IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

REPORTABLE
CASE NO: C308/03

In the matter between:

NUMSA	1ST APPLICANT
D. WILLEMSE & 10 OTHERS	2ND & FURTHER APPLICANTS

and

ATLANTIS FORGE (PTY) LTD	RESPONDENT

JUDGEMENT

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1. The first applicant, a registered trade union, ("NUMSA") has referred a dispute to this court on behalf of 11 of its members ("the individual applicants") contending that their dismissal for conduct allegedly amounting to participation in an unprotected strike was both procedurally and substantively unfair. The individual applicants seek reinstatement retrospective to the date of their dismissal.

2. The respondent, Atlantis Forge (Pty) Ltd, ("the company") is a forging business based in Atlantis, Western Cape. It comprises two distinct operations located one kilometre apart at different plants. The one operation, the forge, is where metal billets are forged into crankshafts as rough forgings, which thereafter are finished on the machining line at the other plant for use by automotive assemblers. The machining line (also referred to as "the crankline") is where the rough forged crankshafts are machined into final form. Until not long ago the two plants were separate businesses. When Daimler-Chrysler acquired an interest in both businesses they became a single corporate entity. Now the crankline takes the rough forgings exclusively from the forge and machines the products for export to one or two clients overseas.

3. Second applicant (Dawie Willemse), third applicant (Mario Philander), sixth applicant (Arnold Dirks), ninth applicant (Alexander Cloete) and twelfth applicant (Erasmus Appolos) were employees at the crankline. Fourth applicant (Riaan

Visagie), fifth applicant (Allen Abrahams), seventh applicant (Desmond Pieterse), eighth applicant (Gerhard Sauls), tenth applicant (Alice Khan) and eleventh applicant (Ntombekhaya Jobo) were employees at the forge.

4. The events that led to the dismissal of the individual applicants took place on 4 December 2002. Early in the morning on that day, employees at the forge gathered in the canteen not long after the commencement of the day shift (at 07h00) in response to rumours that the annual bonus would be paid to employees on 10 December 2002 instead of on 6 December 2002, the date some employees believed was the due date. News of the events at the forge soon reached the employees at the crankline.

5. Shortly after 07h30, the employees gathered in the forge canteen were addressed by Mr Johan Agenbach, the respondent's production facilitator, and at his request dispersed. There are disputes of fact, to which I will return presently, about precisely what Agenbach conveyed to the meeting regarding the resolution of the grievance.

6. Some time after 08h30 the forge employees gathered again in the canteen, and on this occasion were joined by several crankline employees, who, having left their workstations, had walked in a group down the road to the forge and assembled in the canteen. Mr Ledgerwood, the company's production manager at the crankline, followed the crankline employees to the forge and on arrival convened a meeting with the shop stewards in the boardroom. While this meeting was taking place, Mr Mike Louw, an organizer employed by NUMSA, arrived at the forge canteen and directly addressed the assembled employees, advising them to return to their workstations, which they did almost immediately, though the crankline employees obviously took some time to return to the crankline plant, a kilometre away.

7. The incident was followed by three meetings between the company, the union and the shop stewards at which the company took the position that the employees' conduct constituted a strike not in compliance with the provisions of Chapter IV of the Labour Relations Act ('the LRA") and in the light of previous similar action by the workforce decided to initiate disciplinary proceedings. It is common cause that several employees had been issued with final written warnings valid for 12 months for participating in an unprotected strike in February 2002. In response to the conduct of 4 December 2002 the company therefore decided to issue final written warnings to all participants who had not previously received final written warnings for the February strike. Those who were subject to the final written warnings arising out of the February strike and who had participated in the events of 4 December 2002 were brought before disciplinary hearings. The second applicant, Willemse, a shop steward, although not subject to a final warning, was brought before a hearing as well because management felt he took exceptional responsibility for encouraging his colleagues on the crankline to leave their workstations to go to the forge.

8. For different reasons the second and third applicants (Willemse and Philander) had

individual disciplinary hearings, as did another employee, Blankenberg. The nine other individual applicants were brought before a group hearing. All eleven individual applicants were found guilty of participating in an illegal strike and were dismissed. As stated, they all claim the dismissals were procedurally and substantively unfair.

9. The proceedings in this court ran for 15 days and involved the testimony of 19 witnesses, much of it of limited relevance and cogency, nonetheless giving rise to a several disputes of fact and problems of credibility.

10. The primary dispute between the parties is whether the employees' abandonment of their workstations at both the forge and the crankline to attend the second meeting at the forge at 08h30 constituted a strike within the meaning of that term in section 213 of the LRA. The company contends it did. The applicants argue to the contrary that the conduct and assembly constituted a lawful gathering of the workforce, duly authorised by the company's management. Although the events at the first meeting at the forge at 07h30 are of relevance in determining the issue, the company did not seek to establish that such meeting of itself constituted a strike.

Events at the forge

11. A number of witnesses testified to the events at the forge prior to the 08h30 meeting. The testimony of three witnesses about these events was of particular importance: namely that of Johan Agenbach, Gavin Plaatjies (on behalf of the company) and Keenan van Wyk (on behalf of the applicants).

12. Agenbach, as I have said, was the production facilitator on the forge side. As such he was accountable to the forge production manager, Mr Stan Ball (now deceased), and was in effect second in command at the forge. On the day in question he arrived at work at about 06h45, shortly before the commencement of the day shift. At about 07h15 Keenan van Wyk, a shop steward, who had just completed the night shift, approached Agenbach and informed him that a problem had arisen about the payment of the annual bonus. Apparently some workers who had been expecting the bonuses to be paid on Friday 6 December had become aware of an intrenal memorandum instructing the wages department to pay them on Tuesday 10 December. Agenbach undertook to investigate the matter, to raise it with Ball, and to come back to him once he had more information. Because the administrative and clerical staff only came on duty after 08h00, Agenbach understood that he would be in a position to report back only some time after that.

13. Agenbach proceeded straight away to Ball's office to enlist his support in solving the problem. Because the managing director, Mr Dave Lee, and the human resources officer, Mr Natheem Joel, were out of office, and since the administrative staff in the wages department were not expected until later, Ball and Agenbach were unable to establish when in fact the bonuses were scheduled for payment. While they were discussing the matter, van Wyk walked into Ball's office and informed them that the

forge employees had gathered in the canteen and were requesting Ball to come address them on the bonus issue. Ball was reluctant to do so and therefore instructed Agenbach to address the employees on his behalf, which Agenbach then did, telling them that their gathering was illegal but that he would try sort the problem out. With that the workers returned to their workstations.

14. The applicants' version of these events differed from Agenbach's account. According to van Wyk, when he first discussed the bonus issue with Agenbach he obtained his agreement to convene the first meeting in the canteen. It was accordingly put to Agenbach in cross-examination that he had asked van Wyk to remain at work (after completion of the night shift) to assist defuse the situation, had specifically requested van Wyk to assemble the workers in the canteen so that he (Agenbach) could address them and hence had in effect authorised the meeting. Agenbach denied both those contentions, maintaining that when he addressed the assembled employees at about 07h30, on the instruction of Ball, he at once advised them that their conduct was illegal, requested them to return to work, assured them that he would establish the correct situation once the financial staff came to work and then would report back to them. Van Wyk, by contrast, claimed that the first meeting was not illegal because it was authorised by Agenbach and accordingly denied that Agenbach had said otherwise in the meeting. Van Wyk described the mood of the employees at the time as "relaxed". While I accept that the workers were not overly agitated at this time, I doubt if the situation was as harmonious as van Wyk tried to depict it, if only because Abrahams, the fifth applicant, somewhat inconsistently with the impression created by van Wyk, stated that Agenbach had admonished the workers to be calm.

15. I am inclined to accept Agenbach's version of his involvement in the 07h30 meeting for a number of reasons. Firstly, in paragraph 7.9 of their statement of case the applicants averred that van Wyk had asked Agenbach to address the employees and that he had agreed to do so. This is also recorded as a common cause fact in paragraph 3.17 of the pre-trial minute. Though the averment can be interpreted to suit both versions, it is likely that had Agenbach gone further than agreeing to address the meeting by actually authorising it, the applicants would have stated as much in their statement of case. Secondly, Agenbach was an impressive witness. He was forthright, answered questions directly and concisely, was consistent, was certain of himself, and gave his evidence in an apparently honest manner. Van Wyk, in contrast, was evasive and did damage to his credibility by puzzlingly denying during cross-examination that he had given certain instructions to the applicants' legal representative during the earlier stages of the trial when he had patently done so during an adjournment granted for that very purpose. Although not much turned on the issuing of the instructions in questions, I agree with counsel for the respondent that van Wyk's inexplicable stance, as well as his persistence in it, suggested a propensity on his part to deny truthful propositions put to him when he considered it expedient to do so, thus demonstrating that he was prepared to be untruthful even when presented with compelling proof to the contrary. Moreover, in a fleeting unguarded moment, van Wyk referred to the 07h30 meeting as "my

feedback meeting", subtly signifying that it was neither authorised nor convened by Agenbach. Additionally, it seems improbable that Agenbach would have instructed the convening of an assembly half an hour after the commencement of the shift, thereby significantly disrupting production, without the permission of Lee, the managing director, or Ball, the forge production manager.

16. Against this, though, there is the uncontested evidence of Gavin Plaatjies, (a reluctant witness, who testified under subpoena, but whose evidence was in most respects satisfactory), that van Wyk had told him on the morning in question that Agenbach had authorised the meeting. On the strength of this Plaatjies, a team leader, had given his subordinates permission to attend it. As I understand the respondent, it contends that van Wyk misled Plaatjies. Given van Wyk's expediency with the truth, that may be so. Yet the fact that van Wyk conveyed what he did may have led to some confusion among the forge employees about whether the first meeting was authorised or not.

17. Be that as it may, I accept Agenbach's version that he did not authorize the meeting and that when he addressed it he communicated that the stoppage was illegal. The fact that the employees did not contest his position and immediately returned to work, together with the confusion about the meeting's legality, may partly explain why the respondent did not impose discipline for attendance at it.

18. The next question is whether Agenbach authorised the second meeting. At the conclusion of the 07h30 meeting, in the course of a conversation with van Wyk at the door of the canteen, Agenbach gave an indication that he would revert to the employees. The understanding of what he intended is in dispute. Agenbach conceded that the employees wanted him to commit to a specific time. He was not prepared to promise anything but said: "Look I'll see what we can do for nine o'clock". When asked during his testimony what he had proposed to do by nine o'clock, he replied that he had meant he would feedback through the production team leaders and had no intention of stopping production for that purpose by authorising another meeting. Considering the cost and time wasted, normal practice is not to shut down the lines for feedback, and it was therefore unlikely that management would have approved a shut down.

19. Van Wyk confirmed that Agenbach gave him an indication that he would provide feedback at 09h00, which he claims to have understood as an authorisation to convene a second meeting in the canteen at 09h00.

20. Abrahams (the fifth Applicant) testified that he had overheard the conversation between van Wyk and Agenbach in which van Wyk had asked: "Wanneer gaan ons 'n antwoord kry", to which Agenbach had replied "by nege uur". A reading of Abrahams' evidence as a whole reveals that he clearly did not hear Agenbach give permission for a second meeting. His perception was more in line with the idea that Agenbach intended merely to provide feedback. This is borne out further by Abrahams' testimony that he first heard of the second meeting when van Wyk

summoned him and his colleagues to it at about 08h20 and that he sought the permission of Lucas Josephs, his team leader, to attend. Both these facts point to Agenbach not having authorised the second meeting during his conversation with van Wyk at the canteen door. Being in immediate proximity while the conversation was underway, Abrahams would certainly have heard if permission had been given. Yet he never testified to that fact. If anything his explanation of subsequent events contradicts it.

