IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO. P175/09

In the matter between:

SOUTH AFRICAN CLOTHING AND TEXTILES WORKERS UNION (SACTWU)	First Applicant
N.S. MAVAMA & OTHERS	Second to Further Applicants

and

YARNTEX (PTY) LTD t/a BERTRAND GROUP	Respondent

JUDGMENT

BHOOLA J :

INTRODUCTION

[1] The applicants seek an order declaring the dismissal of the second to further applicants on 22 September 2008 following strike action to be automatically unfair as contemplated in section 187(1)(a) read together with section 67(4) of the Labour Relations Act No 66 of 1995 ("the LRA"). In the alternative, the applicants seek an order that their dismissals were substantively and procedurally unfair in terms of section 188(1).

[2] The matter was heard from 26 to 29 January 2010 and the court requested written submissions from the parties. Respondent's attorneys filed written heads on 29 January 2010 when oral submissions were heard at the end of the trial, and applicants'

attorneys delivered their written heads of argument on 5 February 2010. Thereafter respondent's attorneys filed answering heads. These were received by the court on 17 February 2010. I am indebted to both Mr Wade and Ms Ralehoko for their comprehensive submissions, on which I have drawn extensively in preparing this judgment.

MATERIAL BACKGROUND FACTS

[3] The first applicant is the Southern African Clothing and Textile Workers Union ("SACTWU"), a trade union registered in terms of the LRA.

[4] The second and further applicants ("the individual applicants") were employed by the respondent until their dismissal on 22 September 2008 for taking part in an unprotected strike ("the September strike"). They were at all relevant times members of SACTWU, which was recognised as the sole bargaining agent in the workplace.

[5] The respondent is Yarntex (Pty) Ltd trading as the Bertrand Group ("Bertrand"), and conducting business in the textile industry as a manufacturer of worsted or hand knitted yarn.

[6] In February and July 2008, SACTWU members engaged in an unprotected strike, following which they were issued with written warnings. Following the September strike they were dismissed for engaging in unprotected strike action.

[7] Bertrand is a member of the National Association of Worsted Textile Manufacturers' ("NAWTM"), which together with SACTWU and other parties are founding parties to the National Textile Bargaining Council for the industry (" the NTBC"), formed in 2003 from an amalgamation of former bargaining councils. The constitution of the NTBC ("the Constitution"), defines its registered scope in respect of the bargaining levels involved in this dispute. In summary they are as follows:

(a) Sub-sector level: Wool & Mohair and Worsted Products sub-sector.

(b) Section level: Wool & Mohair section and Worsted section.

(c) Sub-section level: The Worsted section consists of the Spinners sub-section and the Verticals sub-section. All employers in the Worsted section are represented by the NAWTM in the NTBC.

(d) Plant level: Bertrand and Derlon (Pty) Ltd formed part of the Spinners sub-section. Hextex and SA Fine (Pty) Ltd fell under the Verticals sub-section.

[8] On 25 June 2003 the parties to the NTBC concluded a transitional agreement to regulate certain aspects arising from the amalgamation of former bargaining councils. This is dealt with further below.

[9] Historically, in terms of previous collective agreements concluded at the Worsted section, employers based in non-metropolitan areas were required to pay only 80% of the prescribed minimum wage ("the gazetted rate"), in order to assist them to remain competitive. Bertrand and Derlon were considered to be non-metropolitan employers. SACTWU then sought to change this arrangement in the 2008/9 wage negotiations.

[10] In the 2007/2008 collective agreement for the Worsted section, Bertrand and Derlon agreed to pay 80% of the gazetted rates. However, Derlon had been granted an exemption by the Independent Exemptions Board established by the Bargaining Council for the Worsted Textile Manufacturing Industry in September 2004, in consequence of which it was not required to pay the increase until 2009.

[11] In May 2008 SACTWU formulated its proposals for the 2008/9 substantive wage negotiations to the NAWTM, demanding a 9.5% wage increase for its members in the Worsted section. The Spinners sub-section offered to pay a 9.5% increase on 80% of the gazetted rates. The gazetted rates for the Spinners sub-section had apparently been determined by wage rates previously paid by Union Spinning Mills, which had ceased trading sometime in 2003/4.

[12] Negotiations in respect of the 2008/2009 year continued over wages and terms and conditions of employment and agreement was reached in the Wool and Mohair section. Negotiations in the Worsted section (involving Bertrand) deadlocked.

[13] Following three rounds of wage negotiations, as required by the Constitution, agreement on wages and terms and conditions of employment in respect of the Verticals sub-section was reached and a collective agreement concluded. No final collective agreement was concluded in the Spinners sub-section, although a draft agreement was signed by Derlon in July 2008. The draft agreement set out the understanding of SACTWU about the process as follows: "*The Worsted sector (sic) agreement is in the process of being finalised by the parties. This agreement will contain the improvements to conditions of employment for the entire Worsted sector (sic) as well as the new minimum wage rates for 2008/2009".*

[14] However SACTWU then informed Bertrand that it had been "*mandated not to conclude an agreement that would cover the Bertrand Group".* Its undated letter stated that :

"We hereby withdraw the submitted and still unsigned draft agreement by the company and confirm that the negotiations remain unresolved. In order to conclude these negotiations we re-propose that the increase of the total labour cost of 9.5% be calculated and applied on the gazetted rate of the Spinners schedule as set out in the Worsted sub-sector gazette annexure to the NTBC main agreement to constitute a new minimum".

[15] The Spinners sub-section (i.e. Derlon and Bertrand) met with SACTWU on 22 July 2008 in an endeavour to settle the dispute. SACTWU tabled its demand for a 100% increase on the gazetted rates. In its letter of 22 July following the meeting SACTWU records that "*after we have motivated our demand the management was very angry with the union claiming we are negotiating in bad faith in that all these years the rates for Bertrand has been paid (sic) less than the gazetted rates. And therefore the*

management rejected our proposal which means now, we do not have the agreement and therefore the union will declare a dispute on an urgent basis against the company".

[16] At the time there was an unprotected strike at Bertrand which had commenced on 17 July 2008. This followed a previous unprotected strike following a dispute concerning shift patterns in February 2008, as a result of which employees were issued with written warnings for misconduct. On 22 July 2008 a "*final ultimatum*" was issued to employees and copied to SACTWU. It stated that it was Bertrand's *"...intention to have serious regard to dismissing your members should they not resume duties at their normal starting time on 24 July 2008*. The ultimatum was complied with and the individual applicants issued with final written warnings for participating in unprotected strike action. The warnings specifically recorded that unprotected strike action is *"extremely serious misconduct"* and that *"..if you within the next twelve months again participate in any form of similar misconduct you can expect your dismissal to be the result".* Although this was the subject matter of correspondence between the parties, at no stage did either the individual applicants or SACTWU seek to challenge their final written warnings in terms of section 188 of the LRA. It is common cause that although SACTWU resisted the imposition of final written warnings, it proposed that *"[a] general notice should be issued to employees advising that unprotected strike action will not be tolerated and that employees could expect to be dismissed if they again participated in unprotected industrial action".* In August the individual applicants were again reminded that they had been issued with final written warnings (and, in some cases, second final written warnings). This was communicated to them with their wage packets on 7 August 2008.

[17] On 25 July 2008 SACTWU advised Bertrand that since the wage negotiations of 22 July had deadlocked it was formally in dispute "*against the company*" and would process the dispute in accordance with the Constitution.

[18] Responding to earlier threats of an interdict should there be a further unprotected strike, SACTWU's attorneys, Cheadle Thompson and Haysom ("CTH") in

correspondence dated 31 July 2008 confirmed SACTWU's undertaking " ...*to only take strike action in accordance with the provisions of the Labour Relations Act'.*

[19] In a letter of 4 August 2008 Bertrand's attorneys, Kirchmanns, notified SACTWU of their objection to its conduct. The letter complained that the approach of the union *"smacks of bad faith bargaining*" in that the union had reneged on the agreement reached in May 2008 that both Bertrand and Derlon would grant employees a package increase of 9.5% based on 80% of the gazetted rates. SACTWU had now placed additional demands on the table which it curiously applied only to Bertrand, and it could not agree for the following reasons:

"Firstly, negotiations take place at a national level and not at plant level. Accordingly, if matters are to be negotiated, this should be done under the auspices of the bargaining council. Secondly; you are aware that many of our client's employees are paid wage rates more favourable than those paid by Derlon. Accordingly Derlon has a comparative advantage in respect of wages. If client were to agree to the union's current demands this would serve to widen the wage gap between the company and Derlon. This, of course, would prejudice the company severely". SACTWU was urged to conclude the process on the basis of the agreement reached and in the event of it persisting with the dispute, was advised that it was a "*national dispute which must be dealt with at that level".*

[20] On 11 August 2008 SACTWU wrote to Bertrand recording that it formally withdrew "...*the dispute declared at plant-level against the Bertrand Group"* and that it intended to declare a fresh dispute in terms of the NTBC Constitution.

[21] On the same day SACTWU declared a formal dispute in the *"Spinners sector of Worsted sub sector"* (sic) and requested the NTBC to process the dispute. This was followed by a conciliation meeting on 25 August 2008. The dispute remained unresolved and a certificate of outcome was issued. A revised offer tabled by Bertrand was rejected and on 29 August 2008 SACTWU advised the NTBC, which accordingly issued the certificate of non-resolution on 1 September 2008.

