OF INTEREST

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JS 795/03

In the matter between:

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA First Applicant

PIET NCHABELENG AND OTHERS Second and Further Applicants

and

EDELWEISS GLASS & ALUMINIUM (PTY) LTD Respondent

JUDGMENT

TODD AJ

Introduction

1. These proceedings are instituted by the Applicant trade union on behalf of 39 of its members who were formerly employed by the Respondent and who were dismissed by the Respondent during a strike that took place in August 2003.

2. Why it has taken more than five years for this matter to come to trial, and the consequence of this for the parties, are matters to which I return later in this judgment.

3. The employees were dismissed on the grounds of their participation in an unprotected strike. The trade union's primary contention is that the strike was in fact protected and the dismissals consequently automatically unfair. In the alternative, if the strike was unprotected the trade union contends that the dismissals were in any event unfair on the grounds that they were not for a fair reason and that a fair procedure was not followed. The employer, by contrast, contends that the strike was unprotected, that dismissals

were fair in the circumstances, and that a fair procedure was followed in effecting the dismissals.

Summary of material facts

4. The Respondent was established by Ms Leana Van der Walt in May 1985. Its business is the design, manufacture and installation of aluminium windows and doors for commercial buildings. It made use of expensive imported machinery. Its employees were for the most part involved in skilled technical work and, according to Van der Walt, who remains the Managing Director of the Respondent, they may take up to four years of employment with the Respondent to reach the right level of skill required by the business. According to Van der Walt the dismissed employees were all skilled workers, with the exception of a relatively small number who had been employed on fixed term contracts that were to expire in November 2003.

5. The Respondent's business falls within the ambit of the construction industry. Prior to 2003 trade union recognition and collective bargaining took place predominantly at an industry level in the relevant bargaining council. The Respondent did not have a plant level recognition agreement or other collective agreements applicable in its workplace. By the beginning of 2003, however, the bargaining council had ceased to function. This left something of a vacuum in the labour relations arena.

6. In the early part of 2003 the Applicant trade union approached the Respondent employer to seek organisational rights and to establish a collective bargaining relationship. Van der Walt felt ill-equipped to deal with this approach, and she called in the assistance of a labour consultant, Mr Lodewyk Pienaar.

7. With the assistance of Pienaar, the Respondent decided that it would be willing to agree to grant basic organisational rights to the trade union but that it did not wish to engage in collective bargaining at plant level. Instead, and in the absence of a bargaining council, it favoured participation in an informal industry bargaining forum.

8. As far as organisational rights were concerned, the Respondent was willing to grant stop order facilities, access to its premises and the right to elect shop stewards. It was not, however, willing to grant all of the rights and facilities to shop stewards which the trade union was seeking.

9. On 23 May 2003 the trade union referred a dispute to the CCMA. The issue in dispute was the company's failure to accede to its demands in respect of organisational rights. At the same time, the trade pressed demands on a range of other matters of mutual interest.

10. On 6 June 2003, while the organisational rights dispute was pending in the CCMA, the trade union addressed a letter to the Respondent in which it set out a range of demands. These included, in relation to organisational rights, demands concerning shop stewards' rights, access to telephones and faxes, shop stewards' cabinet and office space, use of a notice board, and a proposal for monthly meetings. Its "other" demands included demands over sick leave, casual and contract workers, union subscriptions, wages, working hours, leave pay, a leave bonus, safety clothing, uncertainty regarding a provident fund, "harassment and intimidation", a living out allowance and transport, grades, a 13th cheque, overtime, payslips, parental care, and general meetings. The letter provided a brief explanation of the nature of the demand in each case.

11. This list of demands was apparently prepared by a Mr Modimoeng, a regional organiser of the trade union based at its regional office. The demand for a 13th cheque was elaborated upon as follows: *"Since there are no other benefits the union demand 1 equal monthly payment once a year at shut-down."*

12. The parties met on 6 June 2003 to discuss the trade union's list of demands. The meeting was adjourned on the basis that the trade union would consult with its shop stewards in relation to this list of demands and provide some feedback to the Respondent. A meeting was then scheduled for negotiations on the demands on 23 June 2003.

13. Before this meeting took place, the trade union addressed a letter to the Respondent dated 17 June 2007. This letter, written by a Mr Sihlangu, appears to have emanated from the trade union's Tshwane local office rather than its regional office. In the letter the trade union requested a meeting with management of the Respondent "to negotiate wage increases and working conditions". The demands listed in the letter included a demand for wage increases, various demands relating to health and safety, training and employment security, and other matters of mutual interest. Under the heading "leave and leave enhancement pay", a demand was made that workers should qualify for twenty working days of leave and a 13th cheque after completing one year of service with the employer. The letter also contained a demand concerning paid time off for shop

stewards and union office bearers.

14. This letter from the Tshwane office of the trade union appears to reveal a degree of miscommunication between the regional and local offices of the trade union. The demands were formulated somewhat differently from those previously put to the company, and the letter omitted to mention the prior demands and the meeting that had taken place in relation to those demands on 6 June 2003. In a response dated 18 June 2003, Pienaar took strong exception to this discordance. He recommended that the parties should "*proceed with the meeting of 23 June 2003 as scheduled and that we finalise the agenda dated 6 June 2003. Once we have finalised the previous agenda it is our suggestion that some of the (applicable) matters referred to in your letter dated 17 June 2003 stand over for negotiation in the 2004 wage negotiations.*"

15. Pienaar addressed a further letter to the trade union dated 3 July 2003. No copy of this letter was placed before me, but it is apparent from the trade union's response dated 28 July 2003 that this correspondence brought to the surface the sharp difference between the strategies of the trade union on the one hand and the Respondent and its labour consultant, on the other. While the Respondent and Pienaar were willing to attempt to resolve the organisational rights dispute and to conclude an organisational rights agreement on reasonable terms, they were reluctant to conclude an agreement at plant level on terms and conditions of employment. Instead, they wished to defer these matters to the voluntary bargaining forum then apparently in the process of being established.