21. A number of averments in the pleadings are at odds with van Wyk's assertion that Agenbach gave permission for the second meeting. In paragraph 7.11 of the statement of case it is stated that Agenbach undertook to approach the financial manager to attempt sort out the situation and would revert back to the employees at about 09h00. No mention is made of his having given permission for the convening of a second meeting in the canteen. Likewise, it is stated in paragraph 7.37 that after his address Agenbach told van Wyk that he would "come back" to the employees by 09h00. The pleadings go on to set out a variety of specific instances in which individual applicants sought and obtained permission from their supervisors to re-gather in the canteen. Thus, it is stated that Riaan Visagie (fourth applicant); Alice Khan (tenth applicant) and Ntombekhaya Jobo (eleventh applicant) either left their workstations or attended the second meeting after being granted permission by Gavin Plaatjies. Leaving aside the question of whether Plaatjies did give permission (to which I will return later), had Agenbach indeed authorised the meeting as van Wyk alleged, the pleadings would have been constructed differently. The fact that these applicants felt constrained to put up defences based on permission granted by their supervisors implies that they had no knowledge of or confidence in van Wyk's improbable claim that Agenbach authorised the meeting.

22. The absence of prior authorisation for the meeting is further borne out by the testimony of Plaatjies. As I have said, Plaatjies, a team leader at the forge, was a reluctant witness compelled to testify for the respondent under subpoena. He denied giving Visagie permission to attend the second meeting. On the contrary he urged Visagie (his friend) not to go. Visagie, at the time walking at the front of a group of employees leaving the shop floor, had in response dismissively gestured in a way indicating his intention to ignore Plaatjies' advice. Visagie in his testimony could offer no convincing explanation for why Plaatjies, his friend, would incriminate him in this way.

23. In addition, for the reasons stated earlier, Agenbach is to be preferred as more credible than van Wyk, whose credibility was damaged further by his transparent equivocation about the timing of the second meeting. Having initially committed himself to Agenbach giving permission to re-convene at 09h00, he experienced evident discomfort under cross-examination in explaining why the preponderance of evidence revealed that the employees had assembled between 08h30 and 08h50. He perceptibly understood the possible implications of conceding that the employees had gathered earlier (namely that there had been no authorisation to gather at 09h00) and, despite persuasive confirmatory evidence, stubbornly refused

to concede they had done so, not even attempting to tender a plausible innocent explanation for their conduct.

24. But, once more, there are inherent probabilities against Agenbach having given permission for the second meeting. Firstly, considering the difficulty Agenbach had experienced in getting information about the bonuses, he naturally would have hesitated before convening a meeting at a specified time when there was a possibility that he would have nothing to report. Secondly, Agenbach credibly explained that he was reluctant to commit himself, saying he would see what he could do to get information to feedback by 09h00. Thirdly, Agenbach further testified that when it came to his notice that the employees had assembled for a second time he informed Ball that he would not address them again, but that he (Ball) and management should deal with the situation. That he did not address the second meeting is common cause. Had he authorised the meeting, it is inherently improbable that he suddenly and inexplicably would have refused to address it. Fourthly, it is equally improbable that Agenbach, a senior employee with a lengthy period of service, would have authorised a meeting resulting in production coming to a complete halt at a time when the company was under pressure to meet immediate production targets and especially when it was feasible to feedback the information to the workforce through either the shop stewards or the team leaders. Added to that, one must enquire, if the meeting was authorized as alleged, why did the employees return immediately to work once advised by the union organiser, Mike Louw, that the gathering could be construed as an unprocedural strike? Had the workers genuinely believed they were assembled with Agenbach's blessing it is probable that at least someone present would have challenged Louw's apprehension about the legality of the gathering. This did not happen. Finally, it is also unlikely that six of the eleven applicants would have pleaded guilty to participating in an illegal strike, as they did in the collective disciplinary hearing, had they really believed the gathering had been authorized.

25. In a nutshell, therefore, the probabilities are overwhelmingly against the proposition that Agenbach, in his conversation with van Wyk at the conclusion of the first gathering, authorized the convening of a second gathering at 09h00.

26. Returning to the chronology of events. After the first meeting Agenbach went back to Ball's office to give him feedback. At this point in time he was appreciative of the manner in which the employees had conducted themselves and reported to Ball that the situation was under control. He and Ball then set about investigating the bonus issue. They first looked at the minutes of previous shop steward meetings to determine if a date for the payment of bonuses had been agreed. As Agenbach did not as a matter of course attend shop steward meetings he had no personal knowledge of the bonus payment date, agreed or otherwise. He and Ball thus looked for a memo from the human resources or financial departments recording an agreed date. While they were doing this Ball received a telephone call from Simon Ledgerwood, the production manager at the crankline. From what Agenbach heard of the conversation it appeared that the bonus issue had reared its head at the

crankline. Ball conveyed to Ledgerwood that the situation at the forge was under control.

27. Around about 08h30 van Wyk and Kenneth Booysen, (a shop steward at the crankline who had been given permission by his team leader to assist resolve the problem at the forge), entered Ball's office. They confronted Ball and Agenbach with the information that Natheem Joel, the human resources officer, had in a memo unilaterally changed the bonus payment date from Friday 6 December 2002 to Tuesday 10 December 2002. They also informed them that the workers had reconvened in the canteen. When he heard this Agenbach, in his own words, "saw trouble" and said to Ball: "Look, now you handle this, I had my bit and you must take over from here." From then on Agenbach had nothing further to do with the unfolding events.

28. Booysen testified that Ball was unable to give them any guarantee that the bonus would be paid on 6 December 2002. He and van Wyk therefore left his office and went to the meeting in the canteen, where the employees who had marched over from the crankline soon joined them.

29. Booysen accepted that Ball had been taking steps to locate the memo dealing with bonus payment dates, but, despite the obvious difficulties in locating the managing director, the human resources officer and the staff in the wages department, he did not consider it unreasonable to have expected Ball to come up with an answer before 08h30.

30. The testimony of the witnesses regarding the timing of the second meeting varies. Not much turns on this, other the fact that the diversity of versions possibly gives the lie to the proposition that a meeting scheduled for 09h00 had been agreed. Agenbach put Booysen and van Wyk's arrival at Ball's office at about 08h30. If he was correct it means that the forge employees had returned to the canteen some time shortly before that. Van Wyk said he and Booysen left Ball's office between 08h10 and 08h20 and that the workers only gathered in the canteen at 08h50. Abrahams put the time of the meeting at 08h25–08h30, saying at one point that he had returned to his workstation by 08h55. Sauls (the eighth applicant) testified that by 08h25 certain machinery had already been switched off. Visagie, who went to the meeting in a group claimed to have arrived at the canteen by 08h55. Plaatjies put his interaction with Visagie at about 08h30–08h35. The workers at the crankline on hearing about events at the forge walked out at about 08h30.

31. Whatever the case, at some time between 08h20 and 08h45 the workers at the forge left their workstations and went to the canteen. On Agenbach and Plaatjies' versions they did so without permission. This too was confirmed by Lucas Josephs, one of the forge team leaders, who, notwithstanding their assertions to the contrary, denied giving permission to Abrahams (fifth applicant) and Pieterse (seventh applicant). Both Plaatjies and Josephs mentioned that little production had been possible between the two meetings and that it was necessary to shut down the

machines and production process when the workers left the shop floor to go back to the canteen for the second meeting.

32. As the forge workers gathered in the canteen, those who had marched over from the crankline joined them. At the same time, Simon Ledgerwood, the production manager on the crankline, who had followed the crankline workers in his car, convened a meeting of the shop stewards in the company's boardroom at the forge. Prior to leaving the crankline, Ledgerwood had phoned the local NUMSA office to inform the union of the events taking place. The union dispatched two organizers, Mike Louw and Simon Arries, to deal with the situation. They arrived at the forge while the meeting between Ledgerwood and the shop stewards was under way in the boardroom. Louw, as I have mentioned, addressed the workers assembled in the canteen, informed them that their conduct might be construed as illegal and urged them to return to their workstations, which they did some minutes later.

Events at the crankline

33. Before turning to the ensuing negotiations between the union and management, it is necessary to set out the events at the crankline where several of the workers left their workstations to join their fellow workers assembled in the forge canteen. Evidence about what transpired at the crankline was given by Ledgerwood, Visser and Wilds, on behalf of the respondent; and by Philander and Willemse on behalf of the applicants. Once again some of the material facts are in dispute.

34. Mr Grant Wilds is employed as one of the production team leaders on the crankline, with supervisory responsibility for overseeing the needs of the line, the performance of a team of 10–15, ensuring quality and meeting production targets. He is directly responsible to Mr Gert Visser, the crankline production facilitator, and through him to Ledgerwood. The second applicant, Mr Dawie Willemse, a shop steward and the then secretary of the shop steward's committee, was one of the members of his team, who, as will be seen presently, played a significant part in the walk out at the crankline.

35. Wilds testified that on the morning in question Willemse was repeatedly on the telephone next to the production line and noted that he appeared agitated, describing him as "a bit uptight". Wilds instructed him to get back to work. The cross-examination of Willemse's fellow shop steward, Kenneth Booysen, who had been given permission to leave the crankline in order to go over to the forge, revealed that Booysen had been in telephonic contact with Willemse about events of the forge. Although Booysen was unable to recall the precise content of his telephonic conversations with Willemse, he denied responsibility for inciting him to action. However, it is clear that during more than one phone call he gave Willemse feedback on the meeting with Ball and Agenbach and had described the disquiet of the forge employees about the bonuses being paid on 6 December rather than 10 December.

36. When Wilds asked Willemse to refrain from telephone calls, Willemse told him that he needed to go to the forge. Because there were shop stewards employed at the forge, Wilds declined Willemse's request. Willemse became visibly upset, turned to one of his colleagues, Mario Philander, (the third applicant) and said "we cannot just allow this to happen, we need to do something, the people have walked out at the forge", or words to that effect. On hearing this Wilds thought it best to consult Ledgerwood. He accordingly phoned Ledgerwood to tell him that the workers at the forge had walked out and that Willemse sought permission to go to the forge. Ledgerwood requested Wilds to come to his office, where a production meeting was in progress. In the presence of Wilds, Visser and other persons, Ledgerwood phoned Ball and enquired whether Willemse's presence was required at the forge. Ball, relying on what Agenbach had told him, informed Ledgerwood that everything was under control and that there was no need for Willemse to come over to the forge. Ledgerwood instructed Wilds to convey this to Willemse and then continued with the meeting.

37. Wilds went back to the shop floor and explained the situation to Willemse, who took the information badly and requested to see Ledgerwood personally. Wilds phoned Ledgerwood and the latter instructed him send Willemse up to the office.

38. There is a material dispute about what happened during the encounters between Ledgerwood and Willemse in the vicinity of Ledgerwood's office that morning. Willemse testified that he initially had accepted Wilds' assurance that he did not need to go to the forge but had soon after received another call from Booysen telling him that the workers "were moving about the bonus issue". He claims to have started panicking and that Philander advised him to speak to Ledgerwood. He then went up to Ledgerwood, with Wilds' permission, and found Ledgerwood alone in his office. He conveyed to Ledgerwood what Booysen had told him. Ledgerwood, so he said, replied: "Dawie dit is nie reg nie, go back to your workstation and I'll try sort it out," or words to that effect. From this Willemse understood that Ledgerwood had concurred with him that the bonus payment date was indeed 6 December. Willemse then walked back towards the shop floor. As he came down the stairs he noticed that the workforce had left the shop floor and were busy walking out into the yard.

39. Wilds confirmed that during Willemse's absence there had been a "buzz" on the shop floor and that the majority of the workers had left their workstations to stand on the concrete slab outside the door of the factory, apparently awaiting Willemse's return from Ledgerwood's office. According to Willemse, when he observed what was going on he realised that something was wrong because the people were shouting: "meeting, meeting …" He then claims to have turned around, gone back to Ledgerwood's office and told him that the workers were walking out. This news, he stated, upset Ledgerwood to the point that he became rude to Willemse, allegedly saying: "Fuck out of here and get the fucking people back to work." Willemse testified that this outburst "disturbed his mood" and that he consequently told Ledgerwood to speak to the workers himself.

40. Ledgerwood's version of his encounter with Willemse is somewhat different. Almost immediately after the conclusion of the production meeting at 08h30 Gert Visser informed him that the workers were leaving the shop floor. He instructed Visser to summon the shop stewards to his office. Visser testified that Willemse was the only shop steward he saw, that he communicated Ledgerwood's instruction to him, that Willemse heeded the instruction and then went up to Ledgerwood. Taking Wilds and Visser's evidence together, along with Ledgerwood's statement that he asked Visser to send up a shop steward, it would seem that Willemse went up to Ledgerwood twice, once with Wild's permission and once on Visser's instruction. Willemse claims to have gone once with Wild's permission and then to have turned back on his own accord. Visser's testimony on the point was confused, contradictory and altogether unsatisfactory. To compound the difficulty, Ledgerwood in his testimony described only one encounter with Willemse whom he assumed came to see him in response to his instruction to Visser. He made no mention of giving Wilds permission to send Willemse up. Although much was made of this issue in the cross-examination of Visser, little was made of the contradictions during argument. The only possible finding in the circumstances, and in the face of four possible versions, is that some discussion took place between Ledgerwood and Willemse in the vicinity of Ledgerwood's office immediately after the production meeting, which had ended around about the same time as the workers left the shop floor.

