IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN

CASE NO. D176/08

REPORTABLE

In the matter between

SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION (SACTWU) First Applicant

THOSE INDIVIDUALS IDENTIFIED IN ANNEXURE "A" Second Applicant

And

MEDITERRANEAN TEXTILES MILLS (Pty) LTD Respondent

JUDGMENT

Cele J

Introduction

[1] This is a claim of unfair dismissal of the second to further applicants on 4 December 2007 on the basis of their participation in an unprotected strike. The respondent opposed the claim by contending that it did not act unfairly and with haste when it dismissed the said respondents. On the contrary, it said that it had an acceptable reason for the dismissal and

that the employees had shown no intention of stopping the strike in favour of returning to work.

Background facts.

[2] The second to further applicants will henceforth be referred to as the “employees”. The respondent will also be referred to as the company. The facts of this case are basically common cause between the parties.

[3] On 23 November 2007 the first applicant (the union) issued a letter to the respondent advising it that the International Trade Administration Commission (ITAC) had published a notice in the Government Gazette on 9 November 2007, indicating that it would be reviewing and possibly removing or reducing import on textile products. The union expressed its concern in that letter that the removal of duties might lead to job losses. It needed to know what the possible impact would be on the industry so that it could make its comments to the ITAC on a factual assessment. The letter identified the categories of the products in relation to which the government notice applied and indicated that the union believed that the respondent produced such product and it therefore requested the respondent to urgently fill in the required information in the table attached to its letter and to submit the table back to the union by 27 November 2007. For a better understanding of the attitude of the respondent to the removal of import duties from its product,

the letter it wrong in response to that of the union follows hereunder.

“LOWERING OF TEXTILE IMPORT DUTIES

It is with dismay that we read the published notice in the Government Gazette regarding the reviewing of certain tariffs.

It is obvious that the policy of the Trade & Industry regarding our economy is at a crossroad. Barely a year ago quotas were introduced for a period of two years to give the Textile Industry a lifeline to re-quip and tool up so it could meet the requirements of the local industry.

Mediterranean Textile Mills did not directly benefit from these quotas, however it invested in new technology, believing there was an element of sincerity and commitment by the Government and other stakeholders to the Textile Industry.

The Gazette clearly indicates that we misread the Government’s intentions and it obviously is now grappling with the notion to sacrifice the Textile Industry to save the beleaguered Clothing Industry.

There are some garment manufacturers heralding this as a step in the right direction, but this will only be for a short time. I say this because recently at a public meeting a senior executive of a South African retailer quoted as follows:” It is time that we accept that the playing fields are not level and that local industry must not whinge. It is a matter of fact that prices are what they are, and we must just get on with it.”

Quality standards are also treated and managed in the same way. If the above sentiments and philosophy go unchecked, manufacturers will be the losers and traders and retailers will be the winners. There is no win – win under these conditions.

Referring to your letter, I make brief comments on each of the points:

1. Flax –Linen

   The removal of the duties will certainly close 30%of our business and no doubt the fledgling Herdsman linen plant in Atlanta will probably find it extremely difficult.
2. The opening of synthetic filament fabrics will certainly substitute spun synthetics and will take care of another 60% of our business.
3. Woven pile fabrics, include wool, so we can assume that customers who bring in pile Melton could declare it under this heading. This would account for another 30% of our business and Mediterranean Textile Mills will certainly be history.
4. With regard to embroidered fabrics, of course people can have all types of embroidered motifs, however small, put onto the fabric, and this will yet again open another avenue for duty free fabrics.
5. Warp knit fabrics. We have no comment as we do not make this, but surely the warp knitters will have an issue.
6. Knitted and Crocheted. Again here new avenues are opened to confuse and abuse what‘s left of any form of protection.
7. With regard to all the other points, fine weavers cotton rich, fine wools etc. these will indirectly replace fabrics that we currently produce.

