REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 85/2014

In the matter between:

NUM First applicant

Sipho SIGCAU & 13 others Second and further applicants

and

POWER CONSTRUCTION (PTY) LTD Respondent

Heard: 9-11 September 2015; 30 November – 1 December 2015; 31 March 2016

Delivered: 27 July 2016

Summary: Dismissal for participation in unprotected strike.

JUDGMENT

STEENKAMP J

Introduction

[1] Power Construction dismissed 33 workers (the second and further applicants) after they had participated in an unprotected strike. They are all members of the National Union of Mineworkers (NUM). NUM and the other applicants allege that the dismissals were unfair.

The applicants' case

[2] It is common cause that the workers participated in an unprotected strike on Friday 16 August; Monday 19 August; and Tuesday, 20 August 2013.

[3] The union argues that the nature and extent of the strike did not warrant the dismissal of the employees and that they were in any event dismissed without a disciplinary hearing.

[4] In determining whether the dismissals were fair, the court was called upon to consider the following factors:

4.1 The interpretation of the sectoral determination regulating work and pay for days affected by so-called 'inclement weather'.

4.2 The question whether the weather was in fact 'inclement' on Friday, 16 August 2013.

4.3 The events of 14 to 20 August 2013.

4.4 The substantive fairness of the dismissals, including:

4.4.1 the seriousness and reasons for non-compliance with the LRA;

4.4.2 the duration of the strike;

4.4.3 the opportunity given to the employees to reflect on the actions and to take advice from their union representatives.;

4.4.4 the harm caused by the strike;

4.4.5 the legitimacy of the strikers' demand; and

4.4.6 the conduct of the strikers.

4.5 The procedural fairness of the dismissals, and specifically the absence of a disciplinary hearing.

The evidence

[5] The trial took place over a number of days during September, November and December 2015. After the evidence was heard, the matter was postponed for argument on 31 March 2016.

[6] As set out above, it is common cause that the workers participated in an unprotected strike over a period of three days. Much of the evidence led by the parties concerned their demands and the question whether or not they were entitled to refuse working because of inclement weather. That, in turn, raised factual issues as well as the interpretation of the relevant sectoral determination.

[7] The employer called the following witnesses:

7.1 Morkel Stofberg (Organisational Development Executive);

7.2 David Jacobs (site manager);

7.3 Brian Cupido (human resources practitioner);

7.4 James Barnes (senior site foreman);

7.5 Andrea Jacobs (site supervisor);

7.6 Riaan Smit (senior forecaster and head of the forecasting unit at the Western Cape office of the South African Weather Service. His expert evidence was submitted in writing by agreement between the parties).

[8] The union called the following witnesses:

8.1 Russell Desemela (applicant, builder, dismissed on 21 August 2013);

8.2 Eugenia Peter (NUM organiser).

Factual background

[9] Power Construction was involved in a building project on the site at Pelican Park in Grassy Park.

[10] On Wednesday, 14 August 2013, the company informed the employees that they did not have to work on Thursday due to expected bad weather. They asked if they could also take Friday 16 August off as rain was

predicted for the day as well. The company refused and instructed the employees to report for duty on Friday 16 August; and told them that anyone who did not would be disciplined.

[11] As agreed, the employees did not go to work on Thursday 15 August. They did report for work at about 07:15 on Friday 16 August. There is a dispute about the state of the weather on that day.

[12] I think it is fair to say that the union's witnesses gilded the lily somewhat in describing the weather conditions on that day. In their statement of case, the applicants say that it started raining shortly after they arrived at work at 07:15 and that there had to "skuil", i.e. seek shelter. They did not return to work as instructed because by 12:00 "it was still raining" and they insisted that they would not work in the rain. Desemela testified that it was raining heavily when they arrived at work and that it was cold. He conceded, though, that by 11:00 it was "stopping and raining" and that there was no wind although it was still cold.

