IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO: C836/2006

In the matter between:

NATIONAL UNION OF MINEWORKERS

Applicant

and

NAMAKWA SANDS - A DIVISION OF
ANGLO OPERATIONS LIMITED Respondent

JUDGMENT

FRANCIS J

*Introduction*

1. The applicant, the National Union of Mineworkers (NUM) members who are employed at Namakwa Sands (the respondent) embarked in a protected strike from 19 June to 31 July 2006 in support of higher wages and an increase in their housing subsidy. While they were on strike, some non striking employees were paid a daily allowance of R300.00, received food and worked excessive overtime. The applicant on behalf of 334 of its members whose names appear in annexure "A", declared a dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation and after conciliation had failed, referred it to this Court for adjudication in terms of section 9(4) of the Labour Relations Act 66 of 1995 (the LRA). The dispute is described as relating to the general protections in the LRA and the applicant is seeking an order that the respondent pay its members the same amount it paid to non striking employees. The applicant contends that the provision of meals, the payment of the R300.00 and excessive overtime worked by non-striking employees by the respondent contravened the

provisions of sections 4(2), 5(1) and 5(3) of the LRA.

2. The respondent denied that it contravened any of the aforesaid sections. It has a practice to pay a daily allowance of R300.00 to employees who are redeployed to do work that fall outside their normal scope of duties. It denied that the employees worked excessive overtime and contended that the Department of Labour's permission was sought and granted to work overtime. Where employees are redeployed and work more than 12 hours a day, food is provided to the said employees.

*The application to amend*

3. The applicant on 14 June 2007 gave notice to the respondent that it would seek an order to amend its statement of claim. In a notice of intention to oppose the applicant's notice to amend, the respondent indicated that it would oppose only certain portions of the proposed amendment. These are:

*"1. That portion of the amendment that proposes the deletion of the following sentence from paragraph 8 of the statement of claim:*

*"In the alternative the Applicant sought that the Respondent be made to pay a fine to the Union. As is apparent from below, the Applicant abandons the relief sought in the referral form and instead seeks relief as set out below."*

*2. That portion of the amendment that proposes the deletion of paragraph 14.2 of the statement of claim which, provides as follows:*

*"An order directing the Respondent to desist in the future from making any such payment or providing any other advantages to those of its employees not involved in protected strike action"*

*and*

*the substitution of paragraph 14.2 of the statement of claim with paragraph 14.4 in the Applicant's notice of intention to amend which provides as follows:*

*"An order that the Respondent pay to each of the second and further Applicants an amount equal to or substantially similar to the average financial advantage received by each non-striking worker through the payment to them of a daily allowance, the provision of free food and the receipt of abnormal overtime payment"".*

4. The objection was limited only to the relief that the applicant was seeking and in particular the fact that the applicant sought to amend its prayers to request this Court to order the respondent to pay its members an amount equal to or substantially similar to the average financial advantage received by non striking employees through payments made in contravention of the LRA. The basis for the objection to amend was that the applicant having abandoned any claim for relief sounding in money and/or informed this Court and/or the respondent that it would not seek any relief sounding in money, could not seek such relief from this Court.

5. Mr Gwaunza, the respondent's attorney, contended that because the applicant had stated in the pleadings that it was abandoning the monetary relief, it was barred from amending the pleadings by resuscitating that relief. He relied on several cases and in particular the *National Union of Mineworkers Union of SA & others v Driveline Technologies (Pty) Ltd & another* (2000) 21 ILJ 142 (LAC). I do not understand this case to mean that where a party had made certain admissions, withdrawn those and wishes to make them again that

such a party will be barred from doing so. It is trite that where a party makes certain admissions and wishes to withdraw those admissions by way of an amendment, that party is required to depose to an affidavit setting out why the admissions were made and why they are being withdrawn. A factor that a court will also take into account is the question of prejudice to the other party.

6. The applicant was essentially seeking to withdraw certain admissions that it had made in the statement of claim and the pre-trial minute. An affidavit was deposed to by the applicant's attorney of record setting out the circumstances relating to the admissions and withdrawal of those admissions. I do not deem it necessary to repeat the explanation. Mr Gwaunza could not point out what prejudice the respondent would suffer save for the monetary consequences if the claim succeeded.

7. I was satisfied with the explanation that the applicant had tendered and since the respondent could not show what prejudice it would suffer granted the application and made no order as to costs.

*The evidence led*

8. The applicant called four witnesses. They were Brandville Talmakkies, Debra Appollus, Francios Afrika and Danie Carolus. It is not necessary to repeat their testimony in any great detail. Talmakkies is employed by the respondent for eleven years and is currently employed as a supervisor on the tap floor. A supervisor earns more than a tap floor operator. He is a member of NUM and did not take part in the protected strike of 2006. When a tap floor operator is absent from work, the tap floor supervisor works on the tap

floor and is not paid any allowance. During the strike, Talmakkies was asked to work as a tap floor operator instead of a tap floor supervisor for the duration of the strike. He was paid a daily allowance of R300.00. His basic salary before the strike was R7 350.00 per month and he received an allowance of R2 000.00. On 28 June 2006 his monthly income was R13 677.71 and his normal overtime was R787.50. His pay slip for 28 July 2006 reflects that he was paid a project relocation allowance of R7 200.00. His gross monthly income for July 2006 was R33 567.93. He worked 108 hours overtime and was paid R6 542.30 for 108 hours overtime worked. His gross income in August 2006 was R16 796.37 and was paid R1 150.96 as overtime. In an average month where there is no strike he would be paid his normal salary and get paid his normal Sunday pay. During the strike he was paid an R300.00 daily allowance since he was not doing his normal duties.

9. Debra Appollus commenced employment with the respondent on 2 February 1998 as an earth moving machine operator. She drives one of the trucks and sometimes does different work like data capturing. When the data capturer is not at work or is on annual leave, she is asked to do her work. She does not get an allowance for the different work that she is asked to do. She had complained about this and was charged with insubordination and received a six months first written warning. She had complained that when an operator who relieves a production operator the said person gets paid an acting allowance yet she was not paid this. This happened every time and not because of the strike. She had taken part in the strike. She confirmed that there is an acting allowance policy and that she was demanding to be paid R300.00 per day paid to non striking employees.

10. Francios Afrika is employed as a tap floor supervisor. He did not take part in the protected strike of 2006. During the strike, he worked as a tapper and drove and operated cranes that were different to his normal work. His gross earning according to his pay slip of 28 June 2006 shows that he earned R13 057.69 per month. His normal overtime was 19.50 hours that came to R1059.27. His gross earnings for 28 July 2006 was R31 726.07 and he received an extra R300.00 per day during the strike. He worked 94 days of normal overtime and earned R5 106.23. On 28 July 2006 he was paid R3 476.58 for working on his rests days. His August pay slip reflects that his gross salary was R18 211.93 and he worked 46 hours of normal overtime. When there is no strike, he gets paid for working on a Sunday. It was fine that the respondent thanked him for having done alternative work during the strike and for having paid him for that. He was aware that the law did not allow him to work more than 10 hours of overtime per week. Permission would have to be obtained from the Department of Labour to allow him to exceed the overtime. He did not work more than 20 hours per week during the strike period.