41. Ledgerwood's recollection of the content of the conversation with Willemse also differs significantly from Willemse's. He said that Willemse's opening words were: "Mr Ledgerwood this is not your fault, but we must leave now, there's a problem with the bonuses." He then claims to have told Willemse that the conduct was illegal and unacceptable and that he was trying to contact NUMSA. He also cautioned him that any illegal conduct could result in dismissal of employees subject to a current final written warning. After that he busied himself with contacting NUMSA. He denied categorically that Willemse told him the situation was getting out of hand and requested his assistance for that reason. He neither confirmed nor denied becoming abusive and using foul language, intimating essentially that he might have, but could not remember. He was adamant though that Willemse had not taken a co-operative stance, and was plainly of the opinion that Willemse and Philander were the persons who had encouraged the workers to leave their workstations in the first place.

42. The truth of the content of the encounter most likely lies somewhere between the two versions. Ledgerwood struck me as an honest witness, but also as a man of quick temper not usually given to restraining his choice of language. Willemse on the other hand was not an impressive witness. What counts most tellingly against his version is that Ledgerwood's loss of temper and abusive language were never raised at any time before the trial. No mention of the outburst was made in Willemse's disciplinary hearing, even though both he and Philander questioned Ledgerwood during the proceedings. The version put at the disciplinary hearing was limited to the assertion that Willemse had sought Ledgerwood's assistance and had

been rebuffed. Similarly, the version put in the statement of case is confined to an averment that Ledgerwood responded to Willemse's request by telling him to go back and tell the workers that everything (regarding the bonus) would be sorted out and that they should return to work. And although it was put to Ledgerwood in cross-examination that he had become abusive, it is notable that the exact version subsequently testified to by Willemse in chief was never put to him.

43. The improbability of Ledgerwood having become abusive to an offensive degree is strengthened by the fact that on a previous occasion, some months earlier, Willemse had lodged a grievance concerning Ledgerwood's use of abusive language, which when not resolved internally was referred to the bargaining council. Accordingly, I am in agreement with Mr Kirk-Cohen, who appeared for the respondent, that if this was the manner in which Willemse had previously reacted to offensive language he most certainly would have raised the fact that Ledgerwood swore at him on the morning of 4 December 2002 at an earlier time in the dispute. That he did not do so sooner, points to the accusation being either an exaggeration or a fabrication, casting considerable doubt upon his credibility. Moreover, if he was indeed merely trying to assist, it is unlikely that Ledgerwood would have succumbed to directing a sudden outburst of foul language at him. But even allowing for the possibility of a less than courteous interchange, I do not accept that Ledgerwood was guilty of an outburst of a magnitude justifying Willemse's subsequent conduct, which after all was the apparent purpose of his making this belated accusation during his testimony in court.

44. Wilds testified that while Willemse was with Ledgerwood, he and Visser stood at the door of the factory and observed the workers leave their workstations to stand on the concrete slab in the yard. He discussed what action to take with Visser and they decided to wait until Willemse had returned from Ledgerwood's office. When Willemse appeared, Wilds approached him to ascertain if the problem had been resolved. Willemse ignored him, walked through the factory door and started shouting slogans, to which somebody in the crowd responded: "All right guys, let's go". Whereupon the group of workers proceeded towards the factory gate and headed off in the direction of the forge. When asked under cross-examination why he had not intervened to exhort the employees not to leave, Wilds described how the group had started to cheer, shout slogans and become excited, and that because of an unpleasant incident he had experienced in the past, he thought it might have been unwise to intervene.

45. Visser corroborated this in his testimony. After Willemse returned from speaking to Ledgerwood, Visser saw Willemse speak to Philander at the factory door and then heard him say: "Kom laat ons loop". When asked to whom Willemse had addressed those words, Visser replied that they were directed to a group of about 10 workers standing around him on the concrete slab in the yard. The rest of the workers on the slab then followed them to the gate.

46. Willemse himself confirmed that Wilds and Visser were standing at the door of the

factory at this time. He admitted that after his encounter with Ledgerwood (and perhaps frustrated at being denied permission to go the forge) he was, in his own words, “baie omgekrap” and “disturbed in mood because of the way he spoke to me”. And so he got caught up in the mood of the workers. He had no recollection of Wilds and Visser speaking to him at the door. When asked in chief if he had told the people to go, he replied that when he arrived downstairs “the people were already in front”. Asked if the collective conduct of the workers constituted a strike he insisted it was not, saying “ons het uitgestap to the meeting”. As for Ledgerwood’s instruction to him to tell the workers to return to their workstations, he claimed not to have had the chance (despite walking a full kilometre with them to the forge). He qualified this with an explanation that “the people were in the mood”, that he thought the best way to talk to the people would be at the meeting and by admitting that he was curious about what the union would say at the meeting. He described the mood as “high”. He disagreed with the contention that the workers were shouting slogans, but volunteered that they were screaming, “meeting, meeting” and “I want my money”. He denied leading them to the forge, maintaining instead to have merely followed the group that were moving off when he returned from Ledgerwood.

47. This testimony is at variance with what he said at his disciplinary enquiry. The recorded minute reflects him as saying:

> Op daai stadium toe ek daar onder was het ek gesien G Wilds en G Visser het daar onder gestaan by die mense. Sommige mense het by die hek gestaan. Mood was so hoog – onbeheerbaar – dat dit vir my tevergeefs was om die mense tot bedaring te bring. Ons is toe almal daar uit – ook weg na Forge. Ek was ook verstrengel in die mood – ek was een van die voorlopers na Forge om daar by te kom……”

He offered no satisfactory explanation, when pressed under cross-examination, for the obvious discrepancy in his descriptions of his role.

48. Ledgerwood’s account of Willemse’s behaviour and role was in line with the version offered by Willemse at the disciplinary enquiry. By the time Ledgerwood got to the factory door the workers were midway between the factory and the gate to the main road, about 100 metres away. He proceeded after them at a quick pace and caught up with the stragglers close to a bus terminus. He then shouted to Willemse, who by then was about 30-50 metres in front of him, and requested him to come talk to him. The fact that Willemse immediately turned around and looked towards him convinced Ledgerwood that Willemse had heard him. In spite of this, he saw Philander take Willemse by the arm and motion forward. Effectively ignoring Ledgerwood’s call to them, they turned away and carried on walking in the direction of the forge. Ledgerwood after that headed back to the factory. On the way he met Mr Wesley Kelley, a former shop steward and elicited his help in making contact with NUMSA. He next fetched his car, drove to the forge and convened the meeting with the shop stewards in the boardroom. Willemse denied that he saw Ledgerwood or heard him calling out to him. Philander admitted to seeing Ledgerwood standing at the factory door between Wilds and Visser, but not at the bus terminus. He also denied hearing him call Willemse.

49. Once again I prefer Ledgerwood's version on this disputed fact. As I have said, Willemse failed to impress as a witness. He was evasive and at times did not answer questions promptly or at all. His explanations for not giving effect to Ledgerwood's earlier instructions are entirely implausible and lead easily to the conclusion that, caught up in the mood, he preferred not to heed the call to return.

The immediate aftermath and the intervention of the union

50. As already mentioned, while the employees from both the forge and crankline sides were busy assembling in the canteen, Ledgerwood arrived in his car at the forge and immediately summoned the available shop stewards to a meeting in the boardroom. The meeting was attended by Ledgerwood, Ball, Agenbach, Ms Charlene Kemp (the IR officer), van Wyk, Booysen and Willemse. Ledgerwood told the shop stewards that the workers' conduct amounted to an illegal strike that could result in dismissals. In response to requests from the union for guarantees he undertook that there would be no victimization but would not guarantee that disciplinary action would not follow. He requested the shop stewards to get the workers back to work and reminded them that some of the workers were on final written warning for disobeying a Labour Court interdict in February 2002. While this meeting was going on, Mike Louw arrived at the canteen and addressed the workers requesting them to return to work, with which request they immediately complied.

51. Once the workers started to return to work, Ledgerwood convened another meeting in the boardroom, this time with the union representatives, Arries and Louw, together with the shop stewards van Wyk, Booysen and Willemse. This meeting was minuted as having commenced at 09h00. The minutes reflect that the principal concern of the organizers and the shop stewards was to obtain a guarantee that there would be no discipline. The minutes provide a strong contemporaneous indication that all present understood the action to have been a strike. Arries in particular is recorded as saying that the workers had been very upset, but that the union had succeeded in calming them down. Louw is recorded as describing both parties' behaviour as "unprocedural". And van Wyk is minuted as having said: "we know what was done was unprocedurable" (sic).

52. Louw, for reasons unknown, was not called to testify. Arries, on the other hand, did give evidence. At times he vacillated and was observably reluctant to commit himself. He was compelled to concede that the workforce had indeed become agitated, but still tried to exculpate the workers by seeking to categorise their behaviour as attending a meeting without permission. When cross-examined on whether he shared Louw's reported view, conveyed to the workers assembled in the canteen, that the conduct could be construed as an illegal strike, his cagey response in the witness box, if anything, intimated that he did indeed share such a view. Van Wyk, who as I have stated was also not a particularly reliable witness, did not deny the statement attributed to him in the minutes, but nevertheless persisted

in the view that the conduct was not an illegal strike.

53. Later that day another meeting was convened at 11h30 with the shop stewards and Arries, at which the managing director, Mr Dave Lee, was in attendance. From the minutes of the meeting it emerges that Lee was of the unwavering opinion that the conduct was an illegal stoppage. Even so he gave an undertaking, without guarantees, that he would try to pay out the bonuses on 6 December 2002 (which is what actually happened), but at the conclusion of the meeting deliberately reserved the right to impose discipline.

54. None of the minutes of the meetings records any complaint by the worker representatives that there had been a departure from previous practice in regard to the payment of bonuses. The company representatives, particularly at the later meeting at 11h30, took the position that no-one of management had conveyed that the bonus payment date would be 6 December 2002, rather than 10 December 2002 in accordance with the internal memo prepared by Joel (the HR officer), which it transpired had been leaked to the workers on 3 December 2002. No counter argument was raised that there had been a departure from previous practice. Instead, Lee testified, the grievance was that Joel had told them 6 December 2002 would be the bonus payment date.

55. Early the next day, 5 December 2002, Ledgerwood e-mailed Lee a proposal that discipline be considered against certain individuals. He pointed out, amongst other things, that several employees, who were on warning for previous unprocedural industrial action, aware of the dangers, had not participated in the previous day's events. Another meeting was then held at about 08h30 on 5 December 2002 at which it was communicated to Arries and the shop stewards that discipline was likely to follow. The minutes record Arries, while denying there was a strike, conceding that the conduct was illegal, and van Wyk contending that no single person was responsible, that there had been emotion on the shop floor and the workers as a collective had decided "to take action". Neither Arries nor van Wyk in their evidence in court could offer a convincing explanation for these utterances. Van Wyk's clarification of his statement that the workers had decided "to take action" was especially implausible. When asked what action the workers had decided to take he replied: "they went to a meeting."

The disciplinary enquiries

56. The company moved almost immediately to impose discipline. Those employees who had participated in the action of 4 December 2002, but who were not on final warnings for participating in the strike of February 2002, were issued with final warnings. Those employees who had received a final warning in February 2002, being all the individual applicants besides Willemse, were called before disciplinary enquiries and dismissed.

57. As explained at the outset, there were three distinct disciplinary enquiries of

relevance. Separate disciplinary enquiries were held for Willemse and Philander. The other nine applicants attended a collective enquiry. Another individual enquiry was held for Johannes Blankenberg, which resulted in the charges against him being withdrawn. A separate enquiry was convened in his case because he exercised his right to have one. He denied involvement in the action and claimed to have sought to persuade his colleagues to desist with their conduct.

