IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 1006/2016

In the matter between:

NTM obo SHADRACK MOLEMA & 224 OTHERS **Applicants**

and

BOTSELO HOLDINGS (PTY) LTD **Respondent**

Date heard: 8 – 10 October 2019

Delivered: 29 November 2019

Summary - Failure to adhere to ultimatums - Even where employees on an unprotected strike fail to adhere to six ultimatums and two court orders this does not entitle the employer to dismiss them without holding a disciplinary hearing or at least attempting to hold one. Dismissals procedurally unfair. Procedurally unfair dismissal – Even though dismissals procedurally unfair, where employees engaged in an unprotected strike for 12 days and ignored six ultimatums and two court orders to return to work, the requirements of fairness are better met by denying them compensation.

JUDGMENT

CONRADIE, AJ

[1] In this case the National Transport Movement (the union) is acting on behalf of 225 of its members (the individual employees) who were dismissed by the respondent (the company) for participating in an unprotected strike in 2016.

Background

[2] The company was established 37 years ago and is based in Delareyville in the North West Province.

[3] The company conducts business in the farming and maize milling industry and its main clients are Kelloggs, Bokomo and Simba. The company also supplies "chop" which is a by-product of the milling process to various farmers in the surrounding area.

[4] At the time of the dismissal, the company employed approximately 370 people and was the biggest employer in Delareyville.

[5] Other than the strike, which is the subject of this judgment, the company had never faced industrial action prior to 2016.

[6] During June or July of 2015 the union started engaging with the company seeking organizational rights. A meeting took place between the company and the union on 29 July 2015 where it was agreed that if the union reached 30% representation a recognition agreement would be concluded.

[7] On 18 December 2015, prior to the conclusion of a recognition agreement, the union submitted a written proposal in respect of wages and other benefits. In the union's proposal, signed by its Deputy General Secretary, it proposed that the parties meet on 9 January 2016 to negotiate the proposal.

[8] Despite the proposed meeting date of 9 January 2016, the union referred a refusal to bargain dispute to the CCMA on 6 January 2016. According to the union's referral, the company refused to negotiate wages with the union.

[9] While the parties were able to sign a recognition agreement on 25 January 2016, the refusal to bargain dispute was still conciliated on 29 January 2016 and an advisory award issued on 8 February 2016.

[10] The advisory award was to the effect that the parties should attempt to resolve the dispute in terms of the recognition agreement. The commissioner was also of the view that the dispute was prematurely referred to the CCMA and as such it did not have jurisdiction to entertain the dispute. She directed that the file be closed.

[11] On 12 February 2016 the union requested a meeting with the company to discuss wages.

[12] On 18 February 2016 the company sent the union a letter informing it that following a verification exercise it was determined that the union only had 44% representivity. Further, it was pointed out that in terms of the recognition agreement the right to bargain about wages only arises when the union has majority representation.

[13] On 8 March 2016 the union notified the company of its intention to commence with strike action on 14 March 2016 as a result of the company's refusal to meet its wage demands. According to the union, a dispute in respect of the wage negotiation demands was referred to the CCMA in December 2015.

[14] On 9 March 2016 the company wrote to the union informing it, that any strike action would be unprotected and that it would seek to interdict the strike in the Labour Court.

[15] On 10 March 2019 the company's HR Manager, Ian. Putter (Putter), received a call from the union's Deputy General Secretary who wanted to talk about how to handle the "wage situation" within the context of the intended strike. The Deputy General Secretary undertook to get back to Putter but failed to do so.

[16] The strike action commenced on 14 March 2016. That same day the company again informed the union that the strike was unprotected and requested it to call off the strike by 12h00 failing which the company would approach the Labour Court for relief.

[17] The union did not call off the strike and a further letter was sent to it on 14 March 2016. In terms of this letter, the employees were given an ultimatum to call off the strike by 15h00 and to return to work or face disciplinary action.

[18] As the union and its members did not return to work on 14 March 2016, the company launched an urgent application in this Court to interdict the strike.

[19] A further ultimatum was served on the union on 16 March 2016 at approximately 09h00, directing the employees to return to work on 17 March 2016 at 07h00, failing which, the company would take disciplinary action which could lead to dismissal.

[20] On 18 March 2016 La Grange J issued a final order that the strike action was unprotected and interdicted further strike action by the union's members. That same day the company sent a further ultimatum to the union calling on its members to report for duty on Saturday 19 March 2016 at 07h00. In this ultimatum, the company recorded that the Labour Court held that the strike was unprotected and that the union's members were interdicted from participating in the unprotected strike.