16. The trade union's letter of 28 July 2003 concluded as follows:

> *"The contents of your letter imply that you or your client are not prepared to meet with the union to negotiate wages and working conditions. This therefore leaves us with no other option but, to declare a dispute with you. Should you fail to indicate your willingness to negotiate with us within five days from the date hereof, the union will declare a dispute against your client."*

17. Two days later, on 30 July 2003, conciliation of the organisational rights dispute took place in the CCMA.

18. Before the conciliation meeting Pienaar had prepared a document that on the face of it was intended to provide the foundation of a collective agreement between the parties. The document set out the parties' respective positions on the various matters then the subject of negotiations between them. It dealt with both organisational rights and the

other demands being pressed by the trade union.

19. The document was headed "Collective rights, collective agreement and organisational rights". If dealt with all of the various matters which had been the subject of negotiation between the parties. These included shop stewards' rights, access to telephones and faxes, the shop stewards' cabinet, the notice board, monthly meetings (the matters characterised as involving organisational rights), and also included sick leave and payment, casual and contract workers, union subscriptions, wages, working hours, leave pay, safety clothing, provident fund, harassment and intimidation, living out allowance, transport, grades, a 13th cheque, overtime, payslips, parental care and general meetings (the matters that concerned terms and conditions of employment).

20. Under the heading "13th cheque" the document recorded the company's position as follows:

> *"The company does not pay 13th cheque, but provides leave pay and leave bonus as per above."*

21. The union's position is recorded as follows:

> *"It seems that the union wants leave pay, leave bonus and a 13th cheque, but no clear mandate has been received in this regard."*

22. Although it is apparent from this document that agreement had been reached in relation to some of the items under discussion, and while the gap between the parties had narrowed in respect of others, substantial differences remained.

23. On 30 July 2003 the main focus of the conciliation proceedings became the question of the distinction in the scheme of the Labour Relations Act between what may be termed "disputes of interest" and "disputes of right". The commissioner spent most of the available time in the conciliation explaining that distinction to the parties. Why this topic should have taken up as much of the time and attention of the parties as it did is not clear. The parties may have been grappling with the fact that the trade union demands on organisational rights, which undoubtedly concerned matters of mutual interest between the parties, were demands which gave rise to an election on the part of the trade union either to seek adjudication under the provisions of section 22 of the LRA or to resort to the use of power in the form of a strike.

24. What is clear, however, is that as an outcome of the discussions at conciliation on 30

July 2003 the trade union agreed to send to the Respondent, and the Respondent agreed to receive, a consolidated set of demands, dealing both with the latest position of the trade union on organisational rights, and with the further demands relating to conditions of employment. Pienaar's evidence was that the commissioner had "ordered" the parties to continue negotiating. The conciliation period was extended until 7 August 2009.

25. The trade union then set out its consolidated demands in a letter to the Respondent dated 1 August 2009. The opening paragraph of that letter went as follows:

> *"We refer to our CCMA dispute around organisational rights negotiations and attached hereto is the list of substantive issues for discussions."*

26. The letter set out the trade union's latest position in relation to its demands for organisational rights, and then set out separately its "demands on substantive issues". Among the various demands on "substantive issues" was a demand for what was referred to as "leave and leave enhancement pay". Here the letter set out the demand previously placed in the trade union's letter of 17 June 2003 "that workers qualify for twenty working days per annum and 13th cheque after completing one year with the company".

27. Following the trade union letter of 1 August 2003 the parties again met to attempt to resolve the outstanding issues between them. They were, however, unable to conclude an agreement before the conciliation proceedings reconvened on 7 August 2003. On that date, the commissioner issued a certificate of non-resolution of the dispute that had been referred to the commission, being the organisational rights dispute.

28. The trade union gave notice on the same date, 7 August 2003, of the intention of its members to embark on strike action. The strike notice read as follows:

> *"Please be advised that in terms of section 64(1)(b) we will be resuming with the legal strike on the 12th August 2003 as from 07:00.*
>
> *The strike pertains to unresolved dispute on collective agreement on organisational rights. We would further want to meet with yourself on Monday, the 11th August 2003 to discuss proposals on picketing rules."*

Reference to "resuming" the strike appears simply to have been an error. There was no evidence before me of any strike action before 12 August 2003.

29. On 11 August 2003, the day before the strike commenced, the parties met to discuss

picketing rules. In addition, the Respondent called a general meeting of employees. The purpose of this meeting was to communicate in clear terms to employees what the company's attitude was to the strike due to commence the following day. In particular, the Respondent wished to communicate its view that the strike action was permissible only in support of the trade union's organisational rights demands, and that workers were not entitled to strike in support of the trade union's demands in respect of the other matters, the "substantive issues".

