REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA 85/13

In the matter between:

NATIONAL UNION OF MINEWORKERS **Appellant**

(Applicant in the Court *a quo*)

and

WANLI STONE BELFAST (Pty) LTD **Respondent**

(Respondent in the Court *a quo*)

Heard: **22 September 2014**

Delivered: **12 December 2014**

Summary: Dismissal of employees for participating in a strike action - employer obtaining interdiction and restraint order against employees - employees not heeding to the court order and ultimatum issued by employer – employer dismissing employees- employees referring automatically unfair dismissal dispute – Employer raising plea of *res judicata* that dispute dispose of in the urgent application - Labour Court upholding plea of *res judicata* and finding that employees' dismissal substantively and procedurally fair. Appeal – Estoppel - strict requirements of *res judicata* not applicable – in the urgent application the illegal strike the cause of action - the unfair dismissal of the employees the cause of action in the second proceedings. Interdict was sought in the former and reinstatement or compensation was sought in the

later proceedings. Consideration of equity and fairness in determining whether a plea of issue estoppel should be upheld or rejected – evidence showing that rule *nisi* discharged when employees already dismissed. Plea of *res judicata* could not be upheld in term of fairness and equity.

Substantive fairness of the dismissal- employees contending that dispute a wage dispute- employer contending that dispute about refusal to bargain and employee ought to obtain advisory award in terms of section 64(2) of the LRA- evidence showing dispute about refusal to bargain. Strike unprotected in the absence of an advisory award. Labour Court's judgment upheld. Appeal dismissed.

CORAM: Waglay JP, Musi JA *et* Dlodlo AJA

JUDGMENT

MUSI JA

[1] This is an appeal against the judgment of the Labour Court, (Basson J) wherein it found that the dismissal of the members of the appellant (the National Union of Mineworkers (NUM)) was substantively and procedurally fair. The appeal is with the leave of the court *a quo*.

[2] The respondent (the company) carries on business within the granite industry and, in particular, processes granite into finished consumer products for the local and international markets. It commenced business in 2006.

[3] The company had a unionised workforce of about 30 employees. The appellant began recruiting the respondent's employees in 2006, with the result that in August 2007, it was the representative union at the company. Although no formal recognition agreement was concluded between the union and the company, the company agreed to grant the union right of access to its premises and it further agreed to deduct union dues on behalf of the union from the union's members.

[4] On 2 February 2007, three employees of the company, who were members of the union, wrote a letter to the company, on behalf of the employees, wherein they requested a meeting to be held on 6 February 2007 to discuss wage proposals. The letter did not contain any wage proposals or any proposals relating to substantive terms and conditions of employment.

[5] On 9 March 2007, the union sent a letter to the company wherein it *inter alia* set out wage proposals for 2007/2008. It demanded "an actual basic wage rate of R2 500.00 (per) month and (an) across the board increase of 8,5%". It further proposed that the implementation date should be 1 March 2007.

[6] A meeting was scheduled for and took place on 29 March 2007. Ms Dyonne Modlin represented the company and Mr Sonnyboy Mnisi represented the union. Mnisi referred to his letter dated 9 March 2007 and advised that the wage proposals are self-explanatory. Modlin advised the union that the company was not prepared to enter into wage and substantive conditions of employment negotiations with the union, because increases had already been finalised and implemented for 2007.

[7] On 30 March 2007, the union referred a dispute to the CCMA. On the LRA form 7.11, the union categorised the dispute as a mutual interest dispute. It summarised the dispute as follows:

> 'The refusal of the Company to negotiate wages with the representative trade union.'

[8] It indicated that the outcome which it sought was

> 'that the company must negotiate with the representative trade union.'

[9] The dispute was set down for conciliation/arbitration on 3 May 2007. On 12 April 2007, the company lodged an objection against the con/arb process. The matter could not be dealt with on 3 May 2007 because the commissioner recused himself. The parties agreed that the conciliation would be postponed

and that the 30 day period stipulated in s135(2) of the Labour Relations Act 66 of 1995 (the Act) would be extended for an additional 30 days.[1]

[10] There was a delay in rescheduling the conciliation process. On 23 July 2007, Mnisi wrote a letter to the CCMA in which he stated the following:

> 'We hereby notify you that the company refused to negotiate with the representatives from Trade Union (sic) at plant level, hence an application to the CCMA. Therefore we request you to supply us with certificate (sic). Lastly the extended 30 days (sic) period expire (sic) on the 5 June 2007 (sic)…'

[11] On the same day (23 July 2007), the CCMA issued a notice of set down enrolling the matter for 1 August 2007.

