Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD JOHANNESBURG

Case no: JS 831/13

In the matter between:

FOOD AND ALLIED WORKERS' UNION	**First Applicant**
NYANGULA, J & 138 OTHERS	**Second and further Applicants**

and

LA VISAGIE & SEUN	**Respondent**

Heard: 29- 31 August, 1-2, 19-23 September 2016

Delivered: 10 August 2017

Summary: (Unprotected strike- dismissal - arising from wage determination from which the employer was subsequently exempted - workers returning to work but embarking on subsequent strike in protest over suspension of some strikers entry pending disciplinary enquiries for misconduct during initial strike – dismissal substantively unfair – strikers not blameless for their dismissal- relief)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a case involving the dismissal of 87 (eighty-seven) members of the union, FAWU on 22 April 2013 arising from their participation in an unprotected strike. The trial took place over two weeks in August and September 2017.

[2] The respondent is a citrus and vegetable produce farmer in the Nelspruit District.

[3] Mr A Engelbrecht ('Engelbrecht ') an employer's organisation representative, Mr A Visagie ('V1'), a director of the respondent, Mr A B Pieterse ('Pieterse') the Greenhouse manager, and Mr J Nyathi ('Nyathi'),a supervisor in the tomato section, gave evidence for the respondent. Mr B M Sibeko ('Sibeko') a shop steward working as a general worker in the cucumber and tomato sections and Mr S M Msiza ('Msiza'), an organiser of FAWU gave evidence for the applicants.'

[4] The applicant's contend that they were unfairly dismissed for embarking on an unprotected strike. The applicants argued that the sanction of dismissal was too harsh and that the respondent acted inconsistently in allowing certain employees who had participated in the strike to return but not others. The applicants also claimed that the strike was caused by the unjustified conduct of the respondent of not paying them the recently determined minimum wage prescribed by Sectoral Determination 13 for the Farm Worker Sector. Lastly, they claim their dismissals were unfair because the ultimatums were unclear and did not afford them sufficient time to reflect on them. The applicants did not pursue a claim of procedurally unfair dismissal.

Preliminary issues

[5] At the start of proceedings, the respondent argued that the union was not entitled to represent the applicants on the basis that even though they had been members of the union at the time of their dismissal, they were not members of the union when the dispute was referred to court. After hearing argument on the matter, I dismissed the *in limine*

objection. I found that in view of the provisions of the applicants' Constitution and taking into account the principles in the judgement of the Labour Appeal Court in *National Union of Mineworkers v Hernic Exploration (Pty) Ltd*[1] and the decision in NUMSA v CCMA [2], I was satisfied that FAWU was entitled to represent the 87 individual applicants whose names appear on the document entitled 'Final List of Applicants' handed up in court at the commencement of the trial.

[6] The applicants also withdrew their claim of automatically unfair dismissal based on the allegation that the second to further applicants ('the employees') had been dismissed on account of their union membership. The applicants further conceded that the employees had been engaged in an unprotected strike.

[7] On the second day of the trial, applicants gave notice of their intention to apply for an amendment of their statement of case. They tendered party and party costs for the delay which would be occasioned by the postponement necessitated by the respondent having to reply thereto. Leave to amend their statement of case was granted with the applicants to pay the wasted costs of the proceedings of that day but the question of the appropriate scale of costs was deferred pending the applicants filing an affidavit explaining the late filing of the notice of amendment, which has been done.

[8] The amendment related to the anger the applicants had felt towards the respondent because they believed that the variation sought by the respondent from a new wage determination was a ploy to deny them money they were entitled to. They also believed that the state would reimburse them the difference between the new sectoral determination minimum wages and the wage paid by the respondent, so they would not earn less than the newly gazetted minimum wage. They believed that the respondent's request to get them to vote individually on the wage variation, undermined the collective mandate they had conveyed

[1] (2003) 24 ILJ 787 (LAC)

[2] (2000) 11 BLLR 1330 (LC)

to the respondent, namely that they rejected any variation from the wage determination and would rather be retrenched.

[9] The reason why the amendment was filed so late was because the first applicant, FAWU, only confirmed an instruction to the attorneys of record to conduct the trial on behalf of the applicants three weeks before the trial commenced. Given that the individual applicants were all in Nelspruit and the time constraints in preparing for the trial on relatively short notice, the applicants' attorneys only became aware of the individual applicants' alleged understanding and reaction to the wage determination variation *after* the first day's evidence was led, which necessitated launching the amendment application early that evening. I appreciate the difficulties encountered by the applicants' attorneys in the circumstances, but it seems the principal cause for having to bring the amendment was late and poor instructions from FAWU. In the circumstances, the applicants should pay the respondent's wasted costs on an attorney own client scale.

Chronology of events emerging from the evidence

[10] As it turned out, much of the evidence of the sequence of events during February and March 2013 was undisputed in material respects even if witnesses differed on some matters of detail. Insofar as there are material disputes of fact, these mainly concern exactly what might have been conveyed by management at the meeting or meetings held on 21 February and what was conveyed by management at a meeting held between management and union representatives at 17h00 on 2 April.

[11] In February 2013, there was considerable labour relations turmoil in the farming industry, particularly in the Western Cape where farmworkers had been demanding a minimum wage of R150 per day. In 2012, the respondent itself also had experienced protected strike action arising from a dispute over wages. That strike resulted in a collective agreement being concluded between FAWU and the employer in terms of which basic monthly salary of workers for the

period 1 September 2012 to 31 August 2013 was increased to R 1579.00 per month.

[12] Subsequently, on 5 February 2013, the Minister of Labour amended Sectoral Determination 13 for the Farm Worker Sector ('the sectoral determination') which increased the minimum statutory wages in the sector. In terms of the new determination, the minimum wage payable was raised to R 11.66 per hour with effect from 1 March 2013, amounting to approximately R 105.00 per day for a nine hour day. It is important to note that the period between publication of the sectoral determination and the date of the increase was only just over three weeks.

[13] Based on 195 working hours per month, the basic wage concluded under the existing collective agreement between FAWU and the respondent amounted to just over R 8.00 an hour. Even that low wage was about 5% higher than the prevailing minimum wage set by the sectoral determination, before it was revised. Consequently, although the existing basic wage levels were low, adjusting to the new monthly minimum wage of R 2274.82 still entailed an increase of over 40% on the applicants' existing wages. Visagie agreed that the strike in March 2013 was not related to a demand for an increase in breach of the collective agreement, but was a demand prompted by the sectoral determination.

[14] Engelbrecht testified that the Department of Labour ('the Department') had notified employers in terms of s 50(1)(b) of the Basic Conditions of Employment Act 1997 ('the BCEA') that they could apply for 'exemption'[3] from the determination to delay its full implementation. On 21 February 2013, only one week before the new minimum wage was to take effect, under the auspices of the LWO employers' organisation ('LWO'), he wrote to FAWU on behalf of the employer. The letter conveyed the company's view that the only way it could pay the increase required by the determination would be if it retrenched 30%

[3] Strictly speaking the correct term for an 'exemption' in the BCEA is a 'variation' and the term 'exemption' is only used with reference to exemptions previously granted under the 1983 Basic Conditions of Employment Act.

of the workforce. To avoid this, the company was applying for variation on the basis that it would raise wages to 1800. 00 per month from 1 March 2013, to R 2000.00 from 1 July 2013 and to 2275.00 from 1 December 2013, thereby achieving the new prescribed minimum wage within eight months. A meeting had previously been requested with FAWU on 21 February but the union had been unavailable. The letter concluded with an "open invitation" to the union to submit "suggestions and any input" regarding the application "for exemption". Attached to the letter was a schedule detailing the proposed incremental introduction of the minimum wage. Msiza said that no response was received from FAWU to this letter. Sibeko said he was never shown the letter by the union of the employer. The letter did not direct the union to make representations to the Department but implied it was expecting FAWU to make any submissions to the respondent. Msiza did not dispute that the letter was received but denied ever seeing the attached schedule before the trial. The only somewhat fatuous reason he could advance for not responding to this notification and invitation by the company to make submissions on the proposed variation was that the union did not "object to receipt of a letter".

