Reportable

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JS 766/12

In the matter between:

PTAWU obo KHOZA, BONGANI & 1054 OTHERS — **Applicant**

and

NEW KLEINFONTEIN GOLDMINE (PTY) LTD — **Respondent**

Heard: 22, 23, 24 June and 19 October 2015

Delivered: 30 March 2016

Summary: (Dismissal for participation in strike action – unprotected strike – dismissal substantively and procedurally fair – compensation claim under s 68(1)(b) – not just and equitable in all the circumstances to award compensation)

JUDGMENT

LAGRANGE J

Introduction

[1] The approximately 200 individual applicants in this matter were dismissed on 11 June 2012 for participating in what the employer ('Gold1' or 'the mine') maintains was an unprotected strike which endured for two days on 4 and 5 June 2012. The applicants contended that the strike was a protected one in terms of section 64 (1) of the Labour Relations Act, 66 of 1995 (the LRA') and that consequently their dismissal for participating in it was automatically unfair. Alternatively, they claim that if it was not protected strike action but was prohibited in terms of section 65 (1) of the LRA, their dismissal was substantively and procedurally unfair. The mine has counterclaimed against the individual applicants and the union for just and equitable compensation attributable to the strike in terms of section 68 (1) (b) of the LRA.

[2] Before looking at the history of the matter in more detail as it emerged from the evidence and what the parties had agreed in the pre-trial processes, it should be mentioned that until November 2013, the Professional Transport and Allied Workers Union ('PTAWU') was acting on behalf of its members, but at that stage it abandoned any representative role and the attorneys of record it had appointed also withdrew, leaving the individual applicants to their own devices to see how they could take their matter further. It was only after considerable delay that a large group of applicants who were still actively pursuing their case were able to obtain alternative legal representation. When the union withdrew as a party to the dismissal claim, it purportedly withdrew as a respondent in the counterclaim. Obviously it was at liberty, leaving aside any obligations it might have had to the individual applicants as union members, to withdraw as an applicant party but that did not mean that it avoided the possibility of still being held liable for costs incurred up to the time it withdrew or the counterclaim for just and equitable compensation.

[3] Though ill served by their union, the applicants were ultimately able to get legal representation. At the trial, Mr SP Rule ('Rule), an Employee Development Manager, and Mr M Mahlatsi, an HR Superintendent,

testified for the company. Only Mr R Baloyi, the General Secretary of PTAWU ('R Baloyi' or 'the General Secretary'), testified for the applicants. Unfortunately his direct personal knowledge of many of the events related below was very limited. Although the parties agreed that no adverse inference could be drawn from the failure of Mr SH Baloyi ('H Baloyi'), another official of PTAWU, who happened to be a brother of the General Secretary, to testify the applicant's case was also not supported by even the evidence of a single participant in the strike, who might have been able to contradict some of the respondent's evidence. As a result much of the respondent's version of events was not materially disputed.

Factual Synopsis

Events preceding the strike

[4] Apart from a couple of areas of disagreement, events leading up to the strike are largely common cause, or the applicants did not lead any evidence to contradict the mine's version.

[5] In September 2009 the mine concluded a recognition agreement with the National Union of Mineworkers ('NUM'). In terms of that agreement the union was recognised in the bargaining unit for level 3- 8 employees, which include Patterson grades A and B in which it was sufficiently representative for the purpose of obtaining soul collective bargaining rights. In terms of the agreement, the threshold for bargaining rights was set at 50% plus 1 of the bargaining unit, and 30% for organisational rights such as stop orders and access. As is common in the mining industry there is a separate bargaining unit for employees in Patterson grades C and D.

[6] In April 2010 a three-year wage agreement was concluded between gold 1 and NUM and was extended to all employees in the bargaining unit in terms of section 23 (1) (d) of the LRA. Clause 4 of the agreement extended it to all underground process plant and surface workers in Patterson bands A and B. Clause 15 of the same agreement prohibited any demands being made by NUM or employees in respect of substantive

terms and conditions and bound them not to take any industrial action in support of any such demands for the duration of the agreement.

[7] PTAWU began recruiting members at the mine around midyear in 2011. It submitted lists of the members it claimed to management.

[8] On 13 October 2011, it referred a dispute regarding organisational rights to the CCMA. The dispute referral form identified the dispute as an organisational rights dispute and in summarising the facts of the dispute alleged that the union had met with the company which had agreed to verify membership but had yet to respond to the issue of section 12, 13 and 14 rights in the LRA. As an outcome it sought the deduction of stop orders from the union members and rights of access to the workplace for the union. An agreement was concluded at the conciliation of the dispute by the CCMA, which read:

> "Parties agreed as detailed below:
>
> 1. That PTAWU currently has 9, 8%.
>
> 2. PTAWU to submit further stop order authorisation by 14 November 2011.
>
> 3. The parties to meet on 21 November 2011 for purposes of conducting a verification of members exercise.
>
> 4. The employer agreed to grant organisational rights to PTAWU once it meets the threshold of 50 + 1% as per the collective agreement between NUM and Gold One mine."

Of course the last clause seriously misrepresented what the union needed to achieve to obtain stop orders and access rights. Nonetheless, although PTAWU got much closer to the 30% threshold by December 2011 when it submitted membership forms again, it did not break through the threshold by the end of that year.

[9] On 14 November 2011 pursuant to the verification exercise, PTAWU submitted 272 new membership application forms to the mine. Rule and Mahlatsi then proceeded to vet the forms.

[10] On 2 December 2011, Rule sent a letter to PTAWU in terms of which the mine claimed that of the 1462 employees in the A and B bands, NUM

membership stood at 971 members (66, 4% of the bargaining unit) and PTAWU's membership stood at 398 members (27, 2% of the bargaining unit). On the basis of these figures PTAWU was advised that it did not qualify for the organisational rights it was seeking because the threshold was 50% +1. In fact this threshold only applied to bargaining rights and the threshold for the organisational rights of access and stop orders in terms of the agreement with NUM was only 30%. Rule admitted that what had been conveyed to PTAWU was incorrect but claimed that at the time he did not realise the error, which the commissioner had made because he had been going through the agreement with the union when the settlement agreement was concluded and he referred to the 50% + 1 threshold. Nonetheless, it remains true that at that stage, PTAWU still fell short of that lower threshold.

