CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 131/15

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA obo MW NGEDLE and 93 OTHERS Applicant

and

UNITRANS FUEL AND CHEMICAL (PTY) LIMITED Respondent

Neutral citation:	*Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Mhlantla J: [1] to [74] Zondo J: [75] to [199] Jafta J: [200] to [258]
Heard on:	23 February 2016
Decided on:	1 September 2016
Summary:	Labour Relations Act, 1995 – dismissal – strike action – fairness – principles in *Afrox Ltd v SA Chemical Workers Union and Others (1)* – reinstatement – strike protected throughout – strike

may cease to be protected – automatically unfair – meaning of workers solidarity principle – no strike if no obligation to work – appeal from Labour Appeal Court – retrospective reinstatement – plus costs

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ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and the Labour Court are set aside and that of the Labour Court is replaced with the following:
   "(a) The dismissal of the individual applicants by the respondent on 2 November 2010 was automatically unfair.
   (b) The respondent is ordered to reinstate each one of the individual applicants in its employ on terms and conditions of employment not less favourable to him or her than the terms and conditions that governed his or her employment when the individual applicants were dismissed on 2 November 2010.
   (c) The order of reinstatement will operate with retrospective effect to 2 November 2010.
   (d) The respondent is to pay the applicants' costs."
4. The respondent is to pay the applicants' costs both in this Court and in the Labour Appeal Court.

JUDGMENT

MHLANTLA J (Moseneke DCJ, Cameron J, Froneman J and Nkabinde J concurring):

Introduction

[1] This matter concerns a dispute that arose on 2 November 2010 when 94 individuals employed by the respondent, Unitrans Fuel and Chemical (Pty) Ltd (Unitrans), were dismissed, pursuant to a strike. These workers are members of the Transport and Allied Workers Union of South Africa (TAWUSA). The dismissals were confirmed by the Labour Court as well as the Labour Appeal Court (LAC). This matter comes before us as an application for leave to appeal the decision of the LAC. It implicates whether the strike was protected and, in particular, whether the inclusion of impermissible demands with a permissible demand converts a protected strike into an unprotected strike. It also concerns the fairness of the dismissals.

Background and litigation history

[2] Because the facts of this case intermingle with its litigation history, which features five judgments – three from the Labour Court and two from the LAC – the factual background and litigation history before the dismissals will be dealt with before the factual background and litigation history following the dismissals.

Before the dismissals

[3] Unitrans conducts the business of haulage of petroleum and gas. It is common cause that Unitrans and TAWUSA are bound by the Constitution of the National Bargaining Council for the Road Freight and Logistics Industry (Bargaining Council) and the Main Collective Agreement for the Road Freight and Logistics Industry (Collective Agreement) as the business conducted by Unitrans falls within the Road

Freight and Logistics Industry.[1] Unitrans concluded many contracts with various companies. Unitrans had a five year contract with Shell Petroleum Company of South Africa (Shell contract). One hundred and ten workers were contracted to service this contract. The drivers servicing this contract earned more than the drivers that serviced less valuable contracts. This was because the Shell contract was lucrative, as it related to transporting hazardous substances. The Shell contract was terminated in February 2009 and this adversely affected the 110 workers. Most (79) of the workers managed to secure employment elsewhere. The remaining 31 workers continued to work for Unitrans. Of that number, 24 signed new employment contracts in terms of which their remuneration was reduced. The remaining seven refused to sign new employment contracts. These were referred to as the "Shell seven workers". Notwithstanding the Shell seven workers' refusal to sign new employment contracts, Unitrans unilaterally reduced their remuneration.

[4] Unitrans' unilateral conduct led to a dispute with TAWUSA. On 6 August 2010 TAWUSA sent a letter to Unitrans in which it raised four demands:

a. a complaint that the workers were not paid the same rate – this was referred to as the wage discrepancies demand;
b. a complaint that Unitrans had unilaterally reduced the wages of the Shell seven workers – this was referred to as the wage cut demand;
c. a demand for an additional allowance, which they called a coupling allowance, in the sum of R500 per week; and
d. the change to the administration of the provident fund.

[5] Unitrans did not accede to any of the four demands. TAWUSA declared a dispute and referred it to the Bargaining Council. On 29 July 2010, a certificate of

[1] The National Bargaining Council for the Road Freight and Logistics Industry is a body corporate governed by the Labour Relations Act 66 of 1995 (LRA) and was established to *inter alia*: negotiate, conclude and enforce collective substantive agreements on wages, benefits and other conditions of employment; determine by collective agreement any matter which may not be an issue in dispute for the purposes of a strike or a lockout in the workplace; and prevent and resolve labour disputes, within the Road Freight and Logistics Industry.

non-resolution was issued. The mediator added that the dispute could be referred to a strike or lock-out.

[6] On 6 July 2010, TAWUSA issued a strike notice (first strike notice) indicating the intention of its members to withhold their labour after the lapse of 48 hours. It outlined the demands in the first strike notice as follows:

> "2.1 Wage discrepancies
> 2.2 Wage cut
> 2.3 Coupling – R500 per week
> 2.4 Unilateral change of the administration of the fund from the Bargaining Council to your in-house fund."

[7] On 11 August 2010, in response to the first strike notice, Unitrans launched an urgent application in the Labour Court. It sought an order interdicting TAWUSA and any of its members from supporting or participating in any strike in support of the first strike notice. TAWUSA suspended the strike pending the finalisation of the application in the Labour Court. Unitrans contended that all four demands were unlawful and therefore the strike, if undertaken, would be unprotected.

[8] On 3 September 2010, the Labour Court dismissed Unitrans' urgent application on the basis that the disputes in respect of which the strike was called were disputes that were capable of being the subject of industrial action and they remained unresolved at the time the first strike notice was issued.[2]

[9] On 10 September 2010, TAWUSA uplifted its suspension of the strike and issued a strike notice indicating its intention to strike (second strike notice). The demands in the second strike notice were:

[2] *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa and Another* [2010] ZALCJHB 359 (first Labour Court judgment).

"(i) Wage discrepancies – there must be no wage discrepancy between employees who perform work, but on a different contract;

(ii) Wage cut – former Shell contract employees must earn what they used to earn under the Shell contract plus annual increases;

(iii) Coupling – R500 per week;

(iv) Unilateral change of the administration of the fund from the Bargaining Council to your in-house fund – the process be reversed to accommodate TAWUSA Fund not Council Fund."

[10] Aggrieved by the first Labour Court judgment, Unitrans appealed to the LAC. It argued that the parties were bound by the Collective Agreement and TAWUSA could not embark on a strike in respect of substantive issues on wages, benefits and other conditions of employment as negotiations relating to these issues had to be conducted within the Bargaining Council. This is set out in clause 50 of the Collective Agreement, which provides in relevant part:

"LEVELS OF BARGAINING IN THE INDUSTRY

(1) The forum for the negotiation and conclusion of substantive agreements on wages, benefits and other conditions of employment between employers and employers' organisations on the one hand and trade unions on the other, shall be the Council.

. . .

(3) No trade union or employers' organisation shall attempt to induce or compel, or be induced or compelled by, any natural or juristic person or organisation, by any form of strike or lock-out, to negotiate the issues referred to in subclause (1) above at any level other than the Council."

Unitrans also relied on section 65[3] of the LRA.

[3] Section 65 of the LRA provides:

"(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute."