11. Danie Carolus commenced employment with the respondent at the Smelter site on 1 April 1995 and is a NUM shop steward. He is a plant operator at the Smelter site near Vredenburg. The Mine site is at Brand-se-Baai and deposits are mined and taken to the Mineral Separation plant at Koekenaap and than transported to the Smelter Site by rail. 975 employees were employed by the respondent. There are 472 employees in the bargaining unit. 42 members of the bargaining unit did not join the strike. The applicant sent a letter dated 24 February 2006 with 14 demands. They had demanded a 11,5%

basic salary increase with other demands. After negotiations had failed, the applicant declared a deadlock. On 14 June 2006 the applicant sent the respondent a letter with a 5-day strike notice commencing on 19 June 2007 at 7h00. The strike started on 19 June 2006. The mine operates on a 24-hour basis. It needs to operate continuously and there is a contingency plan. The respondent has a policy for allowances and special payments. Clause 1 thereof provides that allowances and payments are recognised by the respondent as due remuneration to employees who do work and/or duties under specified circumstances. There is an allowance in terms of the substantive agreement. The parties agreed that the shift allowance would remain at 9% of the basic salary per month. All employees who works shifts, get a shift allowance. The day shift employees do not get a shift allowance. There are also other allowances like standby, transport and education. Carolus has performed beyond his scope of duties and did not receive the R300 redeployment allowance. There is no normal practice to pay R300.00 a day beyond their duties. There is no redeployment allowance in the 2000 substantive agreement. It is not captured in any document. Allowances negotiated are captured in the substantive agreement. There is nothing in the substantive agreement about the provisions of free meals. Overtime is paid as provided for in the Basic Conditions of Employment Act 75 of 1997 (the BCEA). His understanding of the redeployment pay is that everybody gets a flat rate of R300.00 a day. Employees who worked during the protected strike, received double or triple salaries. The R300.00 was paid as a reward. He did not agree with the respondent's view that the R300.00 a day was paid because people went beyond their agreed work. If there was such an allowance, he should also have received it since about two years ago he worked as a control operator at the furnace. There are tap floor operators. When there is a shortage of tap floor operators, they as control room operators,

go there and receive a *pro rata* tapping allowance that was R500.00 a month and if he worked three shifts it would be a *pro rata* pay for three shifts. There is an acting allowance. His understanding of acting allowance is when a person does someone else job and for that period of acting that person will get an acting allowance. Clause 6.1.2(a) deals with level 1 employees. It provides that level 1 employees on the development group who do not meet the requirement but are required to act in a substantive capacity, will be paid an acting allowance of 15% of their actual monthly salary *pro rata* for the period. The allowance and special payment policy states in clause 7.1 in relation to overtime payment that only level 1 and 2 employees will qualify for overtime payment, except in circumstances where the payment of overtime has been excluded in the employee's contract of employment. The Department of Labour had approved that the overtime per week should not exceed 20 hours. This was based on an application for exemption made. It gave permission for 80 hours of overtime per month for a specific period. This would be lawful. The Minister of Labour (the Minister) may issue a determination. The existing agreement would not be valid for the period of the determination. The determination was valid for 30 June to 25 July 2006 and the respondent was acting lawfully for that period. Employees based at the Brand-se-Baai and the Mineral Separation plant, who worked unplanned overtime exceeding four hours per day, received ration packs consisting of a pack of small beans and bully beef like an army ration. It is not a hot meal and is issued by the material department. When the employees used to take stock, they would receive food and a braai was given. He has received biltong for his wife that was in packets. The Kentucky Fried Chicken outlet is about 1 to 1,5 hours drive from Brand-se-Baai from the Mine site. At Brand-se-Baai they do not receive Kentucky but a ration pack. The strike was settled when the employees

accepted 7.25%. The non strikers also received it.

12. The application for exemption to the Department of Labour indicated that the exemption was from 30 June to 25 July 2007. The variation was for the Smelter production. There are 100 employees at Smelter and the application was made for four employees. It is stated that the four employees are not members of the union. There were employees in the Smelter who were NUM members who did not go on strike. The Minister granted permission to the "employees concerned" to work 20 hours per week overtime. The employees concerned are the four employees referred to in the application. There was no redeployment allowance outside the strike. It was totally unfair in a strike for the respondent to pay R300.00 to non strikers because they were called to do the work of strikers. From NUM's point of view, they saw this as a bribe to keep the employees at work because of the R300.00. From the feedback that they received there were union members who half way in the strike returned to work and received the R300.00 allowance. It was also for the same reason unfair for the respondent to give the employees' free meals who had agreed to do the work of strikers. It was also unfair for non strikers to get an opportunity to earn huge sums of money because they were asked to do the strikers work. 222 employees were redeployed during the strike. Ten of the employees were doing office work and did not work on the plant. They do not do labour intensive work. They were doing something different. Carolus said that if he is on level 1 and is doing a higher job he gets an acting allowance. It was unfair for a manager to get a redeployment allowance for a 2 lower job level and than get more than what the person was earning. There were eight bargaining unit employees who were redeployed but did not receive a redeployment allowance. They were redeployed from East to West. Most

of the employees in the bargaining unit are production operatives. The critical positions during the strike were that of operatives. After the strike, the employees went back and did what they did before the strike. They were not aware of the redeployment allowance that was not discussed with them and only became aware of it during the strike. P Blankenberg, a NUM member was on 11 July 2005 paid R300.00 for alternative work done during stay away action on 27 June 2005. JPG Meissenheimer, a member of NUM, was also on the same day paid R300.00 for having worked during the same stay away action. AJJ Cloete who is a shop steward of NUM was also paid in 1998, 1999, April 2000 and May 2000, 2001 and July 2003 for having worked during strikes or stays away. The respondent had paid allowances for almost 10 years since 1998 based on the documentation shown to him.

13. The respondent called four witnesses. They were Waheed Achmat, Johan Rossouw, Louis Martinus Booysens and Stanley Theron. It is also not necessary to repeat their testimony in any great detail. Achmat is the respondent's group human resources manager. He commenced employment with the respondent in 1998. In 2001, he was the human resources manager's corporate office and the admin. payroll. He has only started to attend the management committee meetings from March 2007. In 2006 he was an ordinary human resources manager. The respondent has a recognition agreement with NUM. There are different levels of employees at the respondent. Level 1 operatives all earn below the BCEA level. Level 1(S) is skilled personnel. Level 1(T) is for artisan level. Level 1(A) is for the admin. staff. Level 2 is for first line supervisors. It also

includes managers, production controllers and group leaders. Level 3 is for mine management level like the production managers etc. Level 4 is for the management committee team and level 5 is for the general manager. There are a number of allowance policies that are not in the substantive agreement. There is an education and medical aid policy that is in the substantive agreement. There is a specialised travel allowance, medical aid, project and subsistence allowance that is not in the agreement. There is also something used by managers called an *ad hoc* allowance. The respondent engages in major projects and employees were withdrawn from their normal duties and seconded to it and management used their discretion to give them an allowance. It is a project allowance but is called an *ad hoc* allowance. As for overtime payment, only level 1 and 2 employees like operatives, technicians, production controllers and group leaders are entitled to it. Some earn above the BCEA threshold level like the level 1S, level 1T and production controllers, tap floor supervisors and group leaders. The conditions of employment currently state that the respondent will pay them overtime even if they are above the BCEA threshold. The respondent has wage negotiations with NUM once a year. At the beginning of each wage negotiations, the parties hand each other a list of their demands. NUM had a list of demands that ended in a strike. Of the 14 demands, the basic demand and increase in the housing subsidy from R1 600.00 to R2 500.00 ignited the strike action. The parties reached a deadlock. Not all the employees took part in the strike. After each negotiation phase a substantive agreement is drawn up to capture the agreement reached between NUM and the respondent on the outcome for the wage negotiations. The wages were increased to 7.25% from 1 June 2006 as opposed to 1 April and the housing subsidy remained at R1 600.00. The standby allowance remained the same. Most of the employees in the bargaining unit took part in the strike. Most