[13] This version must be contrasted with the agreed expert evidence of Smit, the senior forecaster and head of the forecasting unit at the Western Cape office of the South African Weather Service. He recorded that:

13.1 rainfall of less than 2,5 mm per hour is considered "light";

13.2 the amount of rainfall during the period 07:00 to 16:00 on Friday 16 August 2013 was insignificant; and

13.3 the rainfall recorded for the period 07:00 to 08:00 on Wednesday 21 August 2013 was 10 mm, which constituted "moderate to heavy rain".

[14] The company's witnesses agreed that, at the time the employees were to commence the duties on Friday 16 August, there was a light and intermittent drizzle. Although they did not agree that it was necessary for the employees to "skuil", it appears to be common cause that the employees did in fact do so. It is also common cause that the employees had been issued with rain suits. The union contended that the rain suits were of poor quality; the company's witnesses countered that they merely had to hand the rain suit in to receive a new one.

[15] At 08:00 Jacobs arrived on site and instructed the employees to start working. They refused, saying that they regarded the weather as being inclement.

[16] The applicant Desemela conceded that the "heavy" rainfall had ceased by 10:00. The company's witnesses say that it was no longer drizzling at that time. And the weather data for the nearest recording station shows that the drizzle had stopped by 10:00. It is common cause that the employees still refused to go to work.

[17] At 11:00 Jacobs[1], the site manager, and Barnes, the senior site foreman, addressed the striking employees and demanded that they return to work, failing which they would not be paid for the day. They refused.

[18] At some point Barnes arrived with the clock cards for the week. Desemela says that he saw that zero hours had been recorded for Friday 16 August. That is disputed by the company's witnesses. The applicants argue that, by mid-morning, the grievance had shifted from being forced to work in inclement weather to a demand that the company clarify why they would not be paid for the Friday.

[19] Cupido arrived at approximately 13:30. He told the employees for the third time to go to work. He reminded them that, should they have a grievance, they could refer it to the CCMA. He asked the striking workers to nominate two representatives who should meet in his office while the rest of them returned to work. They refused.

[20] At 1430 on Friday 16 August, Cupido and Barnes issued a first ultimatum[2] or communiqué to all striking employees and read it out to them. It was issued under the name of David Jacobs and read as follows:

> **"CORRESPONDENCE 01 : FIRST COMMUNIQUÉ TO ALL STRIKING EMPLOYEES**

[1] Where I refer to Jacobs, it is a reference to the evidence of David Jacobs, the site manager. Where I refer to the evidence of Ms Andrea Jacobs, the site supervisor, I shall refer to her as "Ms Jacobs" or "Andrea").

[2] There was some debate whether the first two communiques could be styled "ultimatums" or "written warnings". Not much turns on it. The wording is in the form of an ultimatum: return to work or face possible dismissal.

> This communiqué serves to advise you that your refusal/failure to work constitutes a breach of your contractual obligations and the provisions of the Labour Relations Act.
>
> You will not be paid for the time that you do not work. The policy of "**no work, no pay**" will strictly be applied.
>
> You are urged to communicate any grievances or this satisfaction by mandating your representatives and union to meet with management.
>
> All employees are instructed to return to work on **Monday, 19 August 2013 by 07h30.** Failure to return to work will result in the company taking appropriate action to protect its interests, including but not limited to disciplinary action being taken against you, which may lead to your dismissal."

[21] The employees still did not return to work. They went home on the company transport at about 15:00 when Jacobs decided to book the site off.

[22] On Monday, 19 August 2013 the employees did return to the site at 07:30 but they still refused to work.

[23] Cupido had contacted Edward Phibantu, a NUM shop steward who works at the company's head office. Phibantu arrived at the site with Cupido. Phibantu spoke to the employees and asked them what their grievances were. He then went into the site office and told Jacobs and Cupido that the employees wanted payment for Friday 16 August as the weather had been inclement. Cupido asked Phibantu to return to the employees and asked them to nominate four representatives to enter into discussions while the rest of the employees returned to work. They refused.

[24] Phibantu left at approximately 09:00. He called the NUM organiser at the Bellville regional office, Eugenia Peter, to assist. Cupido addressed the employees again and instructed them to return to work and to lodge a grievance in due course. They refused.

