(1) Reportable: Yes
(2) Of interest to other Judges: Yes
(3) Revised - No

[redacted] 08 December 2025
Signature Date

**THE LABOUR COURT OF SOUTH AFRICA**
**AT CAPE TOWN**

**Case no: C 583/2023**

In the matter between:

| | |
|---|---|
| **SOLIDARITY obo C J ARENDSE & 38 OTHERS** | **Plaintiffs** |
| and | |
| **HEINEKEN BEVERAGES (PTY) LTD** | **Defendant** |

**Heard**: 20 February 2025 and 27 November 2025
**Delivered**: 8 December 2025
**Summary:** (S 5 of the LRA - Non-payment of bonus to strikers – survey of jurisprudence on the correct test for determining breach of prohibited discrimination under s5 and use of economic measures to incentivise employees not to engage in strike action – Employer failing to discharge onus of demonstrating that withholding bonus from strikers justified)

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# JUDGMENT

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**LAGRANGE, J**

Nature of the case

[1] This is a case concerning an alleged breach of sections 5 (1), 5 (2) (c) (vi), and (vii) read with section 9 of the Labour Relations Act, 66 of 1995 ('the LRA'), on account of the employer not paying a bonus to employees who participated in a protected strike. The plaintiffs originally also claimed that the employer's conduct amounted to unfair discrimination in terms of section 6 read with section 10 of the Employment Equity Act, 55 of 1998 ('the EEA'). Ultimately, only the first claim under the LRA was pursued.

[2] The relevant sections of the LRA state:

> "5 Protection of employees and persons seeking employment
>
> (1) No person may discriminate against an employee for exercising any right conferred by this Act.
>
> (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-
>
> *(a)* …
>
> *(b)* …
>
> (c) prejudice an employee or a person seeking employment because of past, present or anticipated-
>
> …
>
> (vi) exercise of any right conferred by this Act; or
>
> (vii) participation in any proceedings in terms of this Act.
>
> (3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute."

(emphasis added)

[3] The anti-victimisation provision in the previous Labour Relations Act, 28 of 1956, was s7, which was confined to protection against punitive measures taken on account of being involved in union activity, which read:

> "No employer shall dismiss or prejudice an employee, or threaten to do so, by reason of the fact that the employee is or has been a member of a trade union or has acted in accordance with the constitution of a trade union or has participated in its lawful activities."

[4] The pertinent substantive provision of the EEA applicable to the dispute states:

> "6 Prohibition of unfair discrimination
>
> (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
>
> …"

[5] The dispute arises from a failure by the defendant ('Heineken') to pay a short-term incentive bonus ('STI') to members of the union, Solidarity, following their actual or presumed participation in a protected strike, whereas employees who did not participate in the strike were paid the STI.

[6] The parties were largely in agreement on the relevant facts and after discussion and with their consent, the court directed that the matter should be decided by way of a stated case. After exchanging proposed drafts, the parties reached consensus on the stated case and filed heads of argument by early April 2025. It was agreed that oral argument would be heard only if either party requested or the court deemed it appropriate. In the upshot, no oral argument was heard. In the course of preparing a judgment it appeared that there were certain factual issues which still needed to be resolved before the matter could be decided as a stated case. A directive was issued to the parties to clarify the factual questions, and a revised stated case was filed on 27 November 2025.

[7] Heineken also applied for condonation for the late filing of its plea, which was four days late. The application was not opposed and given the shortness of the delay, the absence of any demonstrable prejudice to the plaintiff's, and the explanation provided for the delay, I am satisfied that condonation should be granted.

The stated case

[8] The amended stated case is set out below.

"1.

INTRODUCTION

1.1. The parties attended the trial proceedings before the above Honourable Court on 20 February 2025. The Honourable Justice Andre Lagrange ("Judge") handed down an ex-tempore order regarding the manner in which the trial would proceed.

1.2. The parties agreed that this matter be heard on a stated case basis to determine whether the Plaintiffs were treated differently (as alleged) due to their participation in a protected strike and whether such differentiation is discrimination in terms of section 5(1) and 5(2)(c)(vi), (vii) of the Labour Relations Act ("LRA").

1.3. The Plaintiffs sorted the bundle of documents in chronological order. The bundle of documents should be read in conjunction with the stated cases and heads of argument of the parties, being the copies of all documents necessary at the outset of the hearing of the matter to enable this Honourable Court to decide the question proposed to the Judge appointed to adjudicate the matter.

1.4. The parties agreed that the Plaintiffs will pursue the following points contained in the pre-trial minute:

1.4.1. Whether a partial Short term Incenctive ("STI") payment was made in respect of the period July 2022 to April 2023.

1.4.2. Whether Andries Smit and Stanton van Rooyen participated in the strike and received their STI bonus payment.

1.4.3. Whether employees have been advantaged by receiving payment of the STI in exchange for the waiver to exercise their right to participate in the industrial action in terms of section 5(3) of the LRA.

1.4.4. Whether the Defendant discriminated against the Plaintiffs in terms of section 6 and 10 of the Employment Equity Act.

2.

THE PARTIES

2.1. Solidarity, acting on behalf of the Plaintiffs, a registered trade union in terms of the Labour Relations Act with its head office situated on the corner of D F Malan Avenue and Eendracht street in Kloofsig, Centurion.

2.2. The Defendant is Heineken Beverages (Pty) Ltd with its main place of business at Inanda Business Park, 54 Wierda Road, Sandton, Gauteng. A large section of the Defendant's head office function is situated at Aan-deWagenweg, Stellenbosch, Western Cape.

2.3.The Defendant is represented by Edward Nathan Sonnenbergs Inc ("ENS") with its address at 35 Lower Long Street, Foreshore, Cape Town.

3.

THE PARTIES AGREE THAT THE FOLLOWING FACTS ARE COMMON CAUSE

3.1, The factual background to which this current matter relates is pleaded and set out in the parties' respective statements of case and statement of response[1] and occurred within the area of jurisdiction allocated to this Honourable Court.