[22] Notwithstanding the failed conciliation Bertrand engaged with SACTWU in a further attempt to resolve the dispute. In an email of 3 September 2008 Patrick Arnold, Financial Manager of Bertrand, advised SACTWU of his concern that a dispute meeting was not held at Derlon. He stated:

"*We would like to offer the members a revised offer but we as Bertrand are unable to do so as this would be plant level bargaining. Derlon have made it clear that they (sic) not willing to move off the offer that was put on the table in the dispute meeting held on the 25/08/08 at the East London Golf Club and thus we are unable to revise the offer. John Chang [Derlon] is of the view that a strike does not seem likely at his plant. This is of concern to us as we are willing to revise an offer but yet are faced with strike action. Even though we indicated a revised offer yesterday we are concerned that we are entering into plant level negotiations and not sectorial. We hereby request that you advise accordingly on how to proceed without us having to face strike action".*

[23] Lawrence Xola, Regional Secretary of SACTWU, replied advising that Bertrand should make a revised offer if it chose to and the union would take the matter up with Derlon. He responded to the concern about plant level negotiations as follows: "..*our view is contrary from yours on the basis that it is common cause that our dispute have been declared under the auspices of the Worsted sub-sector for the spinners and therefore any new offer that may arise will not be perceived as plant negotiations but will be regarded as an attempt to settle a national dispute".*

[24] SACTWU conducted a strike ballot at Bertrand on 11 September 2008. Prior to the commencement of the strike, it was again reminded that plant-level bargaining was not permissible. Bertrand also questioned why Derlon had not been involved in the negotiations, and directed the following question in an e-mail to SACTWU:

"Why are Bertrand the only recipients of a strike ballot which indicates we are not bargaining at sub-sector levels which is clear in the Constitution? The question has to be asked why Bertrand alone is being targeted."

[25] SACTWU issued a strike notice regarding commencement of the strike at 6h00 on 17 September 2008. On 16 September Bertrand wrote to SACTWU again disputing its legal entitlement to call for strike action and requesting it to reconsider its position. It also reminded SACTWU that " ...*participation in this illegal strike could result in the termination of [your members'] employment".* The letter drew SACTWU's attention to the fact that the dispute over wages in the "*Spinners sector of the Worsted sub-sector"* was not correct as *"Spinners sector"* was not a party to the NTBC and that the strike notice was misdirected in that it did not include the whole of the Worsted section. On the same day Xola replied stating that the strike was protected and that Bertrand was at liberty to seek legal redress.

[26] Strike action at Bertrand commenced on 17 September 2008. Of the approximately 333 employees, 278 SACTWU members went on strike. It was in this context not disputed that certain of the respondent's employees however continued working. SACTWU then sought to amend its pleadings in regard to eleven employees which it contended were not on the premises on 22 September 2008 when the dismissal notices were issued. The proposed amendment to its pleadings however was not proceeded with, and it sought to lead evidence in this regard during the trial, which was disallowed.

[27] At about 15h30 on 17 September 2008, Bertrand issued an ultimatum to the individual applicants' advising them that the strike was unprotected and that continued strike action could result in disciplinary action being taken ("the first ultimatum"). The ultimatum stated that the strike was unprotected and was interrupting business operations, and alleged further that intimidation was occurring. It stated further that " ...*we urge you not to forget that all SACTWU members are on final written warnings for unprotected strike action. It follows that management cannot tolerate this conduct indefinitely".* The employees were instructed to resume normal duties at the commencement of the normal shift on 18 September 2008. The ultimatum went on to record that failure to comply could result in disciplinary action, which "c*ould result in*

your dismissal." The employees were also urged in the ultimatum to contact their union for advice.

[28] The ultimatum was accompanied by a letter from Kirchmanns to SACTWU advising *inter alia,* that the strike was unprotected and indicating that wages could only be negotiated at sub-sector or section level as provided by the Constitution. The letter explained that Bertrand's previous letter (of 16 September) to SACTWU may have been misunderstood, and it had been intended to convey that wages and other conditions of employment in respect of Bertrand could only be negotiated at the Worsted section level. The purported strike at Spinners was unprotected as this was not a negotiating level contemplated in the Constitution. The letter invited SACTWU to provide an " *urgent response to this matter before decisions are taken by client regarding commencement of discipline against your members".* SACTWU was again reminded that its members were on final written warnings. The letter concluded by recording the following: *"While it is our client's intention to give you and your members a fair opportunity to reconsider and abandon the strike, it is not intended to tolerate this misconduct for an undue period. Accordingly, if it persists, the dismissal of your members is a very real possibility".*

[29] SACTWU officials were then contacted telephonically by Bertrand and requested to intervene. On 18 September 2008 SACTWU advised Kirchmanns that it was in the process of obtaining legal advice and would revert as soon as was practically possible. On the same day Kirchmanns again corresponded with SACTWU referring to discussions with their attorneys, and noting concerns about the conduct of some of the individual applicants. The letter made reference to *"storming*" of Bertrand's premises by the individual applicants and threats to assault monthly paid employees who continued to work. It cautioned that " ...*serious disciplinary action is likely'.* A formal notice was also addressed to all striking employees warning them about their unlawful conduct in entering the premises and that this could result in disciplinary action.

[30] On 19 September 2008 a telephone conversation took place between Kirchmanns and CTH attorneys. It was agreed that the matter would be dealt with on an urgent basis. In a letter of the same date Kirchmanns also confirmed that intimidation and threats of violence were a real concern. CTH confirmed in writing that strike action would be suspended pending further negotiations between the parties, and that SACTWU members would return to work on Monday 22 September 2008. Later that day CTH advised Kirchmanns that most of the individual applicants had left the premises and that SACTWU would only be able to address its members between 06h00 and 07h00 on Monday. The correspondence from CTH stated further that whilst this might delay the tender of services, attempts would be made to ensure that the striking employees returned to work as soon as was "*practical".*

[31] On 22 September 2008 SACTWU officials addressed the individual applicants at about 8h30. There was no attempt to comply with the undertaking. The parties continued discussions in an attempt to resolve the dispute. During those discussions it was conveyed to Kirchmanns that SACTWU understood the gravity of the situation, and that it was making every endeavour to persuade the individual applicants to return to work, but was experiencing difficulty in this regard. CTH also recorded that their clients had been advised of the consequences of not returning to work and of their prospects of success were they to attempt to challenge any resultant dismissal.

[32] The individual applicants failed to heed the undertaking to suspend the strike, given on their behalf by their attorneys. Bertrand issued an ultimatum recording the breach of the undertaking, as a result of which the strike had endured for a further three hours after it should have been suspended ("the final ultimatum"). The ultimatum went on to state the following: *"[u]nder the circumstances, those on the morning shift are hereby given a final ultimatum to commence duties by no later than 10h00 this morning failing which it is management's intention to have serious regard to dismissing those who do not start work in accordance with this ultimatum".* It further stated that *"those who do not commence duties in accordance with this ultimatum are invited to elect representatives to make submissions to management Mr Patrick Arnold in his office at*

10h30. After considering any submissions that you may have as to why you should not be dismissed (for not complying with this ultimatum - and others) Mr Arnold will make a decision as to whether or not you are to be dismissed. You are invited to adhere to this ultimatum or seek urgent advice from your representatives. It is understood that Mr Lawrence Xola is on the premises at the time of preparing this ultimatum. A copy will be handed to him." The ultimatum appears to have been signed by the respondent at 9h10.

[33] No representations were forthcoming from any of the individual applicants or SACTWU. Accordingly, at approximately 11h48, dismissal notices were issued to the morning shift (the 06h00 to 14h00 shift), who refused to accept them. The notices stated:

"*Regrettably you have failed to respond positively to the final ultimatum to return to work. In this regard, management and the company's attorney have been advised by Mr Xola that a decision has been taken not to return to work".* The notices stated furthermore that they had failed "*to make use of the opportunity to make submissions before a decision to dismiss is taken".* The notices set out that the individual applicants had been given an opportunity to obtain legal advice from the union but had consciously elected not to work, and were dismissed with immediate effect.

[34] The normal day shift employees were thereafter issued with notices of dismissal at 12h00, having been issued with a final ultimatum after 10h04, instructing them to resume their duties at 11h00. A final ultimatum was issued to the afternoon shift at 14h20, followed by dismissal notices at 16h00.

[35] It is common cause that the dismissals were not preceded by disciplinary hearings.

[36] On 1 October 2008 SACTWU referred an unfair dismissal dispute to the CCMA and on 17 November 2008 a certificate of non-resolution was issued.

ISSUES FOR DETERMINATION

[37] The legal issues the court is required to determine are recorded in the pre-trial minute as follows:

a. *Whether the strike was protected and hence the dismissals were automatically unfair as contemplated in section 187(1)(a) of the LRA. In determining this issue, this court must determine :*
    i. *Whether there were negotiations at section level as contemplated by the Constitution.*
    ii. *Whether SACTWU could not declare a dispute against Spinners employers of the Worsted section and leave out Verticals employers.*
    iii. *Whether it was open to SACTWU to call [for] strike action against Verticals employers.*
    iv. *Whether SACTWU could call [for] strike action only against Bertrand and not against Derlon.*
b. *In the alternative, should the court find that the strike was unprotected, whether the dismissals were substantively and procedurally unfair as set out in the applicant's statement of case.*

WAS THE STRIKE PROTECTED?