[21] In what appeared to be a positive move, on 18 March 2016, the General Secretary of the union wrote to the company informing it that the leadership of the union was calling off the strike with immediate effect following on the order of the Labour Court. He further recorded that the union would do everything in its power to ensure that its members returned to work. The employees did not however return to work on 19 March 2016. Instead the union served a notice of appeal on the company on Saturday 19 March 2016.[1]

[22] On 19 March 2016 the company sent a letter to the union again recording that should the employees not return to work by Monday 21 March 2016, an urgent application for leave to execute the order of La Grange J would be launched. It also stated that any refusal by the employees to return to work would be viewed in a very serious light and may lead to disciplinary action.

[23] The employees did not return to work, and on 22 March 2016, the company launched an application for leave to execute and enforce the order of La Grange J. The application was granted by Steenkamp J on 24 March 2016. The Court also ordered the union to direct its members not to participate, or

[1] This was a notice to appeal the judgment of La Grange J. Leave to appeal was denied on 5 October 2016.

to continue to participate, in the unprotected strike and interdicted the union's members from participating in the unprotected strike.

[24] Notwithstanding the above Court order, the union's members did not return to work on 24 March 2016. As a result, a further ultimatum was issued that day calling on the employees to report for duty on Saturday 26 March 2016 at 07h00. Attached to the ultimatum was a copy of this Court's order of 24 March 2016. In light of the Court order, the company urged the union to communicate with its striking members with a view to them adhering to the ultimatum. It was specifically recorded that: "*The union and the striking members should take note that employees that proceed with the strike will be dismissed*".

[25] The union and its members did not report for work on 26 March 2016 and gathered at the gates of the company. No production took place on 26 March 2016.

[26] As a result of their participation in the unprotected strike, the individual applicants were dismissed. It is in dispute whether the dismissals took place on 25 or 26 March 2016. The company afforded the union's members a right to appeal against their dismissals by 4 April 2016.

[27] On 27 March 2016 the union's members placed steel barricades at the Respondent's gates, blocking the entrance.

[28] On 29 March 2016 the company launched another urgent interdict in the Labour Court seeking to restrain the union's members from being within 500 meters of the main gate of the company. That same day a *rule nisi* was issued against the union and its members. The *rule nisi* was confirmed on 9 June 2016.

[29] The company's Financial Manager, Reginald Scholtz (Scholtz), testified that as a result of the strike the company incurred losses amounting to R2.9 million over that period.

Issues to be decided

[30] In terms of the pre-trial minute, the issues to be decided are as follows:

30.1 The date of dismissal of the Applicants. The Respondent alleges it was on the 26th of March 2016 whereas the Applicant alleges it was on the 25th March 2016.

30.2 Whether the Applicants were dismissed fairly having regard to the procedures followed as well as the substantive grounds.

30.3 Whether the Respondent was consistent in the application of discipline.

30.4 Whether the Applicants had legitimate reasons for refusing to return to work as per the ultimatums and interdicts granted.

30.5. Whether the Applicants were dismissed prior to the date of 26 March 2016 at 07:00, as set out in the ultimatum or not.

Evaluation

The date of the dismissal

[31] The ultimatum of 24 March 2016 called on the union's members to report for duty on Saturday 26 March 2016 at 07h00.

[32] The ultimatum was sent to the union's General Secretary, Ephraim Mphahlele (Mphahlele), who also represented the employees in this Court. Mphahlele was requested to inform the union's members of the ultimatum. It was also pointed out to him that a copy of the letter would be handed to the shop stewards on the morning of 24 March 2016.

[33] The union argued that despite the ultimatum calling on its members to report for duty at 07h00 on 26 March 2016, the company proceeded to dismiss its members on 25 March 2016. It relies, opportunistically in my view, on the fact that the dismissal letter is dated 25 March 2016. The letter was, however, attached to an email from Putter to the General Secretary and Deputy General Secretary of the union. The email was sent at 11h32 on 26 March 2016 and informs the recipients that the dismissal letter *"was handed out to the striking employees at 11h00 this morning."* The attachment is described as *"2016 03 24 Dismissal letter to striking employees.docx".* The

union pounced on these dates to argue that the dismissal was effected prior to the deadline in the ultimatum expiring.

[34] Putter however testified that he drafted the dismissal letter after 06h00 on the morning of 26 March 2016 in anticipation of the employees not reporting for work. The letter was only issued later that day at about 11h00. Putter kept a detailed strike journal which was introduced as evidence and he testified to its contents. With reference to 26 March 2016 he records that when he arrived at the mill at 06h00 the entrance was barricaded by the strikers.

