THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 263 / 15

In the matter between:

SOUTH AFRICAN CLOTHING AND TEXTILE

WORKERS UNION **First Applicant**

GEORGE RAKAU AND 7 OTHERS **Second and Further Applicants**

and

FILTAFELT (PTY) LTD **Respondent**

Heard: **24, 25 and 26 April 2017**

Delivered: **14 November 2017**

Summary: Dismissal – employees dismissed for participation in unprotected strike action – determination whether dismissal justified and fair

Dismissal – whether employees provoked into striking – principles and evidence considered – employees not provoked – strike in fact pre-planned –

conduct of striking employees unjustified

Inconsistency – subsequent re-employment of two employees – principles considered – issue in reality not one of inconsistency – applicants should have pursued dismissal case under Section 186(1)(d) – no such case made out or pursued

Inconsistency – even if inconsistency considered – no like for like comparison – inconsistency not shown to exist

Dismissal – whether sanction of dismissal for participation in unprotected strike action appropriate – principles considered – dismissal as a sanction justified and fair

Procedural fairness – whether chairperson of appeal hearing biased – principles considered – no bias shown – dismissal procedurally fair

Procedural fairness – absence of appeal hearing held – consequences to procedural fairness – application of LRA and Code of Good Practice relating to procedural fairness – no procedural fairness found to exist

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JUDGMENT

SNYMAN, AJ

Introduction

[1] I feel compelled to make some remarks at the outset of this judgment about the fact that after more than two decades of the new employment law dispensation following the introduction of the new Labour Relations Act ('the LRA')[1], employees still consider it feasible to embark upon unprotected strike action in pursuit of demands relating to employment conditions. I have difficulty in understanding why this is so, especially if regard is had to the high rate of unemployment that prevails in this country. I would expect employees

[1] Act 66 of 1995.

to rather pursue a course of action that protects their jobs, than to embark upon action that places it in jeopardy. It is well known by now what is needed for strike action, in pursuit of demands relating to employment conditions, to be permitted and thus protected under the LRA. This is not difficult to comply with. As discussed later in this judgment, it is equally well known that unprotected strike action not in compliance with the LRA carries with it a very real risk of participating employees losing their jobs as a result. I thus simply cannot comprehend why this still happens.

[2] Having made these opening remarks, back to the matter at hand. The second to further applicants (who I will refer to in this judgment as the 'individual applicants') were all dismissed on 14 October 2014. Following their dismissal, the applicants pursued an unfair dismissal dispute on variety of grounds, against the respondent, ultimately ending up in the Labour Court. In a statement of claim filed on 7 April 2015, the applicants contended that the individual applicants had not embarked upon an unprotected strike, because they were not required to tender services unless they got paid the wages they were entitled to. In the alternative, the applicants contended that even if the individual applicants had embarked upon an unprotected strike, they were in essence provoked by the respondent into this. The applicants also raised an automatic unfair dismissal claim in terms of Section 187(1)(d)(i) of the LRA, saying they were dismissed for exercising a right under the LRA. A further issue raised by the applicants was that the respondent acted inconsistently when it re-employed two of the dismissed employees after the fact. A final complaint was that proper ultimatums were not given to the individual applicants prior to the disciplinary proceedings against them. Only one procedural issue was raised, being that the individual applicants were not given an appeal hearing or an opportunity to make representations at their appeal.

[3] The respondent opposed the claim. It contended that it never provoked the individual applicants in any way. It stated that the issue of wages related to a wage increase, and in this regard, the respondent had applied for and received exemption from the relevant bargaining council, an issue the applicants had been fully briefed on and was aware of. The respondent

explained that the exemption was necessary because of its dire financial position, of which the applicants was also well aware. According to the respondent, the applicants embarked upon pre-planned unprotected strike action for several days, and ignored ultimatums to return to work. The respondent also disputed any inconsistency in its conduct. As to the issue of procedure, the respondent contended it was not obliged to give the applicants an appeal.

[4] Fortunately, and at the pre-trial stage, the disputes between the parties were substantially narrowed down. Firstly, and importantly, the applicants conceded and agreed that the individual applicants had embarked upon unprotected strike action, in which they demanded that they be paid the increased wages under the industry collective agreement. The automatic unfair dismissal claim was also not pursued.

[5] What thus remained for determination was only the following disputes:

5.1 Did the respondent provoke the individual applicants into embarking upon an unprotected strike?;

5.2 Did the respondent act inconsistently in re-employing two of the employees it had dismissed for striking, after the fact?;

5.3 Were the individual applicants issued with proper ultimatums?;

5.4 Was dismissal a fair sanction to impose on the individual applicants?; and

5.5 Were the applicants entitled to an appeal hearing, and not having received the same, whether their dismissal was procedurally unfair?

[6] The matter came before me on trial on 24, 25 and 26 April 2017, and was finalized on the latter date. Argument was presented by both parties on 26 April 2017, and I reserved judgment. I will now proceed to give judgment by first setting out the relevant factual matrix, in answering the above questions I need to decide.

The relevant background

[7] The respondent conducts business as a manufacturer of filter mediums. The business of the respondent resorts under the scope and jurisdiction of the National Textile Bargaining Council ('the council'). The issue of wages and conditions of employment in the industry is regulated by the main collective agreement in the council, as amended from time to time. Wage increases, as well as annual bonuses paid to employees, are determined by this main collective agreement. It must however be pointed out that the respondent is not an actual party to the main collective agreement, but the first applicant was.

[8] It was undisputed that the respondent's business, at least since 2013, had been experiencing financial difficulties. Its financial statements for the year ending 31 December 2013 showed a loss of just short of R4.5 million for the year, up from a loss of some R3.2 million the previous year. As a result of these financial difficulties, the respondent was unable to pay its employees' annual bonuses due in December 2013. On 30 October 2013, it applied to the council for exemption from paying bonuses, and this application was granted. As a result, employees were not paid their 2013 annual bonuses.

[9] On 13 December 2013, a new wage and conditions of employment agreement was concluded in the council ('the agreement'). The agreement also applied to the respondent and its employees. It is common cause that the agreement, in clause 2 thereof, provided that it would come into operation on the date when the Minister of Labour extended to the agreement to non parties, and would apply until 31 December 2015. This extension of the agreement took place on 22 September 2014.[2] This meant that as from 22 September 2014, the employees of the respondent would be entitled to the wage increases and the annual bonus as prescribed by the agreement.

[10] In the interim, and at the beginning of 2014, the respondent embarked upon a retrenchment exercise in terms of Section 189 of the LRA, because of its financial position. This exercise was however not pursued to finality. The

[2] Published by way of GN 715 as contained in GG 37993 dated 12 September 2014.

former proprietors of the respondent commenced negotiating with an overseas investor to acquire the business of the respondent, and the retrenchment process was put on hold as a result, as the successful conclusion of these negotiations would save employees' jobs. The council, first applicant and employees were so informed on 28 May 2014.

[11] The sale negotiations were ultimately successful, and the business was sold to the overseas investor, the current respondent, on 1 July 2014. On 3 July 2014, the respondent then informed the first applicant and the council of the sale, and that the Section 189 restructuring process had been withdrawn. It was also confirmed that the employment of all the employees would transfer to the new owner in terms of Section 197 of the LRA, with all conditions of employment intact. This new owner is the current respondent in these proceedings.

[12] After this acquisition of the business and transfer being effected, the respondent sought to meet with the first applicant to discuss the way forward, especially in the context of the respondent's still dire financial position. A meeting was scheduled for 18 July 2014. In a letter dated 4 July 2014, the respondent requested the first applicant to provide its agenda for the meeting, and stated that the respondent's new owners would give a presentation on the way forward for the business. On 8 July 2014, the first applicant provided its agenda for the meeting, which was recorded as the Section 197 agreement, the 2014 increment, and exemption. In respect of all these discussions, and events to follow, the respondent dealt with Senzo Myeni ('Myeni'), an official at the first applicant's Pretoria branch.

[13] The meeting then indeed took place on 18 July 2014. Myeni did not attend this meeting, and sent a colleague, Cornelius Kodisang. In this meeting, the parties discussed the issue of the Section 197 transfer, and this was resolved. The respondent then proposed that as part of the turnaround strategy for the business, the parties agree to a change in working hours, which was then discussed. Agreement was also reached on this issue. The first applicant then proposed that the employees in fact start as new employees with the new owners, and be paid out severance packages. The respondent undertook to look into this, and revert. But when the respondent wanted to discuss the

issue of exemption, despite this in fact being tabled by the first applicant as well, the first applicant refused to discuss this. The respondent however indicated that it would be seeking exemption.

[14] With the implementation of the new increases and bonuses in terms of the agreement looming, and as part of its turnaround strategy, the respondent on 4 August 2014 then sought to apply to the council for exemption from paying these wage increases and bonuses. A proper substantive application was submitted. The first applicant was fully aware of this exemption application, which was in any event circulated to it by the council itself by e-mail on 8 September 2014. On 9 September 2014, Dennis Maluleka from the first applicant sent an e-mail to Myeni, asking if the branch supported the application.

[15] Inexplicably, and on 10 September 2014, Myeni then wrote to the respondent, indicating that it had come to the attention of the first applicant that the respondent did not pay the 2014 increase, and urged the respondent to pay these increases with effect from 1 July 2014. This was despite the fact that as a non party, the respondent was not yet liable to pay the increase until the agreement had been extended to non parties. The respondent answered on the same day, stating that it had applied for exemption on 4 August 2014. Myeni e-mailed back on 11 September 2014, *inter alia* requesting proof of the exemption application being made and whether it had been approved. The respondent answered on 12 September 2014, indicating that it was still awaiting the outcome of the exemption application, and would keep the first applicant posted of developments. Nothing further was heard from the first applicant in this regard, after this exchange.

[16] On 23 September 2014, the individual applicants then embarked upon unprotected strike action. They occupied the canteen, and refused to work. The managing director of the respondent, Martin Cross ('Cross'), went to speak to them where they gathered in the canteen. They were peaceful, but simply refused to work. Cross asked them to come back to work in the factory, and then the parties could open a dialogue. The individual applicants refused to discuss anything with Cross, and said that all they wanted was their increases. Cross tried for about 45 minutes to get them back to work, but was

met with point blank refusal. Cross then contacted the respondent's labour consultant, Lesley Winkworth ('Winkworth') for assistance.