[15] Engelbrecht did not handle the finalisation of the variation application, which was processed by LWO head office, and could not say if there was other correspondence with the union about the application apart from his letter. He was convinced that a general provisional variation in the form of a notification from the Department had been granted before the Department's letter specifically granting the respondent provisional variation was issued on 2 April, but he could not explain why this was not mentioned in the pleadings or why no copy of the letter had been obtained, even though he agreed such communication was 'quite critical'. Nevertheless, he insisted that the reason for not implementing the new determination wage was that the majority of workers had agreed to the respondent's alternative proposal and the company had explained it would implement it if the majority of workers agreed. Initially in his evidence, Visagie also could not shed any light on specific correspondence of this nature from the Department but

was convinced h had seen correspondence of this nature at some stage.

[16] Later, during Visagie's cross-examination it eventually came to light that a couple of press releases had in fact been issued by the Department on 26 February. One press release advised employers to apply for a variation under s50 of the BCEA if they believed they could not afford the new minimum wage. The other press release indicated the extent of the disturbance caused by the new sectoral determination and sought to calm the situation. The latter release read:

> **"Farmworkers go on unprotected strike after employers' variation**
>
> **26 February 2013**
>
> It has only being a month after the Minister of Labour; NM Oliphant launched the much awaited Sectoral Determination on Farmworkers Sector. A move that saw employees catapulted from a meagre R 69 per day to a whopping R 105 per day.
>
> But the path has not been very rosy since then. Recent turn of events reveal that farmworkers have gone on an unprotected strike and are up in arms with the employers for applying for ministerial variation. The variation gives the employer an opportunity to forward documentations to proof that indeed she/he cannot afford the minimum wage increment.
>
> Phaswane Tladi, Deputy Director in the Department said, in as much as the farmworkers disserve the R 105 per day increment, the law equally gives employers a chance to apply for the variation and the Department will assess the situation and recommend accordingly.
>
> "The law goes even further to say that during the process when the employer has applied for the variation, he or she must continue paying the previous minimum wage until the assessments by the Department has been completed.
>
> But the employers will be liable to pay the differences accordingly to the employees if the application is not successful, Phaswane said.
>
> Latest figures show that 70 percent of farmers in South Africa are having turnover of less than R 300.000 annually.

On the other side of the coin, employers continue to retrench employees in large numbers due to the new minimum wage.

"We would like to appeal for calm and encourage farmers that face challenges and affordability to rather consider applying for this variation than opting to retrench employees as this will add on the already high rate of unemployment in the country.

We are ready to criss-cross the country and go from farm to farm and help with further consultations both with the employers and employees in order to bring clarity and certainty home, he said.

Issued by:

Johannes Mokou

Department of Labour: 083 494 2180

(For media enquiries please contact Phaswane Tladi: 084 5043801)"

(*Sic* – emphasis added)

[17] Visagie could not dispute that individual applicants did not have access to the Internet, but he was of the view that FAWU had knowledge of all requests for deviation of the determination. He nonetheless conceded that he did not know if the union had knowledge of either of the press releases in question. Msiza said he had not seen the press releases before the trial and was unaware of the Department's stance. The respondent had not seen the need to specifically bring this to the union's attention because they had written directly to the union about the application variation and the union had not responded. Visagie was unable to comment on the correctness of the legal opinion expressed in the emphasised portion of the press release: his own understanding was that, provided the variation application process was followed, the determination would not be effective on 1 March subject to the possibility that the variation might not be finally approved. This view is at least partly borne out by another press release issued by the Department on 7 March, which recorded that 918 applications for variation affecting 74,603 farm

employees had been received by the Department. The release stated *inter alia*, and somewhat confusingly, that:

> "Currently the Department is capturing the applications received and also requesting outstanding information from farmers. Also as part of processing the applications, the Department is granting provisional approval to farmers to pay what has been agreed to in the consultation process with the workers provided that the agreed amount is more than R 75,31 per day which would have been the new wage from 1 March 2017 in terms of the reviewed sectoral determination."

(emphasis added)

[18] Engelbrecht claimed that he had brought the determination to the respondent's attention early February, which was about the same time that Sibeko recalled having learnt about the determination from the radio and news headlines. Sibeko said he was very happy to hear the news and that the Department had assisted workers greatly. He was also told by other workers who had heard the news. Since he was elected as a shop steward at the end of 2012, the union did not deal with the issue of sectoral determinations in any of the union meetings he attended and he received no training as a shop steward apart from what he was told by his predecessor. Msiza acknowledged that the union had a responsibility to train shop stewards but conceded that no training was given to Sibeko after he was elected as a shop steward.

[19] Visagie did not agree that the application for variation lodged on 28 February was unreasonably late: his understanding from communications from the employer's organisation was that, it did not matter if permission for the variation was not obtained before the beginning of March and that the respondent could implement what it proposed. As he recalled, it was common knowledge amongst other farmers at the time and was reported in the press as well as in communications from LWO that this was acceptable. Visagie could not point to any correspondence which showed that a copy of the variation application had been sent to the union as required by section 50

(7)(b(i) of the BCEA and Sibeko confirmed that he had never seen the exemption application himself.

[20] Visagie testified that one of the issues considered by the company was whether it could avoid the possible retrenchment of approximately 30 employees to enable it to comply with the determination. An alternative strategy to retrenchment was to apply for a variation of the determination. Visagie said the other options available to the respondent were to implement the minimum wage, reduce working hours, or retrench workers. The prospect of reducing working hours was never a serious consideration however.

[21] On the same day the respondent wrote to FAWU it convened one or more meetings of general workers. In the applicants' statement of claim and the pre-trial minutes, the applicants claimed that separate meetings were held in different Departments on the same day the letter was sent to the union and that the information in the letter was also conveyed to workers. Although the parties recorded this as common cause, Sibeko, who was the sole witness for the applicants on what transpired on 21 February, contradicted this version because he claimed that there had been a single meeting of all the workers except those who worked in the 'oranges' section. Visagie agreed workers in that section would not have been involved anyway because those workers are seasonal workers and it was not the citrus season. Pieterse, the greenhouse manager, recalled three meetings in his own sections (cucumber, tomatoes and the packhouse sections) and understood that two meetings were held in the citrus and overheads sections respectively. Sibeko recalled a single meeting at around 13H00 attended by workers from the tomato, packing and cucumber sections. However, apart from the fact that the evidence tends to support what the parties had agreed upon in the pre-trial minute, nothing material turns on how many meetings were convened on 21 February, though it might have some bearing on credibility issues if these were necessary to decide.

[22] At the meetings, a Setswana interpreter from the CCMA, Ms R Mashego, was present together with Engelbrecht and Visagie. Visagie informed workers that the employer intended asking for a variation, failing which it would have to retrench a significant number of employees. Pieterse also testified that the company's proposal for a staggered introduction of the minimum wage was explained and the alternative option of retrenchment was also discussed. On Sibeko's own version, Visagie did convey what was contained in the sectoral determination, but explained the company wanted to pay the minimum wage bit by bit because it could not pay it immediately. Sibeko mentioned that he and some of the other workers did have a copy of the company proposal, so it appears that copies of the proposal were in circulation by the time the meeting was held. Sibeko conceded that there was nothing about the document he did not understand. The voting process which was to follow was also explained and workers were given until 25 February to think about it. The proposed revised salary structure was presented in terms of which the company would pay the new minimum wage by December that year and workers were issued with a copy of the proposal. Engelbrecht also claimed workers were advised that they would have until 25 February to consider their attitude to the variation proposal. Sibeko understood that the implementation of the plan depended on whether or not workers agreed to it. Pieterse testified that between the meetings on 21 February and the polling on 25 February no complaints were received from workers about the process.

