remembered the cage descending that morning at about 09:00. However, according to him, management merely observed workers singing and dancing with sticks but did not leave the cage or address workers. He denied anyone threw any stones at the cage when it ascended.

[280] On 23 January 2009 nobody surfaced by 11:30 as required by the ultimatum. Instead they surfaced at approximately16:00. Gqadu testified that it was Bhembe who received the call from Mabuyakhulu who informed him that workers must exit the shaft by 15:00.

[281] As at other mines, it was claimed that underground to surface phone lines were disconnected. Du Preez agreed that shutting off water had been considered, but it was decided after re-evaluating the risk that the water supply would be maintained. His claim that workers had phoned to say they were being prevented from leaving and that efforts were made to bring them to the surface which would not have been possible without such communication. Gqadu agreed that phones were working on 22 January 2009 until he tried to contact Mehlomakhulu's replacement that afternoon. The phones were working again on 23 January 2009.

Brandspruit Mine – Number 3E shaft

[282] George Hattingh (Hattingh), shaft manager at 3E shaft at the time and Jeremiah Rapulane (Rapulane), Brandspruit No. 3E shaft underground manager, testified as to the events at this mine.

[283] This shaft was linked underground to the main shaft and coal extracted at the two production shafts (2 and 3E) was carried on conveyer belts to an incline shaft near the main shaft. The night-shift at the time was a maintenance shift. Production at this shaft took place between 4 and 8 km from the shaft bottom, with production teams traveling in LDVs to the production areas. The cage at this shaft and the area around the cage at shaft bottom were big enough to accommodate all production teams on a particular shift.

[284] At about 08:30, Hattingh was advised by mine overseers that night-shift workers were not surfacing. The mine manager, Nzama Baloyi (Baloyi)

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told him that workers were sitting-in as part of a collective action with other dissatisfied miners at other shafts. He descended with Baloyi, Jeff Japhta, the underground manager, Rapulane and other supervisory staff at about 11:00. Baloyi issued an oral ultimatum calling on the 18 or so workers gathered at the shaft bottom to surface within one hour because they were engaged in unlawful industrial action. He could not recall if Baloyi had read from a written document but it was also translated by Japhta. Nevertheless, he recalled that it was in conformity with what they had been advised to communicate by the HR Department, namely:

> "You have embarked on unprotected industrial action by staging a sit-in and refusing to return from your completed shift from underground. By taking this action, you are putting your own safety as well as the safety of co-workers at risk. You are hereby given an ultimatum to come to the surface from underground. If you do not come out from underground, disciplinary action will be taken as follows: you will be suspended pending disciplinary action that may lead to dismissal in line with the Sasol Disciplinary code."

[285] The workers listened but did not respond to the ultimatum and asked no questions. By the time the ultimatum expired, none of the workers had surfaced. He denied a suggestion that there was too much noise and therefore the announcement could not be heard. At the time, Hattingh said Baloyi's voice was loud enough to be heard. He agreed with a statement by Jabu Mashile (Mashile) that on this occasion Baloyi did not attempt to engage with workers about the cause of their dissatisfaction. However, he denied Mashile's claim that ultimatums were thrown on the ground because they had not taken paper ultimatums with them to distribute. That only occurred on the second occasion.

An explanation for the worker's silence was provided at one of the subsequent disciplinary inquiries by one of the workers who testified:

> "While waiting underground Mr Hattingh visited the workers, but we did not want to speak to Mr Hattingh as he did not promise anything to the workers. While underground tried to speak to executive but could not go through to them, as they were suspended. Mr Strauss did not take our memorandum in which they complained wage gap"

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[286] Hattingh did not dispute this, but simply said that this was never conveyed to him when he went underground. His sole intention was to get people to surface as required by law. He further understood a statement made during one of the disciplinary inquiries by one of the workers participating in the sit-in to the effect that" (t)here is a reason why we did not listen to management, we did not want them", as simply confirming his own impression that the workers did not want to engage with them.

[287] Later, at 13:15 Hattingh, De Klerk and Vusi Zulu (Zulu) went down the mine to issue the second ultimatum, which they had received from the central office. It was communicated in English by Hattingh over a loud-hailer and Rapulane translated it. The ultimatum advised them that they should surface by 15:00 or face disciplinary action which could ultimately result in their dismissal.[7] As before, the workers were unresponsive. They also refused to take any of the copies of either the English or the translated version of the ultimatum, which were then left on the ground at the shaft bottom where they were gathered. The ultimatum was also ignored.

[288] Hattingh also remembers telling workers arriving for the afternoon shift at about 15:22 to return home as the underground problem had not been resolved, but could not recall whether that was an instruction from Head Office. The decision was made, even though at that stage management did not know if the morning-shift workers would join the sit-in at the end of their shift. However, by 16:30 he had been told by subordinates that the morning-shift workers were not surfacing. Nevertheless, it seemed that workers were free to leave if they wished and some workers did surface. At 17:30 he obtained a list of persons who had not handed in their lamps at the lamp room, which revealed that 18 night-shift workers and 39 day-shift workers had not surfaced.

[7] Viz: "You are hereby given an ultimatum to come to the surface from underground by 15:00 hours. If you do not come out from underground, disciplinary action will be taken as follows: You will be suspended pending disciplinary action that may lead to dismissal in line with the Sasol Disciplinary code."

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[289] He also phoned and spoke to one P Nkosi who was underground and advised him that if there was an emergency or if someone fell ill he could be phoned in his office and he would arrange an ambulance. No calls were received by the time he was relieved the following morning by Rapulane at 08:15. In this regard he also disputed Mashile's claim that after the day shift ended until the following morning the cage no longer moved and that workers underground were unable to receive calls but were able to make calls to workers on the surface to request food. Hattingh insisted that the cage was available for anybody that called for the cage, but could not comment on the claim that workers underground could not receive calls.

[290] Hattingh agreed that the morning-shift was not served with any ultimatum on 22 January 2009. De Klerk confirmed that no ultimatum was served on workers underground between 13:15 on the first day of the action and 10:00 on the second day.

[291] Hattingh was advised that another delegation consisting of De Klerk, Rapulane, Zulu and Japhta had gone underground at 10:00 on 23 January 2009 to issue a further ultimatum, but on arrival they were met with a hostile reception: workers were brandishing roof bolts and sticks while singing. Accordingly, no oral communication could be made and the written ultimatums were left at the shaft bottom. Rapulane confirmed Hattingh's testimony and also gave evidence on this episode which he was personally involved in. Given the animated state of the workers, who were brandishing roof bolts and drill steel bits whist singing, to be on the safe side they opened the outer roller door but not the cage door when the cage arrived at the shaft bottom. Rapulane said he was not sure if they would assault him but thought it safer if the outer door remained closed. He began reading from the printed ultimatum, of which about 50 copies had been printed. However, as soon as he finished reading the ultimatum, workers started hitting the cage with roof bolts and drill steel and said they did not want to speak to him, but only to their union leaders. As he saw that the workers were becoming aggressive, he closed the roller doors and ascended. He conveyed the workers' demand to Hattingh.

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[292] By the expiry of the ultimatum at 11:30, none of the workers underground had surfaced. However, after UPUSA shop stewards were informed at the mine's central offices that the court had declared the industrial action unprotected strike action, all workers surfaced by 15:30 and left the mine in buses. They were also supplied with food.

[293] Workers reporting for that shift on Sunday evening on 25 January 2009 were advised that the mine had decided not to allow anyone to go underground and they were advised to return the following morning. On the following morning assembled workers were advised that those who participated in the sit-in were suspended. Workers signed for suspension letters and given a chance to make statements to security staff if they had been intimidated or victimized, but no one took up this offer.

[294] Hattingh denied that any telephones were cut and reiterated what other witnesses said, namely that if one phone was not operational there were other phones located every kilometre underground. De Klerk pointed out that if the lines were not working, the workers could not have received news of the strike ending. The workers had called for the cage at some time between 15:00 and 16:00 on 23 January 2009 to leave the mine.

[295] Hattingh did not personally witness any violence but was aware of the aggression shown towards De Klerk. They also had received unconfirmed reports of alleged intimidation of, or threats made, to workers underground.

Twistdraai Mine – Central shaft

[296] Hendrik Potgieter, who was at the time the underground manager at Twistdraai Central, made two statements. The second statement was made after reading the statements of five of the applicants in relation to events at that shaft. Enoch Zwane, a conveyor belt supervisor working on the morning-shift also testified. He was dismissed for participating in the sit-in after being found not guilty of intimidation and harassment in his disciplinary enquiry. He claimed Potgieter found him guilty on this count as he claimed he had been one of the ringleaders of the sit-in.

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[297] Potgieter explained that at the time only two of the three shafts at the mine were production shafts namely the East and Central shafts. Support services were rendered to the whole mine using the Central shaft, because the shafts were linked underground by a 'panel' of roadways. Like other mines there was also an incline shaft and, in addition, a steel stairwell which could be used to enter and leave the mine. The morning and afternoon shifts were production shifts and the night-shift was the maintenance shift. The four production areas were some 12 and 19 km from the central shaft and workers from each team travelled to their production area in two LDVs. The cage at the central shaft was large enough to accommodate 200 occupants and allowed the entire production teams for a shift to descend or ascend at the same time. Similarly, the area at the bottom of the shaft was enough to accommodate all the production teams before they dispersed to their production areas.

[298] Unlike other mines, the night-shift of 21 January 2009 did not stay underground when their shift ended the following morning. When news of the sit-in at other mines became known, management took a decision to take pre-emptive measures to ensure that the workers on the day shift did leave after ending their shifts. Potgieter did recall being given guidelines on how to deal with the situation, but they were not the guidelines contained in the memorandum from the ER department of 22 January 2009. The concerns at that stage were about the safety of workers and protection of mine infrastructure.

[299] According to Zwane he only learned of the sit-in at the start of his morning-shift on 22 January 2009, when it was 'mentioned' by the shaft Manager, Moeketsi Sekukwane (Sekukwane). Zwane first disputed that Moeketsi warned them not to participate in a sit-in and then said he never heard him trying to engage them on the issue like that. He had merely told them there were rumours it might happen. He maintained this version even though the supplementary statement of facts by the applicants actually stated that a manager had issued such a warning at Twistdraai Central. He and the other workers in the service section had no intention of participating in the sit-in but were compelled to remain

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underground because of the conduct of their shift boss, Danie Venter (Venter).

[300] Zwane said that his shift performed their duties as usual on 22 January 2009. At approximately 14:00, they were instructed by Venter to stop working and gather at the Cage. Venter was with Potgieter, the underground manager, and a certain 'Etienne'. Zwane affirmed that the shift thought they would be addressed by management to explain why it is that we had not been paid in January 2009. Venter instructed him to go to the cage and that he would park the LDV, which they had travelled in. Potgieter denied they were told to gather at the cage: the instruction was to surface.

[301] Zwane explained further that, on arriving at the cage, they sat on benches, because the cage had gone to the surface. Workers from other sections and stores began arriving at the shaft bottom. Once they were all there, Potgieter advised them that the cage was returning with the Sekukwane. When Sekukwane arrived, he said that because workers wanted to know why they had not been paid their monies in January 2009, he would go to the surface and come back with an HR representative who will provide answers. Potgieter then instructed Etienne and Venter to take the rescue pack numbers of all workers who were underground.

[302] Potgieter agreed that Sekukwane had some interaction with the workers underground, but did not fully understand what had been communicated between them. After that engagement 'the ultimatum was given' and the rescue pack numbers were taken down. It should be mentioned that it was never specifically put to Potgieter that Sekukwane had undertaken to fetch an HR representative to speak to the workers underground. Zwane stated that all the managerial personnel together with the contract workers ascended with the cage and did not return, despite what Sekukwane had said. Potgieter disputed this saying that Sekukwane had descended again, but on the following day. Potgieter was not challenged on his account of having gone underground a number of times that day.

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[303] Potgieter agreed he had sent supervisors to each production section at around 14:00 to speak to the teams before they left their sections at 16:00. He stated that he went personally with two other supervisors at 15:00 to close the workshop areas. When the workers arrived at the shaft bottom from the production sections he said he was present and instructed them to surface. This measure was an attempt to pre-empt a sit-in by the morning-shift.

[304] In his original statement, Potgieter said that after the morning-shift workers started to return to the shaft bottom in the LDVs around 16:30. Some of them surfaced early before their shift ended as requested and others joined workers seated in the seating area. He asked those who did not surface why they were refusing to do so but they refused to answer. This prompted him to phone the shaft manager to advise him not to allow the afternoon shift to go underground. Ordinarily, they would descend an hour before the morning-shift surfaced at 17:00. The purpose of preventing the afternoon shift from going underground was to minimize the number of workers underground. Accordingly, these measures were taken before any sit-in started at Twistdraai. Potgieter agreed that it was his decision which prevented afternoon shift workers from going underground. However, he said that the decision to actually cancel the afternoon shift and instruct them to go home, as opposed to merely preventing them from going underground, was only taken just before 18:00, after the second ultimatum had been issued to the workers underground.

[305] Potgieter denied ever receiving an instruction that he should try and establish their concerns. He did agree that the ultimatum was a non-negotiable instruction. At that stage, he was unaware of the directive to establish the concerns of workers. Potgieter acknowledged that an employer should engage continuously with workers participating in industrial action. But in his view, the ultimatum was not unreasonable because there was no reason for the workers not to surface once the shift was over. It was true that the assembled workers cooperated with supervisors in providing their lamp room numbers, but they were not prepared to discuss anything else. It was suggested to him that issuing the ultimatum and stating that it was non-negotiable was very provocative

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and unreasonable, but he insisted that he could not get any reasons from anyone. He readily agreed that he could not have engaged with the workers about their concerns about the wage gap as he did not know enough about the process.

[306] When issuing the instruction to workers to surface, Potgieter said no distinction was made between members of different unions. They were all expected to comply. The same applied to the ultimatum. While he was attempting to persuade workers to surface supervisors were verifying the lamp numbers of those underground. At that stage the workers were co-operative. When they surfaced they realized that two persons were unaccounted for. For reasons which are not necessary to relate here neither of them were disciplined for participation in the sit-in as the reasons for remaining underground were unrelated to the industrial action.

[307] Under cross-examination, Potgieter stated that he had phoned the general manager about the situation after workers would not give him any reason why they were staying underground, though he agreed that he had not mentioned asking them this in his written statement. It was put to him under cross-examination that he had issued the instruction to morning-shift workers to surface before the sit-in had commenced. Strictly speaking this was true, but based on his interaction with those morning-shift workers who had refused to surface when asked to leave early, it was not unreasonable to anticipate that one would ensue. A few more workers complied with Potgieter's instruction to surface when the cage returned and they accompanied him in the cage to the surface. At that stage approximately 100 workers remained underground.

[308] Zwane was adamant they were simply told to leave their workstation at around 14:00 and proceed to congregate at the shaft bottom. By 16:00, the cage had already surfaced and they were still waiting at the shaft bottom. According to him, they simply obeyed instructions and waited patiently in vain for nearly a whole day for the managers to return as promised with the HR personnel.

[309] Later that day, Potgieter said that he had returned again to the shaft bottom with an instruction to persuade workers to return to the surface

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and to confirm that those who were still underground corresponded with the lamp room records of miners who had not handed in their lamps. He advised the assembled workers that it was illegal for them to remain underground and unsafe to stay there beyond the end of their shift. This warning had no impact and he read out an ultimatum to them, which he had written in his notebook as the general manager dictated to him over the phone. It read:

> "You have embarked on unprotected industrial action by staging a sit-in and refusing to return from your completed shift from underground. By taking this action, you're putting your own safety as well as the safety of co-workers at risk. You are hereby given an ultimatum to come to the surface from underground … If you do not come out from underground, disciplinary action will be taken as follows: you will be suspended pending disciplinary action that may lead to dismissal in line with the Sasol Disciplinary code."

[310] As mentioned, Zwane denied that Potgieter came down again after he had surfaced on the first occasion with Sekukwane to summons an HR personnel to address them. He also denied that Potgieter conveyed any ultimatum to them as alleged.

[311] Lastly, Potgieter testified that the keys of the cage were taken from the cage operator and given to an artisan with clear instructions that no one other than supervisors or persons instructed by him should descend in the cage. Security guards were also placed at the entrance to the incline shaft to prevent anyone entering the mine from that access point. The phone number at the shaft bottom was changed to limit incoming communications without restricting the ability of those underground to make outgoing calls.

[312] Potgieter said he went down on a third occasion with Sekukwane to communicate an ultimatum. On that occasion workers were shaking the cage door and singing and dancing. Nevertheless, they left the cage and Sekukwane read the ultimatum in English and Zulu. Workers were becoming more unruly and aggressive. They left copies of the ultimatum at the shaft bottom before surfacing.

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[313] Zwane's version was that at no stage during the period when they were underground did they receive any letters or instructions to surface, nor did he see Sekukwane reading an ultimatum. Likewise, he disputed that workers were shouting and unruly, and in any event insisted that the management group never returned underground after they surfaced on the first occasion. However, he did concede he had said at his disciplinary enquiry that he was present when Sekukwane communicated the ultimatums, but all he meant to say was that he was underground at that time but he never saw them at the time they say they issued ultimatums.

[314] Potgieter was also tested on his statement in one of the disciplinary inquiries in advancing aggravating factors to the effect that the workers could not be trusted anymore "because they had become totally out of control and deliberately undermined management decisions". This statement was contrasted with his evidence at the trial that workers had cooperated in providing the lamp room numbers and a statement made in one of the inquiries that night-shift workers who reported at the premises on 22 January 2009 but refused to return home spent the night sleeping, sitting and playing cards. Potgieter interpreted their failure to follow instructions of management as evidence of them being disorderly. Other than his general statement that workers underground became increasingly aggressive and were "shouting louder and becoming unruly", Potgieter could not articulate in any detail how their aggression manifested itself. He could not comment on whether they had legitimate concerns for taking the action that they had.

[315] Not all afternoon shift workers complied with the instruction to return home. Some remained near the steps of the lamp room adjacent to the shaft. The gate between the hospital and the lamp room was locked to prevent night-shift workers from assembling and joining the industrial action, but the next morning, some of the locks had been broken and additional workers had gathered with those congregating at the surface.

[316] According to Potgieter's later statement, at about 23:30 on 22 January 2009, ultimatums were read to the workers gathered on the surface.

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They were called over the intercom to gather at the shaft area near the lamp room and first ultimatum for the night-shift workers and second ultimatum for the afternoon shift workers was read and translated into various indigenous languages. Only four workers then asked to leave and transport was arranged for them. The next morning, day shift workers started arriving at around 05:30 and were turned away at the gate but some managed to force their way past to join those gathered at the shaft area.

[317] On 23 January a further ultimatum was read to those gathered on the surface near the shaft at 07:30, giving them until 08:30 to leave the premises. At 09:00 Potgieter instructed supervisors to go through all the buildings and obtain the names of those who had not heeded the instruction to leave. Potgieter agreed that the workers who had gathered on the surface were not dismissed for not heeding an instruction to leave the premises, but were dismissed for participating in industrial action. He also agreed that there was no danger posed by their presence on the surface from a health and safety perspective. He conceded as well that the afternoon shift workers who reported on 20 to January 2009 were prepared to work their full shift. However, after their shift would have ended, they did not go home but remained at the mine in in solidarity with those underground, which he interpreted as participation in the sit-in and that is why they were dismissed. They had been issued with ultimatums at around 23:30 on 22 January 2009 and again at 07:30 on 23 January 2009. They should have heeded the first instruction because the shift had been cancelled.

[318] On the question of whether Sasol could have mitigated its damages arising from the strike by allowing the afternoon shift to work, Potgieter responded that it could only have done that at the risk of jeopardizing the safety of those underground because of their numbers. Trying to run the mine with additional workers engaged in industrial action underground could have “got out of hand”.

[319] On 23 January 2009, Miners and Artisans went down the west shaft to conduct safety patrols at the production areas of the central and east

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shafts. The patrols were sent down the west shaft because management was uncertain as to how safe it would be to send them down the shafts where workers were striking. Zwane did not directly dispute this, because he merely repeated that the cage had not come down again when this statement was put to him. Potgieter also said a request to take food down the shaft to those participating in the industrial action was refused. Zwane conceded that safety patrols and fire patrols were important for Sasol to perform but he had seen no reason for management to have worried about the safety of persons conducting those patrols.

[320] After word was received around 14:00 that workers at some of the other mines were surfacing, Potgieter and the shaft manager once again went underground with some of the supervisors and security guards. They informed workers that the strike was over and instructed them to surface, which they did. Zwane's version of why they surfaced was somewhat different. He claimed that on 23 January 2009, one of the workers, Jackson Makhanye (Makhanye), said he wanted to call Venter. He told Makhanye that he had keys to Venter's office, and that perhaps the phone there had not been suspended. The phone was working and Makhanye actually phoned one of the LSC members, Johannes Mofokeng (Mofokeng), who advised them that the cage would be descending and that they should surface given that there was a 'letter' instructing all workers to surface. When the cage came down with Moeketsi and security guards, they surfaced. He disputed a version relied on by workers at the disciplinary enquiry that they only surfaced after being addressed by a certain 'Mr Ntshangase', claiming that he did not know such a person. He also avoided the suggestion that the workers' version presented in the enquiry was at odds with his account that they were waiting on Sekukwane to return with an HR representative.

[321] Potgieter denied instructing anyone to turn off the water supply valve, which was located near the hostels. He only became aware that it had been turned off when workers surfaced. Anyone could have closed the valve. Drinking water was still available underground. The phones were all working during the strike and workers underground could phone

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supervisors safety representatives and union representatives whose numbers were on speed dial. Local numbers could be reached by calling the control room, which could transfer the call.

Twistdraai Mine – East shaft

[322] Thavir Baijnath, presently the chief foreman at Twistdraai, Tubalisa shaft, testified for Sasol on the events at Twistdraai East shaft. At that time, he was employed as the Acting Section Engineer reporting to the acting shaft manager, A Tsotetsi (Tsotetsi). a general worker on the morning-shift and Eric Dyani, a roof bolt operator working on the afternoon shift testified for the applicants.

[323] Baijnath testified that, just as in the case of `Twistdraai central shaft, the night-shift of 21 January 2009 worked normally and surfaced the following morning. In view of the news of the sit-in at other mines, similar steps at `Twistdraai east shaft were taken to those taken at the central shaft, on instruction of Tsotetsi. Thus, supervisors were sent to production sections at around 14:00 so that they could reach the production teams before they left their sections at 16:00 and ensure that they surfaced as normal by 17:00. The afternoon shift was also not permitted to go underground and the cage keys were taken from the cage operator and handed over to an artisan who was instructed not to allow anyone to go underground, except supervisors or persons instructed by management.