30. This position was explained by Pienaar, who attended the meeting, and was set out in a document distributed to workers on that date. The document took the form of a letter addressed by Ms Van der Walt, was dated 11 August 2003, and read as follows:

> *"To whom it may concern:*
>
> ***REASON FOR STRIKE***
>
> *Herewith the only reasons why the union members may strike without intimidation:*
> 1. *Shop stewards' time off.*
> 2. *Book and stationery cabinet.*
> 3. *Monthly shop stewards' meeting.*
> 4. *Monthly general meeting.*
> 5. *See attachment A.*
>
> ***MEMBERS***
>
> 1. *Only union members may strike.*
> 2. *Union members have the choice to strike or not.*
> 3. *Union and non-union members may not be intimidated because of the strike.*
>
> ***FURTHER ARRANGEMENTS***
>
> 1. *If you strike for any other issue than the above <u>you may be dismissed</u>.*
> 2. *The <u>no work no pay</u> rule will count.*
> 3. *Deductions for outstanding loans may be made to a maximum of 25% of your pay.*
>
> *Assuring you of our closest attention at all times."*

31. One of the matters agreed in the picketing rules (which were not placed before me) was that there would be hourly meetings between the shop stewards and management of the Respondent throughout the strike to ensure that communication was ongoing and that every reasonable effort was made to resolve the issues in dispute in the strike.

32. The strike commenced on 12 August 2003. It was clear from the evidence that both Ms Van der Walt and the workers were anxious that the strike should be resolved as quickly as possible. The Respondent could not afford prolonged industrial action at a very critical and busy time, and the workers, too, were not enthusiastic at the prospect of a

lengthy period without pay. Although Ms Van der Walt gave evidence that the trade union had promised to pay striking members the amount of any lost remuneration, there was no direct evidence of this and it was not ultimately relevant whether or not any such promise had been made.

33. Initial meetings between the shop stewards and Van der Walt, at or around 09h00 and 10h00 on 12 August 2003, yielded no progress in resolving the issues in dispute. It appears that neither party was willing to yield any ground in relation to the organisational rights issues.

34. At 12h00, however, the shop stewards brought some news to Ms Van der Walt. Since these were the events that ultimately triggered the dismissal, I set out in some detail the evidence given by the various protagonists as to what transpired.

35. Pienaar, who gave evidence first, said that he was called sometime after 12h00 by Van der Walt. She said to him that she had the shop stewards with her and that they had told her that the Respondent could "forget about" the organisational rights issues (or words to that effect) and that what the workers really wanted was a 13th cheque. She then handed the telephone to one of the shop stewards, Shadrack Mahlangu, who was with her. According to Pienaar he was amazed to hear Mahlangu confirm that the workers were no longer interested in the organisational rights issues and that what they actually wanted was a 13th cheque. Pienaar testified that he then gave Mahlangu "an earful", apparently because as a shop steward he should have known that the workers were not entitled to press a demand for a 13th cheque in the course of the strike. It was clear to Pienaar, he testified, that the attitude of the workers as communicated by Mahlangu was that even if the company capitulated in relation to the organisational rights demands the strike would continue until the company agreed to pay a 13th cheque. Pienaar's interpretation of this conversation was that the workers were abandoning their demands for organisational rights and replacing these demands with a demand for a 13th cheque.

36. Van der Walt, the next witness to give evidence on these events, stated that when the shop stewards arrived at the 12h00 meeting on 12 August 2003 they appeared excitable. They then said to her words to the following effect:

> *"Don't worry about that little union office on the factory floor, just give us a 13th cheque and this will all go away".*

37. Van der Walt testified that she could not believe what she was hearing. Mahlangu was speaking Afrikaans and she asked him to speak clearly. Mahlangu repeated exactly what he had said. Van der Walt said she did not know what was going to happen next and that it was then necessary for her to telephone Pienaar. After telling Pienaar what had been communicated to her she handed the telephone to Mahlangu and she heard Mahlangu repeat to Pienaar what he had just informed Van der Walt.

38. The third person to give evidence as to what transpired at this meeting was Mahlangu. He testified that after the initial meetings on the first morning of the strike had failed to yield any progress, he and his fellow shop steward had reported back on each occasion to the striking workers that there was no movement on the organisational rights issues. The workers then mandated the shop stewards to raise with the employer the possibility of paying a 13th cheque. This is what he then did at the 12:00 meeting. Under cross-examination Mhlangu was insistent that if the company had agreed to pay a 13th cheque this would not necessarily have resolved the strike, since workers might still have insisted on resolution of some of the other outstanding issues in relation to organisational rights before the strike could be resolved. He testified, however, that the agreement on the 13th cheque would have been a step forward in resolving the issues.

39. All of the evidence about the words spoken at the meeting must be viewed with some circumspection. The witnesses were testifying about the details of a conversation that had taken place more than five years previously. In addition, the evidence appeared to be coloured to some extent by the witnesses own perceptions, in the light of what subsequently transpired, as to what the company's and trade union's respective stances ought to have been at the time. By this I do not mean to suggest that any of the witnesses were deliberately untruthful in their evidence. From their demeanour and general performance in the witness box, all appeared to give evidence truthfully and to be attempting to recall to the best of their ability the facts on which they were testifying. There was in fact little difference between them as to the objective facts as to what occurred and what was said in the meeting. Their main differences were as to the inferences that should be drawn from the words that were exchanged at the time.