[23] Engelbrecht denied that workers at any of the departmental meetings had said they would rather be retrenched than forfeit the minimum wage in the sectoral determination. Visagie confirmed this, but the respondent had conducted the subsequent poll because the respondent knew that some workers would say that retrenchment was preferable. He denied that the respondent ever unequivocally said that workers would be retrenched if they did not agree to the variation. He denied the issue of retrenchment was ever raised as a means of intimidating workers to agree to the application to vary the wage

determination. On the contrary, when the issue was discussed with the workers, they had not expressed anger when the possibility of retrenchment was mentioned. Sibeko maintained that even though workers were worried about their jobs, some of them did say they would rather be retrenched than agree to the variation. He believed that workers said this because they thought it was a tactical strategy by the employer to raise the issue of retrenchment. It had been explained that the statutory increase would result in the retrenchment of 30 employees if implemented immediately. Pieterse testified that even though there were a lot of questions asked in the meetings, workers were not angry. Nevertheless he conceded they were not happy, which Nyathi also confirmed based on his observation that people were dragging their feet when they left the meeting and because they were noisy during the meeting and were saying the interpreter had been 'bought'. Sibeko also testified that the interpreter was challenged as to her credentials and why she had been sent to explain the proposal to them when they had a union official. According to him the meeting ended on a disruptive note.

[24] Even so, according to Visagie, if workers had not agreed with the staggered implementation of the minimum wage as proposed by the company, the company would not have applied for the variation. Visagie denied that it had ever been communicated to management that workers would rather be retrenched and pointed to the result of the poll which indicated the opposite. But he did concede that this might have been mentioned at one of the meetings. Visagie claimed that employees had been told exactly what they would receive until the sectoral determination was fully implemented, but he also claimed it was made clear to them that the respondent would act in terms of its proposed phasing in of the sectoral determination pending the outcome of the variation application. However, Pieterse did not recall this being conveyed by Visagie, but rather that he had said the company would have to consider retrenching if it was not successful in obtaining the variation. Visagie's comments about what the respondent intended to do also seems at odds with his earlier

testimony that the respondent would not apply for the variation if the majority of workers did not agree to it. Sibeko also confirmed that the interpreter said that if the determination was put into effect that the employer would have to retrench because it could not afford the increase. Personally, he did not believe it could not afford the increase because it was such a big company, but it was never part of the union's case that the increase was affordable and that there was no need for the variation application.

[25] Following the meetings, workers were requested to 'vote' a few days later on whether to support the application for variation or not. This was done by asking them to sign a form headed "Consultation With Employees" in the appropriate column of a table set out in the form. Visagie claimed this polling form had been shown to workers at meetings held with them on 21 February. Sibeko denied that they were told about the voting process or that the company would be applying for variation of the determination: they merely told about the manner in which the employer proposed to pay the increase. According to Engelbrecht, the form was drawn up in line with Department of Labour guidelines for applications for variation of basic conditions. The headings of the columns in the table appeared thus:

NAME & SURNAME	UNION-YES/NO	AGREE TO EXEMPTION	DO NOT AGREE TO EXEMPTION	REASON FOR DISAGREEMENT

[26] Workers were individually approached on 25 February to sign the form indicating their choice. The personnel presenting the form to individual workers were Mr D Mabaso ('Mabaso') and Pieterse. A majority of workers canvassed agreed to support the variation. Engelbrecht

agreed that the completed forms appeared to suggest that 146 out of 274 employees (about 53%) seemed to have acceded to the 'exemption'. Visagie's uncontested evidence was that 24 % voted against the variation, about 8 % of employees were absent and 12 % did not vote. During the cross-examination of Nyathi it also became apparent that some of the employees were polled, including himself, would not have been affected by the wage determination because they were earning higher wages.

[27] It was contended that no interpreter was present when workers were polled but Pieterse, Nyathi and Sibeko all testified that Mabaso, who accompanied Pieterse when the form was canvassed with workers, had explained the poll to workers in Seswati. Sibeko also claimed when he was approached to sign the form it was explained to him that it was needed because the meeting on 21 February did not reach a consensus. Although this sounds plausible, this particular detail was not canvassed with any management witnesses. Sibeko also added that Mabaso said that they wanted to see how many agreed with the proposal and how many disagreed with it, but those who did not agree with the employer would be retrenched, an embellishment of the applicant's case, which was also not canvassed with the employer's witnesses.

[28] Despite any discontent there may have been about the ballot and what was conveyed to workers by management, Sibeko agreed that he made no attempt to contact the union prior to workers receiving their pay notifications at the end of March. When it was put to him that the problem would not have arisen if he had performed his duties as a shop steward to represent his members, he pointed out that inasmuch as management might say they expected the shop stewards to approach them if workers had a problem, management had not approached the shop stewards when they canvassed workers on the variation application: management simply disregarded their representative role as shop stewards and treated them like all the other employees. For example, when meetings were convened with workers, management would not engage with the shop stewards

beforehand. This issue was not canvassed with management witnesses [?].

[29] Msiza admitted being aware of the meetings on 21 February but could not recall being contacted by any shop steward between then and the commencement of the strike on 28 March. On the other hand, he claimed to have known that the union was aware that workers were unhappy about the proposal presented at the meetings and that the union had engaged with members and was giving guidance to shop stewards on how to handle the situation. However, he could not explain why Sibeko said there had been no communications between them.

[30] Anomalously, the name of the interpreter who had been present at the meeting is on 21 February also appeared on the forms on which workers indicated their preference, though it was common cause she was not present during the polling. The forms also contained the names of the union organiser and shop stewards which might misleadingly have suggested to a third party such as the Department that they had been participating in the polling process. However, Pieterse testified that nobody had objected to the polling process when they conducted it and two of the shop stewards had also participated in it, both of whom voted against the variation. Pieterse said he never heard it being said that workers were angry that they were approached individually. He did concede that it would have been fairer if a shop steward was present when the workers were individually approached, but from what he saw the absence of a shop steward did not deter workers voting against the proposal. Pieterse could not comment on whether workers voted for the proposal because they believed that if they had voted against it they might be identified for retrenchment.

[31] Engelbrecht claimed that employees were fully aware that their wages would initially only increase to R 1800-00 per month and that the full new minimum wage would only be paid by December that year. He also claimed workers had been advised the company was going to implement its proposed phasing in of the new minimum wage on the

understanding that the Department of Labour had said that it did not have to implement the new minimum wage provided the application was submitted by 1 March, but with the proviso that the alternative phasing in was not approved, the respondent would have to pay back-pay. Engelbrecht recalled that about 900 employers applied to be excused from implementing the new wage. He could not recall if he had seen a written communication from the Department to that effect but had seen the temporary variation issued on 2 April which was granted on condition that an increase of about 7 % was paid (the respondent paid 14 % with effect from 1 March). It would seem that the Departmental press releases which only emerged in the course of Visagie's testimony lend corroborate his recollections. Nevertheless, he could not dispute that this communication from the Department was not made to FAWU or to the employeees. He did not know why the Department would have felt it was necessary to issue the letter on 2 April if it had already issued a general notice of 'exemption' pending the final outcome on individual applications. It must also be noted that none of the respondent's witnesses provided any evidence that any written notification been provided to the union that it was going to implement its proposal in reliance on such a communication from the Department. In fact, Visagie testified that he saw no need to convey these communications to the union because FAWU had never replied to the respondent's letter of 21 February so in his view they had accepted the respondent's proposal.

[32] Visagie was not present when the polling was conducted and could not comment on the applicants' claim that no shop steward was present when employees were approached individually. It was suggested that the applicants believed that the state would pay the difference between what the respondent was willing to pay and the amount in the sectoral determination. He did concede that if the workers had not been aware that this was the respondent's intention, that might have provoked them

[33] It appears that the variation application was only submitted on 27 February a few days before the new minimum wage was due to take

effect. Engelbrecht admitted the lateness of the application but pointed out that the respondent had notified the union a week earlier of its intention to apply for it. Engelbrecht could not dispute that a copy of the application itself had not been sent to the union. Msiza said that he only saw the variation application for the first time when preparing for trial. He claimed that if he had seen it at the time he would definitely have opposed the application. He explained that the union would have opposed it because it should have been informed of the application and in the absence of reasons for the application, it would have objected to it.

28 March

[34] When employees received their monthly wage payment notifications by SMS from their banks early on Thursday 28 March 2013, they realised that they were not receiving the minimum wage due in terms of the sectoral determination. Sibeko testified that workers were angered by this.