[324] Hokwana recalled knocking off early and travelling to the shaft bottom in an LDV. When she arrived she found other employees sitting around or washing their boots. On enquiring what was happening, she was told that they were waiting or management “to come address them on why it is that the monies that they had been promised were not paid and to also explain why it is that the LSC had been suspended given that it was the LSC that was supposed to update employees on what was happening - the concern was, who would now speak on our behalf”. Hokwana was adamant that they had not been told to surface by the supervisors, even though it was pleaded that shift bosses had told contract employees and non-UPUSA members to surface.

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[325] Baijath said the same arrangements in relation to underground phones and access to the incline shaft were made at East shaft. Though the number of the phone at the shaft bottom was changed this would only have prevented incoming calls to the old number and would not have prevented outgoing calls being made, unless there was something wrong with the phone. He denied that his version that electricity was not cut was implausible merely because he agreed with the worker's version that water was cut and that a phone might not have been working. Under re-examination, he explained that the water supply which was cut was not the potable water supply but the 'service water', which was not drinkable. He was not aware of the drinkable water supply being cut. He also agreed that at some stage, the water supply was suspended. The decision to do so was taken in the interests of health and safety to prevent the risk of flooding in the event of a broken pipe. He could not explain why this was not done at other mines, but disputed that this and the confiscation of the cage keys from the cage driver were measures to pressurize workers to surface.

[326] Hokwana maintained that the lights did go out but could not explain how the fans could have continued working if the electricity had been cut. Hokwana also sought to explain that when workers had phoned for the cage to descend the phone was working but not at other times.

[327] Baijnath could not dispute some contradictions between his evidence during disciplinary enquiries and his later written statements about what time he left the mine on 22 January 2009 and whether he knew what had been communicated to workers underground on the morning of 23 January 2009 by Tsotetsi, but attributed this to being mistaken about the dates.

[328] Baijnath agreed that when these steps were taken, industrial action had not yet started at Twistdraai East. He also did not dispute the applicants pleaded version that the morning-shift had been addressed by Tsotetsi at the safety meeting and told that the mine was aware of a planned sit-in, and that subsequently they were instructed to end their shift earlier than normal. Nevertheless, Baijnath also testified that when the morning-shift

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workers were told to surface early some did but the vast majority remained underground. He did not dispute that Tsotetsi had an opportunity to engage in discussion with the workers underground about their reasons for not surfacing. Apart from Tsotetsi instructing them to surface, Hokwana could not recall if management came down the mine and issued them with an ultimatum and could not confirm or dispute Baijnath's version that the management delegation had issued an ultimatum.

[329] Tsotetsi addressed the afternoon shift and advised them to go home and only approximately 20 workers remained behind saying that they wanted to wait there until the underground workers surfaced. They would only leave later when security personnel asked them to. These workers were regarded as part of the sit-in. He could not comment on the evidence of Strauss to the effect that such workers should not have been dismissed. Baijnath could not remember when the afternoon shift was cancelled, but in the light of his statement that Tsotetsi did not allow the afternoon shift to go underground after only some of the morning-shift surfaced at the end of their shift, he agreed that the afternoon shift had probably been cancelled after 16:00.

[330] Diyane recalls reporting for the afternoon shift at about 15:15. The afternoon shift workers had changed into work-wear but were told to wait in their different sections. His shift boss told him that he thought they were waiting because of the promises made to workers and the morning-shift had not surfaced. However, he was also aware of the decision taken at the stadium to embark on the sit-in, but was not sure about it. He remembers the afternoon shift being told to return home at 17:00, but they were reluctant to because they 'wanted to know what the situation was underground' and did not know 'for certain' that workers had refused to surface and they thought perhaps they had been injured and that management was not being honest about what was happening underground. Paradoxically, he agreed that Tsotetsi had told them the shift was cancelled due to the sit-in. Later, he said Tsotetsi merely said the workers did not want to surface and would not answer the workers who asked him about the reasons people were sitting in. The lack of

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answers made it difficult for the afternoon shift to return home. Diyane further denied they were given ultimatums to leave during the night of 22 January as Baijnath had claimed.

[331] Sometime after 17:00, Tsotetsi had addressed the afternoon shift. He had gone underground with Baijnath, Mr K Nel, Mr J Ngobeni, an HR consultant, and some security personnel. The cage in the east shaft could accommodate 100 personnel. On arriving at the shaft bottom they exited the cage and Tsotetsi read a written ultimatum in English and isiZulu to the morning-shift workers who had not yet surfaced. He advised them that they would be left behind if they did not surface with him. Apart from supervisors, only two other workers, one of whom had a medical condition, no one entered the cage, despite a delay of a few minutes. This is broadly consistent with the version pleaded by the applicants. Baijnath estimated that the morning-shift workers converged at the shaft bottom between 15:00 and 16:00.

[332] According to Hokwana, Tsotetsi descended with Ngobeni and another person sometime around 16:00 to 16:30. She agreed Tsotetsi instructed them to surface in order to allow the afternoon shift to descend. However, workers responded that they could not surface without having been given an explanation as to what has happened with the wage gap payment they would only surface once they received such an explanation and were told when it would be paid and what had happened to the LSC. In her evidence in chief she clarified that they wanted the shop steward leadership to come and do the clarification. Hokwana claimed, Tsotetsi then commented that it was obvious they did not know that the LSC had been dismissed. He and his party then surfaced. When confronted with the fact that Tsotetsi could not have said the shop stewards were dismissed, because that had not yet happened, Hokwana did not dispute this, but maintained that Tsotetsi did say that. This was also not put to Baijnath.

[333] Apart from Tsotetsi instructing them to surface, Hokwana could not remember if management came down the mine and issued them with an

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ultimatum and could not confirm or dispute Baijnath's version in that regard.

[334] Baijnath agreed that there was no engagement between the workers and the management representatives, nor was there any violence or intimidation. He was unable to explain his evidence at the disciplinary inquiry where he testified to the effect that the union had not complied with the recognition agreement, or that the afternoon shift could have obstructed the company from doing its work.

[335] He also agreed that the keys to the cage were handed over to the shaft manager and that it was possible that the cage driver was phoned at about 18:00 to take an ill worker to the surface.

[336] Hokwana stated that Tsotetsi came down the mine in the morning of 23 January and surfaced with Chauke and two others who needed medication. They received a call later that the LSC said they must surface, but when they called the cage it did not come down immediately.

Bosjesspruit Mine – Irenedale shaft

[337] Montgomery, Jabulile Gumede, an artisan and supervisor, Khali and Tyokolo, testified about the events at the Irenedale shaft.

[338] Montgomery was the shaft manager at the time. Originally, Montgomery said in this statement that the morning and afternoon shifts were production shifts and the maintenance shift was the night shift. On reconsideration, he recalled that the maintenance shift was the afternoon shift at the time. The shaft had nine production sections at the time between one and five km from the shaft. The cage carried 120 personnel and the area at shaft bottom could accommodate all production teams.

[339] As in the case of other mines, at the start of the night-shift on 21 January 2009, the shaft manager: services (Mr J du Preez) and Andries Mahlangu, the HR Business partner for the mine, spoke to the shift about the rumours of industrial action and encouraged them not to engage in such conduct. Gumede did not specifically recall the contents of the memorandum of 20 January 2009 being conveyed to the night-shift before they commenced working. However, the version that workers

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reporting for the night-shift were told not to participate in a sit-in was not challenged.

[340] Montgomery claimed that the operational management at mine level did not know what the reason for the sit-in was even though they had been warned of it. During December 2008, he could not remember receiving any enquiries from workers about what they were going to be paid in January 2009. Nevertheless, as far as he was concerned, there were a number of structures where there were meetings with the unions on the mines apart from meetings at the ER department and none of the issues underlying the strike had been raised.

[341] The next morning, the night-shift did not surface as they should have at 08:00. The cage driver said that the key to the cage had been taken from him and hence he could not surface. An artisan was dispatched with spare keys in the small cage and then returned in the large cage with no more than 20 workers in it. Approximately 200 night-shift workers remained at shaft bottom.

[342] The morning-shift also did not surface when it should have at 17:00. Because of the sit-in, the afternoon shift which was due to start 16:00 was cancelled and workers reporting for that shift were advised to go home until the situation was resolved. Gumede claimed that when he arrived in an LDV at the shaft bottom after working overtime on the morning-shift until about 18:00, there was a barricade not too far from the shaft bottom station and he saw workers gathered there. Some were singing and dancing and others were just sitting. He claims that that is was only then he learnt of the sit-in. Tyokolo also claimed to have arrived after completing overtime and gave a similar account. He did not call for the cage because another barricade was blocking the way to the landline even though there was an individual who went to the landline from time to time. According to Gumede, he simply did not know what was happening.

[343] Gumede’s explanation for remaining underground was that, as a Supervisor, he could not have left his team. He had a responsibility to

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see that everyone in his team surfaced and it was safer for him to have remained underground to monitor the situation.

[344] Jordaan disputed suggestions that phones were not working at Bosjesspruit. Given the number of calls received, it is evident that there were no reports of faulty phones after the strike. In fact, as the Irenedale shaft was relatively new so were the phones. Tyokolo also claimed that when he arrived at the shaft bottom after working overtime he came to a barricade and saw that there was another barricade blocking the access to the landline although there was an individual, Mr Makhosandile Gogo, who would nevertheless use the landline despite the barrier.

[345] At about 11:00 on 23 January 2009, Montgomery, Mr J Botha (senior manager: HR) and J du Preez together with three security officials descended to address the miners. On arrival they were greeted by singing and dancing workers, but were able to communicate with them. He told them that they were willing to engage with them about any issues they wanted to address but not in this manner. He could not recall whether managers had been given instructions to engage with participants in the sit-in to determine their reasons for staying underground but he was satisfied that management had provided an opportunity for engagement provided they came to the surface. His primary concern was to address the safety issue and the fact that the workers had already been underground for more than 12 hours which was prohibited. They were told that because their action was illegal and they were being given an ultimatum to return to the surface. English and isiZulu versions of the ultimatum were read out, but while they were being read, workers sang louder and louder and it was obvious that they were not paying attention to what was being said. He agreed that as a result, they would not have heard what he was saying.

[346] Gumede claims that around 10:00 he saw the delegation leave the cage, but denies that they made any attempt to speak to the workers gathered near the shaft, still less issued them with ultimatums. He said that the delegation simply walked midway to the “stick pillars” and then returned to the cage and were joined by three other workers who surfaced with

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them. Gumede does mention in his statement that those underground "continued with singing" Tyokolo denied seeing the cage descend at all that morning.

[347] Montgomery agreed that the workers assembled at the shaft bottom at that stage did not include the morning-shift workers, who were engaged in maintenance work and would have been working at the sections. According to him, there was no feedback from workers nor did they ask to speak to senior management or union officials. The issue of communicating with the union was a matter that was left to the ER department. At that stage, as mentioned previously, Montgomery stated that he was unaware of the dispute which had been declared or the demands underlying the sit-in.

[348] Montgomery said that no steps were taken at that point to issue final written warnings in terms of the memorandum circulated by the ER department that morning, because disciplinary inquiries would have to be convened first. Generally, management would rely on the ER department to give direction on disciplinary issues.

[349] Copies of the ultimatum were placed under a stone and they then surfaced together with 10 workers, being mostly female and older male workers. In his written statement Montgomery stated: "When the cage ascended back to the surface, some stones were thrown at us." Under cross-examination, he explained that the objects were thrown at the cage at the stage when the shaft doors had been closed but the internal roller door of the cage had not yet closed. In other words, the objects were thrown at this cage before it had actually begun its ascent. He denied that this explanation was only offered after the *in loco* inspection had taken place because he had supposedly realized that it would have been obvious that, once the roller door had closed and the cage was ascending, it would not have been possible to see objects thrown at the cage. Montgomery said that he had not intended to convey the impression that the cage was already in motion when objects were thrown at it, but simply to say that it took place when they were about to surface. They could tell that stones were thrown at it because some of

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them fragmented when they struck the mesh off the outer cage door and fragments fell inside the lift.

[350] Further, the safety devices at the shaft station doors were manipulated causing the cage to trip until the safety devices had to be overridden by a foreman on the surface. As a result, it took 20 minutes to ascend as opposed to the normal four minutes.

[351] Later, calls were received from workers in the shaft saying that they wanted to surface. A group of 15 managerial and supervisory personnel, including Montgomery, went down with the cage and approximately 40 or 50 workers returned to the surface. Montgomery could not recall exactly what time it was except that it was long after the first occasion they went down. No ultimatum was served on that occasion. Once again he claimed stones and roof bolts were thrown at the cage when the doors were closed and the safety device was manipulated causing the cage to halt until the safety devices were overridden. He also testified that it was possible to push an object through the mesh on the shaft station doors and open the door handle which would result in causing the cage to trip. The only other way that the cage could be stopped would be by the cage driver. He confirmed what was seen at the *in loco* inspection, namely that the internal door of the cage itself was a solid roller door.

[352] A further group of workers called to say that they wanted to surface. However, the personnel who had undertaken the previous operation were unwilling to do it again because of the behaviour of the strikers and the workers who wanted to surface were advised to return using the incline shaft near the main shaft, which they did. It was common cause that later on, two other workers who required chronic medication were allowed to surface. This appears to have occurred after 18:00 on 22 January 2009. Gumede witnessed the small cage descending and three workers who were on chronic medication requested to surface and were not prevented from entering the cage and leaving the shaft bottom. Tyokolo confirmed this. Both in relation to this group and in relation to another worker who surfaced to attend a funeral, Gumede used the phrase “they let them/him go”, but he denied that this meant anyone

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needed permission to surface. He could not comment on Montgomery's evidence that workers phoned to say they wanted to surface but until he went down they were not allowed to surface and he was met with aggression. Under re-examination he confirmed Tyokolo's statement that management had requested that those on chronic medication 'be allowed to leave' and the three individuals then surfaced.

[353] Khali, who was working on the morning-shift on 22 January 2009 and who remains employed by Sasol, said he was sitting that morning in the office of another shop steward, Mr Magagula, who was also his superior at work. That morning, Magagula was not present because he had been suspended. When Mr Schoeman came into the office and told him that the morning-shift had not surfaced he was not surprised in light of the decision taken at the meeting.

[354] According to Tyokolo, two male workers and one female worker who required chronic medication requested to surface. They also requested Khali to ask management for methane testers and lamps so the night-shift could recommence work, but Khali reported back to them that the request was refused as the mine manager was concerned about their safety. According to Gumede, the same individual whom he saw behind the barrier where the landline was is the person who conveyed this request to management. Montgomery was aware of the request and that it had been refused out of safety concerns. Gumede saw nothing wrong with the night-shift recommencing work on 22 January because they had been resting.

[355] On the instruction of the mine manager Khali told workers who did surface that they did not have to report for work the following day.

[356] On 23 January 2009, between 10:00 and 11:00, Montgomery together with the mine captain, Linda Nzotho (Nzotho), Mahlangu and Botha descended using the small cage with a further ultimatum. However, on arriving at the bottom of the shaft the outer cage door could not be opened because workers in the shaft area were preventing it from opening. Workers would not allow them to exit the cage and when they tried to communicate the ultimatum they were drowned out by workers

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singing louder. Finally, they handed the ultimatums by pushing the ultimatums through the gap between the two shaft gates to a female worker who threw them on the ground, after which they surfaced.

[357] Montgomery agreed that this would have been the only ultimatum served on the day shift workers who commenced work on 22 January 2009. Under cross-examination he elaborated, saying that workers began singing as soon as the cage started moving. When they arrived at the shaft bottom there was an opportunity to start to speak but when he made it clear they wanted to deliver an ultimatum the singing started again.

[358] Gumede was one of the workers gathered at shaft bottom at that time. He remembered around six men, including Mahlangu, arriving in the cage. According to him they exited the caged walked mid-way to the stick pillars and returned to the cage, without a word to the sit-in participants. Three other workers joined them when they surfaced. He claimed only to have learnt of the sit-in the previous evening at about 18:00. His explanation for remaining underground was that, as a Supervisor, he could not have left his team and it was safer for him to have remained underground to monitor the situation.

[359] The workers underground only surfaced at approximately 15:30 more than an hour after the ultimatums had elapsed. Montgomery could not dispute Tyokolo's claim that what prompted them to surface was news of the court interdict reached them and when they realised the message to surface came from Mabuyakhulu they did so. Gumede in fact stated that when the news of the court order was first received by the person who had been manning the phone near the cage, an argument arose between workers about whether or not the message was true, but when it became clear that the message had been conveyed by Mabuyakhulu, they agreed to surface.

[360] It had been contended by Tyokolo that when they returned from working on their day shift after working overtime until 18h00 they found workers participating in the sit-in were gathered at the shaft bottom and that a barricade tape had been erected in the vicinity. After the strike when he

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went underground, Montgomery said he saw no barricade tape. In his view, if Tyokolo had been working overtime there would have to have been a miner with the group, who could have lifted the barricade, but he did not dispute that as an Emco driver, Tyokolo might have been working overtime.

[361] In 2009 there was no waiting area at the shaft.

Bosjesspruit Mine – Main shaft

[362] Nxumalo, the mine overseer, Jan de Klerk (de Klerk), an acting mine overseer, and Khomoetsoeu Molise (Molise), an engineer, testified as to the events at this mine.

[363] When he testified, Molise claimed that he knew nothing of the memorandum issued by the ER department following the march on 19 January 2009, which was supposed to be conveyed to night-shift workers before they commenced work on 21 March 2009. This allegation was not put to any of Sasol's witnesses who testified on events at this shaft.

[364] De Klerk, who left Sasol in September 2016, testified that he had been instructed by Mr J Streicher (Streicher), the Underground Manager, to go down the mine on 22 January 2009 with Nxumalo to deliver ultimatums to the night and day shifts which had remained underground. De Klerk said that they had copies of the ultimatum in English and Zulu and Nxumalo attempted to read the ultimatum but the workers became aggressive and started singing and dancing while holding roof bolts. He claims that they said they would not talk to them and they should take the ultimatums back with them but they left copies at the bottom of the shaft nonetheless.

[365] In his original written statement, de Klerk he said that he had done this on the second day of the sit-in, but when he testified he claimed that he had been mistaken because he had delivered ultimatums the previous day. He claims that he had realized that he made an error when he was reminded by Nxumalo shortly before the court proceedings that it was on the first day of the sit-in that they had gone down in the cage to deliver ultimatums. His revised version was also more consistent with the

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original sequence of events produced by management for the Bosjesspruit mine, which recorded Nxumalo and de Klerk going underground shortly after 2:00 on 22 January 2009. In that document, it was recorded that workers had responded by saying they wanted their shop stewards to communicate with them. De Klerk could only say that the events took place eight years ago and it was only when his attention was drawn to the other documents that he realized it was on 22 January 2009 he had gone down the shaft.

[366] Nxumalo had a more detailed recollection of the events. He recalled going down the shaft after 14:00 with hard copies of the ultimatums and that halfway down the shaft they could hear the workers singing. They exited the cage on their arrival and addressed workers in Fanakalo and Zulu that they showed no interest in listening to them so they decided to return to the surface leaving ultimatums on the shaft bottom floor. Nxumalo claimed that the noise was “high” and they tried to convey to workers that what they were doing was unacceptable. He agreed that he was unable to read the ultimatum in the circumstances. He agreed that it was possible that the ultimatums might have been dispersed by the draft in the shaft, but this was never alleged by the applicants.

[367] Nxumalo also disputed the claim in Molise’s statement that, sometime after the day shift ended on 22 January 2009, he and de Klerk had descended a second time in the smaller cage sometime after the day shift ended on 22 January 2009 and called for all miners on chronic medication or non-UPUSA members to enter the cage and ascend to the surface.

[368] Nxumalo was unaware of any directive from management that Mine Managers and HR personnel should go underground and establish the workers’ concerns, which had testified to. Nxumalo confirmed the evidence of other management personnel, namely that the aim was to get workers to surface and then address their demands. He readily agreed that he would not have been in a position to address the concerns of workers about the wage gap. He could not remember if workers asked him to call someone else to engage with them while they

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were underground: if there had been such a request, he would have taken it further. A more reliable indicator of what he recollected was probably the evidence he gave in a disciplinary inquiry on 2 February 2009, in which he stated that when he went to deliver the ultimatums, workers refused to speak to him and were only prepared to speak to their shop stewards.

[369] Molise remembered de Klerk and Nxumalo, descending and throwing papers out of the cage. Nxumalo said that they should get into the cage and surface, but the workers responded by saying that Sasol should come and address their grievances underground, whereupon the cage door closed and Nxumalo and de Klerk surfaced. According to him no ultimatum was read out. Nxumalo disputed this statement by Molise in all respects. He insisted that they had left the cage when they came to deliver the ultimatums, but agreed that they were told that workers wanted Sasol management and not them to address them, at which point they then left the ultimatums on the floor and left. Under cross-examination, it was put to Molise that his version was at odds with the applicants' own pleadings where in it was said:

> "The individual who read out the contents of the papers indicated that the workers were required to surface; failing which, they would be dismissed."

[370] On their way to the surface, de Klerk claims that the cage stopped three times due to interference with the safety system by the protesting miners. In his evidence he elaborated that the cage tripped halfway up the shaft and had to be reset. Eventually, the cage was hauled to the surface by the shaft foreman who said that the limit switch on the shaft door must have been manipulated. He was not aware it was possible to determine on the control panel inside the cage what the cause of the trip was and relied on the shaft foreman's explanation.

[371] On the other hand, Nxumalo said that the lights on the control panel in the cage showed that the bottom shaft front gate was open when the cage tripped. The lights on the control panel of the lift at Bosjesspruit main shaft were labelled. He agreed that it was not possible to see through the roller door on the cage once it was closed but it was possible if one was near

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the door to see through gaps at the side of the door. He also explained how it was possible to open the limit switch a little on the shaft gate by hand, which was enough to trip the cage. He readily agreed that he could not actually see this being done from the inside the cage. Much was made of the fact that in the disciplinary inquiry he said that "… The cage it tripped three times and one could see that someone was tampering with safety devices", whereas in his written statement he stated that "on the cage panel showed that the shaft bottom front gate was opened." It was suggested that the reference to the electronic panel was an attempt to overcome the fact that the *in loco* inspection had revealed that one could not see someone tampering with the limit switch from inside the cage. As far as he could recall he made the statement before the *in loco* inspection and in any event did not see any contradiction between the two versions.