In summary, I do hear people say that it is not fair that they should be paying duties on fabrics not produced in SA, however is it fair that we should be competing on unlevel playing fields? Quite frankly if the authorities concede to any of these requests, it will soon follow that protection for clothing imports and other inputs will eventually be wavered. (sic)

Now that this Gazette has been published all our customers are holding back on orders to await the outcome of the decision of Government. This

> has meant that we have received no orders recently and are faced with a very lean first three months of 2008.
>
> Unfortunately this is compelling us to seek exemption from paying a mandatory bonus and we will shortly be advising your members of our situation. “

[4] It remained common cause though that ITAC did not, as a fact, reduce the duties which were still in place when this matter was heard.

[5] On 29 November 2007 the respondent’s management held a meeting with the union official and shop stewards and advised them that the respondent would not be paying the employees their annual bonus for that year. The bonus was due, in terms of the main collective agreement of the National Textile Bargaining Council in the textile industry, approximately two weeks from the date of the announcement. While the respondent was not a member of the Bargaining Council, the main agreement was extended to all manufacturers falling within the scope of the main collective agreement.

[6] The respondent informed the union that it intended to apply to the bargaining council for exemption from its obligation to pay the bonus. There was no immediate disagreement with the respondent's stance and the union advised that it would have to consult with its members. On the same day a notice was placed on the company notice board advising of the non-payment of

the bonus and requesting the support of the employees of the company's exemption application. The notice also stated that due to the Government Gazette, indicating the possible reduction/withdrawal of tariffs, the respondent had not received a single order during November.

[7] Due to the fact that the bonus was due shortly, it was common cause that the exemption process would not be finalised prior to the bonus becoming due. By Monday, 3 December 2007 the respondent's repudiation of its obligation to pay the bonus had become known to the majority of employees and they communicated to the shop stewards that they did not support its application for exemption.

[8] On Tuesday, 4 December 2007 shortly before 7h00, the outgoing nightshift and the incoming dayshift gathered at the company premises and requested to speak to management. The workers were approached by Mr. Norman Thompson, the IR Manager, who was informed by the shop stewards that the employees wanted clarity on the payment of their bonuses. Mr. Thompson indicated toward the notice on the board and told them that the position was as stated on the notice. He advised the workers that if they did not return to work they would be participating in unlawful work stoppage and would not be paid by the respondent.

[9] The respondent's Financial Director Mr. Martin Lotter arrived at approximately 7h30 whereupon the notice, described as constituting a formal written warning was issued and handed out to the workers. At the same time a letter was handed to the shop stewards and sent to the union offices asking why a final ultimatum should not be issued to the workers.

[10] At approximately 7h50 the shop stewards requested a meeting with management to discuss the position regarding the bonus. Mr. Lotter again read to the shop stewards the notice handed out at 7h30 and the notice that had been placed on the notice board. The letter was also read out and answers to the questions posed therein were requested. The respondent's management were informed by the shop stewards that they were unable to persuade the employees to return to work at that stage and the employees were requesting that management speak to them directly. Mr. Lotter advised the shop stewards that the company would not negotiate during an unprotected work stoppage.

[11] The shop stewards raised the fact that the workers were extremely unhappy with the fact that the respondent would not be paying their bonus and also with the fact that they had been advised at such short notice of the company's intentions. At

approximately 8h40 the union official Mr. Sbusiso Ndawonde arrived and Mr. Lotter again read out the notice and the letter. The employees indicated to Mr. Lotter that the respondent should sell the new machinery it had bought and pay their bonuses. Mr. Lotter advised the workers that the respondent would continue with its exemption application, that a bonus would not be paid at that time and that the bargaining council would rule on whether a bonus would be paid at all. Mr. Ndawonde then spoke to the workers and informed management that the workers still wanted their bonus to be paid. The workers still wished the bonus to be paid even if, as management suggested, that meant that the company would have to shut down.

[12] At approximately 9h30, still on 4 December 2008, the ultimatum, warning employees to return to work by 11h00 or face a dismissal, was read out and management attempted to hand same to the workers. The workers generally refused to accept the ultimatum and were dismissed at approximately 11h15. The employees remained on the premises until 16h30 when they disbursed and left the premises.

