IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 12/20

In the matter between:

TRELLICOR (PTY) LTD t/a TRELLIDOR **Appellant**

and

NATIONAL UNION OF METALWORKERS OF SA ("NUMSA")

obo MLONDI NDWALANE & OTHERS **Respondent**

Heard: **4 November 2021**

Delivered: **Deemed to be the date the judgment is emailed to the parties 10 February 2022.**

CORAM: Waglay JP, Coppin JA et Savage AJA

JUDGMENT

COPPIN JA

[1] The appellant is appealing the order of the Labour Court (Cele J) ("the court *a quo*") that declared as unfair its dismissal of nightshift workers who were alleged to have acted in breach of a court order ("the interdict") on 17-18 July 2013, and that directed the appellant to reinstate them retrospectively to the date of their dismissal. Leave to appeal the court ***a quo's*** order was granted on petition to this court.

[2] The respondent, which is opposing the appeal, is cross-appealing an order of the court *a quo* that declared as fair the dismissal by the appellant of day-shift

workers for allegedly acting in breach of the interdict on 17-18 July 2013. The appellant is opposing the cross-appeal.

[3] In respect of the issue in the appeal – The court *a quo* essentially found that the appellant did not make out a case on the pleadings or evidence that the employees, who were on the nightshift of 17 and 18 July 2013, withdrew or withheld their labour; that it was actually the appellant that had cancelled the night shift of 18 July; and that the charge sheet was not clear and specific concerning the night-shift workers' alleged misconduct. The appellant contests these findings. The issue in the appeal is thus relatively crisp.

[4] In respect of the cross-appeal, the respondent essentially contests the fairness of the sanction of dismissal of the day-shift workers on two bases. It contends, firstly, that the appellant's conduct in suspending workers was unjustified conduct that purged their industrial action of its illegality and, secondly, that the sanction was not appropriate in light of what they contend are mitigating factors.

The common cause facts

[5] The appellant, situated in Phoenix, Durban, is a manufacturer of burglar guards and the respondent trade union, NUMSA, represents its members cited in this appeal. In this judgment, NUMSA when referred to on its own shall be referred to as "the union", and where reference is made to it, inclusive of its members who are cited, it is referred to as "the respondent".

[6] In July 2013, a job grading or re-grading dispute arose between the appellant and its employees and the union was involved in an attempt to settle it. The dispute itself involved highly technical issues and seems to have been brewing for a while before that.

[7] Subsequent to a meeting held on 14 June 2013, where a union organiser met shop stewards to discuss the grades of employees, there were threats or rumours of individual employees embarking on an unprotected industrial action. The threats actualised on 25 June 2013. The unprotected strike by individual employees started at 8H00 and continued for the rest of that day.

[8] The appellant's attorneys wrote to the union and to the respondent's attorneys, Brett Purdon attorneys, informing them that the appellant intended approaching the Labour Court to interdict the unprotected strike/industrial action.

[9] Staff of the appellant, particularly, Mrs Moonsamy, the Human Resources Manager, and a Mr Wright addressed the shop stewards and the workforce on the issue. They, *inter alia,* informed the workforce that the work stoppage was unprotected, and encouraged them to cease such action and to resume work. These intimations were apparently not heeded. The appellant then proceeded to issue a verbal ultimatum to individual employees, including members of the union, to return to work. There was also an arrangement in terms of which the appellant and the union were to make an urgent request to the Metal Industries Bargaining Council ("the council") to conduct a grading exercise at the appellant's premises.

[10] The union members chose to ignore the verbal ultimatum and continued with their unprotected industrial action. They were gathered in the canteen. The appellant issued two further ultimatums, that they return to work, but these too went unheeded. The appellant informed the respondent and its members that it intended to apply to court on Friday, 28 June 2013, for an interdict on an urgent basis. The striking employees, who had gathered in the canteen, then left the canteen and went through the factory and disrupted those employees who chose to work, by pulling them off or out of their workstations. They then returned to the canteen where they remained.