40. It seems to me that the matter may be decided on the basis that the words that were spoken by Mahlangu at the meeting at 12h00 on the 12th of August 2003 were along the lines set out by Van der Walt. In other words, what Mahlangu communicated in the meeting was along the following lines: *"Don't worry about the organisational rights issues. Just pay us a 13th cheque"*. Whether or not that constituted a communication

that workers were abandoning their organisational rights demands, as the Respondent contended, is a matter to which I return later in this judgment.

41. What happened next was that Pienaar advised the Respondent that the strike was from that point onwards unprotected, and that the appropriate course of action was to discipline Mahlangu and his fellow shop steward on the grounds that they had lead the workers into an unprotected strike.

42. The Respondent suspended the shop stewards with immediate effect and instituted disciplinary proceedings against them for leading the workers into an unprotected strike. Pienaar explained the strategy of disciplining the shop stewards as follows. If the shop stewards were indeed misleading the workers, the Respondent would, by disciplining and dismissing them, "cut off the head". It was hoped that this would result in the trade union taking control of the strike and bringing it to an end. In other words, Pienaar hoped that if the militant shop stewards could be taken out of the picture, then once the trade union had heard the evidence that was given at the disciplinary enquiry it would assist in bringing to an end what was now an unprotected strike.

43. Some time during the course of that week, probably on 14th August 2003, the day before the shop stewards' disciplinary hearing took place, Van der Walt telephoned one of the longest serving employees, Barney Maela. Maela, who was also on strike, had been employed by the company since not long after its establishment in 1985. Van der Walt regarded him and some of his longer serving peers as "natural leaders". She called Maela to communicate her request that the workers should choose natural leaders from among their number to replace the shop stewards as spokespersons for the striking workers. Maela advised her that the workers would not do this, as shop stewards were elected in terms of a process regulated by the trade union's internal processes. Van der Walt testified that Maela confirmed to her in the course of that conversation that if the company agreed to pay a 13th cheque the strike would be over. Maela, who also gave evidence in the proceedings, disputed this part of her evidence.

44. The disciplinary hearing against the shop stewards took place on Friday 15 August 2003. No formal notice of the hearing was given to the trade union. A Mr Tsoga, a trade union official who had been asked by Mr Modimoeng to assist in relation to the strike, found out about the proceedings when he arrived at the premises to meet with workers on the morning of 15 August 2003.

45. Much time was taken up in the trial as to what transpired during the disciplinary hearing. The Respondent alleged that Tsoga was unruly and disrespectful. Tsoga disputed this. It was common cause that he was evicted from the disciplinary hearing. None of this is ultimately relevant to the issues before me.

46. The disciplinary enquiry was, it appears, chaired by a representative of the employer's organisation COFESA. The outcome of the hearing, given in a written finding on the same day, was that the shop stewards were summarily dismissed. The decision to dismiss the shop stewards, and the chairperson's written finding, are extraordinary for a range of reasons that are not directly relevant to these proceedings. The dismissals were challenged in separate proceedings before the CCMA. The arbitrator found the dismissals to have been fair. The trade union instituted review proceedings in this court, which appear to have become moribund. I invited the parties to place those review proceedings before me so that they could be resolved at the same time as the trial in the present matter, but neither party was in favour of this approach. In the circumstances, I say nothing more in this judgment concerning the fairness of the dismissals of the shop stewards.

47. On the following work day, Monday the 18th of August 2003, the Respondent decided to issue ultimatums calling upon the striking employees to return to work. In the early morning of that day, Van der Walt went out to the group of striking workers and addressed them, requesting them to return to work on the grounds that the strike had become unprotected. She was somewhat taken aback by the fact that the mood of the striking workers had changed since the decision to discipline and dismiss the shop stewards. There was no threatening conduct of any kind towards her or any other member of the Respondent's staff, but she testified that the mood had definitely changed.

48. The workers failed to respond positively to Van der Walt's entreaties, and failed to return to work. At approximately 10h00 that morning, 18 August 2003, Van der Walt distributed an ultimatum to the striking workers. The terms of the ultimatum had been prepared by Pienaar. The ultimatum read as follows:

> ***"ULTIMATUM***
>
> ***TO: ALL STRIKING EMPLOYEES OF EDELWEISS GLASS AND ALUMINIUM***
>
> ***FROM: MANAGEMENT***
>
> *You are hereby informed that the strike, which you have embarked on since 12 August*

2003, is in contravention of the New Labour Relations Act, 1995... In terms of the certificate issued by the CCMA a protected strike is only allowed in terms of organisational rights. In this regard you have not conducted yourself in line with organisational rights. From negotiations with the Shop Stewards it is clear that you attempted to address substantive issues (ie. 13th cheque) with your industrial action. The Shop Stewards were reprimanded in this regard and their failure to advise you properly resulted in their dismissal after a disciplinary hearing.

Your continued strike (without newly elected Shop Stewards) is still being conducted on the basis of substantive issues and is in this regard an unprotected strike.

*You are herewith instructed that you should return to work by **10h30 on 18 August 2003** as per your conditions of employment. Any employee refusing to work, and thereby embarking on an unprotected strike, will face disciplinary action, which may include summary dismissal.*

You therefore have ample time to reconsider your possible breach of your contract of employment with Edelweiss Glass & Aluminium. You must however take notice that you will not be paid for the days on which you have taken part in this unprotected strike."