[38] In determining this issue it is necessary to have regard to the following relevant terms of the Constitution and Transitional Agreement:

The NTBC Constitution (clause 3) states that one of its objectives is to "*regulate collective bargaining and industrial action in the industry, in the sub-sectors and in any sections".*

The parties to the NTBC are defined as the employers' associations and SACTWU. The NTBC's structures are specifically recorded to include only sub-sector chambers and sections.

The relevant provisions of clause 13 provide:

"13.7 The rights, powers and functions of sub-sector chambers are to conclude collective agreements within each sub sector and section(s) on:

13.7.1 wages and conditions of employment; …

13.8 The issues set out in sub clauses 13.7.1 … will only be negotiated:

13.8.1 at the sub-sector or section level; and

13.8.2within any sub-sector or section to which they apply, subject to the provisions of the National Textile Bargaining Council Transitional Agreement, signed on 25 June 2003.

13.9 Other matters of mutual interest, not set out in clause 13.7 will be negotiated and managed at Council or plant level…"

Clause 18 deals with collective agreements as follows:

"18.1 Any party to the bargaining council may introduce proposals for the conclusion of a collective agreement in terms of the provisions and procedures outlined in this Constitution.

18.2 A collective agreement may be concluded in a sub-sector chamber or section to apply to a sub-sector or section(s) in a sub-sector….

18.9 The parties to negotiation must hold at least three (3) meetings within forty-five (45) days of submission of the proposals contemplated in sub clauses 18.4 and 18.5 to negotiate on the proposals presented to it for consideration unless a collective agreement has already been concluded.

18.10 If either a collective agreement is not concluded at the second or third meeting contemplated in sub clause 18.9, or any subsequent agreed meeting or alternatively a period of forty-five (45) days has elapsed:

18.10.1 any party may declare a dispute by submitting a written notice to this effect to the Secretary and other affected parties to the bargaining Council engaged in the dispute; and…

18.10.1.2 any party to the dispute may;

18.10.1.2.1 resort to strike or lock out in accordance with section 64 of the Act across the industry,..

18.10.1.2.2 resort to strike or lock out in accordance with section 64 of the Act in the sub-sector in which the proposals for the conclusion of a collective agreement were made; or

18.10.1.2.3 resort to a *strike or lock out in accordance with section 64 of the Act in that section of the sub-sector in which the proposals for the conclusion of* a *collective agreement were made;* ..."(Court's emphasis)

Clause 7 of the Transitional Agreement (to which clause 13.8.2 of the Constitution refers), provides as follows:

"For the Worsted and Wool & Mohair sub-sector, substantive negotiations will take place separately and separate collective agreements will be concluded for the Worsted and Wool & *Mohair sections respectively for* a *period* of *three years after registration* of *the NTBC. After the expiry* of *the three year period, one negotiation process will take place in the sub-sector. At the negotiations on substantive terms the parties may, through collective bargaining, agree to conclude either one collective agreement or two collective agreements containing these substantive terms. If* a *prior single collective agreement exists, the provisions* of *clause 18.10.1.2.3* of *the NTBC Constitution apply to separate industrial action in respect* of *the two sections".*

Was there a practice, alternatively a tacit agreement, authorising bargaining at plant or sub-section level?

[39] The applicants concede that the strike was a sub-section strike, and although not contemplated by the Constitution, was nevertheless permissible on account of the tacit agreement between the parties to negotiate at levels not contemplated by the Constitution.

[40] Ms Ralehoko relied on the common cause fact that in practice negotiations took place separately with Spinners and Verticals sub-sections independently of one another. The Verticals sub-section paid higher wages than the Spinners sub-section, which occurred as a result of actual wage rates paid by employers in the Worsted section being negotiated at plant level to assist some employers to remain competitive. Also, the Worsted section agreements set out different schedules for Verticals and Spinners sub-sections, which confirmed that rates in the sub-sections were formulated through separate collective bargaining negotiations.

[41] Alternatively, the applicants contend that by negotiating and concluding agreements at levels not contemplated by the Constitution, as read with the Transitional Agreement, the parties had developed a practice in terms of which the bargaining levels in the Constitution were ignored. Ms Ralehoko relied on the evidence of Clement Mkhaliphi to confirm that dual level bargaining occurred in practice. Mr Wade submitted however that Mkhaliphi's testimony did not support this contention. His evidence was entirely consistent with that of Arnold's on the issue. Mkhaliphi's evidence-in-chief, (confirmed during the course of cross-examination), was that SACTWU would table one set of demands to the Verticals and Spinners sub-sections in a plenary session at the commencement of the wage negotiations, following which each of them would meet with SACTWU independently. The parties would then reconvene in plenary to see if consensus has been reached, and if not, the employers would then meet with their respective principals to seek a mandate on outstanding issues. His evidence was clearly that although bilateral meetings were held at sub-section level and even at plant level, the intention was always to reach a point where one collective agreement for the

Worsted section regulating wages and conditions of employment was signed. Arnold's evidence was that Spinners' employers had to be present when Verticals sub-section wage rates were negotiated and *vice versa* because they had an indirect interest in the outcome of the negotiations. Ms Ralehoko urged the court to reject Arnold's evidence on the probabilities. She submitted that he had limited personal knowledge of the negotiations process, and had conceded that he was unaware of the actual rates paid in the Verticals sub-section.

[42] The applicants allege that the fact that the Transitional Agreement was ignored supports their contention that the parties had tacitly agreed to ignore the bargaining chambers stipulated in the Constitution. The respondent submitted however, that the Transitional Agreement was irrelevant to the determination of the legality of the strike. Mr Wade contended that the fact that parties may have agreed to ignore the Transitional Agreement did not entitle any party, in the absence of consensus, to elect to unilaterally ignore the binding provisions of the Constitution. This would fundamentally undermine the collective bargaining principles and institutions entrenched in the LRA. Furthermore, it would appear that in fact what the parties consented to (whether verbally or in writing) was to continue separate negotiations in the two sections – in other words they voluntarily elected to ignore the expiry date stipulated by the Transitional Agreement and continued to negotiate at section level instead of at the sub-sector level. This was not in conflict with the Constitution (which permits section level bargaining), but it is clear that neither the Constitution nor the Transitional Agreement contemplate sub-section (or indeed, plant level) collective bargaining or industrial action in respect of wage and conditions of employment demands. Mr Wade submitted that the disregard of the Transitional Agreement by the parties not render bargaining at <u>any</u> level possible, and certainly did not have the effect of converting an unprotected strike (which the applicants initially contended was directed at plant level and in their written heads of argument at sub-section level) into a protected one. The Transitional Agreement does not offend or controvert the provisions of the Constitution, and even if it did, the Constitution would override any offending provision. The simple fact of the matter is that the Constitution prohibits plant level and sub-section level strikes. Therefore, even on the applicants' own interpretation (that the strike was directed at

sub-section level) and irrespective of the Transitional Agreement, the strike would still be unprotected. The practice of dual level bargaining, even if it had been indeed been proven to exist, does not therefore assist the applicants in their contention as it is not legally relevant to determining the status of the strike.

[43] I am in agreement with the respondent's submissions. Although the Transitional Agreement would appear to envisage a situation where during the relevant three year period[1]collective bargaining negotiations would take place at section level and thereafter one negotiation process would occur in the sub-sector, it was still open to the parties to conclude one agreement or separate agreements in the two sections (i.e. the Wool & Mohair section on the one hand and the Worsted section on the other). It further also envisages that where a previous single collective agreement for these two sections existed, then the provisions of 18.10.1.2.3 would apply to strikes and lockouts in the two sections. This would mean that the parties to the NTBC could resort to a strike or lock out "*in that section of the sub-sector in which the proposals for the conclusion of a collective agreement were made*". In other words, where there was one agreement for the Wool & Mohair and Worsted Section, then despite the Transitional Agreement, parties could strike or lockout at section level despite the envisaged move to collective bargaining at sub-sector level. Thus it is clear that section level bargaining, whether by express or tacit agreement, and notwithstanding the provisions of clause 7 of the Transitional Agreement, did not controvert or offend the Constitution.

[44] Mr Wade submitted that in any event, the alleged practice or "*tacit agreement to negotiate at levels not contemplated by the Constitution"* which the applicants seek to rely upon is not borne out by the evidence and has not been proven, nor has it been pleaded. It was raised by the applicants for the first time in their written heads. The applicants' witness, Mkhaliphi, a veteran with thirty years' experience in the textile industry, could not confirm the existence of such an agreement. Even if it had been proven, Mr Wade submitted, in the absence of a plea of waiver, the applicants cannot seek to rely on a vague practice to convert an unprotected strike into lawful action.

[1] It was common cause that this was the period 2003 to 2006.

[45] The applicants also sought to rely on the existence of actual separate collective agreements concluded for the Verticals and Spinners sub-sections as proof of plant-level bargaining. However, what is clear from the collective agreements is that, quite regardless of the fact that the Verticals and Spinners sub-sections reached separate consensus with SACTWU (something quite obvious given their separate and distinct interests, as Mr Wade submitted), the collective agreements are entered into for and on behalf of the employers' association and not individual employers. This is precisely as envisaged by the Constitution. It would appear from the evidence that even where there may at times have been plant level meetings, or even in fact interim agreements or informal exemptions, this does not render legitimate plant-level collective bargaining or strike action in respect of a wage demand. The Constitution expressly prohibits plant-level and sub-section level bargaining and therefore strikes or lock outs at these levels. This would mean that even if plant level negotiations did not lead to consensus, wages in the entire section could not be said to have been agreed. The effect of this would be, in accordance with the Constitution that either SACTWU (at all four plants) or all four employers (as part of the employer's association) would be at liberty to embark upon industrial action. The only proviso would be that the requisite number of meetings and other procedural requirements of the Constitution had been met. The simple fact of the matter is that, in terms of the Constitution, consensus could not be compelled at the individual employers through the parties having recourse to industrial action, whether in the form of a protected strike or a lock-out. In my view this is indeed what the applicants sought to do.