[35] The text messages from the workers' respective banks showed what they had been paid for March. According to Sibeko, the workers had expected that the government would make up the difference between the wage determination wage and what the respondent was intending to pay. Workers had felt they had 'won a jackpot' which would help them over the coming Easter weekend. When he was asked why they expected to receive the minimum wage stipulated by the determination despite the proposal put forward by the company, his explanation was that, they never received any feedback from the company about the outcome of the voting process and assumed that they were going to get the money prescribed by the sectoral determination. By 09H00 that morning a meeting was convened during the morning tea time by workers after which they did not want to return to work because they were unhappy about the wages they had received.

[36] Sibeko approached Pieterse who said they must wait until Engelbrecht arrived and addressed them on the issue of wages. Sibeko claims he had told Pieterse that the workers believed the respondent wanted to

steal their money from the government which they were entitled to, but Pieterse denied being told this. Pieterse spoke to shop stewards and told them that they must return to work and that Engelbrecht would discuss the matter with them when he arrived. Pieterse had already spoken to Engelbrecht when workers were holding their teatime meeting. On his way to the farm at about 09H25, Engelbrecht phoned Msiza and advised him that workers were refusing to return to work. Msiza said that he would try and contact the workers telephonically to try and resolve the issue as he could not come to the farm himself. Msiza claimed that he did speak to Sibeko and told him that the strike was not necessarily protected and that workers should return to work, but Sibeko had told him that there was a great degree of anger amongst the workers. Msiza testified that it was only after the Easter weekend that he had an opportunity to go to the farm. Engelbrecht arrived at the farm shortly before 10H00. When he arrived, a number of employees were sitting in front of the packing sheds and he saw others holding sticks and branches, which he surmised they had used to chase other workers out of the greenhouse section, as he had been told. Pieterse testified that some workers had been chased out of their workplaces.

[37] On speaking to the shop stewards who were present, Engelbrecht was told that workers wanted to be paid R 105-00 as per the wage determination. He reminded them of what had been discussed and that the company was in the process of obtaining the variation. He appealed to them to explain this to members, but when shop stewards returned they advised him that workers were not interested in returning to work unless the issue was resolved by paying them the wage determination rate. Nothing in his evidence gave the impression that he conveyed to the shop stewards that the respondent was relying on the result of the ballot rather than the representations from the Department that because the respondent had submitted the variation application in time, it did not have to pay the new minimum wage in March.

[38] Shortly after this, the employer issued shop stewards with the first ultimatum to return to work by 11h30 that day. Although they refused to sign for it, they took it and discussed it with workers. Engelbrecht also spoke to Msiza about the ultimatum at about 10H20 and faxed a copy to the union office. The body of the ultimatum was entitled "First Ultimatum to Resume Duties" and read:

> "Take note that your current action does not comply with section 64 and/or section 65 the Labour Relations Act and is therefore regarded as an unprotected strike.
>
> And here to this ultimatum may result in serious steps being taken against you.
>
> You are hereby notified to end your current actions and to resume your normal duties at 11 H30 on 28 March 2013.
>
> Should you fail to adhere to this ultimatum and neglect to resume your normal duties may be dismissed due to your actions.
>
> The principle of "no work no pay" will be applicable."

[39] According to Engelbrecht, all previous communications had been issued in English and disciplinary enquiries were also conducted in English. There was no reason to suppose that shop stewards would not have understood the ultimatums. It was suggested that when the ultimatum was issued to Sibeko that he did not understand it. Nevertheless he did say that it was explained to him and that Engelbrecht read the ultimatum to him. Engelbrecht disputed that Sibeko had asked him to call Msiza because he did not understand the documents. In fact, when Sibeko testified he did not mention having made such a request despite going over the events twice in his evidence in chief. Sibeko agreed that Engelbrecht gave him the ultimatum and explained it to him in English, which he understood a bit of, but he refused to sign it because he did not understand English clearly. He claimed that Engelbrecht did not respond to the workers' complaint when he related it to him, but merely gave him the ultimatum. Nevertheless, he took the ultimatum and explained to workers that the company wanted them to return to work by 11h30.

However workers wanted to know if the ultimatum indicated when they would be paid their money which was 'sent from government'. They were not prepared to return to work until the money was paid. They had waited for Engelbrecht to arrive but he had not resolved the problem. By the time the first ultimatum expired, none of the employees had returned to work. Under cross-examination, Sibeko said that he had conveyed conveyed to workers that they must return to work before the ultimatum expired. What prevented them from doing so was they wanted an answer to their demand for payment of the money they believed they were entitled to get.

[40] At approximately 12h30, by which stage the chief shop steward, Mr J Msiza ('J Msiza') had returned from training, Engelbrecht had held another meeting with shop stewards and issued them with the second ultimatum calling upon workers to return to work at 06H00 on Tuesday 2 April 2013, which was the next working day after the Easter weekend. The second ultimatum was handed to J Msiza. Additional copies of the ultimatums made for shop stewards to distribute and Engelbrecht denied that they had only been issued one copy.

[41] The wording of the second ultimatum was identical except for changes relating to the time for compliance and the heading which reflected that it was a second ultimatum. As in the case of the first ultimatum, shop stewards explained it to workers after which they left the premises and went home. As far as Engelbrecht could recall, the second ultimatum was issued between 12H00 and 13H00. Sibeko confirmed that J Msiza explained the second ultimatum and claims that workers were told to return to work on Tuesday 2 April when the matter would be resolved. He said workers were content to leave the premises on that basis.

[42] Copies of both ultimatums were faxed to the union at 12h38 that day. Msiza admits that the ultimatums were received but he was not in the office. Nevertheless, he claimed he did speak to Engelbrecht and undertook to engage with the matter after the Easter weekend.

2 April

[43] On 2 April 2013, workers gathered early outside the premises and erected barriers on the main road opposite the entrance to the farm. By this stage, nothing had been heard from the union since the strike began. According to Engelbrecht, the company did not allow workers access to the premises until the shop stewards or the union confirmed that they were willing to work and were not continuing with the strike. Visagie said he arrived at about 05h45 and asked workers to sign the document agreeing to return to work as a precaution because he was aware of the damage to property that had occurred in the Western Cape and it seemed a prudent measure. He could not say if this had sparked the further strike action or whether workers had intended to continue strike anyway. Sibeko indicated that workers were angered by being locked out of the premises. As things unfolded, it never got to the point that anyone was refused entry because they did not sign a document. It seems that Visagie's recollection of the document was unclear and that he might have confused it with a discussion at the meeting which took place later that day when the issue of workers signing a document that they were prepared to return to work had been discussed.

[44] In any event, according to Visagie by 06H00 on the morning of 2 April, the situation had escalated. Workers had barricaded the national road leading into the company premises and prevented vehicles from passing. At around this time, he phoned Engelbrecht who then phoned Msiza at 06H06. Sibeko agreed that the gates were shut by 06h00 and workers were querying why they were prevented from entering when they had been told to return to work and the problem would be resolved. Sibeko claimed that only the security guards at the gate and no management personnel were present at that time, but this version had not been put to any of the employer's witnesses. According to him, they waited until 07H00 at which point workers decided to close the road in order to get government's attention because the money they were expecting came from government. He denied that workers struck any of the vehicles in any manner.

[45] The applicants did not deny barricading the road but denied throwing sticks or stones at vehicles. They claimed that they wanted to tell the public that the government and the company were trying to steal their money

[46] Engelbrecht described the atmosphere as very tense when he arrived and that workers were aggravated. Workers barricaded the road, threw stones at vehicles or hit them with branches causing drivers to turn their vehicles around.

[47] At 06H27, Engelbrecht again phoned the organiser, but Msiza advised him that he was not available, though he would try to make a plan to get there during the course of the day. Engelbrecht convened a meeting with shop stewards calling upon them to persuade members to return to work to stop what they were doing, but they refused and the actions escalated to the point where the company sought the assistance of the SAPS. The applicants claimed that nobody requested them to return to work, but at approximately 07h00, a final ultimatum was issued calling on workers to return to work by 06H00 the following working day, 3 April. Apart from having the heading 'final ultimatum' and containing the new time and date for compliance, the final ultimatum contained the same content as the previous ones. This ultimatum was also faxed to the union.