[372] Molise denied that the striking workers had caused the cage to stop, but did not dispute that it had stopped. Under cross-examination, he confirmed that he knew nothing about the cage being stopped, but then appeared to remember that after the cage had closed workers would move away from the cage entrance because of the cold draft in that area.

[373] Nxumalo further said that the cage operator had descended with hard copies of an ultimatum on 23 in January 2009 but on his return he advised that the workers did not want to accept them. He mentioned also that the underground phones were working throughout the duration of the sit-in and workers who wished to surface still had the option of leaving using the incline shaft.

[374] Molise said that the workers underground were able to communicate with some shop stewards on the surface who were asking about conditions underground. They were also able to get food from them.

[375] He said that on 23 January 2009 they surfaced between 13:100 and 14:00 when one of the UPUSA shop stewards, P Maleswenye, came down the mine and told them to surface by 15:30.

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Disciplinary process

[376] Workers charged with participating in the unprotected strike action were identified using the lamp room records.

[377] As witnessed during the *in loco* inspection and confirmed by Morodi, each worker who goes underground is issued with a lamp and rescue pack with a unique number. The worker has the key to unlock the items from the lamp room and accordingly the absence of the pack and lamp of a particular worker in the lamp room is *prima facie* evidence that they are underground. Furthermore, an extra safeguard is provided by the lamp room attendant who keeps a register of every lamp and rescue pack that is removed from, and returned to, the lamp room as well as recording the times thereof. If a lamp has not been returned at the end of a shift and there is no known explanation for its absence, a search for the relevant individual will be launched immediately. These records were used to determine which workers did not surface after the end of their shifts on 22 and 23 January 2009.

[378] Sasol decided to use external chairpersons and initiators with legal qualifications to conduct the disciplinary inquiries. All in all, approximately 100 Inquiries when conducted. The chairpersons and initiators attended a joint induction process presented by ER and HR practitioners in which they were taken through the Sasol disciplinary code. Strauss denied that they were instructed how to interpret it or that they were told that workers on final written warnings should be dismissed and others should be issued with final written warnings.

The disciplinary process according to Sasol

[379] Morodi testified about the disciplinary proceedings adopted after the sit-in ended. The HR department issued a memorandum to the following effect:

379.1 All workers that participated in the unprotected industrial action would be suspended until further notice and would be required to

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report back at the mine security offices by no later than 8:00 on a daily basis.

379.2 Those workers that were kept against their will would have to be identified; if they were genuinely kept against their will, they would be allowed to return to work.

379.3 Template charge sheets were prepared by the ER team on 26 January 2009 and these were issued to workers on 27 January 2009. Disciplinary hearings, it was envisaged, would commence on 29 January 2009.

[380] In his statement, which he confirmed, Morodi stated that the Mine Managers and HR Business Partners at each mine were advised that eight chairpersons would be available on Friday 30 January 2009 to conduct hearings at the Bosjesspruit mine (2 persons), the Brandspruit mine (3 persons) and the Middelbult mine (3 persons) and that hearings could be scheduled to commence at 11:00 on that day.

[381] The memorandum also indicated that, prior to the commencement of the enquiries, an information session would be held with the chairpersons to familiarise them with the respondent's internal disciplinary processes. This was necessary because the persons secured to chair the disciplinary enquiries were all external and independent persons practising in the labour field (either as attorneys or labour law advisors). The complainants were also most external appointments. The reason for this is that the respondent simply did not have the capacity to conduct such a large number of enquiries by making use of its own internal staff compliment. Not only would several enquiries be conducted on a particular day, but in each of these enquiries would be a number of witnesses and HR observers to ensure that a fair process is followed. If the complainants and chairpersons had been internal appointees, this would literally have crippled the respondent's operations.

[382] As an HR business practitioner, Morodi attended the various inductions of the chairpersons. They were familiarised with the respondent's disciplinary code and procedure as well as the standard checklist and minutes that the respondent typically required a chairperson of a

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disciplinary enquiry to adhere to. Only at one mine (Brandspruit) did the disciplinary enquiries ultimately commence on 30 January 2009 At all the other mines the enquiries commenced on 2 February 2009.

[383] The record of all the enquiries including that of the shop stewards charged with misconduct relating to the march on 2019 January 2009 comprised more than 70 lever arch files. During the trial, Morodi produced records of a sample of inquiries as an indication of the general nature of the proceedings. Some of the samples also included minutes of inquiries of persons whom Sasol understood to be non-UPUSA members. At various instances during the examination of witnesses, reference was also made to the records of inquiries of a large number of other workers not forming part of the sample provided.

[384] Morodi also produced in evidence a comprehensive spreadsheet summarizing the personal particulars and the course of disciplinary inquiries and subsequent appeals relating to each of the workers who were charged. In the course of comparing these details with the names of the applicants on the original list furnished by them it appeared that some of the applicants cannot be identified as former workers of Sasol. There were also a number of persons identified as applicants who had since passed away. The spreadsheet also did not reflect the details of persons against whom charges were withdrawn or were not found guilty.

[385] Morodi testified that not only did he attend the enquiries at Middelbult but also attended proceedings relating to workers at iThembalethu shaft.

[386] From the records provided, it is apparent that inquiries were conducted in respect of groups of anything between two and twenty workers at a time. The size of the group was determined to try and ensure that workers in the group or from the same production section or service area so that the facts pertaining to those workers would be similar. If it turned out that a worker's circumstances were substantially different from the rest of the group or an worker wanted to lead evidence of his specific circumstances a separate inquiry was sometimes convened for that worker's evidence.

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[387] Morodi claimed that the chairpersons generally adopted the same procedure at the Middelbult mine inquiries that he attended. He characterized that procedure in the following way:

387.1 Each worker was given notice of the date and time of the disciplinary enquiry, the location where the enquiry would be held and the charge that they were required to meet. If the enquiry could not continue on the set date for whatever reason, it would be postponed to a particular date.

387.2 At the commencement of the enquiry all the attendees were typically welcomed by the chairperson and the purpose and roles of the different persons in the enquiry would be explained. Thereafter an attendance register would be completed and signed by all present.

387.3 Thereafter the representatives would be required to identify themselves and this would be recorded in respect of each worker. By way of example, the complainant presenting the case on behalf of the respondent would be identified, the alleged transgressor (the worker), the worker's representative (if any), the interpreter (if one was required) and the HR professional in attendance to ensure a fair procedure is adopted would all be identified and recorded on the checklist and minutes of disciplinary enquiry or in separate notes kept by the chairperson.

387.4 Thereafter the chairperson would typically request the complainant to put the charge to the workers and briefly explain the circumstances in which it arises. The workers would then each be asked whether they understood the charge and, if so, would be required to plead thereto. Where there is a single representative who represents all the workers, that representative would frequently plead on behalf of all the workers as a collective.

387.5 Then the complainant would be requested to present the evidence in relation to the charge. Typically, the evidence would either be presented by the complainant himself, in those instances where the complainant was a company worker intimately involved with

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the strike, or witnesses would be led by the complainant where the complainant was not someone who was involved in the sit-in.

387.6 There was also an opportunity for the workers through their representatives (where they had representation, failing which they would be given an opportunity to do so themselves) to cross-examine and test the evidence put up by the complainant.

387.7 After the evidence presented on behalf of the respondent was completed, it would close its case. The workers would then be granted an opportunity to present their evidence. In some instances, the workers' representative called a single witness. In other instances, each of the workers in question gave evidence.

387.8 After the evidence was completed the complainant and the workers' representative would typically present closing arguments in relation to a finding of guilty / not guilty of the offence. Thereafter a verdict would be handed down with reasons furnished for it.

387.9 The chairperson would then in respect of those workers that had been found guilty of the offence, invite submissions in relation to mitigation and aggravation and the complainant and the representative of the workers would each address the chairperson on the appropriate sanction. The chairperson's decision regarding sanction would then be delivered.

387.10 Insofar as workers who were found guilty and were sanctioned, they were then notified of the right to appeal and the processes to be followed in this regard. Most of the workers that were found guilty and dismissed appealed the decision. In respect of each worker that appealed, an appeal form would be completed and this would be located in the personnel file of each worker.

387.11 Separate groups for the appeal hearings were formed. These groups were sometimes larger in number than the disciplinary groups, but were still in respect of workers employed at the same mine and at the same shaft. Independent appeal chairpersons were appointed to consider the appeals. The appeals were

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conducted on the basis that the reasons for the appeal would be advanced by the representative on behalf of the workers. Notionally the appeal could be advanced on two bases: procedural unfairness of the disciplinary process and substantive unfairness in relation to the finding of guilty or the severity of the sanction. In each instance workers would be granted the opportunity of presenting new evidence should they wish to do so. The respondent's representative would be granted an opportunity to respond hereto where after, the merits of the appeal would be considered and a finding handed down.

[388] Morodi explained that the disciplinary and appeal chairpersons were external consultants employed by the respondent specifically to consider the complaint against the transgressors in accordance with the code and procedures of the respondent and were expected to come to an independent finding in relation to the guilt or innocence of each worker charged. They were also expected in cases where they made a guilty finding to consider the appropriate sanction to be handed down against the workers in question. He believed that the independence of the chairperson is indicated by the fact that some workers were found not guilty and not all workers that were found guilty were necessarily dismissed.

[389] Responding to specific allegations made by the applicants in their stated case on the issue of procedural fairness, Morodi claimed that:

389.1 Individual workers did have the opportunity to ask questions, present evidence or make submissions. Chairpersons were specifically advised during the inductions to give them the opportunity to do so even if they were represented and to advise them of their right to do so. In those inquiries he had attended this did occur and in most of those inquiries more than one worker addressed the inquiry. If the evidence of a single worker was relied on that was an election of the workers facing that inquiry.

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389.2 Internal representation of workers was permitted and was made use of in most instances. He claimed to be unaware of any inquiry in which legal representation was requested by workers.

389.3 Members of CEPPWAWU were not favoured. In fact, several of them were dismissed as the schedule indicates. Insofar as any worker was removed from an inquiry that would only have occurred where they alleged that they were intimidated and wish to give their evidence in a separate inquiry or if they were unable to attend the scheduled inquiry and were granted a postponement.

[390] Some of the specific challenges raised in the course of the trial concerning the conduct of particular inquiries are addressed in a bit more detail below. Ultimately, the applicants did not pursue the issue of procedural unfairness in relation to the enquiries as part of their case on procedural fairness.

Procedural issues pertaining to the enquiries raised during the trial by the applicants

[391] One of the issues raised by the applicants was that the inquiries were chaired and Sasol was represented by legal representatives, even though the recognition agreement did not provide for external representation. Khali said that at the disciplinary inquiries where he represented workers Sasol never made a request to be permitted to be represented by legally qualified persons as initiators of the inquiries. Morodi confirmed a similar experience at the enquiry he attended. Khali's evidence was that the chairperson and the lawyer acting for Sasol as initiator (Mr Rapela) were already present when the workers arrived at the inquiry. Similarly, Tyokolo testified that in the inquiry that he was in, the initiator was a lawyer, one De Waal, and he did not request the chairperson, Rapela, for permission to represent the company at the inquiry. Gqadu, likewise claimed that at his enquiry the workers had queried the company being legally represented, and had asked to be allowed to seek legal representation for themselves as the shop-steward, William Thapa, who was representing them was still undergoing training. However, the chairperson rejected their request saying that they were not

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entitled to external legal representation. These procedural issues were not mentioned in Gqadu's written statement. He did say that Sasol's external legal representative did not ask the chairperson for permission to appear and it appeared to him that Sasol had more trained persons assisting it than they did. He did agree that workers were able to question Sasol's witnesses and give their version of events.

[392] Ketsekile confirmed that this was also the case at his inquiry. He further claimed that they requested legal representation but were told that they could not be legally represented in terms of the rules applicable at Sasol. Morodi likewise claimed that they were advised to elect another worker to represent them since the shop stewards had been dismissed, but they were refused the opportunity to be legally represented. When tested on his recollection of his disciplinary inquiry and confronted with the handwritten notes of that inquiry, Morodi mostly fell back on his standard refrain of not being able to recall what had happened. In

[393] Ketsekile felt that they needed legal representation because the shop stewards were not adequately trained to represent them and they feared that if a lawyer represented Sasol they would lose. On their arrival at the inquiry, they were also told that they had to be represented by one person in the inquiry and should instruct the shop steward what they wanted him to say.

[394] Ketsekile also had said in his statement that during the disciplinary inquiry which he attended they had not been permitted to cross-examine Mr Steyn after he gave evidence, but conceded that the disciplinary inquiry minute showed that Xotshana was able to cross-examine him and that the workers also led their own evidence.

[395] A more extreme example of alleged misconduct by a chairperson during one of the inquiries was made by Molise, though his account was somewhat difficult to understand. He claimed that when they raised the issue of legal representation the chairperson advised them that she had been hired by Sasol to dismiss them and nothing more. Under cross-examination he agreed, despite this statement, that they were given an opportunity to present their case, but the Indian lady chairing the inquiry

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said she was not there to make their case for them but to dismiss them. They were then instructed to hand in their permits and advised that they could appeal. At the appeal hearing Sasol was represented by a lawyer. Their appeal was dismissed.

[396] Zwane, from Twistdraai mine, gave similar evidence in relation to his enquiry and claimed they had no opportunity to question the appointment of the chairperson, even though a typed minute of the enquiry recorded that workers were asked if they accepted the chairperson and nobody objected.

[397] Gumede said that in his inquiry he had raised the issue that Mabuyakhulu had been allowed legal representation. The chairperson appeared to acknowledge this as a good point and adjourned the proceedings. However, when the hearing reconvened they were simply given a chance to make representations in mitigation.

[398] It was also alleged that at the inquiry of Batista Chingubo, of Brandspruit 3E shaft, the chairperson had expressly stated that he was there to dismiss everyone. Hattingh who attended the inquiry was adamant that no such statement had been made.

[399] Another complaint made by some applicants was that they had not been given an opportunity to question Sasol's witnesses or present their case. Bhembe, a shop steward, claimed in his statement that he was not given an opportunity to question either Phalane or du Preez, because they came into the hearing and gave their evidence, then left the hearing. He modified this when he testified, to say that he had expected the pair of them to remain at the hearing because they were management representatives. When the handwritten notes of the hearing were shown to him indicating that he did question Phalane, he could not agree that he had done so because the handwritten notes were not shown to him at the time and, as far as he remembered, Phalane left after giving evidence in chief. However, he was willing to accept other notes indicating that he was given the opportunity to give evidence in mitigation.

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Appeal hearings

[400] Tyokolo and Gumede said that at the appeal hearing pertaining to his section they were told that they could not repeat what they said at the disciplinary hearing and that only Khali could speak on their behalf, after they had been given an opportunity to tell him what they wanted him to say. It appeared that the HR representative De Waal had said something to the chairperson which implied that he was telling him they had to be dismissed.

Evaluation

[401] The individual applicants were all dismissed for participating in the unprotected strike action which took place on 22 and 23 January 2009. A number were also dismissed for additional reasons ranging from assault to harassment, and the like.

[402] An interim interdict was obtained on 23 January declaring the industrial action they had embarked on to be unprotected strike action. Although the applicants had initially contested that they industrial action did not amount to an unprotected strike, during the course of the trial it became common cause and was conceded to be such in the final argument of the applicants, albeit that they conceded it amounted to strike action on a narrow basis. This is explained in the discussion which follows. The applicants contend that their dismissal for participating in the unprotected strike action was both substantively and procedurally unfair.

Substantive fairness

Legal Principles

[403] Section 68(5) of the Labour Relations Act, 66 of 1995, establishes that:

> 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

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dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

Item 6(1) of the Code of Good Practice for Dismissal[8] (the code) provides as follows:

> "(1) *Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissals in these circumstances must be determined in the light of the facts of the case, including –*
>
> *a) the seriousness of the contravention of this Act;*
>
> *b) attempts made to comply with this Act; and*
>
> c) *whether or not the strike was in response to unjustified conduct by the employer*."

[404] Thus, section 68 [5] of the LRA and item 6 [1] of the code set the parameters for the considerations affecting the substantive fairness of dismissals for participation in unprotected strike action. The Constitutional Court reaffirmed that participation in an unprotected strike is unacceptable conduct and a serious breach of the employees' employment contracts. Once participation in an unprotected strike is established it falls to the employees to provide an acceptable explanation for it, viz:

> [44] Item 6(1) of the code provides that while participation in an unprotected strike amounts to misconduct, this does not automatically render dismissals substantively fair. The substantive fairness of the dismissals must be

[8] Schedule 8 to the LRA.

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measured against inter alia: (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.

[45] The LAC held in Mzeku that:

> 'Once there is no acceptable explanation for the [workers'] conduct, then it has to be accepted that the [workers] were guilty of unacceptable conduct which was a serious breach of their contracts of employment. … The only way in which the [workers'] dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction.'

[46] Therefore, where striking workers engage in unprotected strike action, the onus rests on the workers to tender an explanation for their unlawful conduct, failing which their dismissal will be regarded as substantively fair, provided dismissal was an appropriate sanction. In this matter, no reasons were provided to the employer by the striking workers that explained their failure to return to work following the strike becoming unprotected.[9]

[405] Earlier, in *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*[10] the LAC further elaborated on the other factors that might come into play in evaluating the substantive fairness of a dismissal for participation in an unprotected strike:

> "[28] It is clear from the provisions of s 68(5) that participation in a strike that does not comply with the provisions of chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the code but also item 7 which provides as follows:
>
> '7 Guidelines in cases of dismissal for misconduct
>
> Any person who is determining whether dismissal for misconduct is unfair should consider —
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

[9] *Transport & Allied Workers Union of SA on behalf of Ngedle & others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 *ILJ* 2485 (CC) at 2501

[10] (2014) 35 *ILJ* 642 (LAC).

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(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 was an appropriate sanction for the contravention of the rule or standard.'

[29] In my view the determination of substantive fairness of the strike related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not 'a magic wand which when raised renders the dismissal of strikers fair' (National Union of Metalworkers of SA v VRN Steel (Pty) Ltd (1995) 16 ILJ 128 (IC)). The employer still bears the onus to prove that the dismissal is fair.

[30] In his work Grogan expresses the view that item 6 of the code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the code."[11]

[406] It is not entirely clear why the two-stage approach to substantive fairness necessarily flows from section 68 [5] as the LAC held. Nevertheless, support for a dual test of substantive fairness in such cases might be

[11] At 651-2.

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found in section 188(2) of the LRA, which deals with the fairness of all dismissals which are not on grounds which are automatically unfair.[12] Since participation in an unprotected strike is a form of misconduct, then item 7 does fall to be considered because it is part of the code which is relevant to misconduct dismissals.

[407] In any event, in *CBI* the LAC did not find it necessary to consider factors in item 7 of the code in arriving at its conclusion that the dismissal of unprotected strikers in that case was substantively fair, so the two stage test propounded does not appear to have been necessary for the court's decision, and might well be an *obiter* statement. Nevertheless, it is clear that item 6 of the code clearly states that the substantive fairness of unprotected strike dismissals must be determined "in the light of the facts of the case", which include the ones specifically stated, but clearly do not exclude others. The ones mentioned by Grogan, and cited with approval by the LAC in *CBI* are ones that are all directly relevant to weighing up the gravity of the misconduct and determination of whether dismissal is an appropriate sanction, which is an intrinsic part of any enquiry into the fairness of a dismissal for misconduct or incapacity, as mentioned in Item 7 of the Code.

[408] In so far as an unprotected strike is a form of misconduct it does bear some resemblance to an act insubordination. It has been held that "(a) failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee's challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious".[13] However strike action is not simply a collective form of insubordination: it is conduct which not only suborns the employer's normal authority to direct the conduct of employees in the performance of their work, but entails a partial or complete abandonment of duties by the

[12] S 188(2) states:

"Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act"

[13] ***Palluci Home Depot (Pty) Ltd v Herskowitz & others*** **(2015) 36** ***ILJ*** **1511 (LAC)** at 1523, para [22].

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strikers, which is intended to cause economic harm to an employer's business for the purpose of pressurising the employer to meet the strikers' demands. It entails a unilateral suspension of the employees' obligation to tender their services as required, in order to achieve a collective goal. The fact that it is intended to harm the employer's business, even if only for a while, and not merely to challenge the employer's authority, makes it a serious form of misconduct, except when exercised lawfully.

[409] Thus, notwithstanding that a strike will ordinarily constitute serious misconduct, because strike action is also accepted as a legitimate economic pressure employees can bring to bear as a counterweight to the employer's power to determine conditions of employment on its own terms in the context of collective bargaining, it has been given specific protection both in the Constitution and in the LRA.[14] The LRA has made it relatively easy for employees or a union wishing to have recourse to the economic weapon of a strike in that context to do so, by providing a simple procedure under s 64(1) which they need to follow.

[410] With a few special exceptions like essential services, the broad limitations the LRA places on exercising the right are where the strike would undermine an existing binding agreement (and thereby undermine the outcome of collective bargaining) or where the dispute is one that should not be the subject matter of collective bargaining but must be resolved by an adjudicative process.

[411] By complying with a limited number of essential steps, employees can obtain absolute protection against dismissal for participating in peaceful strike action in pursuit of legitimate collective bargaining goals. A failure to comply with the statutory procedures is not simply to be fobbed off as merely an omission to comply with formal administrative steps. The referral of a dispute to conciliation, is intended to provide an opportunity of resolving it without industrial action by providing the parties with breathing space and the assistance of independent mediation expertise. Similarly,

[14] For a discussion of the respective economic weapons at the disposal of both collective bargaining parties see, e.g, ***Putco (Pty) Ltd v Transport & Allied Workers Union of SA on behalf of Members & another*** **(2015) 36** ***ILJ*** **2048 (LAC)** at 2058-9, at [32] – [34] and following.

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subsequently notifying the employer that the strike will begin, provides *inter alia* a further opportunity to try and settle the matter and avert the strike. Incidentally, subjecting the dispute to that process ordinarily ought to clarify if the dispute is one that may be the subject of strike action, or must be resolved by other means, thereby acting as a safety mechanism which might prevent employees unwittingly embarking on an unprotected strike.

[412] Accordingly, if employees do not use the appropriate dispute resolution mechanisms provided by the LRA which are easy to invoke, and embark on strike action in respect of a dispute which must be resolved by an adjudicative process, or if they simply embark on a strike without invoking the prior dispute resolution mechanism, they run the risk of dismissal for what amounts to serious misconduct because it occurs without following the potentially valuable procedural mechanisms that might make a strike unnecessary.[15] Where the dispute is one that could not have been resolved by a deliberative process of adjudication, and a settlement is reached in the period before the strike could take place, the conclusion of an agreement represents the desired outcome of collective bargaining and will have been achieved without inflicting unnecessary economic damage on the employer.