[46] The applicants further take the view that provided there was compliance with the procedure in the Constitution (i.e. three negotiation meetings before deadlock) any party could resort to strike action in the absence of consensus, and SACTWU was therefore legally entitled to call for strike action. In my view, this is a misunderstanding that subverts not only the express terms of the Constitution, which sets out the parties' rights and obligations in the event consensus is not reached within a specific negotiating chamber, but more importantly, the entire collective bargaining and institutional framework established by the LRA. Indeed it is correct that clauses 18.9 and 18.10

permit the parties to resort to industrial action (both strikes and lock-outs) in accordance with the relevant provisions of the LRA where there is no consensus after the prescribed number of meetings, but what is critical is that this is only permitted at the bargaining level in which agreement was not reached – i.e. in the industry, or in the section or sub-sector where the bargaining proposal was made. The parties to the NTBC themselves (and SACTWU as one of the parties) did not envisage plant or sub-section level strikes or lockouts in developing the Constitution, and it would be misconceived for SACTWU to now contend otherwise. As trite as it sounds, Mr Wade submitted and I agree, this in short is the reason why the September strike cannot be said to be protected.

Did bargaining occur at plant or sub-section level?

[47] Ms Ralehoko, relying on the practice or tacit agreement to bargain at levels not contemplated by the Constitution, contended that SACTWU was entitled to conduct a strike at the Spinners' sub-section (i.e. at both Bertrand and Derlon), but it could not call for a strike at Derlon on account of the exemption granted to it (in terms which it was not required to pay the gazetted rate until 2009). SACTWU could, in the circumstances, not make the same demand against Derlon that it had made on Bertrand (i.e. a 100% increase on the gazetted rate). SACTWU and Derlon were free to negotiate at plant level, which Ms Ralehoko submitted in fact occurred in 2008 and led to agreement. As a result, SACTWU could only make the demand on Bertrand, and the fact that only a single employer was affected by the strike did not turn what was in essence a sub-section strike into a plant-level strike. Therefore, Bertrand's contention that it had been targeted for strike action was incorrect and should be rejected.

[48] I agree with the respondent's submission that although the applicants belatedly sought to rely on the strike being declared at a sub-section level, the facts are incontrovertibly that they embarked upon plant specific strike action directed only at Bertrand. It is common cause that since rates had been agreed with Derlon, no demand was made on it; Derlon employees (who form part of the bargaining unit) were not balloted to ascertain their views on a strike in the section of the bargaining council by which they were covered; and the other three employers in the bargaining unit were not

afforded the opportunity to bring pressure to bear on SACTWU in regard to the method by which it sought to process the dispute. Mkhaliphi's evidence was clear on this issue – he confirmed that in his thirty year history in the industry there had never been a legal strike at plant level.

[49] Mr Wade submitted that had the strike resulted in Bertrand acceding to the new demand made only to it, it was common cause that Bertrand would have been required to pay a more substantial increase in wages compared to Derlon, the only other Spinners sub-section employer. Disregarding entirely the fact that the two Verticals employers played no role in the negotiation process leading up to the issue of the strike notice, a situation in terms of which similarly circumstanced employers are potentially required to pay differential increases undercuts the very reason for a bargaining council's existence, which is undoubtedly to ensure relative parity within an industry. This is so as to avoid, *inter alia,* one employer obtaining an unfair competitive advantage over another. Not only was the conduct of SACTWU in the circumstances in contravention of the constitution of the bargaining council to which it was a party, but it also fundamentally undermined the principles of collective bargaining to which the LRA gives effect.

[50] In regard to the applicants' submission that the exemption precluded SACTWU from presenting a demand to Derlon in respect of wages and conditions of employment, I disagree with Mr Wade that it is not the applicants' case that this permitted SACTWU to bargain at plant level with Derlon. To my understanding this was indeed Ms Ralehoko's contention, and it would appear to have formed the basis on which the applicants' initially contended they were justified in submitting the plant level demand to Bertrand. This would appear to be the only plausible explanation for the conduct of SACTWU in withdrawing its demand only from Bertrand after it had allowed Derlon to agree, and submitting a new demand only to Bertrand. Arnold's evidence on this issue was not disputed. He testified that Bertrand had agreed in substance with the proposal made by SACTWU, but only refused to sign it in the format in which it was presented, insisting that it be in the form of an agreement with the employer's association and SACTWU, as Bertrand itself was not a party to the NTBC. His evidence was that Derlon

had signed the SACTWU draft agreement and did not appear to have a similar concern. However, SACTWU then withdrew the draft and changed its demand only in respect of Bertrand, requiring it to pay 100% of the gazetted rate. If it had agreed it would have been the only employer in the industry to do so. It cannot therefore be contended that SACTWU's subsequent withdrawal of its proposal for wages in the Spinners "*sub-sector*"(sic) from Bertrand and replacing it with a demand for payment of 100% of the gazetted rates from Bertrand, did not constitute action targeting Bertrand at plant level. It is moreover apparent from the attitude of SACTWU in their correspondence preceding the strike that they were in dispute with Bertrand. The belated attempt to describe the strike as a sub-section one, even if this was countenanced by the Constitution, must therefore be rejected. The referral to the NTBC also makes it clear that the dispute was declared at "*Spinners*" which is not a bargaining level contemplated by the Constitution. This on its own would in my view dispose of the issue.

[51] In the circumstances, it is clear from the Constitution that individual employers or collectivities of employers forming part of either a section or sub-section are not defined as falling within the scope the NTBC. Where negotiations are conducted and can be conducted by sub-sections separately (with a view to concluding an overall agreement on minimum wage rates for the Worsted section) this does not translate into legitimising the conclusion of collective agreements at those levels. What the applicants' overlook is the fact that virtually all the substantive agreements were concluded between the SACTWU and the NAWTM. This is precisely as is envisaged in the Constitution. The fact that at various points plant level interactions occurred between the parties (which led to an interim agreements or informal exemptions) does not imply that plant level strike action was permissible. The respondent was moreover justified in insisting that the formal agreement should be concluded under the auspices of the bargaining council, and not privately between SACTWU and itself.

[52] It cannot therefore be said that a practice of dual level bargaining had been proven, nor was it proven that there was a tacit agreement to bargain at levels not contemplated by the Constitution. Indeed, even if it had been proven, neither a practice

nor a tacit agreement could serve to circumvent the express provisions of a collective agreement that is intended to regulate bargaining and disputes in the industry. Accordingly it is self-evident that a dispute could only be declared and a demand in respect of wages and conditions of employment submitted at the bargaining levels authorised by the Constitution – in this case at Worsted section level until such time as the parties in compliance with clause 7 of the Transitional Agreement commenced bargaining in the whole sub-sector.

[53] The applicants sought to contend that the conduct of the parties constituted a waiver of their rights to challenge the legality of the strike. In this regard it was submitted that the bargaining council did not reject the dispute referral, nor did the NAWTM challenge the certificate of outcome, and moreover Bertrand participated in the balloting and conciliation proceedings. No basis exists for this submission in the pleadings or in evidence and I do not consider it to be relevant to the determination of the issue.

[54] I further agree with the respondent's submission in its answering heads that a strike directed against a single employer is also outlawed in circumstances where that employer forms part of an employer's association which is not *de facto* joined as a party to the dispute. However this is a technical irregularity and becomes less relevant given that the matter has been decided on its merits.

Was the right to strike infringed ?

[55] The applicants contend that if they were not permitted to strike only at the Spinners sub-section, they would be left without a remedy should wage rates for the entire Worsted section not be agreed. They would not be able to strike against the Verticals sub-section (because there is no dispute) nor against the Spinners sub-section (because this is prohibited by the Constitution). This interpretation has the consequence of limiting a constitutionally guaranteed right. The other difficulty with this interpretation, Ms Ralehoko contended, is that it would result in an absurdity. If agreement is reached in one sub-section and not in the other, all employers in the section would be compelled to lock-out in order for the lockout to be lawful. This raises the question of what

influence, if any, the employees of one sub-section would have over the employees in the sub-section where agreement has not been reached, in order to force the latter to accept their employer's terms so that the lock-out can be uplifted. It would mean that despite agreement at one sub-section employees would still be at risk of being locked out for as long as there was no agreement in the other sub-section.