[25] At about 12:00 the company issued a second ultimatum. It read as follows:

> "**CORRESPONDENCE 02 : ULTIMATUM TO EMPLOYEES PARTICIPATING IN AN UNPROTECTED STRIKE**

Your refusal to work constitute a breach of the contractual obligations in terms of your:

1. contract of employment; and
2. the provisions of the Labour Relations Act.

Management requests that:

- You raise any complaint, concern or dissatisfaction through the grievance procedure with management.
- You return to work on or before Monday, 19 August 2013 at 13h00.
- You mandate your elected representatives from your place of work to meet with management and your union(s) to discuss the reasons/concern of these actions.

Failure to comply with the above request on or before 1300 on Monday, 19 August 2013 will result in management having no alternative but to take appropriate action to protect the interests of the company. These actions may include but are not limited to disciplinary action taken against you, which may result in you being dismissed.

Any employee who briefly returns to work, and thereafter continues with unprotected strike action, will be deemed not to have returned to work and this will not amount to substantive compliance with the original ultimatum and the continuation of strike action will expose employees on strike to dismissal.

The rule of "no work, no pay" will apply.

Management calls on you to mandate representatives and your union to meet with management to communicate the issues/reasons giving rise to your unprotected actions."

[26] Peter only arrived at the premises at about 15:00. She met with the company management and the striking employees. She could not resolve the issue and left.

[27] Jacobs issued a third ultimatum at about 15:00. It read:

"**CORRESPONDENCE 03: FINAL COMMUNIQUÉ"**

Management regrets that you ignored the instructions contained in the ultimatum issued on Monday, 19 August 2013 at 12H10 and its attempts to

resolve the reasons/concerns that gave rise to your unprotected industrial action.

This serves to inform you that unless you return to work by 07H30 on Tuesday, 20 August 2013, management will have no alternative but to dismiss you.

Management trusts that this will not be necessary and that you will reconsider your actions and return to work by 07H30 tomorrow."

[28] The striking workers still did not heed the ultimatum. They left the premises and returned on Tuesday, 20 August 2013 at about 07:30. This was day three of the unprotected strike.

[29] The workers again congregated outside the site gate at the site offices. Peter arrived at about 09:00 and spoke to Cupido. Cupido asked her to speak to the employees and ensure that they return to the site. She tried to persuade the employees to return to work while she attended to their grievance. Instead, the employees insisted on taking their tea break before returning to work. Cupido pointed out that there had not worked at all; that, in the circumstances they were not entitled to a tea break; and that they should return to work immediately. They refused. Peter left.

[30] Cupido issued notices of dismissal at about 11:30 on Tuesday, 20 August 2013. The notices read as follows:

"**CORRESPONDENCE 04: NOTICE OF DISMISSAL TO ALL STRIKING EMPLOYEES**

Management refers to all the attempts made to resolve your alleged grievance(s) which has given rise to your participation in unprotected strike action at Pelican Park (civils site) since Friday, 16 August 2013.

The company has attempted to deal with your representatives in respect of your demands. You have opted not to choose representatives and liaise in a group.

Despite attempts to settle the dispute, together with engaging with union representatives, you have failed to return to work.

You have also ignored numerous requests to resume working and have carried on with your unprotected strike actions even in the face of an ultimatum issued on Monday, 19 August 2013.

In the circumstances and after due consideration, Power Construction (Pty) Ltd hereby dismiss you and terminate your contract of employment with immediate effect.

Payment will be made on 30 August 2013.

You are requested to leave the premises by 0830, Tuesday, 20 August 2013."

[31] After the dismissal, a meeting was held between some of the employees; Phibantu; Cupido and Stofberg at the company's head office on Thursday, 22 August 2013.

[32] At the meeting, the company offered to reinstate the employees on their previous conditions of employment, subject to them signing an undertaking to return to work. In terms of the undertaking, drafted by management, they would acknowledge the following:

32.1 "Employees involved in unprotected industrial action agreed that they did not follow the correct procedure in resolving the dispute.

32.2 Employees acknowledge that this document will be kept on record and be regarded as a final warning in the event of related or similar misconduct taking place in future.