[17] Winkworth then immediately telephoned Myeni, and spoke to him that same morning. Winkworth informed Myeni that the individual applicants had embarked upon an unprotected strike, and asked Myeni to intervene to resolve the situation and get the individual applicants back to work. Myeni said that he was travelling and was in Durban at the time, but that he would telephone the shop steward to find out what was going on. Myeni never reverted to the respondent about his efforts in this regard, and the individual applicants remained in the canteen the whole day on 23 September 2014, refusing to work.

[18] The next day, 24 September 2014, the individual applicants came to work, but once again occupied the canteen and refused to work. Attempts to convince them to return to work failed again. Winkworth called Myeni, who once again undertook to look into the situation and revert. Nothing happened, and Myeni never reverted to the respondent. The individual applicants once again remained in the canteen all day and refused to work. With 24 September 2014 being a Friday, the respondent decided to wait until after the weekend to take any action, hoping that over the week end the first applicant could discuss the matter with the individual applicants and convince them to return to work.

[19] But unfortunately, the respondent's hope was misplaced. On Monday 27 September 2014, the individual applicants again came to work, occupied the canteen, and refused to work. Winkworth then contacted Myeni and informed him that disciplinary proceedings would now be instituted against the individual applicants if they did not resume their duties. The individual applicants however still persisted with their refusal to work. After 27 September 2014, the individual applicants did not report at work at any time.

[20] According to Myeni, and upon being contracted by Winkworth, he did drive to the respondent's premises to meet with the individual applicants. Further according to Myeni, the individual applicants told him that if the respondent gave them a firm date by which they would be paid their increases, they would go back to work. Myeni testified that he told Winkworth that the respondent

must first commit to pay the increases before the individual applicants would go back to work.

[21] A meeting was then held at the respondent on 30 September 2014 to discuss the matter, and try and resolve the impasse. This meeting was also attended by Cross, Winkworth and Myeni. In this meeting, Myeni made it clear that unless the individual applicants receive their increases, they would not go back to work. Winkworth sought to explain that the respondent would wait for the pending exemption application, and if it was not successful, then the respondent would pay the increases, but if it was successful, then the respondent would not pay the increases. Myeni indicated that the union and the individual applicants were opposed to the exemption, and maintained that if there was not a firm commitment to pay the increases, the individual applicants would not return to work.

[22] The issue could therefore not be resolved on 30 September 2014, and the individual applicants persisted with their refusal to tender services. On 30 September 2014, the respondent then notified the first applicant in writing that disciplinary action would be instituted against the individual applicants for what it called an 'illegal work stoppage' and failing to obey a lawful instruction to return to work. Individual notices to attend a disciplinary enquiry on such charges were also issued to each individual applicant. The disciplinary hearing was scheduled for 9 October 2014, but ultimately took place on 13 October 2014.

[23] The disciplinary hearing was presided over by Jacobus Stephanus Coetsee ('Coetsee'), and independent chairperson. The individual applicants were represented in the hearing by Myeni. Myeni in fact entered a guilty plea in the disciplinary hearing to the two charges against the individual applicants. The proceedings then proceeded on the issue of an appropriate sanction. Coetsee testified that even in the hearing, the individual applicants made it clear that they would not go back to work unless they get paid their increases, and they never expressed remorse for what they did. Coetsee recommended the summary dismissal of the individual applicants in a written finding dated 14 October 2014. This finding was conveyed to Myeni on 16 October 2014. The individual applicants were as a result dismissed.

[24] On 17 October 2014, Myeni lodged an internal appeal. The basis of the appeal was that the sanction of dismissal was not appropriate. On 23 October 2014, with no appeal hearing being convened, Winkworth wrote to the first applicant informing it that he had considered the grounds of appeal, but felt convinced that the sanction was commensurate with the misconduct, and that the dismissal was upheld. It is thus undeniable that no actual appeal hearing was held.

[25] The applicants then referred an unfair dismissal dispute to the CCMA on 31 October 2014. In the referral, it was contended that the strike was 'triggered' by the conduct of the respondent in not paying increases, and that the dismissal was procedurally unfair due to non compliance with 'Section 6 of Schedule 8' of the LRA. This dispute remained unresolved, and a certificate of failure to settle was issued by the CCMA on 28 November 2014.

[26] As to the respondent's exemption application, it was only considered by the council on 28 November 2014, and then declined on 10 February 2015. The respondent was advised that it could pursue the matter further to the Independent Exemptions Committee ('IEC'). The respondent did so immediately, and filed an application with the IEC on 16 February 2015. The matter was heard on 22 April 2015, and in a ruling dated 6 May 2015, the exemption was granted by the IEC. In terms of the exemption ruling, the respondent was granted exemption from paying the increases and bonuses under the agreement, for the period from 1 July 2014 to 30 June 2015.

[27] One final factual issue bears reference. It was common cause that two of the individual applicants that had been dismissed because of their participation in the unprotected strike action had found their way back into working for the respondent, as from 10 November 2014. These two individual applicants were Jack Tumelo Rakoma ('Rakoma') and Johannes Ngobeni ('Ngobeni'). The circumstances as to how this came about were in dispute between the parties, and will be addressed later in this judgment.

[28] The aforesaid constitutes the background facts against which the matter *in casu* is to be decided. I must say that in the end and after the witnesses testified, very little of what transpired was in dispute. Only two main factual

issues were in the end in dispute, being the issue of the applicants' prior knowledge of the exemption application and what it meant, and how the two individual applicants referred to above came to be re-employed at the respondent. I will specifically deal with these issues under the appropriate headings later in this judgment.

[29] I will now turn to deciding the merits of this matter, by answering the five issues identified above, starting with answering whether the respondent had provoked the individual applicants into striking.

Were the individual applicants provoked?

[30] As touched on above, it was common cause that the individual applicants had embarked upon unprotected strike action from 23 September 2014, and that this strike action persisted to 30 September 2014. This clearly constitutes admitted misconduct, for which dismissal may well be appropriate.[3] In Section 68(5) of the LRA, it is provided that:

> 'Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'

[31] Schedule 8 deals with the issue of substantive fairness where it comes to dismissals for participation in unprotected strike action in Items 6(1) and (2), which in turn provide:

> '(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 —
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> *(a)* the seriousness of the contravention of this Act;
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> *(b)* attempts made to comply with this Act; and

[3] See *National Union of Metalworkers of SA and Others v CBI Electric African Cables* (2014) 35 ILJ 642 (LAC) at para 28.

(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.'

[32] The applicants have very much focussed their case on Item 6(1)(c), and has pleaded that the individual applicants were provoked by the respondent into striking. As such, this part of the case requires specific attention from the outset. In the pre-trial minute, the applicants have said that the provocation is based on a number of factors, being the following: (1) the respondent failed to pay the individual applicants their full wages pending the outcome of the exemption application; (2) the respondent failed to consult the applicants before submitting the exemption; (3) the respondent failed to advise the individual applicants that it submitted an exemption; (4) the respondent failed to advise the individual applicants that it would not pay the increased wages pending the outcome of the exemption; (5) the respondent did not pay the individual applicants' 2013 bonuses but the employees believed that the respondent was able to do so; and (6) the respondent breached the individual applicants' contracts of employment by not paying their full wages.

[33] Do the facts however bear out these contentions? In my view, not at all. For the reasons I will now set out, I find it very hard to believe the individual applicants were in any way provoked by the respondent. Rather, the irresistible inference to be drawn from the evidence is that the strike was planned beforehand, to coincide with the extension of the agreement to non-parties, which happened on 22 September 2014.

[34] I will dispose of the easiest issue first. In my view, it cannot be legitimately said that the non-payment of the 2013 bonus had anything to do with the

strike. As set out above, the individual applicants were advised in writing that the 2013 bonus would not be paid, together with the reason why this was the case. The first applicant and the council had also been informed of this. The reason why this was the case had been accepted, and no dispute was ever raised. To contend that this could serve as provocation for a strike that started on 23 September 2014 is simply untenable. I may add that the issue of the 2013 bonus never featured in the discussions as to what the individual applicants demanded from the respondent to stop their strike, which was always only that their 2014 increases in terms of the agreement had to be paid.

[35] This then leaves the issue of the 2014 increases in terms of the agreement. As said, the evidence paints a picture far different from one of employees being genuinely provoked by the conduct of the respondent where it came to this issue. Everyone knew the respondent was in financial trouble. There was a retrenchment pending since the beginning of 2014, which was only avoided as a result of the sale. Immediately when the new owners took over, they engaged the first applicant and the employees on the way forward to turn the business around. When the first meeting was set up in July 2014, the issue of exemption from the 2014 wage increases were put on the agenda, however when the respondent attempted to discuss this in the meeting of 18 July 2014, the first applicant refused to discuss it, but knew it was coming. Cross also testified that he did discuss the issue of exemption with the employees themselves as well. According to Cross, the employees were well aware that exemption was needed, in addition to funding procured from the overseas investor, to turn the business around. In short, the issue of the respondent wishing to pursue an exemption from the 2014 wage increases was never a surprise the individual applicants, or the first applicant. I am satisfied that on the probabilities, they knew it was coming.

[36] The respondent then filed the exemption application at the beginning of August 2014. On the undisputed evidence, this application was forwarded by the council itself to the first applicant on 8 September 2014, and then brought to the attention of Myeni specifically on 9 September 2014. Knowing full well there is an exemption application pending before the council, Myeni demands on 10 September 2014 that the respondent implements the wage increase.

Correspondence is exchanged between Myeni and the respondent on 11 and 12 September 2014 in which the respondent makes it clear that the wage increases would not be implemented until the pending exemption application had been decided.

[37] Under cross examination, Myeni confirmed that the first applicant was fully aware of the enforcement provisions in the council main agreement and that if the first applicant believed that the respondent was not complying with the agreement, it could enforce it against the respondent. Myeni then conceded that the first applicant had decided not to pursue enforcement proceedings because of the pending exemption application. It is clear to me that the first applicant always knew that the issue of exemption had to be first decided by the council before increases would be paid or the agreement enforced, and must have briefed the individual applicants accordingly.

