Republic of South Africa

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case no: CA 5/2010

In the matter between:

AHLESA BLANKETS (PTY) LTD **Appellant**

versus

SOUTH AFRICAN CLOTHING AND

TEXTILES WORKERS UNION (SACTWU) **First Respondent**

L M DLAZA & 53 OTHERS **Second to further Respondents**

Heard; **15 November 2011**

Delivered: **02 March 2012**

CORAM: WAGLAY, DJP, MOLEMELA and ZONDI, AJJA

JUDGMENT

ZONDI, AJA

Introduction

[1] This is an appeal against the judgment and order of the Labour Court (Moshoana, AJ), delivered on 19 March 2010 in which it found that the

dismissal of the second to further respondents ("the employees") was substantively unfair and ordered the appellant to reinstate the employees with effect from 1 December 2009, without loss of benefits. There was no order as to costs.

[2] The appellant challenged the findings and orders of the Court *a quo* on various grounds.

Factual Background

[3] It is common cause that the appellant is a vertically integrated blanket manufacturing company. Its activities range from dyeing of fibres to the actual delivering of the final product.

[4] The employees were dismissed by the appellant in June 2008 for allegedly participating in an unprotected strike action. The second to further respondents are all members of the first respondent ("the Union"). The appellant recognises the Union as the sole collective bargaining agent in the workplace.

[5] The Union and the appellant are parties to, and bound by, the Main Collective Agreement for the Textile Industry ("the main agreement"). Clause 19 of the agreement dealing with the blankets sub-sector provides that an employer may introduce short-time by giving the Union and the affected employees four hours notice if such short-time is owing to slackness of trade. The Main Agreement does not impose an obligation on the appellant to consult over the introduction of short-time.

[6] The incorporation of this provision in the Main Agreement was necessitated by the parties' appreciation that the industry, in which the appellant operates, namely the blanket industry, is volatile and subject to fluctuations in demand, and also seasonal changes in demand.

[7] In the implementation of the short-time arrangement, the appellant adopted the view that its workforce in the dye house, spinning and weaving departments would be divided into two groups, so that one half of the workforce would work for two weeks while the other half would take two weeks leave, after which those working would again be replaced by those on

leave for two weeks. Such leave would be regarded as part of the employees' statutory leave (of 15 working days), and they would then not receive their full quota of leave over the festive season.

[8] On Thursday 12, and Friday 13 June 2008, the appellant with the involvement of the supervisory staff, communicated to the workforce in the dye house, spinning and weaving departments which employees would be required to work during the forthcoming two weeks, and which employees would be required to take paid leave.

[9] The appellant did not conduct any operations on Monday, 16 June 2008 as it was a public holiday. During the course of 17 June 2008, some employees in the dye house, spinning and weaving departments who were scheduled to work refused to attend to their work stations but gathered in the appellant's canteen. They were joined by some of the employees who had been (on the appellant's version) placed on leave.

[10] Those employees who took up the position in the canteen were advised by Mr Dan Buckle ("Buckle"), the appellant's human resources manager, that their work stoppage was unprocedural and illegal, and that they were required to return to work. The employees refused to return to work.

[11] In the course of the day, the appellant issued three ultimatums to the employees gathered in the canteen. In terms of the first one, the employees were informed that should they not return to work, disciplinary action would be taken against them, which could lead to their dismissal. In the second and third ultimatums the employees were told that if they failed to return to work by a stated time 'the company will have no option but to summarily dismiss them'.

[12] I may add that in the affected departments, the appellant conducts its operations on a three shift system, namely the morning shift (07h00 to15h00), the afternoon shift (15h00 to 23h00) and the night shift (23h00 to 07h00). When the employees scheduled for the afternoon shift (15h00 – 23h00) arrived at work, they also failed to take up their posts and joined the other workers in the appellant's canteen. At approximately 17h00 on 17 June 2008, all the employees who had gathered in the canteen left the appellant's

premises.

[13] The employees employed in the dye house, spinning and weaving departments, and who were rostered for the night shift (23h00 to 07h00), did not arrive for work during that evening. On the next day, 18 June 2008, the appellant sent a letter to the Union alleging that the strike action was unprotected and recording certain events in respect thereof. The Union was also advised that all employees who were scheduled for work in the dye house on 17 June 2008, and who failed to take up their posts on that day, were dismissed.