[11] Receipt of the letter by PTAWU was acknowledged by H Baloyi in a letter dated 13 December 2011, in which a complaint was also raised that PTAWU members were being intimidated to resign from the union by Mahlatsi. On 9 January 2012, the same official proposed a meeting with the company referring to his previous letter and proposing to discuss an agenda dealing with section 12, 13, 14 and 21 of the LRA, all of which deal with the content of organisational rights other than bargaining rights and the procedure for obtaining them under that Act. Rule was slow to respond and only did so nearly 6 weeks later on 22 February 2012. In that letter Rule confirmed the mine's view that the verification of PTAWU's membership took place on the 21st and 30th of November the previous year, the company had set out the position in its letter of 2 December 2011 and accordingly, it regarded the issues as dealt with as per that letter.

[12] Just over a month later on 26 March 2012 PTAWU referred another dispute to the CCMA. In the dispute referral, it described the dispute as one of mutual interest. The summary of facts of the dispute being referred was expressed as:

> "Provident fund contribution, salary increments, representation of our members in terms of the LRA 66 of 1995 section 12, 13 and 14 and unfair promotion."

In the section of the referral form dealing with dispute procedures already followed, PTAWU stated that it had been refused a meeting by management. Lastly, the outcome of conciliation sought by PTAWU was the implementation of the Provident fund and compliance with sections 12,13 and 14 of the LRA which deal respectively with rights of access, stop order facilities and recognition of shop stewards, but not collective bargaining rights. The General Secretary also stated under re-examination that it was the refusal of the company to meet with PTAWU over organisational rights that triggered the referral of the second dispute to the CCMA.

[13] Rule claimed that the referral document was never properly served on the mine, and he only received the notice of set down from the CCMA. In the section of the form dealing with special features and additional information, PTAWU recorded "Organisational rights dispute was conciliated on 1 November 2011". The CCMA notice, in the typical cryptic style of such notices simply described the primary issue as "64(1), 134-matters of mutual interest." Rule testified that he saw the referral form for the first time at the conciliation proceedings. The certificate of outcome issued by the Commissioner on 17 April 2012 also described the dispute as relating to "64 (1) wages" and concerning "mutual interests". The Commissioner did not tick the box that would indicate the dispute also concerned "organisational rights". One of the areas of controversy concerns the issues canvassed at the conciliation meeting. Rule testified the demands raised by PTAWU at the meeting were: a R500 increase; the presence of a medical doctor at the mine; a Provident fund and fair labour practices. He claims that no demand was made for organisational rights at those proceedings. He was not challenged on this claim under cross-examination. However when R Baloyi) testified he claimed under cross-examination that Mr H Baloyi who had attended the conciliation told him that he had 'reported' the issue of organisational rights at the conciliation. This version was not corroborated by H Baloyi who did not testify.

[14] About a month later on 14 May 2012, H Pillay sent a letter to the company entitled "Wage Demand", which read:

"We hereby remind the company about the industrial action (case ref no GAJB8574/12) that will take place sooner. You will be advised on the date of the notice within five working days upon receiving of this letter.

Workers Demand

1. Minimum wage across the Board - R6,500-00.

2. Provident fund

3. Professional Doctors with in the Employer's Clinic/Medical Aid.

4. 36 days Sick Leave per annum

5. 1 month salary annual bonus/13th cheque

6. Sleeping allowance R1,500

7. Transport Allowance"

R Baloyi reluctantly agreed that the letter did contain the demands of workers, the intention had been that these demands would only follow the resolution of the organisational rights dispute, but he conceded that organisational rights demands were not mentioned in the letter. In the statement of claim the union had referred to this letter, without qualification, as setting out the worker's demands and this was confirmed in the pre-trial minute.

[15] A press report appeared in the New Age newspaper on 21 April 2012, which read:

"Strike looms at Modder

Gold One's Modder East looks to be sent by a strike after the Professional Transport and Allied workers union members resolved to down tools on 4th of June.

Speaking to the New Age yesterday union General Secretary Reckson Baloyi said workers would embark on a protected strike on 4 June after talks between the union and employers reached a deadlock.

'We will be going on a full-blown strike. No employee will be reporting for duty on the 4th', Baloyi said.

The union is challenging the dominance of the National Union of Mineworkers (NUM) at Modder East Mine. NUM's spokesperson Lesiba

> Seshoka said the union was not aware of the planned strike. He said the NUM was scheduled to meet later today.
>
> PTAWU members are demanding a basic salary of R 6,500 and a Provident fund for underground workers. Baloyi Said They Demanded That Gold One Contribute Towards the Provident Fund."

[16] The General Secretary admitted being interviewed by the newspaper but maintained that he had never said the strike would be in support of wage demands and suggested that this must have come from the employer. In his answering affidavit to the mine's compensation claim he had stated that "…the main purpose of the strike, which is not clear from the article, is that the respondent sought to be recognised by the applicant and granted organisational rights." Under cross-examination, he was very reluctant to concede that by referring to a main demand that implied that other demands were also tabled and the furthest he would go was to say that it was the union's intention to proceed with the wage demands once it had been granted organisational rights.

[17] The parties met again on 23 May 2012 to discuss the union's membership. The union presented a list of names of persons whom they alleged were members but without supporting documentation. H Baloyi represented the union at the meeting. According to Rule, he simply stamped and signed for receipt of the list but the annotation stating that he had received a total of 132 membership forms which appears on the attendance register submitted by the union was not there when he signed it.

[18] On 25 May, the mine responded to the union's letter of demands of 14 May 2012. In the letter, the mine warned that any industrial action contemplated in the union's letter would be unprotected because the employees were all bound by the wage agreement concluded with NUM in terms which was only due to end on 31 December 2012 and which contained a peace obligation that prevented strike action on matters of mutual interest, which included the issues referred to the CCMA by the union, for the duration of the agreement. The letter also warns the union that the mine might approach a court for relief if it proceeded with the strike. The General Secretary did not dispute that by 25 May 2012 the union had a copy of the wage agreement.

[19] The union issued a strike notice on 1 June advising that the strike would commence the following Monday, 4 June 2012 at 05H00. The strike notice signed by H Baloyi stated:

> "Re: NOTICE OF INDUSTRIAL ACTION-CASE NUMBER GAJB 8574 – 12
>
> we hereby giving the company 48 hours' notice of industrial action that our members and their supporters will embark on a protected strike starting on the 4 June 2012 at 05:00 AM, venue at Gold 1 maintenance gate.
>
> See attached certificate marked A
>
> Yours in the struggle of the brutally exploited.
>
> Yours faithfully"

[20] On the same day, the mine addressed another letter to the union reminding that the strike would be unprotected referring the union again in even more detail to the wage agreement with NUM and warning that it would approach the Labour Court for an interdict. On Sunday the day before the strike was due to commence, a bulk SMS message was sent to employees stating:

> "SMS from Modder East: PTAWU has confirmed that their members will strike tomorrow, 4 June 2012. Management reminds you such strike will be unprotected. Participants will not be paid and could be dismissed. NUM calls on their members not to support the strike and to report intimidation. To verify this SMS, speak to your staffing clerk. YOU are the 1 in Gold 1!"