58. The hearing in respect of the "Group of 9" was conducted on 10 and 12 December 2002 and was chaired by the company's services manager, Mr I le Roux. The nine applicants all received notice to attend the disciplinary hearing on 9 December 2002. The notice charged the employees for participating in illegal and unprotected strike action and notified them to attend the hearing at 15h00 on 10 December 2002. The notice further advised each employee of his or her right to be represented by a shop steward. Paragraph 4 of the notice stated that if the employee alleged that his or her participation in the strike was not voluntary and/or that he or she disassociated him or herself from the unlawful action that he or she would have the right to make written or verbal submissions to the chairperson of the enquiry in that regard. As just intimated, Blankenberg availed himself of this opportunity and was granted a separate hearing, ultimately leading to the withdrawal of charges against him.

59. The applicants allege that at the commencement of the hearing, which they considered to have been convened on short notice, they requested a postponement in order to have sufficient time to prepare. They claim the request was turned down, that they were instead only afforded 30 minutes to consult and that the hearing thus commenced at 15h30 on 10 December 2002. The minutes do not reflect such a request for a postponement, but do record that the hearing commenced at 15h30. Le Roux in his evidence in chief denied that such a request was made, saying that had one indeed been made he would have granted it. When it was specifically put to him in cross-examination that van Wyk had asked for a postponement and that he had instead granted 30 minutes he unconvincingly replied that it "might have been", but was not sure. He qualified his answer by saying that normally 30 minutes would be enough, but that if more caucus time was needed he usually would give it.

60. Van Wyk's testimony in relation to this issue, like much of his evidence, was less than convincing. His claim to have requested a postponement was in response to a leading question and when asked why the meeting had started 30 minutes late replied that he was unable to recall.

61. Booysen, who assisted in the representation of the group of nine, testified that he had arrived late for the hearing, while the discussion of additional time was taking place, and had added his voice to the call for more time. His explanation for Le Roux's recordal in the company's *pro forma* question and answer sheet ("Guidelines for a Disciplinary Enquiry") of an affirmative answer to the question of whether sufficient time to prepare had been given, was that Le Roux was under the influence of Ledgerwood who dominated the proceedings.

62. While it seems a 30-minute adjournment was in fact granted at the commencement of the hearing, I am unable to find conclusively that the applicants requested and were denied a longer postponement. Besides the fact that such a request is not reflected in the minutes, no allegation of procedural irregularity on this score was alleged in the statement of case alongside the other allegations of procedural unfairness. Nor was it pleaded as an issue to be determined in either the statement of case or pre-trial minute. The first time the issue emerged was when midway through the trial the respondent sought further particulars to the applicants' general prayer for a declaratory order that the dismissal was procedurally unfair. Accepting fully the applicants' right to amend and particularize further, the evidentiary burden nevertheless remained on the applicants and the absence of any averment on the issue in the pre-trial pleadings tilts the probabilities against the applicants in the face of an irresolvable dispute of fact in relation to the issue.

63. Whatever the truth of the situation, I am in any event not persuaded that additional time was necessary, and besides not discharging the burden of showing that a request was made, the applicants have not established that any prejudice arose from the failure to postpone the proceedings.

64. As just indicated, Le Roux commenced the proceedings by following a set of typed guidelines which in accordance with company practice he was obliged to read out and complete in order to ensure procedural fairness. The questions relate to notice, timing, the particulars of the offence alleged, and the rights to representation. After doing this, Le Roux asked the nine to plead. Each employee answered separately. With the exception of the fourth (Visagie), tenth (Khan) and eleventh (Jobo), the applicants pleaded guilty.

65. Ledgerwood, who was acting as the initiator of proceedings on behalf of the company, then requested that each employee who had pleaded not guilty be invited to offer an explanation of their plea before he proceeded with the charges. Visagie, Khan and Jobo then did so. Thereafter, there was a short adjournment. The minutes reflect that when the hearing reconvened van Wyk raised the fact that there was some confusion about the plea of guilty by the six applicants who had done so. He is recorded as saying that the six had intended to plead guilty "for standing outside with impression that they are going to a meeting" (sic).

66. Le Roux in his testimony denied that this interchange amounted to a request to change the plea from guilty to one of not guilty, stating that had that been the case he would have sought advice and allowed a change. When it was put to him in cross-examination that the six had indeed wanted to change their plea to one of attending an unauthorised meeting, he replied that he would not have denied them that, presumably had they persisted with it. However, the minutes reflect Le Roux responding to van Wyk as follows: "I asked very clearly does everyone understand – Asked does everyone say they participated in an illegal strike". Van Wyk's recorded response is that the employees were guilty of being outside and going to a

meeting. In effect, according to van Wyk, they had intended to plead guilty to the offence stipulated in paragraph 1.22 of the disciplinary code under serious offences, namely, "attending an unauthorised meeting on company premises" and not to the dismissible offence in paragraph 1.30 of the code, namely, "any other reason recognized in law as being sufficient grounds for instant dismissal".

67. Despite the confusion around the plea, and his evident failure to grasp the issue at stake, which was confirmed during his cross-examination, Le Roux continued with the enquiry by hearing submissions and testimony (in one instance telephonically) only in respect of the applicants who had pleaded not guilty. Immediately after hearing the evidence, Le Roux made his finding. It is not apparent from the minutes whether he heard argument, but the minutes record his finding as follows:

> "People who pleaded guilty – find them guilty as pleaded – 3 people who pleaded not guilty did not prove that they did not attend an illegal strike not enough evidence – find all employees guilty of attending illegal strike."

68. Le Roux then adjourned the proceedings to the following day and requested the applicants to make written submissions regarding mitigation of penalty by the following morning. The record confirms that various written submissions were made to Le Roux and that some employees requested to make oral submissions. The hearing was reconvened at 15h15 on 11 December 2002. Four of the applicants, Sauls, Visagie, Abrahams and Khan addressed Le Roux, as did van Wyk. Le Roux then called in all the applicants and advised them that he intended to adjourn again to consider the submissions on mitigation, some of which he had just received, and because he wanted an opportunity to read the written submissions.

69. The hearing was re-convened the following afternoon, 12 December 2002, on which occasion Le Roux communicated his decision to dismiss all the applicants. He concluded by saying that because Mr Lee, the managing director, had been involved in settling the strike it was not possible to use him as the appeal forum. Consequently, if the applicants wanted to take the matter further they would have to lodge a dispute with the bargaining council.

70. The applicants, in addition to their grievances about not being granted a psotponement and the right to amend their plea, have alleged that the hearing of the group of nine was procedurally flawed in a number of other respects. I will revert to these matters, as well as the individual applicants' conduct, later in the judgement.

71. Le Roux also presided over the hearing into the conduct of the third applicant, Mario Philander, which was convened on 15 January 2003. The only reason Philander was given a separate hearing was because he was on leave at the time of the hearing of the group of nine. At the outset he requested a postponement. This was granted and the hearing continued on 21 and 22 January 2003.

72. Philander pleaded not guilty to participating in an illegal strike. At the

commencement of the proceedings Philander objected to Le Roux serving as chairperson of the inquiry on the ground that he had served as the chairperson of the enquiry into the misconduct arising out of the previous strike of February 2002 and in respect of which Philander had received a written warning. Le Roux took the view that this was not good enough reason for his recusal. This was followed by an objection to the initiator, Mr Mike Hartung, on the ground that he had not been involved in the events of 4 December 2002. By this time Ledgerwood had left the company and was unable to act as initiator. Le Roux also dismissed this objection holding in effect that it was unnecessary for the initiator to have any direct involvement in the events in order to act as such.

73. Le Roux heard evidence from Visser and Wilds, which cast Philander in a central role in the events that took place at the crankline. Visser is also recorded as having witnessed Philander exhorting Willemse to ignore Ledgerwood's calling out to him at the bus terminus. Wilds attested to Philander being instrumental in exhorting the crankline employees to leave their workstations. Philander was the only witness to testify in his own defence during which he stated that the mood was high, he wanted his money and assumed he was headed to a legal meeting. He admitted he had left his workstation without permission and that each employee had taken his or own decision. On that basis, Le Roux found him guilty of the offence and after hearing submissions in mitigation, dismissed him. Philander, as mentioned, like the applicants making up the group of nine, had received a final warning for his participation in the strike of February 2002.

74. The second applicant, Willemse, owing to his perceived role in instigating and inflaming the events at the crankline, was singled out for different treatment. A separate notice of a disciplinary hearing was sent to him by Ledgerwood on 9 December 2002 in which six charges were levelled against him, including: participating in illegal industrial action; intimidation; serious disrespect; impudence or insolence; restricting output or influencing others to do so; refusal to obey instructions, insubordination or refusal to work; and gross negligence and/or incompetence.

75. Willemse's hearing was scheduled initially for 11 December 2002 but was re-scheduled on more than one occasion for various reasons and eventually took place between 17 and 21 February 2003. It was chaired by Mr D Bouwer, the company's production manager. There are allegations of procedural irregularity in regard to this hearing too. In particular, the applicants allege that Bouwer colluded with Ledgerwood, Wilds, Visser and Hartung prior to the hearing thereby prejudicing Willemse's right to a fair hearing and that Bouwer's refusal to recuse himself on this ground was unreasonable and unfair. Secondly, it was submitted that the company's failure to call Visser as a witness during the hearing was also a procedural flaw. I will return to these issues later.

76. After hearing the evidence of ten witnesses, and relying principally on the evidence of Ledgerwood and Wilds, but also taking account of admissions made by Willemse

that he had walked out aggrieved and was caught up in the mood, Bouwer found Willemse guilty of all the charges against him except intimidation, serious disrespect, impudence and insolence. After hearing submissions in mitigation, Bouwer handed down a penalty of dismissal, even though Willemse had not received a prior warning for the strike of February 2002. Clearly Bouwer was much influenced by the key role Willemse played at the crankline and his defiance of Ledgerwood's instructions to return to his workstation and to inform the other crankline employees to do likewise.

77. Willemse appealed against his dismissal to Lee, the managing director. Lee held an appeal hearing on 10, 11 and 13 February 2003. He approached the appeal from the point of view of considering additional evidence, issues of mitigation and procedural problems in the hearing a quo. He heard the evidence of two additional witnesses. He too accepted that Willemse had got caught up in the mood of the day, but felt the leading role he had played justified strict action especially in the light of his position as a shop steward. He accordingly confirmed Bouwer's findings of guilt and sanction.

Did the events of 4 December 2002 constitute a strike?

78. The applicants contend that their dismissal was substantively and procedurally unfair. The respondent contends the dismissal of the applicants was fair because they had participated in an unprotected strike while on valid warning, or in Willemse's case because his conduct had exceeded reasonable bounds.

79. Section 68(5) of the LRA provides that participation in a strike that does not comply with the LRA may constitute a fair reason for dismissal. In determining whether or not a dismissal is fair this court is obliged to have regard to the Code of Good Conduct: Dismissal in Schedule 8 of the LRA. Item 6 (1) of the Code deals with the substantive fairness of strike dismissals and requires determination of that issue in the light of the facts of the case, including the seriousness of the contravention, attempts made to comply with the legislation and whether or not the strike was in response to unjustified conduct by the employer. Factors that the courts consider relevant include: the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike and the conduct of the strikers.

80. The starting point accordingly is to determine whether the work stoppage in question constituted a strike. If it did, then section 68(5) and item 6(1) have specific application. If not, any breach of company rules may constitute other but similar misconduct.

81. A "strike" is defined in section 213 of the LRA as:

> The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or who have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee ……."

82. In the present matter there were two stoppages, one at the forge and one at the crankline, which culminated in a single assembly at the forge. For that reason it is necessary to determine whether each stoppage independently constituted a strike.

83. In relation to the events at the forge the primary question is whether there would have been "a concerted refusal to work, or retardation or obstruction of work", if permission for the assembly had been granted. As I understand the case for the applicants, the forge employees did not engage in a concerted refusal, retardation or obstruction of work because they reasonably believed that Agenbach had authorised the meeting for the purpose of feedback.