3.2. The payment of any STI to an employee is at all relevant times subject to the Defendant's STI policy. In terms of the STI policy[3], payment is subject to the **qualifying criteria**. Payment of the STI is also subject to the approval thereof by the Defendant's Board of Directors.

3.3. In the event that the Board of Directors approve the STI payment, such payment was effected in October every year. Due to the merging between Distell Limited ("Distell") and the Defendant, the STI payment was delayed and payment was effected with the Defendant's June 2023 payroll.

3.4. The qualifying criteria as determined by the STI policy reads as follows:

"Short term incentive qualifying criteria"

The payment of an STI is discretionary and subject to the approval by the Board and may under certain circumstances not be paid. The following are some of the criteria:

- There are hurdles (i.e. minimum acceptable performance) that must be overcome before any incentive payment can be made. These hurdles are approved by the Board.

- In the event of gross under-performance, misconduct and/**or industrial action** (own emphasis) the Company may decide not to grant a STI payment. Gross under-performance can be defined as, but not limited to, financial loss to the company and/or significant reputational damage to the organization.

- In the event of a disability application surpassing the disability waiting period, the Company may decide to pro-rate the STI payment until the end of the disability waiting period.

- Please note that employees participating in any other scheme for example the Sales Force Optimisation (SFO) and Marketing Incentive Scheme do not qualify for participation in the Corporate STI scheme."

3.5 On or about 9 January 2023, the Commission for Conciliation, Mediation and Arbitration ("CCMA") issued a strike certificate to Solidarity. It is necessary to mention that the Food and Allied Workers Union ("FAWU"), the Agricultural Broadbase and Allied National Trade Union ("ABANTU") and the National Union of Food, Beverage, Wine, Spirit and Allied Workers ("NUFBWSAW") were the representative unions within the Defendant's workplace, whilst Solidarity was a minority union. The strike related to Solidarity's demand for organisational rights and the right to bargain within the Defendant's workplace.

3.6 During the period of 11 to 13 January 2023 the Defendant engaged with the Plaintiffs representatives and members, informing them, inter alia, that the principle of "no work no pay" will apply to any strike action and of the impact that the strike will have on the payment of their STI, due to criteria in terms of the STI policy. [2] During the period leading up to the Plaintiffs strike in February 2023 the Defendant, at all times, encouraged and acknowledged the rights of all its employees, including the Plaintiffs, to engage in a protected strike should they wish to do so, with an understanding of the financial impact of doing so.

3.7. On or about 2 February 2023, Solidarity issued a notice of its strike and the strike commenced on 6 February 2023. The strike was called off on 8 February 2023. The strike only lasted two (2) days.

3.8. Organizational rights were not granted to Solidarity as a result of the strike.

3.9. On or about 5 June 2023, an internal communication from the Defendant's Financial Director, Lucas Verwey. was distributed in which the communication confirmed that the STI bonus had been finalised. The crucial part of the internal communication reads as follows,[6]

“With this context, it is therefore my great pleasure to confirm that all qualifying colleagues — will receive an STI bonus together with the June salary run. This only applies to all qualifying participants as per the current STI Policy. "

3.10. Aggrieved by this, the Plaintiffs submitted a group grievance on 3 July 2023. The Defendant dealt with the Plaintiffs' grievance verbally and with written feedback.

3.11 Again, the letter dated 12 July 2023 in reply to the group grievance, the Defendant confirmed that:

> "Employees who opt to take part in industrial action will be disqualified from the STI payable as they would no longer meet the participating criteria as per company STI policy.
>
> "The Company reserves the right to withhold or cancel STI payments to those employees who choose to participate in the strike, as per the company STI policy."

3.12 The Plaintiffs did not receive their STI bonus payment due to their participation in the protected strike. The Plaintiffs were not disqualified due to any misconduct and/or gross under-performance and the Board approved the STI bonus payment.

3.13. The Plaintiffs participation in the protected strike disqualified them from receiving the STI bonus.

3.14 . The Defendant also withheld the STI from employees who did not qualify to receive the STI payment for reasons relating to misconduct and/or per performance processes, and resignation (this, in accordance with the criteria set out in the STI policy) . The Defendant applied the qualifying criteria as per its STI policy in respect of all its employees when determining whether or not to pay /award the STI.

3.15. Participants who did not strike and were otherwise not disqualified from receiving the STI in terms of the criteria of the STI policy received the STI bonus.

3.16. It was a protected strike, a strike that complied with the provisions of the Labour Relations Act.

3.17. In line with paragraph 1.4.2 herein an accordance with the direction of this honourable court, the parties confirm that they have reached agreement in that the plaintiff will not pursue the point regarding whether Mr. Smit and Mr. van Rooyen participated in the strike and received their STI bonus.

4.

THE FACTS THAT ARE IN DISPUTE FOR PURPOSES OF THE DETERMINATION OF THIS MATTER

4.1. The Defendant disputes paragraph 3.4, 3.10, ~~3.13,~~ 3.18 and 3.19 of the Plaintiffs' stated case.

4.2. Whether the payment of the STI to Mr Smit and Mr van Rooyen was in fact an error.

4.3. The Defendant submits that due to an administrative (human resources and payroll) error, Mr Smit and Mr Van Rooyen, notwithstanding their participation in the strike and/or involvement in the industrial action, were erroneously paid the STI. The error was not detected by the Defendant at the time and was only discovered after the start of these proceedings.

5.

ISSUES THAT THE COURT REQUIRED TO CONSIDER

5.1. Whether the Defendant treated the Plaintiff(s)[3] differently by excluding the Plaintiff(s) from the STI bonus payment.

5.2. Whether, in treating the Plaintiff(s) differently (as alleged), the Defendant has contravened section 5(1) and 5(2)(c)(vi) and (vii) of the LRA.

5.3. Whether, just as it is legitimate for a trade union and its members / an employer's employees (the Plaintiff) to resort to industrial action, so too it may be legitimate for an employer (the Defendant) to respond to a strike with a legitimate exercise of power in collective bargaining context and an exercise of its managerial prerogative.

6.