[13] The respondent had another site where it operated its business called the Twisting Department. There were as well, day and night shift employees based at this department. On 4 December 2008, the employees who had been working night

shift on 3 December 2008 supported the strike from 7h00. Those employees were also dismissed at 11h15, at the time when they were not supposed to be tendering their employment services. The employees working the day shift commenced and continued with their normal duties until their tea time. Thereafter those employees refused to return to their working stations. Instead they remained in their canteen. There were about 7 of such employees. The respondent issued a warning letter at about 15h40 calling on the employees to return to work or to show cause why an ultimatum, which could lead to their dismissal, was not to be issued. They did not heed the warning and the respondent issued an ultimatum calling on them to return to work by 17h00, failing which they would be dismissed. Again they did not return to work and were also dismissed in accordance with the letter of dismissal which stated the reason for such dismissal as being their participation in an unprotected strike from 7h00 to 11h00.

The issue for a decision.

[14] It is to be decided whether the conduct of the respondent, prior to the commencement of the strike, was of such a nature as to leave the applicants with no alternative but to strike and whether the respondent, during the strike, gave the employees sufficient time to consider their positions before they were dismissed. As the dismissal of the employees was common cause, the respondent bore the onus of proving that the

dismissal was procedurally and substantively fair in the circumstances.

Evidence

1. Events before and leading up to the strike.

Respondent's version

[15] The submission of an application for exemption from paying the bonus was not unusual. In 2006 the respondent had advised its employees that it would not be paying a bonus. The respondent was of the view that the Collective Agreement did not apply to it as it had resigned from the Bargaining Council. The Collective Agreement had not been extended to non parties at that time. The dispute was eventually settled by agreeing to a deferred payment of the bonus in 2007 subject to the respondent's trading conditions. It was important to note that at the time of the settlement the Collective Agreement had been extended to non parties. What was important to take into account however was that this deferred payment was reached by way of a negotiated settlement. It was also clear that there was no guarantee of the 2006 bonus being paid in 2007. It was subject to the 2007 trading conditions.

[16] The conduct of employees in reaching the compromise for the 2006 bonus stood at odds with their conduct in December 2007 (zero-order intake). By December 2007, the respondent's overdraft facilities had been withdrawn, that legislation was

being considered by Government which would have a material impact on the respondent's business and that its November trading position was particularly bleak.

[17] To the suggestion of the applicants that a payment of R2 800.00 per worker was an insignificant amount in the bigger picture, Mr. Lotter explained that there was no cash available in the business to make this payment. As the Financial Director, he had statutory duties to ensure that he did not place the business in a precarious position, as he could not simply make payment when no cash reserves were available. The respondent had received loans in the amount of R12 million from the IDC which were in the form of operating capital to purchase machines which were necessary for the respondent to attempt to trade out of its current financial disaster. The fact that a loan was obtained to purchase new machinery did not mean that there was cash available for bonuses. Further to this, the loan as working capital meant that the funds were made available for raw materials on evidence provided by the respondent that it needed to have been purchased for a specific order. The money loaned could not be used by the respondent as it saw fit. It was also to be noted that salary staff were also affected and would not be receiving a bonus for 2007 and had not received a bonus for some time and to date have still not received bonuses.

[18] Mr. Ronnie Meintjies, the respondent's Financial Manager confirmed that the financial situation of the Respondent had not improved. The company continued to operate in very tough financial circumstances and struggled to pay creditors on a monthly basis. The respondent had the capacity to produce 7 million metres of fabric per year and to break even it was to sell 5 million metres of fabric. In 2007, the respondent had only received orders for approximately 4 million metres of fabric. The situation did not improve in 2008, as the respondent had only received orders for 1 million metres of fabric during the first six months of trading. The 2008 annual audit was one where auditors had to decide whether they should in fact qualify the financial statements. The projected financial loss for 2009 was R38 million. The business was in the process of restructuring and retrenchments were being considered. Should the employees be reinstated, a rough calculation of the back pay due to them would be in the region of R10 million. Should such an order be made against the respondent, it would have no option but to close its business. Given the restructuring of the business since the dismissals, the respondent might also not be in a position to accommodate the 125 employees.

Applicants' version

[19] Mr. Ndawonde had been involved in the discussions with the respondent since 2006 on behalf of the employees. He, together with shop stewards, attended the meeting of 29

November 2007 with the respondent. The company informed them that it would not be paying the workers their bonuses which were due for payment in about two weeks time as it sought to apply for an exemption. Alternatives were then suggested on behalf of workers to the company, being

- To pay partial bonuses and
- To defer payment of the bonuses till the following tear.