[21] There was testimony by Rule that the mine had used this method of communication in the past to call for volunteers to work overtime and it worked. This evidence was not disputed.

The strike

[22] On Monday none of the category A and B employees reported for duty at the mine, although those working in the plant did report for work. Workers clocked in at the access points to the mine but not at their workstations. They were due to start work at either 06H00 or 08H00.

[23] According to Rule, 600 copies of an ultimatum were printed and ready for distribution at about 07H30. The ultimatum had been prepared previously in anticipation that the strike would proceed on Monday. The ultimatums

were given to Mahlatsi to distribute. Mahlatsi claims that he got the ultimatums at about 08H00 when he reported for work and distributed them to the group of workers who had gathered within the premises. He used a loudhailer to read the ultimatum in English and then explained it in Sesotho, southern Sotho and Isizulu. He also claims to have provided the copies and placed some on the notice boards. The ultimatum read:

> "TO ALL EMPLOYEES
>
> FROM MODDER EAST MANAGEMENT
>
> MONDAY FOUR JUNE 2012-ULTIMATUM TO RETURN TO WORK
>
> We note that employees are refusing to report for duty, despite a directive to you that what you are doing is illegal and unprotected.
>
> Management has noted that a number of workers have clocked, but not reporting to their place of work. Management would like to remind you that this still constitutes to strike action.
>
> This is your formal warning that you are participating in an ***unprotected strike*** and in breach of the Collective Agreement and management reserves its right under the Labour Relations Act.
>
> Management reiterates that the principle of "no work no pay" applies and urges employees to report to their working places by 11;30."
>
> (original emphasis)

[24] The strikers did not respond to the first ultimatum. Around 12h00 a second ultimatum was distributed by Mahlatsi again. He claimed that this was also read out to the assembled strikers like the first although in his affidavit in support of the strike interdict he only spoke of distributing the ultimatums. The second ultimatum stated that it was a "second formal warning" that workers were participating in unprotected strike. Other than that it was identically worded to the first ultimatum except that the workers were urged to return to work by 14H00. This ultimatum was also ignored. Later that afternoon the mine's urgent application was heard. The General Secretary appeared at the hearing and argued that the strike was protected because the CCMA had issued the certificate of outcome which he maintained authorised the strike action.

[25] In essence, the interim order issued by Gaibie AJ, declared the strike unprotected and interdicted the union and its members from continuing with the strike and restrain the union from encouraging or inciting its members to continue participating in the strike. Workers did not report for the night shift that evening and as the strikers had already dispersed the order could not be distributed, but a copy of the order was faxed to the union at 18H56 that evening.

[26] Mahlatsi said that at around 08h30 on Tuesday 5 June he distributed about 600 copies of the order under cover of a further notice from management after reading the documents in English and explaining them in Sotho and Isizulu. By that stage the group of workers assembled had increased considerably to between 800 and 900 in number. Again, he claimed that he used a loudhailer. The covering notice, addressed like the ultimatums to all employees, read:

> "LABOUR COURT INTERDICT: UNPROTECTED STRIKE
>
> The company has obtained an urgent interdict from the labour court declaring the strike action on Modder East operations to be **illegal**. The Court Order restrains employees from participating in the illegal strike. The Court Order specifically interdicts PTAWU from encouraging and inciting the illegal strike.
>
> All employees are instructed to cease with their participation in the illegal strike and to report for duty immediately. Should you not report for duty as per your normal shift requirements appropriate disciplinary measures will be followed which may lead to your dismissal. We however trust that this will not be necessary.
>
> A copy of the Court Order is attached."

[27] Mahlatsi further testified that, after reading the court order it was explained that if people want to return to work there was an access gates controlled by security where they would be allowed to enter the premises. Testified that a small group of about 15 workers approached the access point but were pelted with stones by other workers. Mahlatsi also fled to escape the stones being hurled at them.

[28] The General Secretary said he arrived at the mine after 11h00 and told the strikers to return to work. He claimed that he had rushed there after being told by H Baloyi that the employer was not allowing workers to report back on duty and that the order had not been read to them. He then read the order to them and told them that for the moment the strike was suspended for a while but could resume after the return day of the interdict on 26 June. He claimed the workers understood that but they queried SMS messages which they had been receiving that the employer did not want them to report back on duty but that they should make representations at a hearing. When he was cross-examined, he further claimed that he had then called a manager by the name of Mr 'Mahlazi', presumably Mahlatsi, who confirmed that they should not go back to work but should attend the disciplinary hearing. This incident and the alleged SMS notifications of the disciplinary enquiries were never canvassed previously in the trial nor did he mention it in his evidence in chief. When it was put to him that the decision to convene hearings was only taken by the mine at about 14H00, he was insistent that workers were already aware of the hearings by the time he arrived three hours earlier.

[29] Rule had testified that at around the same time that the General Secretary said he arrived at the mine, he had received a call from either the General Secretary or H Baloyi. The General Secretary could not confirm whether he had made the call but said he had instructed H Baloyi to contact Rule and he might have also done so himself. Rule had testified that the person he spoke to wanted to meet with the company but was told that the workers were on an unprotected strike and needed to return to work. He was told that nobody would be returning to work until there had been a meeting. The caller said nothing about the nature of the meeting. As far as he could remember the call was around 14h00. R Baloyi definitely did not recall speaking to Rule in these terms and as far as he could recall his instruction to H Baloyi was to ask Rule to allow workers to return to their workplaces.

Disciplinary proceedings

[30] Rule said that at around 14h00 the access cards of striking workers were disabled and a letter was drafted to all striking employees about making representations. Rule testified that the notice was conveyed in the same manner as the ultimatums. The notice addressed to 'all striking employees' stated:

> "NOTICE TO MAKE REPRESENTATIONS
>
> 1. You have been identified as one of the participants in an illegal strike at Modder East on 4 and 5 June 2012.
> 2. Despite various communications to you that the strike would be illegal and ultimatums to return to work, you have not.
> 3. The company had no alternative but to the Labour Court of South Africa on an urgent basis, to interdict the illegal strike on 4 June 2012. The Labour Court interdicted and restrained the workforce from striking and declared it to be illegal. This court order has been communicated to all striking employees on 04 and 05 June 2012.
> 4. Your participation in the illegal strike amounts to misconduct in terms of the Company's disciplinary code and procedure and is sanctioned with a possible dismissal.
> 5. You are therefore invited to make representations as to why a dismissal should not be imposed as follows:
>
> 5.1 you may make representations through the recognised union, i.e National Union of Mineworkers ("the NUM"), or on an individual basis. In this regard, the NUM may make collective representations on behalf of all its members.
>
> 5.2 On Thursday, 07 June 2012 at Modderbee East training centre at 08H00.
>
> 6. Should you not make representations as set out above, a decision will be taken in the absence of your representations."