[11] On 26 June 2013, the council's representative, Mr Sean Drabble, came to the appellant's premises to conduct the grading assessment of employees. The appellant did not proceed with the urgent interdict as scheduled on 28 June 2013, because members of the union returned to work. But by then, all of the union's members, "B" (night shift employees), who had been on strike, had been issued with final written warnings, and the "C" (day-shift) employees, who were already on final warning, had been informed that they would in due course be notified of their disciplinary hearings.

[12] Mr Drabble's unannounced visit to the respondent's premises on Monday, 1 July 2013, to conduct a normal inspection and to ensure that he had covered all aspects, seemingly, triggered great anxiety and mistrust amongst the workers, even before they knew what he would state in his report. It was rumoured that the workforce was not interested in his report and just wanted their grades changed regardless of his findings. In response to the rumours, the appellant reminded the shop stewards by correspondence that such rumours had previously led to unprotected industrial action.

[13] The grading report was presented to shop stewards and management on 4 July 2013 and the workforce had to be given feedback on the report on Friday, 5 July 2013. The shop stewards were reluctant to participate in the process. The appellant's management team informed the workforce that if they had any grievances regarding the grading they could refer them in accordance with its grievance procedure.

[14] The respondent also pleaded with the union's representatives to intervene in order to stabilise the position and to defuse any industrial action. However, after the grading report was made available to the workforce and a feedback session was held, rumours started circulating that employees who were aggrieved by it intended to engage in industrial action on 9 July 2013. This was despite the fact that the appellant was not going to drop certain grades as recommended in the report.

[15] On 9 July 2013, individual respondent employees failed to return to their workstations. Union representatives, who had not succeeded to convince their members not to engage in the industrial action and to return to work, requested Ms Moonsamy and Mr Wright of the appellant to address those employees. They were in turn informed that further meetings would be held with them and that the employees would only be addressed if they returned to their workstations.

[16] Further efforts by union representatives to get their members to return to work and the appellant's efforts to get the union to convince their members to return to work were not successful and the employees continued with their

unprotected industrial action. Consequently, the appellant's attorneys informed the union that if the workers did not return to work by Wednesday, 10 July 2013, in accordance with an ultimatum it had issued, it would proceed on 12 July 2013 to obtain on an urgent basis a court order interdicting the unprotected industrial action.

[17] Even though the night shift of 9 July 2013 had not been cancelled, only about nine employees came to work on that shift. The other employees who were supposed to also work, refused to do so. Many employees informed the appellant that they had been threatened and intimidated and they feared for their safety and lives and those of their families. In response, the appellant enlisted private security as escorts to monitor the situation at the appellant's premises.

[18] Despite the ultimatum issued by the appellant, the unprotected industrial action and the unlawful threats and intimidation continued on Friday, 12 July 2013 when the appellant obtained the interdict. It was served on the union and the implicated employees on that same day. In addition to informing the union of the court order, the appellant sought a collective undertaking that the union's members would return to work on Monday, 15 July 2013. In response, the union informed the appellant that its members would cease their unprotected industrial action and would return to work.

[19] Paraphrased, the Labour Court's order of 12 July 2013, *inter alia*, declared the conduct, of the employees who participated in the industrial action relating to the grading, to be an unprotected strike; interdicted those employees from continuing with the strike or from participating in an unprotected strike; prohibited them from approaching or being within 500 metres from the access gates of the appellant (except for lawful purposes); directed them to return to work and to work as required in their contracts of employment; interdicted them from interfering with the business operations of the appellant, and from intimidating, blockading, assaulting or harassing or in any way unlawfully interfering with the appellant's employees, suppliers or customers, and it directed the SAPS in Phoenix to assist with the service of and enforcement of the order.

[20] When the employees returned to work on the Monday, the appellant attempted to suspend about 11 of them who were suspected of having been involved in misconduct during the previous week's unprotected industrial action.