[11] On 23 September 2010, the LAC upheld the appeal in part.[4] Waglay DJP considered the provisions of the Collective Agreement and concluded that the parties were bound by its terms. He concluded that the demand for a coupling allowance of R500 per week was a demand for an increase in wages and that it was a cost to the company. Therefore, it breached clause 50 of the Collective Agreement.[5] He also held that the demand relating to the unilateral change of the administration of the fund was factually unfounded. In the result, the LAC prohibited TAWUSA from striking in pursuit of the demands relating to the unilateral change of the administration of the fund and for the demand for the extra R500 per week for coupling.[6]

[12] Regarding the wage cut demand, the LAC held that the demand was not a demand for wages but a demand in respect of the Shell seven workers for Unitrans to restore the terms and conditions of employment that applied to them before the termination of the Shell contract. Therefore it was a dispute about a unilateral change to terms and conditions of employment.[7] Similarly, with regard to the wage discrepancies demand, Waglay DJP accepted TAWUSA's contention that it was not a demand for an amount of money but that the employer was required to adjust wages so as to arrive at a uniform level of remuneration for workers performing the same work albeit in terms of different contracts.[8] Accordingly, the LAC concluded that TAWUSA was entitled to strike in respect of the demands relating to the wage cut and

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[4] *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa (TAWUSA) and Another* [2010] ZALAC 20; (2010) 31 *ILJ* 2854 (LAC); [2011] 2 BLLR 153 (LAC) (first LAC judgment).

[5] Id at para 18.

[6] Id at para 23.

[7] Id at para 19 states, in relevant part:

> "Seen in the context of what has transpired at the appellant's work place it is clear that the aforementioned demands relate to the fact that the appellant unilaterally decided to reduce the wages of those of its employees who previously serviced the Shell contract for the appellant. When the appellant's contract with Shell came to an end it did not seek to reach an agreement (at least not with the 7 employees referred to earlier) with those employees who decided to remain in the appellant's employ but reduced their wages. The 7 employees were simply paid a lesser salary. This reinforces the first respondent's averment that the appellant unilaterally reduced the wages of its employees."

[8] Id at para 20 provides:

> "As counsel for the first respondent argued the demand for wage parity is not a demand for an amount of money but requires of the appellant to adjust wages so as to arrive at a uniform level of remuneration for employees performing the same work albeit on different contracts."

wage discrepancies. Unitrans' appeal was thus dismissed in respect of these two demands.

[13] Immediately after the first LAC judgment, TAWUSA issued a new strike notice (third strike notice) and indicated that the strike would commence on 13 October 2010. It listed two demands in the third strike notice as follows:

> "(i) Wage discrepancies – there must be no wage discrepancy between employees who perform work, but on a different contract; and
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> (ii) Wage cut – former Shell contract employees must earn what they used to earn under the Shell contract plus annual increases."

[14] Following the issue of the third strike notice, Unitrans sought clarity from TAWUSA regarding the demands. The parties met on numerous occasions, and the strike was suspended pending the outcome of these meetings. It appears from the correspondence, as well as from the minutes of the meetings, that Unitrans was of the view that TAWUSA impermissibly added further demands.[9]

[15] On 26 October 2010 TAWUSA issued another strike notice (fourth strike notice) and emphasised that the collective refusal to work would be in pursuit of the demands permitted by the LAC, being the wage discrepancies and the wage cut demands relating to the Shell seven workers whose wages had been cut. Unitrans' and TAWUSA's representatives held further meetings but no resolution could be reached.[10] This led to Unitrans launching a further urgent application before the Labour Court to interdict the strike. This application was heard by Basson J, who

[9] In a letter to TAWUSA dated 26 October 2010, the legal representatives of Unitrans recorded that following from meetings held between Unitrans and TAWUSA it was apparent that the demand was not only in respect of the seven ex-Shell drivers that refused to sign new employment contracts, but also in respect of all other ex-Shell drivers, as well as other drivers on different contracts. Also, in a letter to TAWUSA dated 28 October 2010, Unitrans' legal representatives stated that it was of the view that TAWUSA had misled its members, the Labour Appeal Court and Unitrans with regard to its demands.

[10] The minutes of the meetings held on 27 and 28 October 2010 between Unitrans and TAWUSA reflect that no consensus could be reached between the parties.

granted an interdict against TAWUSA.[11] Despite this, on 28 October 2010, the strike commenced. It endured for six days during which several meetings were held between Unitrans' management and TAWUSA. During this period, Unitrans issued four ultimatums in which it stated that the demands made by the workers differed from those determined by the LAC and that the demands were for increases in wages and would be a cost to the company. This, it said, rendered the strike unlawful. It demanded that the workers resume their duties. In the final ultimatum, which was issued on 1 November 2010 at 14h05, Unitrans capitulated to the Shell seven workers' demand. It required the striking workers to resume their duties by 06h00 on 2 November 2010, failing which they would be dismissed.[12] On 2 November 2010, the workers did not return to work. As a result, Unitrans summarily dismissed the workers.

Following the dismissals

[16] TAWUSA and the dismissed workers challenged the dismissals in the Labour Court. The matter was heard by Bhoola J who held that the strike was unprotected and that the dismissals were fair.[13] The individual applicants' claims were thus dismissed with costs. Their appeal to the LAC was also dismissed. Davis JA concluded that the strike was unprotected and dismissed the appeal.[14] He did so without considering the second leg of the inquiry, that is, notwithstanding the fact that the strike was unprotected, whether the dismissals were unfair under the circumstances. In this Court, TAWUSA seeks leave to appeal against the second LAC judgment. The application is opposed by Unitrans.

[11] *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa (TAWUSA) obo Members* (J 2173/10) (LC) (second Labour Court judgment).

[12] The final ultimatum, dated 1 November 2010, is quoted in full at [59].

[13] *Transport and Allied Workers Union of South Africa (TAWUSA) and Others v Unitrans Fuel and Chemical (Pty) Ltd* (JS 359/11) (LC).

[14] *Transport and Allied Workers Union of South Africa (TAWUSA) and Others v Unitrans Fuel and Chemical (Pty) Ltd* [2015] ZALAC 24; (2015) 36 *ILJ* 2822 (LAC); [2015] 11 BLLR 1151 (LAC) (second LAC judgment).

Parties' submissions

[17] TAWUSA contends that the second LAC judgment's interpretation of the Collective Agreement does not promote the spirit, purport and objects of the Bill of Rights[15] as it justifies a system in terms of which actual wages can never be negotiated either at central or at plant levels. TAWUSA further contends that workers who may not, through their union, participate in collective bargaining over their actual remuneration and who may not strike in disputes over their actual remuneration are relegated to the ranks of undignified coerced workers. This falls foul of what was said by this Court in *National Union of Metalworkers of SA.*[16]

[18] TAWUSA further relied on *Early Bird Farm*.[17] It submitted that the strike remained protected until Unitrans capitulated on the wage cut demand. This was so even if it was found that the wage discrepancies demand, as articulated in strike settlement negotiations, rendered the strike on that dispute unprotected. In *Early Bird Farm* the LAC concluded that in a case where employees that were not directly affected by a dispute participated in a protected strike in support of those workers that were directly affected by a dispute it was, strictly speaking, not required of the court to examine whether or not other demands made by the employees not directly affected by the dispute were permissible. This principle was first enunciated in *Afrox* (*Afrox* principle) where Zondo AJ, as he then was, held:

> "In my judgment once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call *all its members* who are employed by that employer out on strike and its members so employed acquire the right to strike."[18]

[15] See section 39(2) of the Constitution.

[16] *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 13.

[17] *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others* [2004] ZALAC 2; (2004) 25 *ILJ* 2135 (LAC) (*Early Bird Farm*).