[56] I do not agree that the prohibition of strikes at sub-section or plant level violates the fundamental right to strike. Indeed it is correct that the right to strike is guaranteed to every employee, but like other rights entrenched in the Constitution of the Republic of South Africa it is not an absolute right and is subject to certain limitations. The LRA gives effect to the right to strike in the context of fair labour practices, and does so by creating a framework in which the right is to be exercised. Thus the statutory collective bargaining mechanisms, as well as other means of regulating strike action are necessary to ensure that the purpose of orderly collective bargaining, as set out in section 3 of the LRA, is met. As was recently held by Van Niekerk J, the right to strike, fundamental as it is, is not an end in itself – the resolution of disputes through collective bargaining remains the ultimate objective : *South African Airways (Pty) Ltd v South African Transport and Allied Workers' Union* [2010] 3 BLLR 321 (LC) at para [22]. On the facts it is clear that the applicants' are not denied the right to strike – they are entitled to exercise this right provided it occurs at the level of the industry, the sub-sector or the section in which agreement on the demand submitted could not be reached. The remedy in this instance would have been for the applicants to initiate strike action at the Worsted section level. The facts are incontrovertibly that they, in terms of a statutory collective agreement that the first applicant is a party to, could not legally strike at plant or sub-section level. Whether or not the employees actually embarked on the action at all the plants in the section after declaring a legitimate demand, is not relevant provided the demand was made at the level authorised by the Constitution – in short, it would have to have been made in the Worsted section to encompass all employers in the Spinners and Verticals sub-sections. This would exercise the pressure necessary to reach consensus at the section level, and failing that at sub-sector or industry level. The same principle would apply to a lock-out – it cannot be contended that every employer would be compelled to lock-out in circumstances

where some employers in the section had reached agreement – they would simply be entitled to do so with a view to bringing pressure to bear on employees at their counterparts.

Conclusion

[57] It is trite that the applicants bear the onus of establishing the protected status of the strike embarked upon by them. The existence of that factual state of affairs is of course a necessary pre-requisite to this court exercising its jurisdiction under section 187 of the LRA. On the material facts it is not possible to countenance how it could be contended by the applicants that they were engaging in a protected strike. Not only is this fundamental contention not supported by a proper construction of the evidence, but even if such practice existed it cannot serve to render protected that which is plainly unprotected. While the collective agreement binding the parties contemplates that they may engage one another at plant or sub-section level with a view to reaching overall agreement on minimum industry wage rates, substantive wage negotiations are not contemplated at those levels, let alone the right to strike in circumstances where a section, sub-sector or industry wage agreement is not reached.

[58] Accordingly, in my view, the strike was unprotected given that negotiations in respect of wages and conditions of employment could not in terms of the NTBC Constitution be conducted at levels other than the Worsted section or the Wool & Mohair and Worsted Products sub-sector or the textile industry. In the circumstances, for the reasons set out above, SACTWU could not declare a dispute only against the Spinners sub-section and legally strike in support of that dispute; SACTWU could and should have called for and conducted the strike at both the Verticals as well as the Spinners sub-sections; and lastly, SACTWU could not call for strike action only at Bertrand and not against Derlon as this would amount to a plant level strike prohibited by the NTBC constitution. In the circumstances, the September strike was unprotected and the dismissal of the individual applicants was accordingly not automatically unfair as contemplated in section 187(1) (a) read together with section 67(4) of the Labour Relations Act.

WERE THE DISMISSALS PROCEDURALLY AND SUBSTANTIVELY UNFAIR?

[59] In consequence of the above finding I am required to determine the applicants' claim in the alternative that the dismissal of the individual applicants was procedurally and substantively unfair as contemplated by section 188 (1) of the LRA. In this regard the LRA guarantees the right to procedural and substantive fairness to employees engaging in unprotected strike action. Section 68(5) of the LRA provides as follows:

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

The Code of Good Practice provides as follows in item 6:

> (1) *Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -*
>
> *(a) the seriousness of the contravention of the Act;*
>
> *(b) attempts made to comply with the Act; and*
>
> *(c) whether or not the strike was in response to unjustified conduct by the employer.*
>
> *(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to* it *either by complying with it or rejecting it. If the employer cannot reasonably be*

expected to extend these steps to the employees in question, the employer may dispense with them."

The Code must be considered in the context of section 188 of the LRA which provides :

(1)A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a)that the reason for dismissal is a fair reason-

(i)related to the employee's conduct or capacity;

(ii)based on the employer's operational requirements; and

(b)that the dismissal was effected in accordance with a fair procedure.

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

Substantive fairness

Submissions

[60] The applicants submit that the dismissals were substantively unfair, *inter alia*, for the following reasons:

a) Bertrand failed to afford those employees present an adequate opportunity to take counsel from SACTWU and to assess their conduct in the light of that advice. Under the circumstances, the harm caused by the dismissal of those employees was disproportionate to the misconduct being perpetrated.

b) Bertrand failed to allow those employees present sufficient time to cool down, reflect on the advice given by SACTWU and a reasonable and practical time within which to return to work.

c) Bertrand failed to take into account that the issue in dispute was a matter of legitimate concern to the employees.

d) Bertrand failed to take into account that the employees were striking in the *bona fide* but mistaken belief that the strike was protected.

e) Bertrand ought to have implemented less severe forms of discipline, such as a final written warning.
f) Bertrand failed to afford the employees a hearing.
g) The dismissal of some employees was substantively unfair in that Bertrand applied the principle of collective guilt and failed to identify which employees had participated in the strike, in circumstances in which it was obliged to do so.

[61] In determining the question whether a strike dismissal is fair or not, Ms Ralehoko, relying on Grogan[2] contended that two questions must be answered i.e. whether the ultimatum was fair, and whether the dismissals pursuant to the ultimatum were fair. Both questions should be answered in the negative in respect of the ultimata of 22 September 2008, she submitted. Firstly, relying on *Plaschem (Pty) Ltd* v *Chemical Workers Industrial Union* (1993) 14 ILJ 1000 (LAC) and *Paper Printing Wood* & *Allied Workers Union* & *Others* v *Tongaat Paper Co (Pty) Ltd* (1992) 13 ILJ 393 (LC), it is clear that the individual applicants were not given adequate time to reflect on the ultimata and act on them. It was not disputed that when they arrived at Bertrand's premises on that day, they were unaware that SACTWU would be addressing them about the legal advice obtained to suspend the strike. They understood the strike to be legal in that all procedural requirements had been complied with by their union. Bertrand issued the first ultimatum while Xola was busy addressing the individual applicants. The first ultimatum was issued barely half an hour after he arrived[3] (i.e. at about 9h00), and this can hardly be considered reasonable and adequate time within the individual applicants could to take advice, reflect on it, cool down and make a decision as whether to comply with the ultimatum. In these circumstances, the ultimatum was not intended to persuade the individual applicants to return to work, and was insensitive and unreasonable. Moreover, the consequence of issuing the ultimatum was that workers became emotional and confused.

[2] Grogan : Collective Labour Law, Juta, 2007, page 227. See also *NUMSA* v *GM Vincent Metal Section (Pty) Ltd* 1999 (4) SA 304 (SCA) para 21

[3] The applicants' contention that the ultimatum was issued at about 09h00 is incorrect. It is likely to have been issued between 10h00 and 10h30 as appears from the analysis of Xola's evidence.

[62] Secondly, Ms Ralehoko submitted that it was unreasonable to expect any employee who wanted to comply with the ultimatum to do so at the time. The evidence of Mabelu was that the atmosphere was highly charged and it would have been dangerous if not stupid for any employee to remove themselves from the crowd : *Performing Arts Council of the Transvaal* v *Paper Printing Wood* & *Allied Workers Union Others* (1994) 15 ILJ 65 (A). In any event, there was no reason why Bertrand could not have extended the ultimatum until the next day. Those individual applicants who contemplated complying would have found it easier and less risky to do so then: *Performing Arts Council* (supra) at p217 para D).

[63] A further reason advanced by the applicants for the ultimata being unfair was that the grounds on which it was contended that the strike was illegal were technical, and the individual applicants were confused about the technicalities of bargaining levels. Mkhaliphi, a veteran of thirty years in the industry and who had been involved in the negotiations since the inception of the NTBC, himself used the terms "*section"* and "*sub-sector*" interchangeably and testified that this had never been an issue during negotiations. The uncontested evidence of Mabelu was that after the address by Xola, the employees were confused and could not understand how the strike could be unprotected when all procedures had been followed and Bertrand had participated in the balloting and conciliation process. This dilemma was understandable given that the wild cat strike of July had been abandoned to ensure that procedural requirements were met.

[64] In addition, it was submitted that, in dealing with this matter Bertrand adopted a rigid and inflexible approach that the hour requested by CTH would be sufficient to convince the individual applicants to return to work. Clearly no one was in a position to say with certainly how much time would be required to address them in order to persuade them to suspend the strike, and the attorneys had simply provided an estimate of the time required, and followed it with a revised undertaking to suspend as soon as was practical after it had been instructed that most of the individual applicants had left the area that Friday.

[65] The failure by the normal day shift and afternoon shifts to comply with the ultimata despite being aware of the dismissal of the morning shift, was also understandable and reasonable. Mabelu testified that after the dismissal of the morning shift, the later shifts resolved not to return to work in solidarity with their dismissed colleagues.