[21] At a meeting of shop stewards and management of the appellant, a union representative requested the appellant not to suspend the union members without having investigated the matter and being certain of the facts, as suspensions at that stage were likely to result in further industrial action. The appellant was requested to only formulate the charges against those that were to be charged after completing its investigation, and then to suspend those implicated accordingly. The appellant undertook to inform the union of its decision in that regard in writing by 16 July 2013.

[22] In a letter dated 16 July 2013, the appellant informed the employees that as an act of goodwill it would issue all employees who had participated in the unprotected industrial action with a further written warning and that allegations of misconduct by individual would be dealt with in terms of its standard disciplinary procedures.

[23] On 17 July 2013, from about 11h00 to 13h25 certain individual employees engaged in further industrial action. They continued with this on 18 July 2013 on the appellant's premises and refused to return to work. The South African Police were eventually called in to escort them off the premises. And on 19 July 2013, the appellant brought an *ex parte* application in the Labour Court in Durban seeking an order holding those employees in contempt of the court order that was granted on 12 July 2013. An interim order was granted returnable on 15 August 2013.

[24] By then a number of employees had been suspended pending a disciplinary enquiry, in respect of allegations of misconduct during the strike, failure to comply with the court order of 12 July, and a failure to comply with a lawful instruction that they return to work.

[25] On 19 July 2013, the appellant issued a notice that a collective disciplinary enquiry was to be held in respect of one hundred and twenty–three (123)

employees. They were all charged with and at the conclusion of that enquiry they were all found by the chairperson of the enquiry to have acted in contempt of the court order of 12 July 2013, by their refusal to obey a reasonable instruction to work and to vacate the appellant's premises, and of gross insubordination. They were all as a result dismissed on 1 August 2013.

[26] The union and employees only appealed (internally) against the sanction of dismissal and not the findings, and the appeal was dismissed on 22 August 2013. The dismissal dispute which was referred by the respondents to the council was conciliated, albeit unsuccessfully. The matter was then referred to the Labour Court for determination.

The Court *a quo*

[27] The court *a quo* distinguished between those employees that were on the day shift and those that were on the night shift. It found that the employees who were on the day shift were on an unprotected strike and were in contempt of the interdict of 12 July 2013. It also found that they were correctly found guilty of the other two counts of misconduct, but treated the two as one (correctly so).

[28] In respect of those who were on the night shift, the court *a quo* held that even though they had congregated with the day shift employees on 17 and 18 July 2013, they worked their shift on 17 July and were "to go and rest during the day on 18 July 2013" and that on that day "they never withdrew their labour in demand for anything". The court *a quo* also held in respect of those employees, that the charge sheet ought to have been more specific about what they were alleged to have done wrong, and could have stated, "for example", that they had acted "in common purpose with the day shift, or words to that effect." Even though the court *a quo* also found in relation to the relief that their "hands are not that clean", it held that it was not proved that they had committed the misconduct they were charged with, and they were, accordingly, found "not guilty and discharged". As relief, the court *a quo* ordered their retrospective reinstatement (with full back pay).

The appeal

[29] As pointed out at the outset, the appeal only relates to the court ***a quo's*** order in respect of the night shift employees. The appellant argues, essentially, that the court *a quo* erred in its conclusions and order regarding those employees. It specifically contends that its version, as opposed to that of the respondent, ought to have been accepted; that the distinction made by the court *a quo* between night and day-shift employees was never raised in the disciplinary enquiries, the pleadings, the pre-trial procedures and in any evidence presented at the trial; that it was not common cause at any time that the night shift employees did not withdraw their labour; that there was no duty to plead common purpose, because the respondent never distinguished between the two shifts in their pleading; and that all the acceptable evidence was to the effect that all the employees, who were members of the union, acted together and in solidarity with each other, irrespective of their shift, in participating in the unprotected industrial action.