[18] *Afrox Ltd v SA Chemical Workers Union and Others (1)* (1997) 18 *ILJ* 399 (LC) (*Afrox*) at 403H-I.

[19] Unitrans, on the other hand, contends that the dismissals of the workers complied with section 68(5) of the LRA in that the strike did not comply with the provisions of Chapter IV and therefore the dismissals were fair. It also relied on the provisions of item 6(1) of the Code of Good Practice (Code). Item 6(1) of the Code provides:

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

[20] Unitrans submitted that the three factors listed in item 6(1) were established and that the striking workers had been provided with numerous ultimatums, resulting in the dismissals being fair. Further, TAWUSA's demands, which were the subject matter of the strike, differed from the scope of the demands allowed by the first LAC judgment. It contended that if TAWUSA's demands concerned a wage increase, it should have negotiated through the Bargaining Council. By failing to do so, TAWUSA breached clause 50(1) and 50(3) of the Collective Agreement.

Leave to appeal

[21] This matter affects the livelihood of 94 individuals and their families. It involves the interpretation of the constitutionally entrenched right to strike[19] and the dismissal of workers whilst exercising their right to strike. Thus, this Court has jurisdiction on the basis that the matter triggers a constitutional issue.[20] This Court's jurisdiction is also established in terms of section 167(3)(b)(ii) of the Constitution as

[19] Section 23(2)(c) of the Constitution provides that every worker has the right to strike.

[20] In terms of section 167(3)(b)(i) of the Constitution, this Court decides constitutional matters.

this case raises an arguable point of law of general public importance which ought to be considered by this Court. That question is, whether a protected strike will be converted into an unprotected one as a result of the addition of impermissible demands to a permissible demand. Clarification is needed, even though this issue was adverted to by this Court in *Moloto*, which concerned the participation of non-union members in a strike for which only the union, and not the individual parties, had given notice to the employer.[21] Further, the lower courts have expressed divergent views on this matter. Leave to appeal should therefore be granted.

[22] It must be noted at the outset that the terms of the Collective Agreement were not challenged nor pleaded by the parties. Hence, as the Collective Agreement stands and in the absence of an exemption to allow the negotiations to proceed at a plant level, it is binding on both parties.[22]

Issues

[23] The fairness or otherwise of the dismissals will depend on the determination of a number of issues. First, was the strike protected? In determining whether the strike was protected the effect of the addition of impermissible demands on the protected nature of the strike in relation to the legitimate demands will be analysed. If the strike was protected, then the dismissals were automatically unfair. However, if the strike was unprotected the next question is whether the dismissals were fair? In this regard, the issue is whether the dismissals were substantively and procedurally fair.

Was the strike protected?

[24] Determining whether the dismissals in this matter related to misconduct will depend on the interpretation of the ambit within which the workers could withhold

[21] *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC). In *Moloto* this Court decided that the strike notice notifying the employer of the commencement and the issue of the strike, which was submitted by the union members, was the only requirement for the non-union members to join the strike.

[22] See *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 *ILJ* 3088 (LC) (*Air Chefs*) at para 19.

their labour. The two demands – which related to the wage discrepancies and the wage cuts – were authorised by the first LAC judgment.[23] This judgment is binding on the parties as there was no appeal against it and its interpretation of these two demands, in light of the Collective Agreement, will hence be dealt with successively.

(a) Wage discrepancies demand

[25] In my view the first LAC judgment characterised the circumstances in which the wage discrepancies demand would fall foul of the terms of the Collective Agreement and thus be considered unlawful. The demand with respect to wage discrepancies was allowed as TAWUSA could strike for "a system of wage parity for the drivers irrespective of which contract they service". The LAC further explained that "the demand for wage parity is not a demand for an amount of money but requires of [Unitrans] to adjust wages so as to arrive at a uniform level of remuneration for workers performing the same work albeit on different contracts".[24] Hence the wage discrepancies demand would be lawful, provided there was no cost implication to the employer, as this is precluded by the Collective Agreement in terms of which strikes on "substantive issues", being "all issues involving costs and affecting the wage packets of workers", must be dealt with in the Bargaining Council.

[26] In determining whether the wage discrepancies demand amounted in reality to a demand for an increase in remuneration, it is apposite at this stage to consider the minutes of the meetings between the parties. In this regard the minutes of the meeting dated 21 October 2010 stated in relevant part:

> "All employees, who are doing the same work or duties, should be paid the same rate of pay irrespective of their category. For example if a driver earns R20.00 and the other is on R60.00, those who are on a lower rate should be lifted to the higher rate so they can be equal. . . . The discrepancy should apply to all employees, not only the number that was mentioned on the court ruling."[25]

[23] First LAC judgment above n 4 at para 21.

[24] Id at para 20.

[25] In the same line, the minutes of the meetings dated 25 and 28 October 2010 stated respectively:

[27] The correctness of these minutes was confirmed before the Labour Court by the testimonies of Mr Ngedle, for TAWUSA, and Mr Badenhorst, for Unitrans. Both testified that the workers sought to achieve wage parity by increasing the wages of all lower paid workers to reach a median wage. Mr Badenhorst also pointed out the inevitable cost implication for Unitrans of such an exercise, should higher wages not be reciprocally reduced. Thus, it is clear from these minutes and testimonies that the workers sought a wage increase. This was in breach of the terms of the first LAC judgment as well as clause 50 of the Collective Agreement which was binding on the parties.

[28] In *Air Chefs*,[26] the workers gave notice of their intention to strike on the basis that the employer conducted a job grading exercise without adjusting the salaries with the new jobs grading. The Labour Court found that the planned strike was unprotected as any adjustments or realignment of salaries with new jobs grading is obviously a matter affecting wages and conditions of service of those employees and thus results in an attempt to achieve general wage increases of the kind that should be negotiated at Bargaining Council level.[27] The workers were therefore barred from pursuing their demand at company level.

[29] It follows that the wage discrepancies demand was impermissible from the strike's commencement as it fell outside the defined ambit of the first LAC judgment. That ensured that substantive wage issues are negotiated at Bargaining Council level

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> "The Union, explained that it want *all employees to go from a lower rate to a higher rate*. For example all code 14 licensed drivers should earn the same nationally. There are employees in Cape Town who are earning R47.00 per hour and those in Gauteng earning R27.00, it is the Union demand that *all should be equal in terms of rate. It is not only those employees on the court ruling but nationally*."
>
> "It is the Union stance that *all employees should be paid at a higher rate*, and no employee's wages has to be reduced or cut."

After being requested to clarify the meaning of this statement, the "Union said that they are not calling for a wage increase but for wage parity".

[26] *Air Chefs* above n 22.

[27] Id at paras 18-9.

and accordingly barred from a negotiation at the plant level. What remains is a consideration of the other demand the first LAC judgment authorised – the wage cut of the Shell seven workers.

(b) Wage cut demand

[30] The first LAC judgment concluded that the wage cut demand regarding the former Shell seven workers was a legitimate demand, as it related "to the fact that [Unitrans] unilaterally decided to reduce the wages of those of its workers who previously serviced the Shell contract for [Unitrans]".[28] The LAC understood the demand in relation to the Shell seven workers to be a demand that would undo the employer's unilateral change and reinstate a cost that had always been there.[29] It was a demand to restore the terms and conditions of employment that had applied to them prior to the termination of the Shell contract. The LAC therefore concluded that this demand did not amount to a wage increase as the employer would not pay more than what it legally had been paying had it not cut the Shell seven workers' wages. Again, the first LAC judgment limited the ambit in which the wage cut demand could be exercised.