[20] The respondent declined to implement the alternatives suggested to it and insisted that it would apply for an exemption. The company had been faced with a similar problem in 2006 and a compromise was agreed to between the company and the union in terms of which a wait and see approach was adopted as a consideration for the payment of the bonuses in the following year.

[21] The reason for non payment of the bonuses for 2007 were not justifiable as the Government did not give effect to its published intention of reviewing and possibly removing or reducing import on textile products. It had not even been definitive in 2007 that the tariff would be removed. The company did not have any reason at all why it would not defer payment of bonuses to the following year. Even at the meeting of 29 November no valid reason for such a deferment was ever given. It was understood that after the meeting of 29 November, shop stewards would report back to the workers, in a meeting of the following Monday, the position taken by the company. The meeting was

held and workers refused to support the exemption application. Instead, they insisted on the company having to pay them their bonuses which they considered would help to ameliorate the difficult financial positions in which they found themselves.

[22] While the financial situation of the company had been explained to the union, no proof thereof had been provided to the union. However, the union was conceding that in 2007 the company received orders for about four million metres of apparel fabric which translated into an annual turnover for 2007 of R90 million. That was down from R98 million in 2006, R96 million in 2005, R104 million in 2004 and R136 million in 2003. A further concession was that the company had only received orders for approximately one million metres of fabric from January to June of 2008. The publishing of the Government Gazette did create an additional problem to the company. However, as the Gazette came out in November 2007, it followed that the company had not budgeted for the payment of bonuses when employees hoped they would be paid. The right of the company to apply for an exemption was also not challenged by the union, neither was there a challenge to the circumstances prevailing in the textile industry, as a whole or the sectors likely to be affected by the application.

2. Events during the strike.

Respondent's version

[23] The respondent conceded that it was told of the request of the employees to be addressed by management. The company did not find it necessary to follow that approach. The position taken was that the notice issued by the company to all workers on 29 November was clear and needed no explanation. Paragraph 2 of the notice was self explanatory as it read:

> "THE UNION LETTER DATED 23 NOVEMBER 2007 REGARDING THE POSSIBLE LOWERING OF TEXTILE IMPORT DUTIES REFERS.
>
> SHOULD TEXTILE IMPORT DUTIES BE LOWERED OR REMOVED THIS WILL HAVE DIRE CONSEQUENCES FOR THE FUTURE OF MEDITERRANEAN TEXTILE MILLS.
>
> THE GOMPANY IS OBJECTING TO THE POSSIBLE LOWERINNG / REMOVAL OF IMPORT DUTIES, BUT WE MIGHT ONLY HEAR THE OUTCOME OF THIS OBJECTION IN THE FIRST QUARTER OF 2008."

[24] Even if the workers were given more time during the strike that would not change anything as they were angry. It was for the union official and the shop stewards to address and dissuade them from engaging in an unprotected strike. It was a known

fact that the company was not receiving enough orders of its stock.

[25] The Respondent had experienced significant violence in a strike ten years ago. The misconduct included employees being killed and Mr Lotter's vehicle was shot at and was peppered with three bullet holes.

[26] Mr. Thompson's evidence was that when he was mingling with the strikers and handing out notices, he heard one of the employees, namely Ms Francinah Khumalo, say that they would burn down the factory. Ms Khumalo was not called to give evidence save for the fact that the factory was not burned down this allegation remains uncontested. It was a threat that was not taken lightly given the previous conduct of strikers. It is important to note that the workforce involved in the 2007 unprotected strike participated in the violent strike 10 years previously. Mr. Thompson's evidence was that he was not a man who scared easily but during the course of handing out the notices, and engaging the striking employees, he was afraid.

[27] There was nothing in the law that required of the respondent to first seek an interdict to prohibit the strike as suggested at the instance of the employees. Given the respondent's dire financial position, one could not have expected it to incur further legal expenses at that stage of proceedings. In any event, that attitude also fails to recognise the union's and shop stewards'

failure to process their dispute normally either through the grievance procedure or by making application to court themselves. At no stage was a formal grievance lodged.