CONCLUSION

6.1. The Plaintiffs therefore pray that the above Honourable Court grants the following relief:

6.1.1 The exclusion of the members from payment of the STI is in breach of sections 5(1), 5(2)(c)(vi), (vii) of the Labour Relations Act,

6.1.2. The Defendant is to provide the Plaintiffs with an account of the formula, used to calculate the STI paid to each individual, with supporting documents within one month of date of this order,

6.1 .3. The Defendant is to use the formula and pay the STI to the Plaintiffs within one (1) month thereafter;

6.1 A, That the Defendant pays the cost of suit.

6.1.5. Further and / or alternative relief.

6.2 The Defendant prays that the matter before the Honourable Court be dismissed with costs and such further and/or alternative relief as this Honourable Court may deem appropriate."

[3] Typographical correction

<u>Submissions of the Parties</u>

[9] The plaintiffs contend that the defendant's refusal to pay the STI bonus solely because of their participation in a protected strike constitutes discrimination prohibited by section 5(1) and 5(2)(c)(vi) and (vii) of the LRA. They argue that the right to strike is a fundamental right under both the Constitution and the LRA, and that employees should not be penalised for exercising it.

[10] They argue that the STI was approved by the Board and they met all other qualifying criteria. The only factor that disqualified them was their involvement in the strike. They contend that this differentiation undermined collective bargaining, created coercive pressure against future industrial action, and indirectly limited the constitutional right to strike. They cite the observation made by this court in *Ngcobo & Others v Chester Butcheries*[4]:

> "This section (Section 5) protects employees from victimisation for having exercised a right under the Act. The right to strike falls within the ambit of this provision. If the employer's conduct has the effect of discriminating, it will fall foul of the protection offered by s 5."[5]

[11] They also cite the Labour Appeal Courts' interpretation of s 5 of the LRA in *Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight & Dock Workers Union*[6]*:*

> (21) Simply put, the provisions of s 5 of the LRA constitute a prohibition against 'anti-union discrimination'. Although s 5(1) does not qualify the term 'discriminate' with the adverb 'unfairly', our constitutional and anti-discrimination jurisprudence generally require that discrimination be unfair and/or unjustifiable in order to constitute an infringement or violation. Differentiation which is fair and/or reasonable will not amount to discrimination. A contravention of s 5(1) therefore comprises two elements: discriminatory conduct or action and such being unjustifiable because it is

[4] (2012) 33 *ILJ* 2932 (LC)

[5] At paragraph 7.

[6] (2013) 34 *ILJ* 335 (LAC)

> irrational, lacking in proportionality, unreasonable or actuated by improper or illegitimate motives.
>
> (22) The party alleging discrimination (or violation of the specific protections in s 5 must establish the facts of the allegedly objectionable behaviour, in which event the onus of justifying it shifts to the party who engaged in the conduct. Moreover, the existence of differentiation or disparate treatment is not enough; generally, it must be established that the reason for the differentiation relates to a proscribed ground, in this case union membership or union activities. Where there is more than one reason for the differentiation, the requirement normally will be met where it is shown <u>that the prescribed ground has an element of predominance. The general prohibition against discrimination in s 5(1) is given content, without its generality being limited, by the provisions of s 5(2) and 5(3) which impose stricter liability in respect of specific forms of anti-union discrimination</u>."

(emphasis added)

[12] Further, they place reliance on comments on the abovementioned passage made by this court in its judgment in *National Union of Mineworkers on behalf of Members v Cullinan Diamond Mine, A Division of Petra Diamonds (Pty)* Ltd[7] which emphasised the point that differentiation based solely on strike participation is illegitimate unless justified:

> "(17) … I further understand the LAC to be saying that the discrimination contemplated in s 5 is one that questions conduct that is irrational, improper or tainted with illegitimate motives. I may add, in my understanding of the section, if an employee is differentiated simply, because he participated in protected strike action, such differentiation is illegitimate, improper and unjustifiable.
>
> …
>
> (18) … (I)n my view, an employee should not be differentiated for exercising a right in terms of the LRA. For instance, an employee may not be differentiated for participating in strike action. In order for an employee to

[7] (2019) *40 ILJ* 1826 (LC)

> invoke this right, he or she must prove facts, firstly, that a person has differentiated him or her by particular conduct and secondly, that the conduct infringed the provisions of s 5(1) in that it was perpetrated on him or her because of his or her exercising a right conferred.
>
> …
>
> (20) Section 5(1) employs the word 'for'. This word is used to indicate the object, aim, or purpose of an action or activity. It calls for a causal link between the differentiation and the exercise of the right. Differently put, the employees must have been differentiated for having participated in strike action. It is important to note that the legislature does not use words like directly or indirectly. Therefore, if the reason for differentiation is something other than participating in strike action, then s 5(1) is not infringed. Whitcher AJ in *Ngcobo* went to the extent of saying the following:
>
> 'I say so, first, taking note of the concessions made by the applicant's witness under cross-examination to the effect that striking members of the union at other outlets were indeed paid bonuses. This, as a matter of logic, puts paid to the applicant's complaint under s 5 of the Act that the strike was the cause of bonuses being withheld from them.' "

[13] As reflected in paragraph 3.13 of the stated case, Heineken does not dispute that the plaintiffs did not receive the bonus because they participated in the protected strike. It accepts also that the discrimination must not be rational or unfair but advances the view in its heads of argument that the ground of discrimination the plaintiffs are relying on is an arbitrary ground and therefore the onus lies on them to prove not only that it acted in a discriminatory fashion but did so irrationally and unfairly.

[14] In respect of which party bears the onus, Heineken's argument is at odds with the LAC decisions mentioned. Firstly, the ground of discrimination which the plaintiffs rely on is not an arbitrary one, but one that is specifically identified in the LRA. Secondly, the LAC confirmed in Safcor that it is the employer who bears the onus of establishing that the differentiation is justifiable[8]. Despite the LAC's failure to expressly rely on s

[8] At paragraph 22.

10, sub-section 10(b) also envisages the employer bearing the burden of showing that the conduct is not an infringement of s 5.