49. This ultimatum, which gave the workers approximately half an hour to comply, did not achieve the desired effect. It was followed, shortly after 10h45 on the same morning, by a final ultimatum. The terms of the final ultimatum contained the same opening paragraph as the earlier ultimatum. The final ultimatum continued as follows:

*"You are hereby advised that you should return to work at **11:30 on 18 August 2003** as per your conditions of employment. Any employee refusing to work, and thereby embarking on an unprotected strike and action will be taken, which may include summary dismissal. (sic)*

You are hereby informed that should you not return to work and tender your services, the company would have no option but to consider the possibility of terminating your services. Employees that return to work will receive a final written warning.

Employees persisting in the unprotected strike may be dismissed as a group due to the fact that it would not be advisable to have disciplinary hearings for all striking employees as a result of the urgency of this matter and the amount of employees involved."

50. No engagement with the trade union preceded the issuing of these ultimatums. In each case the ultimatums were, however, faxed to the trade union at or around the same time as they were issued to the group of striking workers.

51. The final ultimatum was not complied with by the striking workers. At approximately 12h00 on 18 August 2003 they were dismissed. A notice of termination was distributed to all striking workers. It read as follows:

"Further to the first Ultimatum (of 18 August 2003), that you should resume work at 10h30 and the final ultimatum (of 18 August 2003), that you should resume duty at 11h30, you have failed to comply with such Ultimatums.

The Ultimatums were issued to yourselves and faxed through to your Union with no positive results.

The company has no option but to terminate your services with immediate effect.

*Employees who feel that they were intimidated or harassed to participate in the strike may request an investigation in the form of a disciplinary hearing on or before end of business at **16h00 on 18 August 2003.**"*

52. Also during the course of 18 August 2003, and apparently in response to the first ultimatum which had been received by the Tshwane local office of the trade union, Tsoga addressed a fax to the company. In it he expressed the view that the strike was protected and that workers were legitimately entitled to make a demand for a 13th cheque in the course of the strike. The letter communicated in strong terms that the employer's action and decision to dismiss workers while they were participating in protected industrial action would be contrary to the spirit of the LRA and would be viewed as an attack on the union and its members as well as the labour movement in general and would "not be left unchallenged". The letter continued:

"We must indicate to your good selves that dismissal is not a solution to this dispute, in fact will only help to harden each other's attitude. The only way to deal with this dispute to the satisfaction of both parties is to sit around the table and talk to the issues in dispute and the Union is prepared and ready for such.

Should you wish to enter into negotiations on the above you are more than welcome to write to the writer in this regard."

53. Modimoeng addressed a letter to the Respondent from the trade union's regional office the following day, 19th August 2003. Its material terms read as follows:

"Your ultimatum refers 18 August 2003.

We find your intention in dismissing our members to be unfair and unjust as far as section 64(4) is concerned.

You are urged to refrain from these threats and allow a meeting to deal with what the present legal strike is all about. We remain committed in resolving the present organisational dispute as per the issued CCMA certificate.

NB: As far as we know, the strike remains legal.

Where the 13th cheque came in. At the CCMA on the 30th July 2003 you requested postponement and requested the union to send substantive issues so that you address all problems that you fail to resolve. Before the organisational rights came into surface at that time we were to receive the certificate on the deadlock reached on organisational rights. You are the one who requested that substantive issues are addressed.

Then we went back to the plant and those substantive issues were negotiated with yourself and a deadlock was reached then the whole organisational right issues were reviewed by ourselves before the CCMA of the 7th August 2003 same with substantive issues you then rejected the inclusion of substantive issue. It is you who brought in the 13th cheque issue by demanding substantive issues.

Now since you have failed to resolve the organisational issues dispute workers thought

you will be more than prepared to settle both issues around the entire two disputes." (sic)

54. I should mention that Modimoeng did not give evidence in the proceedings, having passed away at some time during the intervening five years.

55. The Respondent did not give a hearing of any kind other than through the ultimatums. No worker in receipt of the notice of termination of employment took up the invitation in that notice to request a disciplinary hearing by close of business at 16h00 on that day.

Applicable legal principles

56. The Constitutional Court has described the central importance of the constitutional right to strike in the South African industrial relations environment.[1]

57. The right to strike is given effect and regulated in Chapter IV of the Labour Relations Act, 1995. Section 64 of the LRA provides that every employee has the right to strike if the requirements of that section are met. Section 65 of the LRA imposes certain limitations on the right to strike. Section 67 of the LRA provides that an employer may not dismiss an employee for participating in a protected strike. Axiomatically, a dismissal is automatically unfair if the reason for the dismissal is that the employee participated in a strike that complies with the provisions of Chapter IV.[2]

58. An important procedural requirement that must be complied with if a strike is to enjoy the protection conferred by Chapter IV of the LRA is that the issue in dispute must have been referred to a council or the CCMA, and either a certificate must have been issued stating that the dispute remains unresolved, or a period of thirty days must have elapsed since the referral was made to the CCMA.[3]

59. In determining whether or not an issue in dispute has been referred in compliance with these provisions, it is the duty of a court to ascertain the true nature of the dispute between the parties. In doing so, the court must look at the substance of the dispute

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[1] National Union of Metal Workers of SA v Bader BOP (Pty) Ltd (2003) 24 ILJ 305 (CC) at paragraph [13]; See also the dicta of the Labour Appeal Court in Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2) [1997] 18 ILJ 671 (LAC) at 674D – I; South African National Security Employers' Association v TGWU & Others (1) [1998] 4 BLLR 364 (LAC) at [21]

[2] Section 187(1)(a) of the Act.