[38] It must also be considered that the individual applicants were not entitled to be paid the wage increase until such time as the agreement had been extended to non-parties such as the respondent. The respondent pro-actively sought exemption, before even this due date. It has to be more than coincidence that the agreement is extended to non-parties on 22 September 2014 and the strike starts on 23 September 2014. To me, this undoubtedly illustrates that the applicants knew that enforcement through the council was not possible because of the already filed exemption, but once the agreement was actually extended to the respondent this could serve as basis to justify the strike by accusing the respondent of unjustified behaviour because of not immediately complying with the agreement upon being liable to do so. Such an approach would be entirely inconsistent with a case of being provoked, and indicates a measure of pre-planning. There was nothing spontaneous about what had happened. In *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*[4] the Court held as follows, as part of the Court's reasoning for finding that the dismissal of the employees was fair:

> '… In addition, the strike was not spontaneous, but rather planned to occur at the time that would create maximum pressure on the respondent and the

[4] (2016) 37 ILJ 2610 (LAC) at para 34.

strike was not one that the employer had provoked through any unjust conduct. …'

[39] It was suggested that what the respondent could have done was to nonetheless pay the increases pending the outcome of the exemption application. This was in fact the demand articulated by the individual applicants throughout their unprotected strike. I am however compelled to agree with the testimony by both Cross and Coetsee that to do this would be destructive of the very basis of the exemption application itself. In simple terms, if the respondent can afford to pay the increase pending the determination of its exemption application, then why is it necessary to apply for exemption at all. This would make no sense. The very purpose of the exemption application is because the respondent cannot afford to pay the increases in the first place. And then, as set out above, the respondent was actually ultimately successful in seeking exemption from paying the increase, showing that the position it adopted was entirely justified.

[40] A consideration that is not lost on me is that if the respondent did pay the increases pending the exemption, and then obtained the exemption resulting in the increases in effect being taken away, this would be far more prejudicial and provocative to the individual applicants. They would by then have enjoyed the fruits of an increase, adapted their living expenses accordingly, only to then have their salary reduced. I am convinced that this would cause far more dissatisfaction. It was thus not only permissible, but actually prudent, not to pay the increases until the exemption had been decided, and in my view the respondent was thus not obliged to pay the individual applicants the increases at the time they went on strike, and cannot be seen to have provoked the individual applicants as a result.

[41] In *National Union of Mineworkers and Others v Power Construction (Pty) Ltd*[5] the Court dealt with a situation where the employer relied on a provision in Sectoral Determination 2: Civil Engineering Sector SA, which in effect determined that if employees could not work due to inclement weather, they would not be paid for the day not worked. There was a dispute as whether the employer was entitled not to pay the employees on this basis, and the

[5] (2017) 38 ILJ 227 (LC) at para 39.

employees embarked upon unprotected strike action because of this. Of relevance to the matter now at hand, the Court said:[6]

> 'It cannot, in my view, be said that the strike was in response to unjustified conduct by the employer. … 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 …'

The point that emerges from this *dictum* is that the individual applicants, if they believed that they were either entitled to the increases as of right, or should be paid the increases despite the pending exemption, had alternative avenues open to them. They could have pursued enforcement proceedings of the collective agreement at the council. Or they could have engaged in the exemption application, opposed it, and then exert pressure through the first applicant's direct membership of the council to expedite the determination thereof. None of this was done. There was simply no necessity for the strike.

[42] I also consider the fact the strike started some two weeks after the respondent's last engagement with the first applicant in which it was made clear that the respondent would first wait for the outcome of the exemption before increases would be paid, with no further interaction between the parties in between. Yet again, there is nothing spontaneous in a strike starting two weeks later. Then, and the day after the agreement is made applicable to the respondent by the Minister's extension to non-parties, the individual applicants simply occupy the canteen, refuse to work and make no specific demands. It is only though the first applicant's involvement that it finally and clearly comes out that what the individual applicants want, is to be paid the increase despite the exemption. In *National Union of Metalworkers of SA and Others v CBI Electric African Cables*[7] the Court said:

> '… While I accept that the respondent's failure to pay the employees correctly for the hours they had worked triggered the employees' response, I do not,

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[6] Id at para 59.
[7] (2014) 35 ILJ 642 (LAC) at paras 38 – 39.

> however, agree that the means they employed justified the end they sought to achieve. Abandoning their workstations and leaving the respondent's premises was not conduct which, in all the circumstances of the case, could be said to have been a reasonable means by which to respond to the respondent's failure to comply with its contractual obligations. Other less disruptive and non-belligerent ways to resolve the issue were available to the employees. There is no evidence that their abandonment of their workstations was coupled with any demand or grievance.
>
> Their conduct was deliberate and calculated. It undermined the process of collective bargaining as a tool to resolve industrial disputes. … Their collective decision to walk off at 22h00 was taken before they filed any grievance. There was no attempt at all on their part to comply with the provisions of the Act regarding the handling of grievances. The employees' contention that they were justified in leaving their shift early because of the respondent's failure to pay them correctly, is according rejected.'

Based on what is summarized above, similar considerations in my view apply *in casu*.

[43] As a concept, provocation requires at least some form of wrongful conduct or *mala fides* or material breach of employment conditions or employment contract by the employer or its representatives (management). In my view, it cannot be said that where an employer implements or pursues legitimate and permitted means to deal with a difficulty that it has, this could be seen to be provocation of the employees. In short, some turpitude on the part of the employer is necessary. An example of the kind of conduct that could be seen to constitute such turpitude can be found in *National Union of Metalworkers of SA and Others v Pro Roof Cape (Pty) Ltd*.[8] In this judgment, the Court held that the employers' failure to pay 'significant amounts' in remuneration due to employees 'contributed significantly to a loss of trust in its industrial relations with its workforce'. Then further, the Court also considered the fact that once the dispute reared its head, the employer chose to deal with the matter in a dismissive fashion, breached an agreement it reached with the union, and

[8] (2005) 26 ILJ 1705 (LC)..

never had the intention to pay the amounts concerned despite saying it would. The Court described these actions of the employer as being 'nothing less than provocative' and 'reprehensible'.[9] The Court concluded:[10]

> 'In sum, the employees showed some forbearance and accommodation in relation to the employer's illegal conduct. What they assumed to be the employer's reneging on 20 December was probably the final straw. Unquestionably, the demand of the strike was legitimate, albeit that it related to a rights dispute. Nor was the timing of the strike calculated to maximize harm. It was a responsive strike embarked upon in reaction to the employer's unsatisfactory conduct. It endured for a mere few hours …'

[44] The case now before me is not anywhere near to what the Court was critical of in *Pro Roof Cape*. The opposite is in fact true. The respondent played open cards with the applicants throughout, and they were fully aware that the respondent's actions were motivated by its dire financial position. The applicants knew why the respondent needed exemption, and they knew it was coming. The applicants also knew that the consequences of this exemption would be that they do not receive increases for 2014. The respondent was entitled to seek exemption, and thus its actions in applying for it was legitimate, and a proper course of action to try and resolve its financial difficulties. At the beginning of August 2014, the respondent had filed a proper application for exemption, of which the first applicant was aware. Despite this exemption, the first applicants still demanded that the increases be paid and the respondent pointed out that this could not be done until the exemption had been decided. This all happened some two weeks before the strike started. Then, and without anything further emanating from the respondent, the strike started on 23 September 2014, the very next day after the 2014 increases were made applicable to the respondent. In light of the pending exemption, and all the background preceding it, the demand by the individual applicants pursuant to their strike was simply not legitimate. And finally, the strike that started on 23 September 2014 persisted until 30 September 2017 when it was

[9] See para 31 of the judgment.
[10] Id at para 34.

decided to discipline the individual applicants. If anyone was forbearing and accommodating in this instance, it was the respondent.

[45] Further examples of where the Court had accepted that employees were provoked into striking are the judgments in *National Union of Metalworkers of SA and Others v Lectropower (Pty) Ltd*[11], *Food and Allied Workers Union and others v Supreme Poultry (Pty) Ltd (Formerly known as Country Bird)*[12], *Transport and General Workers Union and others v Coin Security Group (Pty) Ltd*[13] and *SACTWU and Others v Novel Spinners (Pty) Ltd*[14]. In *Lectropower*, the Court accepted that provocation for the strike existed in circumstances where the strike was triggered by the summary dismissal of three shop stewards without a hearing, the reasons for that dismissal turned out to be that the employer felt that their removal would prevent industrial action, they were considered troublemakers, and that the chairperson of a grievance hearing took exception to the demand tabled by the shop stewards in the grievance.[15] In *Supreme Poultry*, the Court accepted provocation where the employees reacted to a manager of the employer, in response to legitimate grievances laid by the employees, shouted at them and crumpled up the letter containing the grievances and threw it back at them.[16] In *Novel Spinners*, the Court held that the strike was caused by provocation in an instance where the union had tabled various requests for meetings to discuss legitimate issues, to which the employer did not even respond to, and where it found that the employer wanted to unreasonably delay meeting with the union. Finally, and in *Coin Security Group*, the employer simply unilaterally, and without prior notice, withdrew transport of the employees to their sites because they earlier participated in an industry protected strike, and instructed them to make their own way to their sites whilst threatening them with dismissal if they did not do so.[17] The Court in *Coin Cecurity Group* said in this regard:[18]

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[11] (2014) 35 ILJ 3205 (LC).
[12] [2016] JOL 35779 (LC).
[13] (2001) 22 ILJ 968 (LC).
[14] [1999] 11 BLLR 1157 (LC).
[15] See paras 20 – 22 of the judgment.
[16] Para 17 of the judgment.
[17] Para 134 of the judgment.
[18] (supra) at para 135.

> 'In my view, the collective impact of this unjustified behaviour of the respondent provoked the unprotected strike and clearly outweighed any possible criticism against the individual applicants for not utilising the mechanisms of the LRA and for embarking upon an unprotected strike …'

[46] A central theme emerges from all these judgments. In each of these cases, the employer in essence adopted an indefensible position, and acted either unlawfully, unacceptably or unreasonably. The strikes were an immediate reaction to this kind of conduct, and were of short duration. In simple terms, there was a direct connection between the unlawful, unacceptable or unreasonable conduct of the employer and the strike that promptly followed. None of these consideration apply *in casu*, as nothing the respondent did was unlawful, unacceptable or unreasonable, and certainly the strike did not promptly start in reaction to anything the respondent did at and around the time it started. The lengthy duration of the strike of the individual applicants is also inconsistent with a situation where they had been provoked into striking.

[47] I conclude on this topic by other individual references where the Court found that provocation did not exist. In *Mxalisa and Others v Dominion Uranium Joint and Another*[19] the Court held that the strike was not provoked by the dismissal of committee members by the employer, because the strike started long after that dismissal and even after an unfair dismissal dispute had been referred to the CCMA, and that dispute referral had failed. In *National Union of Metalworkers of SA and Others v SA Truck Bodies (Pty) Ltd*[20] the Court similarly rejected a case of provocation based on the employer disciplining a shop steward, because the shop steward has been properly charged and suspended, and was notified to attend a disciplinary hearing on charges of insubordination which the Court found was justified considering the conduct of the shop steward. The Court said:

> 'In these circumstances, the subsequent unprotected strike was in clear defiance of the lawful right of an employer to suspend and charge a disrespectful and defiant employee. …'

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[19] (2013) 34 ILJ 2052 (LC) at paras 49 – 50.
[20] (2008) 29 ILJ 1944 (LC) at paras 23 – 24.