84. As I have stated, I found Agenbach to be a particularly credible witness and the probabilities are overwhelmingly against him having authorized the 09h00 meeting. Agenbach's unchallenged evidence was that he did not authorise the meeting. He made no announcement on this to the general meeting at 07h30. He spoke only to van Wyk, perhaps in earshot of a few others, in response to a specific question as he was leaving the canteen. He said only that he would give feedback, which he understood to be through the team leaders and shop stewards. Van Wyk's evidence on the point is less credible, not least because of the contradictions in it, but also for the reasons already discussed, his tendency to be evasive in his responses and his blatant untruth about not giving instructions to his representative.

85. Moreover, as I have explained, it is more than improbable that Agenbach would have authorised a meeting significantly disrupting the production schedule, without the permission of the managing director, and then refuse to address it. It is also improbable, had the meeting indeed been authorized, that the events at the crackline would have proceeded in the atmosphere in which they did. More than one applicant testified to the existence of an exuberant mood, the shouting of slogans and a sense of grievance about the bonus. Far more likely is it that the crankline employees became agitated, as they did, when Booysen informed Willemse that the forge employees had downed tools. Had Agenbach given permission, Booysen would have communicated that fact to Willemse, who would then surely have requested Ledgerwood to attend an authorized meeting. He has never said that he did this. For that matter, there is no evidence that any employee at the crankline ever requested any person in authority, Ledgerwood, Visser or Wilds, for permission to attend an authorised meeting.

86. I am accordingly in no doubt that no employee at the forge ought reasonably to have believed that permission was granted by Agenbach. Both Plaatjies and Josephs made it clear in their testimony that they saw the meeting as unauthorised, Plaatjies in particular reluctantly conceding that he had prevailed on Visagie to

leave the matter to the shop stewards, who in turn had ignored his advice and gestured to the employees on the shop floor to follow him out.

87. Finally, as also already discussed, had the meeting indeed been authorised it is unlikely that the workers would have yielded to Mike Louw's caution that their conduct was illegal. If the workers believed they had Agenbach's permission, the probabilities are they would have told him so. The unexplained failure of Louw to testify, moreover, leads not unreasonably to the inference that he was reluctant to explain to the court why his first priority, before sitting down to negotiate with management, was to get the workers back to their workstations. The most obvious reason suggesting itself was that he knew he was dealing with an unprotected strike.

88. I am also of the opinion that the stoppage at the crankline was equally a concerted refusal of work. Some half-hearted attempt was made to persuade me that the crankline workers left their workstations to observe the solar eclipse that occurred that morning. The largely unchallenged evidence of Wilds tells a different story. As discussed earlier, he described how Willemse, agitated in response to the repeated calls he had received from the forge, had announced: "You know, we cannot just allow this to happen, we need to do something, the people have walked out at the forge". Wilds further depicted the atmosphere on the shop floor as "a buzz". Additionally, Willemse himself conceded that "iets was verkeerd" and that the people were shouting: "meeting, meeting". Various witnesses confirmed that the mood was running "high" and that the workers were shouting slogans. Moreover not a single witness professed that the crankline employees had permission to leave their workstations. In fact, to the contrary, Willemse in his evidence in chief volunteered that the crankline employees did not have permission to leave their workstations, explaining perhaps the reason for their readiness to plead guilty to attending an unauthorised meeting. What is more, under cross-examination Willemse conceded that at his disciplinary enquiry he had described the events at the crankline as being out of hand. There can also be little doubt, accepting his own version of what transpired, that following his encounter with Ledgerwood, Willemse was left in no uncertainty at all that the workers had no permission to go to the forge.

89. In the face of such irresistible probabilities, Mr Vazi, who appeared for the applicants, eventually wisely conceded in argument that the stoppage on the crankline was illegal. Despite that, he sought to justify it on two bases. The first was that the workers stopped work to watch the eclipse. The explanation is frankly disingenuous. I agree with Mr Kirk-Cohen that the evidence demonstrates that the watching of the eclipse was coincidental and that the true purpose of the gathering on the concrete slab outside was to await Willemse's return from his meeting with Ledgerwood. The second, equally spurious, argument was that Wilds and Visser had a duty to stop the workers from striking once their intention became evident. In addition to being destructive of the contention that the crankline employees were not on strike, the argument has no merit particularly in view of the testimony of

Wilds and Visser that they had instructions from management not to interfere in volatile industrial relations situations.

90. Accordingly the probabilities support the conclusion that the workers at the crankline concertedly refused to work.

91. The purpose of both concerted refusals to work was incontrovertibly to remedy the grievance or resolve the dispute about the bonus payment date. This much is evident from the testimony of the applicants' own witnesses that the workers were shouting "my money, my money". Willemse in particular when asked in chief whether he recalled workers shouting "Viva COSATU", replied that slogans were not being shouted, but the workers in his words were screaming: "meeting, meeting – I want my money".

92. Mr Vazi has sought to argue that with such outbursts the workers were merely expressing concern about their bonus money, that they were not aware of any attempts to resolve the problem and hence were not making a demand as a pre-condition for their return to work. The argument so put, to my mind, misstates the requirements for a strike. The definition in section 213 does not require there to be a demand, the fulfilment of which is considered a pre-condition to a return to work. It is sufficient if the concerted refusal to work is aimed at remedying a grievance or resolving a dispute about a matter of mutual interest. There was clearly a grievance about the perceived change of date for the payment of bonuses. The purpose of the refusal to work was to remedy or resolve the issue. This inference can safely be drawn from the slogans shouted at the crankline, the demand made to Agenbach that management resolve the issue and Arries' request at the meeting in the boardroom at 09h00 on 4 December 2002 that the workers be given a guarantee that the bonuses would be paid by 6 December and not on 10 December 2002 as stated in Joel's memo – a demand to which management ultimately acceded.

93. In the premises, I agree with Mr Kirk-Cohen that quite apart from the direct evidence on the issue, the probabilities are overwhelming and the inferences inescapable that the purpose of the stoppage was to put pressure on management to pay the bonus on 6 December 2002. It follows that the stoppages were indeed a strike within the meaning of that term as defined by section 213 of the LRA.

The participation of the individual applicants in the strike.

94. It is next necessary to determine whether the applicants participated in the strike with the requiste blameworthy state of mind. Of the eleven individual applicants only five testified as to their involvement in the events of 4 December 2002.

95. The second applicant, Willemse, on his own admission got caught up in the mood at the crankline, was aggrieved as a result of his conversation with Ledgerwood, played a central role in communicating to the crankline workers the events taking place at the forge and was seen by Wilds and Visser to actively encourage the

workers to march over to the forge and thereafter ignored the calls of Ledgerwood to come back, as well as the prior instruction to tell the workers to return to their workstation. I will return to a fuller discussion of his role later. Suffice it for present purposes to say that he knowingly defied Ledgerwood and was an active participant in the strike.

96. The third applicant, Philander, was the only other crankline employee to testify. The evidence shows that he was alongside Willemse throughout most of the events that morning. Wilds placed him in the vicinity of Willemse during the telephone conversations with Booysen and other persons at the forge. He also accompanied Willemse during the latter's discussion with Wilds. Visser put Philander in the company of Willemse after the latter returned from Ledgerwood's office and walked into the crowd of workers gathered on the slab. He then witnessed a conversation between Willemse and Philander just before Willemse addressed himself to the group of gathered workers saying "kom laat ons loop". Visser confirmed Ledgerwood's testimony that Philander was with Willemse when Ledgerwood called out to Willemse at the bus terminus and that Philander spoke to Willemse before they both turned away and carried on walking in the direction of the forge. In addition, though he tried to limit his involvement to merely following the other workers as they left the shop floor, Philander acknowledged in his testimony that he left his workstation without permission. He admitted seeing Ledgerwood while they were marching away but denied hearing him call out after them. He too described the mood of the workers as "high", saying that there was much screaming and shouting, that he knew there was a problem about the bonus and that he was taken by the mood. Accordingly, there can be no doubt that Philander consciously participated in the strike.

97. The three other individual applicants who worked at the crankline, Arnold Dirks (sixth applicant), Alexander Cloete (ninth applicant) and Erasmus Appolos (twelfth applicant) did not testify. All three were part of the group of nine and of the six who pleaded guilty before Le Roux at the commencement of the collective hearing. No evidence was tendered implicating them individually. None of them addressed Le Roux on mitigation by means of oral submissions. All three handed in written submissions in mitigation asking for leniency on the basis that they did not know what they were doing was illegal. On this incomplete evidence it is nonetheless safe to conclude that these applicants left their workstations, marched to the forge and attended the assembly in the canteen. No direct evidence or argument was adduced on whether they knowingly participated in the strike. Given previous events at the company in February 2002, the fact that this court had interdicted the February strike, a fact which was communicated to the workforce, and that all three of these applicants had received a final written warning for their involvement in the February strike, I accept that at the very least they foresaw the possibility that their conduct constituted participation in an unprotected strike but were reckless as to the consequence. Such an inferential finding is strengthened by the failure of all three of them to testify. Their attendance at the assembly in the forge canteen called for an answer or explanation, and in the absence of such an explanation I am satisfied

on a balance of probabilities that they knowingly or recklessly participated in an unprotected strike.

98. Of the applicants employed at the forge only Riaan Visagie (fourth applicant), Gerhard Sauls (eight applicant) and Allen Abrahams (fifth applicant) testified.

99. Visagie was one of the group of nine who pleaded not guilty on the grounds that he did not believe the meeting was a strike. During his testimony in court he testified that he had only attended the second meeting briefly for about 3–5 minutes. This conflicted with the version he gave at his disciplinary hearing where he stated: "Ek het daar gesit en wag vir die meeting", implying that he went to the canteen before the meeting actually started. The latter would be more in line with Plaatjies version of Visagie's conduct that morning. Plaatjies, it will be recalled, was Visagie's friend and team leader who testified reluctantly under subpoena. According to him, he, Van Wyk and Visagie witnessed the crankline employees marching towards the forge. Visagie then spoke to several people on the shop floor. Plaatjies tried to discourage Visagie from going to the canteen and urged him to leave the dispute to the shop stewards to resolve. Visagie responded by making a dismissive gesture with his hand before walking out at the head of a group of workers. Thus, his departure to and attendance of the meeting was deliberate and not happenstance as he hoped to convey in his evidence in chief. Taking account of the events in February 2002 and the fact that he had received a warning, I am persuaded that he too knowingly or recklessly participated in the strike.

100. Abrahams was one of the group of nine who pleaded guilty in the collective hearing. During his testimony in court he was evasive and contradicted himself on more than one occasion. Contradicting the view proffered on behalf of all the forge employees that Agenbach gave permission for the meeting, he explained that he had received permission to attend from his team leader Lucas Josephs. Called on behalf of the company, Josephs denied having done so. There was no significant challenge to his evidence. Abrahams' attempts to explain why he had initially pleaded guilty at the disciplinary hearing when he supposedly had obtained permission from Josephs were unconvincing in the extreme, his justification being that he had pleaded guilty to standing outside. His attempts to explain the remorse he had forcefully expressed during mitigation as being regret for attending a meeting were equally less than compelling in view of his conflicting assertion of having done nothing wrong by attending the meeting. He too, therefore, participated in the strike knowingly or recklessly.

101. Sauls also pleaded guilty at the collective hearing for the group of nine. His position was somewhat different to the forge employees who worked on the shop floor. He was employed as a senior laboratory assistant in the metallurgy laboratory located at the forge. His testimony in court was entirely unsatisfactory. He was disobliging, evasive, inconsistent and came across as easily given to dishonesty. When asked who gave him permission to attend the second meeting he testified that he had used his own discretion. When pressed under cross-examination about the basis of

his assumed discretion he was notably evasive. Then asked to clarify why had not asked for permission from his supervisor, Mr Poswa, with whom he had watched the eclipse, he was less than honest. First he retracted his earlier testimony that he had been with Poswa at the relevant time by unconvincingly putting a different time to their observing the eclipse together. Asked why he did not contact him on his cellphone, he weakly claimed that the company discouraged the use of cellphones and then that there was a technical problem with the phone. He too offered an implausible explanation for his plea of guilty. Generally, the perceptibly evasive and inconsistent manner in which Sauls performed as a witness leads easily to the conclusion that he knew full well that he was participating in an unprotected strike.

102. The other three forge employees, Desmond Pieterse (seventh applicant), Alice Khan (tenth applicant) and Ntombekhaya Jobo (eleventh applicant) failed to testify. All three were in the group of nine. Pieterse pleaded guilty, while Khan and Jobo pleaded not guilty.