In the course of the trial, it was argued that by blocking access from 14H00 that day the mine had instituted a lockout. That theme was also raised in letters from the union's erstwhile attorneys.

[31] At 17h22 the same day, the General Secretary responded as follows in a letter to the mine:

> "**Notice to make Representation**
>
> Your letter dated 5 June 2012, addressed to all striking employees, bears reference.
>
> 1. We deny that all striking employees were participating on an illegal strike on the 4th and 5th June 2012.
> 2. The Honourable Acting Justice Gaibie granted an interim order on 4th June at Braamfontein Labour Square building.
> 3. We further place on record that striking employees were not at the court and no documents given to them on the 4 June 2012.
> 4. I also put on record that the striking employees arrived at your premises at about 07H30 today 5th June 2012.
> 5. We deny that there is various communication issued to all striking employees telling them to return to work.
> 6. The company failed to nominate a representative to read aloud the court order to all striking employees and display copies on the notice board at your company premises in terms of clause 4.3 of the court order issued by Acting Justice Gaibie on the 4th June 2012.
> 7. We place on record that our members cannot be represented by National Union of Mineworkers (NUM).
> 8. We request the company to provide us with the Company's disciplinary code and procedures before our members make a representation as to why a dismissal should not be imposed on Thursday, 2 June 2012, at 08H00.
> 9. We request the company to allow all the employees who were on strike yesterday 4th June 2012 to report on duty with immediate effect.
>
> Awaiting your urgent response in this regard."

[32] Rule's testimony that none of the striking workers tendered their services on Tuesday afternoon or the following day, was not contested.

[33] No strikers reported for the disciplinary enquiry scheduled on Thursday morning, 7th June. Consequently, the mine issued a second notice to make representations on Friday 8 June at 08H00 in terms of item 8.7 of the disciplinary code. The second notice recorded: "We record that you have failed to avail yourself and no reason was forthcoming regarding your nonappearance at the hearing." Like the first notice it warned that the hearing would proceed in the absence of an employee if they failed to attend it. This notice was issued sometime between 12H00 and 13H00 according to Rule. He agreed that both the notices gave employees less than 24 hours' notice stipulated in item 8.7 of the disciplinary code. (??)

[34] At 16h11 that Thursday, the erstwhile attorneys of the union, Allardyce Attorneys wrote to the mine. The letter referred to previous correspondence between the mine and the union and asserted the following:

> "Kindly note that we have been instructed that you are not allowing our client's members to report for duty despite the Rule nisi handed down this week declaring they are interdicted and restrained from striking, and further despite our client's members' attempts to tender their services on 5 June 2012. We are further instructed that the only way our client's members are being allowed to tender their services as if they signed a membership form for NUM. Kindly note such actions constitute not only an unlawful lockout but further interference was not only PTAWU's right to freedom of Association, but also with that of its members.
>
> In this regard, we require that you allow all our client's members to tender their services failing which we shall approach the court labour court on an urgent basis in respect of not only the unlawful lockout but also the interference with the freedom of associations of our client and its members."

The letter also reaffirmed the assertion that the mine had failed to comply with the court order by reading the order to the strikers. No mention was made in the letter of the pending disciplinary proceedings. This was followed shortly afterwards by a second letter from the attorneys in which they tended the services of the individual applicants at 07H30 the following morning and repeated the threat of imminent court action contained in the

first letter. The mine's attorneys only responded to this correspondence in the afternoon of 8 June 2012. Rule denied that any strikers tendered their services on Tuesday or Wednesday, and no evidence to the contrary was presented.

[35] Before the trial commenced the parties agreed that the hearings on 8 June 2012 were largely informal and did not follow the disciplinary procedure in that no charge sheets were issued prior to the hearing and no witnesses were called on behalf of the employer.

[36] Some enquiries took place that morning in which NUM members were represented by the shop stewards and other employees made representations themselves. According to Rule, there were a few chairpersons appointed to chair enquiries.

[37] Strikers were given notice of their dismissals on Monday, 11 June 2012 which was communicated by SMS, registered post, and a notice to the unions. After the dismissals, violence erupted amongst the dismissed strikers, including acts of intimidation and acts of assault on non-strikers. These events prompted the company to obtain a high court interdict against the union and the dismissed workers on 13 June 2012 prohibiting such actions.

[38] PTAWU appealed on behalf of some of its dismissed members but the mine refused to entertain representations by the union at the appeal hearing as it had done in the disciplinary enquiry. The mine refused the union the right to represent its members in the appeal hearing because the union was not recognised by the mine. On 16 June 2012, the union advised the mine of eight co-workers who would represent some 43 members in their appeal hearings.

[39] On 19 June 2012, the mine notified the union that it had suffered production losses as a result of the strike and that it would be claiming compensation from PTAWU in terms of section 68 (1) (b of the LRA. The same letter notified the union that the company intended instituting legal action against the union for damages arising from damages to mine property sustained as a result of the conduct of union members after the strike had been interdicted by the Labour Court.

[40] At the appeal hearing, chaired by Rule, written representations were handed up by the representatives of the union's members, which read:

"**Minutes of Preparation for Appeal Hearing**

In the appeal hearing to be held at New Kleinfontein Gold Mine (Pty) Ltd on the 21 June 2012 at 08h00.

Opening Statement

- The appeal hearing is related to unfair dismissal alleged by the employer.
- The reason for dismissal was not procedurally followed prior to SMS dismissal.
- On the fourth and 5 June 2012 at 10 H00, we embarked on legal industrial action.
- The penalty was too harsh; therefore we believe should be issued with the final warning as per company disciplinary guideline Page 16 Schedule 1 Bullet 4.

We challenge the procedure followed prior to dismissal as follows:

- There was no letter informing the union that members are continuously embarking on illegal strike since well the union was the one leading the whole process.
- Ultimatum was not issued to the strikers.
- No charges were issued to anyone to appear in the disciplinary hearing
- It is a normal procedure for any dismissed employee to be provided with the minutes of the said hearing.