In line with the central theme discussed above, these two judgments show that the instances where provocation is not found to exist are where the conduct of the employer was legitimate, and there was no prompt reaction to anything the employer did. As stated, the matter now before me is aligned to these cases.

[48] Also, the issue of the exemption was an ongoing issue, since the beginning of July 2014, and dealt with again in September 2014. There was nothing indicating that this application for exemption would not be properly dealt with in terms of the processes prescribed in the council main agreement, and the applicants could fully participate in these processes. These are further factors that work against a legitimate complaint of provocation. In *Modibedi and Others v Medupi Fabrication (Pty) Ltd*[21] the Court dealt with a situation in which it was contended by the employees that the strike was provoked by the employers failure to resolve the ongoing problem of poor quality food served to the employees. The Court held:[22]

> '… it was argued on behalf of the applicants that they had demonstrated that the issue of the poor quality of meals had been there for some time since 2009, and that action was taken by the respondent only after the meal boycott in February and March 2010. Even if this was the case, to the extent that the employees had laid a grievance in this regard, and countless meetings were held to address the issue, this adds credence to the view that as the matter was on-going and under sustained discussions, this could not serve as provocation to the extent that the whole procedure designed to deal with such matters under the PLA could be completely ignored. To this end, there is no basis for a conclusion to be made that there was provocation that compelled the applicants to ignore the provisions of the PLA and embark on the path that they took. …'

[49] For all the reasons set out above, it is my conclusion that the respondent did not provoke the individual applicants. The strike of the individual applicants was not based on any unjustified conduct by the respondent. The respondent at all times acted in a legitimate and responsible manner, on order to deal with

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[21] (2014) 35 ILJ 3171 (LC).
[22] Id at para 61.

genuine challenges in its business. The applicants were kept appraised of what the respondent was doing, and in particular, the applicants at all relevant times knew that there was a proper exemption application in respect of the 2014 wage increases pending in the council. It was not a legitimate demand on the part of the applicants to insist that these increases be paid irrespective of the pending exemption application. I also believe that the strike was pre-planned to coincide with the date when the 2014 wage agreement became applicable to the respondent so that it could be said that the respondent breached their employment conditions as justification for what they planned to do. The duration of the strike and the demand persisted with therein further convinces me that the strike was a deliberate design by the applicants to scupper the exemption application by way of placing undue pressure on an already struggling respondent. I thus reject any case that the individual applicants had been provoked.

Is there inconsistency?

[50] Next, the applicants contended that the respondent acted inconsistently in dismissing the individual applicants, because the respondent had subsequently re-employed two of the individual applicants, namely Rakoma and Ngobeni. It was undisputed that they were part of the group of dismissed employees, and that subsequently, the respondent in fact re-employed them. Thus, and in order to decide whether this part of the applicants' case has substance, it must be determined exactly how the re-employment of Rakoma and Ngobeni by the respondent came about.

[51] Cross testified that the decision to dismiss the individual applicants was a final one and that the respondent, after the dismissal, took measures to obtain an entirely new workforce. Because of the severe financial pressure the respondent was under, it was according to Cross considered most prudent to utilise the services of a labour broker to provide it with employees.

[52] According to Cross, he was approached by Rakoma and Ngobeni in November 2014, asking for their jobs back. They told him they were sorry for taking part in the strike and did not agree with the demand made in the course of the strike. They also told him that they were coerced by the other

employees to participate in the strike. Cross testified that he told them that the respondent was not employing any employees at that time and had decided to use the services of a labour broker. Cross then referred them to the Labour broker.

[53] Rakoma and Ngobeni then indeed went to the labour broker, LP Artisan Recruitment CC, and signed an employment contract with it on 10 November 2014. The labour broker then placed them along with other workers provided by the labour broker to the respondent. Cross testified that the two of them then worked through the labour broker at the respondent until March 2015 and as far as he was concerned had proven themselves by way of their work and conduct to the respondent again. The respondent then offered them employment with the respondent again, effective 26 March 2015, in terms of new written contracts of employment.

[54] Cross testified that none of the other individual applicants behaved in a similar manner as Rakoma and Ngobeni did after their dismissal. None of them approached the respondent. He was adamant that the respondent never approached any of the individual applicants for re-employment.

[55] Ngobeni testified that he received a telephone call from the respondent to come to the employer to speak about re-employment, and was told there was the possibility of re-employment for him through a labour broker. Ngobeni said that he spoke to the production manager, Adam, in this regard. Ngobeni expressed his interest, and the respondent sent his CV to the labour broker. Ngobeni said he never went to the labour broker, but simply returned to work at the respondent. Ngobeni said that he never spoke to Cross.

[56] Rakoma testified that he indeed went to Cross and asked him for his job back. He said that he did apologise to Cross for being part of the strike. But he disputed that he ever told Cross that he was coerced into joining the strike. He then went to the labour broker as advised, and returned to work at the respondent.

[57] One of the other individual applicants, Bogiso Sekgapani (‘Sekgapani’) also testified in this respect. He confirmed that the individual applicants were not called back to work by the respondent. He stated that even if the respondent

called them back to work, they would not have gone back to work unless the respondent agreed to pay the increases. He also added under cross examination that because they had already referred their dispute, they could in any event not go back to work at the respondent.

[58] When I consider the above testimony, I have little hesitation in accepting the testimony of Cross as being true, where it contradicts that of the individual applicants that testified. There are a number of reasons for me doing this. Firstly, material parts of the testimony of Ngobeni was never put to Cross under cross examination.[23] Secondly, Rakoma in fact confirmed the testimony of Cross that it was not the respondent that approached them for re-employment, but they went to the respondent and asked for their jobs back. Rakoma also confirmed that he apologized for his earlier conduct. In this respect, he directly contradicted the version of Ngobeni. Thirdly, Sekgapani also contradicted Ngobeni when he testified that the individual applicants were not approached by the respondent for re-employment. Fourthly, the documentary evidence showed that the respondent actually sought an alternative workforce through a labour broker, and did not seek to re-employ dismissed employees.

[59] On the basis of a proper credibility assessment,[24] Cross testified cogently and honestly, was willing to make concessions where required, and did not contradict himself. His testimony is also consistent with the documentary evidence. The same cannot be said about the testimony of Ngobeni. He was in my view evasive, and his testimony was directly contradicted in material respects by the applicants' other witnesses. Sekgapani in reality presented evidence consistent with what Cross said, and I am satisfied that he was truthful in this regard. The only part of the testimony of Rakoma that is contradictory to that of Cross, being that he did not say that he was forced to join the strike, was not put to Cross under cross examination and can safely

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[23] *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* (2005) 26 *ILJ* 1652 (LAC) at para 39; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) footnote 13; *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 41.

[24] Conducted in terms of the principles set out in *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

be rejected on that basis. For these reasons as well, the testimony of Cross must be accepted.

[60] Turning next to deciding the case of the applicants, based on the above accepted facts, the gist of the applicant's case is that the respondent had dismissed all the individual applicants, including Rakoma and Ngobeni, for the exact same misconduct, being that they all participated in the same unprotected strike action and refused to comply with the instruction to resume their duties. But then, and despite this, the applicant re-employed Rakoma and Ngobeni, but not any of the other individual applicants. According to the applicants, this showed that the misconduct for which the individual applicants were dismissed, was in reality not considered by the respondent to be dismissable as it forgave some of the transgressors for their sins, but not others. This is where the inconsistency argument comes in.

[61] This argument of the applicant is based on the following *dictum* in *Yichiho Plastics (Pty) Ltd v SA Clothing and Textile Workers' Union and Others*:[25]

> 'The major stumbling block at that stage was the company's insistence on re-employing only some of the dismissed workers. The company's stance was completely unreasonable. Once it had decided, on Monday, 31 January, that it would re-employ some of the dismissed workers, it had taken the decision not to hold the work stoppage against its former employees. It had forgiven them their sins. The workers who had participated in the work stoppage had acted collectively. They had all committed the same wrong. The company could not thereafter discriminate against some of those employees, by not re-employing them. …'

[62] This *dictum* in *Yichiho Plastics* was applied by Cameron JA (as he then was) in *Fidelity Guards Holdings (Pty) Ltd v Transport and General Workers Union and Another*[26] as follows:

> 'As a statement of principle, this embodies certain consequences for employers who, like the company in the present case, evince a willingness to take back dismissed workers. As found earlier, the company was justified in

[25] (1996) 17 ILJ 648 (LAC) at 658C-D.
[26] [1998] JOL 3333 (LAC) at para 45.

> dismissing the strikers when it did on the day of the stoppage. Once, however, it decided to take back some of the dismissed workers it took upon itself a duty of non-discrimination. That duty could be discharged only by the company demonstrating a legitimate basis of differentiation between those reinstated and those not reinstated.'

[63] But it did not follow that because the employer decided to re-employ some of the employees it had dismissed, but not others, this was *per se* unfair to those that had been dismissed but had not been re-employed. In *NUMSA v SA Wire Company (Pty) Ltd*[27] it as held:

> '… I cannot see how it can be suggested that the respondent was obliged to reinstate the entire workforce and by not doing so, committed an unfair labour practice. …'

[64] All three of these judgments referred to, related to the unfair labour practice jurisdiction under the former LRA[28], which included the concept of unfair dismissals. The erstwhile LRA contained no categories of dismissal as defined in Section 186(1) of the current LRA.[29] This meant that categories of dismissal were developed under the all encompassing concept of the unfair labour practice. And in this context, what was recognized was two distinct acts of dismissal in these circumstances, the first being the initial act of actual termination of employment by the employer, and the second being the act of offering re-employment to some but not others. For each of these two acts, the employer would have to show that the dismissal was fair. In short, and even if the first dismissal of employees for participating in strike action was justified, once the employer decided to re-employ only some of the dismissed employees but not all of them, the employer had to demonstrate a legitimate basis for doing so.