[3] Section 64(1)(a) of the LRA

and not merely the form in which it is presented.[4] The label given to a dispute by a party is not necessarily conclusive.[5]

60. The true nature of the dispute may be discerned from the history of the dispute, as reflected in the communications between the parties themselves and between the parties and the CCMA, before and after referral of the dispute. Relevant documents for this purpose may include the referral form, the certificate of outcome, any relevant correspondence, negotiations between the parties, and affidavits filed in court proceedings in which the issue must be determined.[6]

61. Although as a general proposition it may be said that the issue in dispute over which a strike may be called must be the issue in dispute that was referred to conciliation, this is not a rule "to be applied in a literal sense".[7] This would unduly restrict the process of collective bargaining.[8] Parties may readily modify or develop their demands in the course of a collective bargaining dispute, whether during or after the conciliation process.[9] But this does not mean that a trade union may call a strike ostensibly in support of one demand when the true demand is one over which no strike is permissible. One of the considerations which the court will take into account is whether the nominal issue in dispute is the true dispute.[10]

62. As far as procedure is concerned, the giving of ultimatums to striking workers does not by itself satisfy the requirement that workers or their representatives must be heard in relation to their dismissal.[11] The form which a hearing must take in the context of an unprotected strike will depend on the circumstances of each case. It need not take the form of a formal hearing.[12]

63. Ordinarily fairness requires that a hearing be given before ultimatums are issued. This requirement may be satisfied by an employer engaging with the relevant trade union to

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[4] National Union of Metal Workers of SA v Bader BOP (Pty) Ltd at para [52] (the judgment of Ngcobo J); Coin Security Group (Pty) Ltd v Adam [2000] 21 ILJ 924 (LAC) at para [16]; Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union (1) [1998] 19 ILJ 260 (LAC) at 269G - H
[5] National Union of Metal Workers of SA & Others v Bader BOP (Pty) Ltd at para [52]; Coin Security at para [16]
[6] NUMSA v Bader BOP at [52]; Fidelity Guards Holdings (Pty) Ltd at 265B – E and 269H – I; SATAWU v Coin Reaction [2005] 26 ILJ 1507 (LC);
[7] City of Johannesburg Metropolitan Municipality v SAMWU [2009] 5 BLLR 431 (LC) at 435G
[8] City of Johannesburg Metropolitan Municipality at 435H
[9] NUMSA v Bader BOP at [52]; NTE Ltd v Ngubane [1992] 13 ILJ 910 (LAC)
[10] See South African National Security Employers' Association v TGWU (1) [1998] 4 BLLR 364 (LAC) at [28]
[11] Modise v Steve's Spar Blackheath [2000] 21 ILJ 519 (LAC) at para [73]; Karras t/a Floraline v SA Scooter & Transport Allied Workers' Union [2000] 21 ILJ 2612 (LAC)
[12] Avril Elizabeth Home for the Mentally Handicapped v CCMA (2006) 27 ILJ 1644 (LC); NUM v Billard Contractors CC [2006] 27 ILJ 1686 (LC) at para [53]

discuss the course of action that the employer intends to adopt prior to the issuing of an ultimatum.[13] In addition, fairness may require that a further hearing be given (whether before or after workers have been dismissed) in the form of giving workers or the trade union an opportunity to make representations on the question whether or not, as a matter of fact, workers complied with or attempted to comply with an ultimatum to return to work.[14]

Analysis

64. The course of action which the employer chose to adopt in dismissing the striking workers was premised on the views, first, that the workers were precluded from pressing a demand for a 13th cheque in the course of the strike; and second, that if they did, the strike which had been protected until that point was from that point onwards unprotected.

65. Neither of these views was correct in the circumstances. The strike for which the employees were dismissed was in fact a protected strike. I find this for the reasons that follow.

66. First, the evidence does not support the Respondent's contention that the workers had abandoned their organisational rights demands. This was central to the Respondent's contention that the protected strike became unprotected once the shop stewards communicated the demand for a 13th cheque at the 12h00 meeting on the first day of the strike. In my view, the Respondent could not reasonably have reached that conclusion on the strength merely of what was communicated by Mahlangu at that meeting. The Respondent did not communicate to the trade union at the time that it understood the workers to have abandoned the organisational rights demands. Nor did it record this in the ultimatums, where it chose to set out its specific contention as to why the strike was unprotected. There, it recorded only that "*from negotiations with the shop stewards it is clear that you attempted to address substantive issues (ie. 13th cheque) with your industrial action.*"

67. On the contrary the Respondent's attitude at the time, as reflected in its communication to workers prior to commencement of the strike on 11 August 2003 and in the ultimatums, appears to have been that workers were prohibited from pressing a demand for a 13th cheque in the course of the strike and that if they did so this rendered the strike

[13] As required by the code of good practice, Schedule 8 to the LRA, item 6(2)
[14] NUM v Billard Contractors at [48] to [51]

unprotected.

68. It is also clear from the letters from both trade union representatives, Tsoga and Modimoeng, dated 18 and 19 August 2003, that as far as the trade union was concerned the organisational rights demands had not been abandoned and that, in the view of the trade union officials, workers were entitled to press a demand for a 13th cheque in the course of their strike as well. There is no indication in either of these letters that the organisational rights demands had been abandoned.