[12] Despite the aforementioned set down, the CCMA issued a certificate of non-resolution on 31 July 2007. It classified the dispute as a "Matters of Mutual Interest s64(1), 134" dispute. Despite the certificate, the parties met on 1 August 2007, under the auspices of the CCMA. They were advised that the CCMA was acting under section 150(2) of the Act because a certificate of outcome had already been issued.[2] The dispute could not be resolved.

[13] On 1 August 2007, the union delivered a strike notice to the company wherein it stated that it would commence with a protected strike on 6 August 2007. The strike commenced on 6 August 2007.

[14] On 6 August 2007, the company sought and was granted an interim order on an urgent basis, by the Labour Court, to the following effect:

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[1] Section 135(1) and (2) of the Act reads as follows:
"(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.
(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period…"

[2] Section 150(2) reads as follows:
(2) The Commission may offer to appoint a commissioner to assist the parties to resolve through further conciliation a dispute that has been referred to the Commission or a council and in respect of which-
(a) a certificate has been issued in terms of section 135 (5) (a) stating that the dispute remains unresolved; or
(b) the period contemplated in section 135 (2) has elapsed;

'IT IS ORDERED THAT:

1. The Applicant's failure to comply with the forms and time periods set out in the Rules of the Labour Court of South Africa is hereby condoned, and this matter shall be dealt with as one of urgency in terms of Rule 8 of the said Rules.

2. A Rule *Nisi* is hereby issued calling upon the First and Second to Further Respondents (whose name appear in Annexure "B" to the Notice of Motion) to show cause on the 28th day of August 2007 at 10h00, or so soon thereafter as the parties may be heard, why an order should not be made in the following terms;

   2.1 It is determined that:

      2.1.1 The issue in dispute between the parties ('the dispute') concerns a refusal to bargain as contemplated in Section 64(2) of the Act;

      2.1.2 No advisory award, as contemplated in Section 135(3)(c) of the Act, has been made in respect of the dispute; and

      2.1.3 The strike contemplated, in the 'Notice to Resume (sic) Protected Industrial Action', delivered by the First Respondent to the Applicant on the 1st day of August 2007, ('the strike') is not in compliance with the provisions of Chapter IV of the Act.

   2.2 That the First and Second to Further Respondents are hereby interdicted and restrained from:

      2.2.1 Participating in the strike; and

      2.2.2 Engaging in any conduct in contemplation of and/or in furtherance of the strike.

   2.3 That paragraphs 2.2, 2.2.1 and 2.2.2 shall operate as an Interim Order, interdicting and restraining the First and Second to Further Respondents from engaging in the conduct

contemplated therein, pending a final Order being made on the return date of the Rule *Nisi* as aforesaid.

2.4 That the return date of the Rule *Nisi* may be anticipated by the First and Second to Further Respondents on 48 (forty eight) hours' notice to the Applicant.'

[15] The union did not oppose the interim interdict proceedings. It must be noted that the declaratory relief sought in paragraph 2.1 of the interim order did not, correctly so, operate as an interim interdict.

[16] After obtaining the interdict, the company served the order on the employees and the union. It requested the employees and the union to make representations and to return to work. When the employees failed to return to their workplaces, it issued an ultimatum that the employees should return to work by 15h30 on 6 August 2007. The employees paid no mind to the company's requests, pleas and ultimatum.

[17] On 6 August 2007, the company issued a final ultimatum notifying the employees that should they not return to work by 08h00 on 7 August 2007, they would be dismissed. On 7 August 2007, the employees did not return to work and continued with the industrial action. During the afternoon of 7 August 2007, the employees, who took part in the strike, were dismissed.

[18] On 28 August 2007, the company applied for the confirmation of the rule *nisi*. The application was unopposed. It was indeed granted on an unopposed basis.