[14] On 19 June 2008, the day following the dismissal, the appellant, sought and obtained from the High Court an order interdicting the employees from engaging in acts of intimidation and other strike related misconduct.

[15] After their dismissal, all dismissed employees received a notice inviting them to attend an appeal hearing where they could appeal against their dismissals.

[16] In addition to, dismissing employees who were scheduled to work on 17 June 2008, the appellant also, on 25 June 2008, dismissed some of the employees employed in the raising and despatch departments, for allegedly having absconded although they were not required to work on 17 June2008.

[17] Also, the appellant dismissed employees who had been required to go on leave for the two-week period commencing on 16 June 2008 and who allegedly failed to return from leave and commence their duties.

[18] The appellant dismissed employees in the following categories:

18.1 Employees who participated in strike action whilst they were on duty on 17 June 2008.

18.2 Employees in departments other than the dye house who commenced with industrial action on 17 June 2008, and who absconded from duty in other departments even though they were not required to go on leave, and did not convey to the appellant any demand in connection with their work stoppage.

18.3 Employees who were placed on leave for the two week period from 16

June 2008 in terms of the appellant's arrangements set out above, but who failed to return from leave, and to provide any explanation for their absence.

The Evidence

[19] In relation to the facts which were in dispute between the parties, the appellant presented the evidence of Buckle who emphasised that the blanket industry is a very flexible or seasonal business; that the bulk of the appellant's orders are placed normally in September of the year; that its peak season starts in October and continues until May when there is a huge demand for blankets in preparation for winter season; and that, the period between May and September is extremely quiet. He stated that it is for this reason that the appellant introduced a system in terms of which the employees in some of its departments work short-time during the period when the business is slow. The short-time system is run on split shifts basis. The employees in the affected departments of the appellant were divided into groups such that they would work for two weeks and then be granted two weeks leave on a rotational basis.

[20] Buckle testified that when he realised that there was a need to implement the short time system he held discussions with the shop stewards a week before its implementation. He informed them that in terms of the envisaged short time system, the employees in the affected departments would work two weeks and get two weeks off on a rotational basis. But the employees would be paid while on two weeks' lay off. This arrangement did not go down well with some of the employees who felt that it would affect their December leave days and they did not want to find themselves in a situation where they would lose their December leave pay. The two week short-time arrangement was first introduced by the appellant in 2006. He pointed out that each time the appellant sought to implement the two week short-time arrangement it would inform the shop stewards and the parties would then meet to determine how it was to be implemented. He conceded during cross-examination that not all of the employees more especially those who came from the Eastern Cape were happy about the arrangement when it was introduced in 2006 because they wanted to take their three weeks leave in December so that they could spend

time with their families. Also, in the past alternative arrangements were made to accommodate those employees who were opposed to the arrangement by giving some of them extra time off. The employees wanted the appellant to shut down for three weeks in December for Christmas holidays. According to Buckle it is the appellant's policy only to shut down between Christmas and New Year.

[21] Buckle also discussed the proposed rescheduling arrangement with the Union organiser, Mr de Bruyn and he subsequently confirmed their discussion by a letter dated 3 June 2008. With regard to the short time, the letter says:

> 'The Spinning and Weaving Department will be going onto a 3 shift, 5 day week effective 06 June 2008.
>
> The Dye house Department will be going onto a 2 shift, 4 day week effective 06 June 2008...'

[22] On 17 June 2008 when the appellant implemented the rescheduled arrangement, the employees simply refused to carry out their duties. They gathered at the canteen on the appellant's premises. When Buckle arrived at work he held a meeting with the shop stewards in which he informed them that their action constituted an unprotected strike. Buckle also informed de Bruyn of the employees' industrial action and requested him to intervene. He told the shop stewards to tell the employees to return to work otherwise he could dismiss them. He prepared an ultimatum which he addressed to the employees calling upon them to return to work by 09h45 and advising them that the appellant reserved 'the right to take the necessary disciplinary *action"* leading to their dismissal if they failed to do so.

[23] After the ultimatum was given to the employees, Mr de Bruyn arrived on site. He was informed that the employees were engaged in an unprotected strike. De Bruyn undertook to discuss the matter with the employees and to return to Buckle. Buckle understood that de Bruyn informed the employees that they were engaged in an illegal strike and that they had to stop it, but the employees simply ignored de Bruyn.

[24] On the same day, a second ultimatum was sent to the employees in terms of which they were told that they would be summarily dismissed unless they

returned to work by 13h45. The employees ignored this ultimatum as well and continued with their industrial action.