103. From his plea of guilty I accept that Pieterse attended the second assembly in the forge canteen. The only reference to him in the evidence before me was in the testimony of Lucas Josephs, his team leader, who denied giving him permission to attend the meeting. There was also some suggestion in argument that Pieterse was denied the opportunity to mitigate before Le Roux. The record shows that he submitted a request in writing to be allowed to make oral submissions to Le Roux, while the minutes do not reflect him having done so. Without the benefit of his testimony on the matter, however, I am unable to conclude that there was any irregularity on that score. Furthermore, his failure to offer any sworn explanation for his attendance at the assembly in the canteen and the fact of his prior warning lead to the reasonable inference that he too knowingly or recklessly participated in the strike.

104. The same must be held in regard to Jobo, about whom no evidence at all was led.

105. The position of Alice Khan is in some respects different. Her defence at the disciplinary enquiry was that she had sought and obtained permission from Plaatjies, her team leader, to make a telephone call to sort out work related problems concerning her uncle. Plaatjies confirmed that he gave her permission because he had in any event shut down the machines. However, he testified that she was gone from the shop floor for about an hour, much of which time coincided with the second meeting. Accordingly, Khan's absence called for an explanation of the lengthy period it took her to make the call. The failure to give sworn testimony to clarify this aspect, for the same reasons above, leads to the legitimate inference that she knowingly or recklessly participated in the strike.

106. In the final analysis, therefore, all the individual applicants participated in the strike with the requisite blameworthy state of mind. The strike was not in compliance with the provisions of chapter IV of the LRA in that the underlying dispute was not referred to the bargaining council in terms of section 64(1)(a) of the LRA and 48

hours notice was not given in terms of section 64(1)(b) of the LRA. For that reason participation in the strike may indeed constitute a fair reason for dismissal in terms of section 68(5) of the LRA.

Substantive fairness – the third to the twelfth applicants.

107. As I have indicated, the position and participation of the second applicant, who was treated differently from the other applicants by the company from the outset, requires separate consideration on account of the role he played. Nevertheless, some of the findings regarding substantive fairness apply equally to him by virtue of their general nature and effect. Accordingly it is best to consider the issues in relation to the other individual applicants first.

108. The determination of whether participation in unprotected strike action constitutes a fair reason for dismissal requires a weighing of all the facts with particular regard to the cause, nature, extent and objectives of the strike; its timing and duration; the conduct of the employees; and the consequences of the strike.

109. An enormous amount of time and effort was expended by the applicants during the trial in an attempt to show that the cause of the strike was the employer's bad management of its industrial relations, and more particularly its supposedly illegitimate changing of the bonus payment date.

110. The applicants put forward two positions regarding their professed entitlement to be paid the bonus on 6 December 2002. The first was that Natheem Joel, the human resources officer, agreed that the bonus would be paid on 6 December 2002. The second was that a proper interpretation of the practice prevailing at the company over the preceding five years, gave rise to a reasonable expectation that the bonus would be paid on the 6 December 2002. On my assessment, neither proposition has merit. However, because I incline to the opinion that neither scenario adds much justification for the strike, I do not propose to canvass the evidence on this aspect in much detail.

111. There is no documentary evidence on record supporting the claim that the workers were entitled to the payment of their bonuses on 6 December 2002. The minutes of the shop stewards' committee meeting of 26 November 2002 record that certain employees had volunteered to work during the annual shutdown period, that the last day of work would be Friday 13 December 2002 and that "the bonus and leave payout dates remain unchanged". The minute does not identify the dates in question. On management side, the meeting was attended by Lee, Ledgerwood, Joel and Ball. Lee, Ledgerwood and Joel explained during their testimony that the intention was to pay the bonus in the week of the shutdown date. The union claimed that the norm and the agreement favoured payment on the Friday in the week before the shutdown.

112. The incident sparking the strike, we have seen, was Joel's issuing of the memo on

3 December 2002 for the attention of Ms Mariette Lang, the wages administrator, in which he advised her that the bonus was to be paid to the employees on Tuesday 10 December 2002 and that annual leave pay would be paid with the weekly wages on Friday 13 December 2002. This memo, as I have said, was apparently leaked to some of the nightshift employees on 3–4 December and led directly to the events of the morning of 4 December 2002.

113. Joel testified that he issued the memo after getting the go ahead from Charles van der Merwe, the financial manager who had agreed to the 10 December payout date with Lee, the managing director. He conceded however that there had been some discussion of a payout on 6 December 2002 at a shop steward's weekly meeting that took place on 29 November 2002. During the exchange he had asked the shop stewards where they had come up with that date, seeing that no management decision had been made in that regard.

114. The evidence of Lang established that in the 5-year period between 1999 and 2003 there was no clearly discernible pattern to the bonus payout. Sometimes it was paid in the week before the shutdown. Other times it was paid in the week of the shutdown. Whatever the case, I am persuaded that in the year in question there must have been some basis for the expectation on the part of the workers that the bonus would be paid on 6 December 2002. Absent that expectation it is highly unlikely that they would have become as agitated as they did, prompting conduct putting their employment in jeopardy. However, there is no reliable evidence establishing convincingly that the workers' expectation was legitimate in the circumstances.

115. Even if I were to assume that during the meeting of 29 November 2002 Joel negligently led the shop stewards to believe that 6 December 2002 would be the payment date, I do not accept that the subsequent change of the date to 10 December 2002 justified the strike. While I appreciate that the payment of a bonus is important to relatively low paid workers in Atlantis, in this instance the move to industrial action, before management was able to ascertain the true position or the take steps to rectify the problem, was precipitous and foolhardy. Neither Lee nor Joel was available on site, and the workers ought reasonably to have given Ball and Ledgerwood an opportunity to consult with them. The demand that Ledgerwood and Ball in effect give an immediate assurance of payment on 6 December was illegitimate in the circumstances. Accordingly, despite the confusion and the possibility that Joel might have contributed to it, no element of management's conduct was egregious to a degree mitigating the unprocedural nature of the workers' conduct.

116. At the same time, it must be said, there were many indications that industrial relations at the company were less than harmonious, with more than one grievance having been lodged against Ledgerwood and Joel, complaining of foul language, victimization and disrespectful behaviour, and calling for their dismissal. Ledgerwood was conspicuously no shrinking violet in the conduct of his personal

relations. As I have said, he came across as a man accustomed to putting his point across forcefully. Joel too had something of a conflictual relationship with the shop stewards, explicable due to his having risen through the ranks of NUMSA before joining management. By the same token, the applicants who testified did not impress me as men adept in bringing charm, insight or a conciliatory attitude to their conduct of industrial or personal relations. Yet, whatever the fractious relations, I doubt the dynamic exceeded the bounds of what one might normally expect on the factory floor and I accordingly hesitate to apportion blame on this score for the purpose of assigning legitimacy to one or the other parties' case, particularly in view of none of the disputes alleging unfair labour practices having reached final resolution before the bargaining council.

117. The general problem of poor relationships found particular expression in Willemse's desire to attribute the walkout at the crankline to Ledgerwood's alleged outburst and foul language. Ledgerwood, to his credit, did not hasten to deny that he might have used foul language. Assuming for the purpose of argument that he did, only Willemse (on his version) would have witnessed it and hence it had no direct impact on the workers already assembled some distance away on the concrete slab, thus contributing little if anything to the decision to walk out. It moreover provided insufficient justification for Willemse's disobedience of Ledgerwood's instruction to try get the workers back to work.

118. Even though I consider the demands of the strikers to have been illegitimate, their conduct during the strike was not unruly or marked by criminal behaviour. Many of the applicants conceded that the mood was high-spirited and spoke of shouting and the bandying of slogans. But no damage was inflicted on company or personal property, there were no assaults and when instructed by Mike Louw to return to work, the workers did so immediately without demur. Clearly the union intervened responsibly and assisted appreciably in bringing the matter under control. Albeit irresponsible, the strike was not timed to afflict maximum damage. It was a responsive strike, in reaction to a perceived grievance, even if impulsive. At most the action endured from 08h15 until 10h00, when normal production would have been restored. There is no evidence quantifying the financial loss caused by the stoppage, if any.

119. On balance therefore it cannot be said that the strike was a particularly disruptive, damaging or unruly affair. Were it not for the fact that the company had suffered a similar occurrence 10 months earlier it is unlikely that discipline in the form of dismissal would have been meted out. This is verified by the fact that by far the majority of participants in the strike received final written warnings – in itself an indication that the strike did not render the continuation of the employment relationship intolerable. With the exception of the second applicant, the company chose to dismiss the individual applicants not because their participation in the strike of 4 December 2002 was particularly damaging. They were dismissed because they had done it before and to give effect to the company's preferred policy of "second strike and you are out".

120. Hence in order to determine whether dismissal was for a fair reason in respect of the third to twelfth applicants, careful consideration must be given to the general requirements that dismissal should be the appropriate remedy in the light of the facts of the case. Whether this is the case depends upon a number of factors and variables including the gravity of the offence, assessed in accordance with the employer's disciplinary code, the employee's disciplinary record, length of service and personal circumstances.

121. In this context the prior warnings issued to the individual applicants assume added significance. The strike in February 2002 that led to the individual applicants receiving a final written warning had its origins in a dispute that arose in mid 2001. In July and August 2001 the shop stewards' committee wrote to management expressing their frustration about the company's alleged failure to implement its affirmative action and preferential procurement policy. In September 2001 the dispute was extended to embrace issues concerning team centre meetings, the public display of employee attendance records without permission and the unilateral grading of employees. There was also disquiet about the alleged unsatisfactory manner in which grievances were processed. Various complaints were made against Joel and in particular his alleged disrespectful behaviour and provocative attitude towards employees. Eventually when matters were not resolved, the union gave the company notice on 20 September 2001 of its intention to call upon its members to embark upon a protected strike, which they then duly did. It is not clear how long this protected strike lasted. My sense is that it did not endure too long before being called off. The union claims its intention in calling off the strike was merely to suspend it in order to allow the parties to meet over a period of months to try and settle nineteen unresolved issues. Joel acknowledged that such an agreement was mooted and that the term "suspended" was used. However, the agreement proposed was eventually not signed by the company because, according to Joel, the union introduced new issues that had not formed part of the original dispute. After the dispute dragged for about three months, evidently contributing to tension and an atmosphere of hostility, the union gave notice on 22 February 2002 of its intention to embark on further strike action on 25 Feburary 2002.

122. The workers on the morning shift of 25 February 2002 embarked upon strike action as expected. The company urgently approached the Labour Court for a rule nisi declaring the strike illegal and an interim order interdicting the workers from participating in it. An order to that effect was handed down at about 12h00 on that day by Waglay J "by agreement between the parties."

123. Shortly after the interdict was granted, discussions took place between NUMSA and Joel in which the union made the proposal that the morning shift workers be allowed to return to work the following morning, that the afternoon and night shift would report as normal, and that a policy of no work no pay would apply in respect of the morning shift. The union made the proposal, it seems, because it doubted its ability to ensure compliance with the interdict before the end of the morning shift at 15h00.

Joel responded in a letter addressed to Simon Arries, the union organizer, in with he dealt with the request as follows:-

> The request is denied. The company reserves the right to take disciplinary action against employees who have been on strike and who continued with the strike despite the granting of the interdict and who are unable to justify their departure from the workplace beyond the time that the order was granted. We urge you to advise those employees who were gathered outside the premises from 07h00 until they dispersed to immediately tender their services before their shift ends at 15h00. In the absence of an explanation it would appear that the strikers deliberately dispersed in order to avoid the consequences of the interdict.

124. The union wrote back bemoaning the difficulty it faced in getting the morning shift back in time. It is common cause that the morning shift did not resume, but that the afternoon and night shifts commenced as required.

125. Some time thereafter the company instituted disciplinary action against the morning shift workers who failed to report between 12h00 and 15h00 on 25 Februay 2002 and thereby, according to the company, had not complied with the court order. The company was motivated in part by the fact that prior to the commencement of the strike it had communicated in more than one memo to the workers that the strike would be illegal.