32.3 Employees agree to and acknowledge the company's grievance and disciplinary code. Furthermore, the employees acknowledge, as noted in the union's recognition agreement with the company, that the company has the right to apply management discretion in its daily running of the company.

32.4 Upon written acknowledgement of this document through signature, employees will be reinstated as they were employed prior to their dismissal.

32.5 During unprotected industrial action, some company employees experience intimidation from striking employees. The company reserves its right to apply disciplinary procedures against those employees were found guilty of intimidation."

[33] The employees refused to sign the undertaking. That resulted in the offer to reinstate them retrospectively being withdrawn.

[34] The union referred an unfair dismissal dispute to the CCMA. Conciliation failed and it was referred to this court for trial.

The sectoral determination

[35] Clause 1 of the Sectoral Determination 2 : Civil Engineering Sector South Africa[3] defined 'short time' as:

> "a temporary reduction in the number of ordinary hours of work owing to the vagaries of the weather… or any unforeseen contingencies and/or circumstances beyond the control of the employer… which directly affect the employer's ability to provide work."

[36] Under the heading "short time", the sectoral determination goes on to prescribe the remuneration when hours of work are reduced on account of short time "excluding short time owing to inclement weather".

[37] Clause 7(4)(b) then goes on to prescribe that, whenever the ordinary hours of work prescribed in clause 8 of the sectoral agreement are reduced "on account of inclement weather" the following arrangements will apply:

37.1 where no work has begun at all on site, and if an employee has reported for work, the employee will be paid for four hours, provided the employee has at the request of the employer, remained at the workplace during this period;

37.2 should work be stopped after the first four hours, the employee will be paid for the hours worked;

37.3 should work be stopped during the first four hours, the employee will be paid for four hours only;

37.4 where the employer has given his employees notice on the previous working day that no work will be available due to inclement weather, then no payment will be made provided that clause 7(4)(a)(i) is complied with.

[3] *Government Gazette* 22103 of 2 March 2011.

[38] Clause 7(4)(a)(i) provides, in short, that any deduction may not exceed one third of the employee's weekly wage.

[39] The only sensible construction to be placed on the determination, it seems to me, is that, where the employer gave the employees notice on the previous day that no work will be available due to inclement weather, they are not entitled to payment for the day. That is what happened in this case with regard to work on Thursday, 15 August 2013. But that is coupled with a proviso: the deduction may not exceed one third of the employees' weekly wages.

[40] Were the applicants entitled to be paid for Friday, 16 August 2013? That question must be determined by first deciding whether they had to stop work due to inclement weather on that day. It is common cause that they were instructed to go to work, therefore clause 7(4)(b)(iv) does not apply.

[41] The sectoral determination was amended on 25 August 2009.[4] In terms of the amendment, employers are required to pay their employees a full day's pay irrespective of the number of working hours lost as a consequence of inclement weather. The applicants say that this also applies where the employer had given notice the previous day that no work would be performed on site. The company disagrees.

[42] It is not essential for the determination of this case to decide what the proper interpretation of the amended sectoral determination is. What is relevant, is whether it could be said that the weather on Friday, 16 August 2013 was "inclement" to the extent that the employees reasonably refused to work. The question whether they were entitled to payment for the day (or for four hours) only becomes relevant if the prior question is answered in the affirmative.

Weather conditions on Friday 16 August

[43] The term 'inclement weather' is not defined. The Oxford English Dictionary defines it as "unpleasantly cold or wet". But what is unpleasant for one person may not be unpleasant for another. I would agree with Mr *Whyte,*

[4] *Government Gazette* 32525, 25 August 2009.

for the applicants, that one must have regard to a combination of rainfall, wind, and temperature, as well as the working conditions at a particular site.

[44] The expert evidence of Mr Smit -- taken together with that of the witnesses on site – is conclusive. It was drizzling when the workers arrived at work shortly after 07:00. By 10:00 the rain had either stopped (according to the company's witnesses and the expert evidence) or it was only raining "on and off" (according to Desemela). On Desemela's version, the wind had also died down, even though it had been windy earlier. According to the expert witness, the amount of rainfall on the day was insignificant. And the temperature arranged between 11 and 16°C. Desemela testified that the cold was not a factor, only the rain.