[25] At about 15h00, Buckle sent a third ultimatum to the employees telling them to return to work by 16h00. It was now the start of the second shift. The employees who should have been on the morning shift did not do their shift. The afternoon shift employees also did not start their shift. They walked straight into the canteen and joined the morning shift employees. The whole day, on 17 June 2008, the shop stewards were moving between Buckle's office and the canteen in attempt to resolve the dispute.

[26] At about 17h00, the employees marched out of the appellant's property. There were some, however, who returned to work and started their shift. Buckle remained on the premises to ascertain if the night shift employees would report for work when the shift began at 23h00. Whereas six employees were scheduled for the night shift on that day only one employee reported for work. Buckle did not issue any ultimatum to the night shift employees as at that stage there were no striking employees on the premises. The shop stewards had also left the premises. He could not have faxed the ultimatum to the Union offices as he believed there would be no one there to receive it at that time of the night.

[27] On the morning of 18 June 2008, Buckle sent a letter to de Bruyn advising him of the dismissal of all employees identified on the list attached to the letter. In the letter, the appellant invited the Union to lodge an appeal by no later than 20 June 2008 should it intend to challenge the dismissal of the employees which it did on 18 June 2008 contending that the dismissal was unfair both substantively and procedurally.

[28] Buckle included the night shift employees in the dismissal notification although he had not served them with ultimatums. He believed that they were aware of the industrial action and that they had associated themselves with it by not coming to work.

[29] During cross-examination, he testified that the decision to dismiss the employees was taken late on 17 June 2008 and the following day the appellant wrote a letter to the Union confirming their dismissal. He denied the

suggestion that the strike was triggered by the appellant communicating confusing messages to the Union and the employees on how short time arrangement was to be implemented. He stated that during the strike the appellant lost out on production.

[30] During re-examination, Buckle explained, that he regarded the dismissal to have taken effect in the case of the morning and afternoon shifts, on expiry of their respective ultimatums. It is instructive to refer to the discussion which took place between the Court *a quo* and Buckle regarding how the appellant had behaved in the past in its application of the two week short-time policy. The following discussion took place at 122 line 12 to 124 line 8 of the record:

> 'Court: Mr Buckle there are a couple of issues that I want you to assist the court, just for the court's own understanding. Can you explain to me this two weeks issue what exactly was that, what was the proposal? --- What would happen is that for the workers not – from our side, the company's side first of all, that half the staff would take two weeks leave, right.
>
> Just take is slow. Yes? --- And then upon their return the other half would take their two weeks.
>
> Yes. --- Fully understanding the financial constraints that a lot of employees have it is then paid for that period.
>
> So the two weeks period would be paid leave? --- Correct. However some of the employees requested they only take one of the two weeks, and some of the employees requested the whole two weeks are unpaid.
>
> So those that wanted one week of the two weeks. --- They still go two weeks, one week would be paid and one week would be unpaid.
>
> Oh, I see. --- So the period remains the same, that is the timing of the payment.
>
> Yes, and other would take two weeks unpaid? --- Unpaid.
>
> With the request that that money they would have received gets paid out in December to them.
>
> Yes. --- And each employee then, we sent out a circular to all the employees, they then select or elect which of the options they would prefer.

Those three options? --- Correct, correct.

Yes, so that was how the company proposed the two weeks issue? --- That's how we've done it two years prior to that we did it the same way, 2006 and 2007 we did it that way as well.

2006/2007. --- And we did it the same way in 2009 as well.

Now you also testified that the – when this was introduced in 2006 there some were some employees who were complaining or had complained about it. --- They were not happy.

Oh, they were not happy? ---They were not happy.

Yes, what was the source of unhappiness? --- A lot – or not a lot, those employees, some of the employees stay far away, when we bought out Waverley in East London and transferred it to Atlantis the company then decided not to – to retain some of the staff, original staff from Waverley and transfer them to Atlantis, so they don't lose their jobs in East London, so the company had to sort of compassion about the situation there, and it's come of those employees that still return to East London once a year, they are the ones that tended to not be happy about it.'

[31] Mr de Bruyn, who gave evidence for the Union, confirmed that it is the practice in the industry for the company to implement short time on four hours' notice. He, however, pointed out that in practice the company would consult with the Union and the shop stewards to get its input on the issue before implementing it.