[19] The union referred an unfair dismissal dispute to the CCMA. The dispute could not be resolved through conciliation. The dispute was therefore referred to the Labour Court because it concerned the alleged unfair dismissal of the employees for participation in strike action, which constitutes an automatically unfair dismissal.[3]

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[3] See section 187 which reads as follows:
"A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

[20] Numerous witnesses testified in the court *a quo*. The most important being: Du Plooy and Modlin, on behalf of the company, and Mnisi on behalf of the union. The court *a quo* rejected Mnisi's version and accepted the version of the company's witnesses. This credibility finding was not challenged before us.

[21] In the court *a quo*, the company raised a special plea of *res iudicata*. The company alleged that the Labour Court under case number J1804/07 confirmed the rule *nisi* meaning that the court had therefore definitively ruled that:

(i) The issue in dispute between the parties concerned a refusal to bargain as contemplated in section 64(2) of the Act;

(ii) No advisory award, as contemplated in section 135(3)(c) of the Act has been made in respect of the dispute; and

(iii) The strike was not in compliance with the provisions of Chapter IV of the Act.

[22] The court *a quo* upheld the special plea. Evidence was thereafter led in order to ascertain whether the dismissal of the employees was fair.

[23] Mr Kennedy, on behalf of the union, argued before us that the court *a quo* erred in upholding the special plea. He submitted that the special plea ought to have been dismissed because the interim order and the final order were improperly granted. He submitted that the interim order was wrongly granted because the dispute and therefore the strike fell within the ambit of section 64(1) rather than section 64(2) of the Act.[4] There was therefore no need, so

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(a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV…"

[4] "(1) Every employee has the right to strike and every employer has recourse to lock-out if-
(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
(i) a certificate stating that the dispute remains unresolved has been issued; or
(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

the argument went, for an advisory award. He submitted that the interim order ought to have been discharged on the return day, because the employees were already dismissed and could not participate in a strike.

[24] Mr Basson, for the company, submitted that a proper case was made out on the papers in the interdict application, which was unopposed. According to him, the judge properly granted the interim interdict and that the subsequent confirmation of the interim interdict was also proper, because there was no opposition.

[25] We only have to decide two issues in this matter. Firstly, whether the plea of *res iudicata* or rather issue estoppel was correctly upheld and secondly, whether the real dispute in this matter was a wage dispute or a refusal to bargain. Mr Kennedy accepted that if we find that this matter concerned a refusal to bargain then an advisory award ought to have been sought. Absent that, the strike would be unprotected.

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-
  (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
  (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
(d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) (c) before notice is given in terms of subsection (1) (b) or (c). A refusal to bargain includes-
(a) a refusal-
  (i) to recognise a trade union as a collective bargaining agent; or
  (ii) to agree to establish a bargaining council;
(b) a withdrawal of recognition of a collective bargaining agent;
(c) a resignation of a party from a bargaining council;
(d) a dispute about-
  (i) appropriate bargaining units;
  (ii) appropriate bargaining levels; or
  (iii) bargaining subjects…"

[26] In *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another*, a judgment of the Supreme Court of Appeal, the meaning of *res iudicata* was captured as follows:

> '[10] The expression "*res iudicata"* literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi* (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H and the cases there cited). In time, the requirements were, however, relaxed in situations which give rise to what became known as issue estoppel. This is explained as follows by Scott JA in *Smith v Porritt* 2008 (6) SA 303 (SCA) para 10:
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> Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res iudicata* is raised in the absence of a communality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 667J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res iudicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse*

> *Inkomste v Absa* (*supra*) at 67E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others…'[5]

[27] In this matter, the strict requirements of *res iudidata* are not applicable, because the cause of action and the relief sought are not the same. In the first matter, the illegal strike was the cause of action, whereas in these proceedings the unfair dismissal of the employees is the cause of action. In the first matter, an interdict was sought, whereas in this matter reinstatement or compensation was sought for the unfair dismissal of the employees. The court *a quo* found that the respondent succeeded in establishing that *res iudicata* in the form of issue estoppel prevented the appellants from raising issues which were finally adjudicated upon in the interdict proceedings. The question, however, is whether it would be fair to uphold the plea of issue estoppel on the facts of this particular case.