[28] The decision to dismiss was not taken lightly by the company as there was a very real possibility that a mass dismissal would affect the respondent's ability to satisfy its current order book. The respondent avoided cancellation of orders by hiring temporary labour and having its managers and administration staff work the machines in the production line.

Applicants' version

[29] Mr. Lotter had years of experience in the company and he knew the workers very well. It lay in the hands of the company to persuade the workers to support the exemption application and not to expect the shop stewards and the union official to do it. Mr. Ndawonde never had a chance to dissuade the workers, even if the union had to do it. In the meeting of workers held on 4 December 2007 at about 08h40 they made it clear to Mr. Ndawonde that they were very angry as they needed the bonus to:

- Pay the debts which they had accumulated in the year in anticipation of bonus being paid and
- To use it to pay off school fees and to buy school uniforms for the following year.

[30] The anger of the workers was borne out by the fact that:

- In the previous years the company would communicate with them directly. That was why they insisted on the company coming to them to explain its position;
- One person from the company management had refused to explain to them what workers had seen on the notice board;
- The timing for the exemption application was wrong. Even if the exemption was not granted, they would go on the December vacation without their bonuses as it was already a couple of weeks before the shut down;
- The R12 million machinery purchased by the company had contributed in its financial difficulties. Workers were not willing to accept the explanation given to them by the company.
- Workers did not see any difference in the 2006 and 2007 situations of the company as they were told the same things in both situations. They insisted on their payment, even if the company were to close down as a result thereof because they were told that in any event, the money that the company had would last for only a few months. The company had told them that it would close down if it paid them.

[31] Workers required to be given some explanation on the position taken by the company and they felt aggrieved that they were only being referred to the notice board. Had management agreed to address them, they would lessen and then reflect on what to do. They would have considered going back to work as they were not even fighting or acting violently. The company acted with haste in dismissing them before they had time to reflect on the ultimatum issued.

[32] Mr. Lotter should have first made application to court for an interdict declaring the strike unprotected and compelling individuals to return to normal work before dismissing them.

Submissions by the parties.

Respondent's submissions

[33] The employees' stance that they should receive their bonuses even if it meant that the respondent was to close was short sighted. Job security should, in current times, trump all other considerations. The strikers made it abundantly clear to both the union representatives and the respondent that they would not return to work unless bonuses were paid. The respondent was in no position whatsoever to pay the bonuses as demanded and therefore did not foresee that the strikers would return to work. Urgent orders were to be completed before shut down and if the strikers had no intention to return to work

alternate arrangements needed to be made. Whilst it was the respondent's intention to seek exemption from paying the bonus, the respondent was perfectly justified in making such application whilst the employees were not justified in unlawfully withholding their labour.

[34] The simplistic argument by the applicants that a R2 800, 00 bonus was insignificant when compared to a R12 million loan was without foundation and was designed simply to confuse. Mr. Lotter's explanation from an accountant's perspective could not be challenged and on that basis it could not be suggested that the respondent acted recklessly and in bad faith by making an application for exemption from paying the 2007 bonuses. The Government Gazette notice was only published on 9 November 2007, a mere 20 days before the notice advising employees of the company's position was published.

[35] It was conceded that there was no damage to property during this particular strike. However, this conduct must be viewed against the very aggressive and violent circumstances that occurred in the 1998 strike which although some time ago, remained fresh in the minds of those managers having to deal with the striking group. On the basis of the admitted facts and in light of the agreed trading circumstances faced by the respondent, it was difficult to ascertain what other steps the respondent had open to it when faced with a steadfast demand to pay bonuses.

[36] The employees were aware that their strike was unprotected and that their conduct might lead to their dismissal. At all times communication was had directly with the shop stewards who also had a number of opportunities to address the strikers. From an early stage during the unprotected strike, the union organiser was also present. There was absolutely no evidence to suggest that, if more time had been given to the employees to consider their fate, they would have calmed down and undertaken to return to normal work and to continue doing so pending the outcome of the exemption application. It was apparent from the strikers' attitude that unless the bonuses were paid, they would not return to work. The respondent was entitled to make an application for exemption from the payment of bonuses.