[32] De Bruyn stated that when he met with Buckle to discuss a matter unrelated to the short time arrangement, Buckle mentioned to him informally that the appellant intended to implement short-time arrangement which he estimated to be a day or two. De Bruyn asked Buckle to put it down in writing so that he could convey it to the employees. Buckle never did this. De Bruyn denied that the two week lay-off period featured in their discussion. He was surprised when on Saturday, 14 June 2008 he received a telephone call from the shop steward enquiring whether he was aware that the appellant was going to implement a two weeks lay-off arrangement. The shop steward informed him that the employees were not happy with the arrangement and had resolved to

hold a meeting on Sunday to discuss the short time arrangement which the appellant intended to implement. De Bruyn is aware that the employees did hold a meeting but to his knowledge they had taken a decision to report for work as normal for him to address them on the issue.

[33] On Tuesday, 17 June 2008 at about 09h00, he received a telephone call from Buckle advising him that the employees had gathered in the canteen and were on strike. Buckle asked him to come over immediately which he did. On his arrival at the appellant's premises, he held a meeting with the employees at the canteen to establish the cause of their unhappiness. The employees reported to him that they were not happy about the two week short-time arrangement. He thereafter met with Buckle. His impression was that the employees were willing to resume their duties if the appellant was prepared to reduce the short time from two weeks to two days. He conveyed the employees' proposal to Buckle but the latter was not prepared to back down; the Union and the appellant deadlocked on the issue. The employees remained in the canteen until 17h00 during which period the appellant sent them various ultimatums. At about 16h00 Buckle told him that the employees were dismissed. De Bruyn left the appellant's premises together with the employees at 17h00.

[34] On 18 June 2008, the appellant sent him a letter confirming the dismissal of the employees who were engaged in an unprotected strike and extending to the employees an opportunity to appeal which he did on their behalf. Their appeal was dismissed and the employees referred the matter to the Court *a quo* contending that their dismissal was unfair both substantively and procedurally.

Proceedings in the Court a quo

[35] The Court *a quo* held that the employees' dismissal was substantively and procedurally unfair and ordered their reinstatement. The bases for its conclusion were that the strike was of short duration and occurred in circumstances where the appellant's business was slack which therefore did not justify the appellant's conduct to take a harsh decision to dismiss the employees and secondly the fact that there was no violence during the strike. The Court *a quo* found that the penalty of dismissal was clearly

disproportionate to the employees' misconduct and for that reason it held that the dismissal in so far as it related to the morning and afternoon shift employees, was substantively unfair but procedurally fair, but in relation to the evening shift employees it was both substantively and procedurally unfair. It ordered their reinstatement as there was no evidence presented to suggest that continued employment relationship had been rendered intolerable.

[36] The Court *a quo's* findings are challenged on various grounds by the appellant. The gist of its attack is that it was wrong for the Court *a quo* to find that the employees' dismissal was substantively and procedurally unfair in circumstances where the employees' conduct forming basis of their dismissal amounted to clear challenge to the appellant's authority which in the instant matter was the employees' refusal to comply with the ultimatums and to return to work (at least in so far as the morning and afternoon shifts are concerned).

[37] The question whether the appellant was justified in dismissing the employees for their participation in an alleged unprotected strike must be determined by reference to the legal framework in which the appellant's and the employees' rights are located.

The Law

[38] Section 68 (5) of the Labour Relations Act ("the Act")[1] is a statutory provision affording a right to the employer to dismiss employees who participate in a strike that fails to comply with the provisions of the Act. In determining the fairness of the dismissal effected as a consequence of the employees' participation in an unprotected strike, the Act enjoins the judge who is called upon to determine the fairness of the dismissal to have regard to the Code of Good Practice: Dismissal in Schedule 8 ("the code").

[39] Item 6 (1) and (2) of the code deals with the substantive fairness of strike dismissals and provides as follows:

> '6. **Dismissal and industrial action.** – (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined

[1] 66 of 1995.

in the light of the facts of the case, including –

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

[40] It is also clear from the provisions of section 68 (5) that participation in a strike that does not comply with the provisions of Chapter IV (strike & lock-outs) constitutes a misconduct. In other words, a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the code but also item 7(b) which provides that any person who is determining whether dismissal for misconduct is unfair should, *inter alia*, consider whether dismissal was an appropriate sanction for the contravention. See *Hendor Steel Supplies (A Division of Argent Steel Group (Pty) Ltd formerly named Marschalk Beleggings (Pty) Ltd) v National Union of Mineworkers of SA and Others* (2009) 30 ILJ 2376 (LAC) at 2385C.