[31] I agree with the reasoning of the LAC. In my view, this demand cannot be described as an increase in wages as there was no cost implication to the employer. Of course the restoration of the terms and conditions of employment would mean that Unitrans should also pay the Shell seven workers their back pay from the time that Unitrans commenced paying them at reduced rates. That, however, cannot be regarded as a wage increase nor cost implication to Unitrans, as it had unilaterally reduced those wages and, over a period, enjoyed a saving at the expense of the workers who had to endure hardships. Therefore, it would have to pay what it should have paid had it not changed the terms and conditions of employment. All that was required from the employer was for it to restore the *status quo ante*. That demand was

[28] First LAC judgment above n 4 at para 19.

[29] Id.

permissible only to the extent that the wage cut demand related to the Shell seven workers.

[32] However, it is evident from the record that TAWUSA introduced another demand relating to the wage cut of the former Shell and other Unitrans workers. Despite this, the inclusion of impermissible demands could not extinguish the Shell seven workers' wage cut demand, which remained lawful and permissible. This was recognised by Waglay DJP:

> "Finally I need to add that, although I find that only two demands are demands upon which the first respondent is entitled to call upon its members to strike, because the four demands are severable and each can stand alone, the appellant cannot succeed to have the strike interdicted on the grounds that some of the demands are demands on which the first respondent is prohibited from striking the intended strike is prohibited."[30]

[33] It is clear that Waglay DJP held that if one or two of the demands being pursued during a strike is permissible, that strike in respect of this permissible demand is lawful even if TAWUSA had added impermissible demands severable from the permissible demands. It follows that since the Shell seven workers' demand was lawful and severable from the other demands, the addition of an impermissible demand could not render the Shell seven workers' demand unlawful.

[34] The right to strike in pursuit of a permissible demand does not evaporate upon the addition of impermissible demands. The fact that the strike remains protected is also based on the principle established by the Labour Court in *Afrox*,[31] which was subsequently confirmed by the LAC and this Court.[32] This is:

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[30] First LAC judgment above n 4 at para 26.

[31] *Afrox* above n 18.

[32] The *Afrox* principle was subsequently approved by the LAC in *SA Clothing and Textile Workers Union v Free State and Northern Cape Clothing Manufacturers' Association* [2001] ZALAC 13; (2001) 22 *ILJ* 2636 (LAC); *Chemical Workers Industrial Union v Plascon Decorative Inland (Pty) Ltd* [1998] ZALAC 27; (1999) 20 *ILJ* 321 (LAC); and *Early Bird Farm* above n 17. It was also approved by this Court in *Moloto* above n 21 at para 89.

> "Once a union has complied with the requirements of section 64 of the LRA by referring a dispute to conciliation, it is not necessary to refer the same dispute again to conciliation when other members of the same union who are employed by the same employer want to join the strike in respect of the same dispute which is protected."[33]

[35] Hence it is permissible for workers, not directly affected by the demands of a certain group of workers directly affected, to participate in the strike in support of these demands – as long as the strike is protected in respect of the workers who are directly affected by the dispute.[34] It follows that when the permissible demand is extinguished following the employer's acceptance of such demand the collective refusal to work becomes unprotected. Similarly, when workers collectively strike in support of a permissible demand, the strike remains protected although the workers included impermissible demands.

[36] The addition of impermissible demands does not dissolve the lawfulness of the strike based on a permissible demand is subject to one condition: the strike notice, notifying the permissible demand to the employer, must set out "the issue over which the workers will go on strike with reasonable clarity". This requirement stems from *Moloto* where this Court stated that what is required in a strike notice has been interpreted in a generous manner, but notwithstanding the issue triggering the strike and its commencement must be set out clearly.[35] This is so because the strike notice determines the ambit of the strike that remains strictly limited to the permissible demand. By no means can impermissible demands widen the ambit of a strike.

[37] The objective of a clear demand is to give the employer proper warning of the strike, and an opportunity to take necessary steps to protect the business.[36] It cannot

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[33] *Early Bird Farm* above n 17 at para 27 and *Afrox* above n 18 at 403H-I.

[34] See also *Moloto* above n 21 at para 88.

[35] Id at paras 89-90.

[36] *County Fair Foods (a Division of Astral Operations Ltd) v Hotel, Liquor Catering Commercial and Allied Workers Union and Others* (2006) 27 *ILJ* 348 (LC). See also *Ceramic Industries LTA t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)* (1997) 18 *ILJ* 671 (LAC) at 672A-B.

be emphasised enough that the practice of concealing the core nature of a permissible demand cannot, and should not, be condoned. A strike is a high-stake exercise that is fraught with difficulty. It is undesirable for both employer and workers that strike action is unnecessarily protracted. A strike is a measure of last resort born of the collective desperation of workers to give their demands force. Negotiations between employers and workers (through a trade union or otherwise) should be facilitated, as opposed to hindered, and should be approached in good faith by both parties.

[38] In this case, I am satisfied that the introduction of the impermissible wage cut demand in respect of the other workers did not extinguish the permissible wage cut demand relating to the Shell seven workers because the permissible issue was set out with reasonable clarity in the various strike notices. Therefore, the strike remained protected by virtue of and within the ambit of the Shell seven workers' wage cut demand.

[39] In the result, the strike was protected from 28 October 2010 until 1 November 2010 when the employer capitulated to the Shell seven workers' wage cut demand. From that moment, the workers could not persist in their conduct of withholding their labour as the other demands were impermissible demands and no longer enjoyed the protection provided by the Shell seven workers' wage cut demand. Their actions in participating in an unprotected strike from 1 November 2010 amounted to misconduct.

[40] I have read the judgment of my colleague Zondo J. Regrettably, I do not agree with his conclusion that the strike was protected for the entire duration and that the dismissal was therefore substantively unfair. In my view, as I have set out above, the strike was protected until 1 November 2010 when the Shell seven workers' wage cut demand was fulfilled. Whether Unitrans fulfilled the demand must be determined objectively. The subjective motive for fulfilment of the demand cannot undo the fact that the demand was fulfilled. In the light of my conclusion, the next inquiry relates to the determination of whether the dismissal was fair.

[41] The LAC, in the second LAC judgment decided the matter on the basis that the strike was unprotected from the beginning and declared that the dismissal was fair. That conclusion is wrong when regard is had to the facts. It is clear that the strike became unprotected only on 1 November 2010 when the employer capitulated. Accordingly, it is imperative that an inquiry relating to the fairness of the dismissal be conducted to determine whether the dismissal was substantively and procedurally fair. I will first consider whether the dismissal was substantively unfair.

Were the dismissals substantively unfair?

[42] Counsel for TAWUSA submitted that the dismissals were substantively unfair, and he accordingly sought the reinstatement of the dismissed workers.

[43] Schedule 8 of the Code provides that a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure. Whether a dismissal is for a fair reason is determined by the facts of the case and the appropriateness of dismissal as a penalty.[37] That is the substantive fairness enquiry.

[44] Item 6(1) of the Code provides that while participation in an unprotected strike amounts to misconduct, this does not automatically render dismissals substantively fair. The substantive fairness of the dismissals must be measured against *inter alia*: (i) the seriousness of the contravention of the LRA; (ii) the attempts made to comply with the LRA; and (iii) whether or not the strike was in response to unjustified conduct by the employer.[38]

[37] Item 2(1) of the Code provides that:

> "A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below."