NUM members are in production. All three production sites were most vulnerable and were affected. Achmat was the human resources manager at corporate during the strike. The respondent had asked people to volunteer for redeployment and he was one of them who put his name down. The respondent had to meet the production targets and customers needs. He was redeployed not from day one. He made himself available for the receiving and despatch area. The work there was much easier. During the days when he was redeployed, his working hours were from 7h00 to 19h00 or from 7h30 to 16h30 and he was not paid any overtime. He did not know why some employees were not redeployed. Some were not licensed to drive major vehicles due to safety and they needed training. Some felt that they would be taken away from their comfort zones where there would be winds and rains. There were instances where redeployment was rejected as it was done on a need basis and there was no guarantee that if a person volunteered that the person would be redeployed. When he joined the respondent, he discovered that people were redeployed to keep the operations running. There were instances in 1989/1999 and 2005 of wildcat strikes. During May 2006, 36 employees volunteered to be redeployed and one was a bargaining unit member and 35 were non bargaining unit members and they were paid a R300.00 daily allowances for doing so.

14. When there was a stay away called by COSATU, NUM would tell the respondent that they would take part in the stay away and the respondent would then look at what needed

to be done. This also happened in June 2005 when 22 employees were redeployed, six of whom were bargaining unit members and 16 non bargaining unit members and they received a redeployment allowance. In October 2005, 31 employees were redeployed four of whom were bargaining unit members and 27 non bargaining unit members who did work outside their scope and were paid a redeployment allowance. Page 99 reflects the bargaining unit employees who were redeployed during the strike at the Mineral, Smelter and Mine sites. It shows who the individuals are, their designation, union status and the area in which they did work. Blake was a stores operator who contributed to the Department of Labour and during the strike was used to ensure that the trucks were off loaded and did the work done by them. A tap floor supervisor is an individual who supervises activities of the tap floor, schedules, organises and plan and ensure safety and housekeeping on the tap floor. The tap floor supervisor has tap floor operators including launder cleaning, mud gun refilling, tapping and laundering of tappers. Some bargaining unit members underwent some training to be redeployed in other areas. The respondent could carry on with the production and meet the customers' requirements. There are various documents dating back from, 1998 where employees who worked during strike actions were paid a redeployment allowance. During the strike action of 2006 payments were made to 222 employees who were redeployed. They were paid a redeployment allowance for doing duties out of their normal jobs that they were employed to do. They were paid for the actual days when they were redeployed and for the duration of the strike. They were paid allowances since they were working long and hard hours and were working overtime. If they worked the same shift and longer hours, they would receive overtime. There is an arrangement that the employees would not exceed 10 hours overtime per week or 40 hours per month. They were in terms of the determination

allowed to work 20 hours per week overtime from 30 June to 25 July 2006. The relevant person at human resources for industrial relations applied to the Department of Labour to extend the 10 hours to 20 hours a week. Paragraph 5 of the application states that the number of employees is four. There is no correlation between the application and the determination granted by the Department of Labour. Paragraph 3 of the determination encompasses all employees of the respondent. This is a conclusion that the respondent reached after they had a discussion. Human resource's view was that it applied to all employees. Another determination extended the 10 hours to 20 hours. Their interpretation was that 24 employees could work 20 hours per week overtime. There were meal requests for employees who worked overtime. Their requests were completed when there was a break down, an emergency shutdown and the work taking normally longer than what was required. There were requests for meals when there were shutdowns. These were for unplanned shutdowns and overruns and meals were requested for individuals working in a shutdown. Meals were provided when people were not planning to work long hours. During the strike, the employees were not accustomed to working long hours and were given meals. There were people who covered 12 hours shifts on 21 June 2006, 3 days into the strike and 31 employees on the plants. Meals were ordered for them. Two employees who worked in the receiving and despatch area and who were not redeployed, received meals with the other six to eight employees who were redeployed. Achmat received meals for the days that he was redeployed. He went back to his office to do catch up work. He was redeployed as the need arose for a period between 9 to 10 days. It was put to him that it was an incentive if volunteers received R300 a day with their normal salaries. Achmat said that the respondent's strategy initially was that there would be no indication that there would be an amount paid and

how much. The strategy was raised 1 to 2 weeks later when it was asked if there would not be a redeployment allowance paid. He did not know in what context this was raised. The rationale was that the respondent would lose money on production. More than enough people had volunteered. The employees had initially volunteered to work without being offered any money and during the strike a decision was taken to offer payment. The offer was made to those who did more work. They were paid because they did work outside their scope. There was a practice to pay a redeployment pay. They were not paid for the first two weeks because the respondent did not know how long the strike was going to be. Usually in the past it would be a one day strike. The decision was taken by the management committee. Achmat was referred to the management committee meeting of 27 June 2006 where Botha said that they should "consider incentives to the employees and their families who are at work during the strike. Not a monetary contribution but a moral booster" and that this was a plan not to pay. He said that if he looked at how the minutes were captured, it was not taken verbatim and not everything was actioned. There were many to and frow communications. It was discussed and reason prevailed. A decision was taken eight days into the strike to pay monetary compensation for those who were redeployed. He was asked about the "incentives to the employees and their families". He said that this was meant to keep them happy. It was not discussed in his presence. Casper Lotter was in the legal department at Anglo American. He was asked about the entry made that Botha had to consult with C Lotter about "the payment for conducting extraordinary work and that it was agreed that a broad approach would be followed for the definition of extraordinary work". He said that he did not know exactly what it meant. The decision came from the management committee that they would pay a redeployment allowance during the strike. Botha could answer whether they wanted legal