126. The minutes of this collective disciplinary hearing (Exhibit F1 pg 10-12) reflect that the union sought leniency for the workers on account of their belief that the strike was legal, being in its view the re-activation of a suspended strike, at least until such time as the court order was granted. It was also not, in the opinion of the union, a wildcat strike, but was embarked upon at the instance of the union. The union argued further that it had insufficient time to get the morning shift back to work. The company rejected both these contentions: firstly because the workers had been warned in advance in circulated memoranda that their conduct would be illegal and that the morning shift workers had breached the court order. In the result, the morning shift employees were found guilty of both participating in an illegal strike and failing to return to work timeously in accordance with the court order.The company therefore decided to apply the “no work no pay rule” and issued all the morning shift workers (except two) with a “final written warning valid for 12 months and permanently on record”. The minute reflects that the company was not prepared to entertain an appeal against the warnings and advised the union and the workers to proceed to the bargaining council if they wished to challenge the warnings.

127. On 14 March 2002 the union referred a dispute regarding the warnings to the Metal and Engineering Industries Bargaining Council challenging their validity in terms of the company’s disciplinary code.

128. Surprisingly, the section of the disciplinary code dealing with the company rules does not specifically identify participation in unprotected strike action as an offence. However, such conduct falls within the ambit of various offences categorized by the code as “minor”, “serious” or “dismissible”. For instance, “absence without

reasonable cause" is considered a minor offence. Clause 1.22 defines "attending an unauthorised meeting on company premises" as a serious offence. And clause 1.30 contains a catch all provision providing as a dismissible offence "any other reason recognized in law as being sufficient grounds for instant dismissal". Most importantly the code ends with a note that reads:

> The omission of any offence from the Code does not preclude disciplinary action against the offender for good cause.

These provisions taken together support the conclusion that the company may at its discretion regard participation in unprotected strike action as serious or dismissible misconduct, depending on the circumstances of the strike, its nature, duration and timing.

129. Clause 3 of the disciplinary code contains a number of general provisions regarding its scope and application. Clause 3.4 provides that contravention of the employer's rules will be dealt with in accordance with the disciplinary procedure. Clause 3.5 provides that the disciplinary procedure shall form part of the contract of employment of all employees.

130. Clause 3.6 is of particular relevance. It reads:-

> Disciplinary warnings issued in terms of the disciplinary procedure shall be kept in the personal file of the relevant employee for a period of six months from the date of latest breach. Disciplinary warnings that are removed from the personal file of the employee after the elapsed period are to be destroyed in the presence of the employee.

131. Clause 3.8 is equally important. It provides:

> Employees shall not be dismissed from employment unless the disciplinary procedures have been complied with.

132. Clause 6 of the disciplinary procedure, which forms part of the disciplinary code, identifies the nature of the disciplinary measures available to the company, which include the five standard forms of disciplinary action: recorded reprimand; written warning; final written warning; suspension without pay; and dismissal.

133. Clause 7.2 of the disciplinary procedure deals with written warnings providing for their issuance for offences of a more serious nature or as a means of progressive discipline for repeated less serious infractions. Clause 7.2.1.6 deals with the currency and validity of written warnings and provides as follows:-

> The written warnings shall remain valid for a period of six (6) months after which, provided that no further transgression occurs during the six (6) month period, it will be removed from the employee's personal file and destroyed.

134. Clause 7.3 of the disciplinary procedure deals with step 3 of the procedure that allows for a formal disciplinary enquiry, inter alia, when the offence may require more than a written warning. Clause 7.3.1.6 authorizes the chairperson of a formal

disciplinary enquiry to issue a final written warning. It states:

> If the offence is of a more serious nature, and a final warning is the appropriate discipline to be meted out, then such final written warning will be delivered by the Chairman.

Clause 7.3.1.7 regulates the effect of a final written warning. Consistent with the general policy regarding warnings in clause 7.2.1.6, it stipulates:

> The Supervisor shall ensure that the employee and the employee's Shop Steward are aware of the fact that should the employee commit a further offence within the period of six (6) months following the receipt of the final warning, then depending on the decision reached at a formal disciplinary enquiry, that offence may result in the disciplinary action of dismissal.

135. As I understand the submissions made on behalf of the union, it has always been its position, in view of these provisions of the disciplinary code and procedure, that the warnings issued to the morning shift employees who participated in the strike of 25 February 2002 were invalid because it is not permissible for the company to issue warnings that remain current for 12 months. The maximum currency being explicitly restricted to 6 months, it is also not permissible to record the warning on an employee's record permanently, especially if one has regard to the instructions in clauses 3.6 and 7.2.1.6 to remove and destroy warnings from an employee's file after the expiry of the six-month period.

136. The unavoidable implication of the union's argument, if correct, is that the warnings issued to the third to twelfth applicants in late February 2002 were in fact invalid, or at the very least had expired in terms of the disciplinary code and procedure in September 2002. If that is so, then they ought not to have been taken into account when disciplining the individual applicants for their participation in the strike of 4 December 2002. And, as a result, the individual applicants were in the same position as the other strikers who merely received a final written warning. Put differently, because the warnings of February 2002 were objectively invalid, or had expired, the individual applicants were in the same position as their fellow strikers who were not dismissed, and hence there was no legitimate or legal basis for their differential harsher treatment.

137. As I have mentioned, a dispute about the validity of the warnings was referred to the bargaining council on 14 March 2002. A certificate of outcome declaring that conciliation had failed and that the dispute remained unresolved was issued by the council on 3 April 2002. It seems the matter was subsequently referred to arbitration but was not actively pursued and no arbitration award was issued resolving the matter.

138. Mr Kirk-Cohen, during argument, sought to down play the significance of this issue. When it emerged that the question had greater importance than he had initially assumed, he requested a postponement and leave to supplement his heads of argument, both of which I granted. Unfortunately, scheduling difficulties made it impossible for the court to re-convene and I am restricted to the submissions he made in court and those contained in his original and supplementary written heads

of argument, which have been of considerable assistance to me.

139. The company's original arguments on the point were three. Firstly, it was submitted that because the union did not persist with the arbitration, the 12-month final written warning should stand and hence remained current at the time of the December strike. Secondly, though it was permissible for the company to have dismissed the workers who participated in the February strike, the company in a spirit of leniency had opted for a lesser sanction and it was inappropriate for this court now to second-guess that sanction. Thirdly, even if the warnings had expired, the offence committed in December 2002 remained a dismissible one and the fact that a lesser sanction was meted out to the employees with a clean record did not render the dismissal unfair on the basis of differential discipline.

140. The supplementary heads elaborate on and add to these themes. With reference to the LRA's prescriptions advancing speedy dispute resolution of alleged unfair labour practices relating to disciplinary action short of dismissal, it was submitted that disputes about disciplinary sanctions should be dealt with promptly, failing which they should stand and only the CCMA has jurisdiction to pronounce upon them (sections 186(2)(b) and 191 of the LRA). It was further contended that it would be undesirable to permit a court, upon dismissal, to enquire into the past history of progressive discipline for two reasons. Firstly, this will "double up" the ambit of issues upon which admissible evidence can be led, making them "impossibly broad", and the proceedings unwieldy. Secondly, the purpose of the warning in immediately correcting behaviour would be lost.

141. Finally, it was submitted, albeit tentatively, that the disciplinary code's prescriptions with regard to warnings did not have the effect that the warnings lapsed at the expiry of the 6-month period.

142. Mr Kirk-Cohen's arguments pose difficult policy dilemmas. They suffer, in my opinion, from one critical defect: they make no reference whatsoever to the provisions of the disciplinary code and procedure, which in terms of clause 3.5 are expressly incorporated into the contracts of employment of the employees. In three separate clauses of the code (3.6; 7.2.1.6 and 7.3.1.7) the unambiguous intention appears that warnings are current for a period of 6 months and that after that period they are to be removed from an employee's file and destroyed. Clause 3.6 goes so far as to mandate that the destruction of the warning take place in the presence of the employee concerned. There can be only one plausible explanation for this ritual of physical and symbolic destruction: that is, the warning no longer exists and will not be taken into consideration in the future. For better or for worse, such are the terms of the contract between the parties and no compelling argument has been made that justifies treating the relevant clauses as *pro-non-scripto*.

143. The argument that the company was entitled to rely on both the union's failure to persist with the arbitration and the workers knowingly electing not to pursue the matter, has the ring of an estoppel or waiver argument. Estoppel normally requires

a deliberate or negligent representation that a state of affairs is true and reliance upon that representation. Neither the union nor the individual applicants ever made any representation that they accepted the objectively invalid warnings as valid or as enduring for more than 6 months. On the contrary, they took issue straight away and represented unequivocally that they considered the warnings to be invalid. The company's chosen reliance upon its own interpretation was at its own peril, once if had been forewarned. That the union may not have acted conscientiously does not change the situation. If the warnings were objectively invalid there was no duty on the union to seek a declarator to that effect. Indeed, it could be argued, once the union had put the warnings in contention, management, rather than the union, had a duty to the company and the shareholders to seek a declarator. Likewise, the failure to pursue a specific statutory remedy within a legislative time frame does not of itself constitute a waiver of an entitlement to assert the invalidity of conduct not contractually sanctioned.

144. Nor am I able to accept the policy argument that re-consideration of previous sanctions will lead to an unacceptable broadening of the range of admissible evidence in subsequent dismissal proceedings. Whether a sanction in any given case was in accordance with the employer's disciplinary code and the employee's disciplinary record has always been a relevant consideration when determining the substantive fairness of a dismissal. Importantly though, in the present case, the company consciously chose to premise its selective disciplinary action in response to the strike of December 2002 upon the disciplinary record of the employees, and while dismissal might very well have been justified for all the employees involved, it elected for its own reasons to spare those employees without a warning and thereby put the validity of the warnings, and its reliance upon them, directly in issue. In view of the earlier challenge to the warnings, it did so knowingly. It is consequently a matter of reason and common sense that the validity of the warnings would assume relevance. Admittedly this extended the ambit of the issues, but evidence was in any event led on the issue and though taking up some time it did not render the trial any more unwieldy than it otherwise in fact was.

145. Lastly, albeit correct that the CCMA is the appropriate body to pronounce upon whether the warning of February 2002 constituted an unfair labour practice, that does not preclude this court from pronouncing upon the validity of the warnings in terms of the contract between the parties. Accepting, in accordance with the principle *ommia praesumuntur rite esse acta,* that the warnings may have been presumptively valid, if objectively they were in fact and in law invalid, this court and the applicants are free to disregard them. Unlawful or wrongful conduct cannot be regarded as lawful merely because it has not been challenged or pronounced upon in an appropriate forum.

146. Lest these be any further doubt, there is an additional forceful policy consideration applicable in the peculiar context of our pluralistic system of industrial relations and collective bargaining. Rycroft and Jordaan, in *A Guide to South African Labour Law* (Juta, 2nd Ed) pg 119 – 120, point out that the pluralistic model has as its

cornerstone the conception that a divergence of interests exists between management and labour and that conflict is inherent in their relationship. They continue:

> Yet it postulates that management and labour have at least one interest in common, namely that inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures.

147. To allow Mr Kirk-Cohen's arguments to prevail would be to sweep away this cardinal principle of pluralism by which the parties are held to their pre-ordained standards and procedures, especially in the context of collective bargaining of which the strike weapon is an integral part. The game must be played strictly in accordance with the rules. And the rules in this instance provide that the warning for the February strike was invalid, or at least had expired. And, consequently, all strikers were entitled to equal treatment. As I have said, management's decision to issue a final written warning to the majority of the strikers confirms that it did not view the strike and participation in it as dismissible conduct *per se*. The imposition of dismissal for repeated offences, while legitimate, cannot be substantively fair unless applied consistently in accordance with the prevailing code.

148. The idea of ignoring previous misconduct, especially when it has been committed relatively recently, will not sit comfortably with some. That much is evident from our case law. In *Shoprite Checkers (Pty) Ltd v Ramdaw N.O and others* (2000) 21 ILJ 1232 (LC), Wallis AJ held:

> The fact that a person no longer has a final written warning hanging over their lead no more extinguishes prior misconduct than the lapsing of a suspended prison sentence extinguishes the conviction from a person's criminal record.