[413] Notwithstanding this, the provisions of s 68(5) of the LRA read with Item 6(1) of the Code provide a framework within which the fairness of such dismissals might still be challenged. It is important when evaluating the

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[15] See also in this regard *SA Clothing & Textile Workers Union & others v Berg River Textiles - A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) at 979-980:

> [27] As with any dismissal for misconduct, the court ultimately needs to determine whether the relationship has irretrievably broken down and whether a less severe form of discipline ought to have been utilized by the employer, dismissal being the ultimate and most severe sanction available. At the same time, the court will take into account that the LRA prescribes a relatively simple procedure to render strike action protected; the failure of a trade union and its members to make use of this procedure removes the protection with which they could have clothed themselves and opens them up to the sanction of dismissal, especially if the employer had issued an ultimatum making the consequences of their actions clear.

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facts bearing on substantive fairness not to see the factors specified in item 6(1) just as random examples of relevant facts to be considered, but as essential considerations which the legislature chose to identify, whatever other facts might be relevant. Thus, items 6(1)(b) and (c) point on the one hand to the importance of considering whether there was good justification for the statutory machinery of dispute resolution not being invoked. Item 6(1)(a) focusses on the extent of the departure from the provisions of the Act itself. By highlighting these factors as essential considerations, the legislature emphasised that employees embarking on unprotected strike action must provide a good justification for not following the statutory dispute resolution.

[414] Considering all these factors together with the applicable provisions of Item 6 of the Code will assist the court in determining whether a dismissal for participating in an unprotected strike was "proportional to the misconduct"[16] and therefore appropriate or fair. As the LAC more recently stated:

> [35] The principle that was established in *Hendor* is not that the dismissal of employees because they were on a short duration strike will inevitably be found to be disproportionate and thus substantively unfair. Rather, the principle established there is that when determining whether the dismissal of striking employees is proportional to the misconduct, a court must examine the conduct of both the employer and employees 'as to the manner and conduct of the strike'. [17]

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[16] See *Hendor Steel Supplies (A Division of Argent Steel Group (Pty) Ltd formerly named Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of SA & others* (2009) 30 *ILJ* 2376 (LAC) :

> "[8] Mr Redding correctly conceded that an unprotected strike did not automatically justify dismissal as the only appropriate sanction. Dismissal is manifestly the sanction of the last resort. W G Davey (Pty) Ltd v National Union of Metalworkers of SA 1999 (3) SA 697 (SCA); (1999) 20 ILJ 2017 (SCA) para 18. Hence there is a need to examine the arguments of both parties as to the manner and conduct of the strike to test whether dismissal was proportional to the misconduct."

[17] *SA Commercial Catering & Allied Workers Union on behalf of Mokebe & others v Pick 'n Pay Retailers* (2018) 39 *ILJ* 201 (LAC) at 213.

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Accordingly, the conduct of the parties during the unprotected strike is also an important consideration in determining the fairness of the dismissal.

The parties' respective submissions on the substantive fairness of the dismissals

Applicants' submissions

[415] The applicants identified themselves as belonging to six different classes, which they argued required separate consideration in determining the substantive fairness of the dismissal. The classes were identified as follows:

415.1 Category 1 Applicants – dismissed employees who reported for the night shift, underground, on 21 January 2009, performed their duties from 22h00 – 08h00 and commenced with the sit-in on the morning of 22 January, at the conclusion of their respective shift. Category 1 applicants were part of the sit-in from 08h00 on 22 January 2009 – 23 January 2009 in the afternoon;

415.2 Category 2 Applicants – dismissed employees who reported for duty on the morning of 22 January 2009, whose shift was scheduled from 07h00 – 17h00 and were either instructed to down tools by Sasol or concluded their duties, and joined in on the sit-in started by Category 1 applicants or commenced with the sit-in underground themselves. Category 2 applicants were part of the sit-in from 17h00 on 22 January 2009 – 23 January 2009 in the afternoon;

415.3 Category 3 Applicants – dismissed employees who reported for the afternoon shift, scheduled from 16h00 – 02h00 underground, which shift was cancelled by Sasol and preceded, in some instances, by the locking of the gates around the perimeter of the shafts in order to prevent access by the afternoon shift to it's premises. These employees were not party to the underground sit-in by Category 1 and 2 applicants but remained on/about Sasol's premises, in support of Category 1 and 2 applicants;

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415.4 Category 4 Applicants – those employees who do not report for work underground and are mainly stationed in offices on the surface (e.g. Fulltime Safety Representatives, Surveyors, General Workers). These employees were not party to the underground sit-in by Category 1 and 2 applicants but remained on the Sasol's premises, following the conclusion of their respective shits, for various reasons, including support of the Category 1 and 2 applicants;

415.5 Category 5 Applicants – the peculiar category of dismissed employees employed by Sasol as cage drivers. Category 5 applicants were not party to the underground sit-in but remained on Sasol's premises, following the conclusion of their respective shifts, for various reasons;

415.6 Category 6 – Sasol employees at Sasol Coal Supply, who stopped working in support of the employees conducting the underground sit-in, but who were issued with final written warnings instead of being dismissed.

The applicants argue that not all categories of applicants at each shaft received ultimatums or received the same number of ultimatums. Likewise, the duration of the sit-in was not the same for workers in the different categories. Additionally, workers in categories 3 to 5 neither participated in the sit-in nor received ultimatums which has a significant bearing on the fairness of their dismissals.

[416] In summary, the applicants argue that the dismissals were substantively unfair for the following reasons:

416.1 Some of the applicants dismissed simply did not participate in the sit-in, for different reasons. These applicants in the main are to be found in categories 3, 4 and 5. The employees in category 6, namely those working at Sasol Coal Supply, were not dismissed, but were issued with a final warning valid for four months.

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416.2 The dismissal of those applicants who were underground and did participate in the sit-in was substantively unfair for one or more of the following reasons:

416.2.1 Sasol provoked them to embark on an unprotected strike by not fulfilling its obligation to completely implement the wage gap closure process by January 2009, and by suspending the members of the LSC who were dealing with the wage gap process.

416.2.2 They made an attempt to follow proper procedure by declaring a dispute and by attempting to hand in the memorandum of grievances so they did not deliberately disregard the provisions of the LRA.

416.2.3 The ultimatums issued by Sasol were inadequate as an attempt to end the strike in a number of respects.

416.2.4 Sasol engaged in 'unfair bargaining tactics' by disregarding the UPUSA plant leadership it had agreed to deal with

416.2.5 the duration of the sit-in in respect of each Applicant and in circumstances where the Applicants reported for work, performed their duties and only joined in on the sit-in following the conclusion of their respective shifts;

416.2.6 the respective Applicants' previous disciplinary record or lack thereof, and length of service; and

416.2.7 the inconsistent application of discipline in the circumstances. More particularly, the applicants contend that Sasol was inconsistent in the following respects:

416.2.7.1 employees who had participated in the 2006 unprotected strike had been issued with final written warnings, in comparison with the applicants;

416.2.7.2 those employees who had been found guilty of participating in the sit-in and were issued varying sanctions, such as various warnings (including serious warnings) and/or unpaid suspension;

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416.2.7.3 SCS employees were issued with verbal warnings, in comparison to the Category 3 and 4 applicants.

Sasol's submissions

[417] Sasol claims it did not provoke the strike by its conduct or, alternatively, there was no justification for the strike insofar as it is claimed the implementation of the wage gap, the suspension of LSC members or the refusal to accept the memorandum of the marchers on 19 January could have provided such provocation or justification. More particularly:

417.1 It was not proven that the marchers' memorandum was not accepted by Tshikovhi;

417.2 In any event, management engaged with the LSC to try and deal with the grievances;

417.3 The fact that the strike only started three days later negates the notion that any failure to accept the memorandum spontaneously provoked it;

417.4 Sasol did not breach any agreement on the Wage Gap in implementing the changes it did in January 2009;

417.5 Management did not falsely raise workers' expectations of what they might receive in January 2009 as a result of implementing the Wage Gap agreement.

417.6 Even if the remuneration received in January 2009 was below the expectations of workers, that could not have been a factor causing the strike, because the details of the January remuneration would not have been known to them when the strike commenced;

417.7 Bonus payslips issued on 15 January 2009 could not reasonably have fuelled a belief that the workers' remuneration that month would not improve;

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417.8 The lawful suspension of LSC members, pending disciplinary enquiries, could not be equated with disciplinary steps taken against them, which only occurred after the strike, and in any event could not legitimise a retaliatory strike;

417.9 The contention that the strike was in part provoked by workers' concern that nobody could represent them in wage gap deliberations once the LSC members were suspended was unmerited because there were no negotiations imminent at the time and Sasol had indicated its commitment to finalising the outstanding wage gap issues;

417.10 The suspension of the LSC members did not render them inaccessible to workers, who in any event had ordinary shop stewards they could take problems to;

[418] On the issue of inconsistent treatment, Sasol argues that notwithstanding employees having been issued with final written warnings in the past, this strike was distinguishable on the following grounds:

418.1 The sit-in underground exposed workers to significant safety risks;

418.2 The strike was marred by violence and intimidation and threatening behaviour towards management; and

418.3 The decision to strike was taken at a meeting of UPUSA members and, as such, was considered and orchestrated action by those applicants who participated therein.

[419] Sasol did not deal with the applicant's argument that different categories of worker required separate consideration in determining the fairness of their dismissals.

Evaluation of Substantive fairness

Causes of the Strike

[420] Under this heading, the cause or causes of the strike will be considered, taking account of the reasons advanced by the applicants, which are mentioned above. Identifying the causes of the strike is only the first step.

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The next step is to consider whether the reasons for the unprotected strike, in any way mitigated the seriousness of the misconduct in the light of the considerations relevant to that inquiry. This has a bearing both on the issue of whether it was an understandable reaction to provocative conduct by Sasol and the question whether the strike demands were legitimate.

[421] The first issue concerns whether Sasol failed to meet its commitments in terms of what had been agreed in the wage gap project implementation discussions. This essentially concerned two main issues: the timetable for completing implementation of all aspects of the wage gap project, and whether it failed to pay the 0.5% service increment in January 2009, by not making it in the form of a retrospective accumulative increment.

- Failure to implement all elements of the wage gap scheme in January 2009

[422] Looking at the events which dominated relations between the UPUSA shop floor leadership and management prior to the strike, it appears that matters began to deteriorate after the meetings to clarify what would be implemented in January 2009 pursuant to the wage gap negotiations.

[423] What prompted the first meeting being held in December was the HR managers at the various mines were receiving queries which they could not answer about what was going to be implemented in January in respect of the wage gap project. Matlaba was called in clarify the situation. There is a dispute about whether he indicated that the 5% service allowance would be paid in January. Tshikovi, who was at the meeting was certain that he had mentioned that workers would receive both the 6.5% adjustment increase and the 0.5% service increment in January. Against this version, there is only Mabuyakhulu's hearsay evidence that he heard that the 0.5% service increment was not discussed. According to Tshikovi, it was necessary to call another meeting to provide further clarity because Matlaba could not respond on other features of the wage gap program about which he had no knowledge, and the UPUSA leadership was not happy with his clarification.

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[424] The second meeting on 15 January was attended by a significant number of the LSC members, including two members whom Mabuyakhulu identified as part of the smaller project team concerned with the finer details of implementing the project, namely Mofokeng and Lemaoana. Tshikovi's recollection of what transpired at that meeting was vague, except that he recalled that the UPUSA representatives were demanding that all aspects of the wage gap project should be implemented simultaneously and not in a staggered fashion and that they declared a dispute. Strauss's evidence was simply that the UPUSA representatives were demanding that the remaining issues that had to be implemented such as the collapsing of salary bands, salary scales career progression and the like had to be implemented simultaneously with the wage adjustments in January. Strauss also confirmed that he had conveyed to the meeting that in January workers would receive the 6.5% adjustment and the 0.5% service increment. His response was that it was impossible to implement everything simultaneously and that the emphasis had been on implementing the monetary adjustment, but that the collapsing of the wage bands, the transferring of wage personnel to monthly salaried personnel, determination of minimum and maximum scales, job titles and career progression could not be implemented immediately but would have to be done in phases.

[425] It was at this point that the LSC members announced that this state of affairs was unacceptable to them and orally declared a dispute before walking out. At that time, it is noteworthy that there was no evidence to suggest that anything was said about a problem relating to the 0.5% service increment not being paid retrospectively. Nevertheless, it was put to Strauss under cross-examination that it was because it was reported at the meeting of 15 January that the 0.5% service increment would not be paid that the first demand in the memorandum drawn up by the LSC members for the march on 19 January was for implementation of the wage gap with immediate effect and not in phases. However, if the understanding was that the 0.5% service increment was not going to be paid at all, it is odd that this was not articulated more expressly. It seems more probable that it was the confirmation that some issues were not

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ready for implementation that was the impetus behind that demand. Moreover, it is difficult to credit that there could have been a genuine belief that Sasol was not intending to pay the increment. given that Matlaba had previously confirmed that the 0.5% increment would be paid and that Strauss had no reason to represent that it was not going to be paid,

[426] In this regard, it must also be mentioned that Strauss had testified that part of the reports he had received from his team when he returned from leave was that it had been incorrectly communicated to employees that the wage gap implementation would not be implemented in phases. He could not say whether that had been incorrectly communicated to employees by Sasol or by their union representatives.

[427] If one has regard to the last document recording progress in the wage gap implementation up to that point, it was the email of 25 July 2008 issued by Mkhize. Having regard to the content of that email, there was a strong suggestion that the transition would be concluded by January 2009, as implied by the following passage:

> All WP workers will be moved to Monthly Salaried Personnel (MSP) category with effect from 1st January 2009. To facilitate this transition, a project team will be put in place to review and align the wage personnel job level structure (reduction from 9 job levels to 4), career paths, progression and related allowances.

[428] Although the email also made it clear that the project team still had tasks to complete, it did not suggest that the transition would not be finalized by the end of January 2009. Strauss had testified that it was unreasonable to believe that all of this could be done by January 2009. Mabuyakhulu maintained that if this was the case it had never been conveyed to him that there was a problem in finalizing the wage gap implementation

[429] Whether the UPUSA representatives on the project team ought to have been well aware before the end of 2008 that everything was likely to be finalized is another question. Mabuyakhulu, testified that in January the project team was expecting a report from the Finance department on the proposed distribution of wage personnel within the revised salary bands in time for them to consider it and approve them for implementation in the

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January payroll. As mentioned already, this important allegation was not contained in his written statement, nor was it put to any of Sasol's witnesses who would have had knowledge about such a step. He also could not satisfactorily explain why he did not ask Strauss in January about what had happened to the expected report from the finance department, if indeed it was expected. Consequently, I am not persuaded that such a process was underway or that a report was expected as Mabuyakhulu claimed.

[430] Nonetheless, it does seem it had been intended by the parties that the wage gap implementation would be finalised by January 2009. All things considered, it was not unreasonable for there to have been a degree of disappointment amongst ordinary employees that the wage gap project would not be finalized by January 2009. On the other hand, it seems improbable that the three project team members would not have been aware by December 2008 which issues were still outstanding and that it was unlikely everything would be completed by January. It appears that both parties' representatives failed to keep employees abreast of the pace of progress.

[431] Nevertheless, the existence of reason for discontent does not necessarily translate into a justification for embarking on unprotected strike action. This will be discussed further below.

-Failure to pay the 0.5% service increment on an accumulative retrospective basis in January 2009.

[432] The first question is whether there was ever any agreement that when the 0,5% service increment was paid in January 2009, it would be done so on the basis that all wage personnel would receive an increment of 0,5% for every year of service with Sasol, so that, for example, a person with 11 years' service could expect a service increment of 5.5%. There is no document clearly recording this understanding of how the service increment would be calculated. In so far as documentary support for their claim is concerned, the best the applicants could do was to contend that their interpretation of the email of 25 July 2008, penned by Mkhize, supported the retrospective and accumulative version of the service

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increment. The relevant passage has been cited already, but is repeated for ease of comprehension:

> "All WP workers will be moved to Monthly Salaried Personnel (MSP) category with effect from 1st January 2009. To facilitate this transition, a project team will be put in place to review and align the wage personnel job level structure (reduction from 9 job levels to 4), career paths, progression and related allowances. The 0,5 % annual service increment normally paid to Wage Personnel will be incorporated in the alignment process."

(emphasis added)

[433] The applicants contend that Mkhize recorded that the annual service increment was going to be incorporated in the wage gap alignment process. Strauss's evidence was that it was suggested in the Blue Horizon report that it should be replaced because of the disparities it created, a point which Mabuyakhulu also acknowledged, but that they had been advised that it could not be assimilated by the wage gap adjustment process because it was an industry standard and would disappear if it was so subsumed.

[434] Although there was initially some confusion about whether or not wage personnel had all been receiving the annual service increment it appears that those who no longer received it were those who had reached the 30 years' service ceiling, after which it was no longer payable. It is possible, as Mabuyakhulu testified, that some wage personnel might not have been credited with the annual service increment in the past when they were contract employees, but this was never an issue put to Sasol's witnesses, nor was it the essence of the applicants' complaint concerning the 0.5% increment.

[435] In any event, even if Mkhize did imply that the annual service increment would be assimilated as part of the wage gap adjustment process, that alone could not have given rise to an inference that there would be any retrospective payment due. Consequently, based solely on the email of 25 July 2008, I am not satisfied that the applicants' interpretation of the 0,5 % service increment is plausible, even if the issue of incorporation was never expressly corrected in a subsequent email prior to January 2009 to record

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that it would remain a standalone benefit. As a matter of principle, there is also no logical reason why the 0.5 % increment would naturally have been an incidental, let alone a necessary, component in any process designed to eliminate discrepancies between WP and MSP, especially as the annual service increments had been paid to WP workers previously. If it had been agreed that the annual service increment was to be paid on an accumulated basis, the increases that would have resulted would have been considerable. For example, a worker with 13 or more years' service would have received an additional increase least equal to, or more than, the 6.5 % wage gap adjustment increase due in January 2019.

[436] However, the applicants did not rely only on the email as an alleged source of expectations of a retrospective service increment, but also on what they say was reported to them. Essentially, the other sources of information the applicants' witnesses claimed to have been influenced by, which caused them to expect something of a bonanza in January 2009, were oral reports received from mine management and HR officials in the course of their regular safety meetings before commencing their shifts, and reports received from shop stewards.

[437] The versions the applicants' witnesses provided as to how they came to know about the January increases, and in particular the anticipated retrospective payment of the 0.5 % service increment, were diverse. Ketsikile claimed to have developed an expectation of a substantial increase linked to his years of service and the move to MSP status from the LSC during meetings. Gqadu, Bhembe, Matwa, Diyane, Gumede, Molisi and Manhique, claimed to have learnt of this from mine managers or other mine management personnel and HR personnel at their safety communication meetings. Tyokolo and Matwa claimed they heard about it both from the LSC and shaft management. Tyokolo said that initially it had been Mabuyakhulu who had told them that the wage gap programme would result in a bigger improvement like the one they were engaged in during 2007. This was clearly a reference to the year when UPUSA demanded an increase of R 9,000.00. Molisi claimed that he understood the 'substantial amount' he was expecting to receive was about R9,000.00. Khali did not mention what the source of his information was,

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save that he did see the memorandum of 25 July 2008. The only other witness to mention Sasol circulars as a source of the information was Matwa. The fact that so few of the applicants' witnesses referred directly to the email of 25 July suggests that any supposed ambiguity about the service increment it might have conveyed was not the most likely source of workers' expectations about receiving an accumulative service increase.

[438] All of the managers implicated in having promised generous improvements denied having done so. Degenaar denied any knowledge of the *fanakalo* phrase witnesses claimed he had used to describe the large amount of the expected increases. Most managers appeared to have had limited knowledge of the wage gap process, which was something dealt with by central management and not at mine level. If they had conveyed such optimistic information, the natural question is where did they get that information from? Their source of information was the type of memorandum issued on 25 July by Mkhize. It is very difficult to believe that Mkhize or the other HR staff would have systematically transmitted information about an accumulative retrospective increase in the 0.5 % service increase without a single document being produced by the department on that issue, given the detail that was provided in the other memoranda issued on the progress in implementing the wage gap. This is especially so if one bears in mind that the magnitude of such an increase would have been very significant and would have entailed a major departure from the existing service increment practice.

[439] Further, if indeed there was an expectation of substantial increases because of the anticipated cumulative payment of the 0.5 % service increment, which was expected to provide the bulk of any improvement in remuneration witnesses said they were anticipating, then it is extraordinary this did not appear as a distinct demand in the memorandum the LSC members wanted to present on 19 January. Even when Mabuyakhulu mentioned it as the last item in dispute in his dispute letter, he did not mention the failure to implement it retrospectively, but rather cryptically expressed it as a failure by Sasol to 'align' the 0.5 % service increase with the wage gap process.

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[440] Considering all the evidence, I am not persuaded that it probably had been agreed in the wage gap deliberations that a retrospective annual service increment would be paid at any time. It is more probable that there was talk of subsuming the ordinary 0.5% service increment, which was already being paid to WP workers, in the course of closing the identified 10% wage gap, but that this idea was abandoned and it was retained as a standalone annual payment. Accordingly, there is also no basis for arguing that Sasol had breached such an agreement, which could have been one of the reasons used to justify the strike. It should also be mentioned that if there had been such an agreement, then the appropriate dispute mechanism would have been to enforce it as a breach of contract if it could not be enforced as a breach of a collective agreement as such.

[441] In any event, assuming that there was a genuine perception that a wage bonanza would be showered on WP workers in January 2009, it was the belief that they were not going to receive what was due to them which was cited as a cause of the strike. When Strauss met with LSC representatives on 15 January he reiterated the 6.5 % wage gap adjustment and the 0.5 % annual service increment would be paid. When the shop stewards declared a dispute it was about the rest of the wage gap issues not being implemented immediately. That was echoed in their memorandum of 19 January too. Thus, at 15 January there was no reason to suppose that the moneys due under the wage gap implementation were not going to be paid in January.

[442] Yet, between then and the strike, the applicants effectively contend that a belief developed amongst workers that the increases due in January would either not be paid at all, or would be much less than expected. It is argued that the source of this belief was twofold. Firstly, it is claimed that when workers received their bonus payslips on 15 January for the production bonus earned in December 2008, they saw no change in their remuneration or designation as WP, which led them to believe the increases they expected would not be given effect to. Secondly, they received information that they would not be paid their wage gap monies.