[30] The appellant further contends that in respect of both counts of misconduct, the undisputed facts are that on 17 and 18 July 2013, the employees who congregated at the canteen, included day and night shift employees and that "unprotected industrial action took place"; by participating in such action on the appellant's premises when they were supposed to have left after their shift and to have gone to rest, in preparation for their next shift, the night shift employees effectively rendered themselves unfit to work the next shift; that they also refused to obey the appellant's instructions that they leave the appellant's premises after their shift had ended, and were in contempt of the interdict by wilfully remaining on the premises in those circumstances, where it was not for a lawful reason; and that participation in the unprotected industrial action was not a lawful reason for remaining on the premises.

[31] As indicated earlier, the respondent essentially supported the reasoning of the court *a quo* in respect of the night shift employees. It further submitted that the case of the appellant in the court *a quo* did not relate to those that had been on the night shift, and that they had, in fact, been wrongly charged as also having been on day shift. With reference to the pleadings, it argues that it did

in fact distinguish between the day shift and the night shift employees, and that it was indeed the appellant's pleaded and presented case that was defective because it did not make such a distinction. It further contends that the appellant's pleadings, do not accord with the evidence, or the "propositions it now seeks to advance" concerning the night shift employees.

Discussion

[32] In paragraph 37 of its statement of claim, the respondent ("Applicant" in the court *a quo*), on behalf of its members who were on the night shift, alleged, *inter alia*, the following: "*The dismissal of the Applicant employees engaged in night shift during the period 17 and 18 July 2013 was substantially unfair because: (i) they did not engage in any work-stoppage during the period 17 and 18 July 2013; (ii) the Respondent cancelled their night shift of 18 July 2013; (iii) they did not disobey an instruction to leave the respondent's premises*." It dealt with the position of the day shift employees later in the statement of claim.

[33] In paragraph 91 of its response, the appellant confirms that it cancelled the night shift of 18 July 2013 and had informed those employees who were on night shift of that fact by SMS, but pleaded that it did so "*to protect the night shift employees from any violence or threats of intimidation as this had become a pattern resorted to by the individual Applicants*", and further pleaded that "*The sms also informed them to report for duty on the day shift the next day and they were assured that security will be provided to ensure their safety and they were informed of the day shift times, these employees failed to return to work as requested by the Respondent*". Otherwise the appellant denied the balance of the contents of paragraph 37 of the respondent's statement of claim.

[34] In its response, the appellant also, *inter alia*, pleaded to the respondent's version of events that took place from Monday, 15 July 2013. It pleaded specifically as follows: "*80.1 The contents of these paragraphs are noted. 80.2 On Wednesday, 17 July 2013 after the tea break at approximately 10h50 a number of individual Applicants refused to return to work and remained in the canteen at the*

Respondent's premises. 80.3 The Respondent issued an ultimatum to these individual Applicants to return to work by 13h30, the individual Applicants had returned to their workstations but subsequently refused to work the next day. 80.4 During the morning of 18 July 2013 one hundred and twenty-three (123) of the Respondent's employees who had been scheduled to work the day shift had gathered in the canteen at the Respondent's premises and refused to work in accordance with their individual contracts of employment and abide by the court order that was granted on 12 July 2013. 80.5 The Respondent rendered three (3) verbal ultimatums to the one hundred and twenty-three (123) employees to return to work in accordance with their individual contracts of employment and in compliance with the Court Order granted on 12 July 2013 or leave the Respondent's premises. Members of the applicant remained on the premises and refused to work. At approximately 08h45 on 18 July 2013 the NUMSA organiser, Mduna, attended the respondent's premises and addressed the one hundred and twenty-three (123) employees that gathered in the canteen. Despite this the individual Applicants continued to remain on the premises and refused to work. The Respondent was left with no option and rendered a written instruction to the one hundred and twenty-three (123) individual Applicants to leave the premises as they refused to work and defied the interim Court Order. 80.6 The one hundred and twenty-three (123) individual Applicants refused to return to work and remained in the canteen in defiance of the interim Court Order. 80.7 The remaining eighty-three (83) employees had signed letters of undertaking that they would comply with the Court Order and work at the Respondent's premises in accordance with their normal shifts."