[35] Putter and the payroll administrator prepared the dismissal documents. By 09h30 they had still not handed out the dismissal letter. They informed the police of the plan and asked them to tell the striking employees that those that wanted to come in could do so. Those that did not want to come in would be dismissed. At 11h00 it was decided to hand out the dismissal letter.

[36] Putter called one of the shop stewards, Shadrack Molema, and told him that he wanted to speak to the rest of the shop stewards. Molema tried to call two other shop stewards but they walked away. Molema eventually caught up with them and a short discussion took place. Putter and the Operations Manager, Len Steyn, tried to walk closer to the shop stewards, but they walked away and climbed into a car and ignored them.

[37] They then proceeded to hand the dismissal letters out to the striking employees who refused to take the letters. One employee, Petrus Mofokeng, grabbed a stack of letters from Putter's hands and threw it into the air. The rest of the letters were put next to the stop sign where the employees were assembled. The employees also threw these letters into the air.

[38] At about 15h00, on his way home, Putter called the General Secretary and the Deputy General Secretary of the union, but neither of them answered their phones. He left a message and later the General Secretary called him back. He was surprised to learn that the employees were still striking and indicated that the union had informed the employees of the Court order.

Putter informed him that the employees were dismissed that morning. When asked why the employees did not return to work the General Secretary indicated that the shop stewards were immature.

[39] Putter also referred to photographs in the bundle showing that on 26 March 2016 the entrance to the Mill was blockaded.

[40] Scholtz corroborated Putter's version. He was present on 26 March 2016 when the dismissals took place and testified that when the ultimatums were issued the employees turned away when they tried to speak to them. Further, the date on the email attachment and the dismissal letter were incorrect as the dismissal letters were only handed out on 26 March 2016, that being the day on which the decision was taken to dismiss the striking employees.

[41] Under cross-examination, Putter explained that the attachment was described as *"2016 03 24 Dismissal letter to striking employees.docx"* because he used a template of the letter of 24 March 2016. He cleared the contents of the letter of 24 March, typed the dismissal letter, but did not change the name of the document.

[42] It was put to Putter that the dismissal took place on 25 March 2016, despite the terms of the ultimatum. Putter maintained his version and indicated that 25 March 2016 was Good Friday and he was not at work. It was also put to Putter that on 26 March 2016 the union officials presented themselves at the company to seek clarity regarding the dismissal. This was strongly denied by Putter who indicated that none of the union officials were present hence his telephone call to them.

[43] Mr Thabane, a shop steward, testified on behalf of the employees. According to him, the striking employees were dismissed on 25 March 2016 and they subsequently informed the union. The union leaders said they would come to the mill on 26 March 2016, which they did. The company was however adamant that they were dismissed. He also questioned why, if the letter was incorrectly dated 25 March 2016 , Putter did not approach them and say it was an error.

[44] There is no merit in the unions' attempt to argue that the employees were dismissed prior to 26 March 2016. Besides the fact that Putters evidence was not seriously challenged, the pre-trial minute records that it is common cause that *"the Applicant and its members continued to refuse to work on 26 March 2016 and collected at the gates of the Respondent. No production took place on the 26th of March 2016."* In any event, I find it remarkable that if indeed the employees were dismissed before the expiry of the ultimatum that the union did not immediately write to the company to bemoan this fact. I would imagine that it would be outraged by what would be extremely bad faith on the part of the company.

[45] I have difficulty in accepting much of the evidence of Mr Thabane, particularly given his position as a shop steward. This is supported by the following:

45.1 It was put to Thabane that it was common cause in the pre-trial minute that the employees refused to work on 26 March 2016. When asked why the workers refused to work, if they were under the impression that they had already been dismissed, Thabane was evasive in his response and when the question was repeated, he stated "*I do not know what transpired in the pre-trial*".

45.2 When it was put to Thabane that the CCMA had rejected the refusal to bargain referral on the basis that it was a premature referral and in closing the case the CCMA referred the employer and employees to resolve the dispute (negotiations) in terms of the recognition agreement, Thabane responded to say *"this is not known to me*".

45.3 When asked why the employees continued to strike despite the union having informed them that the strike action was illegal, Thabane responded that information was conveyed to the union via the employer and not directly to him and that the employees believed the strike was legal.