[37] It is clear that the applicants showed flagrant disregard to pre-strike procedures as envisaged by Section 64(1) of the Act and that strikers intentionally thwarted the employer's attempts to have them comply with warnings and ultimatums issued.

Applicants' submissions.

[38] It is trite that participation in a strike that does not comply with the provisions of chapter 4 of the Act may constitute a fair

reason for dismissal. The Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

[39] It is thus submitted that, in view of the constitutional imperatives and similar considerations which apply to retrenchment procedures, an employer cannot simply follow a “checklist” of issuing warnings and ultimatums and thereafter simply dismissing the employees. Equity requires a proper consideration of all facts and circumstances before a decision is taken to dismiss.

[40] The respondent’s conduct on the bonus issue was patently unlawful. It was common cause that the annual bonus provisions of the main collective agreement applied in the respondent’s workplace in 2007. It is trite that employers are obliged to comply with such provisions unless an exemption has been applied for and granted. Thus, regardless of whether the exemption was ultimately granted or not, it was quite apparent that this would only happen sometime in 2008, and the employees would not receive their bonus for that year’s Christmas. If not unlawful, the respondent’s conduct was at the very least, unfair because of its effect on the employees.

[41] The respondent’s Financial Director could not dispute the importance of the annual bonus to the employees and that such bonus would have been of increased importance to employees

at their lowest end of the salary scale. On the respondent's own version it is apparent that the company refused to compromise or to negotiate on the issue of the bonus. In view of the fact that the exemption application could not be resolved until the following year, the attitude of the company could only be viewed as highly antagonistic towards the employees. In that regard the following factors were common cause, alternatively, were not placed in dispute by the Respondent:

- At the meeting of 29 November 2007 the Respondent informed worker representatives that it would not be paying the bonus and would be applying for an exemption in due course. Suggestions that at least a partial payment be made and / or that the bonus be differed until such time as the company's position might improve, were rejected out of hand.
- The same attitude towards the workers was exhibited by both Messrs Thompson and Lotter on the morning of 4 December 2007. When asked for "clarity" about the bonus situation Mr Thompson directed the shop stewards toward the notice board and the notice which confirmed that the respondent would be applying for a complete exemption.
- As was apparent from Mr. Lotter's own summary of the events, his repeated response, to suggestions by the shop stewards that he had to address the workers concerns, was

to refer them to the warnings, letters and ultimatum that had been issued and to ask why they should not be dismissed.

- Even when Mr. Lotter finally agreed to discuss the issue with the workers he remained utterly inflexible and advised the workers that the respondent would continue with the exemption application and that the workers could make any representations they wish to make to the bargaining council in that regard.

[42] In the circumstances, the repudiation of the respondent's obligation to pay the annual bonus and the absolute and uncompromising stance adopted by management on the issue constituted unjustifiable conduct as contemplated by the Act. Even if this were not the case:

- the respondent's complete failure to meaningfully address the employees concerns:
- the extremely short notice and lack of proper consultation with the workers as against the bonus issue;
- the fact that the bonus was late the previous year and should have been included in the 2007 budget; and
- the fact that the respondent had spent approximately R12 million on equipment during the year,

were clearly factors which ought to be taken into account when determining the appropriateness of the respondent's actions and whether further steps should have been taken to allow the

employees to calm down and to persuade them to return to work.

[43] There were legitimate frustrations felt by the employees which has to be seen against the fact that:

- there was clearly no urgency or compelling reason requiring the dismissal of the employees as early as 11h15. The only explanation given for urgency, that there had been episodes of unlawful conduct by unknown persons in the course of a strike which occurred ten years previously, was untenable. The evidence of the respondent in that regard was an *ex post facto* attempt to rationalize the company action.
- no acts of violence, damage to property or intimidation were observed during the course of the strike, despite vague assertions by Mr. Thomas that one of the employees had threatened to burn the workplace in the morning;
- At no stage was there a need to call the South African Police Services or security personnel to guard against any realistic threat of unlawful conduct of the strikers;
- Despite being further angered by management's conduct in the handing out of the dismissal letters at 11h15, the employees remained at the premises until at about 16h30 again without any reports of violence or unlawful conduct.