[35] However, in paragraph 82 of its response the appellant pleaded as follows concerning the events of 18 July 2013: "*… 82.2 on 18 July 2013 at approximately 06h30 about 50%, both, day and night shift employees began demonstrating in the canteen and refused to work. Maduna, the NUMSA organiser, informed the Respondent that if he could represent the suspended employees he could get them back to work. 82.3 The Respondent's management team made appeals and verbal ultimatums to the workforce to return to work and after three (3) verbal ultimatums the individual Applicants, refused to cooperate and return to work. 82.4 At approximately 08h45 the Respondent's management team transmitted a letter to the senior shop stewards requesting that all striking employees should leave the Respondent's premises. Despite this the individual Applicants continued to sit in the canteen and refused to return to work. 82.5 Employees not engaged in the unprotected strike were authorised to leave the Respondent's premises after signing*

an undertaking indicating their willingness to work. The disruption affected production at the Respondent's premises to such an extent that it was impossible for anyone to work. The safety of those employees willing to work was substantially compromised. 82.6 SAPS, Phoenix and the security company was requested to intervene as the striking employees refused to leave the Respondent's premises despite verbal and written requests to do so were made. Eventually they were escorted by South African Police Services to the outside gate and were allowed in smaller groups to enter the Respondent's premises to collect personal items from the change room."

[36] In their pre-trial minute dated 11 December 2014, the parties recorded that it was in dispute, *inter alia*, that the "applicant employees ", i.e., the one hundred and twenty-three (123) employees referred to in the pleadings, included the individuals who were on the night shift of 17 July 2013.

[37] The respondent argued before us that the appellant did not plead a proper case in respect of the night shift employees; that it was incumbent on the appellant to do so because it bore the onus of proving that their dismissals were fair; that once it became apparent from the evidence that the case pleaded by the appellant was not correct it was incumbent upon it to have applied to amend its pleadings, to have pleaded the basis upon which it contended that the dismissal of the night shift employees was fair; and to have then led evidence accordingly. The respondent contends that since such a course was not followed by the appellant, its submission, in light of the vague and confusing allegations in its response, that the dismissal of the night shift employees was proved by it to have been fair, has no merit. The respondent also denies, given those facts, that the issue of the fairness of the dismissal of the night shift employees had been fully and fairly canvassed at the trial.

[38] It is a trite principle that litigants are to be restricted to the issues defined in pleadings. Other issues which are not defined in the pleadings do not have to be decided unless they were fully canvassed without objection in the evidence. The principle was captured as follows in *Shill v Milner*[1]:

[1] 1937 AD 101 at 105.

> "The importance of pleadings should not be unduly magnified.' The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the court has wide discretion. For pleadings are made for the court, not the court for the pleadings. Where a party has had every facility to place all the facts before the trial court, and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleadings of the opponent have not been as explicit as it might have been.' *Robinson v Randfontein Estates GM Co Ltd* (1925 AD 198). In another case, *Wynberg Municipality v Dreyer* (1920 AD 443), an attempt was made to confine the issue on appeal strictly to the pleadings, but it was pointed out by Innes CJ that the issue had been widened in the court below, by both parties."' The position should have been regularised of course," said he," by an amendment of the pleadings; but the defendant cannot now claim to confine the issue within limits which he assisted to enlarge."'

[39] Thus, courts of appeal have decided issues not canvassed on the pleadings in situations where the parties had widened the issues in the court below to include issues not pleaded or raised in the pleadings, and have done so without ordering an amendment.[2] It is also an established principle that on appeal an amendment to pleadings, to include issues not originally pleaded, will only be allowed if it does not cause prejudice to the other side, and, ordinarily, such prejudice will only occur if those issues that were not pleaded were not fully canvassed in evidence at the trial.[3]

[40] In this instance, it is apparent from the pleading (i.e., the response) of the appellant that it did not specifically implicate the night shift workers in misconduct. The pleading assumes that everyone that participated in the unprotected strike was on day shift and the appellant's gripe with them is that they refused to comply with requests that they return to work. Clearly that could not apply to the night shift, who, according to the common cause facts, worked their shift on the night of 17 July to the morning of 18 July 2013. It is