45.4 When asked who informed him that the strike was legal, Thabane responded that even if he had not received the information from a specific person *"we were embarking on a legal strike"*. He went on

to say that he was not at work at the time just preceding the strike, however, when he returned to work, he was informed by fellow employees that the strike was legal. In response to a question from me during argument, his representative conceded that Thabane's view that the strike was protected was incorrect.

45.5 Thabane conceded that the employees had received notification from the union to call off the strike as it was unprotected, but then proceeded to justify their behaviour on the basis that *"before any strike action commenced the process to be followed was to approach the CCMA, from there we received an advisory award. A certificate was issued indicating that employees were permitted to embark on a strike that was legal. As employees we always thought it was legal given the certificate from the CCMA".*

45.6 When asked why the employees did not stop the strike following the first Court order, Thabane conceded that he was aware that there was an order flowing from an urgent application, but that the employees were appealing the order and until the appeal was heard, they would continue on the strength of the CCMA certificate. When asked why they did not adhere to the second Court order he replied that "*I am not in a position to respond*".

45.7 It was put to Thabane that it was common cause that the employees were in contempt of two Court orders and that a reason should be furnished as to why this was the case. He replied that *"as employees we did not believe that we were in contempt of any order, rather we were embarking on a legal strike"*.

45.8 Even though he was a shop steward, throughout his testimony, Thabane persisted that he was a mere employee and any communications/negotiations between the union and the company were, for the most part, not conveyed to the employees.

45.9 When asked whether he had received any of the six ultimatums or Court orders, Thabane denied receiving any of them and said that it was the first time he had seen these documents in Court.

[46] Thabane was one of 225 applicants in this case. Surely if the termination letter was issued on the 25th of March 2016 this would be easy to corroborate by calling any of the other applicants to testify to this effect. The senior leadership of the union, based on the version put up by the employees, could also have corroborated Thabane's evidence. This did not happen. Instead, after leading only the evidence of Thabane, the union closed its case. In assessing why a witness was not called to put a version before the Court it was held in *Heath v A & N Paneelkloppers*,[2] relying on the Labour Appeal Court judgment of *Absa Investment Management Services (Pty) Ltd v Crowhurst*[3], that:

> *"'[I]t is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support — and may even damage — that party's case*."

[47] In the circumstances, I accept the company's version that the employees were dismissed on 26 March 2016 in accordance with the ultimatum.

Procedural Fairness

[48] The employees were dismissed without a disciplinary hearing having been convened.

[49] The company did however offer the employees the right to appeal the decision to dismiss them.

[50] On 31 March 2016 the union submitted an appeal against the dismissal of the members. The appeal grounds are scant and simply record the following:

50.1 *"It is submitted that the Appellants' dismissals are unfair as the Appellants were never accorded the right to a disciplinary hearing.*

50.2 *It is further submitted that the Appellants' dismissals are unfair as the employer followed no procedure in dismissing the Appellant.*

[2] [2015] 36 *ILJ* 1301 (LC) at para 51.
[3] [2006] 27 *ILJ* 107 (LAC) at para 14.

50.3 *It is further submitted that the Appellants' dismissals were unfair as the Appellants were instructed to return back to work on the 26th March 2016, and mysteriously got dismissed on the 25th of March 2016.*

50.4 *It is further submitted that the dismissals of the Appellants are unfair as the Appellants were to go back to work, but that they first would want to talk to the managing director, who refused to address them.*

50.5 *Finally, the Appellants would advance further Appeal grounds at the Appeal hearing*".

[51] On 13 April 2016 the company wrote to the union, taking cognizance of *"the mass appeal"* on behalf of the union's members. The company indicated that it would deviate from it's normal procedure and would deal with the appeal process on paper. The company outlined the appeal procedure to be as follows:

51.1 "*Any further appeal grounds on behalf of the ex-employees must be submitted in writing*.

51.2 *Due to the extraordinary circumstances individual ex-employees who want to do so must be afforded the opportunity to submit written appeals independent from the mass appeal.*

51.3 *The ex-employees must also be given the opportunity to submit mitigating circumstances in writing*.

51.4 *An independent chairperson will be appointed to conduct the appeal hearing on paper and the results will be communicated in writing*.

51.5 *Any further written appeal grounds and/or mitigating circumstances from individual dismissed employees must be submitted by Tuesday, 19 April 2016 at 12:00".*

[52] The company reinstated five of the dismissed employees who submitted individual appeals. The rest of the employees did not take up the opportunity.

[53] The reasons advanced by the company for not complying with the *audi alteram* principle in respect of the disciplinary hearing include that the employees:

53.1 would not adhere to instruction;

53.2 walked away and threw documents in the air when the company tried to hand it to them;

53.3 were given ultimatums; and

53.4 were provided with an opportunity to submit individual appeals against their dismissals.