advice to understand if it were lawful. The practice was to pay the R300.00 daily allowance during strikes or stays away. It was put to him that the point of offering the money was to encourage the employees not to strike because it dangled a big carrot to someone who went on strike and did not get the R300.00 daily allowance. He said that he did not fully agree with what was put to him. The amount was paid to keep the operations going on and to meet customer needs, generate income and have job security. There are certain laws about what a union and an employer can do during the strike. Employees who were not on strike would be redeployed and paid the R300.00 daily allowances. The second reason was that they agreed to do work outside the scope of their employment contract. A person who was on strike could not be paid R300.00 a day since he or she did not receive a salary. He was asked if the respondent was contractually obliged to pay R300.00 to those who volunteered to do it outside their contract. He said that it was not documented that they would receive it and he did not receive it. A gratuity is a thank you gift as an appreciation. The employees were not obliged to do the work done by strikers. The respondent should have raised the redeployment allowance with the union like they did for example with the specialist, educational, subsistence and medical aid allowances. He was asked what would have happened if the union was approached about the redeployment allowance. He replied that it would have taken about five minutes. He did not agree that the redeployment allowance was hidden but agreed that it was not documented and did not know why it was not documented. It was put to him that it was not documented because it was wrong. They performed and were paid and a decision was taken eight days into the strike. He was not at the management committee meeting of 4 July 2006 where it is recorded that “people who are disadvantaged as a result of the negotiations must be identified and the company must commit to recognize

their efforts in the future and individuals and their families are to be rewarded over and above the R300.00 day allowance". He said that the practice was that those who were redeployed got an allowance and no families were rewarded. Redeployment means doing something different from what he is supposed to do. If a person is asked to do something else for three days, it is a redeployment. Deploy means to take someone from one area to another. Acting appointment is when a person is promoted to a job at a higher level than the position that they are in. If a person moves from the position of a supervisor and works in the production site, it is a lower job. He was asked that where a person earns R5 000.00 per month and earns R233 a day and now is paid R527 whether it was a genuine redeployment allowance. He said that it was in terms of their policy and the goal was to keep the production going. He was asked why this was a flat fee. He said that there were other allowances that were flat fees like travelling, education and medical aid.

15. The respondent according to Achmat, paid redeployment allowances of R1 040 004.00 which was not specifically budgeted. This was received from the respondent's day to day expenses. Labour was overspent and he was not sure if they received authority but the instruction was to keep the operations running. They capitalised this under project allowance and others were not captured. There was no line item in the pay slip as a redeployment allowance or project allowance. It was put to him that this is money paid to people to do work during the strike and was awarded to them. He said that it was called a project allowance. The amount spent on food was R296 800.09. They were given meals for having worked longer hours and for sustenance. Employees usually bring their own meals. It was unplanned overtime and they could not make arrangements for

food. It was put to him that the reason they were given this was different in that it was a special reward, a moral booster for non strikers and to thank them for doing long work. He said that it was not entirely correct. Food was given only to redeployed people and in certain instances to others who were not redeployed. The difference is the token of appreciation. It was to thank them for doing the work, the commitment shown and going the long mile. With the planned shut downs they were thanked by the senior manager and a braai was given. This was not on a daily basis and was only when the need arose. He did not know in what context the words "moral booster" was used. They used an out sourced company to fetch the meals. He was not part of the decision to provide meals and to extend it to others. He did not get biltong. He knew of employees who received Kentucky, Wimpy, and curry and rice. He agreed that during the strike the overtime worked was doubled. They did this by letting the non striking employees do the work of striking employees. They had to work longer hours. They used to work 8 hours but were now working 12 hours. In terms of the policy if a person was removed from his current occupation and worked for a period of time, he received overtime. The respondent was contractually obliged to pay the overtime. Besides the overtime, they received an extra R300.00. There were instances in engineering where they worked daily 8 hours and than worked 12 hours overtime and they got paid overtime and the R300.00. Somebody like Talmakkies worked 108 hours overtime and 45 hours of rest day that is higher than his ordinary month. Except in a strike, they did not work so much overtime unless they were asked to do so. In a furnace shutdown or break down, they worked long hours overtime. It was put to him that a further advantage not being on strike was the opportunity to work many hours of overtime. He said that there was an opportunity but not a blanket opportunity. They received this when they were redeployed. They could only work

longer hours of overtime in terms of the BCEA if they received a determination. The people in the North have 12 hour shifts. They worked four days and there is an agreement with the union to vary it. His understanding is that the determination applied to all employees. If he looks at the current variation, it applied to specific employees. He did not know why the application form for the determination was not placed before the Court. The determination was discussed as a team about what it meant. He agreed that an application to the Minister must be served on the union for their comment. It was not served on NUM. The application only referred to four employees. The four employees were NUM members falling under the shop agency agreement. If they were not given permission, they could not work longer than 40 hours overtime a month. If the threshold applied and they worked more than 40 hours overtime a month, they would be acting unlawfully in normal circumstances. The respondent would be acting unlawfully if it paid more than the threshold in breach of it and only if it applied to four employees only. NUM was not approached when the application was made for the determination since they were in an abnormal situation. The respondent did not have to pay the striking employees R1 557 706.73. At the Smelter in an unplanned shutdown, the employees received meals from Wimpy, KFC and Excellsia. This was the same place where the meals were provided for during the strike. The total figures for overtime in March 2006 before the strike was R368 956.93 and in April R353 115.93. The wage increase was implemented for non bargaining unit employees on 1 April 2006 and for the striking employees on 1 June 2006 and back pay from August. The increase affected the overtime pay since it was linked to their salaries. No person could be forced to be redeployed. They could not instruct anyone to be redeployed.

16. Johan Rossouw is employed by the respondent as an engineer operator. He fixes electrical breakdowns and is a member of NUM. He used to be a production operator. He was asked by the group leader to work in the plant during the strike. He did operations that are normally done by a plant operator. It is different to what he was employed to do. An engineer operator does not work shifts. A production operator works a 12-hour shift. He was not told that he would be paid if he were redeployed nor did he know of the payment. He worked 2 to 3 days and heard through the grapevine that they would get allowances for being redeployed. This would be where he is moved from one department to another like for example from engineering to production. He received payment for the days that he had worked as a production operator and when he went back to work as an engineer operator he did not get the allowance. He worked overtime usually on weekends when there were no production operators and sometimes he was called at 16h00 and told that he would have to work until 19h30 when the others did not want to work. They were given meals when he worked in the plant. As an engineer operator, he did not receive meals every day. They would on some occasions when the engineer thanked them for their hard work, receive a meal. This happened two or three times. He did not think that everyone should be receiving a redeployment allowance. A person should only get it when the person is redeployed. If a person is on standby that person gets a standby allowance and if he is not on standby he does not get it.

17. Louis Martinus Booysens is employed by the respondent as the operations manager at the Smelter site for five and half years. There is an operations manager at the Mine site and the operations furnace. Booysens's responsibility as an operations manager is to maintain production level for all the plants and operate it with due regard to safety and

environmental issues. Most employees are employed on an operation level and the majority are in the production operative positions. If the bargaining unit employees do not work for one day, the plant should be shut down. There will be opportunity losses and consequential damages to equipment. As a result of the strike, it was foreseen that there would be a possibility that the respondent might not have the services of the production employees and other operations and there would be operations disruptions. The respondent had prepared an emergency preparedness plan that appears at page 201. They analysed what critical work had to be performed and took stock of the inventory in terms of other people that had to help out. They listed out the requirements and the number of people required if they had to be successful to maintain the operations. The plan was prepared when there was going to be a strike or a situation. This plan was created last year by the operations manager. If there is a withholding of labour, they looked at the critical position and ensure that they keep the operations running. They had to see if it were possible to redeploy people to keep the plant running. Everybody who was willing to perform such duties was redeployed. Nobody was excluded. They did it on the assumption that most of the bargaining unit employees would not be available. They looked at the skills' levels. Some positions require licences or permits and they see who had it. They looked at the lower skills' levels and had to see who was available and volunteered. Nobody was forced. A person could volunteer but it was filled on a need basis. A person could be omitted where there was no position or requirement available. When the strike started a large contingent of the workforce did not arrive for work. They worked two 12 hour shifts. The volunteers were not asked to come at night. They normally worked day shifts. They had volunteered to do night shifts. On the first morning, they were told to come during the night shift. The

respondent had to wait and see which of the employees reported for work and if there were vacancies they than used the volunteers to fill it. When the strikers returned, there was no further need to redeploy and the redeployed employees went to their normal positions.