[66] Lastly, it was common cause that certain individual applicants returned to the premises after their dismissals. Mabelu testified that they could not believe that they had actually been dismissed and still considered themselves to be employees of Bertrand. Mabelu's evidence when he was pressed on the issue was that a change of mind was quite possible, although they were concerned about the present situation. This version stands uncontested and it was submitted on this basis that SACTWU was opposed to the continuation of the strike and might have succeeded in ultimately influencing its members to work after they had been given an opportunity to cool down. Insofar as Bertrand blames Xola for not requesting more time if he was of the view that a change of mind was possible, Ms Ralehoko submitted that Xola's evidence was that the final ultimatum, issued while he was still addressing the members, signaled Bertrand's intention to dismiss as soon as possible. In any event she submitted, his failure to request more time does not detract from the fact that the individual applicants were not given adequate time within which to take counsel, reflect on legal advice and decide their next course of action. Bertrand was obliged to give them sufficient time to reflect on the ultimatum and should have acted with restraint prior to dismissing given that the job security of so many employees was at stake. In these circumstances, three hours could hardly be considered as sufficient time: *Performing Arts* (supra) p217 para E and *Doornfontein Gold Mining* Co *Ltd* v *NUM* & *Others* (1994) 15 ILJ 527 (LAC) and *WG Davey (Ply) Ltd* v *NUMSA* (1999) 20 ILJ 2017 (SCA).

[67] A further factor which should be taken into account to determine whether the applicants were afforded reasonable time, Ms Ralehoko submitted, is that Bertrand gave the applicants the impression that they could engage in strike action until a day before the strike was scheduled to commence. It attended the conciliation, received the

certificate of outcome and participated in the balloting and now seeks to contend that it did so reluctantly. This argument, built with the benefit of hindsight, was belated and opportunistic and should be rejected as such.

[68] Mr Wade submitted that, in determining this issue, regard should be had to the purpose of an ultimatum in the strike context. In *Professional Transport Workers' Union and others v Fidelity Security Services* (2009) 30 ILJ (LC) at para [41] the court held as follows:*"[T]he purpose of an ultimatum is to afford the striking employees an opportunity to consider their position before action which may have dire consequences is taken against them."* Because of its intended purpose *"such an ultimatum is required to give the strikers a sufficient opportunity to consider the matter and consequences of non-compliance with the ultimatum as well as to seek advice before taking the decision to comply or not to comply with the ultimatum".* See *Karras t/a Floraline v SASTAWU and others* [2001] 1 BLLR (LAC) at [36]. Thus *w*hat the law requires is that the ultimatum should be communicated to the striking employees, in clear and unambiguous terms and should set out what is required of them, including the time-frames within which they are expected to comply, and should indicate the possible consequences of a failure to comply: *NUMSA v G M Vincent Metal Sections (Pty) Ltd* 1999 (4) SA 304 at para [21].

Evidence

[69] Grogan points out the factors to be considered in assessing the fairness of an ultimatum to include the developments that led to the decision to issue it, the terms of the ultimatum and the time allowed for compliance.[4] This is a question of fact dependant upon a range of issues, and can only be determined once an analysis of the evidence led in regard to the circumstances leading up to the issue of the ultimatum is undertaken.

[70] Xola vigorously denied that the problems arose because he had arrived late on Monday 22 September, and testified that the time of arrival had been agreed with Van Tonder (the Managing Director of Bertrand) the previous Friday, because he had to

[4] Supra.

drive three hours from Port Elizabeth. Van Tonder had suggested, in jest, that he should then depart at 3h00 to be on time. He arrived at 8h30 and the meeting commenced around 8h35 or 8h40. The strike had by then gained momentum and the individual applicants could not understand why it had to be suspended. The technical detail took time to explain and the meeting was interrupted by the issue of the final ultimatum, which a SACTWU official then read out loud. He did not consider the premature issue of the ultimatum to renege on the agreement he had with Van Tonder, but viewed it simply as an interruption. He was at a loss to provide a credible explanation for why he did not simply request more time if indeed this would have assisted the process. He ultimately sought to suggest that time was not requested as it was apparent to him that Bertrand was intent on *"rushing*" to a dismissal. During the course of his cross-examination it appeared that the alleged telephone discussion with Van Tonder took place on the Monday morning whilst Xola was *en route* from Port Elizabeth, not on the previous Friday. Despite Xola's late arrival (he should have arrived at the premises between 06h00 and 07h00 as arranged) the respondent's attitude was unambiguously that the union would have been given more time had this been requested. It is highly improbable that Xola would not protest when, on his version, Bertrand proceeded to issue the first ultimatum while he was still addressing the individual applicants. It exceeds the bounds of imagination that he would sit calmly by and simply capitulate while the employer proceeded to commit such a grossly unfair act. In any event, whether or not Xola's version on the agreement with Van Tonder is accepted does not alter the material fact that the undertaking to suspend had already been given by the union's attorneys the previous Friday.

[71] It is therefore not correct to contend, as Ms Ralehoko seeks to do, that the first ultimatum was issued about half an hour after Xola began addressing the workers at 8h30. It appears to have only been signed by the respondent at 9h10 and Xola's conversation with Kirchmann occurred at about 10h41 after the ultimatum had been read. It would appear then to have been read after 10h00. Kirchmann's version was that during the telephone conversation (while Xola was still on the premises), Xola informed him that he had read the ultimatum issued to the morning shift and they *"had elected*

not to heed the ultimatum and would not be returning to work." Kirchmann recorded this in a contemporaneous file note. He enquired from Xola whether more time would assist and the latter replied that he did not believe so as the individual applicants had made up their minds. He informed Xola that the prospect of dismissal was very real. Xola had agreed with him that it was a sad day when the dismissal of over 200 workers could not be avoided. Xola then left the premises to return to his office. Kirchmann's file note records that Xola said he could not take the matter any further. Kirchmann testified that Bertrand would not have hesitated to allow more time had this been required. He said: *"We are not in the business of firing people. The strike affected the business but they needed a fair opportunity to digest and understand what was going on. It wasn't a question of confusion and misunderstanding – they had made up their minds".* Kirchmann's evidence was furthermore that he had a telephone conversation with Jason Whyte of the applicants' attorneys at about 9h25, which he again recorded in a contemporaneous file note. This occurred while Xola was still addressing the individual applicants. It was conveyed to him by Whyte that Xola understood the gravity of the situation and was attempting to persuade the individual applicants to return to work but was encountering difficulties.

[72] After the issue of the ultimatum Xola was still on the premises and it would have been open to him to seek more time from Kirchmann to persuade the individual applicants to return to work. It is common cause that he failed to do so. More importantly however, his explanation for this omission is simply nonsensical. Accordingly, his evidence that his discussion with Kirchmann was exceedingly short and he could therefore not request more time falls to be rejected in its entirety. It was not only plainly disingenuous, but the import of his evidence was at odds with the probabilities, and in particular with the patient attitude of the respondent up to that point. Xola testified that his discussion with Kirchmann was confined to him confirming that the workers had not returned to work after which Kirchmann said " *we will have to do what we have to do"".* It is evidence which of course suggests that Kirchmann dishonestly fabricated his file note and his evidence. There was nothing preventing Xola from prolonging the telephone conversation if he can be believed that the conversation was

too short to discuss an extension of the undertaking or additional time to address his members. Nor indeed was he prevented from calling Kirchmann back if the conversation was prematurely terminated by Kirchmann. On the probabilities the conversation was short because Xola had stated that the individual applicants had decided not to heed the ultimatum and this, as far as he was concerned, was the end of the matter. It would suggest that he was of the view that there was no prospect that they would change their minds and suspend the strike as had been agreed. Xola was also not a credible witness. He was hesitant and evasive and appeared at most times to be uneasy. His evidence would appear to have been plainly fabricated in order to conceal the fact that he had for all practical purposes informed Kirchmann that the union was powerless to bring an end to the strike.

[73] Kirchmann said further that at no stage after the issue of the final ultimatum or dismissals did the union or its attorneys allege that the individual applicants had been confused or that insufficient time had been afforded to consult with them on the morning of 22 September. Although he conceded in cross examination that there could have been room for confusion regarding the technical terms concerning bargaining levels authorised by the Constitution, he said that all the applicants needed to understand was that their union and attorneys had advised that they suspend the strike as there was a possibility of dismissal if they failed to comply. It appeared that the individual applicants had determined not to heed the advice of their union and attorneys. The impression he got was that that SACTWU did its bit to persuade the individual applicants to suspend the strike and was dismayed at their attitude. His understanding was fortified by developments afterwards when he invited SACTWU to indicate if Bertrand had acted unfairly and received no response.

[74] Xola's evidence must also be rejected on the probabilities for the following reasons: despite his position in the union he did not know whether dismissal could follow as a logical conclusion from a final written warning for the same conduct; and he was unable to say whether the individual applicants understood that they could be dismissed if they went on strike again after the final warnings issued pursuant to the

July strike. His version was moreover completely at odds with that which was put to Arnold during the course of his cross-examination.

[75] Mr Wade submitted that it is clear from the evidence that the individual applicants reacted to the final ultimatum with absolute disdain and disinterest. In so doing they blatantly ignored the advice of both their trade union and their attorneys, and the undertaking made on their behalf. They moreover advanced no pleaded reason as to why they were justified in persisting in their apparently belligerent refusal to work. If indeed it is correct that they were confused about the bargaining levels contemplated in the Constitution, then there is no reason why they could not simply have asked for more time for this to be explained. On the facts it is clear that this was not a genuine concern, and in any event it was only raised *ex post* facto in the trial. Moreover, if Xola had any inkling that the conduct of his members could be attributed to simple confusion, it would have been negligent for him as a senior trade union official to not seek more time to explain the circumstances to them, and if this had been refused, vehemently challenged or at the very least placed the refusal on record at the time.