[41] The determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of a rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7.

Contentions of the Parties

[42] In argument before us, Mr Rautenbach, who appeared for the appellant, submitted that the Court *a quo* in the determination of the fairness of the dismissal only had regard to the factors in favour of the employees and paid no attention at all to those which were in the appellant's favour. He argued that the Court *a quo* failed to recognise that the employees' refusal to comply with the ultimatums and to return to work constituted a clear challenge to the employer's authority which, he argued, amounts to gross insubordination. He pointed out that there was a commercial rationale for the appellant to implement the two weeks leave policy. He emphasised that the employees' conduct undermined the appellant's authority to take business decision. He argued that the ultimatums were issued in clear and unambiguous terms and gave the employees sufficient time to reflect on their conduct.

[43] He added that had the Court *a quo* also considered the facts which were in favour of the appellant, it would have arrived at a different conclusion with regard to the fairness of the penalty. He argued that the Court ***a quo***'s failure to have regard to the facts in favour of the appellant in its determination constituted gross misdirection entitling this Court to interfere with its discretion.

[44] Mr Whyte**,** who appeared for the employees, submitted that the suggestion that the Court *a quo* improperly exercised its discretion in determining the fairness of the dismissal was incorrect. He argued that having regard to the short duration of the strike, absence of violence during the strike action, the slackness of the appellant's business at the relevant time and the fact that the employees had a clean disciplinary record, the penalty of dismissal was unfair and the Court *a quo* was correct in its finding. He pointed out that there was no evidence to suggest that as a consequence of the employees' conduct relating to their participation in the strike action the employment relationship between the parties had become intolerable and which would have rendered dismissal appropriate.

[45] I disagree with Mr Rautenbach's contention that the Court *a quo* failed to have regard to the facts in favour of the appellant in its determination of the fairness of dismissal and that such failure constituted gross misdirection justifying this

Court's interference. It is clear upon a proper analysis of the Court *a quo's* judgment that in determining the fairness of the dismissal it considered all the facts which items 6 (1) and 7 (b) (iv) of Schedule 8 enjoin the Court to take into account. The fact that the Court *a quo* failed to mention in its judgment facts, which Mr Rautenbach argues, were in the appellant's favour, does not mean that it overlooked them.

[46] In my view, it is not entirely correct to argue, that the employees should have been dismissed in the instant matter because their conduct – failure to comply with the ultimatums and return to work – constituted gross insubordination which resulted in the breakdown of employment relationship between the parties. It is correct that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent with it would entitle an innocent party to cancel the agreement (*Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A)). I think that it is important to contextualise the misconduct relied upon by Mr Rautenbach. It occurred in the context of the strike *albeit* an illegal one. By its very nature a strike action whether procedural or not whether lawful or not involves the partial or complete concerted refusal to work unless the demands made by the striking workers are addressed. In such circumstances to characterise the employees' failure to comply with employer's ultimatum to return to work as gross insubordination is to completely miss the point. The case of *Johannes v Polyoak Industries*[2] on which Mr *Rautenbach* relies is clearly distinguishable on the facts from the instant case. In the *Polyoak* case, the insubordination which underlined the employee's dismissal was her refusal to comply with an instruction to fill in a quality checklist until her grievance was resolved by the employer. The dismissed employee was not engaged in a strike action. It was simply a refusal to obey employer's instruction.

[47] In my view, the Court *a quo's* findings that the employees' dismissal was unfair, by reason of the short duration of the strike, absence of violence and slackness of the appellant's trade, were correct and did not constitute gross misdirection. In the circumstances, I would dismiss the appeal.

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[2] [1998] 1 BLLR 18 (LAC).

[48] As far as cost is concerned, Mr Whyte submitted that he would not ask for cost in the present matter in light of the parties' ongoing relationship. In the circumstances, I would be disinclined to order the losing party to pay the costs of the successful party but would instead order that each party pay its own costs.

The Order

[49] In the result, the appeal is dismissed with no order as to costs.

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ZONDI AJA

I agree

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WAGLAY DJP

I agree

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MOLEMELA AJA

APPEARANCES:

FOR THE APPELLANT	Adv. N F Rautenbach
	Instructed by MZ Barday & Associates
FOR THE RESPONDENTS	Mr J Whyte of Cheadle Thompson & Haysom Inc.