[65] These two concepts then found their way into the formal categorization of what constitutes a dismissal as defined in Section 186(1) of the new LRA. Section 186(1)(a) reads: '… an employer has terminated employment with or without

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[27] [1996] 3 BLLR 271 (LAC) at 278.
[28] Act 28 of 2956.
[29] See Section 186(1)(a) to (f) of the LRA.

notice.'[30] Then also, and in Section 186(1)(d), dismissal is defined as meaning:

> '… an employer who dismissed a number of *employees* for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another …'

Section 186(1)(d) thus contemplates selective re-employment by an employer of employees that have already been dismissed in the first instance for same or similar reasons. It is therefore, for all intents and purposes, a case of a second dismissal following a first dismissal. In *National Union of Metalworkers of South Africa (NUMSA) obo Jan and Others v W E Geysers*[31] the Court said:

> 'This form of dismissal is possible only when it has been preceded by a 'conventional' dismissal and the employees concerned were dismissed in similar circumstances.
>
> Selective re-employment constitutes a dismissal only when one or more of the formerly dismissed employees have been offered re-employment, and when others have been refused re-employment. It is the *refusal* of the employer to re-employ dismissed employees that triggers this form of dismissal. …'

[66] Considering inconsistency *per se*, it is simply an element of disciplinary fairness that applies to any dismissal for misconduct, and seeks to prevent arbitrary behaviour by an employer. It could therefore apply to a dismissal under Section 186(1)(a) or (d) of the LRA, as respectively the first instance dismissal or the selective re-employment dismissal. In *Food and General Workers Union and Others v Design Contract Cleaners (Pty) Ltd*[32], the Court held:

> '… It is a well-established principle of our labour law that selective dismissal of workers may constitute an unfair labour practice as envisaged in the Act - on the basis that it is discriminatory in nature **…** There is, however, no rule that

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[30] This is the definition after the amendment of the LRA effective 1 January 2015. Before the amendment, it simply referred to the termination of an employment contract with or without notice.
[31] [2017] ZALCJHB 152 (8 May 2017) at paras 10 – 11.
[32] (1996) 17 ILJ 1157 (LAC) at 1166A-G.

> selective action is unfair per se; the question depends on the circumstances of each case. … The above principles are applicable mutatis mutandis to selective re-employment …'

As also said in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd*[33]:

> '… Our law requires that employees who have committed similar misconduct should not be treated differentially. …'

[67] In the case of a dismissal as defined in Section 186(1)(a) of the LRA, inconsistency is about employees committing the same misconduct being visited with the same sanction (being that of dismissal), in the first place.[34] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[35], the Court, in this context, said:

> 'The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant …'

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[33] (2004) 25 ILJ 231 (LAC) at para 35. See also *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 35; See *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (2010) 31 ILJ 2836 (LAC) at para 20.

[34] See Item 3(6) of Schedule 8 which reads: 'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[35] (2010) 31 ILJ 452 (LC) at para 10.

[68] And in the case of a dismissal as contemplated by Section 186(1)(d), inconsistency, as an element of fairness in dismissal cases, is about the requirement that selection between employees for re-employment or not being re-employed, must not be done in a discriminatory or arbitrary fashion.

[69] Applying the above to the matter *in casu*, the applicants have targeted their inconsistency challenge at the first dismissal on 14 October 2014. The applicants pleaded a case that this first dismissal was unfair because the respondent has re-employed two of the dismissed employees, but not the other individual applicants. So, and in other words, the applicants have equated subsequent selection for re-employment *per se*, as rendering the first dismissal unfair for that reason. This is however an entirely wrong approach, and unfortunately for the applicants, simply has no substance. In dealing with inconsistency the case of a first instance dismissal, which in my view can equally be applied to cases such as the one now before me, the Court in *Minister of Correctional Services v Mthembu NO and Others,*[36] found as follows:

> '…Consistency is therefore not a rule unto itself, but rather an element of fairness that must be determined in the circumstances of each case....'

Thus, the approach of the applicants is to make selective re-employment a rule unto itself, the mere existence of which rendering the act to be unfair. This falls far short of the complete consideration necessary.

[70] The first difficulty the applicants has is that, as I have illustrated above, the subsequent re-employment of employees is not relevant to the consideration where it comes to the fairness of the first dismissal of the individual applicants on 14 October 2014. Inconsistency where it comes to the first dismissal must be an issue that exists at the time when the first dismissal was effected. This simply means that at the point in time when the employer decides to first dismiss some employees and not others, the employer must be reasonably aware that what it doing is tantamount to impermissible differentiation – the

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[36] (2006) 27 ILJ 2114 (LC) at para 9. See also *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19.

subjective element referred to in *Southern Sun Hotel Interests*.[37] As a matter of common sense and logic, what happens after this dismissal has been effected, specifically in the context of taking some employees back and not others, cannot be an issue that even exists at the time when the first decision to dismiss is taken. This is the very reason why Section 186(1)(d) was introduced into the definition of a dismissal, so as to properly cater for such kind of actions of an employer after the fact. As held in *National Union of Mineworkers and Others v MCC Group of Companies*[38]:

> 'As it was correctly pointed out on behalf of the respondents, the dismissal as identified above can only be as contemplated in section 186 (1) (d) of the LRA. This form of dismissal is a statutory defined dismissal that is distinct and separate from the original dismissal in terms of section 186 (1) (a) of the LRA. The elements of selective non-re-employment include a previous dismissal; employees dismissed for the same or similar reasons; an offer of re-employment made to some of them; and a refusal to re-employ other employees. All of these factors are present in this case. It is further accepted that the date of a dismissal contemplated in section 186(1)(d) is the date on which the employer refused to reinstate or re-employ other dismissed employees.'

[71] In short therefore, the re-employment of Ngobeni and Rakoma does not render the dismissal of the other individual applicants on 14 October 2014 unfair based on inconsistency. There existed, on the evidence, no issue of inconsistency at the time of this first dismissal, and no such case was made out on the pleadings and in evidence. The re-employment that took place on 10 November 2014 is a distinct, and separate, dismissal in itself, that must be evaluated on its own.

[72] This brings me to the second difficulty in the applicants' inconsistency case. This is the fact that the applicants have not sought to rely on a dismissal as contemplated by Section 186(1)(d). No such case was pleaded, both in the

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[37] (*supra*) footnote 35. See also *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section*) (2014) 35 ILJ 2406 (LAC) at para 39; *Comed Health CC v National Bargaining Council for the Chemical Industry and Others* (2012) 33 ILJ 623 (LC) at para 10; *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) para 50.

[38] [2015] ZALCJHB 64 (27 February 2015) at para 6.

statement of case or the pre-trial minute. The applicants are bound by their case as pleaded in the statement of claim and articulated in the pre-trial minute. In *Knox D'Arcy AG and another v Land and Agricultural Development Bank of South Africa*[39] the Court said:

> 'It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. …'

And where it comes to a case as articulated in a pre-trial minute, Conradie JA in *National Union of Metalworkers of SA and Others v Driveline Technologies (Pty) Ltd and Another*[40], said the following:

> 'It is true, of course, that a pretrial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issue set out therein...'

[73] Without such a pleaded case, it is simply not open to me to decide whether or not such a dismissal was unfair, meaning whether the selection of some employees to be re-employed and not others, was arbitrary.[41] In simple terms, if the applicants have not pleaded a dismissal in terms of section 186(1)(d), then a consideration of the fairness of such a dismissal cannot arise. This should for all intents and purposes then be the end of the applicants' inconsistency case.

[74] However, and even if I am wrong in this respect, and even if it is considered whether re-employing two of the individual applicants and not the other individual applicants was fair or unfair, I am satisfied that on the evidence, no unfairness can be shown to exist. Perhaps the most important consideration

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[39] [2013] 3 All SA 404 (SCA) at para 35. See also *Imprefed (Pty) Ltd v National Transport Commission* 1993] 2 All SA 179 (A) at 188 – 189; *Naidoo v Minister of Police and Others* [2015] 4 All SA 609 (SCA) at para 30; *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para 11; *Chester Wholesale Meats (Pty) Ltd v National Industrial Workers Union of SA and Others* (2006) 27 *ILJ* 915 (LAC) at para 19.

[40] (2000) 21 *ILJ* 142 (LAC) at para 16. See also *GE Security (Africa) v Airey and Others* (2011) 32 *ILJ* 2078 (LAC) at para 20 – 21.

[41] See *Ekhamanzi Springs (Pty) Ltd v Mnomiya* (2014) 35 *ILJ* 2388 (LAC) at para 19; *Lowies v University of Johannesburg* (2013) 34 *ILJ* 3232 (LC) at para 29; *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v CTP Ltd and Another* (2013) 34 *ILJ* 1966 (LC) at para 105.

in this regard comes from the testimony of Sekgapani. He made it clear that the respondent did not approach them for re-employment and even if the respondent did so they would not come back to work, without a commitment to pay increases. As he was the only individual applicant that testified that had not been re-employed, therefore one can accept that this point of view applied to all the others. In *W E Geysers*[42] the Court held:

> 'In order to establish that they were subsequently dismissed by the respondent in terms of section 186(1)(d) of the LRA, the applicants bore the onus to establish two critical facts:
> 13.1 first, that the respondent offered to re-employ or re-employed one or more employees previously dismissed by it; and
> 13.2 second, that the applicants tendered their services to the respondent and the respondent refused to re-employ them.'

The individual applicants never, on the evidence, tendered service after dismissal. The first applicant equally never tendered services of the other employees or take efforts to get them back to work.[43] The only evidence was that they would not go back to work even if this was offered, without their increases being paid, which was the very issue that gave rise to their dismissal in the first place. On this basis alone, the failure by the respondent to re-employ the other individual applicants cannot be considered to be arbitrary or even unfair.

[75] The fact is that Rakoma and Ngobeni came back to the respondent of their own accord, expressed their apology and regret for what happened, and asked the respondent to give them their jobs back. They did not attach any condition to this request. Cross said that under these circumstances, he was willing to consider taking them back into employment, which in my view is an entirely justified approach to adopt.[44] Cross went even further and testified that if the other individual applicants had behaved the same way, he may have also considered taking them back into employment. But they did not do so.

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[42] (*supra*) at para 13.
[43] Compare *Yichiho* (*supra*) at 658A-659G.
[44] As to the effect that genuine remorse may have on the restoration of the employment relationship, see *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC) at para 25; *Independent Newspapers (Pty) Ltd v Media Workers Union of SA on behalf of McKay and Others* (2013) 34 ILJ 143 (LC) at 146A-B.