True as that may be in the field of criminal law, the Labour Appeal Court, perhaps more consciously attuned to the pluralist and voluntantist nature of our industrial relations system, felt a different emphasis was called for. In the same matter on appeal it held:

> In our law there is no statutory provision that deals with what the duration of a disciplinary warning is nor is there a statutory provision that deals with what the effect is in law of the lapsing of a disciplinary warning. An employer and an employee may deal with these matters in their contract of employment. This may also be dealt with in a collective agreement …. These matters may also be governed by an established practice in a particular workplace. Depending on what the contract of employment ….or the applicable collective agreement provides, or what the established practice is in the particular workplace the fact that an employee's previous warning has lapsed or expired may well mean in a particular workplace that such employee must be treated as having a clean record when he is next found guilty of misconduct.

Grogan, in *Dismissal* (Juta) at pg 101, commenting on this passage of the judgement observes:

> This extract indicates that employers must follow the requirements of their disciplinary codes or the employee's contract as the case may be, when they refer to past warnings. If the

disciplinary code or contract of service provides that the warnings lapse after a particular period, they cannot be held against employees after that period.

Accordingly, finding myself in respectful agreement with both the Labour Appeal Court and Grogan, the conclusion is inescapable that in terms of the contracts of employment and the prevailing disciplinary code and procedure, the warnings given to the third to twelfth applicants in February 2002, if not invalid, lapsed after 6 months and ought to have been removed from the files and destroyed in September 2002, meaning that the applicants should have been treated as having a clean record when they were next found guilty of misconduct in December 2002 – January 2003.

149. It follows that in differentiating between the strikers in the way it did, the employer made itself guilty of contemporaneous inconsistency in its disciplinary action. Taking account of the code and contractual provisions there was no rational or justifiable basis for the differential treatment. In the premises, the dismissal of the third to twelfth applicants was not for a fair reason and was substantively unfair.

150. The applicants have raised other grounds of supposed inconsistency as well. Basically they relate to the company's failure to take action against van Wyk and Booysen, and the withdrawal of charges against Blankenberg, which conduct is presented as an indication of the employer's assumed arbitrary approach. The contentions in this regard have no merit. Van Wyk was not on duty, having stopped worked after the completion of the night shift. Booysen had permission to leave the crankline and go to the forge. Accordingly, neither could be said to have gone on strike. In so far as van Wyk might have made himself guilty of other disciplinary offences they were not the same as those for which the applicants were disciplined. As regards Blankenberg, the charges against him were withdrawn owing to his efforts to persuade the other employees to return to work. The failure of management to discipline these employees does not smack of capricious discipline or a discriminatory policy, and accordingly has had no bearing on my finding of substantive unfairness.

Substantive fairness – the second applicant, Dawie Willemse.

151. As discussed earlier, the dismissal of the second applicant was not predicated upon the application of the principle of progressive discipline for repeated participation in unprotected industrial action. Willemse was a first offender. His dismissal was based upon the key role he played, his disobedience of specific instructions and his not living up to the standard expected of him as a shop steward.

152. Willemse, we have seen, admitted that he had got caught up in the mood, had ignored Ledgerwood's instruction to get the crankline employees back to work (or at least to try) and headed off to the forge because by his own account he was curious about what would be said at the meeting.

153. Willemse failed to impress as a witness. He was obstructive, evasive and slow to

answer questions. At times he remained silent and failed to answer questions completely. His attempt to seek justification for his impetuous conduct in Ledgerwood's alleged use of foul language gives credence to the proposition that he knew what he did was wrong and beyond the bounds of the conduct reasonably expected from him. The fact that the question of abusive language was raised for the first time at the trial, not being foreshadowed in the pleadings, disciplinary hearing or appeal, reveals it in all probability to have been an *ex post facto* stab at validation, and one of dubious merit in its own right.

154. That Willemse harboured a strong sense of grievance towards Ledgerwood was obvious from much of this testimony. That some of it may have been justified does not of itself excuse his impetuous conduct. If anything his testimony throughout confirms that of Wilds and Visser that he was agitated, upset and frustrated. He did not deny being repeatedly on the phone and later accusing Wilds of restricting him. Nor did he counter Wilds' testimony that he turned to Philander, clenched his fists and in apparent frustration uttered words to the effect that they could not allow this to happen and that the crankline employees needed to do something, seeing that the forge employees had walked out. Nor did he challenge or convincingly deny Visser's testimony that after speaking to Philander, he had said "Kom laat ons loop", in effect suggesting that he took the lead in the crankline employees' decision to march to the forge. Even were I inclined to give him the benefit of the doubt on whether or not he heard and understood Ledgerwood to be calling him back from the terminus, the other evidence sufficiently captures him in a mood of defiance exhorting his fellow workers to take industrial action.

155. The multiplicity of charges levelled at Willemse involves a measure of splitting and duplication and, frankly, are a bit of an overkill. Nevertheless, Bouwer's findings that Willemse participated in the strike, ignored Ledgerwood's instructions, exhorted his fellow workers and failed in his duty as a leader to advise them of the consequences of their conduct, cannot he faulted. Looked at together, his conduct amounted to a dismissible offence in terms of the disciplinary code. To some the sanction of dismissal might be harsh. However, I am unable to coonclude that it falls beyond the bounds of reasonableness. Accordingly, there was a fair reason for his dismissal and I find his dismissal was substantively fair. The fact that Willemse saw himself as acting as a shop steward in the situation does not mitigate his conduct. He had no licence to resort to defiance and needless confrontation. Good sense required him to heed Ledgerwood's advice and not to expose his co-workers to unnecessary risk.

Procedural unfairness

156. As mentioned earlier, after several days in trial, the legal representative of the company, understandably concerned not to be ambushed by questions of procedural fairness, sought an order compelling further particulars. The existing pleadings clearly were not satisfactory and in the interest of allowing an opportunity for better preparation, and in the vain hope of curtailing proceedings, I granted the

order. The respondent was rewarded for its folly by a plethora of largely spurious allegations of procedural irregularity pertaining to the three disciplinary hearings that preceded the dismissal. Although I have already dealt with some of them, I turn now to deal with them as pleaded.

157. The first allegations relate to the notice and timing of the hearing of the group of nine, which I have discussed fully above, and in respect of which I found that the applicants did not satisfy the evidentiary burden of showing that a postponement had been requested and refused or that they had suffered prejudice as a result of the short notice and timing of the hearing.

158. The second allegation of procedural unfairness arises from Le Roux's dealing with the request by the six applicants to change their plea. From his testimony in court it was plain to me that Le Roux did indeed misconstrue his duties in the situation. In effect, the applicants were seeking to change their plea to one of guilty for attending an unauthorized meeting under clause 1.22 of the code, a lesser offence, and not guilty to the more serious offence under clause 1.30 of participating in a strike. Mr Kirk-Cohen endeavoured to persuade me that because the applicants did not persist with their attempt to change the plea, I should regard it as essentially a tactical stunt or opportunistic manoeuvre. And, in the end, had Le Roux allowed the change, it would have made no difference. I disagree. The minutes of the disciplinary hearing, together with Le Roux's obvious inability to grasp the issues at stake, indicate that he impatiently and prematurely dismissed a legitimate application to change the plea. Procedural fairness obliged him to enter a plea of not guilty on the strike charge on which he then ought to have invited evidence. He did not do this. The fact that the evidence before this court admits a finding of participation in the strike on a balance probabilities does not excuse the procedural irregularity. Public policy obliges fair procedure if only because justice must be seen to be done. The "no difference principle" therefore has no place in our law. It follows that the dismissal of the group of nine was procedurally unfair on this count.

159. The allegation that the withdrawal of charges against Blankenberg amounted to a procedural irregularity is without merit for the reason already discussed. The allegation that the chairperson unreasonably and unfairly prohibited the applicants from raising pertinent evidence by not allowing Blankenberg to testify during the collective hearing is also dubious seeing that no evidence was led during the trial in support of this allegation.

160. The applicants further alleged that Le Roux acted improperly and unfairly by allowing Plaatjies to testify by way of telephone as regards Alice Khan's obtaining permission to be absent from her workstation. Ideally Plaatjies should have been asked to testify in person. However, his evidence was not challenged at the time and was limited to his statement that he had indeed given Khan permission to use the phone at the same time as the second meeting at the forge and that she was absent for about one hour. Throughout the proceedings this evidence has remained uncontroversial. I do not consider it a procedural irregularity to obtain

uncontroversial evidence of this nature by way of a telephonic interview conducted on an open-speaker phone. The situation might have been different had there been a contemporaneous objection, persisted with on valid grounds.

161. I also find no merit in the complaints that Ledgerwood should not have acted as the initiator of the proceedings in respect of the forge employees on the spurious ground that they did not fall under his direct line of supervision. Nor am I persuaded that there was any flaw in the consideration of the submissions in mitigation. Le Roux requested and obtained written submissions, which he considered together with the oral submissions by those who made them – a proper opportunity to mitigate was granted.

162. The contention that Le Roux should have recused himself as chairperson because he had served as chairperson in prior proceedings is specious, hardly worthy of comment, as are the various unsupported allegations of bias. Likewise the attempt for make something of the company's failure to call Visser as a witness in the disciplinary hearing cannot be entertained either. Had the applicants wanted to hear his version at the hearing they could have called him.

163. The applicants further allege that Bouwer colluded with Ledgerwood, Visser, Wilds and Hartung prior to the hearing of the second applicant, which alleged collusion prejudiced the second applicant's right to a fair hearing. The evidence on this issue is scanty. The accusation is premised on some workers having witnessed what management saw as a chance, informal encounter and an exchange about the logistics of the disciplinary process. The evidence is not sufficiently cogent to draw the adverse inference sought by the applicants.

Remedy and costs

164. From the preceding analysis, therefore, I am persuaded that the dismissal of the group of nine was both substantively and procedurally unfair, that the dismissal of the third applicant, Philander, was substantively unfair for the same reason as the group of nine, but procedurally fair (there having been no procedural challenge to his hearing during the trial) and that the dismissal of the second applicant was both substantively and procedurally fair.

165. Once this court concludes that a dismissal has been substantively fair, it is obliged in terms of section 193(2) of the LRA normally to reinstate the employees unless continued employment would be intolerable, the employees do not want reinstatement, or the remedy is not reasonably practicable. There is no evidence supporting or making any claim that continued employment would be intolerable, or that reinstatement would not be reasonably practicable. Hence, I am constrained to grant the employees the relief they seek. However, in terms of section 193(1)(a), reinstatement need not be retrospective to the date of dismissal, the operative date being left at the discretion of the court, taking account of the conduct of the

litigation, the behaviour of the parties and the circumstances of the employer.

166. The conduct of litigation in this matter did not proceed smoothly. The union ranged far and wide, putting almost every pertinent fact in issue, often unnecessarily so. Much time was wasted on irrelevancies, and the matter was on more than one occasion delayed by a lack of preparation. As for the applicants who gave evidence, they were altogether an unimpressive lot. They evaded, obstructed, contradicted themselves, equivocated and sporadically told lies in service of an extremely implausible version. Their case was poorly conceived, badly constructed and exposed at times to be plainly untrue. The finding of substantive unfairness in their favour does nothing to vindicate their behaviour. The finding flows mainly as a consequence of a tactical error on the part of the company to effect selective discipline and the necessity for this court to enforce legal policy in accordance with the prevailing norms of collective bargaining. It certainly should not serve as any indication that this court approves of the manner in which the applicants have conducted themselves in their industrial relations or before this court.

167. On that basis, compelled as I am to make an order of reinstatement, as an expression of the court's displeasure, I use my discretion not to do so retrospectively at all and to reinstate the third to twelfth applicants from the date of this order. For similar reasons I decline to make an order of costs in favour of the applicants.

168. I accordingly make the following orders:

    a. The dismissal of the second applicant is declared to be substantively and procedurally fair.

    b. The dismissal of the third applicant is declared to be substantively unfair and procedurally fair.

    c. The dismissal of the fourth to the twelfth applicants is declared to have been substantively and procedurally unfair.

    d. The respondent is directed to reinstate the third to twelfth applicants on the same terms and conditions of employment that prevailed at the date of their dismissal but only prospectively with effect from the date of this order.

    e. There is no order as to costs.

MURPHY A.J.

DATE OF HEARING: 19-23 July 2004; 17-28 January 2005

DATE OF JUDGEMENT:

APPLICANT'S REPRESENTATIVE: Mr. N Vazi, a trade union representative

RESPONDENT'S REPRESENTATIVE: Adv S Kirk-Cohen instructed by Guy and Associates