[15] However, it maintains that its conduct was lawful and consistent with its STI policy. It argues that the STI is a discretionary benefit, not an entitlement, and that the policy expressly excludes employees who engage in industrial action, alongside other disqualifying factors such as misconduct and underperformance. The Defendant emphasises that this exclusion was communicated to employees *before* the strike and applied uniformly. It further contends that withholding the STI was not punitive but a legitimate exercise of managerial prerogative within the context of collective bargaining.

[16] It argued that the crux of the case is whether the differential treatment of the plaintiffs in relation to payment of the STI bonus amounted to unfair discrimination and therefore a breach of s 5(1). It places particular reliance on the LAC decision in *Cullinan*[9], which upheld the Labour Court decision and clarified that an employer is not prevented from rewarding non-striking employees as part of the exercise of economic power in the collective bargaining process, subject to certain conditions being met:

> (25) Thus, just as it is legitimate for a trade union to resort to industrial action (temporarily suspending the contract) in response to an employer's unilateral management changes, so too it may be legitimate (depending on the circumstances) for the employer to respond to a strike with a unilateral exercise of the managerial prerogative to alter temporarily the terms of employment. Economic sanctions underwrite the collective bargaining process. The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided the measures are suitable and necessary (proportional) for that purpose."

Solidarity made no reference to the LAC decision in *Cullinan.*

[9] *National Union of Mineworkers v Cullinan Diamond Mine (A Division of Petra Diamonds (Pty) Ltd)* (2021) 42 *ILJ* 785 (LAC)

[17] Heineken argues that differentiation is permissible if rational, proportionate, and connected to a legitimate purpose. It argues that the decision to withhold STI was aimed at preserving operational stability and was neither arbitrary nor actuated by improper motives.

Jurisprudential background

[18] Before analysing the factual scenario in this case, a brief survey of the factual scenarios and outcomes in the various judgements dealing with the denial of a benefit to strikers is useful to illustrate the courts' changing approach to cases of this nature.

*Chemical Workers Industrial Union v BP South Africa* [10]

[19] The underlying dispute in this case was ultimately formulated as an unfair labour practice claim under the pre LRA legislation. The union claimed that *ex-gratia* payments made to non-strikers while its members were engaged in a legal strike was an unfair labour practice either because it amounted to victimisation, or the payments had been introduced unilaterally without negotiating with the union, which was the sole bargaining agent, or it amounted to a unilateral amendment of working conditions[11]. It is the first claim that is pertinent here. The industrial court found that :

> "I am quite satisfied that respondent's payment of bonuses to certain of its non-striking employees on 25 October 1989 constituted recourse to an economic weapon well within the parameters referred to above. Firstly, …, it is common cause that respondent's objective in deciding to pay the bonuses was the preservation and continued viability of respondent's business operations. Secondly, …, I am convinced that respondent's payment of the bonuses was a suitable and necessary measure for respondent to employ in combating the strike with which it found itself confronted, particularly if regard be had to respondent's position as a major supplier of petroleum products to strategic and essential services. Thirdly, … payment of the bonuses constituted a fair and reasonable response

[10] (1991) 12 *ILJ* 599 (IC)

[11] Page 603

to the strike, particularly inasmuch as (a) respondent's decision to pay bonuses was taken only after the commencement of the strike, and (b) no bonuses were paid after the strike ceased. In the result, … I am quite unable to find … that there was anything inherently unfair in respondent's payment of bonuses to certain of its non-striking employees, or that such payment constituted an unfair labour practice (as an act of victimization) in terms of para (j) of the definition of that expression in s 1 of the LRA or otherwise. Nor are my conclusions in this regard in any way affected by the fact that the payment of the bonuses may possibly have weakened the position of applicant in the bargaining process or discouraged trade union members. <u>These are merely some of the consequences which may result from the cut and thrust of collective bargaining, in which the court should not F be too keen to intervene</u> (cf the remarks of Landman AM in NUM v Henry Gould (Pty) Ltd & another (1988) 9 ILJ 1149 (IC) at 1156I).

…, I am of the view that, apart from anything else, respondent's payment o  bonuses to certain of its non-striking employees on 25 October 1989 was an act justified by considerations of necessity. <u>In short,… the payment of such bonuses was a fair and reasonable response by respondent to the strike with which it found itself confronted, but, further, that it was a  legitimate (in the sense of a lawful) response</u>.

… I accept as a basic proposition that it is only fair that employees having the same seniority and employed in the same job category by the same employer in the same plant should enjoy the same terms and conditions of employment unless there are good and compelling reasons to differentiate between them (cf A NUM v Henry Gould (Pty) Ltd & another at 1158A-B; NAAWU v Atlantic Diesel Engines (Pty) Ltd (2) (1990) 11 ILJ 579 (IC) at 585A-586E). However, the fact of the matter is that where certain of an employer's workers elect to embark upon a strike whilst others do not, <u>good and compelling economic reasons do exist for the employer differentiating in his treatment of striking and non-striking workers, albeit, as in the instant case, for the duration of the strike only. In such circumstances, there cannot, in my opinion, be talk of any victimization of striking workers</u>. <u>Moreover, it seems to me inappropriate to refer to respondent's payment of bonuses to certain of its non-striking employees as 'victimization', even in the broadest sense of the word, when it is clear that</u>

> respondent's object in making such payment was not to penalize applicant's striking members, but, rather, to preserve its business operations (cf in this regard East Rand Gold & Uranium Co Ltd v NUM at 696G-I)."[12]

*SA Commercial Catering & Allied Workers Union v OK Bazaars (1929) Ltd* [13]

[20] In this case, a pre-existing bonus was part of employees conditions of service. The company had adopted a policy of not paying a full bonus to workers who participated in a strike during the year. In the case of illegal strikes, the entire bonus was forfeited. Prior to the commencement of a legal strike in 1990, employees were warned that if they went on strike they would forfeit the bonus in accordance with past practice and their terms and conditions of employment. After the strike ended, the company decided to give a bonus to non-strikers. In the case of strikers the normal forfeiture formula, of reducing the bonus for every day on strike, was applied. Because of the length of the strike the strikers forfeited their entire bonus. The union argued, as a matter of principle, that inducements to employees to desist from striking amounted to an unfair labour practice. The court held:

> "The threat of withholding a bonus from strikers, or the actual withholding thereof, does not affect workers' freedom to strike. That freedom remains undiminished. The only result is to increase the practical disadvantages to strikers A which may flow from a particular strike action. When a strike is contemplated there are a number of conflicting considerations which are logically relevant to the decision whether to proceed or not. On the one hand, there are the potential advantages to be derived from a strike by way of increased wages, improved conditions of service, etc. The extent of these benefits, and the likelihood of obtaining them, have to be weighed against the disadvantages which would or could flow from strike action. Thus the striking workers would normally lose their wages for the duration of the strike. In addition they may face dismissal lock-outs or other forms of retaliation by the employer, which may, depending on

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[12] At pages 605-6

[13] 1995 (3) SA 622 (A); (1995) 16 *ILJ* 1031 (A)

> the C circumstances, be lawful. A financial disincentive of the sort with which we are here concerned would make it more expensive for workers to strike, or, to look at it from the other side, more advantageous to stay at work. It may therefore in a particular case tilt the balance of expected advantages against striking - the worker may consider that he would probably lose more from striking than he would gain. In this way the financial disincentive might help to prevent a strike but this does not, in principle, derogate from workers' freedom to strike if they consider it, on balance, to be in their best interest. In my view this result is not necessarily unfair in the sense contemplated by the unfair labour practice definition."[14]

(emphasis added)

[21] The court also rejected the contention that there was anything unfair about the nonpayment of the bonus in the particular circumstances of the case. In arriving at that conclusion, it considered that the employer's financial situation was parlous and the union had pursued demands that the employer could never have met. It also took account of the fact that the bonus was discretionary and not part of their terms and conditions of employment. Workers were also made aware that they faced forfeiture of the bonus if they went on strike. The strike was a long one lasting seven weeks, causing the employer substantial losses and resulting in a settlement substantially lower than the union's demands. The court felt in the circumstances it would be *"somewhat anomalous for striking workers to claim a bonus granted in recognition of service during the year."*[15]

*Food & Allied Workers' Union and Others v Pets Products (Pty) Limited* [16]

[22] This is the first reported case in which employees relied on s 5 of the LRA. After the end of a nine-day strike, the employer issued employees, who had not joined the strike, with R200 Pick n Pay vouchers. The union alleged that the payment contravened section 5 (1) and, or alternatively,

[14] At pages 1036-7

[15] pages 1038G-1039A.

[16] (2000) 7 BLLR 781 (LC); (2000) 21 ILJ 1100 (LC)

section 5 (3) of the LRA. The employees in the operations division who remained at work enabled the employer to maintain production at a level that allowed it to shut down on 16 December with its customary stock level at that time of the year. The vouchers were issued to these employees in February the following year and the employer expressly stated that they were to reward them for their hard work ("going the extra mile") during the strike. It disputed that it had any ulterior motive in making this *ex gratia* payment, such as undermining the union's status as collective bargaining representative of its members. The payment was a purely commercial consideration.

[23] The union argued that the vouchers were a reward for not striking and an incentive not to strike in the future. The action also discriminated against its members by disadvantaging them for exercising their right to strike and advantaging employees who did not strike.

[24] The parties accepted that a breach of section 5 (1) required not merely differential treatment but such treatment had to be unfair. The union argued that because it differentiated between strikers and non-strikers that made it unfair *per se,* and that the vouchers amounted to giving an 'advantage' to the recipients in exchange for them not exercising their right to strike, which brought it with in the ambit of the prohibition in section 5 (3).

[25] The court held that in interpreting the two provisions it was important to do so in the context in which the alleged violations took place, namely in the context of a protected strike. the court reasoned:

> "It is not in dispute that the act of discrimination took place in the context of a protected strike. Similarly, the advantage allegedly given by the respondent was done in the context of a protected strike. In other words, for not striking (legally), the respondent paid to the non-strikers a sum of money. The *sine qua non* for the payment of the R200,00 voucher was not so much the hard work performed by the non-strikers, but the fact that the non-strikers did not go on strike and therefore maintained production at a level sufficient to enable the respondent to commence its annual shut down on 16 December 1998 with the customary level of product in

> stock. This must be the case since the non-strikers were otherwise remunerated for overtime work and working weekends - in the sum of R46 000,00. Put another way, the non-strikers did nothing extraordinary to warrant additional or extra payment other than that provided for in their service contracts. Indeed, there was otherwise no other rational or objective basis on which the additional R200,00 was paid to the non-strikers other than what was described by the respondent as thanking the non-strikers for their "hard work, above the call of duty, during our industrial unrest in December last year".

[26] In concluding that the employer had breached both s5(1) and s 5(3), the court regarded the differential treatment of the strikers as akin to an act of discrimination on a prohibited ground, which is presumed unfair unless the contrary may be established according to the Constitutional Court decision in *Harksen v Lane NO & Others*[17].

[27] Secondly, the court pertinently noted that:

> "19. One is however assisted somewhat by the provisions of section 10 of the Act which provides in sub-section (a) that in proceedings before this Court a party who alleges that a right or protection conferred by Chapter II has been infringed must prove the facts of the conduct; and (b), the party engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter. In this matter, the facts have been agreed and it is indeed common cause that following a lawful strike in December 1998, the respondent employer paid to the non-strikers (including at least one union member) the sum of R200,00. The applicants allege that the employees' right to strike conferred by section 64 of the Act has been infringed thereby. Section 10(b) of the Act then provides that the party engaged in that conduct, i.e. the respondent in this case, must then prove that the conduct did not infringe any provision of Chapter II.
>
> "20. In my view, where a person (such as the respondent employer in this case) discriminates against employees (such as the individual applicants) for

[17] 1998 (1) SA 300 (CC) at paragraph 47, cited at paragraph 15 of *Pets Products*.