18. Booysens sit in the management committee meetings. An R300 daily allowance was paid to certain employees. The decision to pay them was taken at the meeting of 27 June 2006 that was some eight days after the commencement of the strike. The management committee minute is not a verbatim recordal of what was discussed. It is a general description and the action parts were listed. It is recorded in the minute that it was agreed to make more regular payments to employees working during the strike and that payments would be paid in their bank accounts. Previous strikes lasted for a day to 3 to 4 days. The respondent paid allowances whenever they occurred after the strikes took place and during the normal pay roll. It became evident that the 2006 strike was going to be a protracted one and there was a discussion about whether the payments should be made at the end or interim payments should be made. There was a further management committee meeting on 18 July 2006. It was recorded that it was agreed to pay employees who were doing work outside their normal duties their allowances at the end of the month with their salaries. The supervisors and operations managers had to sign the name lists of those who qualified. This was a regular payment. It is also recorded in the minute of 27 June 2006 that they should consider incentives to the employees and their families who were at work during the strike not a monetary contribution but a moral booster. This was debated. Sense then prevailed and only the redeployment allowance was paid. In terms

of the industrial action, people have the right to strike. This right cannot be infringed. Giving a redeployment allowance was sufficient and it was decided not to give any other incentives. The redeployment was not given as an incentive but for working outside their normal duties. The minute also records that the respondent should continue with small tokens of appreciation to everybody at work like lunches etc. The thinking was that management from its side should show appreciation for the employees doing more than what was expected of them. It was an expression of gratitude, an appreciation and token in terms of lunches to people working 12 hour shifts. Meals were given to them. It is recorded that Hans Botha who was the human resources manager had to consult with C Lotter, a legal advisor of Anglo American, about the payment for conducting extraordinary work. It was agreed that a broad approach would be followed for the definition of extraordinary work. They had to seek legal opinion on the payment of redeployment allowance. The issue was debated and it was raised whether it should be extended to everybody working and the feedback after consideration was that it was a defensible position to pay to those doing outside normal duties. Booysens did not attend the management committee meeting of 4 July 2006. He has a subordinate, Errol Matthews who attended on his behalf. It was recorded that once they had returned to normal, the overtime must be normal. They would revert to the normal shifts and two shifts would not be required. It is recorded in the minute that people who are disadvantaged as a result of the negotiations must be identified and the respondent must commit to recognise their efforts in the future. Individuals and their families are to be rewarded besides the R300.00 daily allowance. He was not aware of the awards besides the allowance paid. Meals were provided during the strike and it was not normal to provide meals. The current policy is that when they exceed 12 hours or it was an

unplanned basis the respondent would provide meals. People were given meals as a token of appreciation and it was not normal circumstances. He saw the application for exemption of over time at the preparedness and emergency plan. He did not discuss the number of persons with Nel. Four employees sounds on the low side.

19. Stanley Theron commenced employment with the respondent on 8 October 1997 as an operator in the receiving and despatch area. He was promoted on 1 December 2006 as a production controller in the receiving and despatch area. During the strike he was a member of NUM in the bargaining unit. He did not take part in the strike because he thought that NUM's demand was not reasonable especially in relation to the demand for an R900.00 increase housing subsidy allowance. He was not redeployed because he was needed in his area. There used to be 18 employees but 16 took part during the strike. Two did not take part in the strike. He received his normal salary plus overtime. Those who received redeployed allowance received it because they were working in different areas. He was happy that he was not redeployed and was not paid like the others were. The fact that people received redeployment allowances will not stop him from striking and it depends on the demands. He received meals with the other employees who were redeployed.

*The parties submissions*

20. Mr Kahanovitz who appeared for the applicant contended that chapter 2 of the LRA contains general protections intended to reinforce and further protect the right of employees to participate in the lawful activities of trade unions. One such activity is the right of trade unions and their members to engage in protected strike action. Chapter 2 of the LRA recognises that difficulties may be encountered by employees in proving that

different treatment of union members and strikers was in breach of the rights or protections conferred by chapter 2. Section 10 provides that in any proceedings where a party alleges that a right or protection conferred by this Chapter has been infringed, must prove the facts of the conduct; and the party who engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter. The applicant must prove the facts that tendered to show that its rights protected by chapter 2 had been breached. Once this has occurred, the onus then shifts to the respondent to prove that its conduct of tending to promote particular category of persons was not in breach of the chapter 2 protections.

21. Mr Kahanovitz further contended that by being specially rewarded for helping the employer to continue production; by agreeing to do the work usually performed by the strikers in return for an extra allowance of R300.00 a day; coupled with the further incentive or advantage of receiving daily hot meals as "an energy and moral boost" the non strikers were being rewarded for being prepared to do work that was necessary to break the power of the strike. They were being rewarded for being prepared to "relocate" into areas of production most affected by the strike. They were also asked to work "lengthy shifts" for which they received abnormal high amounts of overtime pay (much of which was for working unlawful overtime hours on dangerous equipment). Much was made of whether the conduct of the respondent was commercially rational. That is besides the point. Breaking the strike through illegitimate means may be perfectly commercially rational, albeit illegal.

22. Mr Kahanovitz further contended that the non strikers were obviously advantaged

because they benefited from the financial and other rewards they received for not striking, namely the R300.00 daily allowance, the abnormal overtime work made available and the meals, food, drinks and snacks not received in circumstances where there is no strike. The amounts paid by the respondent indicate that little expense was spared in endeavouring to break the power of a strike through those methods. Thus, R1 040 000.00 was spent on the daily allowances of R300.00. R268 094 was spent on food and beverages and R899 328,00 on overtime in July 2006 compared with the monthly average of R420 231 for the period February to May 2006 or for example R353 115,00 in April 2006. Those amounts could be paid without the respondent having to suffer any serious pain because the amount saved on not having to pay wages to striking workers was R1 500 000,00 in July 2006 alone. Similarly the strikers were prejudiced for purposes of section 5(2)(c) of the LRA in two senses. First they were prejudiced in their ability to exercise their right to strike because illegitimate methods not sanctioned by law were used to negate the impact on the strike on the respondent. Secondly they were prejudiced because by exercising their right to strike, they were not placed in a position such as witnesses like Talmakkies and Afrika who could double or triple their usual earnings by doing the work usually done by those who were on strike. Different classes of non strikers were also treated differently with those prepared to perform blackleg labour earning a bonus of R300.00 per day for their loyalty.