[48] Msiza arrived at the premises at about 10H30. He met with workers and a local municipal councillor. Sibeko claimed that Msiza arrived at about 10h00 or 11h00, which was after the councillors arrived.Irrespective of the sequence of events, a meeting between management and union representatives was convened for 17h00 the same day. Sibeko claimed that a meeting was held with shop stewards, Msiza, Visagie and some and some members of management but it was agreed that another meeting would be held at 17h00 because Engelbrecht was not present. This version of an additional meeting in the morning was never put to Engelbrecht. Shop stewards returned from the meeting with the management to the workers and reported that the union would be meeting with

management at 17H00 to discuss the issue of the wages and workers should return home and report for duty the following morning.

[49] In any event, there was some agreement to hold a meeting and it convened at 17h00. The meeting was attended by Visagie, the respondent's financial manager, the general farm manager (Mr Alwegen), Engelbrecht, Msiza and the three shop stewards. According to Engelbrecht, Msiza raised the issue of the new minimum wage in the wage determination. He was then he was shown a copy of a letter from the Department of Labour issued on the same day which had granted provisional permission to the respondent to pay a minimum of R 75.31 per day pending the final outcome of the application to vary the minimum wage. The letter also reminded the company to provide certain requested information by 8 April 2013 relating to its financial position and hours worked, failing which the application would deemed to be refused. Engelbrecht testified that although the letter required employer to pay increase of 8.6% with effect from 1 March 2013, it had in fact paid an increase of 14% in terms of its proposal. I note in passing that this meeting was the first meeting held between the union and the company at which the variation application was discussed. It was also the first time there was official confirmation of a provisional variation by the Department in favour of the respondent, as opposed to press releases. The letter had only been received from the Department at about 14h30 that day.

[50] According to Engelbrecht, the union representatives accepted that the temporary variation had been granted by the Department and agreed to await the final outcome of the variation application. However, Sibeko indicated that it made them angry to learn that the employer would not have to pay back the difference between the determination and the proposal, if the application for variation was successful. When he was asked if he thought the employer had done anything wrong in the light of this letter, Sibeko responded that it was wrong of the company to bring it to their attention so late. Msiza said the union delegation was shocked to see the letter but agreed to urge workers to return to work the following day.

[51] Engelbrecht claimed that union representatives also accepted that the strikers would be issued with a final warning, but later under cross-examination, he was more equivocal about whether that was merely something which management intended to do but had not yet decided upon. He maintained that the respondent would have been entitled to do so, but his advice to the respondent was that the issue should be discussed with the workers once they were back at work and a final written warning probably would have been issued for participation in the strike up to and including 2 April. Visagie could not recollect being advised by Engelbrecht to issue a final written warning or that this had been mentioned in the meeting on 2 April. He was adamant that the company did advise the union representatives at the meeting that it intended taking disciplinary action the following day against eleven employees whom the respondent had identified as being involved in hitting vehicles and erecting burning barricades on the public road. Visagie claimed they advised the union delegation that the workers in question would not be allowed onto the premises. The need for proceeding with this disciplinary action fell away when all workers were disciplined for their participation in unprotected strike action. Sibeko and Msiza both denied that any mention was made of the planned disciplinary action that would be taken against some of the workers. Sibeko was under the impression that there would be further discussions between management and shop stewards to resolve matters and that they were not warned that workers facing disciplinary action would be prevented from entering the premises.

[52] At the meeting which took place between the union, shop stewards and management representatives the following issues were raised:

52.1 the union was concerned that the company had not complied with these actual determination called upon to do so.

52.2 Engelbrecht advised that the company was unable to pay the wages prescribed and gave Msiza a copy of a letter from the Department of labour responding to its variation application.

The union delegation discussed the information received and advised the company that they noted the response from the Department and would await the outcome of that process.

3 April

[53] The following day workers entered the farm premises but when the eleven employees identified by the company for disciplinary action were prevented from entering the premises and were issued with notices of suspension, other workers resumed their strike demanding that the respondent abandon the intended disciplinary action against the individuals. Sibeko said that certain workers had been prevented from going to the workstations by the security officials who had retained their clock cards which made other workers very upset. At around 06H40, Visagie said he phoned Engelbrecht and advised him of developments. Engelbrecht then phoned Msiza and explained to him that despite the commitment made to resume work, workers were still refusing to do so. Engelbrecht made three telephonic attempts to get hold of Msiza in during the following hour after learning about the new turn of events.

[54] When Engelbrecht arrived at the premises some of the strikers were sitting on the grass and he saw two of the shop stewards chasing workers from the greenhouse with sticks or branches and that he could not say if they were subsequently disciplined for this. Pieterse claims to have seen this but could not identify which individuals had been involved. Nyathi also claimed that he had been allocating tasks to workers who had reported for work in his section when a group of workers arrived and asked how they could work when others were outside. Workers who had taken tools began handing them back and there was a commotion during which time some workers were assaulted. He fled the scene on a motor bike.

[55] A meeting nonetheless ensued with shop stewards in which the company reiterated the commitment to return to work which had been made in the previous day's meeting. Shop stewards raised the issue of the disciplinary action to be taken against the 11 individuals which the

other workers wanted the respondent to abandon. Visagie and Engelbrecht said the shop stewards said they would continue with their strike action until the eleven employees came back to work. It was explained to the shop stewards that the workers in question would have an opportunity to present their cases at the disciplinary inquiries. The shop stewards then reported back to the striking workers but they did not return to work.

[56] According to Engelbrecht, Msiza arrived at the farm at about 07H30, approximately 30 minutes after he had. He claims that Msiza spoke to members for approximately five minutes and then left again without speaking to management at all. He then phoned Msiza at 07H46 and asked him why he had left. Msiza responded that workers did not want to listen to him and there was nothing more he could do. The fact that workers were not interested in listening to Msiza was borne out by Sibeko's testimony. He indicated that workers were agitated and noisy and did not give him their attention because they were saying that the company was "coming with another tactic" by blocking some employees. He could not say workers did not listen to Msiza but he could not hear what he was saying because workers were singing. Msiza essentially confirmed that over the course of about 10 minutes he had attempted to persuade workers to return to work without success. He also confirmed that he had conveyed his frustration to Engelbrecht and that he had left because workers did not want to listen to him and there was nothing more he could do.

[57] There was no real doubt what the strike on 3 April was about. Visagie himself was of the view that the strike on 3 April was in support of the 11 employees who had not been admitted to the premises pending disciplinary action. Since the union and the shop stewards had been advised the previous day of the company's intention to discipline these employees and the nature of the alleged misconduct, he did not think it was provocative of the company to exclude them from the premises.

[58] Thereafter, at about 11h00 the respondent met with the shop stewards and explained that the conduct of the workers was unacceptable and

gave them notices of suspension and that workers should appear at disciplinary enquires on 5 April. It is common cause that no further ultimatum was issued to the strikers after the final ultimatum the previous day. The notice of suspension explained that they were suspended without pay pending the disciplinary enquiry on account of being on an unprotected strike. The notice of the enquiry, which contained a certain amount of duplication, and was issued to all the workers gathered outside the premises, charged them with the following:

"1. UNPROTECTED STRIKE, in that on 28 March 2013, 2 April 2013 and 3 April 2013 you participated in an unprotected strike and not adhere to any of the ultimatums issued in this regard. First ultimatum was issued on 28 March 2013 09:30 to resume duties at 11:30. The second ultimatum was issued on 28 March 2013 at 11:00 to resume duties on 2 April 2013 at 06:00. Final ultimatum was issued on 2 April 2013 at 07:00 to resume duty on 3 April 2030 at 06:00 which is not adhere to.

AND/OR

2. GROSS INSUBORDINATION in that on 03 April 2013 you ignored the final ultimatum to resume duty. First ultimatum was issued on 28 March 2013 09:30 to resume duties at 11:30. The second ultimatum was issued on 28 March 2013 at 11:00 to resume duties on 2 April 2013 at 06:00. Final ultimatum was issued on 2 April 2013 at 07:00 to resume duty on 3 April 2030 at 06:00 which is not adhere to.