[38] See items 6(1)(a)-(c) of the Code, quoted at [19].

[45] The LAC held in *Mzeku* that:

> "Once there is no acceptable explanation for the [workers'] conduct, then it has to be accepted that the [workers] were guilty of unacceptable conduct which was a serious breach of their contracts of employment . . . The only way in which the [workers'] dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction."[39]

[46] Therefore, where striking workers engage in unprotected strike action, the onus rests on the workers to tender an explanation for their unlawful conduct, failing which their dismissal will be regarded as substantively fair, provided dismissal was an appropriate sanction. In this matter, no reasons were provided to the employer by the striking workers that explained their failure to return to work following the strike becoming unprotected.

[47] More seriously, the workers' unprotected strike following Unitrans' capitulation in its final ultimatum was impermissible not only for failing to comply with the provisions of the LRA, but for failure to comply with the orders of both the Labour Court and LAC. TAWUSA did not appeal against either the first LAC judgment per Waglay DJP, nor the interdict granted by the Labour Court per Basson J. It and its members therefore acted outside of these court orders when its members proceeded to withhold their labour following the employer's capitulation. That caused the strike to go beyond the bounds of *Afrox* and, consequently, the first LAC judgment – rendering the strike unprotected. Strike action in defiance of a court order is a serious contravention of both the court order and the provisions of the LRA. It cannot be condoned, barring the existence of exceptional circumstances in favour of the striking workers.

[48] In this case, I see no exceptional circumstances that could remedy the striking workers' failure to comply with the applicable court orders to the extent that dismissal

[39] *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* [2001] ZALAC 8; 2001 (4) SA 1009 (LAC); (2001) 22 *ILJ* 1575 (LAC) at para 17.

would not warrant an appropriate sanction. As I have found, and the facts before this Court show, it is apparent that the striking workers' demands (other than those relating to the Shell seven workers) exceeded the scope of the first LAC judgment. They therefore fell outside of the ambit of the Collective Agreement. Despite the employer capitulating in respect of the Shell seven workers, the striking workers continued to pursue demands that fell outside of the ambit authorised by the LAC and the Labour Court. This is a serious contravention of the LRA that cannot be condoned. In response to it, the employer's decision to issue an unequivocal ultimatum was justified.

[49] Furthermore, I do not accept that the employer's decision to unilaterally reduce the wages of the Shell seven workers can bear relevance to the substantive fairness, or lack thereof, of the dismissals effected after this demand was capitulated to by the employer. Strike action in relation to the employer's conduct was permissible only to the extent that that action was contemplated by the first LAC judgment. In the absence of the Shell seven workers' demand, the remaining demands, which I have demonstrated fall outside of the scope of the first LAC judgment, cannot be said to be in response to the employer's unjustified conduct. This is because they went further than the framework contemplated in the first LAC judgment, and therefore the Collective Agreement.

[50] In determining the appropriateness of a dismissal as a sanction for the striking workers' conduct, consideration must be given to whether a less severe form of discipline would have been more appropriate, as dismissal is the most severe sanction available. This the LAC overlooked. An illegal strike constitutes serious and unacceptable misconduct by workers.[40] This was exacerbated in that the workers also acted outside the bounds of both a court order and a collective agreement. In instances such as this, where an employer has issued an unequivocal ultimatum informing workers engaged in an impermissible strike that their misconduct will result

[40] *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* [1993] ZASCA 201; 1994 (2) SA 204 (A) (*Performing Arts Council*) at 216E.

in dismissal, subsequent dismissal has been found to be an appropriate sanction for non-compliance.[41] I am satisfied that dismissal was the appropriate sanction.

[51] I therefore conclude that the dismissals effected in response to the unprotected strike action were substantively fair. This, too, the LAC overlooked. That, however, is not the end of the matter. One must still determine whether the dismissals were procedurally fair. And that is the aspect that I shall consider below.

Were the dismissals procedurally fair?

[52] The Code provides that whether or not a dismissal is procedurally fair will be determined by referring to the guidelines set out in the Code.[42]

[53] The procedural fairness of a dismissal effected in terms of item 6 of the Code of Good Practice, which concerns dismissals effected in response to unprotected strikes, is determined in light of item 6(2) of the Code. Item 6(2) provides that when effecting a dismissal within its ambit, the employer must first contact the strikers' union "at the earliest possible opportunity to discuss the course of action it intends to adopt"; if this step produces no result, the employer may issue an ultimatum.[43] Item 6(2) can therefore be sub-divided into two requirements: first, that the employer should contact the strikers' union; and, second, that the employer must issue an ultimatum prior to effecting the dismissals.

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[41] See, for example, *SA Clothing and Textile Workers Union and Others v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) at para 30 where dismissal was found to be appropriate as the worker's misconduct was particularly serious in that the unprotected strike was a contravention of the LRA; it disregarded an unequivocal ultimatum; and it disregarded the provisions of a collective agreement, all relevant considerations to the matter at hand.

[42] See Item 2(1) of the Code above n 37.

[43] Item 6(2) of the Code provides:

> "Prior to the 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."

[54] Regarding the first requirement, that is, contact with the union, the Labour Court held in *Goldfields* that the purpose of engaging with the union is because workers in the heat of a strike are often unable to appreciate precisely the consequences of their actions or what the right thing to do may be, and a dose of reality may be required from an outside source such as a trade union.[44] It follows, and has been confirmed in *Goldfields*, *Fidelity* and *Performing Arts Council*, that merely notifying the union is not enough; its officials must be given a reasonable opportunity to persuade the workers to abandon the strike.[45] In *Coin Security Group* Basson J held:

> "In my view, item 6(2) of schedule 8 to the LRA . . . gives effect to and codifies the *audi alteram partem* principle in the context of a strike dismissal under the provisions of the LRA in that the clear purpose of these provisions is that a union official should be granted an opportunity to make representations on behalf of striking workers at the very earliest opportunity. Moreover, in the absence of the striking workers being granted such opportunity individually (such as was the position in casu), it is of the utmost importance that their union official be granted such opportunity on their behalf. In other words, a union official should be granted the opportunity to deal with the situation collectively at the very least. It follows that the refusal to do so is a serious impediment to the fairness of a strike dismissal."[46]

[55] Therefore, the first purpose of item 6(2) is that at the very earliest opportunity a union official should be allowed to make representations on behalf of striking workers (who are not given an opportunity to make representations individually).[47] In this regard, item 6(2) embraces the *audi alteram partem* principle in the context of a strike dismissal under the provisions of the LRA, compelling an employer to engage with

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[44] *National Union of Mineworkers and Others v Goldfields Security Ltd* (1999) 20 *ILJ* 1553 (LC) (*Goldfields*) at para 34.

[45] Id at para 36; *Professional Transport Workers Union and Others v Fidelity Security Services* (2009) 30 *ILJ* 1129 (LC) (*Fidelity*) at para 43; *Performing Arts Council* above n 40 at para 217D.

[46] *Transport and General Workers Union and Others v Coin Security Group (Pty) Ltd* (2001) 22 *ILJ* 968 (LC) (*Coin Security Group*) at para 74.