[2] See, inter alia, *Shill v Millner* (above); *Collen v Rietfontein Engineering Works* 1948(1) SA 413 (A); *Cooper and Others NNO v Syfrets Trust Ltd* 2001 (1) SA 122 (SCA) at 133 B-D.
[3] See, inter alia, *Collen v Rietfontein Engineering Works* (above); *Middleton v Carr* 1949 (2) SA 374 (A), and *Road Accident Fund v Mothupi* 2000 (4) SA 38 SCA) at 54 C-F.

also apparent that the appellant is now contending that the dismissal of the night shift workers was fair based on what was not alleged in their pleading concerning those workers. The appellant has also not sought to amend its pleading to include those allegations.

[41] Hence, the question that arises in the circumstances is whether the basis upon which the appellant contends the dismissal of the night shift workers was fair, was indeed fully canvassed at the trial and whether this is a matter where the court should entertain and decide them, because they were fully canvassed. The court *a quo* rightly found that they had not been pleaded, but did not, at least apparently, engage those questions.

[42] The appellant contends that "the issue of the night shift and their motivations was dealt with in cross-examination of the witness Wright who dealt with it decisively." The appellant also contends that it was "not competent for the [court *a quo*] to find against Wright's evidence on the issue without making direct and express findings against him." In addition to submitting that the appellant was not obliged to distinguish between the day and night shift workers in its pleading, unless the respondent made such a distinction in its pleading, the appellant contended that the court *a quo* "could not competently find against Wright because no witness from the night shift was called to give evidence." And based on that contention the appellant's counsel argued, that "it is not competent to give evidential weight to cross-examination unless it forms the basis of evidence given by a witness (and not counsel) on an issue that has been pleaded".

[43] Thus, the appellant's counsel was essentially arguing that the respondent was bound by its pleadings and could not draw a distinction between the shifts because such a distinction was not pleaded. But, ironically that is the very thing that the appellant wants to do in respect of the night shift workers. Nevertheless, the appellant's contentions are not sound for other, more fundamental, reasons. The respondent did in fact call a witness from the night shift to give evidence, namely, Ms Theodora Sheila Ndlovu or Nzama, a shop steward. She testified about events of the night shift of 17 July 2013 and of the following day, i.e. 18 July when employees gathered in the canteen.

[44] She was one of those that congregated outside the appellant's premises after the employees had been removed from the canteen by police. She testified that outside the premises they spoke to an official of the respondent union and explained to him the position going forward. The official told them that they were supposed to go back to work. It was agreed that those who were to work on the night shift on the evening of 18 July were going to do so and that the others, i.e. the day shift would come to work the next morning. She testified that, she did not come to work the night shift because she received two electronic messages (SMS's) from the appellant, the first one, which, seemingly, had also been sent, *inter alia*, to all those who were on the night shift for that week, stating that the night shift for 18 July 2013 had been cancelled in the interests of safety and a second one stating that she had been suspended on full pay and that she had to collect the suspension notice relating to disciplinary charges from the appellant's premises on 19 July 2013.

[45] She was the most obvious person to whom the appellant could have put the version it now wants to rely on in respect of the night shift workers who were dismissed, but it was not put to her. The case the respondent had to meet was still as per the pleading of the appellant, *inter alia*, that the 123 that were gathered in the canteen on the morning of 18 July were dismissed because they refused to return to work. It is rather opportunist for the appellant to rely on evidential material that emerged from Mr Wright's evidence during his cross-examination. In any event, in the course of his cross-examination, Mr Wright actually concedes, in effect, that the case the appellant sought to make out was in respect of the day shift employees only. In an affidavit he deposed to he averred that the employees in the canteen on the morning of 18 July were in fact day shift employees, even though he had known that the number included both day and night shift employees. He testified that he had "excluded the word 'night shift'", and he could not explain why he did not refer to the night shift employees.