3. ANY OFFENCE WHICH IS IN CONFLICT WITH THE ACCEPTED NORMS OF BEHAVIOUR AS WELL IS THE DISTURBANCE OR RELATIONSHIP WITHIN THE WORKPLACE, in that on 02 April 2 013 you blocked the National Road R538 with rocks and burning branches. That you also threw stones at passing vehicles and hit them with branches.

4. BRINGING THE COMPANY NAME INTO DISREPUTE, in that on 02 April 2013 you blocked the National Road R538 with rocks and burning branches. That you also threw stones at passing vehicle and there was branches. This action lead to the Company's good name and reputation being damaged."

[59] Copies of the suspension notice and the notice of the disciplinary enquiry were faxed to the union. At the union's request the enquiry was postponed to 16 April 2013.

Disciplinary Enquiry of 16 April and 22 April

[60] A disciplinary hearing was held on 16 April and on 22 April the employees dismissed.

[61] Msiza represented workers at the enquiry. An external chairperson found the workers guilty and recommended their dismissal which recommendation the respondent followed. Sibeko said that the enquiry was conducted in English and workers did not follow the proceedings properly. None of the shop stewards testified but the organiser, Msiza, made representations. Msiza said that they did not call any witnesses because of the nature of the charges. When he was asked why no evidence was presented that the workers were angry because they did not understand the variation process, Msiza could only say that he might have mentioned that to the chairperson but could not remember clearly what he had said.

The selective re-employment process

[62] After the strikers had been dismissed approximately 24 of those who had originally been dismissed were allowed to return to work on the basis that the respondent concluded that they had either not been involved in the strike or had been identified as employees who had been intimidated to participate in the strike. However, a number of those dismissed were subsequently re-employed by the company. Engelbrecht had no involvement in the process which led to their re-employment. Visagie instructed management that only people who were positively identified as being intimidated could be re-employed.

[63] The process of re-engaging some employees was as follows. Pieterse said that on the day workers were dismissed forms were handed out to them to apply for re-employment, but not everyone took a form or re-

applied. Sibeko confirmed that forms had been handed out and he was confident everyone had applied for re-employment.

[64] On Visagie's instruction Pieterse assembled a committee comprised of 6 to 8 senior employees who did not participate in the strike, such as Mr J Nyathi and Mr A Machola, to go through the applications for re-employment.They considered applicants who claimed to be intimidated and who had wanted to work during the strike but could not do so. It was the committee together with the relevant section managers which made the decision as to who should be re-employed.

[65] Only those applicants who were selected by the committee were subsequently interviewed by the committee and management. According to Pieterse, the selection was made on the basis of the knowledge of members of the committee as to who had been intimidated during the strike. Nyathi, who was a member of the committee said that the committee also considered workers whose houses had been set alight or workers who had been on leave. Sibeko denied that there had been any intimidation during the strike, but conceded that he could not dispute if someone's house had been set alight. Nyathi was equivocal about his role in the committee and on his account did not attend any of its meetings, though he confirmed the names of certain assistant supervisors from the tomato, cucumber and workshop sections who were part of the committee. He was also able to identify a number of the persons listed as still employed by the company as employees who had been subject to intimidation or had been on leave during the strike. Sibeko, claimed that ten of the employees whom the company listed as still employed had participated in the strike. However, these claims he made were not properly canvassed with management witnesses. On the other hand there was scant evidence of any substance supporting the objectivity of this peculiar secretive selection process.

Evaluation

The causal chain

[66] The facts of this dismissal case somewhat unusual because the original strike was did not originate in demands from the workers, but was a strike arising from failure to implement a statutory wage increase. It arose because of legitimate expectations of a significant increase arising from the published sectoral determination which were drastically curtailed by the unfolding variation application process initiated by the respondent in an effort to deal with the unexpected and significant rise in labour costs (in relative terms).

[67] The original strike might well have been avoided if both the company and the union had been more proactive in their communications. Both parties were equally surprised by the publication of the new sectoral determination and the scale of the increases. No doubt, the Department made the determination in good faith as an attempt to address the low wages of agricultural workers which at least in part had been identified as a cause of the labour turmoil in the sector which began in the Western Cape. However, the relative scale of the adjustment and the timeframe between publication of the determination and implementation of the new minimum wages was such that it precipitated its own problems as illustrated by the large number of variations applied for.

[68] Because of the limited time between publication of the determination and the implementation date, the Department evidently resorted to the practical expedient of provisionally suspending the obligation to implement the new minimum wage in full pending the final determination of the flood of variation applications. This legally questionable measure laid the basis for a degree of confusion surrounding what would happen with effect from 1 March 2013 when the new minimum wage was supposed to take effect.

[69] Apart from the rushed efforts of the Department to deal with the situation, the employer and the union each contributed in their own way to the confusion because of their limited communications during the critical period after 21 February. I accept that the company initially did the right thing in asking the union to meet with it and in notifying it

of its intentions and inviting the union to make submissions about its intended application in the letter of 21 February 2013.

[70] Nonetheless, the respondent still bears a significant degree of responsibility for the initial strike occurring. Although the respondent commenced the process appropriately, once it did not receive a response from the union there is no evidence it made any further effort to communicate with the union about developments. It did not bother to send the union a copy of the formal variation application when it submitted it to the Department on 27 February as it was required to do under section 50 (7)(b)(i) of the BCEA. The fact that it had notified the union of its intention to apply for the variation did not its excuse it from this statutory obligation.

[71] In this regard, it is noteworthy that its letter to the union of 21 February invited the union to make suggestions and input regarding the proposed application. The purpose of s50 (7) (b) (i) is to alert the union and employees to the *formal* application and to invite them to make use of the opportunity to submit written representations to the Minister before a decision is made on the variation application. The formal application requires a fuller motivation to be provided by the employer, and goes beyond what was stated in its letter of 21 February. The formal application procedure is a mechanism to ensure that both interested parties have an equal opportunity to make representations to the Minister before a decision to vary a basic condition of employment is taken. Given the union's initial failure to engage the respondent on the variation proposal, it is perhaps doubtful that it would have done anything even if it had received such notice, but it was not for the respondent to make that call based only on the union's failure to respond to its initial letter. Its omission to comply with section 50(7)(b)(i) meant that a further channel for engagement over the variation application was not opened. It is true that Msiza said he would have opposed the formal application if he had received it, but if he was waiting for it, he gave no hint of this because he failed to respond in any way to the company's stated intention of applying for the variation.

[72] In relation to the respondent's engagement with the workforce, whatever workers may have understood about the purpose of the poll conducted by the respondent, it appears to be common cause that they understood that if they did not agree with the variation, it would not be implemented. The consent to the respondent's proposal based on the poll was based on a slight majority of those polled. The poll clearly included some individuals whose wages would not be affected by the determination and who should not have been part of the poll. It must also have been apparent from the meetings on 21 February that there was a degree of vocal dissent over the proposal. Between the result of the poll being known to management on or about 26 February and workers being notified of their March salaries on 28 March, the respondent made no attempt to convey the result of the poll to any of the affected employees or to shop stewards or the union. According to Visagie, 56 % of those polled voted in favour of the proposal, 24 % voted against it, 8 % were absent when the poll was conducted and 12 % did not vote.

[73] Accordingly, workers would not have known what the majority of those polled had decided nor whether the company proposal would be implemented or not. They also would have had no knowledge of the press releases of the Department which might have encouraged the respondent in the approach it adopted. The first indication employees would have had of what the outcome of the poll might have been was what they could infer when they received notice of their March salaries showing that the respondent was not implementing the prescribed minimum wage, but its proposed increase. Given the gap between the prescribed minimum wage and the March salary any reasonable person would have anticipated that prior warning about the outcome of the poll would have been both prudent and necessary, rather than in being revealed indirectly through the banks' sms notifications.

[74] Moreover, when the strike commenced, the evidence does not suggest that the respondent relied on the outcome of the poll or even discussed the outcome as a justification for implementing its own proposal. On the contrary, it would seem that the justification

advanced was that the Department had agreed that it was not required to pay the new minimum wage pending the outcome of the variation application, provided it paid a lower minimum increase. This would have been the first time that workers were advised of the existence of the pending application and its implications for their entitlement to the minimum wage. The last communication they would have had from the company prior to that would have been that the respondent was intending to apply for a variation, which would still depend on whether or not they supported it.