[44] It was common cause that most of the employees had extremely long service with the respondent as some had more than 20 years of service. That consideration should weigh

heavily in their favour. The respondent perceived the striking workers as disloyal to it by not accepting the non – payment of their bonuses. It was that perception which fuelled the undue haste with which the employees' services were terminated. The respondent acted irrationally on 4 December 2007. Further evidence of it was the dismissal of the entire night shift staff along with the day shift staff only to subsequently retreat from that position. Further still, the respondent dismissed employees in the Twisting Department but none of its witnesses was able to explain why and how those employees had to be dismissed. Therefore the dismissal of all the employees was premature and was carried out at a time when the union was trying to assist by persuading workers to return to work. There was a high probability that employees would have returned to work had the respondent given them sufficient time to cool off or had the respondent taken the simple step of obtaining a court interdict from court on that afternoon, the employees would have returned to work on the following morning.

[45] In the circumstances, the dismissal of all employees by the respondent was substantively and procedurally unfair and they are entitled to a re-instatement with back pay.

Evaluation.

[46] The determination of whether participation in an unprotected strike constitutes a fair reason for dismissal requires a weighing

of all the facts with particular regard to the cause, nature and extent of objectives of the strike; its timing and duration; the conduct of the employees; and the consequences of the strike, see *NUMSA & Others v Atlantis Forge (Pty) Limited [2005] 26 ILJ 1984 (LC)* at paragraph 108.

[47] In *Coin Security Group (Pty) Ltd v Adams & Others [2000] 4 BLLR 371 (LAC)* the Labour Appeal Court said that the reasonableness of an ultimatum must be assessed according to the interests of both employer and strikers, and that shorter notice was justified where strikers who engaged in an unprotected strike had no intention to return to work.

[48] .It is trite that participation in a strike that does not comply with the provisions of chapter 4 may constitute a fair reason for dismissal in determining whether or not a dismissal is fair, see the Code of Good Practice: Dismissal (the Code) in Schedule 8. Item 6 of the Code provides that the fairness of any dismissal pursuant to unprotected strike action must be determined in the light of the facts of each case, including, whether or not the strike was in response to unjustified conduct by the employer.

[49] In *Num & Others v Goldfell Security Limited (1999) 20 ILJ 155 (LC).* Court held that:

> "The Code of Good Practice: Dismissals gives an indication of what is to be done in such a situation. This procedure is rather in the

nature of the process and is more akin to the procedure required in a retrenchment situation than a disciplinary situation. The aim and object of a fair process in the case of both retrenchments and unproceedural and impermissible strikes is to comply with the constitutional commitment to fair labour practices including the preservation, within the limits of the law and equity, of job security. To that end a real and genuine effort must be made to avoid dismissals".

[50] When considering the question of dismissal it is important that an employer does not act overhasty. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on the decisions is eliminated or limited, see *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers Union & Others* 1994 (2) SA 204 (A).

[51] The cause of the strike in this matter was the announcement by the respondent that it would not be paying its workers their yearly bonuses because of its financial difficulties. The company announced that it would be applying for an exemption from the compulsory payment of bonuses and sought to have support from its staff. Throughout the hearing of this matter, it was never

in dispute that the respondent was facing a decline in its trade. Mr. Ndawonde conceded to the financial challenges of the company. Mr. Meintjie's evidence on the performance of the company basically stood unchallenged. During 2007, the company had received orders for about four million metres of apparel fabric which translated into an annual turnover for 2007 of R90 million. That was down from R98 million in 2006. The decline in trade took place long before the publication of the Government Gazette of ITAC dated 9 November 2007.

[52] When this matter was heard two years had elapsed since the publication of the gazette but the tariffs were neither reduced nor withdrawn. While there were serious and real concerns in the textile industry of cheaper imports coming into the country as a result of the lifting or reduction of tariffs, the problems of the company appear to have their origin elsewhere than in the publication itself. In the letter of the respondent dated 27 November 2007, as a response to that of the union the company said that the publication of the gazette resulted in its customers holding back on orders to await the out of the decision of Government and that the company had received no orders for November 2007. Yet it is known from Mr. Meintjies' evidence that the company was already

experiencing financial difficulties long before November 2007 and had to secure a loan of R12 million.