[46] The evidence of Ms Nompumelelo Happiness Mkhize, which corroborated that of Ms Ndlovu (Nzama), was also led on behalf of the respondent. The appellant could also have put their case regarding the night shift employees to

her, but that was not done. In the circumstances, it can hardly be concluded that the issues regarding the fairness of the dismissal of the employees who were on night shift had been properly and fully canvassed. On the appellant's pleading, as it stood then and still stands, no proper case in respect of fairness of the dismissal of those employees was made out. The court *a quo* was justified in coming to the conclusion it did in respect of those employees. The appellant cannot in the circumstances seek to "stitch together" a case in respect of those employees[4] at all, let alone from otherwise random bits of evidence. The appeal therefore stands to be dismissed.

The Cross-appeal

[45] One gathers from the respondent's argument that it is not disputed that the (respondent) day shift employees participated in unprotected industrial action, but that it contends that such action was justified, because it was in response to unjustified conduct on the part of the appellant (the employer), as envisaged in item 6 (1)(c) of the Code of Good Practice-Dismissals[5] ("the Code") and that the dismissal of those workers for their participation in the unprotected strike, and for other misconduct in that regard, was therefore substantively unfair and that the appellant ought to have reinstated them.

[46] Item 6 (1) of the Code provides, in essence, that participation in a strike that does not comply with the relevant provisions of the Labour Relations Act[6] ("LRA") is misconduct, but that it does not always deserve dismissal; and that the substantive fairness of dismissal in those circumstances must be determined in light of the facts of each case, including (a) the seriousness of the contravention of the LRA; (b) attempts made to comply with the LRA; and (c) whether or not the strike was in response to unjustified conduct by the employer.

[47] The respondent contends that the court *a quo* "did not properly consider or properly take into account" the "unjustified conduct" of the employer" and the "mitigatory effect" that it had on the issue of the sanction. The respondent

[4] *Cooper and Others NNO v Syfrets Trust Ltd* (above) at 133B-D.
[5] See Schedule 8 of the Labour Relations Act, 66 of 1995.
[6] See previous footnote.

contends, essentially, that the court *a quo* had correctly found that the work stoppages of 17 and 18 July 2013 were as a result of the suspensions of two nightshift employees, Messrs James Mkhize and Happiness Mkhize on 17 July, and that they were removed from the factory at gunpoint by armed security guards, but erred in not accepting that such conduct on the part of the appellant was "unjustified conduct", as envisaged in item 6 of the Code. The respondent argues with reference to *Grogan*[7] that "unjustified conduct" is not confined to unlawful conduct.

[48] Further, the respondent contends that the appellant proceeded with the suspension of employees "knowing fully well that industrial action would result" and has not been able to furnish "any remotely cogent or plausible reason why it was necessary [to] give effect to the suspensions immediately and without serving properly articulated charges on the employees concerned". According to the respondent, there was no evidence that the employees concerned "constituted a threat to anyone" and it is "inconceivable that they would have reacted violently to their suspensions in front of witnesses."

[48] On the other hand, the appellant argues, in response, that its conduct was not unjustified, but fully justified in light of all the circumstances that pertained at the time, and that the court *a quo* had taken into account all the relevant factors that it was required to take into account in coming to a conclusion concerning the substantive fairness of the dismissal of the day shift employees and the appropriateness of that sanction.

[49] The submissions of the respondent on this issue grossly underplays the seriousness and egregiousness of the unlawful conduct of the employees in not only participating in the unlawful, or unprotected strike, but in engaging in behaviour, including acts of violence, intimidation and threats of violence, that constituted a real threat to the safety and security of those employees who elected not to participate, and others, including management. The strike was prolonged, albeit intermittent. The employees did not even heed requests by the union that they desist from unlawful conduct; it was necessary to obtain a

[7] John Grogan *Workplace Law* (Electronic Edition) Chapter 24.

court interdict; but despite the interdict, the employees continued with their unlawful conduct in contempt of that court order. The threat of further industrial action if there were suspensions, was in itself unlawful and in breach of the court order. It is rather rich for the respondent to characterise the efforts of the appellant to restore order and protect others as "unjustified" when its members continued to engage in unjustifiable, unlawful conduct throughout, including on 17 and 18 July 2013.