[75] For its part, the union's failure to endeavour to set up another meeting or to provide any response whatsoever to the letter and its failure to engage with the company after the company started canvassing workers from 21 to 25 February was grossly negligent. Even if the union had been unaware of the specific press releases from the Department, it is incomprehensible how a union organising in the agricultural sector could have been so ill-informed of, or disinterested in, developments affecting its members arising from the publication of the determination and the variation applications affecting its members, which were generated thereafter.

[76] On the evidence, in all probability there was also no communication between Msiza and the shop stewards during the critical period from 21 February to 28 March. Any confusion or unhappiness on the part of the union's members working at the respondent ought reasonably to have been the subject matter of communications between the officials and shop stewards and the union should have followed this up with the respondent. On the evidence, it is fair to say that the union left its members and shop stewards to their own devices and failed to play a meaningful role in assisting them in dealing with the impact of the sectoral determination and the variation application. Apart from the limited and largely reactive role played by the shop-stewards, the individual applicants might as well not have been unionised. Such assistance which they eventually got from the union came late in the day.

[77] In the circumstances, it is not unreasonable to believe that a degree of confusion probably existed amongst the workforce about whether or not they ought to have received the gazetted minimum wage in the wage determination in March and that this would have caused an understandable degree of frustration and anger. It was a situation in which expectations should have been more responsibly managed especially given the magnitude of the promised increase imposed by government relative to what was actually paid. The complexity of the provisional variation application procedure and the provisional blanket permission ostensibly granted by the Department to employers should also have been properly explained given the novelty of the situation and the fact that the affected workers were mostly unskilled agricultural workers.

[78] In the circumstances, although the original strike was clearly an unprotected one, because it was not preceded by any dispute declaration, the downing of tools by workers who had not been kept abreast of developments since they were polled on 25 February was understandable. It is true that initially they ignored the ultimatums issued. However, it is equally true that once they were presented with proof that the Department had provisionally approved a smaller increase pending the outcome of the variation application that they agreed to go back to work despite their obvious disappointment. Had matters ended there, nobody would have been dismissed, aside perhaps for those accused of other misconduct during the strike, because they made good their commitment to return to work the following day.

[79] It was the new strike which erupted on 3 April that precipitated the dismissal inquiries. It was common cause that workers had returned to work on 3 April. It was only when the news reached them that the eleven workers who were facing disciplinary action had been refused access to the workplace that strike action started afresh. This alone suggests they were probably taken unawares by the suspensions. If in fact it had been made known to workers on 2 April that eleven workers would be facing disciplinary action and would be suspended the

following day, it seems less likely they would only have reacted after the workers were suspended the next morning. It is more probable they would not have started work in the first place. Even if I accept that the union delegation at the 17h00 meeting on 2 April was told of the company's intention to take disciplinary steps against the eleven individuals, it seems unlikely that they were also told that the workers in question would not be allowed back at work pending the enquiries. On the probabilities it was the exclusion of the eleven individuals which sparked the fresh outbreak of strike action.

[80] It is true the respondent first spoke to the shop stewards and reminded them about the commitment to return to work, but the shop stewards explained workers would not unless the suspended workers were allowed to return to work.

[81] Thereafter Msiza very briefly and unsuccessfully attempted to persuade workers to return to work. He was understandably frustrated by their refusal to listen to him. Even so, it is remarkable he left the premises without communicating anything to management even though he came to the premises at management's request. It would seem he did not even have a separate discussion with the shop stewards.

[82] The respondent clearly adopted the view that it was no longer necessary to issue further ultimatums, but proceeded directly to suspend all the workers and initiate disciplinary action. Beyond the ultimatum issued the previous day in respect of the original strike, apart from insisting that workers should honour the agreement they would return to work, neither the shop stewards nor Msiza were advised that the respondent was going to proceed with disciplinary action if the new strike action over the suspensions did not cease. It is clear from the charges levelled against them that the respondent regarded the strike as a continuous event and that the tools down on 3 April was merely a continuation of an uninterrupted strike which began on 28 March, when in fact the strike which commenced on 28 March

had been resolved at the meeting at 17h00 on 2 April and ended with workers returning to work the next day.

[83] The strike which ensued thereafter was sparked by different reasons relating to the respondent's subsequent action in suspending those to be disciplined. Obviously, the disciplinary action and suspension were consequences of the first strike, but management clearly was of the view that it had already done all that was necessary to warrant dismissing the strikers because of the ultimatums issued in the main strike. It is also true Msiza had washed his hands of the workers after a brief attempt to persuade them to return, which might have emboldened management to believe there was nothing more to be done if workers would not even listen to a union official. Nonetheless, it was implicit in management's approach that no further warning of impending disciplinary action which could result in dismissal was necessary in view of the final ultimatum issued on 2 April before workers returned to work.

Were the dismissals unfair?

[84] According to ***National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*** [4]Item 6 of schedule 8 of the LRA, which must be taken into account of in deciding the fairness of unprotected strike dismissals in terms of s 188(2), states:

> "Dismissals and Industrial Action
>
> (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—
>
> (a) the seriousness of the contravention of this Act;
>
> (b) attempts made to comply with this Act; and
>
> (c) whether or not the strike was in response to unjustified conduct by the employer.

[4] [2014] 1 BLLR 31 (LAC) at 36, par [26].

(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."

[85] In the CBI matter, the LAC also stated:

"[28] It is clear from the provisions of section 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 which provides as follows:

"7. Guidelines in cases of dismissal for misconduct. –

Any person who is determining whether dismissal for misconduct is unfair should consider –

Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

If a rule or standard was contravened, whether or not –

the rule was a valid or reasonable rule or standard;

the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and

dismissal was an appropriate sanction for the contravention of the rule or standard.

[29] 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. This is so because the illegality of the strike is not "a magic wand which when raised renders the dismissal of strikers fair" (National Union of Mineworkers of SA v Tek Corporation Ltd and others (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair.

[30] 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." [5]

Factors mentioned in Item 6 of Schedule 8

[86] There was no attempt by the applicants to embark on a protected strike prior to the initial strike commencing. In my view it was an understandable response in the circumstances. The respondent had not advised them or their union of the result of the informal poll and confirmed that it was proceeding to implement its proposal, which was at odds with the sectoral determination, based on the advice dispensed by the Department on pending variation applications. Moreover, the respondent was aware the poll result had not taken account of 8 % of the workers' views who were not polled, and included employees who were not affected by sectoral determination. It ought to have been more cautious in accepting the poll result as a clear endorsement of its proposal by those affected by it. At the very least it should have conveyed the results to the union, provided it with a copy of the formal application and confirmed what it was planning to do. Simply leaving workers to infer its intentions from their wage packets was a risky step. It should also have been obvious that the

[5] At 38-39.

gap between what the determination promised and what the respondent was going to pay workers on 1 March was huge and required a more careful handling of the employees' thwarted legitimate expectations of receiving the prescribed minimum wage.

[87] In relation to the initial strike, I accept that the ultimatums did give workers enough time to consider their actions and that the thrust of the ultimatums were understood. In fact there was nothing in the applicant's evidence to suggest the strikers were confused about the ultimatums or that the time to consider them was insufficient as had been pleaded.

[88] Another important consideration is that even though the union and strikers had not been aware of the Departments 'blanket' provisional variation permission as conveyed in its press releases, which the respondent was relying on to legitimise its actions, as soon as they were told about the very late formal provisional variation granted to the respondent, they accepted its legal status and agreed to end the strike, despite their disappointment with the result. Up to that point I do not think the applicant's actions could justify their dismissal for participation in the unprotected strike. In effect the ultimatums and the meeting with the union delegation at 17h00 on 2 April served the purpose of ensuring the strikers to work before the final ultimatum expired.

[89] Regrettably matters did not end there. On balance I believe the employer did convey its intention to discipline the eleven employees it accused of strike related misconduct, but that it had not been conveyed that they would be suspended on their arrival at work. If this had been conveyed to workers before they returned to work on 3 April it is unlikely they would have reported to their work stations and begun to prepare to commence their duties. Management reminded the shop stewards of the commitment made to return to work and the shop stewards responded with the workers' effective demand to uplift the suspensions. Management did seek the union's assistance but Msiza's efforts were ineffectual, though it seems workers decided he

was not worth listening to. The employer then issued the notices of suspension and disciplinary enquiry notices to the rest of the workforce. It seems at that stage the respondent viewed the resumption of strike action as a breach of the undertaking to return to work in compliance with the final ultimatum issued the previous day and that no further warning to strikers was required prior to initiating disciplinary action.