> exercising their right to strike which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established. In this regard it is analogous to discrimination on one of the grounds specified in the Constitution, the unfairness of which is presumed until the contrary is established (Harksen supra at para 48). In my view therefore it is not necessary at the section 10(a) stage of the proceedings in this Court, for the party alleging the infringement to prove, for example, that the discriminatory conduct was or is actuated by an illicit reason or by an ulterior motive on the part of the respondent employer."

[28] S 10 of the LRA reads:

> "10 Burden of proof
>
> In any proceedings-
>
> (a) a party who alleges that a right or protection conferred by this Chapter has been infringed must prove the facts of the conduct; and
>
> (b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter."

*National Union of Mineworkers v Namakwa Sands - A Division of Anglo Operations Ltd* [18]

[29] In this case, this court essentially followed the approach adopted in *Pets Food*. Unlike the latter case, the offending benefits were paid to non-strikers during the strike, which lasted more than a month. Another difference was that the court also found that section 187 (1) (a) and (b) of the LRA which prevents an employer from dismissing an employee who refuses to do the work normally done by striking worker, indirectly prohibited an employer from asking non-striking workers to do such work[19].

[18] (2008) 29 *ILJ* 698 (LC)

[19] At paragraph 40.

[30] The mine operated on a continuous basis. Eight days into the strike, non-striking staff were redeployed to perform operational duties to maintain production, for which they received a daily redeployment allowance of R 300. They also receive meals when they performed overtime. The court found that the employer could not explain why this ad hoc redeployment allowance was only paid to employees who worked during strikes. It found that the allowance was simply an incentive for other employees not to join the strike action and, in fact, had the effect of some of the strikers returning to work to obtain the allowance. The employer's conduct amounted to a contravention of section 5 (3) of the LRA[20]. It had discriminated against the union's striking members and had failed to prove that its conduct did not infringe the provisions of s 5 of the LRA[21]. The court made an order prohibiting the payment of the daily allowance, the provision of free meals and abnormal overtime wages on the basis that it contravened s 5(1), 5(2)(c) (i) and 5(3) of the LRA[22].

*Ngcobo and Others v Chester Butcheries* [23]

[31] This is the last in the line of cases following the approach in *Pets Food* and applying the test set out in section 10 of the LRA to determine if a contravention of s 5 had taken place. The employees had participated in a protected strike during 2010 and did not receive their normal discretionary bonus for that year. This, they believed was a punitive measure because they had participated in the strike. However, in this instance the court found that they were unable to even establish a prima facie case that the non-payment of the bonus was because they had participated in the strike[24]. The court accepted that there was evidence at certain stores of employees who had participated in the strike receiving the bonus and the

[20] At paragraphs 41 and 42.

[21] At paragraph 45.

[22] At paragraph 54.

[23] (2012) 33 *ILJ* 2932 (LC)

[24] At paragraph 9.

bonus was based on the financial performance of each of the employer's stores[25].

*Safcor Freight (Pty) Ltd t/a Safcor Panalpina v SA Freight & Dock Workers Union* [26]

[32] This LAC decision signalled something of a sea change in the approach to these type of cases . No longer is the analysis of a breach of s 5 based on the previous interpretation of the test in s10 of the LRA. Instead, the LAC adopted an approach, which echoes some of the thinking in the pre-LRA decisions in *OK Bazaars* and *CWIU* cases. In *Pets Products, Namak*wa Sands and *Ngcobo*, the approach was to firstly to identify if the differential treatment of strikers had been established (in *Ngcobo* it was not) and then to determine if the reason for discriminating against them was because they had engaged in strike action. In terms of the LAC's approach the first stage of proving the existence of discriminatory action remains, but instead of merely deciding if the reason for the discrimination was the employees participation in the strike, the employer is require to show that the discriminatory conduct was 'unjustifiable' because it was irrational, lacking in proportionality, unreasonable or actuated by improper or irrational motives[27]. The LAC invoked the principle that, despite the absence of the word 'unfairly' in s 5, *"our constitutional and anti-discrimination jurisprudence <u>generally require</u> that discrimination be unfair and/or unjustifiable in order to constitute an infringement or violation."* [28]

[33] The onus for establishing the justifiability of the discriminatory conduct remains that of the employer[29]. In this respect, the LAC's approach is consistent with the structure of s 10, which requires the employee party to prove the conduct complained of and the employer to prove that the conduct did not amount to a breach of s 5. What is less clear, with respect, is why the LAC decided that the second part of the test is not to determine

[25] At paragraph 6.

[26] (2013) 34 *ILJ* 335 (LAC)

[27] *Safcor* at paragraph 21, cited in paragraph 11 above.

[28] At paragraph 11.

[29] At paragraph 22.At par

if the reason strikers were penalised because they went on strike, which can be difficult enough to do where mixed motives exist, but whether the employer can justify the differentiation on the basis that it was not irrational, lacking in proportionality, unreasonable or actuated by improper or irrational motives.

[34] It is apparent from the LAC decision in *Safcor* that it made no reference to s 10 of the LRA, nor to any of the judgments in *Pets Foods, Namakwa Sands* or *Ngcobo*. Consequently, in so far as the requirement of justifiability might be assumed to have replaced the requirement of proving that the discriminatory conduct did not amount to an infringement of s 5, the reasons for this were not made explicit by the LAC.

[35] In *Safcor*, the discriminatory conduct complained of what that the employer granted a 4.5% mid-year increase only to non-union employees, and made it conditional on not joining the union. The company took the decision in early August 2007 and applied it retrospectively to 1 July that year. At the same time, the annual wage review of non-unionised staff was changed to 1 July each year. A critical condition of receiving the increase was that it was subject to a "condition precedent": if the employee joined the union (thus entering the bargaining unit) any time between 1 July 2007 and 30 June 2008, the increase would cease at the end of the month of joining, and the employee's pay would revert to the level before the 2008 non-union cycle increase.