[28] In *Prinsloo v Goldex* (*supra*), it was said that:

> '[23] In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see e.g. *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.
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> [24] At the same time, however, our courts have realised that relaxation of the strict requirements of *res iudicata* in issue estoppel situations creates the potential of causing inequity and unfairness that would not arise upon application of all three requirements. That potential is explained by *Lord Reid*

[5] *Prinsloo and Others v Goldex 15 (Pty) Ltd and Another* 2014 (5) SA 297 (SCA)) at para 10.

in Carl-Zeiss-Stiftung v Rayner and Keeler Ltd (No 2) [1966] 2 All ER 536 (HL) at 554G-H when he said:

> "The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought?"[6]

[29] Whether considerations of fairness and equity militate against upholding a plea of issue estoppel will always depend on the facts and circumstances of a particular case. In *Prinsloo v Goldex*[1] it was stated that:

> '[26] Hence, our courts have been at pains to point out the potential inequity of the application of issue estoppel in particular circumstances. But the circumstances in which issue estoppel may conceivably arise are so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound the warning that the application of issue estoppel should be considered on a case-by-case basis and that deviation from the threefold requirements of *res iudicata* should not be allowed when it is likely to give rise to potentially unfair consequences in the subsequent proceedings (see eg *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 676B-E; *Smith v Porritt supra* 2008 (6) SA 303 (SCA) para 10. That, I believe, is also consistent with the guarantee of a fair hearing in s 34 of our Constitution."[7]

[30] A similar approach was adopted in *Holtzhausen and Another v Gore NO and Others*[8] where Thring J came to the following conclusion:

> 'It seems to me, however, that if I were to do that and non-suit the applicants I would be enabling the first and second respondents to shelter, so to speak, behind a decision of this Court which I regard as wrong and insupportable. That weighs very heavily with me in the exercise of my discretion in deciding

[6] At paras 23 and 24.
[7] At para 26.
[8] 2002 (2) SA 141 (C).

> whether or not I should relax the requirements. To me it seems clear that "overall fairness and equity' demand, in these circumstances, that I should exercise my discretion against the first and second respondents and decline to relax the requirements, or I may be in danger of facilitating a 'palpable realit(y) of injustice…'[9]

[31] In this matter, the respondent contended that the issue of whether the strike was protected had been definitively decided in the interdict proceedings. This issue was also up for consideration in the unfair dismissal proceedings, because the dismissals would be automatically unfair if the strike was protected. This brings the matter squarely within the ambit of issue estoppel.

[32] As set out above, considerations of equity and fairness are decisive in determining whether a plea of issue estoppel should be upheld or rejected. The Labour Court is a court of law and equity. See section 151 of the Labour Relations Act 66 of 1995. The criterion of what fairness and equity demand, which was applied by the courts in civil litigation unrelated to labour law, finds particular resonance in unfair dismissal disputes. The question to consider is therefore whether it was fair to uphold the special plea of issue estoppel under these circumstances.

[33] Mr Kennedy submitted that the court *a quo* acted unfairly by upholding the plea of issue estoppel, because, firstly, the interim order should have been discharged and not made final on the return day and secondly, that the interim order was in any event wrongly granted.

[34] As stated above, the interim order was granted on 6 August 2007. The employees were dismissed on 7 August 2007. The rule *nisi* was confirmed on 28 August 2007.

[35] It is therefore common cause that by the time the company applied for the confirmation of the rule *nisi* and the order declaring the strike illegal, the employees had already been dismissed and were thus incapable of continuing with the strike, protected or unprotected.

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[9] at 156B-D.

[36] Neither Mr Kennedy nor Mr Basson could shed any light on whether the court was informed, on the return day, that the employees were already dismissed and that the strike was effectively over. In my view, it would not be farfetched or unreasonable to infer that the court was not informed about the changed circumstances when application was made for the confirmation of the rule *nisi*. I say this because the court would not have confirmed the rule *nisi* if it was fully apprised of the changed circumstances. The court would, in all likelihood, have discharged the rule *nisi*.

[37] It seems to me that the company's counsel at the time, who was not Mr Basson, did not bring the relevant facts under the court's attention.

[38] The ethical duty of legal representatives to disclose relevant information to the court cannot be overemphasised. Where a legal representative knowingly withholds relevant information from the court and as result thereof an order that would otherwise not have been granted is granted, it cannot be fair to hold the other party to the consequences of such an order. Such order is clearly sought by deceit or misrepresentation. There is, in my view, scant difference for purposes of issue estoppel between a wrong order and one obtained by deceit or misrepresentation.