23. Mr Gwaunza for the respondent contended that the applicant must prove the objective facts that establish that the respondent discriminated against the strikers for exercising their right to strike. Further that the respondent prejudiced or threatened to prejudice strikers for present membership of the applicant and the respondent advantaged, or

promised to advantage persons in exchange for not exercising the right to strike. If the objective and external facts are established by the applicant, it is for the respondent to show that it had no mental intent as to drive itself into the ambit of section 5 of the LRA. *Inter alia* the respondent must prove that the motivation underlying its conduct was not such that it discriminated against the strikers for exercising the right to strike, prejudiced or threatened to prejudice strikers for present membership of the applicant and advantaged or promised to advantage persons in exchange for not exercising the right to strike.

24. The respondent did not deny that it paid the R300.00 redeployment allowance to non-striking employees or that it provided meals to non-striking employees or that it required non-striking employees to work overtime and made payments in relation thereto. However, in so doing, the respondent denies that it contravened sections 5(1), 5(2)(c)(i) of the LRA. The redeployment allowance was a payment made to selected employees who had agreed to perform duties and/or work that fell outside the scope of their employment contracts and/or outside the scope of their duties and responsibilities. The respondent did not make an arbitrary decision on the redeployment and redeployment allowance. It was a decision that had its roots in past practices dating to 1998 when employees were paid an allowance for working alternative duties during industrial action that affected the respondent. The respondent did not deviate from its normal practice by paying the redeployment allowance. The decision was well calculated and informed. The redeployment allowance was not a payment made to lure people from not going on strike or to return from the strike. The respondent had shown that it had no mental intent such that it drove itself into the ambit of section 5(1) of the LRA by paying the

redeployment allowance. The respondent's conduct did not prejudice the strikers because of their present membership of NUM or similar reasons to those above. The redeployment allowance was not an advantage given to employees in exchange of them not striking.

25. It was further contended by the respondent that the rationale for the light meals is an energy and morale boost for employees who are required to work long shifts at critical times and to sustain them during the lengthy shifts that the employees are otherwise not ordinarily accustomed to working. The respondent provided meals to redeployed employees who had to work long shifts. The respondent has a long practice of providing meals to employees who are required to work long shifts because of the happening of certain events such as extended shut downs, break downs etc. This practice was applied to redeployed employees who were required to work long shifts and later to other employees who worked in the same area as the redeployed employees. Not all employees received meals. The respondent's motive in providing the meals was not to discriminate against strikers because they were striking or to prejudice the strikers because of their membership of the union nor was it to advantage or promise to advantage an employee in exchange for them not taking part in the strike.

26. It was further contended that the respondent applied for a variation of section 10(1)(b) of the BCEA in respect of four employees. On receipt of the determination, the respondent interpreted the determination to mean that it applied to all employees at the respondent who would have needed to be covered by the determination to work the extended overtime hours. The respondent in good faith relied on the determination when

permitting those employees who would have needed the determination to work extended overtime hours to work the hours referred to in the determination. The respondent required the employees who worked overtime during June/July 2006 to work such overtime to meet its operational needs. Accordingly the employees worked overtime on a need's basis and whenever required to do so. To the extent that the respondent misinterpreted the determination, then those employees who had thought that they were covered by the determination and worked more overtime than the statutory maximum would have done so unlawfully. The respondent made a *bona fide* error of interpretation. However its conduct was not motivated by a mental intent to discriminate against the strikers for exercising their right to strike or to prejudice strikers because of their membership of NUM or to advantage or promise to advantage non strikers in exchange for them not exercising their right to strike.

27. The respondent did not engage in any conduct with the mental intent as might have brought itself within the ambit of section 5 of the LRA.

*Analysis of the evidence and arguments raised*

28. The respondent's business involves the recovery of heavy minerals from sand deposits on the West Coast of South Africa. Its operations are spread over three geographical sites in the Western Cape, being the Smelter site in Vredenburg; the Mineral separation plant in Koekenaap near Vredendal and the Mine site in Brand-se-Baai that is also near Vredendal. The business conducted by the respondent at its premises operates 24 hours a day and some of its employees work day and night shifts.

29. NUM is recognised by the respondent as the collective representative of various

employees of the respondent who are its members in the bargaining unit. There is a recognition agreement between NUM and the respondent. NUM is the sole collective bargaining agent for employees who are its members in the production line. There are approximately 472 bargaining unit employees. The respondent's total employees compliment is 957. Wage negotiations commenced between NUM and the respondent in February 2006. After several meetings between NUM and the respondent, the parties were unable to agree. On 5 May 2006, NUM referred a dispute to the CCMA. A conciliation meeting on 14 June 2006 failed to resolve the dispute and the CCMA issued a certificate of non resolution on the same day. On 15 June 2006 NUM notified the respondent of its intention to commence strike action with effect from 19 June 2006 in support of an increase in the housing allowance and wage increment. The protected strike action commenced on 19 June 2006 and ended on 31 July 2006. Most of the bargaining unit employees who participated in the strike works in the respondent's production unit affected most by the strike action. Not all the bargaining unit employees participated in the strike action. The strike ended after the wage negotiations between the applicant and the respondent were settled. The parties agreed *inter alia* to a 7.25% increase to the basic monthly salaries of bargaining unit employees with effect from 1 June 2006.

30. During the protected strike action, the respondent provided meals to most of the non striking employees on a daily basis. It also paid a redeployment daily allowance of R300.00 to some non striking employees and employees worked overtime more than the statutory limit.

31. The applicant referred a dispute to this Court for adjudication in terms of section 9(4) of

the LRA after conciliation had failed. The applicant contended that the respondent breached the provisions of section 5(1) and (3) of the LRA. Section 4(2) of the LRA provides that every member of a trade union has the right, subject to the constitution of that trade union to participate in its lawful activities.

32. Section 10 of the LRA deals with the burden of proof in disputes that this Court is required to adjudicate. In terms of section 10(a) of the LRA a party, in this case the applicant, who alleges that a right or protection conferred by Chapter 2 has been infringed must prove the facts of the conduct. In terms of section 10(b) the party, in this case the respondent, who engaged in that conduct must then prove that the conduct did not infringe any provision of Chapter 2. I share the views expressed by Arendse AJ in *Food & Allied Workers union & others v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC) at pages 1110 and 1111 where he has dealt with the issue of onus.

33. The right to strike is a right enshrined in our Constitution. The right to strike is an important right that employees have acquired after years of struggle in the workplace. The LRA has placed certain limitations on the right to strike. Section 4(2) of the LRA grants every member of a trade union the right subject to the constitution of that trade union to participate in lawful activities of that trade union. The right to strike is one such right. Section 5 of the LRA grants employees certain protections. Section 5(1) outlaws discrimination and states that no person may discriminate against an employee for exercising any right conferred by the LRA. In terms of section 5(3) no person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by the LRA or not

participating in any proceedings in terms of the LRA. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

34. It was not seriously contested that the protected strike that the members of the applicant took part in is a lawful activity referred to in section 4(2) of the LRA. The issue that needs to be decided is whether the daily allowances that were paid to non striking employees who were redeployed, the excessive overtime worked and the provision of meals fell foul of the provisions of section 5 and in particular section 5(3) of the LRA.