[45] The employees were issued with rain suits. It does not appear to me to be unreasonable to expect them to work in the conditions as described. The weather as described by the expert witness did not seem to me to be inclement to the extent that it was not possible to work outdoors.

[46] The reasons for striking underwent a metamorphosis during the course of the trial. It ranged from refusing to work because it was raining to a grievance regarding the interpretation of the sectoral determination. But on either basis, it was an unprotected strike; and the reasons for striking do not appear to me to be reasonable. As Cupido pointed out to the workers, if they disagreed with the interpretation of the sectoral determination they could have referred a dispute to the CCMA or to the relevant bargaining council. And should the workers have wished to renegotiate the terms governing inclement weather, that is something that must be done at national level by their trade union and the employers' organisations in accordance with the constitution of the Bargaining Council for the Civil Engineering Industry.

The meeting of Thursday 22 August

[47] It is common cause that, at the meeting of Thursday 22 August, the company offered to reinstate the employee's on the previous terms and conditions of employment, provided that they signed the undertaking set

out above. The applicants say that they refused to sign the undertaking because the company was not prepared to address their grievance relating to payment on the Friday; and that the purpose of the meeting was not to revisit the fairness of the dismissals. It was thus not intended to constitute an after-the-fact disciplinary hearing or appeal.

The legal principles

[48] The relevant legal principles have to a large extent been clarified by case law and codified in the LRA[5] and the Code of Good Practice: Dismissal.[6]

[49] Participation in an unprotected strike may constitute a fair reason for dismissal.[7] As the Constitutional Court pointed out in *NUPSAW v National Lotteries Board*:[8]

> "Employees have a constitutional right to strike. The [Labour Relations] Act regulates the manner in which that right can be exercised. There is no obligation on employees to use the regulated dispute-resolution procedures under the Act, but there are consequences if they do not. If they start by using these regulated procedures, but then abandon them and simply stop working, they are not committing a crime. They are, in that sense, still acting "lawfully". But that "lawfulness" does not afford them the benefits of a protected strike under the Act. By failing to adhere to the Act the strike becomes unprotected, and an employer will be in a position to take disciplinary steps against them for not coming to work."

[50] The substantive fairness of the dismissal must be determined in the light of the facts of the case, including:

50.1 the seriousness of the contravention of the LRA;

50.2 attempts made to comply with the LRA; and

50.3 whether or not the strike was in response to unjustified conduct by the employer.[9]

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[5] Labour Relations Act 66 of 1995.

[6] Schedule 8 to the LRA.

[7] LRA s 68(5).

[8] 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 *ILJ* 1885 (CC) para [69] [per Froneman J].

[51] Prior to dismissal the employer should, at the earliest opportunity, contact the trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms such a 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 the steps to the employees in question, the employer may dispense with them.[10]

[52] As the Labour Appeal Court pointed out in *Mzeku & Ors v Volkswagen SA (Pty) Ltd*:[11]

> "… Where employees are dismissed because they refuse to work, the substantive fairness of the dismissal means that the conduct for which the employees are dismissed is unacceptable (or is conduct which constitute a material breach of the employment contract) and for which dismissal is a fair sanction. Whether conduct for which the employees are dismissed it is unacceptable but the sanction of dismissal is, in all the circumstances, not a fair sanction, the dismissal cannot be said to be substantively fair. Obviously, where it is found that the conduct for which the employee has been dismissed is not unacceptable conduct or where it is found that the employee is not guilty of unacceptable conduct for which he was dismissed, the dismissal cannot be said to be substantively fair."

Evaluation / Analysis

[53] In the light of these legal principles, I will consider the substantive and procedural fairness of the dismissals.

Substantive fairness

[54] It is common cause that the applicants did not comply with the LRA. How serious was this contravention?

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[9] Item 6 of the Code of Good Practice: Dismissal.

[10] Item 6(2).

[11] [2001] 8 BLLR 857(LAC) para [15].