[76] At a more elementary level, however, Mr Wade submitted that Xola's version was not even put to Kirchmann during his cross-examination. What was put to him was that the individual applicants would deny that they had instructed CTH and/or SACTWU in regard to the undertaking to suspend. Also, it was put to him that Xola would testify that he had given his attorneys the NTBC Constitution and the first ultimatum, and that it was apparent from the undertaking and the subsequent concession that the strike was unprotected that they had not properly considered these. Mr Wade submitted that in considering the material issues left unchallenged in the cross examination of Xola, regard should be had to the legal principles stated in *Small v Smit* 1954 (3) SA 434 (SWA) at 438:

> *"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other*

witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness' evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness' testimony is accepted as correct." (See also, *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at paras 61-63; *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 137 - 138A; and *Masilela v Leonard Dingler (Pty) Ltd* (2004) 25 ILJ 544 (LC) at para 28).

Were the ultimata fair ?

[77] In my view, even if it can validly be contended that the individual applicants were confused about the bargaining levels and acted in the genuine belief that their strike was legal, they must at the very least have known that plant level strikes were an exception in the industry. Even if they did not understand the technicality of the sections and sub-sectors at which legitimate collective bargaining could occur, it is clear from the evidence of Mkhaliphi and Mabelu that, at the very least, they must have known that a legal strike could only be undertaken at Worsted level. In any event, any confusion about the status of the strike on the part of the first shift would have been dispelled by the time the final ultimatum to the subsequent shifts was issued. It surely would then have occurred to them that the spectre of dismissal stood large. However, even if it became apparent then, on the applicants' case the subsequent shifts had decided that all the individual applicants should be dismissed in solidarity with one another.

[78] Accordingly, on the facts and in the light of the applicable authorities, it cannot be contended that the ultimata did not set out in clear and unambiguous terms what was expected of the individual applicants and what possible consequences would follow a failure to comply. Indeed the clear and consistent message of Bertrand, from the very inception of the dispute and at the very least from the first ultimatum of 17 September,

was that the strike was illegal and that it (given the history of unprotected strikes at the plant) could result in dismissal. Nor can it be contended, in the light of the evidence led, that insufficient time was given to comply. Indeed even if there is some doubt that the final ultimatum provided a reasonable time within which the individual applicants could consider the union's advice and decide how to proceed, the probabilities favour the respondent's version of Xola's frustration that his members had determined not to heed legal advice. In the circumstances, the ultimata were eminently fair and reasonable.

Other factors relevant to substantive fairness

[79] Ms Ralehoko made the following submissions on additional factors relating to substantive fairness:

(a) The issue is of legitimate concern: The concern of the individual applicants that their employer was paying them less than the minimum prescribed wage rate was legitimate. Although they were aware of this in 2007, it was almost a year later that they embarked on the unprotected strike in July and only later the strike of September 2008. The uncontested evidence of Mabelu was that the July strike was abandoned on the advice of SACTWU that procedural compliance was necessary. In embarking on the September strike the individual applicants were satisfied that the procedural requirements had been met but were then faced with the possibility that their strike may be illegal on account of a technicality. Any reasonable person in the position of a striking employee would have needed more time to understand the basis of the legal advice, reflect upon it and decide whether to comply with the ultimate or not. The individual applicants were not afforded this opportunity: *Performing Arts Council of the Transvaal* (supra) at para 26.

(b) Duration of the strike**:** The strike lasted for only three days, and Bertrand failed to lead evidence that the strikers sought to unfairly inflict maximum harm on its business. In any event no evidence was led on the extent of the harm suffered by Bertrand as a result of the strike and if any, that the strikers were to blame. Any strike action is meant

to cause harm to the employer's business and in the absence of evidence that the employees exceeded the limits, it is submitted that the duration of the strike was a mitigating factor.

(c) Conduct of the strikers: The unchallenged evidence of Gajuna, a monthly paid employee who was a supervisor at the time of the strike, was that the strike was peaceful. Although the police visited the premises during the course of the strike, it is common cause that no arrests were made, although some individual applicants who persisted in coming to the premises were arrested after the strike. There was no evidence that any property had been damaged or that anyone had been assaulted. The employer did not lock out or seek an interdict to deal with unruly strikers. The testimony of Arnold that there was intimidation, assaults, and storming of the company premises could not be substantiated and should be rejected.

(d) Reasonable but erroneous belief that the strike was protected: At the time the strike notice was issued, Bertrand was aware that SACTWU held the erroneous but *bona fide* belief that the strike was protected: *Early Bird Farm* v *FAWU* (2004) 25 ILJ 2135 (LAC). This was not unreasonable considering that the alleged illegality was merely technical: *Coin Security Group (Pty) Ltd* v *Adams* & *Others* (2000) 21 ILJ 924 (LAC). Once legal advice had been obtained, SACTWU accepted such advice and advised its members to suspend the strike. Therefore, the applicants submitted, had Bertrand allowed the individual applicants additional time to take counsel, reflect on the advice and cool down, the likelihood was that a change of mind would have prevailed and the individual applicants would have accepted the advice of SACTWU to suspend the strike.

[80] In dealing with the additional and mitigating factors Mr Wade submitted that on the facts and evidence the contention that the strike was short-lived, that the respondent should have borne another day of striking in order to induce a return to work, and that it acted insensitively in not so doing, cannot correctly be submitted. Arnold's evidence on the damage suffered as a result of the strike was not challenged, and the evidence of a

monthly paid employee that he saw no intimidation or aggressive conduct did not take the issue any further. Moreover, the strike was protracted and in no way functional to collective bargaining: See *inter alia, National Union of Metal workers of SA and others v SA Truck Bodies (Pty) Ltd* (2008) 29 ILJ 1944 (LC).

Conclusion

[81] In my view, it is clear that on the probabilities it is not correct that SACTWU and/or the individual applicants were unaware that, whether termed a final written warning or otherwise, repeat misconduct in the nature of participation in unprotected strike action would in all probability result in termination of their employment. Notwithstanding this the individual applicants chose to disregard the advice of both their attorneys and their trade union, and persisted with the strike. They could not under any circumstances have been said to be acting in the genuine and reasonable belief that their strike was legal. Moreover, Bertrand had exercised restraint until it was finally informed that there was no prospect of ending the strike. In the context of the history of illegal strikes at its plant and the effect on its business, as was the uncontested evidence of Arnold, the reason for the dismissal was fair. However, what is finally determinative is that in accepting the evidence of the respondent on the probabilities, it is clear that the union had become frustrated by the attitude of the individual applicants in ignoring the ultimata and adamantly persisting with their illegal strike despite advice to the contrary. SACTWU had also acknowledged that a general warning should be issued following the July strike stating in no uncertain terms that further unprotected strike action would result in dismissal. In the circumstances, the applicants cannot now contend that there was no valid reason for their dismissal.

Procedural unfairness

[82] The applicants submit that the dismissals were procedurally unfair, *inter alia,* for the following reasons:

(a) Bertrand failed to afford the individual applicants a pre-dismissal hearing as required by the LRA, the Code of Good Practice: Dismissal and established legal principles.

(b) Accordingly, Bertrand failed to comply with any or all aspects of the *audi alteram partem* rule as is required for the purposes of fair disciplinary action.

[83] It is common cause that no formal disciplinary hearings preceded the dismissals. Although the applicants concede that they were afforded an opportunity to make representations prior to the decision to dismiss being taken, they submitted that the time afforded to make such representations was inadequate. Ms Ralehoko submitted that given that the ultimatum to the morning shift required representations by 10h30, it would have been unreasonable and impractical to expect SACTWU to be in a position to take instructions from the approximately 278 members and submit timeous representations. It was also possible that not all the individual applicants were present at the time. The applicants contend that despite the fact that it was common cause that no representations were made prior to the dismissals, nor were appeals lodged thereafter, subsequent to the dismissals SACTWU did seek a meeting to explore resolution of the matter, but Bertrand refused its request. The incontrovertible fact is that Bertrand was simply not willing to engage SACTWU.

[84] In any event, Ms Ralehoko submitted, the failure to make representations prior to or subsequent to dismissals, or to appeal, could not turn an otherwise unfair dismissal into a fair one. This is particularly so in circumstances where no evidence was led that an appeal would have resulted in the reversal of the dismissals. Instead, even in these proceedings Bertrand persisted in its views that the strike was unprotected and since the employees failed to comply with the ultimata, the decision to dismiss was fair. That Bertrand would not have reversed the decision to dismiss was evident from Arnold's rhetorical question to the effect that "*were workers going to work*?" when he was asked in cross examination whether any of the individual applicants were considered for re-employment. Unfortunately the individual applicants were themselves not afforded the opportunity to answer the question.