[36] On 8 August 2007, the company wrote to all non-union staff in Durban, awarding a 4.5% increase backdated to 1 July 2007 and simultaneously changing their annual wage review date from January to July. Crucially, this increase was subject to a "condition precedent": if the employee joined the union (thus entering the bargaining unit) any time between 1 July 2007 and 30 June 2008, the increase would cease at the end of the month of joining, and the employee's pay would revert to the level before the 2008 non-union cycle increase. The employee would then only receive increases negotiated by the union (effective until 31 December 2008).[30]

[30] At paragraphs 12-13.

[37] The union communicated that its members were agreeable to changing their incremental date to 1 July, but the company refused to amend the union's 2007 wage agreement before the next annual negotiations, while it simultaneously amended the non-union employees' terms by moving them to the July cycle and granting the 4.5% increase.

[38] In consequence, a unionised employee earning R 10,000 per month, would receive approximately R 5,000 less that a non-union member over the 18-month period starting from January 2007. The court found the employer's conduct *"provided a strong inducement to non-union members not to exercise their right to join the union"* and was an inducement for union members to resign to obtain the extra 4.5 5 benefit, which had the potential of undermining the union as a bargaining agent.[31] The court rejected the employer's argument that the differentiation was simply between different bargaining units, because it was a differentiation based on union membership[32]. It also rejected the rationale advanced by the employer that the differentiation was for reasons of efficiency, managerial resource planning and holding the union to its agreement as *"vague," "opaque,"* and inconsistent, especially given the union's expressed willingness to align to the July cycle[33].

[39] The conduct amounted to anti-union discrimination prohibited by sub-section 5(2)(c)(i), by prejudicing employees on account of their union membership, and by s 5(3), because it advantaged employees in exchange for not exercising LRA right to join a union[34].

[40] The LAC did not expressly make a finding that Safcor's discriminatory conduct was irrational, lacking in proportionality, unreasonable or actuated by improper or irrational motives. However, it implicitly rejected the employer's attempt to rationalise the measure as irrational, noting that "*differentiation must be supported by a commercial rationale*"[35], and

[31] At paragraphs 29-30.

[32] At paragraph 31.

[33] At paragraphs 23 and 28.

[34] At paragraphs 30 and 32.

[35] At paragraph 28.

implied that the employer's motive was improper in that it was to induce non-members not to exercise their right to join a union[36]. In all probability, the same conclusion would have been reached by determining if the employer had contravened s 5 because of the reason it implemented the measure.

*National Union of Mineworkers v Cullinan Diamond Mine (A Division of Petra Diamonds (Pty) Ltd)* [37]

[41] Because the LAC decision in this case supersedes the labour court decision, which it confirmed, and that in most key respects the reasoning of both courts are in conformity with each other, the discussion will concentrate on the LAC decision.

[42] The essential facts of the case are as follows. A strike took place for 12 working days. It ended on 15 September 2013. There was an annual pre-existing discretionary bonus, which was linked to audited company-wide production and financial targets, normally payable in September. The employer warned employees before the strike that payment of the bonus was dependent not only on the audited results for the 2013 financial year, but also on *"the successful settlement of the wage negotiations for the 2014FY without the negative impact of a strike*". The notice continued:

> "The strike will definitely impact the quantity of this bonus negatively. The choice whether to partake in the strike or to come to work remains the choice of each and every employee.
>
> The negative impact of the strike on the company as well as the bonus of employees will be reduced if revenue could be safely generated during the strike period. Employees who decide to come to work and assist the mine to generate revenue during this period by performing alternative and additional duties in an exceptional manner would be considered for an additional payment."[38]

[36] At paragraph 30.

[37] (2021) 42 ILJ 785 (LAC).

[38] At paragraph 4

[43] After the strike, the annual bonus was scrapped, but an exceptional performance bonus was paid to all employees who had worked one day or more during the course of the strike and had contributed to exceptional productivity and performance during the strike. Evidence was led that, during the strike, the mine had achieved 52 % of its production level with only 34% of the man hours it would normally have worked. Although queried, these figures could not be disputed and the mine maintained that the bonus was paid not only for working during the strike, but also for their performance in in minimising the effects of lost production[39].

[44] The union contended that the payment of the bonus was a breach of s 5(2)*(c)(*vi) and s 5(3) of the LRA, read with ss 6 and 10 of the EEA and amounted to unfair discrimination. The LAC pronounced definitively that discrimination involving employees' exercising rights under the LRA is governed principally by s 5 of the LRA, and the EEA does not apply to such disputes[40].

[45] The LAC followed *Safcor*'s reasoning and stated that the issue on appeal was whether the payment of bonusses amounted to unfair discrimination under s 5.

[46] On this occasion, the LAC referred to the *CWIU* decision, noting the similarities between that case and the case before it, namely the decision early in the strike to reward those who worked longer hours and the fact that it was an exceptional bonus which allowed operations to continue. The court noted with approval the Industrial Court's reasoning that there are compelling economic reasons why an employer should be entitled to reward employees who worked during a strike, and that where the purpose of the payment was to preserve its operations, not to penalise strikers there could not be any talk of victimisation.[41] The LAC also alluded to the Appellate Division's reasoning in the *OK Bazaars* case, with approval, namely that the freedom to strike was a necessary ancillary to effective bargaining, but that did not preclude an employer from offering

[39] At paragraph 5-6.

[40] At paragraph 8.

[41] At paragraph 14.

financial inducements to workers to refrain from striking, dependent on the circumstances. After citing these decisions, the LAC then posed the question, whether s 5 of the LRA required a different approach towards rewarding non-strikers, given that those judgments were dealing with unfair labour practices.

[47] While noting the decisions in *Namakwa Sands* and *Pets Foods,* the LAC observed that there *"there is no general express provision in the LRA or elsewhere outlawing the practice of paying bonuses to non-strikers. The issue is whether that practice is unfairly discriminatory."*[42]

[48] After the strike, the company announced that, due to the strike's negative impact and failure to meet the usual criteria (production, profitability, audit confirmation, and a period free of major disruptions), no annual bonus would be paid. The LAC accepted that the differential impact of the bonus payment in the dispute before it was discriminatory, and then considered whether that conduct undermined the union as a bargaining agent or whether it was merely a retaliatory measure forming part of the power play during a strike. It held that it was no more objectionable than the use of replacement labour. The court held:

> "The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided the measures are suitable and necessary (proportional) for that purpose."[43]

[49] The LAC concluded:

> "(28) … By reason of its temporary retaliatory nature, and the computation of the bonus being explicitly tailored to attendance and performance for the limited period of the strike, the bonus was a proportional means of advancing the respondent's collective bargaining objectives.
>
> (29) As such, the respondent's conduct did not unfairly discriminate against or prejudice the striking employees;

[42] At paragraph 19.