[47] Id. The Court went on to state that "the refusal to [grant a union official the opportunity to make representations] is a serious impediment to the fairness of a strike dismissal".

the workers' union.[48] Only once it becomes clear that the union's attempts will prove fruitless or merely seek to extend the strike, the employer may issue an ultimatum.[49]

[56] The second stage entails consideration of whether the ultimatum was fair; and, if so, whether the dismissals effected pursuant to the ultimatum were fair.[50] If the ultimatum was unfair, the second question does not arise, namely whether an unfair ultimatum renders the dismissals procedurally unfair. When assessing the fairness of an ultimatum, the factors to be considered are the background facts giving rise to the ultimatum, the terms thereof and the time allowed for compliance.[51]

[57] Unitrans' final ultimatum was tendered after three similar ultimatums had been provided to the striking workers. The difference is, however, that Unitrans' first three ultimatums were tendered during the protected strike period. While I accept that these ultimatums were tendered in fact, and therefore form part of a factual enquiry, they cannot be given legally binding force. To do so would allow employers to flout the protective measures afforded to workers should their strike action be protected by virtue of compliance with the legislative requirements. Item 6(2) is clear. It demands compliance "prior to dismissal", presuming that an employer has already established that the workers' misconduct deserves dismissal – this is the substantive fairness enquiry in item 6(1). An employer must therefore first establish, in accordance with item 6(1), that the workers' conduct is deserving of dismissal. Only after an employer has done so, may it turn to item 6(2), which prescribes how the dismissal is to be effected in a procedurally fair manner. The contention that an employer can presume eventual non-compliance with item 6(1) and seek to bolster its compliance with item 6(2) by issuing an ultimatum during protected strike action is unsustainable.

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[48] Id.

[49] See *National Union of Metalworkers of SA and Others v Datco Lighting (Pty) Ltd* (1996) 17 *ILJ* 315 (IC) at paras 330I and 331D.

[50] *National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd* [1999] ZASCA 18; (1999) 20 *ILJ* 2003 (SCA) (*GM Vincent*) at para 21. See also *W G Davey (Pty) Ltd v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2017 (SCA) at para 12.

[51] Id.

[58] Further, an ultimatum tendered during protected strike action is not legally binding on striking workers, as their dismissal at that point would amount to a serious contravention of the LRA.[52] How then can an employer seek to rely on such an ultimatum in the uncertain event that the workers conduct is determined to be deserving of dismissal after the permissible strike action has ceased, if the defect in the ultimatum lies in the employer's own judgment, namely that the ultimatums were tendered regardless of the permissibility of the strike action. In my view, the first three ultimatums cannot be considered in determining whether Unitrans acted in a procedurally fair manner.

[59] With regard to the terms of the ultimatum, item 6(2) specifically requires that an employer should issue "an ultimatum in clear and unambiguous terms that should state what is required of the workers and what sanction will be imposed if they do not comply with the ultimatum". The pertinent terms of the final ultimatum provided by Unitrans are as follows:

> "You are hereby issued with a final ultimatum that you must return to work and resume your normal duties by no later than 06:00 on Tuesday, 02 November 2010. If you do not resume your normal duties, you will be summarily dismissed, unless you or your representatives provide us, in writing, with reasons before expiry of this ultimatum showing that your current strike action is lawful and why you should not be dismissed. Kindly note that this ultimatum will not be repeated."

[60] The ultimatum clearly informs striking workers that their failure to resume their normal duties at the specified time would result in summary dismissal, barring the making of representations, of which there were none. To prevent uncertainty in the minds of the workers regarding the finality of this ultimatum, which may have been

[52] Section 187(1)(a) of the LRA provides:

> "(1) 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—
>
> (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."

created as a result of Unitrans having tendered three ultimatums during the period in which the strike action was permissible, Unitrans also emphasised the finality of this ultimatum. I am satisfied that the terms of the ultimatum reflect those terms specified in item 6(2). Accordingly, the procedural fairness of the dismissals must turn on the period of time afforded to the striking workers by Unitrans.

[61] It has been held to be unreasonable to expect strikers to resume work in too short a time. A reasonable time ultimately will depend on the circumstances, but an ultimatum should afford the strikers "a proper opportunity for obtaining advice and taking a rational decision as to what course of action to follow".[53]

[62] In *Allround Tooling*[54] the LAC found the dismissal of 117 workers pursuant to two ultimatums, served on the same day, procedurally unfair as too short a period of time was given. The employer's ultimatum should have expired "after the striking employees had had a weekend to cool down and to calmly reflect on the consequences of their conduct and having obtained the advice of the local union leadership, *the probabilities are that they would have returned to work*".[55]

[63] In *Pro Roof Cape*[56] the Labour Court found the dismissal of 22 workers who had been given just over two hours' notice to adhere to an ultimatum to be procedurally unfair. It held that "more time should have been allowed to reflect on the ultimatums once an undertaking had been given. . . . The [dismissals] could have been avoided by the provision of more time and information by the employer".[57]

[53] *Plaschem (Pty) Ltd v Chemical Workers Industrial Union* (1993) 14 *ILJ* 1000 (LAC) (*Plaschem*) at 1006H-I.

[54] *Allround Tooling (Pty) Ltd v NUMSA and Others* (1998) 8 BLLR 847 (LAC) (*Allround Tooling*).

[55] Id at para 48.

[56] *NUMSA and Others v Pro Roof Cape (Pty) Ltd* (2005) 11 BLLR 1126 (LC) (*Pro Roof Cape*).

[57] Id at para 35.

[64] In *Plaschem* the LAC found the dismissal of 42 workers, pursuant to a series of oral and written ultimatums, provided between 12h15 and 14h45 during the course of a working day, to be procedurally unfair. In this regard, the Court held:

> "When considering the question of dismissal it is important that an employer does not act over hastily. 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 their decisions is eliminated or limited."[58]

[65] In light of these decisions, it is apparent that the period of time conferred by the ultimatum must be viewed in light of the conditions prevailing at the time it was issued. The time period conferred by an ultimatum must be viewed in the context of whether the ultimatum provided an adequate opportunity for the workers involved to engage with its contents and respond accordingly. This is in line with item 6(2) of the Code encompassing the *audi alteram partem* principle, which extends into the terrain of unprotected strike action.[59] Further, the importance of conferring an adequate period of time for both parties to the dispute to "cool-off" must be emphasised. An adequate cooling-off period ensures that an employer does not act in anger or with undue haste[60] and that in turn the striking workers act rationally having been given the opportunity to reflect.

[66] In this case, the only legal ultimatum was the one that was issued on 1 November 2010. This was because the other three had been issued whilst the strike was protected and at that stage the workers were entitled to ignore them. The strike became unprotected at 14h05 on 1 November 2010, that is, upon Unitrans capitulating to the Shell seven workers' demand. The ultimatum continued to provide

[58] *Plaschem* above n 53 at 1006G-I.

[59] See *Modise and Others v Steve's Spar Blackheath* [2000] ZALAC 1; (2000) 21 *ILJ* 519 (LAC), which confirmed the applicability of the *audi alteram partem* principle in the context of a dismissal effected pursuant to an unprotected strike.

[60] See *Plaschem* above n 53 at 1006G-I.

unequivocally that the striking workers should return to work and resume their normal duties by 06h00 on Tuesday, 2 November 2010. Failure to do so, the ultimatum continued, would result in the workers being summarily dismissed, unless the workers or TAWUSA, as their representative, "provide [Unitrans], in writing, with reasons before expiry of this ultimatum showing that their current strike action is lawful and why they should not be dismissed".

[67] The workers effectively had three working hours to consider the ultimatum, reflect on the situation and respond. In my view the time provided by Unitrans was insufficient to enable them to do that. The ultimatum failed to afford the workers an adequate period of time to consider its contents and respond accordingly, which the *audi alteram partem* principle demands. Given the complexity of this matter, the fact that the strike action had been protected, and that the employer only capitulated in respect of the Shell seven workers' demand in this same ultimatum, a period of just under 16 hours (effectively three working hours) cannot be regarded as sufficient to justify Unitrans' actions in dismissing the workers.