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[443] In regard to the first mentioned source of information, much was made of the fact that the production bonus payslips of 15 January showed the same base rate of pay as in December 2008. The reason for this was only clarified when McLelland gave evidence. He explained that the base rate was not the actual remuneration of any employee but was a base rate of remuneration applied to a group of workers falling within particular wage bands for the purposes of calculating their production bonus, and that the base rate was not linked to the outcome of substantial of wage negotiations. He also testified that when the wage increases and the wage gap adjustment were paid in July 2008 the bonus payslip for that month would also not have reflected any change in the base rate. However, he did agree that if employees were removed from WP to MSP, their base rate would have changed. Nevertheless, given that the bonus payslip referred to the previous month's production bonus, any change to an employee's WP status in January, would only have reflected in the February bonus payslip.

[444] The other sources of information were the discussions at the meeting held on 18 January and shop stewards. Gqadu heard from the shop stewards at that meeting that Sasol would not honour the agreement relating to wage gap payments. Similarly, Bhembe, himself a shop steward, heard this from another UPUSA shop steward before participating in the march the following day. Mabuyakhulu also accepted that shop stewards might have conveyed that certain things were not going to be implemented following their meeting with management on 15 January. Khali, who was also a shop steward, relied on LSC members for information about the wage gap. Zwane also believed that the march of 19 January was prompted by news that the wage gap implementation would not take place. Though not present at the meeting with Strauss on 15 January, Matwa (another ordinary shop steward) understood that it was at that meeting that 'changes were made with regards to the payment of moneys in January 2009'. Hokwana heard from other workers on their way to the march on 19 January, the day after the Sunday meeting, that workers would not get the money they were expecting.

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[445] In considering the bonus payslip as a source of information, I accept it might have been possible that some employees would have believed changes to their status or remuneration would have been reflected in those documents, even though they ought to have been aware that, as recently as July 2008, that an increase in remuneration would not be reflected in the bonus payslips, and certainly not for the bonus earned the month before an increase was implemented. How widespread this mistaken belief actually was, is difficult to gauge. What is more certain is that, following the meeting on 15 January, it is likely that LSC members at that meeting reported to the meeting on 18 January that wage increments relating to the wage gap implementation were not going to be implemented in January as expected.

[446] Although there were witnesses who testified that the decision to march was taken by workers at that meeting, it is clear that marches were already planned by the LSC members. On 16 January they had already signed a notice of their intention to hand over a memorandum to management at the times on which both the marches actually took place on 19 January. It is important to note in this regard that the testimony of these witnesses implied that their understanding was there would be no improvement in their remuneration in January in consequence of implementing the wage gap agreement, and not that the issue of concern was that the 0.5% would not be paid retrospectively. None of the applicants' testimony was along the lines that workers were told that what they would receive by way of an increase was less than they had expected because the 0.5% increase would not be paid on an accumulative basis.

[447] If the LSC members had simply reported to workers that management had reneged on the agreement that everything would be implemented in January, but that the salary adjustment of 6.5% and the annual service increment of 0.5% would nevertheless be paid, it is difficult to understand how the applicants', whose testimony is summarised above, all got the impression that the monetary portion of the wage gap agreement was not going to be put into effect at all in January 2009. The probabilities point either to a comprehensive misunderstanding on the part of workers about what the LSC reported to them about management's intention to phase in

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other aspects of the wage gap implementation, or to a significant misrepresentation made to workers about what had actually transpired at the meeting on 15 January, for which we only have Strauss's testimony to rely on. As mentioned previously, none of the LSC members who attended that meeting came forward to testify nor did any of them testify about what was reported at the meeting with workers on 18 January.

[448] Whether it was the report that the wage gap implementation would be done in phases coupled with an erroneous belief that the later phases would also entail further salary improvements is impossible to determine, but it clearly was a widespread belief that the wage gap implementation process would not yield what many workers expected in January because management had decided not to implement all the anticipated changes in January.

[449] I am doubtful about the claims that management falsely pumped up workers' expectations in relation to the sums of money which would result from the remunerative components of closing the wage gap. There was no evidence that any of the managers involved in reporting had any more information available to them than what was reduced to writing by the ER department in its circulars, none of which foretold the amounts of the size workers were speculating about. In the absence of a source of information emanating from Sasol central management promising such windfalls, it is difficult to understand why they would have recklessly promised the same. Most of the managers' evidence revealed only a limited familiarity with what the wage gap project entailed. To give credence to the view that they exaggerated what WP employees would be paid in January would imply a highly elaborate conspiracy to provoke a strike which was conceived during 2018, because that could have been the only motive for doing so in the absence of evidence that they were supplied with misleading information from the HR department, which they merely relayed.

[450] On the other hand, it is plausible that there was a belief circulating amongst ordinary members that eliminating wage gaps between WP and MSP would not merely put WP employees on the equivalent level of MSP counterparts, but would also mean WP employees would be earning the

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kind of salaries they associated with MSP employees on higher grades. The disgruntlement over the wage gap project which led to the meetings in December and January indicates that workers did have hopes about what the effect of fully implementing it would be. There was also evidence that the R 9000 wage demand which had been abandoned in 2007 by UPUSA, had somehow filtered into some workers' expectations about the benefits of eliminating the wage gap and was being bandied about as a possible figure that might now be realised. The workers' belief that their remuneration expectations in January 2009 would not be met, could equally probably have been fuelled simply by being told that finalising the wage gap implementation would be delayed beyond that month, contrary to what they reasonably believed had been conveyed previously. If they had high expectations of the full monetary impact of finalising the transition process, it is not surprising if they would have been very disappointed on hearing such news.

[451] In any event, the only criticism that can be laid at Sasol's door at that stage is that not all issues relating to the finalization of the wage gap project could be implemented in January, and that this fact was not clearly communicated before the meeting on 31 December 2008. In so far as this was not done, even Mabuyakhulu conceded that none of those unresolved issues would have had an impact on the workers' remuneration. I am satisfied Sasol did not play any part in misrepresenting what workers were due to receive in January 2009, and to the extent that workers did believe that they were not going to receive what was due to them in January, that was based on misinformation or rumour which emanated elsewhere, and should have been corrected by LSC members when they reported to workers about what transpired at the meeting on 15 January. Nonetheless, it does not detract from the reality of the exaggerated expectations of what the wage gap project would deliver, which appear to have been widely held and which would have been unsettled by news that the wage gap project would not be completely implemented in January 2019.

[452] Whether or not the information contained in the January remuneration payslips probably did fuel dissatisfaction amongst workers will be considered below.

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-The suspension of the LSC members

[453] It is common cause that the LSC members who were suspended were the team which had steered the wage gap negotiations since 2007. It is also common cause that at the time of their suspension, there was, at the very least, dissatisfaction which had been building up about the pace of finalizing implementation of the wage gap agreement.

[454] It emerged from the evidence that the LSC members were the only UPUSA members with any real knowledge about the wage gap deliberations. More particularly it was the three members who were the UPUSA representatives in the project team, which was charged with giving effect to the implementation process. Sasol maintained that it was committed to honour its commitments to implement the normalization of the wage gap in terms of the measures agreed which were reflected in the communications of 25 July 2008 and 19 January 2009 and was open to a constructive resolution of all outstanding issues. In the same memorandum containing this undertaking, which was issued on 20 January, the very day the LSC members were all suspended, Sasol also stated that it was committed "to continue to sit with the wage gap working committee around the table and finalise agreements" on specific issues "starting from January 2009" (emphasis added).

[455] In the course of cross-examining the applicants' witnesses, they conceded in more than one instance that they were unaware of any imminent negotiations on the wage gap process, which were due to take place between the time the LSC members were suspended and their disciplinary inquiries. On the other hand, at the time of the suspensions there was no way in which the applicants would have known how long that period would be and it was obviously apparent that the wage gap agreement implementation had already become a controversial matter.

[456] Sasol also made much of the fact that the suspension of the LSC members, as such, did not legally constitute disciplinary action notwithstanding the ominously predictive tone in the same circular that: "serious disciplinary action will be taken against the union leadership that instigated it [the marches] with immediate effect" (emphasis added), which

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seems to anticipate a finding and a probable outcome. Quite apart from this, Tshikovi conceded that the suspension or dismissal of the LSC, in the context of incomplete wage gap deliberations and implementation, would have had a huge negative impact on workers because the LSC was the only point of contact at the bargaining level between them and the company.

[457] The suspensions took place on 20 January. The following day, a meeting of workers was convened at the stadium and it was at that meeting that the decision was taken to engage in a sit-in. It is noteworthy that there was little delay between the suspension of the LSC and the inception of the industrial action, whereas the news that workers would not receive what they were expecting in monetary terms did not prompt them to embark on anything more serious than marches when they were off duty, albeit that authorization for the marches was not obtained beforehand.

[458] A repeated refrain of the applicant's witnesses was that given the suspension of the LSC they did not know who their representatives in negotiations would be. Given the limited knowledge of other shop stewards about the wage gap deliberations, it was not unreasonable of workers to believe that they had been deprived of a meaningful channel of representation in the wage gap process, which was causing discontentment at the time. It is true that when the sit-in was in progress, there was no explicit demand for the uplifting of the LSC members' suspension, but the frequently expressed demand by the workers underground in a number of the shafts to be addressed by their leaders or at least by Mabuyakhulu, was obviously an indirect way of seeking to re-affirm the LSC members' status as the workers chosen representatives, even though they were on suspension as employees.

[459] The proximity of the strike to the suspensions and the understandable belief amongst workers that at a critical juncture in the wage gap deliberations, they had been deprived of the benefit of representatives with an intimate knowledge thereof, in my view was a critical factor in the decision to embark on industrial action and was probably a major cause of the strike, if not the main one. Sasol may have been within its rights to

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suspend most of the LSC members, but it difficult to see how it could not have appreciated that its undertaking to continue sitting with the wage gap working committee who were all suspended would not have sounded hollow and insincere in the circumstances.

[460] It is true that Mabuyakhulu's suspension had much less justification than that of other LSC members, given that he had not played any part in initiating the marches, though he was present at the afternoon march, but there was no case made out that it would have made much difference if all the LSC members had been suspended except for him.

-The failure of Sasol management to receive the memorandum from the marchers on 19 January.

[461] On 16 January, after management received the notice of the intended march from the shop stewards and the dispute declaration drafted by Mabuyakhulu, Sasol responded with a letter to the Evander branch of UPUSA. In the letter Sasol agreed to arrange a special meeting in terms of clause 8.3.4 of the recognition agreement to deal with the dispute, and proposed a meeting at 08:00 on 19 January "to address the issues of concern", whilst also warning the union that the proposed marches scheduled by the LSC for 10:00 and 17:00 that day were in breach of clause 13.1 of the recognition agreement. Mabuyakhulu was sent a copy of the letter and it was Sasol's failure to respond directly to him which resulted in his dismissive response to the proposed meeting at 08:00.

[462] Strictly speaking, Sasol was following the prescripts of the recognition agreement by formally notifying the union on these issues, but it does not explain why it did not also address the letter directly to the LSC or Mabuyakhulu as well. After all, the LSC had sent the notice of the march and it was Mabuyakhulu who had penned the dispute letter. It is difficult to understand how Strauss could not have appreciated the potential this had to appear as a slight to the LSC and Mabuyakhulu and to aggravate relations between the LSC and Sasol. That should have been obvious, given that the LSC was the primary *de facto* mouthpiece of UPUSA members and that Sasol had also expressly acknowledged it would deal with the LSC and had been doing so, while maintaining its obligations

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towards the union itself under the recognition agreement. This peculiar re-orientation of communications with UPUSA leadership at such a critical juncture was to recur in the coming days.

[463] Tshikovi's undisputed evidence was that when the first march took place in the morning of 19 January, he advised Lemaoana no one from management would receive the march, but that if they dispersed a meeting with the shop stewards would be arranged for the afternoon. This was done, and the meeting was duly convened, with Mabuyakhulu present. This was the first formal meeting with management he attended in January 2009. However, the meeting could not proceed because the LSC members left the meeting when the Sasol representatives refused to proceed in the absence of Strauss, as demanded by the LSC members. Mabuyakhulu said he had asked for a caucus with the LSC members before the meeting was abandoned but this was refused by Mkhize. However, this was never put to Strauss during his cross-examination and was only mentioned for the first time when Mabuyakhulu testified.

[464] Strauss agreed that, at the previous meeting on 15 January, the shop stewards had said that they wanted to speak to senior management about the issues raised about the wage gap, and such a request had never been refused. However, the meeting on 19 January had been agreed to with the LSC members and a Strauss was then unaware that there was an objection to his participation going forward. It must be remembered that, at this stage, the memorandum had not been presented to management. There was no evidence to suggest that the issue of his attendance or participation had been ventilated with Sasol as a specific problem prior to the meeting. Strauss also testified that no reason for his exclusion from the meeting had been provided by the LSC at the meeting on 19 January. He was not challenged on this evidence.

[465] Both parties accused the other of standing up when the impasse was reached over Strauss's presence in the meeting, but whichever party did indicate that the meeting was over by so doing, the immediate cause of that was the refusal of the LSC to accept the presence of Strauss as a chosen representative of Sasol, which was the main reason the meeting

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collapsed. By insisting on Strauss's exclusion from the meeting, the LSC members were in effect attempting to impose one of the demands contained in the memorandum, prior to any discussion having taken place on that and the other issues in dispute. By so doing, an opportunity to address the grievances in the memorandum or the dispute which had been declared was torpedoed by the LSC itself.

[466] At this juncture, the question of whether or not Mkhize said that she would 'see' the shop stewards at the march in the afternoon as claimed by Mabuyakhulu, needs to be mentioned. Tshikovi did not remember her saying this and only recalled the LSC representatives standing up when she refused to 'excuse' Strauss from the meeting. Strauss denied that Mkhize ever made such a statement. There was also no evidence that she was present when the march arrived at Sasol's office that afternoon. Given that the company had previously warned that the marches would be in breach of the recognition agreement and that the management delegation was not prepared to meet with the LSC on terms dictated by LSC, it seems somewhat improbable that Mkhize would nevertheless have indicated that she would 'see' the representatives at the march, as if she would be present to receive them.

[467] The undisputed evidence of Tshikovi was that, when the morning march arrived at the company offices, Lemaoana told him they had come to present a memorandum to management. He responded that there was nobody to receive the marchers and that is when the meeting with the LSC at 14h30 was arranged. It was never put to Tshikovi that he received the memorandum then or later in the afternoon. The failure to receive the memorandum was another factor which the applicants' witnesses mentioned as motivating workers to go on strike. The context in which the memorandum was not received, namely that the march had not been authorised and that an opportunity to present the memorandum in the meeting the same day had been scuppered by the demand that Strauss leave the meeting, does not appear to have been reported to workers when they were informed that management would not accept it. Presented in stark terms as a simple refusal to accept a memorandum and stripped of any details about the context in which that happened, and without

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knowing that management had proposed and agreed to meet with the LSC to discuss matters, it is not surprising that UPUSA members might have got the impression that management did not want to engage with their representatives. Add this to the improbability that the suspended shop stewards would be able to continue to represent them in wage gap negotiations in the near term, the impetus for a demonstration of power to compel Sasol to engage with the UPUSA membership and their concerns would have naturally grown amongst the workers. It is difficult to see how ordinary employees could have had any confidence that channels of communication with Sasol remained open.

[468] In any event, I am satisfied that the news that Sasol would not accept the memorandum after workers had endorsed the proposal by the LSC to do so, was another significant factor in precipitating the strike.

-Information obtained from the January salary payslips

[469] The applicants had claimed that the strike was also caused by the realization by workers that they were not going to receive the wage gap monies they expected in their January remuneration. Leaving aside the question whether expectations of a significant increase were justified or existed, which has been discussed above, the issue is whether they probably were aware of what they would receive in their January remuneration when the decision was taken at the meeting on 21 January to embarked on a sit-in.

[470] Tshikovhi had indicated that payslips would have been available two days before payday and agreed that they would have received them between the 20th and 21st of January. However, Venter's evidence was that payslips would only be distributed to the mines on the 21st of the month and would be issued to individual employees between then and the 23rd of the month. Morodi indicated that the last payroll run would be done on or about the 19th of the month and employees would have access to their payslips around the 21st of the month. Mabuyakhulu's own evidence that there would be sufficient time to review the Finance department's expected proposal on collapsed wage bands, provided this could be done on 19 and

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20 January because that would still be in time for the final payroll, is also more in keeping with a payslip distribution date no earlier than 21 January.

[471] Ketsekile indicated that, at the meeting on 18 January, workers who had access to Sasol's computer systems had circulated information that there would be no additional money in the workers' January payslips, but his evidence about this was vague and was not mentioned by any of the other witnesses. Makoko claimed to have realized that he was not going to get the money he expected after he saw his payslip but did not mention this as the source of his information in his statement made in his disciplinary inquiry where he had claimed the information was received from the union leadership. The majority of the applicants' witnesses seem to have attributed the source of their knowledge either to the absence of any change in the bonus payslip and, or alternatively, to what they were advised by shop stewards.

[472] It is impossible to gauge from the evidence the extent to which the January payslips had reached workers hands by 21 January, but it seems unlikely that any were issued *before* that date. Given that the evidence suggests workers were already informed at the meeting on 18 January that they were not going to get the increase as they were expecting, it is more likely that this was the main source of information about the implementation of the monetary component of the wage gap adjustments. In my view, the January payslips are unlikely to have played any significant role in causing workers to decide to go on strike at the meeting on 21 January.

- *Conclusion*

[473] In light of the above, the main reason for the strike was probably the news of the suspension of the LSC members in the context of the discontent over the progress in implementing the wage gap agreement and a belief that they would not receive all the significant financial benefits that they supposed would flow from it in January 2009. Coupled with this was an impression amongst the workers that management was not interested in hearing workers' grievances because Sasol would not accept a memorandum containing them and also being unaware that management

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was in fact willing to meet and talk with the shop stewards on the day the marches took place. These reasons are also broadly consistent with the issues which the applicant's witnesses claimed were discussed at the mass meeting on 21 January. This conclusion is reinforced by the way workers responded to management during the sit-in. A recurrent theme in the demands expressed by workers underground was either to be allowed to establish communication with the suspended leaders, in particular Mabuyakhulu, or for senior management to come and engage with them directly about wage gap issues and the suspensions. None of those demands articulated anything specifically relating to non-payment of an accumulative 0.5 % service increment, though there was talk of the wage gap moneys not being paid.

[474] However, I am not satisfied that the fact that workers had high expectations of increases in remuneration can be attributed to Sasol. Even if delays in finalizing every aspect of the wage gap agreement by January 2009 was partly or mainly Sasol's fault, which is not entirely clear, it is apparent that the main source of disappointment was not the delay as such but a belief that the financial benefits of moving to MPS conditions would be much greater than they actually were. There is good reason to believe that even if every other aspect of the wage gap agreement implementation had been possible to implement in January, the misinformed belief that the financial benefits of the transition would be much greater, would have still caused considerable discontent. As mentioned, the suspension of LSC members pending inquiries for initiating unauthorized marches was not unlawful, but given the manifestly more limited involvement of Mabuyakhulu in the marches, his suspension at a time of rising tension was ill-judged. Nevertheless, even if he alone among the LSC members had not been suspended, the suspension of the rest of them would in all likelihood still have given impetus to the decision to sit-in.

[475] As far as management's refusal to accept the memorandum of the marchers is concerned it was not illegitimate to refuse to receive the memorandum when it had made it clear that the marches were not authorized and Sasol nonetheless acted reasonably in trying to convene a meeting where those issues that prompted the marches could have been

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discussed. At best, it was inept of Sasol to communicate directly in correspondence with the UPUSA officials, which was at odds with the previously accepted channel of communication, but this was not advanced as a reason why workers embarked on the sit-in, so cannot be considered a contributory factor though this change in communication channels takes on more significance when considering steps taken by Sasol to try and end the strike once it had started.

Steps taken to comply with the dispute procedures of the LRA prior to the strike and after the decision was made to strike.

[476] The only steps taken by the UPUSA leadership employed by Sasol was the declaration of a dispute and their attempt to submit a memorandum, albeit in the course of an unauthorized march. As mentioned above, the meeting with management on the day of the marches provided an opportunity to debate issues of concern to the workers. Those discussions could have embraced both the issues in the memorandum and issues in the dispute declaration, even though management had also undertaken to convene a special meeting for the discussion of the dispute. However, that opportunity was lost because of the LSC members' cavalier insistence on Strauss being excluded from the meeting, which had been convened on Sasol's initiative.

[477] Despite having declared the dispute, there was no attempt to follow through the procedure provided in the recognition agreement. Thus, no attempt was made to set a date for the special meeting which Sasol had undertaken to hold despite it being made clear it was willing to do so. In so far as the workers intended to strike, no attempt was made to refer the dispute to mediation as required by the recognition agreement, nor was there any attempt to invoke the conciliation machinery of the LRA. Obviously, there was also no explicit prior warning given to management of the impending action. Following the meeting on 21 January no clear demand was conveyed before the strike commenced that might have led to an engagement that might have averted it.

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[478] It must also be noted that the strike was not an immediate and spontaneous response even when the LSC members were suspended. A mass meeting was held a day after the suspensions. A clear plan of action was decided upon in advance and was put into action simultaneously and consistently across all the affected shafts.

[479] In the main, the tenor of the evidence of the applicants' witnesses about what transpired at the mass meeting on 21 January was that the meeting was conducted by the ordinary members themselves with no input from any of the LSC members or even ordinary shop stewards, if indeed they were even present. That none of the leadership was present nor made any input is very difficult to accept as plausible. Given that one of the biggest concerns of the workers was that the leaders whom they trusted would no longer be able to represent them in discussions with management and given their confidence and faith in that leadership, in particular that of Mabuyakhulu, it hard to believe that the meeting would not have wanted to hear and obtain guidance from those very leaders on what to do about the challenges facing them. It was suggested by one witness that the LSC members could not speak at the meeting because they no longer had a 'voice' following their suspensions, but that explanation is irreconcilable with the fact that the workers clearly still recognized them as their legitimate leaders, and that the strike, directly or indirectly, sought to persuade Sasol to accept the continued legitimacy of the LSC members as the representatives of UPUSA members.

[480] Whatever transpired at the meeting, there was also no evidence that the shop steward leadership of UPUSA did anything to dissuade members from embarking on industrial action prior to the dispute procedure being exhausted, or alternatively, to persuade them to follow the appropriate dispute resolution mechanisms for different elements of the dispute.