[43] At paragraph 26.

> nor did it unfairly advantage the non-strikers without legitimate reason. <u>The non-strikers were not advantaged for not exercising their right to strike. They were advantaged for their attendance and exceptional performance during the strike. But for the exceptional performance the bonus would not have been paid</u>. Accordingly, the respondent's conduct was not an infringement of the relevant provisions of s 5 of the LRA."

(emphasis added)

[50] With *Cullinan* the law seems to have come full circle. The test first set out in *Safcor* has now been fleshed out to make it clear that if an employer can withhold a benefit from strikers and correspondingly offering it to non-strikers, despite the fact that this amounts to discriminating between the treatment of strikers and non-strikers, if the employer can justify it as a way of discouraging strikers from engaging in strike action and encouraging employees to choose to work, that is an acceptable part of collective bargaining power play tactics, provided that is a suitable and proportional way to achieve that aim. If those criteria are satisfied, the differential treatment of strikers and non-strikers will not amount to a breach of s 5 of the LRA.

[51] The difficulty in applying this test, lies in determining when the tactic of offering an incentive to non-strikers and a disincentive to strikers will be a suitable and proportionate response.

[52] It is only where the advantage offered to non-strikers is patently disproportional to what the employer wants to achieve that the commercial rationality of the measure might be challenged, because the value of the incentive offered to non-strikers is notably disproportionate to the benefit obtained or conversely imposes a significantly disproportionate disadvantage on the striking employees relative to the real impact of the strike, such that its punitive character is a prominent feature.

[53] Nonetheless, it means that to successfully defend a claim that such differential treatment on the basis that it is not unfairly discriminatory and not in breach of s5, an employer needs to do more than simply say it adopted the strategy as a part of collective bargaining power play. If that

was not the case, all an employer need do to defeat claims of this nature, is to utter the incantation that it is simply an instance of economic power play to overcome the protection supposedly afforded by s 5, which risks the provision becoming nugatory.

*Evaluation*

[54] In this instance, the pre-existing discretionary STI bonus policy provided for the forfeiture of the bonus in the event of participation in a strike. Solidarity and its members were warned before the strike that Heineken would invoke the provision in the STI bonus scheme which disqualified employees who participated in strike action. Plainly, employees who waived their right to strike, would have retained their eligibility to receive the bonus, subject to not forfeiting it for misconduct or poor performance. They would have obtained an advantage relative to strikers who exercised their right to strike and forfeited their bonus.

[55] Solidarity argued that the basis for differential treatment, was also the very reason its members did not receive the bonus, namely they did not receive the bonus merely because they went on strike and that was the entire explanation for them being deprived of the bonus.

[56] Heineken contended that the fact that the policy was a pre-existing one and that employees were warned they would forfeit the bonus if they embarked on strike action somehow supports its argument that the differential treatment was justified. It also argues, as a matter of principle, that withholding the bonus in the context of collective bargaining was a legitimate exercise of its power to decide whether to withhold it. It further argues that the decision was aimed at preserving operational stability and was not based on improper motives.

[57] However, Heineken's defence amounts to little more than stating the general principle that differential treatment of strikers and non-strikers is capable of defeating a claim of unfair discrimination and alleged breach of s 5.

[58] As mentioned above, under the current test, the onus rests on Heineken to demonstrate, notwithstanding that it differentiated between strikers and non-strikers when deciding to pay the bonus, that the reason it did so was justified. It needed to demonstrate that it was a suitable and proportionate response. It provided no details of the impact its denial of the bonus would have on strikers or on incentivizing workers not to strike. It is worth noting that this was a strike to obtain organizational rights for Solidarity, so it was not one that was likely to have attracted support from non-members of Solidarity. In the absence of any explanation of how the loss of the bonus was a proportionate measure to deter strike action by Solidarity members which was confirmed by Heineken before the strike even commenced. Further, there was no explanation why it was considered a proportionate response to completely deny strikers the bonus when the strike ended after only two days.

[59] In the circumstances, I am not satisfied Heineken has provided an adequate defence to justify why withholding the STI bonus was not in breach of sections 5(1), 5(2)(c)(vi) of the LRA.

[60] Although it was pleaded that the employer's conduct was also a breach of section 5(2)(c)(vii) of the LRA, which involves prejudicing an employee for participating in p oceedings under the Act, no case was made out why this provision was breached.

[61] On the question of costs, this is not an appropriate case to deviate from the normal practice of not making a cost award taking account of principles of law and fairness.

<u>Order</u>

1. The late filing of the Defendant's plea is condoned.
2. The exclusion of the Plaintiffs in Annexure X to the Plaintiffs' statement of claim, from payment of the STI bonus in 2023 was in breach of sections 5(1) and 5(2)(c)(vi) of the Labour Relations Act, 66 of 1995.
3. Within thirty (30) calendar days of the date of this order, the Defendant must provide the Plaintiffs with an account of the formula and the supporting documents used to calculate the 2023 STI bonus payable to each individual

Plaintiff, which they would have received if they had not been disqualified from receiving because they participated in a strike, with supporting documents,

4. Within thirty (30) calendar days of complying with paragraph 3 of this order, the Defendant must pay the individual Plaintiffs the 2023 STI bonus, which they would have received if they had not been disqualified from receiving because they participated in a strike, in accordance with the aforementioned formula.
5. No order is made as to costs.

[redacted]

R Lagrange

Judge of the Labour Court of South Africa

<u>Appearances</u>

For the Applicant: N Ras from Solidarity

For the Respondents: C Nhliziyo from Edward Nathan Sonnenbergs