In the new Evidence

The agreement entered into between NUM and New Kleinfontein Goldmine (Pty) Ltd , was only provided to our New Organisation PTAWU on the 4th June 2012 at 08H00 starting of business hours.

Should that agreement had been known to us we do not even believe that the industrial action could have taken place.

This question you must preserve until the employer raises it.

Why you joined the unprotected strike?

> **The reason for us to embark on a strike it was for simply reason: to fight for benefits and a living wage**."

(Original emphasis)

It seems that this document was not originally intended to be submitted to the chairperson of the appeal hearing but was prepared to assist the worker representatives in the hearing. According to the minutes of the brief appeal hearing, which were confirmed by Rule, the representations made corresponded closely to the written document.

[41] The appeal was dismissed on 21 June 2012 and the written reasons provided give a useful summary of the mine's rationale for proceeding with the dismissals:

> "Procedural unfairness
>
> The company went to great lengths to ensure that all employees and PTAWU was aware that the strike was illegal. In this regard, various correspondences have been forwarded to PTAWU, well before the strike commenced, that it will be illegal. On Sunday, 3 June 2012, the company also forwarded SMS messages to all its employees wherein it was communicated that the strike will be illegal. When the strike commenced, notwithstanding all the communication to PTAWU and the striking employees that it would be illegal, the Company also distributed an ultimatum to the employees wherein it was recorded that the strike is illegal. The correspondence to PTAWU, the SMS message and the ultimatum is attached hereto.
>
> The dismissals were on a collective basis and therefore individual charge sheets were not issued to employees. A memorandum setting out what the misconduct was Participation in an illegal strike, was distributed to the striking employees and they were called to a collective disciplinary hearing where they could make submissions. The striking employees were therefore fully aware of the misconduct they were accused of. The memorandum is attached hereto.
>
> The employee's representative the appeal hearing elected to not participate in the disciplinary hearing and it was therefore not necessary to provide them with a minute of such hearing.
>
> Substantive fairness

The sanction set out in the disciplinary code and procedure is a guideline only and where necessary, such guideline may be deviated from. In the circumstances, the aggravating factors of overwhelming; therefore the sanction of dismissal is appropriate. These aggravating factors include that the company went to great lengths to ensure that the employees and their representative body, PTAWU the, was aware of the legal nature of the strike and the company issued ultimatums when the strike commenced. Notwithstanding these efforts, the employees chose to embark on the legal industrial action. These employees simply cannot be trusted going forward. The company places an exceptionally high premium on industrial peace and these employees have shown that, notwithstanding communication to them regarding the legal nature of the strike, they chose to cause industrial unrest.

New evidence

The Wage Agreement has been concluded between the company and the NUM. The NUM has made its members aware of the Agreement. There was no obligation on the company to provide this agreement to PTAWU, the company did so in any event communicated to PTAWU that the strike would be illegal. It is further incorrect that the wage agreement was only provided to PTAWU on 4 June 2012, it was provided to PTAWU on 25 May 2012. It is improbable that, in circumstances where the striking employees did not heed to various communications from their employer that the strike was illegal, they would have complied with the peace clause in the Wage Agreement even if they were in possession of it.

Conclusion

For the reasons set out above, the appeal is dismissed and the sanction of dismissal is upheld."

[42] At this point it should be mentioned that participation in any form of unprotected industrial action was listed as a very serious offence in terms of the mine's disciplinary code and procedure and was the kind of offence that would normally lead to convening a disciplinary enquiry. A failure to abide by a binding collective agreement was classified as a serious offence in terms of the code.

[43] It was common cause that after the strike approximately 200 of those who were participating in the strike were employed after making

representations on 8 June 2012, or were employed subsequently by contractors or labour brokers. It was also common cause that after the Rule nisi was discharged on 26 July 2012, the individual applicants tendered their services the following day and the employer refused to allow them to return to work.

The compensation claim

[44] In essence, the mine set out its claim for compensation in an application, which the union initially opposed. In its founding affidavit the mine claimed that but for the two-day strike it would have mind no less than 32.52 kg of gold which at that stage it could have sold for R 426,000 per kilogram. The average operational cost and the cost of sales for each working day during May 2012 would have amounted to R 3,000,964 956.40, meaning that the company suffered a loss of net income of R 9,888,564.00 as a result of the two-day strike. The union was unable to dispute these figures and the individual applicants did not contest them either. When legal argument was presented at the close of the proceedings, the mine indicated that it was willing to accept a figure of 30% of the loss as compensation on terms of payment to be decided by the court.

Evaluation

The legal status of the strike

[45] The applicants contend that the only reason for the strike was a demand for organisational rights. This is the basis for the applicants claim that their dismissals were automatically unfair. Accordingly, they bore the burden of adducing enough evidence to demonstrate that there is a credible possibility that they were dismissed for participating in a protected strike.[1]

[46] The only evidence adduced in support of this claim was that the referral form to the CCMA did mention organisational rights as one of a number of demands the union had. However, there was no evidence to gainsay Rule's evidence that organisational rights did not come up as an issue.

[1] ***State Information Technology Agency (Pty) Ltd v Sekgobela*** **(2012) 33 *ILJ* 2374 (LAC)** at 2380, para [15].

Further, everything from the certificate of outcome right up to and including the representations which were made in the appeal hearing indicated that the only demands in the strike pursued by the union and the strikers related to substantive wage demands. At no stage during that whole period did the union articulate the view that the strike concerned organisational rights in whole or even in part. In this regard, it is revealing that in the representations made in the appeal hearing reliance was placed on the strikers suppose that ignorance of the wage agreement. The representations went so far as to suggest that if they had been aware of it they would not have gone on strike. Leaving aside the fact that it was in fact common cause that the union had knowledge of the wage agreement since 25 May at least, the defence advanced in the appeal made absolutely no mention of the strike being in support of organisational rights. The first time the achievement of organisational rights was mentioned as the object of the strike was when the union filed its statement of claim, which was only in October 2012.

[47] What is also inexplicable is why the union made no attempt to correct the very explicit and detailed explanation in the mine's letters of 25 May and 1 June why the strike would be in breach of the wage agreement and therefore unlawful. That was the ideal and obvious opportunity to set the record straight about the real purpose of the strike. It is also relevant to note that the union had announced its intention to strike over the stated wage demands in its letter of 14 May, which was before another meeting took place over the union's representative status on 23 May. At the meeting on 23 May, the union was effectively pursuing its demands for organisational rights based on the degree of representation it believed it had achieved amongst the workers in the bargaining unit. In other words, it was hoping to achieve organisational rights on the basis of meeting the thresholds in the recognition agreement not by industrial action. For reasons which were never made clear, the union did not vigorously pursue its claims that it had met the necessary thresholds for achieving organisational rights. If indeed such demands had formed part of the demands over which the strike was called, that was never articulated even when circumstances cried out for an express assertion of such demands.