[54] Item 6(2) of the Code provides that prior to a dismissal for participation in unprotected strike action:

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

[55] According to Cheadle *et al*[4],*"The purpose of these steps is to enable the strikers and the Union to be aware of the consequences of their actions and to reconsider their position. The Union should be informed that the strike is unprotected and that disciplinary steps will be taken which may lead to dismissal. The union plays a vital role in resolving an unprotected strike and should, as soon as possible, be given a reasonable opportunity to speak to the members and make representations on their behalf*".

[56] In *Modise & others v Steve's Spar Blackheath*[5],it was emphasized that the main intention of an ultimatum is to *"give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making a decision whether to heed the ultimatum or not".* It was also held that in keeping with the *audi alteram partem* rule, unprotected strikers must

[4] Cheadle *et al Strikes and the Law* (2017) at 212.
[5] [2000] 5 *BLLR* 496 (LAC) at para 73.

be given a hearing as well as an ultimatum prior to dismissal. The only justification for failing to hold a hearing is if the strikers impliedly or expressly waive their rights to a hearing. "*Such waiver cannot however be inferred from the strikers' non-compliance with the ultimatum, as the hearing and the ultimatum serve different purposes"*[6]. The Court went on to explain that:

> *"The purpose of the hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to illicit any information or explanation from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and if need be, seek advice before making a decision whether to heed ultimatum or not The nature and formality of the hearing will depend on the circumstances. It can be collective in nature."*[7].

[57] The ultimate test however is whether the strikers were given a fair opportunity to state their case before a decision was taken to dismiss them.[8] In *Karras t/a Floraline v SASTAWU and others*[9] the Labour Appeal Court followed the approach in *Modise* and held that section 188(1)(b) requires the observance of the *audi* rule in all instances of dismissal, regardless of the reason.[10] According to the Court, the only difference would be that in a case of collective misconduct, the opportunity to state a case will ordinarily be given to the collective, usually the trade union, if one is involved. The Court held that the approach is consistent with Article 7 of the ILO Termination of Employment Convention, 1982 (No 158), which provides that: *"[t]he employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."*[11]

[58] Ultimately, the consideration is whether the strikers or the union were given a reasonable opportunity to make representations before the strikers were

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[6] See Cheadle *et al Strikes and the Law* 214.
[7] At para 73.
[8] See Cheadle et al *Strikes and the Law* 215 and *Modise* at para 96.
[9] [2001] 1 *BLLR* 1(LAC).
[10] At para 25.
[11] At para 26 and *Modise* at para 30.

dismissed for participating in an unprotected strike. The circumstances faced by both the employer and employees should dictate what procedural steps are reasonably practical and fair in the context[12]

[59] The real reason advanced by the company for not convening a disciplinary hearing is that when they previously tried to hand documents to the employees (the ultimatums and Court orders) they refused to accept it. The refusal was also accompanied by the employees walking away and destroying the documents. I do not believe that this explanation is sufficient to justify not at least attempting to hold a disciplinary hearing. While tensions between the employees and the company were high during the strike and there was a police presence there is nothing to suggest that the climate was of such a nature that the company had no choice but to deviate from the requirement to hold a disciplinary hearing. Neither of the Court orders issued prior to the dismissal of the employees addressed issues of misconduct on the part of the employees. The orders were focussed on the unprotected nature of the strike. Putter's strike journal also does not paint the picture of a violent strike where the employees were out of control. This does not mean that I accept that there was no intimidation or violence, but rather, the point is that, the circumstances were not of such a nature that the company could not even consider holding a disciplinary hearing or affording the employees an attenuated form of *audi*. It could have held a collective disciplinary hearing or it could have invited the union to give written reasons why its members should not be dismissed, following on their refusal to comply with a string of ultimatums, and two Court orders. While there were regular interactions between the company and the union, this was in the main when the company communicated the ultimatums and Court orders (which had already been given to the employees) to the union. There were no meetings where the company asked the union for submissions prior to taking the decision to dismiss.

[60] Although the employees were afforded an appeal, I do not believe that this cured the failure to adhere to the *audi alteram* requirement. The facts of the present case are similar to those in *National Union of Metalworkers of South*

[12] See Cheadle et al *Strikes and the Law* 216.