[50] The respondent also appears to misconceive the meaning of the term "unjustified conduct" as envisaged in item 6 of the Code. The fact that such conduct is not confined to illegal conduct most certainly does not mean that it would include reasonable and fair conduct. The latter conduct does not require justification, in the sense envisaged in the item, but illegal, unfair and unreasonable conduct, does.

[51] The court *a quo's* findings concerning dismissal of the day shift employees for participating in the industrial action following the appellant's suspension of employees, including that of the Mkhize's, is justified on the evidence that was before it. It is noteworthy that there is no finding by the court *a quo* that the Mkhize's, or any other employee for that matter, were removed from the appellant's premises "at gunpoint". It held as follows:

> '[36] These employees withdrew their labour on 17 July 2013 at 11h00 to 13h25 and on 18 July 2013 demanding the Respondent to uplift suspensions imposed on their colleagues. They made no attempt to first comply with the provisions of the LRA, so that their strike could be protected. The Applicant employees cry foul that the Respondent had brought armed forces into the workplace. It remains unclear to me why the Respondent denies that the security company they brought to the workplace were armed. The probabilities of the evidence point towards these security guards being armed. In the same vein, [the] probabilities favour the acceptance of the version that some of the employees waylaid the gate of the respondent with guns, threatening any of their colleagues who wanted to come to work instead of taking part in the strike. The working environment had become unsavoury, as some of the management members were sent threatening messages. The Respondent was entitled to restore order in its workplace, where the

intervention of the members of the South African Police Services proved to be of limited benefit.'

[52] Similarly, the court *a quo's* findings and conclusions, concerning the appellant's suspension of employees, are properly based on the acceptable evidence. It held: "[33] On 12 July 2013 this court issued an order, inter-alia, prohibiting participation in an unprotected strike. The order was properly served to the Applicant and its members. In any event, it was issued in the presence of the applicant's representatives. Five days after the order was issued and served, employees embarked on an unprotected strike. The warning by the union that suspending employees could spark a strike cannot make the suspension unlawful. The Respondent already had [the] evidence it needed. As an employer, it had the right to decide when to discipline its employees. A delay could be used against the respondent that it tolerated wrongdoing. I accordingly find that the whole of the employees, who took part in the unprotected strike of 17 to 18 July 2013, by withholding their Labour while making a demand, are guilty of contempt of court."

[53] The court *a quo* also found in respect of the day shift employees the following: "[39] On 12 July 2013, the intervention of this Court, through its order, was intended to bring normality to the workplace, which parties alone had failed to do. The terms of the order [were] still fresh in the minds of the employees. The employees by then, already knew that the employer had committed no wrong on their grading. They knew very well that from June to July 2013 they had embarked on a series of unprotected strikes with devastating economic effect on the employer. I take into account that the strike was accompanied by threats of violence, where [the] Applicant's organiser, Mr Maduna was assaulted and threats were made even to members of the Respondent's management. The employment relationship between the Respondent and these employees had clearly been irretrievably broken down. Their dismissal was substantively fair."

[54] It is thus apparent from its judgment that the court *a quo* did consider all the facts and effectively held that the appellant's conduct was not unjustified, and instead, that it was lawful, fair and reasonable in the circumstances. It was clearly not an instance where the employees could claim a purging of their illegal actions. The court *a quo's* findings concerning the day shift workers who were implicated, are unassailable. It follows therefore that the cross-appeal must also fail.

[55] In the result, the following order is made:

The appeal and cross-appeal are dismissed. There is no costs order.

_____

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: AJ Dickson SC

Instructed by Farrell Inc. Attorneys

FOR THE RESPONDENTS: P Schumann

Instructed by Brett Purdon Attorneys