[48] In any event, even if the strike could conceivably have also been called over a demand for organisational rights, the fact that it indisputably also related to substantive wage demands meant that as long as the wage demands remained part of the worker's demands, they had to overcome the obstacle of the wage agreement prohibiting strikes over substantive issues for the duration of the agreement.[2] Thus even if I accept the adroitly argued submissions of Mr Mpofu that the organisational rights issues referred to conciliation for a second time together with the substantive issues, remained part and parcel of the dispute which eventually led to the strike and that the respondent could not claim it had 'metamorphosed' into a dispute completely falling within the ambit of the wage agreement, the applicants cannot escape the fact that the wage demands featured very prominently in the strike demands and as long as those were not abandoned, the conflict with the collective agreement peace clause remained as an insuperable obstacle to the protected status of the strike. In any event, for the reasons stated above, it is clear that the perception of the union and workers at the time was that the wage dispute was the reason for the strike.

[49] Considering the above, I am not persuaded that the purpose of the strike was to pursue the union's organisational demands but was a strike over substantive wage demands. Workers participating in such strike were in breach of the peace obligation contained in the wage agreement and accordingly their strike was unprotected in terms of s 65(1)(a) of the LRA which renders participation in a strike unlawful where an employee is bound by a collective agreement prohibiting a strike in respect of the issue in dispute.

[50] Having determined that the strike was not protected, the remaining issues to be decided whether the dismissal of the strikers was procedurally and substantively unfair.

[2] See ***Unitrans Fuel & Chemical (Pty) Ltd v TAWUSA & another*** **[2011] 2 BLLR 153 (LAC)** at 159, para [26] where the LAC made it clear that a union wishing to pursue a strike in support of demands some of which were prohibited and others which were not, would have to abandon the prohibited demands if it wished to proceed with the strike.

Substantive fairness

[51] Schedule 8 Code of Good Practice Dismissal states:

> "**6. Dismissals 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 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."

[52] In broad terms Items 6(1) and 6(2) above delineate the respective requirements of substantive and procedural fairness for dismissals for participation in unprotected industrial action, save that in addition to the procedural guidelines in items 6(2), the employer ought to observe the principle of *audi alterem partem* when contemplating the dismissal of strikers. However observance of the principle does not necessitate a formal enquiry, and might, depending on circumstances even be satisfied by giving the relevant union an opportunity to make written representations why its members should not be dismissed.[3]

[3] ***Modise & others v Steve's Spar Blackheath*** **(2000) 21 *ILJ* 519 (LAC)** at 551-552, para [97], viz:

> "I have no hesitation in concluding that in our law an employer is obliged to observe the audi Rule when he contemplates dismissing strikers. As is the case

[53] Before dealing specifically with the pleaded case of substantive and procedural unfairness, it is useful to contextualise the nature of this particular unprotected strike. In this regard, it is important to note that the strike in this matter was not a spontaneous or wildcat strike called or initiated by members, without the union's knowledge.

[54] In this instance the union was directly involved in the organisation of the strike as evidenced by its correspondence with the mine before the strike began. It is also the case that the union was advised well in advance of the commencement of the strike that the employer regarded the impending strike action as unlawful and provided very clear reasons why it thought so. Workers were also advised by SMS prior to the commencement of the strike that their action would be regarded as unprotected. The union decided not to heed these warnings and did not even engage with the mine as to why it might have genuinely believed the strike was still protected in spite of what the employer said.

[55] Both the SMS to employees the day before the strike commenced and the covering note to the court order handed out on Tuesday referred to the

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> with all general Rules, there are exceptions to this general Rule. Some of these have been discussed above. There may be others which I have not mentioned. The form which the observance of the audi Rule must take will depend on the circumstances of each case including whether there are any contractual or statutory provisions which apply in a particular case. In some cases a formal hearing may be called for. In others an informal hearing will do. In some cases it will suffice for the employer to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike. In the latter case the strikers or their union or their representatives can send written representations or they can send representatives to meet the employer and present their case in a meeting. In some cases a collective hearing may be called for whereas in others - probably a few - individual hearings may be needed for certain individuals. However, when all is said and done, the audi Rule will have been observed if it can be said that the strikers or their representatives or their union were given a fair opportunity to state their case. That is the case not only on why they may not be said to be participating in an illegal strike but also why they should not be dismissed for participating in such strike."

prospect of dismissal if they persisted with the strike. None of the applicants gave any evidence as to why they did not, or ought not to have taken such. Warnings seriously.

[56] The General Secretary was also present at the workplace by late Tuesday morning by which stage the court order and the notice had been distributed according to Mahlatsi. It is true that the applicants dispute that this was done, but no evidence was led by the applicants as to what happened before the General Secretary arrived that morning at around 11H00. It is common cause that the mine's attorneys spoke to H Baloyi at around 10h00 to confirm that he had received the fax transmission of the court order and that he had confirmed he had but said he was just waiting for the mine to explain the order to the strikers before they returned to work in accordance with it.

[57] It was also not disputed that a call was made to Rule that morning, by either the general secretary or his brother. However, the General Secretary was very vague as to whether he also spoke to Rule but he did confirm that he had asked his brother to ask for the strikers to be allowed to return to work. He dismissed the idea that he could ever have insisted on a meeting, but it was not in a position to dispute that his brother might have said that to Rule. It is telling that if he was under the impression when he arrived at the mine that morning that the employer was already refusing access to workers who wanted to report for work that, this was not reflected in his letter late that afternoon. The letter states that workers arrived that morning at 07H30 and requested the company to allow all workers to return to work immediately, but strangely nowhere claims that they were prevented from reporting for work. The letter also makes no mention of workers querying the SMSes to make representations but barring them from working, even though the letter itself is a direct response to the request for representations. It is only late in the afternoon of the following day in the letter from the union's attorneys that the allegation is made for the first time that strikers were prevented from working the previous day.

[58] In the light these anomalies and Mahlatsi's evidence of how strikers reacted to workers who attempted to report for work, which was not contradicted, it seems more probable that workers did have the opportunity to report for work that morning but rejected it in no uncertain terms and that it was only after the company decided to proceed with disciplinary action that they were barred from entering the premises. In any event, there was no evidence of a single striker who had tendered their services before or after the notice to make representations was conveyed.