[39] Judges should, as a general rule, on the return date also ask the legal representative who applies for the confirmation of a rule *nisi* whether he/she is aware of any changed circumstances between the granting of the interim order and the confirmation thereof. In this way one can at least avoid a misrepresentation by omission.

[40] In my view, the court *a quo* should have found that to uphold the plea of issue estoppel, under these circumstances, would be contrary to the requirements of fairness and equity. It should therefore have dismissed the special plea of issue estoppel.

[41] The second question to consider is whether the strike was protected. The appellants contended that the strike was one which fell within the ambit of section 64(1) and not 64(2) of the Act. The appellant submitted that the strike

was about wages rather than bargaining and thus the employees did not require the issuing of an advisory award to render the strike protected.

[42] The company on the other hand contended that the dispute concerned a refusal to bargain and that the employees were required to obtain an advisory award in order to embark on a protected strike.

[43] In *Coin Security Group (Pty) Ltd v J Adams and 37 Others*[10] it was said that:

> 'It is the court's duty to ascertain the true or real issue .in dispute: *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others* (2) (1997) 18 ILJ 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union &* others (1) (1998) 19 ILJ 260 (LAC). In conducting that enquiry a court looks at the substance of. the dispute and not at the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is .not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). There is in my .view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act…'. The phrase 'issue in dispute' is, in relation to a strike, defines as 'the demand, the grievance, or dispute that forms the subject matter of the strike"[11]

[44] A refusal to bargain is defined in section 64(2) of the Act as

> '(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes-
>
> '(a) a refusal-
>
> (i) to recognise a trade union as a collective bargaining agent; or
>
> (ii) to agree to establish a bargaining council;

[10] (2000) 21 ILJ 924 (LAC).
[11] At para 15.

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about-

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.'

[45] Ms Modlin testified that the company was approximately one year old at the time. It had not negotiated wages with the union at any stage. The wage increase at the company ran from January to December, meaning that the increase is implemented during January each year. During 2007, a wage increase was granted and implemented in January without bargaining with the union. It was unilaterally implemented. There was no collective agreement between the parties.

[46] When the company received the letter from the union, the wage increase was already implemented. During the meeting held on 29 March 2007, Mnisi was told that the company is not prepared to negotiate with the union. Modlin told Mnisi that the company refuses to negotiate with the union, because the period to negotiate wages for that year had already closed. During the conciliation process, Mnisi repeatedly asked the company to bargain with it, but the company repeatedly told him that it is not prepared to do so.

[47] Mr Kennedy argued that the true dispute between the parties was a wage dispute and not a refusal to bargain dispute. I disagree.

[48] Although the union's categorisation of the dispute is not determinative of the issue, it is important. The union understood and labelled the dispute as a refusal to bargain dispute. It wanted, as a desired outcome, the company to bargain with it.

[49] Mnisi conceded in his testimony in the court *a quo* that the dispute was about the company's refusal to bargain with it.

[50] Modlin's testimony was also clear that the company refused to bargain with the union for the calendar year 2007.

[51] Mr Kennedy submitted that it is quite apparent that the company was not refusing to bargain with the union *per se*, but was not willing to bargain over terms and conditions for the calendar year of 2007. He submitted that this is an indication that the strike was about wages.

[52] In my view, it matters not whether the refusal to bargain was for a calendar year or permanent. The mere fact that the company was unwilling to negotiate with the union is a refusal to bargain. It must be remembered that the company unilaterally implemented the wages increase without negotiating with the union. This is also a clear indication that the company did not recognise the union as a bargaining agent of its workers.

[53] Mr Kennedy submitted that despite the terminology used in the referral form, Mnisi was clear that the issue between the parties was about wages and that an acceptable wage offer would have brought the strike to an end. He further submitted that Modlin could not dispute this because the company never ascertained from the union what exactly the strikers' demand was.

[54] The demands of the union were well-known to Modlin. In fact, during the meeting of 29 March 2007, Mnisi said that the demands in his letter are self-explanatory. Modlin told him at that stage already that the company is not prepared to negotiate with the union. Modlin's testimony on this issue is very clear. She said the following during questions by the court:

> 'Yes. It was put to you that a wage offer and correct me if I am putting words in your mouth or putting words in the mouth of counsel, it was put to you that a wage offer would have ended the strike. Did you understand it at the time of the strike? Was that your understanding?
>
> --- M'Lady, my understanding was that we had refused to negotiate and if I am refusing to negotiate with the union or with a group of employees, then I am not going to make a wage offer…'

[55] During cross-examination she said the following:

> 'Mr Orr: My instructions are that the strike, what would have resolved the strike was a wage offer. Can you comment on that? --- Well, we had refused to bargain, so I have commented on that earlier. We were not bargaining so…
>
> But the view of the workers was that the issue that was at stake, was wages. Do you want to comment on that? --- I have commented on it, we were refusing to negotiate wages.'