[481] Prior to the commencement of the strike, Sasol did make some efforts to warn workers that unprotected strike action could result in disciplinary action. Firstly, on 20 January, following the suspension of the LSC members a circular was issued not only indicating that serious disciplinary action was going to be taken against them, but also warning that other

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workers who participated in further unprotected industrial action would also be subject to disciplinary measures. However, how or when this was supposedly communicated to all the applicants is unclear. Neither Ketsikile nor Matwa admitted knowledge of the circular.

[482] Further, there was evidence that during the course of the morning of 21 January there had been a communication from the HR department to the mines to warn workers not to participate in any further unprotected industrial action following the two marches and advising that disciplinary action was being taken in relation to the marches. This appears to have been patchily conveyed as discussed below.

[483] There was evidence that the night shifts of 21 January at Bosjesspruit mine – Irenedale shaft and both Middelbult West and Main shafts (where the night shifts were both production shifts) were warned prior to starting work not to participate in a sit-in. At Twistdraai, for reasons which were not explained, the night-shift of 21 January never participated in the sit-in and surfaced as usual the next morning. There was evidence also that the morning-shift at Twistdraai Central shaft was warned not to participate in a sit-in. The evidence of Enoch Zwane that Moeketsi merely 'mentioned' the sit-tin to the morning-shift at Twistdraai Central shaft, without warning workers not to join it is somewhat improbable, and the variations in his version of this suggested he was being evasive on the issue. Hokwana likewise agreed the morning-shift at Twistdraai East was advised about the sit-in before the commencement of the shift, but denied hearing that participating in it would be unlawful. Again it seems inherently improbable management would merely have publicised the sit-in without issuing an accompanying warning not to become involved in it. In this regard, I am not persuaded that management personnel who did address workers before they started would merely have mentioned the existence of the sit-in as if it was just an item of passing interest to the workers they were addressing. The most likely purpose of raising the sit-in would have been to dissuade them from following suit.

[484] At four shafts there was no evidence of night-shift workers having been addressed prior to the commencement of their shift and where they also

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did not surface at the end of their shift, namely Middelbult Mine – iThembalethu shaft and the three shafts at Brandspruit mine. Consequently, with those four exceptions and the anomalous case of Twistdraai where the night-shift did not participate in the sit-in, I am satisfied some attempts were made to warn workers not to participate in a sit-in before they commenced work and that Sasol did not simply wait for the industrial action to unfold.

Steps taken by the parties to end the strike while it was in progress

-Ultimatums and interaction with participants in sit-in

[485] The first point that needs to be made is that the issuing of ultimatums was directed centrally from the HR department of Sasol, in the sense that draft ultimatums were sent at regular intervals to the different mines. The number and regularity with which ultimatums were actually served was ultimately dependent on mine management, the response of participants in the sit-in to attempts to serve ultimatums and the particular circumstances prevailing at each shaft. The detailed evidence relating to ultimatums and pre-strike warnings was dealt above in the discussion of evidence about events at each shaft.

[486] At four shafts (Middelbult Mine – iThembalethu shaft, Middelbult Mine – West shaft, Brandspruit Mine – Number 2 shaft and Bosjesspruit Mine – Irenedale shaft) an attempt was made in the morning of 22 January, to get night-shift workers to surface by advising them that it was unlawful to stay underground after their shift ended and if they wanted to raise issues with management that could be done after they surfaced.

[487] On 22 January, attempts were made to serve two ultimatums with greater or lesser degrees of success at six shafts (Middelbult Mine – iThembalethu shaft, Middelbult Mine – West shaft, Brandspruit Mine – Number 2 shaft, Brandspruit Mine – Number 3E shaft and Twistdraai Mine – Central shaft). At three other shafts (Bosjesspruit Mine – Irenedale shaft, Bosjesspruit Mine – Main shaft and Twistdraai Mine – East shaft) at least one attempt was made to serve an ultimatum on 22 January. Except possibly at Twistdraai Central and East shafts all attempts to serve ultimatums on 22

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January would have been made before the morning-shift stopped work and joined the sit-in.

[488] On 23 January attempts were made to serve a single ultimatum at Brandspruit Mine – Main shaft, Brandspruit Mine – Number 2 shaft, Brandspruit Mine – Number 3E shaft and Bosjesspruit Mine – Irenedale shaft, again with varying success. Thus, by 23 January, also taking into account the pre-emptive steps adopted at both Twistdraai shafts, even if morning-shift workers at six shafts had been told nothing by night-shift workers and had seen no copies of written ultimatums, in all probability they would have been aware of an attempt by management to serve an ultimatum on them.

[489] At five shafts on three mines (Middelbult Mine – iThembalethu shaft (service shaft), Middelbult Mine – West shaft, Brandspruit Mine – Number 2 shaft, Brandspruit Mine – Number 3E shaft and Twistdraai Mine – East shaft) where there was evidence of workers' response to management addressing them, it was reported that workers either would not engage with management or demanded to speak to senior management or LSC members, or alternatively they would not leave until either senior management or the shop stewards came and explained why the wage gap money had not been paid or, in some cases, why the LSC members had been suspended. These reported responses were broadly in keeping with the main objects of the sit-in as discussed at the meeting on 21 January, namely to make senior management engage with them about the wage gap and the LSC suspension. A corollary of wanting to communicate with senior Sasol management was that the workers would not engage in discussion with local mine management.

[490] Another related aspect of the conduct of strikers in responding to the ultimatums must be highlighted. Even where workers did not attempt to disrupt the issuing of an ultimatum they would not accept any written copies. In other cases, the conduct of workers by singing and dancing rendered attempts to read ultimatums futile and, in some instances, the conduct of strikers in the vicinity of the cage when it descended made it potentially hazardous to exit the cage.

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[491] To understand what role if any the ultimatums might have played, it is also instructive to consider what brought the strike to an end at the different shafts. At six shafts workers only surfaced after being advised to do so by one of the three LSC members making up the UPUSA wage gap project team delegates. At Middelbult Mine – iThembalethu shaft (service shaft), Middelbult Mine – Main shaft, Bosjesspruit Mine – Main shaft and Brandspruit Mine – Number 3E shaft workers surfaced after ordinary shop stewards were made aware of the interdict. What this shows is that, on the whole, the only time workers in the sit-in heeded the call to surface was when they got the call from their own leadership to do so and that call only came after the interdict was obtained. Nevertheless, once news of the interdict was conveyed by recognised leaders the strike ended quite quickly.

[492] It is probable the shop steward leadership did motivate the call to surface on the basis of the court interdict. It is also reasonable to infer that workers waited for their shop stewards' word, and in the main, that of LSC members before they were prepared to so surface. It is also noteworthy that, unlike other unprotected strikes where the return to normality is the result of communications and undertakings between union representatives and the employer, the UPUSA Sasol leadership and Sasol did not negotiate an end to the strike. Only at Twistdraai – Central shaft did management's intervention to persuade workers to surface also play a role. Even in that case workers' still sought Mofokeng's endorsement before they would do so. In none of the shafts was the decision to surface prompted by receipt of an ultimatum which was about to expire.

[493] In any event, the applicants' argument relating to the ultimatums as an issue affecting the substantive fairness of the dismissals focussed rather on the failure of management to communicate with the LSC members and, in particular Mabuyakhulu. Further, a recurrent theme in much of the cross-examination of Sasol's management witnesses who interacted with the strikers was questioning Sasol's failure to engage with them about the reasons for the sit-in rather than fixating on getting them to surface or issuing them with ultimatums. It is only in relation to procedural fairness

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that the applicants raise the fact that certain strikers were never served with ultimatums.

[494] It is true that the same number of ultimatums were not served on all employees, but it would be wrong to elevate to an inviolable principle that a certain number of ultimatums must be issued before an employer is entitled to consider dismissing employees. In fact, as the requirement of providing an opportunity to unprotected strikers to be heard before dismissing them has been strengthened by the courts, the significance of a final ultimatum being issued arguably does not assume the same importance it did when it was accepted that the final ultimatum could also convey the message that if it was not complied with dismissal would follow automatically. That is not to say the issuing of ultimatums might not still be relevant to the issue of procedural fairness.

-SMS messages sent by Sasol

[495] A bundle of proof of SMS transmissions to employees, whose cell phone numbers Sasol had on record, was submitted in evidence. The fact that such SMSs were transmitted was not disputed, though individual applicants claim not to have received them. The first SMS urging workers not to embark on a sit-in or go slow and warning that such conduct would be regarded as unprotected industrial action leading to serious disciplinary action was sent at 18:02 on 22 January and at 02:19 the following morning. By this stage, any of the night-shift workers of 21 January and morning-shift workers of 22 January who had not surfaced would already have been underground and would not have received these. Nor would two other SMS messages sent on the same day at 18:33 and 19:03 about UPUSA's head office stance on the matter have reached them.

-Efforts made by Sasol to communicate with the union and shop floor representatives

[496] Sasol was bound by its recognition agreement with UPUSA, which formally recognized the union as the collective bargaining representative

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of its WP members. The agreement also recognized the right of elected and accredited “union representatives” elected by UPUSA members to represent members on behalf of the union and to negotiate and consult with the company in terms of the agreement. In the case of the dismissal of the LSC members, one of the criticisms raised in cross-examination of Sasol witnesses was that in attempting to address the LSC members’ involvement in organizing the unauthorized marches, the company had resorted directly to disciplinary action instead of invoking clause 7.9 of the recognition agreement. That provision stipulated that if Sasol had any grievances regarding “… the manner in which an accredited union representative is conducting himself” the matter would be dealt with by a full-time official of the union and a representative of the company. Under normal circumstances where the relationship between shop stewards and union officials is intact such criticism might be well deserved, but in this case there was no relationship with the local Evander organiser or the general secretary and had not been for some time. Little purpose would have been served in invoking that provision in this instance.

[497] In consequence of suspending the entire LSC, including Mabuyakhulu, pending disciplinary action, the only remaining union representatives on 20 January were the ordinary shop stewards. On the evidence, it is fair to say that these shop stewards did not seem to play any company wide role, unlike the LSC members. In any event, for the most part they were ignored by management as a channel of communication in addressing the strike action, apart from Middelbult where they were used to communicate ultimatums, but not as representatives to engage with on the causes of the strike.

[498] The rift between the Sasol-based leadership of UPUSA and the UPUSA Evander branch and Johannesburg office, as represented by the officials Lepheane and Luthuli, could hardly have been deeper at the time the strike took place. Since the contested National Congress in September 2008 and Sasol’s letter to UPUSA in early October the same year, Sasol had committed itself to working with the local executive leadership until the internal leadership issues had been resolved. In fact, in relation to the wage gap project it had already been dealing with the local leadership for

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a long time before that. Since the congress, Luthuli's status as general secretary of UPUSA was a contested issue.

[499] By the time the strike began, Sasol management knew there had been rumblings about the implementation of the wage gap project and the contents of the memorandum and the dispute declaration, all of which pointed to the wage gap implementation as a source of discontent. Sasol had been dealing exclusively with the LSC on the wage gap. Nevertheless, Sasol's HR manager, Mkhize decided to phone and write to Luthuli to assist in resolving the "emergency" presented by the strike. In a second letter she sent mid-morning on 22 January, in anticipation of meeting with the officials at 15:00, Mkhize obliquely recognized the importance of Mabuyakhulu's role in the situation in the following cryptic passage, alluded to previously in the judgment:

> "In preparation for the meeting we would appreciate it if you could speak to the local Union coordinator Victor Mabuyakhulu, and give us feedback on how you intend to address the situation from a union perspective."

The letter in which this appears was written after 10:24, which is when the first letter was sent to UPUSA. By that stage it is reasonable to assume that any feedback about demands by workers at Middelbult Mine, Twistraai - East shaft and Bosjesspruit – Main shaft to be addressed by LSC members ought to have filtered back to the central ER and HR departments. Strauss could only recall mine managers reporting that workers would not speak to them at all. It seems somewhat odd that they would only have mentioned that and omitted to mention anything else, which workers had conveyed to them.

[500] In any event, though Strauss was at a loss to explain why Mkhize had suggested Mabuyakhulu be spoken to by UPUSA and Mkhize never gave evidence to explain herself, it must have been obvious to Sasol HR and ER personnel that if any UPUSA leader might be able to influence the situation it was him and, perhaps to a lesser extent, the other LSC members. The passage in Mkhize's letter can only be interpreted as a convoluted way of recognizing his importance in any solution, without attempting to deal with him directly. Nonetheless, given the atrocious

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relationship between the officials and the shop steward leadership at Sasol, it should have been equally obvious that trying to get Mabuyakhulu's co-operation using Luthuli as an intermediary would have been a doomed exercise. In the end, no reasonable explanation was provided why Sasol did not attempt to communicate with Mabuyakhulu or the other LSC members, notwithstanding that, formally speaking, their suspension was only from work. In passing, it appears that their status as union office bearers would not have been altered by their suspension. It ought to have been obvious that the persons Sasol really needed to communicate with if it was looking for assistance to resolve the situation were the LSC members.

[501] I accept Sasol would have felt obliged to also communicate with the ostensible general secretary of UPUSA, because the recognition agreement was between UPUSA and Sasol, but from an industrial relations perspective, it was obviously a complete non-starter as a way of resolving the strike, given that workers only recognised the Sasol based UPUSA leaders and that Sasol itself recognised them both formally and practically as the UPUSA members' representatives. In the circumstances, Sasol's insistence on only communicating directly with the officials whom it knew to be thoroughly discredited, is astonishing and it could not genuinely have done that as a *bona fide* attempt to end the strike. Accordingly, Mkhize's communications with UPUSA cannot be taken as a serious attempt to resolve the situation, but rather as a way of formally satisfying the requirement of communicating with the union.

[502] As with many other considerations that have to be assessed in weighing up the fairness of dismissals in an unprotected strike, it cannot be said with any certainty that if Sasol had acted differently and asked the LSC members to intervene on 22 January to try and solve the strike, that the strike would have ended that day, without management agreeing to bargain with the strikers. Nonetheless, the court must consider in evaluating the fairness of the dismissals whether parties omitted to take obvious steps which should have been pursued in an attempt to end the disruption once the strike started.

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[503] It is also true that the LSC members took no initiative to intervene until the interdict was handed down, though there was evidence that some telephonic communication between them and the workers underground did occur. On the other hand, one must also take account of the fact that they had effectively been excluded from the workplace by their suspension and there was certainly a perception amongst workers, which was not unreasonable, that the suspension applied to their role as representatives too at least as far as Sasol was concerned. Management's unwillingness to engage with them directly during the strike suggests Sasol indeed have held that view, though this was never articulated by any of Sasol's witnesses as a reason for not dealing with the LSC members over the strike.

[504] Unsurprisingly, the officials in Evander and Johannesburg, kept their distance from the dispute, while formally condemning the strike action. There was no evidence they took any steps to contact any of the union leadership at Sasol and confined themselves to communicating with the company. That said, it was obvious it could never have played a constructive role in resolving the strike, given the rift between the officials in question and the union's membership and local leadership at Sasol.

The timing and duration of the strike and its economic impact on the employer

[505] It is well established that the seriousness of unprotected strike action is not diminished merely because the strike is of short duration.[18] For example, in principle, there is a difference between a short strike which occurred spontaneously in response to an act of provocation by an employer and a strike of the same duration which was planned in advance.

[506] What was somewhat unusual about this industrial action was that the action consisted of not surfacing *after* workers had completed their shift. Nevertheless, in not surfacing, quite apart from defying standard procedures, they knew they would precipitate an untenable situation for

[18] *SA Commercial Catering & Allied Workers Union on behalf of Mokebe & others v Pick 'n Pay Retailers* (2018) 39 ILJ 201 (LAC) at 213, par [36]

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Sasol, by remaining underground in an environment in which safety risks are constantly sought to be minimized, even though they had not withheld their labour. If they did not think management would be very concerned by their failure to surface, they would not have used this tactic to gain management's attention.

[507] Once it became evident that every successive shift which reported for duty was unlikely to surface, management knew that if it allowed the afternoon shift on 22 January to go underground, at the end of that shift the number of persons simultaneously underground would have been somewhere between two and three times the normal number of personnel underground (taking account of the fact that one shift in three would be a smaller maintenance shift). Consequently, the number of people exposed to risk in the event of a health and safety incident was more than double the number who would normally have been so exposed.

[508] The only responsible measure Sasol could take at that stage was to forfeit the production on the afternoon shift. Further, because the night-shift had never surfaced and would have been underground for more than 24 hours by the time the night-shift of 22 January ended, it would have been reckless of Sasol not to take measures to prevent that shift undertaking further production, with the risks attendant on such workers resuming work without a proper rest interval. However, merely because the decision not to proceed with the subsequent shifts was taken by management the loss of those shifts was an unavoidable consequence of workers remaining underground and therefore a consequence of their industrial action. In this case, the period during which no production effectively took place began at the end of the morning-shift on 22 January at approximately 17:00 and could not have resumed for at least another day.

[509] Schneider estimated that the losses suffered by Sasol in consequence of the strike amounted to approximately R 186 million. It is true that there is a possibility that if Sasol had sought the intervention of LSC members before resorting to this court to obtain an interdict that the duration of the strike and consequently the losses suffered as a result might have been

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reduced. However, it cannot be said that the strike began *because* of reckless or provocative conduct by Sasol.

[510] Nevertheless, leaving aside whether Sasol might have mitigated its loss by dealing with the UPUSA leadership at Sasol, I am not persuaded that the sum of R 186 million can be entirely attributed to the strike, as it was based also on a comparison of the entire months of January and February 2009 compared to other months of the year. Schneider explained that it was typical that prior to and after a strike that production was below normal. However, there was no evidence that before the strike management was complaining about any industrial action underground. Further, without comparative data of those two months in other years it is difficult to know if production in January and February is typically similar to other months of the year. In addition, it must be noted that the suspension of all the strikers would inevitably have been a major contributory factor to low production in the subsequent weeks, which cannot be attributed to the strike itself but to the disciplinary steps taken by Sasol thereafter. Be that as it may, I accept that the loss of at least a full day's output over eleven shafts and need to source alternative sources of coal was still a very significant economic imposition on Sasol despite the duration of the industrial action.

[511] In the sense that the strike was not preceded by any notice of commencement of the strike, nor by any conciliation process, inevitably that would have affected forward planning, for example in relation sourcing alternative coal supplies. It stands to reason that, in the circumstances, Sasol had to make these arrangements on short notice and accordingly the timing of the strike was an aggravating factor. Had the strike been protected Sasol would have had a minimum of two days to prepare for it and also would have been starting to prepare for such an eventuality once conciliation had failed.

The impact of the strike on safety

[512] In summary, a major concern of Sasol during the sit-in was that the sit-in compromised safety in the mines and that the simultaneous presence underground of the employees of different shifts exposed more workers to

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the inherent risks of underground coal mining operation than would normally be the case when each shift clears the shaft on completion. While the parties are largely in agreement about the major hazards of underground coal mining at Sasol's mines, the applicants contend that the sit-in did not have grave safety implications as contended for by Sasol.

[513] A significant amount of evidence was led by both parties about the various safety procedures and protocols applicable in Sasol's coal mines. Those have been dealt with above in setting out the evidence. Certain features of that evidence stand out:

513.1 The risk posed by methane gas ignition, which could lead to an explosion resulting in fatalities, is a serious hazard in coal mining.

513.2 The risk is not a hypothetical one, as evidenced by fatal explosions at Middelbult in 1987 and 1993 and the fact that there had been three methane ignitions per year from 2009 to 2013.

513.3 To minimize that risk, a number of safety measures had been adopted by Sasol. These are designed to: detect the presence of dangerous concentrations of methane of 1.4 % and above; reduce the concentration of methane using large-scale ventilation systems and to minimize the presence of coal dust, which magnifies and propagates the explosion which a methane ignition can trigger. In 1993 some of the personnel killed in the explosion were working in other areas of the mine and not in the production section where it originated.

513.4 Although there is a degree of remote monitoring of methane levels using Tri Flow sensors situated in the mine, those meters measure the volume and quality of air in the return airway in the last through road of the mine but not in the different production phases of the mine. To deal with this limitation, at the start of a shift a supervisor and a miner on the shift go to each phase or branch of the ventilation system and test for methane with handheld devices.

513.5 Tri Flow meters will also not detect if a particular ventilation fan stops working, which is critical in preventing the build-up of methane concentrations, nor will it detect a build-up of methane at the coal

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face of a production phase. The methane ignitions mentioned above were contained within a smaller area because the ventilation fans reduced the methane concentration. Further, if a Tri Flow meter at the control centre turns red, a manual inspection is still necessary at the physical location of that meter in the mine.

513.6 Production shifts require more regular monitoring (at three hourly intervals) at each coal face where methane is extruded as the coal is cut and extracted, whereas in preparation shifts tests are done at the beginning and end of each shift.

513.7 Another risk in coal mining is the prospect of a rock fall caused by an unsupported roof, which can also cause a methane explosion. In a situation where there is no mining activity or supervision of mined areas for a period of more than 24 hours there is an increased likelihood of a roof being left unsupported for 48 hours. Although there were some disputes about whether a roof would be unsupported, even accepting Gumede's evidence that roof support work is done by the preparation shift, if there is no preparation shift after a production shift, the roof will remain unsupported for longer than normal. Jordaan's evidence that at any one time in the mine there would be at least one and possibly two mining phases with unsupported roofs was not disputed. Gumede could also not say if roof support work had been done in anticipation of the sit-in. It is reasonable to conclude therefore that there probably were certain unsupported areas of the mines during the sit-in.

513.8 A further risk related to the risk of flooding if the seals on pumps, which pump water out of the mine, are not checked which is normally done on a daily basis.

513.9 Actual safety conditions during the sit-in could not be properly monitored at all the shafts. At Bosjesspruit – Irenedale shaft and Brandspruit no 2 shaft, safety teams were unable to check if there was a build-up in methane levels owing to the sit-in. At Middelbult West shaft the fire patrol team that was sent down was not allowed to surface by the strikers and at Twistdraai Central and East shafts

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safety patrols inspecting production areas were sent down using the West shaft because of concerns about their safety. It was also not possible at all shafts for management to determine if all the workers underground were in fact gathered at the shaft bottom. At Middelbult main shaft, none of the night-shift workers could be found when supervisors descended to instruct them to leave, which implies they were not in the comparatively safer environment of the shaft bottom.