Procedural Unfairness

[59] The first point to be made is that the only point of procedural fairness raised in the pre-trial minute is that the striking employees were denied representation by PTAWU in the disciplinary process. It is a well-established Rule that parties are bound by the issues they have agreed to in the pre-trial minute.[4]

[60] The mine's reason for not permitting union representation as such at the appeal hearing or in the disciplinary hearing was that the union was not recognised by the mine. It also relied on item 4(1) of the Code of Good Practice: Dismissal, which only requires representation by a trade union representative or fellow employee. A trade union representative is defined as "a member of a trade union whose elected to represent employees in the workplace" and does not include a union official. Even if PTAWU had been recognised by the mine that would not necessarily have entitled the workers to anything more than shop steward representation in the enquiry.

[61] Even though I am not unsympathetic to an argument that in a case where workers are defending themselves against dismissal for strike action and where the company has been dealing with the union as the representative of strikers in the course of such industrial action, it would be more consistent with the collective nature of the dispute to allow the union to make representations, I was not referred to any authority stating that representation by officials in the case of an unprotected strike dismissal

[4] ***National Union of Metalworkers of SA & others v Driveline Technologies (Pty) Ltd & another*** **(2000) 21 *ILJ* 142 (LAC)** at 147, para [16]

hearing is a prerequisite for procedural fairness, in the absence of such a right existing in a collective agreement. I am also mindful of the fact that such a right must be seen in the context of the rather attenuated right to a hearing in the context of a strike dismissal and that the facts of this case are such that the representations made could just as well have been made in writing in response to an opportunity to present reasons why strikers should not have been dismissed, especially as none of the applicants were claiming that they were non-participants in the strike and needed to present evidence thereof.

[62] Consequently, I am not persuaded that the dismissals were procedurally unfair.

Substantive fairness

[63] The applicants contend that their dismissals were substantively unfair because:

63.1 the employer's conduct in failing to grant organisational rights to the union was provocative;

63.2 the sanction of dismissal was too severe, and

63.3 the applicants complied with all internal and external procedural requirements in attempting to resolve the organisational rights dispute and the wage increase.

[64] As discussed above, the threshold for organisational rights of access, stop orders and shop steward recognition in terms of the recognition agreement with NUM were in fact 30% and not 50% +1. Rule's evidence that this error arose because the Commissioner at the conciliation of the organisational rights dispute assume that the 50% +1 threshold applied to all rights and not just collective bargaining rights. I accept that indeed it is possible and plausible that if the union had realised earlier that the correct threshold for the initial organisational rights was 30%, it might well have pressed ahead with a demand for further verification more vigorously when it met the company on 23 May 2012. However, it is odd if the union did present 132 additional forms at that meeting, rather than a list of additional names, that it did not insist on the verification of those forms in

order to validate its membership claims that stage. Be that as it may, it never articulated that it or its members were becoming frustrated with the ongoing verification of membership process that might have given some credence to a claim that the strike was prompted by the mine's perceived frustration of its efforts to obtain recognition through the verification of membership. In any event, if that was the case it is reasonable to expect that the union would have included this in the strike demands.

[65] Rule was questioned extensively about the fact that at the time of the strike, given that the number of employees in the A and B bands stood at 1124, the 398 verified members of the union would have amounted to more than 30% of the bargaining unit and accordingly the union ought to have qualified for the primary organisational rights in terms of the collective agreement with NUM. That may well be true, though there is no evidence that the union had followed through since the meeting on 23 May with a request for an update on its degree of representation. What it does demonstrate is that perhaps the union missed an opportunity to strengthen its position because at the time it was focused on pursuing the wage dispute.

[66] On the question of compliance with procedures for pursuing protected strike action, I accept that the union did not just embark on strike action without attempting to follow the procedures in the LRA. If the mine had remained silent in the face of the announcement of the impending strike and said nothing until the strike began about why it viewed the strike as unprotected, the action of the union in pursuing the strike in the belief it was protected would have been less blameworthy. The difficulty the applicants have is that the mine explained more than once well before the strike and in considerable written detail why the strike would be in breach of the wage agreement. As mentioned previously, the union made no attempt to engage with the mine's stance on the legal status of the strike for example by explaining its own interpretation of why it believed it was entitled to press ahead despite the argument raised by the mine. In this instance, the union had plenty of time to reflect on the wisdom of pursuing the strike but decided to press ahead regardless.

[67] There is also no evidence that the union took any prompt steps itself to persuade workers to return to work despite knowing by the close of the court proceedings on 4 June 2012 that the strike had been declared unprotected. At best for the union, the first of the officials to arrive at the mine was the general secretary who only did so around 11h00. He made no attempt himself to engage with the company to ensure that the strikers returned to work as soon as possible. It is true that there was some telephonic contact between the union and the mine's lawyers and with Rule, but the upshot of the evidence in that regard is that there was no unequivocal tender of the strikers return to work, or of their clear intention to do so. This evidence must also be understood in the context of the undisputed evidence that the reaction of workers to the news of the interdict and the invitation to return to work was one of violent rejection.

[68] As to the strikers themselves, this is not a case where evidence was given that the strikers were assured that the company's SMSes on Sunday 3 June could be ignored as mere scare tactics or that the union failed to advise workers why the mine was arguing that the strike would be unprotected. There was also no evidence from any of the strikers that they misunderstood any of the announcements made by Mahlatsi or any other evidence to explain why they did not heed any of these unequivocal warnings or the announcement of the interdict which was coupled with a demand that they returned to work. It may be that there was a good explanation for their conduct which did not relate to simply to a determination to pursue their demands come what may. But no alternative explanation was provided in evidence.

[69] There was also no evidence to suggest that they needed more time to consider and debate the ultimatums, nor was there any evidence that they did not get the mine's SMSes on 3 June warning them in advance that the strike was not protected. This prior warning coupled with two ultimatums followed by the notification of the interdict confirming that the strike was unprotected and a further demand to return to work, in my view was sufficient opportunity for them to consider and reflect on the prospect of serious disciplinary action.

[70] It may be thought that because the strike took place on two days that somehow this made it less significant. When viewed against the undisputed losses suffered by the company as a result of the unlawful action, the duration of the strike is put in perspective. Effectively, as a result of the strike, significant loss of net income was inflicted on the mine in circumstances where it had given the union ample time to reconsider its course of action. Consequently, the strike cannot be regarded as insignificant or minor in its impact simply because it did not go on longer. In fact, on the evidence there is no reason to believe that it would have ended soon if the union and the strikers had been left to their own devices. It was only the decision to take disciplinary measures once it became clear that workers were not heeding the strike interdict that brought matters to a head and prompted requests to allow workers to return to work.