[55] Neither the individual employees nor the NUM made any attempt whatsoever to comply with the LRA. The employees simply downed tools and refused to work without referring any dispute to the CCMA, even when invited to do so by Cupido.

[56] The company reminded the striking workers at least three times, in writing, that they were breaching their contractual obligations and the provisions of the LRA. They were told in terms that failure to return to work would lead to disciplinary action which could include their dismissal. They paid no heed.

[57] The striking workers were not even willing to listen to the advice of their own union representatives. Phibantu did not give evidence, but Barnes's evidence that Phibantu advised the employees to return to work and that they refused, was unchallenged. Peter's evidence was startling. She had been an NUM organiser for five years. She advised the striking workers to go back to work but they refused. She acknowledged that Cupido advised her that the applicants should refer a dispute to the CCMA. Yet her members did not heed her advice. What is startling, is that she would not, at first, even acknowledge in cross-examination the common cause fact that the union's members were engaging in unprotected strike. She acknowledged that "they were sitting down because they were refusing to work until they got paid for Friday"; that they had not referred any dispute to the Bargaining Council or the CCMA; yet she refused to concede, at first, that this constituted an unprotected strike. This is what she had to say:

> "To me a strike is when people are damaging people's property, then holding sticks and stuff like that. That is why I do not agree with you. That is how I am explaining a strike."

[58] This statement is indicative of how the NUM (the first applicant) approached this matter. Because the strike was not violent, it deems dismissal to be too harsh a sanction. It is, to say the least, shocking that a trade union organiser with five years' experience would equate a strike to wilful damage to property.

[59] It cannot, in my view, be said that the strike was in response to unjustified conduct by the employer. The first reason for the strike – that it was raining and that it constituted inclement weather – is not borne out by the expert evidence relating to the weather on Friday 16 August. And the second reason – that they wanted management to deal with the grievance regarding the application of the sectoral determination – is an issue that they should have referred to the Bargaining Council, as Cupido advised them to do.

[60] Should the employees have wanted to renegotiate the terms of the sectoral determination, that had to be done at national level in terms of the constitution of the Bargaining Council for the Civil Engineering Industry. That is a collective agreement that binds the union and the company.

[61] The third reason profferred for the strike is that the company provoked the employees by refusing to pay them for Friday despite the fact that that reported for duty. But after they reported for duty, they refused to work. The company's witnesses were adamant that the weather conditions at the time did not prevent them from working. That is borne out by the expert evidence. They refused to work despite being instructed to do so. In those circumstances, they were not entitled to be paid and this was not a good reason for them to embark on unprotected strike action.

[62] Were the strikers given an opportunity to reflect on their actions? Most assuredly. They were given the first communique on Friday. They had the weekend to reflect and, if necessary, to contact their union representatives. They did not.

[63] On Monday, both union representatives – Phibantu and Peter – urged the striking workers to return to work. They did not do so. Peter tried again on Tuesday. Still they refused. The strike carried on for a third day. And when they were offered reinstatement, they spurned that offer as well. The conditions on which they were to be reinstated were hardly unreasonable. Instead they chose to remain unemployed.

[64] The company can be criticised on one aspect. Although Cupido contacted the shop steward, Phibantu, he did so belatedly; and there is no clear evidence that, on a balance of probabilities, it was Cupido rather than

Phibantu who contacted Peter, the NUM organiser. And the company did not send copies of the three ultimatums to NUM.

[65] This failure does not, in my view, detract from the substantive fairness of the dismissal. Even when Phibantu and Peter did try to intervene, it had no effect. And even when the dismissed employees were given the opportunity after the fact to reconsider and to return to work, they refused.

Procedural fairness

[66] There was no disciplinary hearing before the company dismissed the employees on Tuesday 20 August 2013.

[67] The Code of Good Practice[12] does not envisage a formal disciplinary hearing before employees participating in an unprotected strike may be dismissed. However, in *Modise & ors v Steve's Spar Blackheath*[13] a divided Labour Appeal Court held that, subject to certain exceptions, and procedural strikers must be given a hearing as well as an ultimatum prior to dismissal in order to give expression to the *audi alteram partem* rule. The hearing may be of a collective nature and may take place in the context of the discussion that the employer is required to have with the employees' trade union in terms of item 6 (2).