513.10 It was common cause that the shaft bottom area is the safest area underground in a coal mine, relatively speaking. Reasons for this are that the ventilation there is good because the main air ventilation supply enters the mine by means of a fan at shaft bottom. Also, the mine roof is sprayed with a flame retardant and a supportive coating which enhances fire safety and minimizes the risk of a rockfall in that area. The shaft bottom also does not qualify as a hazardous area in terms of the Mine Health And Safety Act.[19] However, despite the reduced degree of risks originating in that area, workers gathered there still remained exposed to potential risk, such as might be caused by a methane explosion.

Breach of statutory MHSA and BCEA time limits

[514] At the end of a shift, it is standard practice to conduct a shaft clearance exercise to ensure that all the employees who went underground on that shift have been accounted for. This is done with reference to the lamp room records.

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[19] MHSA Regulation 2(g) of General Notice 160 in Government Gazette 13002, dated 1 February 1991 contains the following provision:

(11A) "hazardous area" means –

(i) in respect of a coal-mine –

(aa) a return airway; or

(bb) an area within 180 metres of any working face; or

(ii) any area in or at a mine or at a works in addition to an area referred to in regulation 1 (11A) (i)

where there may be a risk of igniting gas, dust, vapour or any other explosive material;

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[515] Sasol's witnesses emphasized that workers could not stay underground for longer than 12 hours except in the case of certain statutory exclusions provided for in Regulation 4.15 of the Minerals Act, which permit workers to work more than one shift in a 24 hours period owing to work arising from an accident or other emergency or to affect repairs to equipment that cannot be delayed without causing a serious interruption of a mine's operation.[20]

[516] Jordaan and Montgomery who testified on the standing operating procedures insisted that, barring such exceptions, a shift cannot extend beyond 12 hours even in the case of a so-called *zama-zama* or *Ilima* shift. Counter-examples were cited by Gumede and Tyokolo, though some of these could quite easily be classified as falling within the exceptional categories mentioned in the regulation, such as accidents or machine breakdowns. They also disputed Jordaan's claim that an *Ilima* shift never extended beyond 12 hours.

[517] Sasol also relied on the provisions of the BCEA. The provisions in question are section 10(1A), which prevents an employee working more than 12 hours a day including overtime, and section 15(1)(a), which requires an employer to give an employee a 12 hour rest interval between ending and starting work. Strictly speaking, these provisions found no direct application in the strike. Sasol's real argument in relation to the proposition that workers on the sit-in could have recommenced work when their next shift began, was that they had not in fact had a proper rest interval because they would not have slept and also would not eaten. That

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[20] Viz:

> 4.15 No employee shall work, or be caused or permitted to work, two or more shifts at any mine
> during any continuous period of 24 hours: Provided that this restriction shall not apply –
> (a) to work necessitated by accident or other emergency; or
> (b) to such repair work to equipment or such service as cannot be delayed without causing serious interruption to the operation of the mine; or
> (c) to a shiftworker when he changes over shift times or where the shiftworker for the succeeding shift fails to arrive and a replacement is not immediately available; or
> (d) in other cases of necessity permitted by the Principal Inspector of Mines and specified in writing to the manager of the mine.

(Regulation 4.15 added by Regulation 6 of Government Notice R305 in Government Gazette 3397, dated 1 March 1972) (Regulation 4.15 amended by Regulation 26(h) of Government Notice R3083 in Government Gazette 13684,dated 20 December 1991.

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was probably true and, in the interests of safety, militated against allowing such workers to resume their duties when their next shift was due to begin.

[518] I believe that Sasol's concerns about safety being compromised by the sit-in have considerable merit. Although there was no comprehensive evidence about each shaft and whether safety procedures were properly conducted, there clearly were at least three instances at different shafts where manual checks on safety were compromised. Moreover, it is difficult to gainsay the points made by Sasol that it could not be confident that all the workers underground were in fact gathered in the relative safety of the shaft bottom, or that regular safety checks were being conducted.

[519] That said, it is true that it seems for the most part that strikers were congregated around the cage in the relatively safer location of the shaft bottom of the various shafts. It is also true, fortunately, that none of the potential hazards inherent in coal mining operations manifested as actual hazards during the sit-in. Even so, it is a misconception of the importance of safety considerations to view the period of the sit-in with the benefit of hindsight. Management's first concern was to get workers to the surface primarily for safety reasons. Sasol as the employer has a statutory duty to operate its mines in such a way as to ensure, as far as reasonably practicable, that employees can perform their work without endangering their own health and safety or that of others.[21] Further, "(a)n employer is also obliged at common law to take reasonable care of the health and safety of employees by providing them with a reasonably safe system of work".[22]

[520] Under normal operating conditions only one shift would be underground at any one time, apart from a brief interval when shifts overlap at shift changes. Accordingly, the number of workers exposed to underground

[21] Section2(1)(b) of the Mine Health and Safety Act 29 of 1996.

[22] See *National Union of Mineworkers & others v Impala Platinum Ltd & another* (2017) 38 *ILJ* 1370 (LC) at 1373, par [10], cited with approval in *Association of Mineworkers & Construction Union & others v Northam Platinum Ltd* (2018) 39 *ILJ* 2692 (LC) at 2713, par [45]

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risks, at any one time would normally be limited to the shift on duty. However, by mid-morning on 22 January, all but one mine would have had two shifts underground simultaneously. Further, had management allowed the afternoon shift to go underground that number would have swelled even more. The net effect was that the number of persons exposed to the inherent risks of the operations at any one time was considerably magnified by the sit-in and would have been further increased if management had allowed the afternoon shift to go underground. Had any serious accident occurred, the number of persons exposed to risk of injury would have been far greater than normal. In the circumstances, Sasol would have been seriously derelict in its duties as an employer responsible for workplace safety, to have simply allowed two shifts of employees to remain underground and for a third shift to join them.

Conduct of strikers

[521] The conduct of most strikers concerning their heedless approach to management's attempts to serve ultimatums, or to accept management's proposals that they should first surface and then their grievances could be addressed has already been dealt with above.

[522] The issue that remains to be dealt with is the extent to which the strikers resorted to violence, threats of violence or other intimidating conduct during the strike. There were instances of violent conduct by strikers, but this was not a consistent feature of the strike at all shafts. It is also the case that certain individual applicants were also dismissed specifically for such conduct and not only because they participated in the strike.

[523] More common were instances of conduct of a more general ominous nature, where the extent of the threat posed varied in intensity according to the type of behaviour displayed. Thus, for instance, at Middelbult Mine – iThembalethu shaft, Zwane decided it would be unwise to exit the cage when he went down sometime after 16:00 on 22 January to try and persuade workers to surface, not because stones and objects were thrown at the cage, but because when they descended he heard workers saying they should not exit the cage. Similarly, at Middelbult West shaft, Duvenage became increasingly worried that levels of tension were

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increasing and found the stamping of roof bolts on the shaft floor by strikers intimidating.

[524] At other shafts such as Brandspruit Mine – Number 3E shaft, management also perceived an escalation in tension as the sit-in progressed. Thus, on the second day of the sit-in, they did not judge it safe to leave the cage but issued the ultimatum whilst keeping the outer mesh shaft door closed and, on ascending, heard objects being thrown at the cage.

[525] Although there was much controversy about the operation of the lift doors, I am satisfied on the evidence that it was probable that workers underground were able to manipulate the handle on the outer mesh shaft doors to the cage so that the cage would trip causing it to stop, until it could be overridden by a foreman on the surface. It would also appear that in some cages it was possible to see from the control panels inside the cage the cause of the fault, but in others that could only be determined from the control panels on the surface. What was not disputed is that the cages at certain mines had their ascent retarded due to frequent tripping of the safety mechanism. The most probable explanation for this occurring during the sit-in was that it was the result of interference with the safety mechanism. There was evidence that this occurred at Bosjesspruit Mine – Main shaft and at Bosjesspruit Mine – Irenedale shaft.

[526] At Irenedale shaft there was also evidence that stones were thrown at the cage before the inner door of the cage had closed. This evidence was disputed on the basis that there were no stones around the shaft bottom, but Montgomery insisted that there were because some of them fragmented and fell inside the cage after striking the outer mesh door. As in the case of Brandspruit no 2 shaft, some workers who phoned the surface saying they wanted to leave the mine were advised to leave via the incline shaft as personnel who had gone down earlier were reluctant to descend again. Two other workers were allowed to leave the mine owing to being on chronic medication and another to attend a funeral. It was evident from the language used about these individuals that they had needed permission from the strikers to do so, and it was only when senior

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management of the mine went underground to fetch them that they were allowed to leave.

[527] Henderson testified that on leaving Middelbult – West shaft at about 17:00 on 22 January, the black artisans in his team were prevented from surfacing with him. There was also hearsay evidence that artisans who attempted to exit at the incline shaft near Middelbult main shaft were prevented from doing so. Henderson's evidence of tussles to prevent workers from entering the cage who wanted to surface and strikers using implements such as roof bolts to try and prevent the cage doors from closing was not contradicted by any direct evidence to the contrary, apart from Matwa, who was present during one of these episodes, but said he was only focussed on a sick worker who was taken to the surface and was not aware of anybody else attempting to enter the cage. The events that the West shaft also had a knock-on effect because they led to management deciding not to send anyone down to serve further ultimatums on the afternoon of 22 January.

[528] At Brandspruit No 2 shaft, du Preez reported having sent the cage down to collect workers who had phoned the surface to say they were being held against their will, but the cage returned empty. Only salaried personnel such as shift bosses, foremen and the like surfaced. He also testified that he had advised workers who wanted to leave to rather do so by walking to the incline shaft. Gqadu did not dispute that some artisans had surfaced this way. Clearly, given that this entailed a walk of some kilometres, it is unlikely that they would have undertaken this if they could have easily left using the cage at the number 2 shaft as usual. Schuller also reported being manhandled and prevented from entering the cage. On the evidence, it is difficult to escape the conclusion that those who wanted to leave could not do so easily and that a degree of coercion was used to prevent people surfacing, despite Gqadu's general denials to the contrary.

[529] There was no evidence of generalized intimidating conduct at Brandspruit _ Main shaft or at Twistdraai – East shaft. At Twistdraai Mine – Central shaft, the only reported incident was that when an ultimatum was served later in the day on 22 January, workers shook the outer cage door, but

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there was no evidence of objects being thrown at the cage as claimed at some other shafts.

[530] In summary, at the majority of the shafts there was evidence of a degree of threatening behaviour, but this varied in levels of seriousness. In three shafts this resulted in some workers being unable to leave the mine in the normal way by using the cage. There was also evidence of interference with the cage safety mechanism at Bosjesspruit shafts and of objects being thrown at the cage at Bosjesspruit Mine – Irenedale shaft and Brandspruit 3E shaft. The most serious incidents of physical manhandling or result appeared to have occurred at Middelbult West shaft, but on the evidence which was led in the trial this was not characteristic of the general pattern of conduct at all shafts.

[531] For the most part, the hostility that was directed at mine management personnel took the form of drowning out the person attempting to deliver an ultimatum, by raising the level of singing and dancing. In some instances, the reaction seemed more ominous because workers were brandishing steel roof bolts. The attempts to sabotage the operation of the cages was also a form of threatening behaviour. The mere fact that there were no instances of actual assault on such occasions does not mean that the environment was not threatening to those who had descended in the cage.

Consistency in disciplinary sanctions for unprotected striking

[532] Two types of inconsistent disciplinary treatment were raised by the applicants, one being historical and the other contemporaneous.

- Contemporaneous consistency

[533] There was no evidence tendered by the applicants as to what transpired at Sasol Coal Supply (SCS), even though they had pleaded that workers at that facility had also participated in the sit-in. According to the information received by Morodi, at the end of their shift at 14:00, workers at SCS started chanting and went to the kitchen saying that they were going to wait for the managers to appear. However, the Manager of Engineering

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Services at SCS issued them with an ultimatum to disperse, which they did within approximately 30 minutes and boarded the buses at 14:45. They were also issued with warnings and their conduct was treated as a failure to comply with an instruction rather than industrial action.

[534] It was suggested to Morodi that their conduct was the same as the workers who had participated in the sit-in and accordingly the workers engaged in the sit-in should have been treated as leniently. Their treatment was also compared with the category three and four employees who had not participated in the sit-in but had refused to leave the premises when they reported for work for the afternoon shift.

[535] In respect of the comparison made with the workers who participated in the sit-in underground, an obvious distinguishing feature is that the SCS workers occupied the kitchen premises very briefly and dispersed shortly after being warned to do so. That conduct is hardly on a par with workers who turned a deaf ear to management's attempts to get them to surface for a day or more (depending on which shift they worked) and whose conduct disrupted normal operations and raised safety risks.

[536] In relation to the comparison with category 3 and 4 workers a similar, but not identical, distinction can be drawn. Whereas the SCS workers essentially responded to a single instruction to disperse and leave the premises, which they shortly after the instruction was issued, workers who remained on the surface of the various shafts having been instructed to leave remained for a prolonged period, some of them only leaving the following morning.

[537] That said, it is difficult to regard the conduct of the afternoon shift workers who did not disperse after reporting for work as being on a par with their colleagues engaged in the sit-in. It is almost certainly true this group of workers would have joined the sit-in after they completed their shift just as the previous shifts had done. It is also true that they probably refused to return home as a show of solidarity with the workers engaged in a sit-in underground. However, their conduct did not have the same disruptive consequences on the mining operations of Sasol as the sit-in by workers underground. At most, those who did not disperse and return home after

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being told to do so might justifiably have been issued with final warnings, but it is difficult to understand how they could have been dismissed for participating in the unprotected strike action.

-Historical consistency

[538] The other case of alleged inconsistent treatment concerned the comparison between the sanctions imposed on workers who had participated in a four-day unprotected strike in 2006. The strike was by UPUSA members and was related to a membership verification exercise which was underway at the time. According to Tshikovhi's statement, workers who participated in that strike were issued with final written warnings, or were dismissed if they had a final written warning for similar misconduct. The principal reason why Sasol distinguished those sanctions from the dismissals in this case was that the strike activity did not take place underground but was on the surface. Consequently, it was still possible for to send production teams underground and mine safety was not compromised. At least that is what Morodi testified. Tshikovi, on the other hand, believed that production had not taken place during the 2006 strike. Sasol also argued, by contrast, that the 2009 strike was marred by violence and intimidation and threatening behaviour towards management. Further, it was the result of a deliberate decision to strike taken at a meeting of UPUSA members and, as such, was considered and orchestrated action by those applicants who participated in it. There was no evidence led on the last two factors to compare the 2006 strike with the 2009 strike, though both factors obviously are part of the overall circumstances to be considered.

[539] Insofar as comparisons can be made in relation to the first two factors arising from the different sites of the two strikes those are not insignificant or trivial considerations. To the extent that the disparity in sanctions might not be justified, it something that will be considered below as the parity issue is a component of substantive fairness to be weighed with other factors.

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Summary of substantive fairness

[540] Without detracting from the more detailed reasoning above, the factors bearing on substantive fairness may be summarised below.

[541] Firstly, the workers in categories 3 to 5 did not participate in the sit-in, even if it had been their intention to do so. It is true that many did not heed the instructions to disperse once their shift was cancelled. However, their presence on the surface caused no demonstrable hindrance to Sasol nor posed any safety risk. There was no evidence they were even picketing in support of those underground. Any disciplinary action taken against them should not have been for participating in the strike and it was plainly unfair they were dismissed on that ground. That is not to say their insubordinate conduct warranted no sanction but it did not warrant dismissal for participation in an unprotected strike.

[542] As far as the night and morning-shift workers who did participate in the sit-in are concerned, the following factors are pertinent in determining the substantive fairness of their dismissals

542.1 The strike was not provoked by Sasol's conduct in so far as it related to the wage gap adjustment increase and the annual service increment that was actually due to the applicants. Even though the suspension of the LSC was a major reason for the strike against the backdrop of discontent over the wage gap process, Sasol was entitled to suspend them. Though it is arguable that Mabuyakhulu's suspension was ill-considered, it cannot confidently be said the strike probably would not have occurred if he alone had not been suspended. In any event this was never argued or pleaded by the applicants.

542.2 The strike was not spontaneous but was planned and decided upon in a mass meeting.

542.3 Whether or not the applicants sought advice from their recognised leaders before embarking on the strike, it was reckless to embark on it without considering if it was protected knowing that management was cautioning them against embarking on unprotected industrial action.

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542.4 Other than the dispute declaration by Mabuyakhulu, no attempt was made to follow the recognition agreement procedures or the statutory procedures to resolve the dispute before resorting to strike action. This was a serious contravention of the LRA procedures.

542.5 To the extent that the strike was about implementing the wage gap agreement as purportedly agreed to by management, then the applicants should have invoked contractual remedies or, at least, invoked the procedures for striking where an employer unilaterally alters conditions of service and refuses to reinstate the agreed conditions under section 64(4) of the LRA. If the dispute was about a disagreement over an unresolved issue of when the wage gap process would be completed, then they should have utilised the procedures for bargaining followed by a procedural strike if that failed.

542.6 Even though the intention of the strikers was not to interrupt production, the strike threatened to compromise mine safety procedures and exposed more workers than necessary to the inherent risks of coal mining. It was not disputed that if a lapse in safety measures had caused an incident such as a methane ignition which propagated and became an explosion, there was no guarantee it would not have affected workers at the shaft bottom even if that is a relatively safe place. In order not to compound the risk management had little choice but to prevent the afternoon shift from going underground and to stop production being resumed by shifts whose members had spent a whole day underground with little rest.

542.7 The consequence of management having to take that step was that a day's production was lost at eleven shafts. Even if the loss sustained was only the loss resulting directly from those shifts not being worked that was still significant and caused Sasol economic harm.

542.8 The duration of the sit-in was not simply an hour or two but lasted close to 24 hours in the case of the afternoon shift and closer to 36 hours in the case of the night shift.

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542.9 During the sit-in management's attempts to serve ultimatums were either stifled or ignored. Workers made it clear they were not going to respond positively to mine management and were not interested in budging until senior management and, or alternatively, LSC members came and spoke to them and their concerns about the wage gap moneys and the suspension of the LSC members were addressed. On the other hand, they did not defy the court interdict when it was conveyed and their leaders encouraged them to surface.

542.10 Generally, only more senior employees who wanted to leave at the end of a shift were allowed to do so. In some cases, they had to leave via the incline shafts. Other employees were only able to surface for medical reasons or special personal circumstances such as attending a funeral. There was also evidence of intimidating conduct towards management though it was mainly at Middelbult – iThembalethu shaft, Middelbult West shaft and Brandspruit no 3 shaft where the threatening behaviour became more overt.

542.11 It must also be noted that a number of individuals were also dismissed for alleged acts of violence, intimidation or harassment apart from participating in the strike so Sasol did differentiate to some extent between those who only were part of the sit-in and those accused of being responsible for the such misconduct, rather than holding all responsible for that conduct. Nonetheless, it does not mean that if such conduct is a prevalent characteristic of a strike that cannot have a bearing on determining the substantive fairness of dismissals or a bearing on the relief where the dismissals are nonetheless substantively unfair.

542.12 For its part, Sasol did attempt to issue ultimatums and was not unreasonable in refusing to engage with workers' concerns while they remained underground. However, it made no attempt to engage with the leaders it had already recognised and been dealing with as the authentic representatives of the UPUSA membership at Sasol and whom it knew offered the best chance of curtailing the strike. It must also be remembered that the LSC members were formally

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recognised under the recognition agreement as representatives. This was not a situation in which management was expected to deal with hitherto unrecognised or unelected leaders. Sasol's conduct in approaching the union officials, whom it knew had no standing whatsoever in the eyes of UPUSA membership, whilst not making any attempt to contact the LSC members to intervene cannot be viewed as a *bona fide* attempt to end the strike quickly. If Sasol took the strike as seriously as it claimed this omission is inexplicable.

542.13 Unlike the 2006 unprotected strike, all the applicants who were found guilty of participating in it were dismissed irrespective of whether they had a previous final warning or not. Although the 2006 strike did not impact on mine safety, it was a conventional strike in which the participants refused to work for four days, unlike this one in which the participants worked their shifts but interfered with the mines' operations causing Sasol to have to halt production. The disparity of treatment of strikers in that strike compared to this one cannot be simply brushed aside, when the 2006 strike entailed a complete withdrawal of labour and was four times as long as the 2009 strike.

542.14 In my view, to the extent that the conduct of the applicants who were only dismissed for participating in the strike is concerned, their dismissals are notably at odds with Sasol's more indulgent treatment of unprotected strikers in 2006 considering the nature and duration of both strikes. I accept that the participation of the applicants in this strike was serious misconduct but taking account its nature, duration, the strikers prompt response to the call by their leaders to end the strike when the interdict was obtained, and the failure of Sasol to make any attempt to engage those leaders to end it, I am not persuaded that the dismissal of the night-shift and morning-shift workers for participation in the strike was an appropriate sanction and therefore substantively fair. To the extent that their conduct was nonetheless far from blameless that is best dealt with when deciding the relief they should get.

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Procedural fairness

[543] There are normally two legs to the enquiry into procedural fairness in unprotected strike dismissals. The first relates to the steps taken by the employer to give the strikers a reasonable opportunity to reflect on what they are doing and to abandon their strike action, and the second concerns the provision of an opportunity for strikers to make representations why they should not be dismissed for striking before a final decision was taken. The courts' approach to the two requirements was usefully summarised in ***National Union of Metalworkers of SA & others v Lectropower (Pty) Ltd***:

> " While at one stage the issuing of a fair ultimatum was considered to be sufficient to satisfy the requirement of procedural fairness in a strike related dismissal, some 15 years ago, in Modise & others v Steve's Spar Blackheath 2001 (2) SA 406 (LAC); (2000) 21 ILJ 519 (LAC); [2000] 5 BLLR 496 (LAC), the Labour Appeal Court placed a construction on item 6(2) of the code that requires an employer to provide workers who participate in an unprotected strike with both an ultimatum as well as a right to be heard before any dismissal is effected. The court stated that the hearing may be of a collective nature and that its form and formality would largely be dictated by the context. This reading of the code was discussed and applied in NUM & others v Billard Contractors CC & another (2006) 27 ILJ 1686 (LC); [2006] BLLR 1191 (LC), where this court held that the purpose of an ultimatum is to provide a cooling-off period before a final decision to dismiss is taken, and that there is a discrete right to be heard after the ultimatum has expired. The court was not specific on the nature, form and extent of this right but it is clear from that decision that an employer cannot simply issue an ultimatum and thereafter, without more, effect a dismissal. These decisions were recently affirmed by the LAC in the CBI judgment…" [23]

[544] In this case, the applicants make the following claims of procedural unfairness relating the disciplinary inquiries and the *bona fides* of Sasol in following disciplinary procedures The applicants also made additional

[23] (2014) 35 *ILJ* 3205 (LC) at 3213, par [25].