[68] It follows that the dismissal of the workers was procedurally unfair. What then is an appropriate remedy?

Remedy

[69] This Court must be mindful of its obligation to grant remedies that would serve the parties practically. The provisions dealing with remedy are sections 193(1), 193(2)(d) and 194(1) of the LRA, which respectively provide:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may—
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other

reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee."

"(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

. . .

(d) the dismissal is unfair only because the employer did not follow a fair procedure."

"(1) The compensation awarded to an employee whose dismissal is found to be unfair either because . . . the employer did not follow a fair procedure . . . must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[70] It follows that in terms of section 193(2) the Labour Court must order that unfairly dismissed workers be reinstated or re-employed, barring where the conditions in subsections (a)-(d) are fulfilled. Should any of these conditions be fulfilled, then the Labour Court is not obliged to order that the workers be reinstated or re-employed, but may order any form of relief specified in section 193(1), which, in addition to reinstatement and re-employment, contemplates the payment of compensation to the workers by the employer.

[71] I have found the dismissals to be unfair on grounds of procedural fairness, which sections 193(2)(d) and 194(1) specifically contemplate. It follows that it is inappropriate that an order of reinstatement or re-employment be given pursuant to section 193(2). Therefore, a remedy must be fashioned in terms of section 193(1) read with section 194(1) should an award of compensation be made.

[72] In my view, the issue of remedy must be determined by the Labour Court, which will have regard to all the relevant issues. These may include the question relating to the interests of justice, delay in proceeding with the appeal in the LAC and

re-employment or otherwise of the workers. This Court is not adequately placed to consider these issues, even more so with a remedy having to be fashioned in terms of sections 193(1) and 194(1), the latter requiring that any award of compensation made be "just and equitable in all the circumstances". It is more appropriate that the matter be considered by a specialist court which will be able to investigate and interrogate the circumstances of each worker and determine an appropriate remedy. It is therefore in the interests of justice that the matter be remitted to the Labour Court to fashion an appropriate remedy in terms of sections 193(1) and 194(1).

Costs

[73] There is no reason why costs should not follow the result.

Order

[74] In the result, if I had the support of the majority, which I do not, I would have made the following order:

1. Leave to appeal is granted.
2. The appeal is upheld with costs.
3. The orders of the Labour Appeal Court and the Labour Court are set aside.
4. The order of the Labour Appeal Court is replaced with the following order:

   "The dismissals of the 94 individual applicants by Unitrans Fuel and Chemical (Pty) Ltd on 2 November 2010 was procedurally unfair."
5. The matter is remitted to the Labour Court to determine an appropriate remedy.

ZONDO J (Mogoeng CJ, Bosielo AJ, Khampepe J and Madlanga J concurring; Jafta J only concurring in the order)

Introduction

[75] The dispute between the parties in this matter is whether the dismissal of the second and further applicants (individual applicants) by the respondent (Unitrans) at about 08h00 on 2 November 2010 for allegedly participating in an unprotected strike[61] from 14h30 on 28 October 2010 to the time of their dismissal was automatically unfair[62] alternatively substantively[63] and procedurally unfair[64] and, if so, what remedy, if any, they should be granted.

[76] The Labour Court, which was called upon to determine the dismissal dispute, concluded through Bhoola J that the individual applicants had participated in an unprotected strike for six days and their dismissal was justified and was both substantively and procedurally fair. It then dismissed their claim with costs. In prosecuting their appeal to the Labour Appeal Court, the applicants failed to deliver the appeal record on time with the result that their appeal lapsed in terms of the Rules of that Court. The delay was for about a year. The applicants had to make an application for condonation and for the reinstatement of their appeal.

[77] In a judgment by Davis JA (in which Ndlovu JA and Landman JA concurred (the second LAC judgment))[65], the Labour Appeal Court concluded that they had failed to show good cause for their failure to comply with the time-limit for the delivery of the record. It dismissed the application but also concluded that, on the

[61] A protected strike is a strike that complies with the provisions of Chapter IV of the Labour Relations Act, 1995 (LRA). See section 67(1) of the LRA.

[62] A dismissal is automatically unfair if it was effected for any one or more of the reasons listed in section 187(1)(a)-(h) of the LRA. One of those reasons is participation in a protected strike.

[63] A dismissal is substantively unfair if there is no fair reason for it. See section 188 of the LRA.

[64] A dismissal is procedurally unfair if a fair procedure was not followed in effecting it. See section 188 of the LRA.

[65] Second LAC judgment above n 14. There is an earlier judgment of that Court that is defined as the first LAC judgment see [110].

merits of the appeal, the individual applicants had participated in an unprotected strike and their appeal lacked merits and fell to be dismissed. It is against this judgment that the applicants seek leave to appeal. They seek to appeal against the decision dismissing their application for condonation and for the reinstatement of their appeal in the Labour Appeal Court and the decision that, in any event, their appeal had no merits.

Jurisdiction and leave to appeal

[78] I have had the opportunity of reading the judgment by my Colleague, Mhlantla J (first judgment). For the reasons given in the first judgment, I agree that this Court has jurisdiction and that leave to appeal should be granted. However, with regard to granting leave I would like to say more than has the first judgment.

[79] In the second LAC judgment the Labour Appeal Court advanced two bases for its decisions against the applicants. It said:

> "To summarise: this case stands to be dismissed on two bases, namely that, given the non-existent explanation for the delay of a year before the appeal record could be prosecuted, the application for condonation stands to be dismissed. This is particularly so because, on the basis of the finding to which I have arrived, there are no prospects of success on appeal. However, given that the matter was exhaustively canvassed before this Court in oral argument, and given the finding to which I have arrived, the appeal stands to be dismissed on its merits."[66]

[80] From this passage it is clear that, although the applicants had delayed by about a year in lodging the appeal record for which they failed to provide an adequate explanation, the fact that the Court thought that the applicants' appeal had no prospects of success played an important role in the Court's decision. Furthermore, the Court made an order that dismissed the appeal because it said that the appeal was

[66] See the second LAC judgment above n 14 at para 34.

without any merits. Earlier on in the second LAC judgment, the Labour Appeal Court had said:

> "Strictly, this Court should dismiss the applications for condonation and the reinstatement of the appeal. However, it was decided at the hearing to determine whether there were any merits in the appeal which might weigh in favour of the applicants. In addition, Mr Redding, who appeared on behalf of the respondent, submitted that, in the circumstances, his client would prefer if the case was disposed of to finality."[67]

[81] It is against the above background that the application for leave to appeal must be assessed. This background is to the effect that, although the applicants' applications for condonation and the reinstatement of their appeal were weak because of the delay and absence of a proper explanation, both the applicants and the respondent wanted the appeal to be disposed of on the merits. In my view this was a very important factor that the Court should have taken into account. Indeed, it may have taken it into account but did not grant condonation and the reinstatement of the appeal because it took the view that the appeal had no prospects of success.

[82] To my mind, this suggests that, had the Labour Appeal Court taken the view that there were reasonable prospects of success for the appeal, it would probably have granted condonation and reinstated the appeal. This must be so because it did consider part of the merits of the appeal, namely, whether the strike in which the individual applicants had taken part for which they were dismissed was a protected strike. It concluded that the strike was unprotected, held that their dismissal was, therefore, fair and dismissed their appeal.