[71] The stance adopted in the appeal hearing, did not suggest that in any way the strikers felt they had acted wrongly. It was even suggested that the mine had acted in bad faith in relying only on an interim interdict to dismiss them for participation in unprotected strike. The union had done nothing by the time the appeal was conducted to anticipate the return day and as at the time of the appeal hearing, the interim order was still valid. The gravity of unprotected strike action was identified as serious misconduct in the disciplinary code and the strikers in this instance simply disregarded every indication and warning that their action might be misguided. On the evidence, after the interdict was obtained, their stance did not alter, though it is not a pre-requisite that an employer must obtain an interdict before its justified warnings have to be taken seriously.

[72] It may sometimes be thought that as long as an unprotected strike is resolved within a few days that does not make it serious. There are a number of difficulties with this. Firstly, where the strike could have been a lawful one if procedures are followed, and given that those procedural pre-requisites are not onerous, there is no reason why a failure to follow them should be readily condoned. It is true the union did follow the procedures of the LRA, but chose to blindly continue with the strike when it must have realised that this was a strike which could not be made lawful. If, as the applicants claimed, the wage demands were not the reason for

the strike, they needed to redirect their efforts to pursuing that dispute properly. Secondly, as we have seen the economic impact of the strike was significant. There is no justification why, when simple mechanisms exist to regularise a strike, economic damage can be inflicted on an employer, without those mechanisms being invoked and thereby ensure a reasonable opportunity to resolve the dispute is created. Had the union more diligently pursued the organisational rights demands to their logical conclusion using the dispute mechanisms available, it might well have achieved those aims possibly without even having to resort to industrial action.

[73] Considering all these factors, I am satisfied that the company acted reasonably in dismissing the strikers for participating in an unprotected strike, their dismissal was substantively fair.

The claim for damages

[74] Section 68(1)*(b)* sets out the following considerations governing the determination of payment of compensation:

> "In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction — ...
>
> *(b)* to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to —
>
> (i) whether —
>
> *(aa)* attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
>
> *(bb)* the strike or lock-out or conduct was premeditated;
>
> *(cc)* the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and
>
> *(dd)* there was compliance with an order granted in terms of paragraph *(a)*;
>
> (ii) the interests of orderly collective bargaining;
>
> (iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.'

[75] In this instance, it is true that in the mine's letter of 1 June 2012 it did state:

> "Furthermore, kindly be advised that any violent and intimidatory behaviour will not be protected in terms of the LRA and/or the Constitution of the Republic of South Africa. In accordance with South African transport and Allied workers union v Garvis & others [2011] BLLR 1151 (SCA), PTAWU will be liable for damages if it decides to proceed with the unprotected strike in volatile *mileu.*
>
> Accordingly, should PTAWU and/or its members intimidate, threaten and engage in any violent conduct against the replacement labour and/or any other employees who continue to provide their services to the company, the company will *inter alia* seek an urgent interdict and damages against PTAWU and its members and *inter alia* seek punitive costs against PTAWU and its members."

[76] The SCA case referred to in the letter was one in which a union was held liable for damage done by its members in the course of an unruly march. Prior to and during the strike, no express reference was made to PTAWU being liable for a claim for compensation in terms of sections 68(1)(b) of the LRA.

[77] As a result of the suspension of employees from 14H00 on 5 June 2012, the strike itself had no direct impact on the ongoing production loss suffered by the mine. The mine at that stage had still not advised the union of its intention to seek compensation under the LRA for the economic loss suffered. In the case of ***Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & Others***[5] the employer had notified the union immediately after obtaining the interdict that it could be held liable for damages suffered as a result of the strike. In that instance the strike persisted for another five days without any intervention by the union to attempt to curtail it, despite that warning.

[5] **(2015) 36 *ILJ* 2292 (LC)**

[78] The issues listed in section 68(1)(b)(i) above have largely been canvassed in the previous analysis and it is not necessary to repeat them here. In this case, one does not have a situation where the strike persisted long after the interdict was granted, because of the suspension which occurred after workers failed to return to work. As to the financial position of the mine, while I accept that there would have been a net loss of income of the amount claimed at the end of the strike, but there is no evidence of what steps, if any, were ever taken to recover the lost production to mitigate the loss, by for example working additional shifts *albeit* perhaps incurring abnormal extra overtime costs. On the basis of the 2011 audited statement of the union it showed net assets of approximately R 126,000 and net income of R51,000, but the previous year it had suffered a net loss. Even if I consider the proposal that the compensation claim to be reduced to 30% of the original amount, this would be approximately R 3 million and would take the union approximately 58 years to pay off in annual instalments assuming it was able to generate the same amount of surplus income annually in the future. Anything more onerous than that might jeopardise the union's ability to function, and in any event would place a severe strain on the union. The loss of members resulting from the dismissals can reasonably be assumed to have had a negative impact on its finances in 2012 as well.

[79] While unions cannot escape liability simply because it would be onerus financially, it is important that compensation claims are not used as a device to cripple a union's ability to operate or to deal it a terminal blow. While I am reluctant to allow the union to escape the consequences of pursuing the unprotected strike, I am also concerned that the issue of liability for compensation under section 68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of persisting with the strike action.

[80] Under these circumstances, I do not think this is an appropriate case in which it would be just and equitable to order the union to pay compensation.

Costs

[81] I am reluctant to make an adverse cost order against the individual applicants who had been abandoned by the union and the former attorneys of record. However, I am not persuaded that the union should escape all liability for costs incurred as a result of it prosecuting the claim until the time it withdrew as a party to the dismissal claim on 26 March 2015. The legal foundation of the claim was weak and it abandoned its members to obtain their own legal representation at a late stage in the process, considerably complicating the conduct of the proceedings.

[82] In respect of the costs of the compensation claim, despite finding that it would not be just and equitable to award compensation in all the circumstances, because I am also satisfied on the evidence that a *prima facie* case of economic loss occasioned by the strike was made out and that loss could have been avoided had the union heeded the company's warnings about the strike, I am disinclined to compensate the union for any costs incurred in defending that claim.

Order

[83] The applicants' claim of automatically unfair dismissal for participating in a protected strike is dismissed.

[84] The applicants' alternative claim of substantively and, or alternatively, procedurally unfair dismissal for participating in an unprotected strike is dismissed.

[85] The respondent's claim for compensation against the PTAWU is dismissed.

[86] PTAWU must pay the respondent's costs incurred up to an including 26 March in defending the applicants' unfair dismissal claims.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	DC Mpofu, SC instructed by Eastes Inc
RESPONDENTS:	AT Myburgh,SC assisted by G Fourie instructed by ENS Africa