[68] The form that the hearing takes will depend on the circumstances. In some cases a formal hearing might be required whereas in other circumstances it will suffice to send a letter to the strikers or the union inviting them to make representations. The ultimate test is whether the strikers were given a fair hearing.

[69] The finding in *Steve's Spar* was upheld by the Labour Appeal Court in terms of the 1995 LRA in *Karras t/a Floraline v SASTAWU*[14]*, Mzeku v Volkswagen SA (Pty) Ltd*[15] and *Volkswagen SA (Pty) Ltd v Brand NO.*[16]

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[12] Schedule 8 to the LRA, Item 6(2).

[1313] [2000] 5 BLLR 496 (LAC), decided in terms of the 1956 LRA and summarized by Du Toit et al, *Labour Law through the Cases* (LexisNexis) at Sch 8-17 (issue 22). I repeat the authors' summary of this case and those that followed here.

[14] [2001] 1 BLLR 1 (LAC).

[15] [2001] 8 BLLR 857 (LAC).

[70] As the learned authors in *Labour Law through the Cases*[17] point out, the decision in *Mzeku* was confirmed by the Constitutional Court in *Xinwa v Volkswagen of South Africa (Pty) Ltd*[18] without, however, pronouncing on the scope of the *audi alteram partem* principle in the context of a strike. Given that several meetings had been held between the union, management and the strikers' representatives, at which the strikers had been warned that the strike was unprotected, and an agreement had been reached between the union and the company, the Constitutional Court held that "the applicants have no prospect of persuading this court that the dismissal was procedurally unfair".

[71] In this case, as in *Xinwa*, management repeatedly warned the striking workers that the strike was unprotected. It issued three ultimatums in which it warned the striking workers that they could be dismissed if they did not return to work. To union representatives tried to persuade the workers to return to work. They refused.

[72] It could still be argued, as the union did, that the very absence of a disciplinary hearing before the dismissal is in itself procedurally unfair. But on the facts of this case, and given the precedent of the Constitutional Court in *Xinwa*, I disagree. It is difficult to see how a formal disciplinary hearing could have made any difference before the striking workers were dismissed. They were made aware of the unprotected nature of the strike, not only by management, but also by their own union representatives. They were told at least three times that they ran the risk of dismissal, should they continue. Yet they persisted. They were given the opportunity to make representations through the union representatives and invited to appoint their own representatives. They refused. And although the company did not, on a balance of probabilities, contact the regional office of NUM – choosing to involve the shopsteward, Phibantu, instead – that fact, though open to censure, did not have any effect on the strikers'

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[16] [2001] 5 BLLR 558 (LC).

[17] Above at Sch 8-18 (issue 22).

[18] [2003] 5 BLLR 409 (CC); 2003 (4) 390 (CC) para [16].

actions. Phibantu did contact the regional organiser, Peter. She spoke to management and to the strikers. Her efforts came to nought.

[73] What is more, the company gave the striking workers yet another opportunity to make representations through both the elected representatives and the trade union representatives after the dismissal. They were offered reinstatement on conditions that were not unreasonable. In my view, that cured any procedural unfairness that may have arisen before the dismissal.

Conclusion

[74] I hold that the dismissal of the workers for participating in an unprotected strike was substantively and procedurally fair.

[75] With regard to costs, I take into account that the representatives of the NUM did try to persuade the striking workers to return to work. It would not be fair to saddle the union with a costs order. The individual workers have already lost income, albeit through their own actions. I do not think it would be fair to impose a costs order on them. And although I have held that any procedural unfairness brought about by the failure to have a disciplinary hearing before the dismissal was cured by the subsequent offer of reinstatement, the company should bear in mind that it is preferable, even in these circumstances, to have a disciplinary hearing before dismissal. For this reason also, I do not make a costs order.

Order

[76] I therefore order that:

76.1 The dismissal of the employees was fair.

76.2 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Jason Whyte of Cheadle Thompson & Haysom.
RESPONDENT:	Glen Cassells of Maserumule Inc.