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submissions about the alleged unfairness of the ultimatums which are addressed at the end of this section.

[545] Insofar as the disciplinary inquiries and the *bona fides* of Sasol in convening the inquiries is concerned, the applicants claim that:

545.1 Sasol had decided on the disciplinary action it intended to take against the applicants in the morning of 22 January, rendering their dismissal a *fait accompli* and presumably, by implication, that the ultimatums and disciplinary hearings were a sham;

545.2 the chairpersons of the inquiries were not impartial and imposed sanctions of dismissal when it was inappropriate to do so, and

545.3 Sasol did not comply with the requirements of the recognition agreement relating to part-time stewards because they were not afforded the opportunity to be represented by the UPUSA union officials.

[546] The applicants' heads of argument provided more particularity only in respect of some of these claims.

[547] The first claim appears to relate to the internal memorandum circulated to mine managers and HR business partners in which they were encouraged to keep a record of everyone involved in their strike action, to prepare warning letters and setting up a disciplinary process and to issue strikers with an ultimatum to surface within an hour, whereafter they would be issued with final warnings or alternatively be subject to a disciplinary process which could lead to dismissal if they were already on final written warnings.

[548] I agree that it might have appeared at that early stage that there was a clear progression of how matters should unfold in Mkhize's view, though this memorandum was not as emphatically predictive as the one reporting on the suspension of LSC members. It certainly conveyed an intention that final warnings should be imposed for first offenders, which was in keeping with how Sasol had handled the longer strike in 2006, but nevertheless it left the outcome of a dismissal hearing to be a matter determined at an enquiry.

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[549] In any event, management at mine level never got further than issuing ultimatums, except in the case of SCS, which was exceptional for a number of reasons. The disciplinary process only unfolded much later in the disciplinary inquiries, by which stage it was clear that any ultimatums which had been issued had been ignored and the action had endured until the end of the morning-shift more than a day later. While the internal memorandum was indicative of a narrow focus in addressing the strike by emphasising formal steps to be taken, in view of the way dismissals subsequently did take place, it does not follow in my view that the circular was tantamount to a *fait accompli* which determined that the decision of the disciplinary inquiry chairpersons was a foregone conclusion.

[550] The second claim concerns the extent to which the external chairpersons and prosecuting representatives were truly independent. I agree that the fact that the external appointees played different roles in different inquiries and attended an induction session prior to the commencement of the inquiries, might have raised some reasonable doubt about whether they would be truly independent in the performance of their duties. However, it has to be remembered that under normal circumstances the inquiries and presentation of the company's case at each inquiry would have been conducted by Sasol employees in terms of Sasol's disciplinary procedures. Morodi had testified that Sasol had decided to appoint external representatives because of the practical difficulties of Sasol staff having to conduct such a large number of separate inquiries, which numbered approximately one hundred in all.

[551] There is no reason to suppose, as a matter of principle, that the internal chairpersons would have been more independent than externally appointed ones. On the contrary, usually the opposite assumption is made because the externally appointed chairpersons, particularly in the case of legal professionals, should also act in accordance with their professional ethics to conduct impartial proceedings and are not employees of the client. Although the appointment of external chairpersons was a departure from the code, that alone would not have rendered the inquiries unfair. It is trite law that a departure from a disciplinary code, though possibly

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indicative of procedural unfairness, will only be found to be procedurally unfair where it results in demonstrable or obvious prejudice.

[552] However, there were allegations that certain chairpersons had expressly indicated that their job was merely to dismiss applicants. Such claims were made by Molise and Hokwana in their evidence. Apart from the fact that these allegations are not borne out by handwritten minutes of those inquiries, it is striking that no evidence was advanced that such blatant statements of bias were raised on appeal, if indeed they had been made. It seems more likely that Molise's revised version of his evidence in which he accepted that the chairperson said she was not there 'to make out a case for employees' is what was actually said by her, though the meaning of the statement might have been misunderstood. Quite apart from that, it would be quite extraordinary for a legally trained chairperson in those circumstances to make such a declaration. In the circumstances, I am not inclined to accept that such statements of patent bias were probably made.

[553] On the issue of shop stewards not being represented by union officials, this was not something set out in any detail in the applicants' argument. On the evidence, the only persons identified as shop stewards amongst the applicants were Bhembe and Matwa. Matwa was represented by one Mapeya at his enquiry. Insofar as a challenge was raised in the inquiry about the issue of representation in both their inquiries it was about the question of legal representation on account of the company having a legal representative as a complainant. Moreover, the objection was raised in relation to the representation of employees in general and not with specific reference to their status as shop stewards. There was no evidence of either Bhembe or Matwa specifically asking for representation by a union official. Though there was no evidence of this issue being raised at the inquiries or on appeal, it is not disputed that shop stewards were not represented by union officials.

Procedural unfairness relating to the ultimatums

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[554] In part, the basis of the applicants' claim of procedural unfairness concerning the issuing of ultimatums draws on Grogan J's identification of important features to be considered in evaluating the fairness of the ultimatums, namely developments prior to the issuing of the ultimatum, the terms of the ultimatum and, the time allowed for compliance.[24] Secondly, the applicants point out that some categories of employee never received ultimatums.

[555] In essence, the thrust of the applicants' complaint which they articulate relates mainly to the developments prior to the ultimatums being issued. They take no issue with the terms of the ultimatums or the time allowed for compliance. Their attack is more broadly concerned with whether the ultimatums were meaningful in the context they were issued. The applicants argue that management knew in advance full well which issues were fuelling employee discontent. Despite that, management focused on a strategy to discipline the applicants rather than to attempt to address the causes of their concern, even when workers mentioned issues such as their unhappiness with the wage gap monies, the suspension of LSC members or demanded to speak to LSC leadership and, or alternatively, senior management. In communicating with the applicants only through ultimatums and preferring to communicate with the Evander and Johannesburg offices of UPUSA while deliberately avoiding engagement with the LSC and Mabuyakhulu, Sasol did not make a *bona fide* attempt to engage with the applicants. In truth, this point really has more to do with Sasol's overall approach in trying to bring the strike to an end rather than with the ultimatums themselves. I have already dealt with the shortcomings of Sasol's attempt to get UPUSA officials to intervene and its failure to engage the LSC.

[556] As to whether Sasol should have engaged with workers concerns as suggested, there are a number of difficulties with this argument. Firstly, there is no obligation on an employer faced with an unprotected strike to engage with the demands of the strikers. To impose such an obligation would be to legitimate the unprotected strike as an acceptable avenue for

[24] Grogan J, Workplace Law, Eleventh Edition page 471

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coercing consultation and ultimately negotiation and would also undermine the rationale for using the statutory procedure which promotes engagement and dialogue before resorting to economic coercion.

[557] Secondly, the initial message to workers participating in the sit-in was that management *would* listen to their concerns, but only if they ended their sit-in and surfaced. This was not acceptable to the workers because they obviously wanted to engage with management only if they could simultaneously maintain pressure on Sasol. Thirdly, it was plainly going to be wholly impractical for the senior management to simultaneously deal with workers underground in ten shafts and it was disingenuous of the strikers to have expected Sasol to deal with them shaft by shaft when the issues were plainly ones that needed to be addressed in a central forum because the issues affected workers in all shafts the same way.

[558] The second issue relating to the ultimatums is that some employees engaged in the sit-in did not have ultimatums served on them. It is common cause that the morning-shift workers at all shafts and would not have been present when the ultimatums were issued to the night shift. Nevertheless, it was only in the case of Middelbult shafts that morning-shift workers were not served with any ultimatums during the course of the sit-in. Sasol argues that it could not have been expected of management in the circumstances prevailing at those shafts for further attempts to serve ultimatums to be made.

[559] At Middelbult-iThembalethu shaft, where two ultimatums had already been issued, the reason for Zwane not serving the ultimatum after 16h00 was that he heard workers saying the management group should not leave the cage. It is possible another manager might have decided, despite hearing this, to issue the warning, but the court should be wary of adopting an armchair approach in assessing whether a reasonable manager, in Zwane's position, ought to have kept the cage at the shaft bottom long enough to attempt to address workers through the cage doors in order to deliver the ultimatum. The court cannot impose a requirement that an attempt to serve an ultimatum must be made irrespective of reasonable perceptions of the risks involved.

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[560] At Middelbult West shaft, two ultimatums were served by 13:00 on 22 January, but thereafter the interpreter was reluctant to return underground again owing to the tensions experienced underground on the last occasion. Degenaar also cited the atmosphere on the second occasion as being the reason they did not leave written ultimatums on the floor of the shaft bottom before surfacing. In the early hours of 23 January an attempt to collect someone who wanted to surface was abandoned because a group of strikers prevented the cage doors from being opened. Henderson experienced similar conduct the next day when he went to fetch members of his team and which led to a violent tussle between workers trying to surface and others trying to keep them underground.

[561] At Middelbult Main shaft, the night-shift workers were not found anywhere in the vicinity of the shaft bottom. Supervisors were sent down twice to serve ultimatums printed in English and Zulu but reported the members of the night-shift were not present at the shaft bottom on either occasion. Though this was hearsay evidence, there was no evidence tendered to the contrary by any members of the night-shift to support the pleaded version that they remained underground and nobody came to address them until 16:00 on 22 January, nor was any evidence tendered to gainsay Tshivashe's evidence that they were warned before starting the night-shift not to participate in the sit-in. Though some of the morning-shift workers did surface, others did not, but Tshivashe decided it was unsafe to serve any ultimatums after hearing of incidents at other mines, so no ultimatums were served on the morning-shift.

[562] On the evidence, I am satisfied that it was not unreasonable of management at Middelbult West and iThembalethu shafts to have decided that discretion was the better part of valour and not to take risks in the prevailing circumstances by attempting to serve an ultimatum. There was less justification for never having sent anyone down to serve an ultimatum on the morning-shift at Middelbult Main shaft considering that the night-shift workers had not gathered at the shaft bottom to the best of management's knowledge and that there was no untoward conduct taking place at that shaft.

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[563] However, in light of the earlier analysis, the likelihood of morning-shift workers being any more receptive to respond positively to ultimatums if they had been issued with them, was probably very slight. It is also improbable they would not have been informed by the night-shift workers about management's previous attempts to serve ultimatums given that they would have met the night-shift workers underground when they joined the sit-in.

[564] Be that as it may, there was less justification at some shafts why no attempt was made to serve an ultimatum on morning-shift workers to give them the same opportunity as others to consider whether to heed the threat of possible dismissal or to take the chance it would not eventuate. On the evidence this was true of Middelbult Main shaft and Bosjesspruit Main shaft.

Conclusion on procedural unfairness

[565] In light of the analysis above, I am not persuaded that the enquiries conducted by external chairpersons and prosecuting officers (complainants) were inherently any more tainted by bias than enquiries conducted by Sasol employees would have been. In terms of the requirements of an opportunity to be heard before dismissal in the case of unprotected strikes, the applicants did have an opportunity to dispute or explain their participation in the strike and to make submissions why they should not be dismissed.

[566] Sasol did attempt to ensure that ultimatums were served and for the most part did what could be expected in the circumstances which varied from shaft to shaft. If workers choose to drown out managers trying to issue ultimatums or otherwise seek to prevent ultimatums being served, they cannot rely on management's lack of success under those circumstances to argue that they did not have an opportunity to consider and reflect on the ultimatums that could not be effectively served because of their own conduct. That said, there ought to have been attempts made to serve ultimatums on the morning-shift workers at Middelbult Main shaft and Bosjesspruit Main shaft and the failure to do so there entailed some procedural unfairness. The significance of that must also be weighed

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against the lack of any evidence from applicants on those shifts that they would have heeded the ultimatums if they had received them and would have surfaced before the rest of the strikers who only surfaced on receiving news of the interdict and the advice of LSC members.

[567] Overall, I am satisfied that there was no material procedural prejudice suffered by the applicants in the events leading to their dismissals.

Identification of Applicants

[568] The parties could not agree on which basis the individual applicants should be identified, even after much prodding from the court. Their respective positions on this issue are summarized below.

[569] The only issue the parties could agree on was that individuals whose names did not appear on the list of workers accompanying the referral of the disputes to the CCMA, could not be applicants in the referral to this court. On the face of it, the CCMA list contained the names of 941 persons. It also appears to be common cause that the number of employees actually dismissed arising from the sit-in was 666. Clearly the CCMA list either entailed a considerable degree of duplication, or included names of persons who were not among those dismissed arising from the sit-in. That list is attached to the judgment as Annexure “J3”.

[570] Using this list as a starting point, the parties compiled their own respective spreadsheets in which they identified those persons they believed were legitimate parties to the Labour Court referral. Despite directives from the court to reconcile the discrepancies between the lists, the parties’ legal representatives have been unable to do this. The applicants came up with a list of 609 applicants, whereas the respondent identified only 547 applicants. Accordingly, there is still a significant discrepancy regarding 62 names, assuming that all of the 547 persons identified by the respondent are amongst those listed by the applicants. In the absence of an agreement on whether persons who appear in the applicants’ list but do not appear in the respondent’s list should be considered parties to the Labour Court referral it will be necessary to take account of this

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unresolved issue in the order made. Why the parties could not have already resolved this between themselves is inexplicable.

[571] The only point of principle I can discern between the parties as to the correct identification concerns a submission by the applicants that persons who were dismissed arising from the strike, but were not included in the CCMA list of applicants, ought nonetheless to be included as applicants. I am satisfied that it is now settled law that before the labour court can entertain a dismissal dispute reporting within its jurisdiction the dispute must have been referred to conciliation and that to be a party to a Labour Court referral, that party must also have been a party to the conciliation.[25] Accordingly, to the extent that the applicants have included the names of persons who were not a party to the CCMA referral, those individuals cannot be employee parties in this case.

Relief

[572] On the lists of applicants submitted by their attorneys, a number of them opted only to claim compensation.

[573] Having found the dismissal of applicants to be substantively unfair, the court is obliged in terms of section 193 [1] [a] of the LRA to order reinstatement of those applicants, in the absence of any of the factors set out in section 193 [2] being present. In this matter, it is only where the applicants have not sought reinstatement that compensation should be payable. Where the applicants have indicated their preference for reinstatement the question arises to what extent an order of reinstatement should be retrospective.

[574] In ***Kroukam v SA Airlink (Pty) Ltd***[26] the majority of the Labour Appeal Court expressed the view that re-instatement or re-employment may be ordered retrospectively to the date of dismissal, even if that period exceeds 12 months, in the case of substantively unfair dismissal, or 24 months, in the case of automatically unfair dismissal. “In summary”, the

[25] *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and others* [2015] 3 BLLR 205 (CC) at 214-218, paras [26] – [40].

[26] [2005] 12 BLLR 1172 (LAC)

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court held, "the wording of section 193(1)(a) supports appellant's contention that the court has a discretion in respect of the retrospectivity of a re-instatement award. In exercising this discretion, a court can address inter alia the time period between the dismissal and the trial. The court can accordingly ensure that an employer is not unjustly financially burdened if re-instatement is ordered."[27]

[575] In this matter there was an unusually long delay before the trial could commence. As mentioned previously it was only when the court intervened to assist the applicant's in obtaining legal aid, that the matter was able to proceed. The trial itself was plagued by delays caused *inter alia* by factors such as: the difficulty of the applicants' attorneys obtaining instructions from a group of applicants, who were no longer conveniently situated near the workplace; the need to obtain specific instructions on events at each of the 10 shafts; the difficulty in finding appropriate court venues to accommodate the large number of applicants attending court, and the availability of representatives. While it is not suggested that the applicants were to blame for the delays in galvanizing the trial proceedings, it would not be equitable to unduly burden Sasol with an order of extensively retrospective reinstatement.

[576] In relation to the specific categories of workers who were dismissed for participation in strike action, in my view an appropriate gradation of retrospective reinstatement is the following:

576.1 Category 4 and 5 employees, who did not opt for compensation, are entitled to retrospective reinstatement for a period of two years. In respect of cage drivers (category 5), who remained on duty they should not have been disciplined, let alone dismissed. Mehlomakhulu is an exception to that group as the evidence shows he eventually joined the strikers. Consequently, he falls to be considered in the same category as workers who participated in the sit-in.

576.2 Category 3 employees, who did not of for compensation, are entitled to retrospective reinstatement for a period of two years, and

[27] At 1232, para [61].

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to be issued with a final written warning for disobeying a lawful instruction.

576.3 Category 1 and 2 employees, who did not opt for compensation, are entitled to retrospective reinstatement for a period of one year, and must be issued with a final written warning for participating in unprotected strike action. There is no reason in my mind to distinguish between afternoon and morning-shift workers based solely on the number of ultimatums they received. None of the applicants' witnesses testified that if they had been issued with ultimatums they would have heeded the call. It is also meaningless to distinguish them on the basis that some commenced their sit-in earlier than others. There was nothing to suggest that the day shift workers only intended to stay underground for 24 hours. It was simply fortuitous that they worked a later shift than the night-shift workers. However long the strike continued they would always have been underground for a shorter period than the night-shift unless the night-shift surfaced before them. The day shift workers surfaced for the same reason as others: because they received word from the LSC members, after the interdict was obtained, that they should call off the sit-in. It was this which caused them to end their participation in the sit-in, not because they decided 24 hours underground was enough.

[577] Owing to the ceiling on compensation for unfair dismissal of 12 months' remuneration, it is more difficult to apply an appropriate differentiated scale. Accordingly, all the applicants who opted to ask for compensation should be paid 12 months' remuneration.

Costs

[578] The applicants' attorneys, were paid by the Legal Aid Board, which would have incurred a significant financial burden in funding such extensive litigation conducted by a team of lawyers. To all intents and purposes there cannot be much semblance of an ongoing relationship between the

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applicants and Sasol in the circumstances where that relationship as being in a state of dissolution for several years. Accordingly, in the circumstances, I believe it would be fair and equitable for Sasol to pay the legal aid Board its costs in funding the litigation on the ordinary party and party scale.

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Order

[1] In so far as applicants were dismissed for their participation in unprotected strike action, their dismissals were substantively unfair but procedurally fair.

[2] Subject to the provisos in paragraphs 3, 4 and 5 of this order, the respondent must:

2.1 reinstate Category 4 and 5 applicants, who appear on the applicants' spreadsheet attached hereto as Annexure "J1" to have requested reinstatement, with retrospective effect to a date two years prior to their reinstatement, provided their names also appear on the respondent's spreadsheet, attached hereto as Annexure "J2";

2.2 reinstate Category 3 applicants, who appear on Annexure "J1" to have requested reinstatement, with retrospective effect for a period of two years, and must issue them with a final written warning for disobeying a lawful instruction, provided their names also appear on Annexure "J2";

2.3 reinstate Category 1 and 2 applicants, who appear on Annexure “J1 to have requested reinstatement, with retrospective effect for a period of one year, and must issue them with a final written warning for participating in unprotected strike action provided their names also appear in Annexure “J2”, and

2.4 must pay all other applicants who sought relief in the form of compensation so indicated in Annexure “J1”, an amount of twelve months’ remuneration, provided their names also appear in Annexure “J2”.

[3] All applicants who are entitled to retrospective reinstatement in terms of the order above, must tender their services within 45 calendar days of the date of this order.

[4] Payment of compensation to those applicants entitled to such payment in terms of paragraph 2.4 above, must be made within 30 calendar days of the date of this order.

[5] Notwithstanding paragraphs 2, 3 and 4 above, any applicant, whose name appears on both Annexure “J1” and “J2” and who was also dismissed for a reason other than their participation in the unprotected strike action, may refer their alleged unfair dismissal for such other reasons to the CCMA within 30 days of the date of this judgment for arbitration. In the event a CCMA arbitrator finds that any such applicant’s dismissal was substantively unfair for such other reasons, that applicant shall be entitled to the relevant relief set out in paragraph 2 of this order, save that the time periods in paragraph 3 and 4 for giving effect to that relief shall run from the date the applicant receives the arbitrator’s award. In the event an arbitrator finds that an applicant’s dismissal for a reason other than their participation in the unprotected strike was substantively fair, that applicant is not entitled to any relief in paragraph 2 of this order, but will, if the arbitrator finds their dismissal for another reason was procedurally unfair, be entitled to such compensation as the arbitrator might determine for procedural unfairness.

[6] In respect of all other applicants, whose names do not appear on both Annexures “J1” and “J2” hereto, the parties must meet by no later than 25

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September 2019 to attempt to reach agreement on whether they are applicants or not, subject to the proviso that to be eligible for consideration as a potential applicant the person's name must appear on Annexure "J3".

[7] The parties must file a further list of additional applicants on whose identity they agree upon, by 7 October 2019. Additional applicants identified as a result of the process in paragraph 6 must be reinstated retrospectively or paid compensation in accordance to the relief ordered in paragraph 2 above, save that the payment of compensation or tender of service must be made by 25 October 2019 and 19 November 2019 respectively.

[8] In respect of applicants whose names appear on the list compiled in terms of paragraph 7, who were also dismissed for a reason other than participation in the unprotected strike action, they may refer their alleged unfair dismissal for such other reasons to the CCMA within 30 days of the date the parties finalize the list. The remaining provisions of paragraph 5 shall apply *mutatis mutandis* (i.e. with the necessary changes) in respect of such applicants.

[9] In the event the parties are unable to agree by 7 October 2019 whether certain persons appearing on Annexure "J1" qualify as applicants in this matter, either party may on application refer such a dispute back to court for determination. If the court is seized with such an application, the determination, in respect of the applicants referred to in this paragraph, of the relevant dates for reinstatement, payment of compensation, referral of dismissal for other reasons to the CCMA, as set out in paragraphs 3, 4 and 5 of this order, shall be made by that court.

[10] In the case of any applicant who passed away on or after 5 August 2009, being the date of the referral of the dispute to the Labour Court, the respondent must pay compensation to the applicant's deceased estate in accordance with paragraph 2 of this order, provided they were not also dismissed for reasons other than participating in the unprotected strike, within 30 calendar days of receiving written particulars of the executor of their deceased estate and confirmation of the executor's appointment.

[11] The respondent must pay the applicants' costs.

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R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: Adv. N S Mteto instructed by BM Kolisi Inc. and Mr. M Kolisi, N Motshegare of BM Kolisi Inc.

RESPONDENT: W La Grange, SC and P Kirstein instructed by Cliffe Dekker Hofmeyr Inc.

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