[56] The above extracts from the record clearly show that Mr Kennedy's submissions are incorrect. It is clear that the company did not want to negotiate with the union. Before wages could be negotiated, the company first had to agree to bargain with the union. It did not want to bargain on the issue of wages, although it is the genesis of the dispute, is not what the dispute was all about. The dispute was certainly about the company's refusal to negotiate with the union. The evidence established conclusively that the company consistently refused to bargain with the union.

[57] This matter seems to be similar to the *Food & General Workers Union and Others v Minister of Safety & Security and Others* matter.[12] In that matter, the learned judge said the following:

> '[28] While it is so that the dispute between the parties in this matter was initiated by a standard demand for a wage increase and improvement in certain conditions of service, this is not enough in itself to categorize the ensuing dispute as one concerning a mere matter of mutual interest, as Mr Nduzulwana would have it. It is recorded in the unchallenged answering affidavit of Mr D Schnetler, the fifth respondent's regional manager, that the first applicant had been informed on a number of occasions, and again after receiving the demands, that the fifth respondent was not prepared to negotiate with the first applicant I because it was 'entirely unrepresentative' in the Eastern Cape operations. In the form LRA 7.11 upon which the dispute was filed with the CCMA, the first applicant described the dispute as being about (I quote verbatim) 'refusal of the company to negotiate wage increment and conditions of employment'. The desired outcome was that the fifth respondent 'grant us organizational rights and allow us to negotiate wage

[12] (1999) 20 ILJ 1258 (LC).

increment and adjustments of conditions of employment of our members'. Furthermore, under the heading 'special features' the first applicant proposed 'a meeting with the company for wage negotiations'. The first applicant also confirmed that 'the company's response was that we don't have a majority in the Eastern Cape region', and added: 'Our argument is that we have the majority which the LRA refers to at the workplace.' Furthermore, in the founding affidavit to this application it is stated:

'The company advised the union verbally that it is refusing to negotiate wage increases and adjustments of conditions of employment with the union because the union does not have a majority of its employees, employed in the Eastern Cape region, but conceded that in its Uitenhage shop the union has [a] majority of its employees.'

[29] The meaning of the phrase 'refusal to recognize a trade union as a collective bargaining agent' has not yet received judicial attention. Mr Nduzulwana contended that the phrase should be restrictively construed so as to embrace only disputes arising out of the refusal by an employer to enter into a formal recognition agreement with a trade union. Although I am conscious that, insofar as they curtail the constitutional right to strike, restrictions imposed by the Act on strike action should be narrowly interpreted (see, for example, *Adams & others v Coin Security Group (Pty) Ltd* Labour Court case no C163/97 dated 3 September 1998 unreported), in my view the phrase 'refusal to recognize a trade union as a collective bargaining agent' embraces situations, such as those *in casu*, in which the employer refuses to negotiate with a trade union over wages and conditions of service.'[13]

I align myself with the sentiments and conclusion of the learned judge.

[58] The dispute was, in my view, a refusal to bargain dispute. Although the court *a quo* did not consider this issue because it had upheld the issue estoppel plea, it is clear that the true dispute between the parties was a refusal to bargain and that the union was supposed to obtain an advisory award as contemplated in section 135(3)(c) of the Act. It is common cause that no such award was issued by the CCMA. The strike was therefore unprotected.

[13] At paras 28 and 29.

[59] The court *a quo* comprehensively dealt with the fairness of the dismissals and correctly concluded that the dismissals were substantively and procedurally fair. This finding of the court *a quo* and its reasons were not challenged before us. There is in any event no reason to interfere with the court *a quo*'s findings in this regard.

[60] In my view the appeal ought to be dismissed.

[61] I therefore make the following finding:

The appeal is dismissed with costs.

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Musi, JA

I agree

_____

Waglay JP

I agree

_____

Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT:	Adv Kennedy
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