Africa and Others v I G Tooling and Light Engineering (Pty) Ltd.[13] In that case, three ultimatums were issued and a mass dismissal took place without a pre-dismissal hearing. There were however several engagements with the union regarding the continuous unprotected strike action and three agreements in an effort to avoid such action was also concluded. It is worth quoting quite extensively from the judgment of La Grange J.[14]

> *"In relation to whether the subsequent automatic right of appeal rectified the absence of an opportunity to make representations, I accept that it has been held that an appeal can sometimes cure the procedural defect of not conducting an original enquiry or procedural failures in the initial inquiry. It is not an inviolable rule and will depend on the circumstances. As the LAC stated in* ***Semenya & others v CCMA & others****:*
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> *[30] I have referred to the Slagment decision to illustrate the point that in that case the Appellate Division held that the rules of natural justice had been complied with where there had been no hearing before the employees were dismissed but there had been one albeit in the form of an appeal hearing after they had been dismissed. The court found that the appeal hearing had effectively undone whatever unfairness had been occasioned by the absence of a hearing before the dismissal. My reference to the Slagment case should not be construed as in any way an endorsement of the view or proposition that where a person is entitled to a hearing at first instance as well as to an appeal or where he is entitled to two hearings, the holding of a fair appeal hearing when there was a defective first hearing or no first hearing at all, or the holding of one fair hearing instead of two or the holding of a first defective hearing and a second fair hearing satisfies the requirements of the audi alteram partem principle. I say no more than simply that, where a person is entitled to an opportunity to be heard before a decision is taken and he is not given such an opportunity, in certain circumstances an opportunity to be heard can be given after the decision and one of those circumstances is where the employee is offered a disciplinary hearing that is as fair, if not fairer, as the hearing that he or she was entitled to have been afforded before the decision could be taken. I also make the point that, where as in this case the employee is offered a hearing that would be chaired by a chairperson of the employee's choice who would make the relevant decision, then the audi*

[13] (JS763/06) [2018] *ZALCJHB* 181 (15 May 2018).
[14] At para 103.

alteram partem rule is complied with and such employee cannot complain about procedural unfairness if he or she rejected the offer or chose not to make use of it.

*"In **Semenya**, the employee was actually offered a hearing de novo before a chairperson of her own choice. In this instance, the chairperson was not an employee of the company, but was also not a consensual appointee. More importantly, the chairperson had to decide an appeal, where employees are trying to overturn an existing decision, rather than answering to a case against them. Moreover, employees had a contractual right to a hearing, even if that right was only to a joint hearing. It is also not a case where there was an initial hearing which was perhaps flawed in certain respects and those flaws could be corrected on appeal. In this case, a major consideration is that, IGT did not have a sound justification for not providing even an attenuated form of audi that is acceptable in strike dismissals before it took the decision to issue the dismissal ultimatum. In addition, although the LAC in Steve's Spar expressly left open the question whether an opportunity to be heard should be offered, in a case such as this where the final ultimatum is not merely issued with the threat of subsequent disciplinary action which could result in dismissal, but is issued with a pre-determined sanction, the imperative for inviting representations before giving effect to it, is even more compelling. In this regard, the following dictum in the case of **National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables** is also of relevance:*

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

employees an opportunity to be heard before a decision to dismiss them was taken. The respondent's failure to do so rendered its decision to dismiss the affected employees procedurally unfair. (Mamabolo v Rustenburg Regional Local Council, supra, at 144B–C). For these reasons I hold that the employees' dismissals were procedurally unfair.(emphasis added)"[15]

"Further, even if I assume its favour that it was impractical to convene a mass enquiry at the time, it did not even attempt to call for representations before taking the decision to dismiss. It may have been a different matter if that had also been genuinely impractical, but there were no exceptional circumstances which prevented it from asking the union to make representations by the afternoon before the deadline ran out as to why it should not dismiss the strikers. The right to a hearing prior to dismissal would be severely diluted if the court treated the absence of a hearing as something that would always be cured by offering a subsequent appeal, when there is no good justification for the failure to hold an enquiry in the first place.

Consequently, I am satisfied that the employer has not established that the dismissals were procedurally fair. The fact that an opportunity to make representations after the fact may mitigate that does not detract from the fundamental unfairness of denying the strikers an opportunity to make representations beforehand".[16]

[61] As I have stated above, I am not convinced that the circumstances were such that the company could not hold a disciplinary hearing or at least attempt to hold one. There are also no exceptional circumstances which prevented the company from asking the union to make representations as to why its members should not be dismissed. Putter did call the General Secretary of the union on the day of the dismissal, but this was to tell him that his members were dismissed.