These pertinent facts, in my view, serve as a material and justified distinction between Rakoma and Ngobeni, and the other individual applicants, where it comes to selective re-employment. It is a legitimate basis for doing so. Borrowing from the principles relating to inconsistency where it comes to first instance dismissal, I wish to refer to the following *dictum* in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd*[45] which in my view can equally be applied to cases of selective re-employment:

> '… Consistency is simply an element of disciplinary fairness …. Every employee must be measured by the same standards …. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. …'

[76] Taking the very basis of the decision of Cross to re-employ Rakoma and Ngobeni, in my view it cannot simply be legitimately argued that it was capricious, discriminatory, or mala fide. Cross was motivated by what he saw as an approach by individual employees to him, expressing their sincere remorse for what they did, and in effect pleading for another chance without

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[45] (1999) 20 ILJ 2302 (LAC) at para 29. See also See *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others* (*supra*) at para 21; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19; *Southern Sun Hotel Interests* (*supra*) at para 10.

any condition attached to the plea. Certainly also, it was never the respondent that initiated the re-employment, and if the two individual applicants did not approach Cross, they would not have been re-employed. And finally, if the other individual applicants followed suit, they may well have also been re-employed, but instead they deliberately did not seek re-employment. In *Triple Anchor Motors (Pty) Ltd and Another v Buthelezi and Others*[46] the Court said the following, in circumstances where the employer had extended a blanket offer of re-employment to all dismissed employees, but only some of them took up the offer and were re-employed:

> '… a number of employees who did apply within a reasonable time to be re-engaged were in fact re-employed. In terms of Adamson's evidence the offer was a blanket one extended to all the dismissed employees. In these circumstances there can be no talk of selective re-employment …'

[77] There was no case of the respondent dismissing the employees with the intention of purging what it considered undesirable elements and then re-employing the rest, or some surreptitious strategy to make changes to the workforce, or could not even provide a basis for the selection.[47] Even if Cross can be criticized for even considering to re-employ only the two individuals and not the others, this simply cannot be seen to be unfair towards the other individual applicants in the circumstances, considering what I have said above. In the end, selective re-employment *per se* is not unfair, as this selective re-employment must be shown by the applicants to be coupled with capricious conduct by the employer, ulterior motives in effecting the selective re-employment, or the application of discriminatory management policy. None of this was shown to exist in casu.

[78] In conclusion therefore, on the issue of inconsistency, there exists no case of inconsistency where it comes to the first dismissal on 14 October 2014. As regard to the issue of selective re-employment following the first dismissal, no

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[46] (1999) 20 ILJ 1527 (LAC) at para 31.
[47] Compare *Betha and Others v BTR Sarmcol (A Division of BTR Dunlop Ltd)* (1998) 19 ILJ 459 (SCA) at 512A-H; *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing and Textile Workers Union* (1998) 19 ILJ 731 (SCA) at 735A-G; *Mamabolo and others v Manchu Consulting CC* [1999] JOL 4704 (LC) at para 22; *Pro Roof Cape* (*supra*) at para 36.

case of dismissal as contemplated by section 186(1)(d) has been pleaded or raised, and as such, the fairness of such a dismissal cannot be considered. But even if the fairness of the selective re-employment is considered, it can be seen to be justified and legitimate, and certainly not unfair. The exercise of a value judgment further convinces me that this is a case where the individual applicants should not benefit from the conduct of the respondent in re-employing the two employees concerned, and not the others.[48] The applicants' inconsistency case must thus fail.

Did the applicants receive proper ultimatums?

[79] It was common cause that no written ultimatums were issued by the respondent to the applicants. However, and even though it was initially contended by the applicants in the pleadings that no ultimatums at all were given by the respondent to the applicants, it was conceded by Mr Savant, for the applicants, when the matter started before me, that verbal ultimatums were in fact given to the applicants. He indicated that the applicants' challenge remained that these ultimatums were insufficient.

[80] The issue of an ultimatum is dealt with in Item 6(2) of the Code of Good Practice, referred to above. Applying this provision, the Court in *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*[49] said:

> 'The code does not suggest how the ultimatum should be distributed, or require that it must be in writing. Furthermore, it states that the issuing of an ultimatum is not an invariable requirement. The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of

[48] Compare *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at paras 23, 26 and 31.
[49] (2016) 37 ILJ 2610 (LAC) at para 27.

> which is to provide for a cooling-off period before a final decision to dismiss is taken, the audi rule must be observed both before an ultimatum is issued and after it has expired. …'

[81] What does the evidence *in casu* then show? In my view, it shows an employer that exhibited extraordinary restraint and patience. When the strike started on the morning of 23 September 2014, Cross spoke to the individual applicants and tried to convince them to get back to work. He did not make accusations nor was he confrontational. I accept that he genuinely tried to get the individual applicants back to work. But unfortunately it quickly became clear that nothing that Cross could say could get the individual applicants back at work, unless he agreed to pay them the increases subject to the pending exemption application.

[82] Where it came to the first applicant, this was tasked to Winkworth to deal with. The undisputed evidence was that he did contact Myeni on 23 September 2014 to ask him to intervene, and Myeni undertook to do so. The respondent took no further action against the individual applicants for the whole day, so as to afford the first applicant a proper opportunity to intervene.

[83] When the individual applicants again reported at work on 24 September 2014 and refused to work, the same process unfolded. Cross addressed the individual applicants and Winkworth contacted Myeni. Again, Myeni said that he would look into it. Myeni, on his own version, indicated that he did meet with the individual applicants at about this time, but they made it clear to him that they would only return to work if there was a commitment by the respondent to pay their increases. The respondent decided to not take any action until after the intervening week end, giving the individual applicants a further opportunity to consider their position and consult with the first applicant about what to do next. It was only on the morning of Monday, 27 September 2014 when the same action again unfolded, that Winkworth called and told Myeni that disciplinary action would now be taken against the individual applicants.

[84] Despite this view expressed by Winkworth on 27 September 2014, the respondent was still prepared to convene a meeting to discuss the matter so as to try and possibly resolve the dispute. This was convened on 30

September 2014. In the interim and pending this meeting, the individual applicants persisted with their refusal to work. The respondent however did not take action, but sought to give the meeting a chance to succeed. The applicants however remained intransigent, and made it clear that no matter what, they will not come back to work unless there was a commitment to pay their increases despite the pending exemption. Only then was disciplinary proceedings instituted.

[85] In all of these circumstances, it is simply not possible to say that the applicants did not receive a proper ultimatum. Over the course of eight days, including an intervening week end, the applicants were given time to consider their position, which must be more than enough time. In *Power Construction*[50] the Court held:

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

[86] The individual applicants clearly knew that the respondent viewed their conduct as unlawful, and would take disciplinary action against them. The individual applicants also had the opportunity to consult the first applicant, who had a proper chance to advise them. They made a deliberate and conscious decision to proceed with the strike, in the face of all else. It has to be said that if this cannot be regarded as being a proper opportunity given to striking employees to reflect on their behaviour and the consequences thereof, cool down and make an informed decision, and also consult their trade union, it is difficult to comprehend what would be. In what I consider to be comparable circumstances, the Court in *Xstrata Alloys (Rustenburg Plant)*[51] held:

> '… The peculiar circumstances in this case reveal that the opportunity to attend the launch, which was planned for one day, was slipping away and having been afforded a second opportunity during lunch to attend the launch, the appellants did indeed have sufficient time to consider their stance and to modify their conduct. Having regard to the principles pertaining to ultimatums

[50] (*supra*) at para 62.
[51] (*supra*) at para 28. See also *SA Truck Bodies* (*supra*) at para 31.

> and their purpose, I agree with Lagrange J that the appellants were issued with an ultimatum that served the purpose for which the law requires an ultimatum to be issued. The appellants were cautioned in clear language and were specifically informed of the consequences of their failure to heed the warning. They were accordingly given an opportunity to reflect on their conduct and to desist from it.'

[87] Applying the ratio in *Xstrata Alloys (Rustenburg Plant)*, the Court in *AMCU obo Sibiya and Others v Shanduka Coal (Pty) Ltd*[52] held:

> 'The Employees' contentions that the ultimatum was unclear on the basis that they were simply informed that they should desist from the strike immediately and to return to work is without merit. In line with what Murphy AJA had stated in *Mndebele & Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*, the mere fact that the ultimatum was issued, and the Employees were told on no less than three occasions that they should desist from their actions and return to work failing which consequences would follow was more than sufficient …'

I align myself with these views, which I consider to be equally applicable *in casu*.

[88] It must also be considered that the respondent first took the matter up with the union (first applicant) before deciding on any action against the individual applicants. It did so on no less than three occasions, including a meeting on 30 September 2014. It is only after the meeting on 30 September 2014, which turned out to be fruitless, that disciplinary action was instituted against the individual applicants. In *CBI Electric African Cables*[53] the Court held as follows:

> '… Item 6(2) of the code makes it clear that 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. This is necessary for two reasons. Firstly, it affords the union an opportunity to persuade the strikers to resume work and secondly, it provides a safeguard against possible rash action by the

[52] [2017] ZALCJHB 134 (25 April 2017) at para 61. See also para 62 of the judgment.
[53] (*supra*) at para 35.

> employer. In the event that the employer decides to issue an ultimatum, which should meet the requirements of the code, the employer must ensure that it allows the employees sufficient time to reflect on the ultimatum and to respond thereto. …'

And in *Association of Mineworkers and Construction Union and Others v Anglogold Ashanti Ltd*[54] it was said:

> '… I also accept that at least once the strike action commenced AMCU national leadership, as represented by Mphahlele, had sufficient information to have recognised the need to intervene even if the consequences of failing to bring the strike action to an end were not spelt out. In this regard, I think it is reasonable to acknowledge that while there is an obvious need for unambiguous and explicit communication to striking workers about the employer's intentions, it is sufficient for the purposes of seeking the union's assistance that it be advised of the unfolding events and that its urgent assistance in resolving the situation is required. …'

[89] The facts in casu are clearly in conformity to the above principles in *CBI Electric African Cables* and *Anglogold Ashanti*. Myeni as trade union official was asked twice to intervene and he undertook to do so. He was given two days before the week end to intervene. He did try and persuade the individual applicants to resume their work, but they were steadfast in their demand and he failed. The employees were given a whole week to reflect on their conduct and come to other insights. And finally still, the issue was fully ventilated in the meeting on 30 September 2014 before the final decision was taken to discipline the individual applicants.