35. It is common cause that most of the bargaining unit employees who participated in the strike action work in the respondent's production unit that was most affected by the strike action. The business conducted at the respondent's premises operates 24 hours a day and some of its employees work day and night shifts. There was a need according to the respondent to keep the production unit running. It had to put contingency plans in place. The respondent requested non-striking employees to perform duties and/or work that fell outside the scope of their employment contracts and/or outside the scope of their duties and responsibilities in areas such as the production unit where the respondent needed labour. Most of the employees who were redeployed were persons who did not work in the production unit. A total of 222 employees was redeployed in terms of the contingency arrangements and of these 42 were bargaining unit employees who were not participating in the strike action and 180 were non bargaining unit employees. They were paid an R300.00 daily allowance for the days that they were redeployed. The total paid was R1 040 000.00. The respondent continued operating its business running at reasonable, though not normal, levels during the strike action. The employees who were

redeployed received their normal remuneration during the redeployment. Those of them who qualified for statutory remuneration for overtime received overtime payments. R268 094.00 was spent on food and beverages during the strike. Most of the non striking employees worked overtime more than the statutory limit. In July the overtime paid was R899 328.00 that was almost twice the normal amount before the strike.

36. It is clear from the evidence led that the R300.00 daily allowance was only paid to the employees who were redeployed. Food was also provided to employees who worked shifts and in one instance to two employees who were not redeployed but who were working with employees who were redeployed. The respondent has provided meals to employees who had worked excessive overtime. The parties are in dispute about the circumstances under which the meals have been provided by the respondent to employees in the past. The respondent provided meals to non striking employees during the strike action. It is in dispute whether the meals were provided to some or all non-striking employees. The meals differed from time to time and included beverages, KFC street wise two meals, curry and rice, biltong, pizzas, chocolates etc. None of the striking employees received the R300.00 payment or meals from the respondent during the strike action. It is common cause that the payment of R300.00 per day and the provision of certain meals to non-striking employees during the strike action is not a written term and condition of employment; is not regulated by an individual contract of employment and is not regulated by a collective agreement. There is no written term or condition of employment prevailing at the respondent that employees are remunerated for work done besides the normal contractual entitlements.

37. The respondent's rationale and defence for the payment of the redeployment allowance is that it is a practice that exists at the respondent. It was its token of appreciation to the employees who volunteered to be redeployed and, therefore, agreed to perform duties and/or work that fell outside the scope of their employment contracts. The employees were paid for their extra effort beyond the call of duty and individual effort in assisting the respondent to meet its operational needs. The employees who were redeployed and worked shifts of 12 hours or more were provided with light meals on the days that they actually worked during the redeployment in terms of the respondent's practice. A decision was taken to provide light meals to other employees who were not redeployed but who worked similar shifts to the redeployed employees and/or worked in the same areas' as/with the redeployed employees so that the respondent did not differentiate between the employees and to prevent tension between them. The rationale for the light meals was that it was an energy morale booster for employees who were required to work long shifts at critical times and to sustain them during lengthy shifts that the employees are otherwise not ordinarily accustomed to working.

38 The applicant's witnesses testified that they were not aware of such a practice to pay a redeployment allowance. More importantly Carolus, a NUM shop steward testified that no such an allowance was discussed with them but conceded that there are some allowances that do not appear in their substantive agreement with the respondent but do exist. An example was the subsistence allowance. Achmat on the other hand testified that when he joined the respondent in 1998 he found that there was such an allowance which he conceded was not documented any where. He called this an *ad hoc* allowance that was solely in the discretion of management. Reliance was also sought in referring to

various letters given to employees over a ten-year period for work performed during the strike action. Achmat conceded that the allowance was only given when there was protected and unprotected strikes, stay away or wild cat strikes. So for example on 14 May 1998 a T Celliers was given a cheque for R250.00 for alternative duties performed during stay away action on 11 May 1998. On 11 July 2005 the amount was increased to R300.00 also for having performed alternative duties performed during stay away action on 27 June 2005. The rationale for giving this "is in recognition of alternative duties performed and/or flexibility shown during the stay away action on 27 June 2005". On 28 April 1999 Celliers was given R250.00 for working during the unprotected strike over the period 20 April 1999 to 22 April 1999. On 12 April 2000 he was paid R250.00 for having worked during the stay away action over the period 13 March 2000 to 17 March 2000. On 11 July 2005 DA Adams was paid R300.00 for alternative duties performed during the stay away action on 27 June 2005. On the same day HAP Cornett was paid the same amount for the same reason and like AP de Beer.

39. The obvious question that arises is why this practice to pay the redeployment allowance was not discussed with NUM, why it was shrouded in secrecy and hidden from it. This question was partly answered by Achmat who said that if it were discussed with NUM, the matter would not have lasted for more than five minutes. NUM would clearly have declared a dispute and would have approached this Court for appropriate relief including an order to declare that practice as unlawful. This explains why the practice was not documented. This was a tool used by management in strike situations. The amounts that were paid did not appear as a separate line item in the budget. The evidence before me indicates that it was only paid out in strike situations. The letters given to employees who

worked during previous strikes states that it was for alternative duties performed during strike action. It was not called a relocation allowance. It is therefore my finding that it has been shown that a practice existed which was shrouded in secrecy to pay employees who performed alternative duties during strike action. The legality of the practice was raised at one of the respondent's management committee meeting where an instruction was given to seek legal opinion on it. This clearly suggests that the respondent had some doubts whether this practice would be defensible and whether it falls foul of the provisions of section 5(3) of the LRA. The fact that the respondent had such a practice for a number of years does not render it lawful. The practice to pay the redeployment allowance applied only in stay away and protected strikes. This was part of the Preparedness plan that Booysens testified about.

40. The respondent was aware of the provisions of section 187(1)(a) and (b) of the LRA that prevents an employer from dismissing employees who are embarked in a protected strike and employees who refuse or indicate an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV unless the work was necessary to prevent an actual danger to life, personal safety or health. This section in my view places an indirect prohibition on an employer to ask non striking employees to do the work of striking employees during a protected strike. The employees who were not on strike were paid to do the work of non striking employees and the reward for doing this were the R300.00 daily allowance and free meals. The respondent clearly knew that it could not force the non striking employees to do the work of their striking colleagues. It therefore came up with

this policy that from the evidence led was clearly to incentivise non striking employees to do the work of their striking colleagues. Talmakkies who worked during the protected strike said that when he sometimes worked as a tap floor operator not during strikes he was not paid the R300.00 allowance. This was also confirmed by Appollus. None of the employees who did alternative work outside a strike situation were paid this daily allowance. They were either paid a shift or acting allowance.