[53] It must follow that the respondent saw it much earlier than November 2007 that it would face difficulties in paying its staff their bonuses. Added to the financial difficulties of 2007, was the fact that in the previous year it failed to pay bonuses of its staff in time and compromises had to be made with the union. It was therefore very reckless of the respondent to sit back and do nothing about the payment of bonuses until almost the end of November 2007, when it well knew that an exemption application normally takes long for the bargaining council to process and either approve or decline. A reliance to the letter of the union was rather opportunistic. The same wisdom that informed the respondent to make a R12 million loan should have informed the respondent to timeously attend to the issue of the bonuses. The failure of the respondent to attend to the bonus issue in time was consequently unfair to its employees. The respondent was mainly responsible for the grievance of the employees and was therefore partly responsible for the cause of the strike.

[54] The overwhelming evidence of both parties indicates that the strike was not violent. The evidence led in favour of the applicants was that the main demand was for management to come to the employees and to address

them. It was admitted by the respondent that in the past, management had on occasions, address the staff on matters of their concern. Mr. Ndawonde and the shop stewards took the responsibility of trying to resolve the impasse. They were not successful because the respondent failed to own up to its responsibility. As already indicated, the gazette was not the real origin of the problems of the respondent. A deferment by the respondent to its notices on the notice board was irresponsible in the circumstances of this case. Had management attended the meeting of the strikers, as invited, there was a potential that the strike could be resolved.

[55] The union had taken a responsible position in initiating the issue on tariffs. It sent its representative to the company on 29 November 2007 and on 4 December 2007. There was no reason at all to doubt its commitment in the resolution of the problems facing the parties. The strike did not last for a long time. In fact it lasted as long as the respondent was refusing to meet the workers. While the strike was unlawful, its objectives were not. The workers were demanding of the respondent to comply with the law, namely the payment of a bonus in terms of the Basic Conditions of Employment Act 75 of 1997. While the respondent had a corresponding right to apply for an exemption to pay the bonus, it had left the matter

unattended for a longer period than was appropriate. Clearly, if the application was refused, the respondent would not be able to pay the bonus in time.

[56] The strikers appear not to have timed the strike with the moment when the respondent was at its vulnerable moment. The strike started on the very day workers had a meeting where they were to be told of the outcome of the meeting of the shop stewards with the company. No damage to company property took place and even after their dismissal, the employees gathered peacefully within the company premises, making it unnecessary that police be called in.

[57] The respondent acted with unnecessary haste in dismissing the employees. It acted with so much haste that it dismissed employees that had not withdrawn their labour and were consequently not on strike. This indicates that the respondent failed to apply its mind properly to the relevant issues as were confronting it. Instead it acted emotionally. The same mistake was committed in relation to the employees of the twisting department. When weighing up all the facts as against all relevant considerations, I form the view that the participation by the employers in the unprotected strike did not constitute a fair reason for their dismissal. The employees seek to be re-instated. Whatever challenges

come the way of the respondent, it should be able to comply with the order of re-instatement which the applicants have shown an entitlement to. I have not been able to find any condition listed in section 194 of the Act that militate against an order of re-instatement. I have reflected on an appropriate costs order befitting the circumstances of this case.

[58] Accordingly the following order will issue:

1. The respondent is ordered to re-instate each of the applicants listed from pages 40 to43 of the pleading bundle, which list is attached to the order hereof, with effect from the date of dismissal, (4 December 2007); with no loss of income and benefits.
2. Each such applicant is to report for duty on 4 April 2010 and at 07h00.
3. The payment of the outstanding salary is to be made within 14 days from the date hereof. Interest is thereafter payable for any outstanding salary.
4. No costs order is made.

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Cele J.

DATE OF HEARING : 14 DECEMBER 2009

DATE OF JUDGMENT : 30 MARCH 2010

APPEARANCES

FOR APPLICANT	:	Adv P SCHUMAN
INSTRUCTED BY	:	BRETT PURDON ATTORNEYS
FOR RESPONDENT	:	M G MAESO OF SHEPSTONE & WYLIE