[85] Insofar as the applicants contend that the failure to afford the individual applicants pre-dismissal hearings contravened the *audi* rule, Mr Wade referred the court to the decision of the Labour Appeal Court in this regard. In *Modise & Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC) at para [73], Zondo JP made it plain that, in the context of a strike, a hearing and an ultimatum were not synonymous. The learned Judge President dealt at length with the law relating to a fair ultimatum and hearings before dismissal in the context of a strike and said the following:

> *"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur, or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to elicit any information or explanations from the workers but to give the workers the opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence of a failure to comply with an ultimatum is usually, and, is meant to be, a dismissal. In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to pursue the opportunity provided by an ultimatum to reflect on the situation, before deciding whether or not he will comply with the ultimatum. In the light of all these differences between the audi rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgment, for the proposition that the giving of a fair ultimatum is or an ever be a substitute for the observance of the audi rule."*

[86] Mr Wade submitted that the above *dictum* does not mean that the employer is required to convene a formal disciplinary enquiry, or that some form of representations have to actually be made. All that is required is that the employees be afforded the

opportunity of persuading the employer that they ought not to be dismissed. Thus, he submitted, hearings are most certainly not necessary in circumstances where the opportunity for representations has been extended and rejected. It is apparent from the following *dicta* in *Modise* that the opportunity of making written representations on its own may suffice:

> *"[53] The only situation which I am able to envisage where it can be said that an employer's failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: We are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is, indeed, the case. However, in my view the latter scenario falls within the ambit of a waiver. Accordingly, the normal requirements of a waiver must be present".*

[87] *Modise*[5] also recognised that the form of the hearing could vary vastly:

> *"In the light of all the above I have no hesitation in concluding that in our law an employer is obliged to observe the audi rule when he contemplates dismissing strikers. As is the case with all general rules, there are exceptions to this general rule. Some of these have been discussed above. There may be others which I have not mentioned. The form which the observance of the audi rule must take will depend on the circumstances of each case including whether there are any contractual or statutory provisions which apply in a particular case. In some cases a formal hearing may be called for. In others an informal hearing will do. In some cases it will suffice for the employer to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike. In the latter case the strikers or the union or their representatives can send written representations or they can send representatives to meet the employer and present their case in a meeting. In*

[5] Supra at [96].

some cases a collective hearing may be called for whereas in others - probably a few - individual hearings may be needed for certain individuals. However, when all is said and done the audi rule will have been observed if it can be said that the strikers or their representatives or their union were given a fair opportunity to state their case. That is the case not only on why they may not be said to be participating in an illegal strike but also why they should not be dismissed for participating in such strike (see Zenzile's case at (1991) 12 ILJ 259 (A) at G-H).

[88] The Labour Appeal Court therefore clearly contemplated that circumstances may even be such that the combination of ultimata (depending upon how they are phrased), meetings and other attempts to bringing striking employees to their senses could adequately serve the purpose of providing a fair opportunity to make representations as to why employees should not be dismissed (or indeed the ultimata acted upon[6]). This approach was expressly acknowledged by the Constitutional Court in *Xinwa & Others v Volkswagen of South Africa (Pty) Ltd* [2003] 5 BLLR 409 (CC), where the Court was required to deal with a situation in which employees were dismissed for embarking on strike action considered to be illegal and unprotected. The intervention of the national trade union federation, COSATU, evoked little or no response, and it appeared that the strikers intended to persist in their strike until NUMSA revoked the suspension of shop stewards. The Court was faced with the argument that Volkswagen had acted procedurally unfairly. In dismissing what it construed to be an application for leave to appeal, the Constitutional Court[7] held as follows:

" The facts show that management held meetings with the delegation of the striking workers and NUMSA, separately, to try to end the strike. At these meetings, management warned that the strike was illegal and that those participating in it faced possible dismissal. Management resorted to the closure of its plant in an attempt to get the workers to return to work. It required workers returning to the plant to resume their duties or face dismissal. This too did not

[6] The question has often been raised whether employees in such circumstances are dismissed for the illegal strike or for failure to comply with the ultimatum. This was not in issue here however, and in *Modise* Zondo JP made the point that the distinction was in itself artificial.

[7] At para [15].

work. The agreement between NUMSA and management to end the strike did not succeed in getting the applicants back to work. Nor did the warning that those workers who did not return to work on 31 January would face disciplinary action which would include dismissal. An ultimatum calling upon the workers to return to work on 3 February 2000 and warning that failure to return to work would result in dismissal did not succeed in getting the applicants to return to work either."

[89] The Court[8] said further prior to concluding that there was no prospect of the applicants persuading it that the dismissal was procedurally unfair.

"On appeal, the LAC upheld the finding that the dismissal was substantively fair but set aside the finding that the dismissal was procedurally unfair…It found that both NUMSA and the applicants were given ample opportunity to make representations prior to the decision to dismiss the applicants. It added that because the dismissal had been in accordance with the agreement to end the strike that was the end of the applicants' case".

[90] As regards precisely when - in the context of a strike - the employer is required to afford the envisaged hearing, this was dealt with in *Modise,* although the question of whether it is an absolute rule that the hearing should be held before or whether it can be held after an ultimatum is issued was not decided.

Conclusion

[91] In my view, it is on the facts clear that the respondent adequately complied with the requirement of affording the individual applicants an opportunity to be heard prior to a final decision to dismiss being taken. Not only were the applicants' repeatedly invited (in correspondence) to make representations, they were in the ultimata afforded a designated period within which to indicate why the respondent should not act in

[8] Supra at para [9].

accordance with its final ultimatum by dismissing those of the individual applicants who failed to comply. No such representations were forthcoming. Arnold testified that he received no representations from SACTWU or any of the individual applicants as to why the ultimata were not complied with and why no efforts could be made to resolve the dispute. The applicants were clearly invited to make representations to Arnold as to why they should not be dismissed for failure to heed the ultimata. Insofar as the applicants sought to contend that the time afforded for this was unreasonable, there is no reason why they could not have urged Xola to engage the employer in this regard. Xola was at the time still on the premises but on the point of leaving in frustration, and it was common cause that he made no request for any extension of time or any other indulgence to enable representations to be made either *en masse* or individually. Instead, as appears from the dismissal notices and the evidence, management was advised that the individual applicants had already made a decision not to return to work.

[92] In addition, the applicants also at no stage after their dismissals sought to advance any reasons as to why those dismissals ought not to stand. It was also common cause that they specifically spurned the opportunity to appeal in respect of the dismissal. Arnold's evidence was that they were given 5 days to appeal. Xola's evidence on the reason for not utilising the right to appeal is simply inexplicable – he said it was because of the belief that the strike was legal. In these circumstances, it can hardly be contended that the individual applicants were denied the right to be heard. Whilst it is true that the applicants were ultimately not heard in relation to their dismissals *per se,* SACTWU's lack of interest in pursuing representations or indeed lodging an appeal could be said to be consistent with its frustration at the decision of the individual applicants not to heed legal advice. However, it is the individual applicants who are ultimately responsible for their decision, and irrespective of whether they were confused about the legality of the strike or not, could have suspended pending resolution of the issue. It is inconvertible that ultimately they acted in blatant disregard of the advice of their union and its attorneys. Insofar as Xola testified to this effect, and it was put to Kirchmann that the union's attorneys may not have been properly mandated to agree to suspension of the strike, Xola's evidence in this regard must be disbelieved, since the same firm of attorneys continued to represent the applicants in the trial. Had Xola been

genuinely of the view that the attorneys had acted improperly, he would no doubt have taken appropriate steps and in the absence of this it cannot be contended that the undertaking to suspend was improperly made.

[93] In my view, therefore "*ample opportunity"* (as per *Volkswagen*) was extended to the applicants to make representations prior to their dismissal, which they rejected. In any event, consistent with the finding in *Volkswagen* (supra), the undertaking to suspend is in itself dispositive of the issue. In the circumstances, the dismissal of the individual applicants cannot be said to have been effected without fair procedure.

Costs

[94] The parties were *ad idem* that costs should follow the result in the main action. They addressed me on the issue of the wasted costs occasioned by the postponement of the trial on 30 November 2009 following the applicants' indication of their intention to amend their statement of claim in a substantive respect to remove the concession that the strike was unprotected. The applicants submit that there was a reasonable explanation why their notice to amend was only brought at the beginning of the trial, in that the complexity of the issue only emerged at the eleventh hour after the document gathering process and final consultations with witnesses in preparation for trial. Of course it is trite that pleadings can be amended at any time prior to judgment and this court exercises a discretion in this regard. To the extent that the court would be inclined to grant a wasted costs order in respect of 30 November 2009, the applicants submitted that the respondent's conduct in failing to co-operate with finalising the amended pre-trial minute and in persisting with its *locus standi* challenge should be taken into account. I do not consider the applicants' change of stance to be relevant to my determination, save to state that the initial concession was in my view well made and its withdrawal led to a rather prolonged proceeding which could have been avoided. In my view an order that the applicants pay the wasted costs occasioned by the postponement of the trial enrolled for five days on 30 November 2008 would be in the interests of law and fairness. However, I am equally of the view that the respondent should pay the

costs occasioned by the postponement of the matter for a day to enable the parties to finalise the pre-trial minute.

Order

[95] In the premises, I make the following order:

(1) The dismissal of the individual applicants for embarking on unprotected strike action is not automatically unfair in terms of section 187(1)(a) of the LRA.

(2) In the alternative claim, the dismissal of the individual applicants is not substantively or procedurally unfair in terms of section 188(1) of the LRA.

(3) The applicants are to pay the wasted costs occasioned by the postponement of the trial on 30 November 2009.

(4) The respondent is to pay the wasted costs occasioned by the postponement of the matter to attend to finalisation of the pre-trial minute on 26 January 2010.

(5) The applicants are to pay the respondent's costs in the main matter.

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Bhoola J

Judge of the Labour Court of South Africa

29 April 2010

Appearance:

For the respondent: Adv R B Wade instructed by Kirchmanns Inc

For the applicants: Mrs. Tapiwa Ralehoko instructed by Cheadle Thompson & Haysom Inc.