[62] As in the *IG Tooling* case, the chairperson of the appeal hearing was not an employee of the company, but was also not a consensual appointee. Also, the chairperson had to decide an appeal, where the employees would be trying to overturn an existing decision, rather than answering a case against

[15] At para 104.
[16] At paras 105-6.

them. This is also a case where although three of the ultimatums preceding the final ultimatum threatened disciplinary action, one of which indicated that continued action could lead to dismissal, the final ultimatum contained a pre-determined sanction of dismissal. According to the ultimatum *"The union and the striking members should take note that employees who proceed with the strike will be dismissed.*"

[63] Despite continuously referring to the holding of a disciplinary hearing, the company ended up dispensing with this hearing, for reasons I have already found not to be compelling, and proceeded to dismiss the employees. This course of action is not that surprising if regard is had to the company's policy on "*Handling Strikes and Work Stoppages*". Clause 5.6.1 of this policy provides that once the deadline in an ultimatum has expired and the striking employees have not returned to work *"their services shall be terminated".*

[64] In the circumstances, I find that the dismissals were procedurally unfair.

Substantive Fairness

[65] In ***National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables***[17] the LAC set out the test for substantive fairness in dismissals for participation in unprotected strike action:

> *"Item 6(1) and (2) of the Code deals with the substantive fairness of strike dismissals and provides as follows:*
>
> *"6. Dismissal and industrial action. –*
>
> *(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –*
>
> *(a) the seriousness of the contravention of this Act;*
>
> *(b) attempts made to comply with this Act; and*

[17] [2014] 1 *BLLR* 31 (LAC).

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

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."[18]

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

"7. Guidelines in cases of dismissal for misconduct.

Any person who is determining whether dismissal for misconduct is unfair should consider –

(a)Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(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

[18] At para 27.

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard".[19]

"In my view the determination of the substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not "a magic wand which when raised renders the dismissal of strikers fair" (National Union of Mineworkers of SA v Tek Corporation Ltd and others (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair".[20]

"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".[21]

Item 6

[19] At para 28.
[20] At para 29.
[21] At para 30.

[66] In my view, the contravention of the LRA in this case was extremely serious. The issue relating to the wage demand was never conciliated. This is a violation of section 64(1)(a) of the Act. While the union submitted wage proposals to the company on 18 December 2015, the only referral to the CCMA was on 6 January 2016, in respect of a refusal to bargain dispute. During evidence, it was suggested that a referral to the CCMA was made in December 2015. However, no such referral was submitted into evidence.

[67] The union also made no attempt to comply with the LRA and blatantly ignored two orders of this Court. I have already rejected the evidence of Mr Thabane that he was not aware of any of the ultimatums or Court orders. On 18 March 2016, following the judgment of La Grange J, handed down that same day, it appeared as if some sanity was prevailing when the union placed on record that it would do everything in its power to ensure that the employees returned to work. However, the very next day the union served a notice to appeal the Labour Court's decision on the company.

[68] The union also embarked on strike action in contravention of the recognition agreement. In terms of the recognition agreement, no party would take part in industrial action unless the applicable dispute procedure in the agreement had been exhausted. The dispute procedure required that a dispute be declared in writing informing the other party of the issue in dispute and the desired outcome. This was to be followed by a dispute meeting where the parties would endeavour to resolve the dispute. No dispute was brought to the attention of the company. While the union did request a meeting with the company on 12 February 2016 to discuss wages, it appears that this meeting did not take place. What happened is that on 8 March 2016 the union proceeded to notify the company of its intention to commence with strike action on 14 March 2016 as a result of the company's refusal to meet its wage demands.

[69] In this case, the strike was not in response to any unjustified conduct on the part of the company. The employer concluded a recognition agreement with the union which regulated negotiations, including those in respect of wages. What was required of the union was to comply with the recognition agreement and the LRA.

[70] As far as item 6(2) is concerned, I have already dealt with this extensively above. The company issued six ultimatums in the hope of getting the employees to return to work. The employees were allowed sufficient time to reflect on the ultimatums in order to make an informed decision.

Item 7

[71] The LRA prohibits the participation in unprotected strikes. Section 68(5) provides that should an employee participate in a strike that does not comply with the provisions of the LRA, it may constitute a fair reason for dismissal.

[72] The recognition agreement also provides that a party to the agreement shall not participate in industrial action, unless the applicable dispute procedures have been exhausted.

[73] The company's policy on *"Handling Strikes and Work Stoppages"* also regulates strikes and makes it clear what the consequences of unprotected strike action will be.