Was the sanction of dismissal fair?

[90] Although the CBI decision refers to all the factors in item 7 of Schedule 8, the key issues to consider once it is established that workers embarked on a protected strike is whether the sanction of dismissal was fair in the circumstances. Factored into that decision are the court's consideration of the issues listed in Item 6.

[91] As mentioned in the evaluation above, the initial strike was in fact resolved because workers agreed to return to work and did, albeit perhaps unhappily because of the outcome of the wage determination issue which gave rise to the strike. One of the outstanding consequences of the strike was the disciplinary measures to be taken against strikers implicated in the activities of the road blockade.

[92] I have indicated that on the probabilities, workers might not have been surprised by the fact that disciplinary action was contemplated for the alleged misconduct of the eleven workers, but had not expected their immediate suspension and I am also satisfied the employer did not warn the union delegation on 2 April of this measure. Be that as it may, it does not mean the employees were entitled to strike over the suspensions. S 186 of the LRA recognises unfair suspensions as unfair labour practices which may be referred to the CCMA and which may be decided by arbitration. Similarly the suspension of the employees could not simply be assumed to be tantamount to their dismissal and any dispute over that, if it occurred could also be referred to arbitration. Msiza tried to advise workers not to strike over this issue but they did not want to even listen to their own union's advice, let alone heed the advice he offered. They consciously rejected his attempt to guide them. They must accept that if

they had listened to him they might not have found themselves where they are today.

[93] Nonetheless, when Msiza addressed them, he did not know what the company intended to do next. There is no evidence in his communications with Engelbrecht that the latter warned him that the next step the company would take would be to initiate disciplinary measures against all the strikers which could lead to their dismissal. Equally the company never conveyed this to the shop stewards before they reported back to workers or to the workers before it started issuing the notices of suspension and the disciplinary charges.

[94] I accept that the strike on 3 April cannot be considered in isolation from the events of the preceding days, but in deciding an appropriate response to the fresh outbreak of strike action over the disciplinary issue the employer's actions should have taken account of the previous course of events as well. The initial strike had effectively been resolved and the ultimatums issued had finally been heeded. In a real sense those ultimatums did not relate to the events of 3 April but to the events resulting in the conclusion of the original strike. The employer appeared to have adopted a formalistic view of the final ultimatum, namely that it could be relied on as applicable and 'valid' for the purposes of any fresh outbreak of strike action albeit that the issue which caused the next strike was the result of developments following the cessation of the main strike.

[95] Obviously, an employer cannot be expected to endure ongoing strike action where strikers ingeniously try to refashion the issue which gave rise to the original strike to create the impression that the issue giving rise to the new strike is about a different matter altogether, whereas it remains essentially the same. But I am not persuaded that this was the case here. It may be that the suspension of the workers arose from the first strike but it was a fresh development and workers were obviously reacting to the new turn of events, whether their conduct was justified or not. The employer saw it as merely a resumption of the original strike, but it was not because workers had acceded to the consequences of the provisional variation issued by the Department. They were now questioning the

suspension of workers arising from the strike and they saw it as different from the dispute which gave rise to the original strike even if they thought it was a tactical move by the employer.

[96] Under those circumstances, I do not think it could be assumed by the employer that workers would appreciate that the company was of the view that the previous ultimatum which they had heeded also served as a final warning to return to work or face possible dismissal for walking out over the suspension of the shop stewards. At the very least, the company could have conveyed its intentions to give the workers a chance to contemplate the possible consequences of the fresh strike action before it instituted disciplinary action.

[97] But having decided not to issue such a warning and to rather follow the disciplinary process, it ought then to have taken into account when deciding on the sanction that it had embarked on disciplinary steps without any further warning in circumstances where it could not assume workers would have understood no further ultimatum would be issued and would have considered that possibility before they continued with the strike action over the suspensions. That does not mean when considering the legitimacy or seriousness of the strike, the duration of the new strike could be considered in isolation from the fact that it would mean the employer was facing its third day of strike action.

[98] In deciding to dismiss the employees for the strike which commenced on 28 March and in collapsing that strike with the strike of 3 April, the employer failed to acknowledge the distinct reasons for the two strikes and that it would have been wholly unfair to dismiss the strikers for their mere participation in the first strike which had arisen in highly unusual circumstances and when workers legitimate expectations were so poorly handled by the employer and the union and more importantly, where ultimatum was actually heeded. The weight of justification for the dismissals would therefore have to be found in the second strike where no further warning of imminent disciplinary was issued at all and no opportunity was given to them to reflect on the consequences of persisting, even if it was necessary to give strikers only one opportunity to

do so given the illegitimacy of the second strike and the fact that they had ignored Msiza's advice.

[99] Under the circumstances, the respondent ought not to have dismissed the individual applicants for the reasons given, but should have issued them with final written warnings subject perhaps to them accepting a period of suspension. The fact that the employer subsequently re-employed a substantial number of employees without affording all employee's a chance to defend their claim to re-employment implies a lack of parity of treatment of all the strikers albeit that the original decision to dismiss strikers was applied to all those charged.

[100] Consequently, I agree with the applicants that the sanction of dismissal was too severe and I am satisfied the dismissal of the applicants was substantively unfair.

Relief

[101] The normal remedy for substantively unfair dismissal is reinstatement. The employer advanced no evidence it could not re-employ the workers. If their reinstatement will leave the employer with an excessively large workforce then it may well have to embark on retrenchments to accommodate the reinstated workers, but that in itself is not a bar to reinstating them under s 193(2)(c) of the LRA.

[102] The extent to which they should be afforded backpay is another matter. The applicants would not have been dismissed if they had heeded Msiza's advice. They decided to proceed regardless, even if at that point they did not realise the employer would not give them any ultimatum in respect of the new strike. They are at least partly responsible for the situation they find themselves in. Similarly, it would be inequitable for the employer to face an inordinately large payment of backpay simply because of the litigation process. Consequently, the period effective reinstatement should be limited to six months in my view, even if it is without loss of service continuity. It is also appropriate to issue a final written warning for participating in unprotected strike action. Alternative relief is afforded in the case of applicants who might have passed away since the dismissals.

Costs

[103] Aside from the discrete issue of the costs of the union's late amendment of its statement of case which have been dealt with above, in this instance it is appropriate that costs for the remainder of the trial should follow the result.

Order

[1] The respondent must reinstate the 87 individual applicants whose names appear on the Final List of Applicants attached hereto as Annexure "A" ('the individual applicants) with retrospective effect to a date six calendar months' prior to them presenting themselves for reinstatement at the respondent's premises, which they must do by no later than 31 August 2017.

[2] Reinstatement must be effected on the same terms and conditions of employment the applicants would be receiving if they had not been dismissed. Payment of backpay for the six month period prior to the date an individual applicant presents himself or herself for reinstatement must be paid by the respondent within 20 calendar days of that date.

[3] Reinstatement of any individual applicant is subject to that applicant signing for receipt of a final written warning for participating in unprotected strike action, valid for a period of 12 months' from the date the applicant presents himself or herself for reinstatement.

[4] In the event any individual applicant has passed away by the date of judgment, the respondent must pay to the deceased estate of that applicant an amount of eight months' remuneration as compensation, calculated on the rate of remuneration that applicant would have earned on 10 August 2017 had that applicant been still been employed by the respondent,.

[5] The first applicant must pay the respondent's wasted costs incurred in opposing the applicants' application to amend their statement of case brought during the course of the trial hearing, on an attorney own client scale.

[6] The respondent must pay the applicants' costs, excluding costs incurred by the applicants in their application to amend their statement of case during the course of the trial hearing, such costs to be paid on the ordinary scale.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	R Daniels of Cheadle Thompson & Haysom Inc
RESPONDENT:	A Jacobsz instructed by Barnard Inc