69. In those circumstances, even if the Respondent were correct that the demand for a 13th cheque could not permissibly be pressed in the course of the strike over organisational rights, the strike itself was not rendered unprotected merely by reason of the workers articulating that demand.

70. Second, and in any event, the workers were in my view entitled to press a demand for a 13th cheque in the course of the strike in the present circumstances. There is no basis in the Labour Relations Act for adopting the restrictive approach to the issues in dispute which Pienaar and the employer adopted in the context of the present strike, as articulated in the employer's notice of 11 August 2003. Critical to the dispute resolution structure of the Labour Relations Act is the encouragement of the resolution of disputes by agreement. This requires open dialogue.

71. It would be completely unrealistic, in the context of a strike, to insist that in any engagement that is aimed at resolving the strike the parties are limited to pressing only those demands that have specifically been formulated in the run-up to the strike. The parties are entitled to adopt a much broader problem solving approach to resolving a collective bargaining dispute. This may include introducing proposals or issues that have not even been thought of, let alone presented at the bargaining table, if this might lead to breaking the deadlock that exists.[15]

72. This is, in my view, precisely what the workers and the shop stewards attempted to do in the present matter. The employer was wrong to characterise the communication of a demand for a 13th cheque in the course of this strike as impermissible and rendering the protected strike unprotected. This of course does not mean that a trade union may seek to use a protected strike as leverage to achieve other objectives in respect of which no

[15] See the comments in NUMSA v Bader Bop at para [52]

strike action could be taken.[16] On the facts, this is not such a case.

73. In the present matter, the demand for a 13th cheque had in fact been the subject of negotiations between the parties already. It appeared on Pienaar's document prepared in the run up to conciliation together with the organisational rights issues. The trade union did not run its case at the trial on the basis that the so-called "substantive issues", over which formal deadlock had not yet been reached when conciliation commenced on 30 July 2003, had became part of the subject matter of the dispute because of the "consolidated" approach to the issues adopted by the conciliating commissioner and the parties between 30 July 2003 and 7 August 2003. It seems to me that the trade union may justifiably have contended[17] that the "issues in dispute" in the strike included the "substantive issues" (and the demand for a 13th cheque) because by the conclusion of the conciliation process the parties had in fact reached deadlock not only on the organisational rights issues but also on those "substantive issues".

74. On the other hand, it appears from the certificate itself that the conciliator regarded the issue in dispute in the conciliation to have been limited to the organisational rights issues, the strike notice referred only to organisational rights issues, and the trade union in fact referred a separate dispute to the CCMA in relation to the "substantive issues" after the strike had commenced. In any event, since the trade union did not advance this contention in the proceedings, I need not deal with it further here.

75. For the reasons set out above, I conclude that the strike was protected. It follows that the dismissal of all of the individual members of the trade union on the grounds of their participation in the strike was automatically unfair.

76. Even if I were wrong in reaching this conclusion, there is little doubt in my view that the dismissals were in any event unfair both because there was no fair reason to dismiss and because no fair procedure was followed. The employer could not in my view fairly dismiss in circumstances where the trade union and the workers themselves reasonably believed the strike to have been protected. For the employer to embark upon the course of action that it did in these circumstances, without seriously engaging with the trade union as to the protected or unprotected nature of the strike, without approaching this Court on an urgent basis to determine the protected or unprotected nature of the strike, and where the employer had accepted that the strike was at its inception a protected

[16] As was found to be the case in Ceramic Industries Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2) [1997] 18 ILJ 671 (LAC)
[17] On the approach in Fidelity Guards v PTWU supra at 265B-F

strike was, in industrial relations terms, folly of the highest order[18].

77. Van der Walt made it clear that she had relied on the advice of Pienaar throughout this period, though she endorsed the advice he had given and the actions he had recommended. The Respondent must take responsibility for those actions.

78. As far as procedure is concerned, the failure of the company to engage the trade union prior to issuing the ultimatums, the extremely and unreasonably short period given to workers to reflect on the ultimatums, and the failure of the company to provide a realistic opportunity to hear the trade union or the workers either prior to or following the termination undoubtedly rendered the dismissals procedurally unfair as well.

79. In the circumstances, the dismissal of the second to thirty ninth Applicants was automatically unfair. I must then deal with the question of the appropriate relief.

Relief

80. The trade union seeks retrospective reinstatement of the dismissed employees. This is despite the fact that most of the dismissed employees, as is apparent from affidavits submitted in the proceedings, have subsequently secured alternative employment, in many instances on terms more favourable than those on which they were employed by the Respondent.

81. With regard to the delay in prosecuting the proceedings, I indicated to counsel for the trade union that I found it inexplicable that a trade union of the stature of the First Applicant could take more than five years to successfully bring to trial a case of this nature. I called upon the parties at the conclusion of the matter to set out an agreed chronology of events in relation to the conduct of the matter. This was presented in the course of argument by Mr Sibuyi, who appeared for the Applicants, and Mr Venter, who appeared for the Respondent.

82. Although the proceedings were instituted in December 2003, four months after the dismissals, and an application for default judgment brought in April 2004, there is no apparent explanation as to why the default judgment application should first have been set down only a year later, in March 2005. The default judgment application did not proceed after the Respondent belatedly filed papers. The Respondent was permitted to

[18] phrase borrowed from the Labour Appeal Court in National Union of Metalworkers of SA & Others v The Benicon Group (1997) 18 ILJ 123 (LAC) at 133C

oppose the proceedings.