[90] I am therefore satisfied that the requirements as contemplated by Item 6(2) of the Code of Good Practice have been complied with by the respondent. Despite there being no written ultimatums, the applicants were clearly appraised that what the individual applicants were doing was misconduct, and that they faced disciplinary action as a result. The first applicant as a trade union was properly consulted beforehand, and given an opportunity to consult

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[54] (2016) 37 ILJ 2320 (LC) at para 237.

its membership and bring them to other insights. A period of more than a week was given to the applicants to cool off, contemplate their actions and make an informed decision. In the end, they made a deliberate and informed decision, which was to continue with the strike action, in the face of all else, until there was a commitment to pay their increases. The applicants' case of not having received a proper ultimatum thus falls to be rejected.

Was dismissal an appropriate sanction?

[91] The consideration as to whether dismissal is an appropriate sanction applies to the first dismissal of the individual applicants on 14 October 2014. As stated, the individual applicants participated in unprotected strike action, and refused to return to work despite being instructed to do so, which is clearly misconduct. As a matter of principle, it is the kind of misconduct which is sufficiently serious to place it in the realm of a dismissable offence.[55]

[92] The above being said, it does not automatically follow that this kind of misconduct is *per se* dismissable.[56] As said in *CBI Electric African Cables*:[57]

> '… It is clear from the provisions of s 68(5) that participation in a strike that does not comply with the provisions of chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the code but also item 7 …
>
> In my view the determination of substantive fairness of the strike related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7 …'

Item 7 of the Code of Good Practice deals specifically with the requirements considering whether dismissal for misconduct is fair, it must be considered

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[55] Section 68(5) of the LRA; *Power Construction* (*supra*) at para 49; *Pro Roof Cape* (*supra*) at para 30.
[56] *SA Truck Bodies* (*supra*) at para 34; *Nkutha and Others v Fuel Gas Installations (Pty) Ltd* (2000) 21 ILJ 218 (LC) at para 94.
[57] (*supra*) at para 28 – 29.

whether: '… dismissal was an appropriate sanction for the contravention of the rule or standard …'.[58] This means that the normal principles where it comes to deciding whether dismissal is an appropriate sanction is equally applicable to unprotected strike misconduct.

[93] Navsa AJ in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[59] summarized the considerations in deciding whether dismissal is an appropriate sanction as follows:[60]

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'

[94] Following on the judgment in *Sidumo*, a number of other principles were crystalized out, that would require consideration in assessing whether the sanction of dismissal is fair. The further principles are the issue of the breakdown of the trust / employment relationship between the employer and employee, the existence of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[61]

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[58] Item 7(b)(iv) of the Code of Good Practice.
[59] (2007) 28 ILJ 2405 (CC).
[60] *Sidumo* (*supra*) at para 78. This *dictum* was also referred to with approval in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 94; *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82.
[61] See *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of*

[95] Dealing specifically where it came to applicable considerations in the case of strike dismissals, the Court in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others*[62] it was held as follows in deciding whether unlawful strike action justified dismissal:

> '… The rationality of the conduct of the respective parties will always be a factor; so too their flexibility and bona fides, the cause, purpose and continued "functionality" of the strike, the financial and economic repercussions for both sides of the strike and of the dismissals, the I ability of the employer and his employees to absorb the harm done thereby and the duration of the strike, actual and anticipated. There are, I am sure, other considerations as well. The relevant factors cannot all be captured in a single formula or formulation.'

And in *CBI Electric African Cables*[63] the Court articulated the considerations particular to strike action as follows:

> **'**In his work Grogan expresses the view that item 6 of the code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the code.'

[96] Applying all of the above, I will first consider the nature of the misconduct. As said, the misconduct is serious. It must also be considered that the strike

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Cape Town v SA Local Government Bargaining Council and Others (2) (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.

[62] 1996 (4) SA 577 (A) at 593F-G.

[63] (*supra*) at para 30. See also *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd* (2005) 26 ILJ 1984 (LC) at para 79; *Pro Roof Cape* (*supra*) at para 30.

action was of an excessively lengthy duration.[64] It started on 23 September 2014 and in reality never ended. As I have discussed above, and even following the meeting of 30 September 2014, the misconduct did not end. Even as late as the disciplinary hearing on 13 October 2014, the individual applicants never proposed that their behaviour would stop and that they tendered their services, and they in fact persisted with their demand. Comparable is the following dictum form the judgment in *Modibedi and Others v Medupi Fabrication (Pty) Ltd*[65]:

> 'There can be no doubt that the applicants' decision to embark on industrial action between 5 and 10 March 2010 was well thought out albeit ill-conceived. It is one thing to embark on unprotected industrial action for a few hours and something else to do so on four consecutive days in pursuance of unreasonable demands. The applicants knew the seriousness and impact of their actions on the entire Medupi project. They knew that disruptions experienced in their contract impacted negatively on other projects. The respondent had more than bent backwards in accommodating them insofar as any perceived grievances they may have had with catering. At no stage did the applicants pause to take stock of their actions.'

[97] As I have dealt with in detail earlier in this judgment, there was no legitimate justification for the individual applicants' conduct, and there was nothing done on the part of the respondent that could be seen to justify such kind of a reaction from the individual applicants. In short, there was no justified cause or reason for what the individual applicants did. And further, it cannot be said that the strike was in any way functional to collective bargaining, which the Court in *SA Truck Bodies*[66] regarded as an important factor to consider as well.

[98] The applicants made no attempt to comply with the procedures in place, in terms of the LRA, to render the strike action to be protected. This was the case despite the fact that in the period between 10 and 12 September 2014, it was demanded that the respondent pay the increases despite the exemption

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[64] I dealt with this above when discussing the issue of a proper ultimatum. Also compare, to the contrary, *Supreme Poultry* (*supra*) at para 16 where the Court held that a strike duration of 1(one) hour was of a short duration.
[65] (2014) 35 ILJ 3171 (LC) at para 73.
[66] (*supra*) at para 34.

application, and the respondent made it clear that the outcome of the exemption application would inform its decision in this regard. There was ample time to comply with the requisite LRA procedures. In *Power Construction*[67] it was held as follows, in finding that the dismissal of the employees was fair:

> '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.
>
> 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.'

As already summarized earlier in this judgment, similar considerations apply *in casu.*

[99] The respondent led undisputed testimony about the break down in the employment relationship. Insofar as the re-employment of Rakoma and Ngobeni is concerned, I have dealt with this in full, above, and for the reasons already given, this cannot serve to dispel this testimony about the break down in the employment relationship, especially considering that even at trial before me, the remaining individual applicants confirmed that if their demand was not met, they would not have gone back to work.

[100] The individual applicants showed no remorse in the disciplinary hearing. As touched on above, and had the individual applicants shown remorse, Cross may have decided not to dismiss the individual applicants. The guilty plea they proffered in the disciplinary hearing was in my view not genuine, especially considering that despite this guilty plea, the individual applicants never actually acknowledged their wrongdoing, and never pleaded for forgiveness. Worse still, and despite this guilty plea, they remained steadfast in their view, even in the disciplinary hearing, that unless there was a

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[67] (*supra*) at paras 55 – 56. See also *Transport and General Workers Union and Others v De la Rey's Transport (Pty) Ltd* (1999) 20 ILJ 2731 (LC) at para 43

commitment to pay the increases, they would not go back to work. This meant that in reality, the individual applicants were not rehabilitated, and there was no possibility of restoring the employment relationship.

[101] Coetsee conceded that the personnel files of the individual applicants was not placed before him in the disciplinary hearing and that he did not have proper particulars about their personal circumstances. But he did testify that he was aware that some of them had long service. In my view, these considerations would have a minimal impact on the ultimate decision as to whether the sanction of dismissal was fair. All the other factors, and in particular, the gravity of the misconduct, was such that personal circumstances, length of service and an unblemished disciplinary record could not save the individual applicants from dismissal.[68]

[102] The respondent's disciplinary code does provide for dismissal in the case of a refusal to obey a reasonable and lawful instruction. There is no specific provision therein relating to a penalty for participation in unprotected strike action, other than a general reference to dismissal being justified on any grounds recognized in law.

[103] It is also true that the strike was peaceful. But in my view, that was part of the design. This is evident that on every day of the strike, the individual applicants would simply come and report at work, but then proceed to the canteen and refuse to work. The fact that the strike was not coupled with the kind of violence and intimidation often seen in the case of unprotected strike action cannot assist the individual applicants in the circumstances where it comes to the penalty of dismissal.

[104] In my view, the strike was designed to inflict maximum harm on the respondent. It happened without any prior warning or indication that it was even contemplated. It took the form of a deliberate design, with the individual applicants actually attending at work, but then occupying the canteen and refusing to work. As Cross testified, the result of this conduct was that all production ground to a complete halt for several weeks. He further testified

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[68] See *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at para 15; *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* (2008) 29 ILJ 1180 (LC) at para 42

that this caused a loss in confidence from customers and the respondent had problems paying suppliers. The individual applicants were specialized employees, working on specialized machines, and could not simply be readily replaced by replacement labour, a fact which the individual applicants were very much aware of. The strike thus caused the respondent significant, and entirely undue, prejudice, in circumstances where it was already financially in dire straits. In *Xstrata Alloys (Rustenburg Plant)*[69] it was held as follows in the Court upholding dismissal:

> '… In addition, the strike was not spontaneous, but rather planned to occur at the time that would create maximum pressure on the respondent and the strike was not one that the employer had provoked through any unjust conduct. …'

[105] I may add that a relevant consideration at trial is that the respondent was ultimately successful in its exemption application, showing that it was entirely justified in doing what it did, when pursuing exemption.

[106] I am convinced by all the above considerations that the individual applicants earned their dismissal. Overall considered, the sanction of dismissal implemented upon the individual applicants on 14 October 2014 was fair.[70] There simply exists no basis in fact or in law to interfere with this decision taken by the respondent, as employer.

Was the applicants' dismissal procedurally unfair?

[107] As stated above, participation in unprotected strike action is nothing else but misconduct. Thus, and just like any other dismissal for misconduct, any dismissal for participation in unprotected strike action must be procedurally fair. Where it comes to procedural fairness in the case of dismissals for misconduct, Item 4(1) of the Code of Good Practice provides:

> 'Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry.

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[69] (supra) at para 34.
[70] Compare *Shanduka Coal* (*supra)* at paras 88 – 90.

> The employer should notify the employee of the allegations using a form and a language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'

The Court in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*[71] applied Item 4(1) as follows:

> 'It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.'