[74] The prohibition of unprotected action is clearly valid, in particular, given its basis in statute.

[75] As far as consistency is concerned, the company had not previously faced industrial action, so the consistency of the company's application of the law cannot be tested at this level. The company allowed five employees to return to work, but this followed on them submitting individual appeals which convinced the company that they should be allowed to return to work.

[76] There is no doubt in my mind that dismissal was the appropriate sanction in the circumstances.

<u>Compensation</u>

[77] In *South African Revenue Services v CCMA and others* [22], the Constitutional Court quoted the LAC judgment in *Kemp t/a Centralmed v Rawlins*[23] which

[22] [2017] 1 *BLLR* 8 (CC) at para 50.
[23] [2009] 30 *ILJ* 2677 (LAC).

outlined the considerations a Court may take into account in deciding on compensation:

> "*To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA."*

Zondo JP outlined the applicable factors in these terms:

> *"There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:*
>
> *(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.*
>
> *(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.*
>
> *(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.*
>
> *(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.*
>
> *(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.*

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes."

The LAC in *Kemp* also stated that:

"I do not think that the provisions of sec 193(1)(c) of the Act give the Labour Court or an arbitrator the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit. In my view the ultimate question that the Labour Court or an arbitrator has to answer in order determine whether compensation should or should not be granted is: which one of the two options would better meet the requirements of fairness having regard to all the circumstances of this case? If however the Court or arbitrator answers that the requirements of fairness, when regard is had to all of the circumstances, will be better met by denying the employee compensation, no order of payment of compensation should be made. If the Court or arbitrator answers that the requirements of fairness will be better met by awarding the employee compensation, then compensation should be awarded. When that question is answered, the interests of both the employer and the employee must be taken into account together with all the relevant factors. In my view, where the court or an arbitrator decides the issue of whether or not to award the employee compensation, it does not exercise a true discretion or a narrow discretion. The determination of that question or issue requires the passing of a moral or value judgment. It is decided or determined on the basis of the conceptions of fairness because the Court or arbitrator has to look at all the circumstances and say to itself or himself or herself as the case may be: What would be more in accordance with justice and fairness in this case? Would be to award compensation or would it be to refuse to award compensation? It or he or she would then have to make the decision in accordance with its, his or her sense of which of the two options would better serve the requirements of justice and fairness."[24]

[24] At para 22.

[78] I have taken into account the interests of both the company and the employees as well as all the relevant circumstances in deciding whether or not to grant compensation.

[79] In my view, the requirements of fairness will be better met by denying the employees compensation. While, in the end, the company did not hold a disciplinary hearing, it endured the unprotected strike for nearly two weeks, incurring substantial losses in the process and tried through six ultimatums and two court orders to get the employees to return to work. Without detracting from what I said above, it also offered an appeal and reinstated five employees pursuant to their appeals. On the other hand, the union and its members ignored the ultimatums and showed flagrant disregard for two orders of this court. The union opportunistically built it's case on no more than a *bona fide* mistake relating to the dismissal date. It only called one witness in support of its case who was less than honest with this court. When asked why he did not adhere to the two court orders, which he conceded knowing about, he replied that *"as employees we did not believe that we were in contempt of any order, rather we were embarking on a legal strike."* His representative had no choice during argument but to distance himself from this statement.

[80] In the circumstances, the employees are not entitled to any compensation for the procedurally unfair dismissals.

Costs

[81] The union did not seek a costs order against the employer, even though it felt that the employer frivolously dismissed the employees. The union further submitted that the Court should consider the judgment of *Sibongile Zungu v Premier of the Province of KwaZulu-Natal and Others* [25] in which it was held that "*the rule of practice that costs follow the result does not govern the making of orders of costs in this Court"* . The employer argued that the only way that this Court could show its dissatisfaction was through a costs order in favour of the employer.

[25] [2018] ZACC 1 at para 24.

[82] My decision not to award compensation speaks to my dissatisfaction with the conduct of the union and its members. I am therefore not inclined to also make a cost order against the union.

[83] In the circumstances, I make the following order:

Order

1. The dismissal of the individual applicants was substantively fair but procedurally unfair.

2. The individual applicants are not entitled to any compensation in respect of their procedurally unfair dismissals.

3. No order is made as to costs.

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BN Conradie

Acting Judge of the Labour Court of South Africa

Appearances:

Applicants: Mr E Mphahlele of the National Transport Movement

Respondent: Advocate PH Kirstein

Instructed by: Johanette Rheeder Attorneys Incorporated.