83. Later in 2005, following a proposal by the Respondent's then attorneys, it was agreed that the matter would be dealt with by way of a stated case and a stated case was prepared and filed in February 2006. The stated case was enrolled for hearing only a year after that, in February 2007. Shortly before the stated case was heard, the Respondent's then attorneys withdrew and the matter did not proceed. Following a further pre-trial conference, the parties abandoned the stated case and the matter was then enrolled eighteen months later, in August 2008. For various reasons for which it appears the Respondent was primarily responsible, the trial was then postponed until it came before me in March 2009.

84. Having regard to the delay in bringing this matter to trial, and the fact that most of the dismissed workers have since secured alternative employment on more favourable terms, I do not consider this to be a matter in which reinstatement is the appropriate remedy. However, Mr Sibuyi made it clear that the Applicants were seeking the remedy of reinstatement, and this was stated, too, by the workers in the affidavits filed in the proceedings. In those circumstances it seems to me that I am bound by the provisions of section 193(2) of the LRA to make an order of reinstatement or re-employment. The employer led no evidence that satisfied the provisions of section 193(2)(b) or (c).

85. In view of the circumstances of the individual workers, in particular the fact that most have in the interim secured alternative employment on favourable terms, I am left with the uncomfortable feeling that the true purpose of the trade union in seeking reinstatement as a remedy is to attempt to secure greater financial relief by way of a retrospective reinstatement order than they may feel confident of achieving by way of an order for compensation. This is not in my view the purpose behind the provisions of section 193(2) of the LRA. In light of this concern I intend to make an order that will cater for the interests of those workers who genuinely want their jobs back, but that provides, in the alternative, compensation for those who do not.

86. The Respondent contended, in respect of eight of the individual employees, that they were at the time of their dismissal employed in terms of fixed term contracts which were due to expire some three months after the dismissals. The position is, however, more complicated than that. In the case of at least three of these, the trade union disputed that any valid fixed period contract existed, and contended that these employees should be treated as having been employed on a permanent basis. In relation to all of the

employees in this class it cannot reasonably be stated with any certainty what their prospects of employment would have been beyond November 2003. In addition it was apparent from the evidence that the status of fixed term contract employees was the subject matter of ongoing negotiation between the parties at the time of the dismissals. Nevertheless, the different circumstances of these employees do in my view warrant different relief.

87. As to what amount of compensation would be just and equitable, it should be clear from what I have stated earlier that from an industrial relations perspective the employer's conduct was reprehensible and the dismissal was grossly unfair. In the circumstances, I consider it to be just and equitable to grant the Applicants the maximum compensation that I may award in terms of the provisions of the LRA, save in the case of those Applicants who were at the time employed on fixed term contracts of employment. In my view it would be just and equitable to award employees in that class compensation in an amount equal to twelve months' remuneration.

88. I was provided with a schedule of the individual Applicants and their remuneration at the time of the termination of their employment. I was informed that the information in the schedule had been agreed between the parties insofar as it reflected the amounts of remuneration of the various employees at the time of dismissal. It is my intention that those should be the rates of remuneration that should be applied in the implementation of this order.

89. Insofar as Applicant 23 is concerned, the compensation will be payable to his executor. Insofar as Applicant 29 is concerned, when the trial concluded the parties had still not agreed on whether this employee was indeed an employee at the time and was dismissed at the time. The parties expected to reach agreement in this regard. Should the parties remain in dispute on this issue either party may approach this Court on notice to the other to lead any necessary evidence, limited to the questions whether the 29th Applicant was employed by the Respondent as at 11 August 2003, whether he was dismissed by the Respondent on 18 August 2003, and as to the rate of his remuneration at that date.

Order

I make the following order:

1. The Respondent is ordered to reinstate the 2nd to 39th Applicants, with the exception of Applicant 23, within 20 court days of the date of this order. The reinstatement is, in the case of Applicants 7, 8, 18, 24, 25, 26, 34 and 38, to be effective from 1 June 2008, and in the case of the remaining Applicants, to be effective from 1 June 2007. The reinstatement is subject to the provisions of paragraph 2 of this order.

2. All Applicants who wish to be reinstated in terms of paragraph 1 of this order shall give notice of this to the Respondent or its attorneys of record, in writing, within 20 court days of the date of this order, and in that notice shall tender their services. The amount of back pay due to Applicants who tender their services must be paid within 10 court days after they recommence employment in terms of the order of re-instatement.

3. All Applicants who do not give the notice contemplated in paragraph 2 of this order shall be entitled to be paid compensation by the Respondent. In the case of Applicants 7, 8, 18, 24, 25, 26, 34 and 38, that compensation will be an amount equal to twelve months' remuneration, and in the case of the remaining Applicants, an amount equal to twenty four months' remuneration, in each case calculated at the rate of remuneration applicable at the date of dismissal. The compensation must be paid within 10 court days of the expiry of the period referred to in paragraph 2.

4. The Respondent is ordered to pay to the heir or executor of Applicant 23 compensation in an amount equal to twenty four months' remuneration calculated at the rate of remuneration applicable at the date of dismissal.

5. The Respondent is ordered to pay the Applicants' costs in these proceedings

Date of hearing:	23, 24, 25 March and 3 April 2009
Date of judgment:	May 2009
For the Applicants:	Adv Sibuyi instructed by History Matukane Attorneys
For the Respondent:	Adv Venter, instructed by Bornman & Mostert Attorneys