[108] What is clear from the above is that the Code of Good Practice does not provide for an internal appeal process or appeal hearing. This was recognized in *Avril Elizabeth*,[72] where the Court said:

> '… Neither the Act nor the code obliges an employer to provide any workplace right of appeal against the decision to dismiss. …'

[109] But it is not just about the provisions of the LRA and the Code of Good Practice. Where it comes to an internal appeal, the right to such a process may well be afforded by the employer's own disciplinary code or related procedures. In *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others*[73] the Court held:

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[71] (2006) 27 ILJ 1644 (LC) at 1651F-H. See also *Nitrophoska (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1981 (LC) at para 18; *Tshongweni v Ekurhuleni Metropolitan Municipality* (2010) 31 ILJ 3027 (LC) at para 14.
[72] (*supra*) at 1654E.
[73] (2013) 34 ILJ 1440 (LAC) at para 44.

> 'Although the LRA does not oblige an employer to provide an internal appeal structure, it is, in my view, imperative that once the employer has decided to establish such structure in the workplace the appeal process must be fair. Any employee who feels aggrieved by the outcome of a disciplinary process has a vested right of access to a fair internal appeal process, where such appeal structure is provided in the workplace. Otherwise, if the fairness of the internal appeal process should simply be ignored as irrelevant, then the establishment of such appeal structure becomes a meaningless exercise. …'

[110] Now it is true that in his disciplinary hearing finding, Coetsee has indicated that the applicants had a right to lodge an internal written appeal, which they duly did on 16 October 2014. Also, the disciplinary code of the respondent made provision for an internal appeal procedure, and in particular, the convening of an appeal hearing. It would therefore certainly seem that the respondent's own rules give the applicants the right to an internal appeal hearing.

[111] The basis of the applicant's internal appeal, as recorded in the appeal document itself, only related to the issue of the sanction of dismissal not being appropriate. However, and having so appealed, the applicants never received an internal appeal hearing in this regard. What happened is that Winkworth considered the appeal, on the documents and the disciplinary hearing finding, and came to the conclusion that there was no prospect of a different decision on sanction at an appeal. In a finding dated 23 October 2014, he upheld the dismissal of the individual applicants. The reason he gave was that the individual applicants had pleaded guilty, an 'illegal strike' warranted a dismissal and the failure to follow a lawful instruction also warranted dismissal.

[112] It is undoubtedly so that the individual applicants were at least afforded a fair and proper disciplinary hearing prior to filing their appeal, and this was never challenged by the applicants. The factual circumstances relating to the misconduct was never disputed in the disciplinary hearing. The disciplinary hearing chairperson was an independent third party and the individual applicants were represented by their union official in the proceedings. In the disciplinary hearing, the issue was also in reality only about an appropriate sanction, and this issue was fully ventilated in those proceedings.

[113] The crisp question now is whether the failure to afford the applicants an actual appeal hearing and Winkworth in fact deciding the issue on the papers, so to speak, rendered the dismissal of the individual applicants procedurally unfair. As held in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[74]:

> '… Even if it may be considered that the issue raised by the applicants could feasibly constitute some or other form of procedural irregularity, this does not by automatic consequence mean that the dismissal of the second applicant was procedurally unfair …'

[114] The point I wish to make is that procedural fairness is a holistic consideration, taking into account the provisions of the Code of Good Practice and the employers' internal code and procedure. In this regard, the background events in the course of the entire disciplinary process must be considered. The primary consideration always has to be whether, considering what happened internally in the employer as a whole, the employees understood the allegations against them, had a fair and proper opportunity to state their case in respect of the same before an impartial chairperson, and then, if found to have committed the misconduct, had a proper opportunity to address the issue of an appropriate sanction. The fairness of any appeal process should not be considered in isolation without having regard to the preceding events. In *Silverton Spraypainters*,[75] the Court specifically dealt with procedural complaints about the internal appeal process, in circumstances where the preceding disciplinary process was considered to be fair, and said:

> '… On a holistic consideration of Mr Van Jaarsveld's disciplinary process, I am inclined to hold that it was conducted fairly. In any event, his complaint about the internal appeal process would have been compensated by the fact that he was subsequently accorded another opportunity to state his case and ventilate all his grievances when the dispute was dealt with de novo during the arbitration hearing. Accordingly, I hold that the procedure followed by the company which led to the dismissal of Mr Van Jaarsveld was a fair procedure. …'

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[74] (2013) 34 ILJ 945 (LC)55]
[75] (*supra*) at para 45.

[115] Does the absence of an actual appeal hearing in this case constitute the kind of procedural failure that would render the dismissal of the individual applicants procedurally unfair in the face of all else? In my view, this cannot be the case. On face value, the absence of an appeal hearing in the face of the provisions of the respondent's own disciplinary code does appear irregular, but it does not follow that its absence would necessarily render the dismissal procedurally unfair. In *Power Construction*, the Court considered, specifically in the context of a dismissal relating to unprotected strike action, whether the dismissal was procedurally unfair because the employees did not receive an actual disciplinary hearing, and concluded:[76]

> '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. …'[77]

Comparing this reasoning to the matter before me, all these considerations equally apply, and more. Despite all the events preceding the disciplinary process, which I have discussed in detail above, there was an actual proper disciplinary hearing held which led to the decision to dismiss the individual applicants being taken. I simply cannot see how an appeal hearing could change anything, especially considering that the appeal was only about the issue of an appropriate sanction which had already been fully ventilated, with

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[76] (*supra*) at para 72.
[77] The Court in *Power Construction* was referring to the judgment of the Constitutional Court in *Xinwa and Others v Volkswagen of SA (Pty) Ltd* (2003) 24 ILJ 1077 (CC) where the LAC (Court *a quo*) held that the dismissal of striking employees was procedurally fair, because the union and the employees were given 'ample opportunity' to make representations prior to the decision to dismiss, and the Constitutional Court held in this respect at para 16: 'In the light of these facts, the applicants have no prospect of persuading this court that their dismissal was procedurally unfair'.

the applicants having been given a proper opportunity to make representations.

[116] In *Anglogold Ashanti*,[78] the Court specifically dealt with irregularities where it came to an appeal process in the course of a strike dismissal dispute, and said:

> 'As regards the appeal process, it does seem that communication of the right to appeal was not well done. However, it was extended and AMCU was a party to the extended appeal process. The attenuated right to hearings in strike dismissals does not extend to a right to an appeal hearing as a matter of course and insofar as it is offered, there is no reason in principle why it has to be more elaborate than the dismissal hearing in its execution.'

[117] In the end, and as said in *Schwartz v Sasol Polymers and Others*[79]:

> ' … As was stated in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation & Arbitration & others* and has been repeatedly emphasised by this court, the balance struck by the LRA recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements.'

[118] The applicants have argued that Winkworth, who decided the appeal, was biased because of his earlier involvement in the matter. I accept that Winkworth, who is the respondent's labour consultant (employers' organization official), was involved in the exemption, in advising the respondent, interacting with Myeni, the first applicant's official, during the strike, and assisted with the formulation of the charges against the individual applicants. If Winkworth was an arbitrator in the course of arbitration proceedings under the LRA, it could legitimately be said that this constitutes bias because of a reasonable apprehension that the decision maker would not bring an objective mind to

[78] (*supra*) at para 243.
[79] (2017) 38 ILJ 915 (LAC) at para 13.

bear on the matter.[80] But it must be remembered that an internal appeal is not arbitration, and as said in *Mathabathe v Nelson Mandela Bay Metropolitan Municipality and Another*[81]:

> 'Insofar as bias is concerned, the applicant was afforded the benefit of an independent chairperson. This is more than the code provides and more than what is common in most workplaces where disciplinary enquiries are ordinarily chaired by a more senior member of management. Further, as the court observed in *Avril Elizabeth Home*, the code does not provide for a test for bias in the form that applies in the civil or criminal courts.'

[119] *In casu*, the applicants had the benefit of an independent chairperson, and a fair disciplinary hearing. Winkworth was not involved in this disciplinary hearing and the actual decision taken therein to recommend the dismissal of the individual applicants. Winkworth was not even in the disciplinary hearing. Winkworth, as labour consultant, simply dealt with the appeal, which was only about the sanction of dismissal, by bringing an external eye, so to speak, to bear on the prior events, and decided that there was no apparent basis to interfere with the original finding. Applying the watered down test for bias as recognized in *Avril Elizabeth*, I am of the view that it cannot reasonably be said the dismissal of the individual applicants was procedurally unfair because of the possible argument that Winkworth may be biased, and it must be concluded that he dealt with the appeal in a reasonable manner.

[120] Based on the reasons as set out above, it is thus my view that the failure to afford the applicants an appeal hearing and the manner in which Winkworth disposed of the appeal does not render the dismissal of the individual applicants procedurally unfair. Overall considered, the requirements of Item 4(1) of the Code of Good Practice, as well as the respondent's own code and procedure, was satisfied. The applicants' claim of procedural fairness must therefore fail.

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[80] See *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another* (1992) 13 ILJ 803 (A) at 817F-I; *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 *ILJ* 1583 (CC) at paras 14 – 16.
[81] (2017) 38 ILJ 391 (LC) 24. See also *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 11.

Conclusion

[121] I accordingly conclude that the dismissal of the individual applicants by the respondent was substantively fair. There existed a fair and proper reason for dismissal, and dismissal as a sanction was similarly appropriate and fair. The individual applicants, in the end, earned their dismissal by way of their entirely unjustified conduct. As to procedural fairness, I am satisfied that the individual applicants were subjected to an overall fair process in the course of the respondent arriving at a final decision to dismiss them, and their dismissal was procedurally fair.

[122] The applicants have thus failed to make out a case of unfair dismissal, and their claim must fail.

[123] This only leaves the issue of costs. I have, in terms of Section 162 of the LRA, a broad discretion where it comes to the issue of costs. I do understand why the individual applicants behaved as they did. After all, the failure to get an increase may justifiably make employees unhappy. But this does not charge the reality that the applicants went about this entire matter all wrong. Even though the applicants have failed to make out a case that their actions were justified, I will be prepared to consider their subjective views where it comes to the issue of costs. I also consider that the respondent and the first applicant have an ongoing relationship. As a whole, I believe that this is a case where it would be most appropriate and fair to make no order as to costs.

Order

[124] For all of the reasons as set out above, I make the following order:

1. The dismissal of the individual applicants by the respondent was both substantively and procedurally fair.

2. The applicants' claim is consequently dismissed.

3. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants:	Mr I Savant of Cheadle Thompson & Haysom Attorneys
For the Respondent:	Adv A P Van Der Westhuizen
Instructed by:	Bimelow De Oliveira Ekerhold Inc Attorneys