41. It is clear from the evidence led that the non striking employees had a feast during the protected strike action. I find it rather strange that Achmat who was at the time a level 3 employee was redeployed to work at receiving and distribution that is at level 1, was paid his normal salary and received the daily allowance. I had asked him to explain what redeployment meant and he struggled to explain what it meant. I would have expected that if there was a genuine redeployment policy that this would not have been hidden and would have been known to everybody. Some of the witnesses were prepared to work without been paid the allowance. They only heard through the grapevine that there was such an allowance. Management then took a decision eight days into the strike to pay the allowance. I am left with no other conclusion but to conclude that this was a strategy used by the respondent to negate the constitutional strike action embarked by members of NUM. This was an incentive for other employees not to join the legitimate strike action so much so that some of the striking employees went back to work and were also paid the allowance. The management minute of the meeting of 4 July 2006 states that people who are disadvantaged as a result of the negotiations must be identified and the respondent must recognize their efforts in the future. Stanley Theron who worked during the strike was promoted in December 2006. Some employees in the North who did not take part in

the strike were redeployed but were not paid a redeployment allowance because they did the same work.

42. There was no rational explanation given by the respondent about why this *ad hoc* allowance was only paid out to employees who worked during strikes or stays away. This policy was known only to the management committee and some employees who were paid this for having taken part in some strike actions of the past. It was not tabled at any of the meetings that the respondent had with NUM. By paying the non striking employees who were redeployed the allowance they were being advantaged in exchange of not taking part in the protected strike. Some NUM's members did not take part in the strike, were redeployed and received the daily allowances. The respondent's conduct by paying the non striking employees a redeployment allowance and the free meals contravenes the provisions of section 5(3) of the LRA.

43. This brings me to the question of the excessive overtime worked during the strike. It is common cause that the normal agreed hours for working overtime were 10 hours per week. On 30 June 2006, the human resources manager of the respondent, a Mrs AA Nell of Smelter made on behalf of the respondent an application to the Department of Labour for Ministerial determination and an exemption on overtime. A determination was issued by the Director General: Labour in terms of section 50 of the BCEA. The provisions of section 10(1)(b) of the BCEA were replaced. The Director General stated in paragraph 2(a) of the determination "That the employees concerned may exceed the weekly overtime limitation of 10 hours by 20 hours weekly". The determination period granted was for 30 June 2006 to 25 July 2006. In paragraph 3 it is stated that the

employers or employees in respect of whom the determination applies is "Employees employed by Namakwa Sands Division of Anglo Operations Ltd". Achmat testified that he had made no inputs in the application made by Nel. He said that the "employees concerned" referred to in paragraph 2(a) of the determination related to the "employees employed" by the respondent as referred to in paragraph 3 of it. However he conceded that the application for Ministerial Determination was for the Smelter-Production and had stated in paragraph 5 thereof that the number of employees affected were four. It is also stated in paragraph 6 of the application that "the 4 employees for whom the variation is sought are familiar with the type of work they are doing and by using these employees there is less risk of employees being injured. Employees are given a rest day at least every 7th day". It is further stated that the matter was discussed with the four employees and all have given their consent for this variation. A copy of their consent was attached.

44. There is no substance in the respondent's contentions on the question of the determination. For some reason best known to the respondent, a copy of the application was not initially placed before this Court. After it was placed before this Court it became clear that an application was only made in respect of four employees at the Smelter. The exemption was granted only for the four employees concerned. The overtime worked by the employees during the strike was far in excess to that which was allowed for by the Minister. More than four employees worked overtime in contravention of the Minister's determination. The said employees were members of NUM. NUM's consent was not sought when the application was made. The employees who were redeployed received up to three times their monthly salaries during the strike action. If Achmat is correct that the determination is correct and applies to all employees of the respondent, it means that either the Department of Labour was misled and that the other employees worked

overtime unlawfully. Mr Gwaunza conceded that the permission was only sought and was given in respect of four employees. The overtime worked during the strike was clearly unlawful.

45. There was simply no evidence placed before this Court that showed that employees who were redeployed when there were no strikes were paid this redeployment allowance. I am satisfied that the applicant has placed sufficient facts before this Court about the respondent's conduct. I am satisfied that the applicant has proven that the respondent has discriminated against the its members. The respondent has failed to prove that its conduct did not infringe the provisions of section 5 of the LRA.

46. To summarise, the respondent's conduct in paying the non striking employees the redeployment allowances, the provision of free meals and the excessive overtime worked falls foul of the provisions of section 5 of the LRA. The respondent has failed to prove that its conduct did not infringe the provisions of section 4 and 5 of the LRA.

47. All that remains to be determined is the issue of relief. The applicant sought an order that I direct the respondent to pay them also the same allowance paid by the respondent to non striking employees. I do not believe that in doing so is competent for this Court since the respondent's conduct was unlawful. I do not believe that the applicant's members should benefit out of an unlawful conduct perpetrated by the respondent.

48. The claim before me is not a delictual or damages claim but is one brought in terms of section 9 of the LRA. The remedies provided for in terms of section 193 read with

section 194 of the LRA are therefore not applicable. The applicant's claim is also not founded in terms of the Employment Equity Act 55 of 1998. This seems to be a *sui generis* or a statutory claim. I accept that this Court may in terms of section 158(1) (a) make any appropriate order. There is not a *numerus clauses* orders that this Court can make. There is no definition of what an appropriate order is that this Court may grant. Section 158(1)(b) of the LRA allows this court to make an order in compliance with the provision of the LRA.

49. A similar issue arose in the matter of *Food & Allied Workers Union & others (supra)* where the Court also refused to grant damages or compensation. I cannot simply see either in law or logic how I can order the respondent to pay to each of the members of the applicant an amount equal to or substantially similar to the average financial advantage received by each non-striking worker through the payment to them of a daily allowance, the provision of free food and the receipt of abnormal overtime payment. The applicant has simply not made out a case for such relief.

50. The order sought by the applicant is also fraught with difficulties. Its members were exercising a right in terms of the LRA. No evidence was led by the applicant how the sum for damages or compensation should be made up. Should they be allowed to be paid the excessive over time that the respondent's employees had worked which was clearly unlawful? How many days would they have been entitled to take off during the strike? How long would the strike have lasted but for the daily allowances that were paid out? How long would the non striking employees have worked without being paid the incentives?

51. I do not believe that this is a proper case to order the respondent to pay the applicant's members compensation or damages.

52. A copy of this judgment should be brought to the Director General of the Department of Labour to deal with the excessive overtime worked by the respondent's employees in clear breach of the Minister's determination.

53. There is no reason why costs should not follow the result.

54. In the circumstances I make the following order:

1. The respondent's conduct in paying a daily allowance of R300.00, providing free meals and offering and paying abnormal overtime wages to non-striking employees was in contravention of section 5(1), 5(2)(c)(i) and 5(3) of the LRA.

2. The respondent is prohibited from engaging in such conduct with effect from the date of this order.

3. The respondent is to pay the costs of the application.

4. The registrar must bring to the attention a copy of this judgment to the Director General of the Department of Labour to deal with the issue of excessive overtime worked during the protected strike of June/July 2006 and to act accordingly.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

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| FOR APPLICANT | : | C KAHANOVITZ INSTRUCTED BY CHEADLE THOMPSON & HAYSON INC |
| FOR RESPONDENT | : | KD GWAUNZA OF EDWARD NATHAN SONNENBERG INC |
| DATE OF HEARING | : | 26 - 29 JUNE 2007 |
| DATE OF JUDGMENT | : | 28 NOVEMBER 2007 |