[83] I say that the Labour Appeal Court considered part of the merits of the applicants' appeal because that is what happened. Part of the applicants' appeal was that they had been dismissed for participation in a protected strike and that, therefore, their dismissal was automatically unfair. Another part was that, even if it was held

[67] Id at para 9.

that their strike was unprotected, their dismissal was both substantively and procedurally unfair. The Labour Appeal Court failed to consider this part of the applicants' appeal and dismissed their appeal without having considered it. This was a serious misdirection on the part of the Labour Appeal Court that weighs heavily in favour of granting the applicants leave to appeal. This is because that meant that there was an important part of their appeal which had been left undecided by the Labour Appeal Court. That part of their appeal would remain undecided if we refused leave to appeal.

[84] Furthermore, there are reasonable prospects of success for the applicants' appeal not only in relation to showing that their dismissal was unfair but also in showing that the dismissal was automatically unfair. This would be by reason of the dismissal having been a dismissal for participation in a protected strike. I am also of the view that the Labour Appeal Court may have overlooked its own previous decisions relevant to the legal status of the strike in coming to the conclusion that the strike was unprotected and that, if effect is given to those decisions, the conclusion may be reached that the strike was either largely or wholly protected. I am, therefore, of the view that the appeal has reasonable prospects of success.

[85] Lastly on the application for leave to appeal, this matter raises important legal and constitutional issues on which this Court has not pronounced before. One of these issues is how a protected strike may change into an unprotected strike. Another one is whether, if the strike was protected for all of the days except part of the last day before the workers were dismissed, the reason for dismissal is automatically unfair or substantively unfair or is predominantly automatically unfair. This, too, is an issue that this Court has never pronounced upon. Indeed, I am not aware of any case in which any of our courts has pronounced on such an issue. I am, therefore, of the view that it is in the interests of justice that this Court grant leave to appeal.

[86] I am unable to agree with the first judgment's conclusions that—

(a) although the strike was initially protected, its legal status changed at 14h05 on 1 November 2010 and it became unprotected;[68]

(b) the individual applicants participated in an unprotected strike from 14h05 on 1 November 2010 to 06h00 on 2 November 2010 and were, therefore, guilty of misconduct;[69]

(c) Unitrans acted substantively fairly in dismissing the individual applicants;[70] and

(d) the matter should be remitted to the Labour Court for that Court to fashion an appropriate remedy.[71]

[87] In my view the strike was protected throughout and the individual applicants and the other workers were dismissed for participation in a protected strike. Even if the strike can be said to have become unprotected at about 16h00[72] or so on 1 November 2010 and the individual applicants can be said to have participated in an unprotected strike between 16h00 on 1 November 2010 and 06h00 on 2 November 2010, the reason for the dismissal would still be predominantly for participation in a protected strike and would still be predominantly automatically unfair. This Court should grant the remedy itself and that remedy is reinstatement. My approach to the issues and my reasons for these and other conclusions appear below. However, I deal with the background first.

Background

[88] The background to the dispute has been set out in the first judgment. It is, therefore, unnecessary to repeat that exercise in this judgment except in so far as it may be necessary to set out a brief background for a proper understanding of my

[68] See [39], [41] and [66].

[69] See [39].

[70] See [51].

[71] See [72] and [74].

[72] The reason why I say 16h00 and not 14h05 appears later in my judgment at [131].

approach to the issues. When necessary I shall refer to certain parts of the background only as and when I discuss different aspects of the matter.

[89] Unitrans enters into contracts with various suppliers of dangerous goods such as petroleum products, oxygen and LPG (liquefied petroleum gas) and undertakes to transport and deliver those products to their destinations. To transport the goods and products Unitrans uses large trucks. It employs many Ultra-heavy Duty Vehicle drivers who drive the trucks that transport these goods or products. Some of the trucks transport goods beyond the borders of South Africa. The drivers are attached to a particular contract entered into between Unitrans and a client. For convenience I shall call such a contract a supplier contract. In terms of their conditions of employment, the drivers may be transferred from one supplier contract to another.

[90] In or about February 2004 Unitrans entered into a contract (Shell contract) with Shell Petroleum Company of South Africa (Shell) for a period of five years. In terms of that contract Unitrans would deliver Shell's petroleum products to various service stations throughout Gauteng and Limpopo. That contract expired by effluxion of time in February 2009. There were about 110 drivers employed by Unitrans who were attached to this contract. Unitrans offered to retain all those drivers in its employ but the vast majority opted to take up employment with the new contractor, Fuel Logic (Pty) Ltd. Only 31 of the drivers chose to remain in Unitrans' employment. All the 31 drivers were transferred to various supplier contracts that Unitrans had at the time.

[91] Unitrans says that the terms and conditions of employment of its drivers are governed by the terms and conditions of employment agreed to at the National Bargaining Council for the Road Freight Industry, their letters of appointment and their contracts of employment. The relevant collective agreement was not included in any of the papers. Only certain sections of the collective agreement were referred to, and quoted, in written argument as well as in the judgments of the Labour Court and Labour Appeal Court. In its founding affidavit filed in support of the urgent application for an interdict that Unitrans made to the Labour Court in August 2010 the

deponent, Mr Titus Sekano, who was Unitrans' Human Resources Manager at the time, put up what he called "an example" of a letter of appointment of drivers employed by Unitrans. This suggests that the letters of appointment of all the drivers essentially contained the same terms and conditions as that letter of appointment except for personal details and rates of remuneration. The particular letter of appointment was that of a Mr Sipho Radebe. It is dated 19 February 2009.

[92] That Mr Radebe's letter of appointment is an example or sample of the letters of appointment of drivers employed by Unitrans is supported by the fact that there are two other letters of appointment in the record which reflect the same terms and conditions of appointment as the terms and conditions appearing in Mr Radebe's letter of appointment. Those two letters relate to a Mr Vincent Mayekiso. One is dated 1 June 2007 and the other 13 March 2009.

[93] In the first paragraph Mr Radebe's letter of appointment confirms his appointment as an Ultra-heavy Duty Vehicle Driver "on the LPG in the Greater Gauteng Regions" with effect from 16 February 2009. Mr Mayekiso's 2007 letter of appointment confirms in the first paragraph his appointment also as an Ultra-heavy Duty Vehicle Driver but "on the Shell Alrode Contract" and with effect from 19 June 2007. The 2009 one confirms in the first paragraph his appointment, also as an Ultra-heavy Duty Vehicle Driver, and, like Mr Radebe's one, "on the LPG Contract in the Greater Gauteng Regions" but with effect from 2 March 2009.

[94] Unitrans said that the wage rates at which its drivers are paid differ depending on the supplier contract to which a driver is attached. Therefore, some drivers will be paid at a higher rate than others if the supplier contract to which they are attached is more lucrative than another or others to which some of the drivers may be attached. The Shell contract to which reference has been made was one of the lucrative contracts. As a result, the drivers who were attached to it were paid at quite a high wage rate.

[95] The second sentence in Mr Radebe's letter of appointment is important because it reveals that the terms and conditions of appointment which follow in the rest of the letter are the terms and conditions of service applicable at Unitrans or are at least some of the terms and conditions of service applicable to drivers employed by Unitrans. It says:

> "Your remuneration and conditions of service will fall in line with those instituted for Unitrans, in March 2001 and are as follows . . ."

and, thereafter, the remuneration and other terms and conditions are set out.

[96] Under the heading: "Hours of work and overtime", Mr Radebe's letter of appointment reads:

> "The Company operates in accordance with the National Bargaining Council for the Road Freight Industry and currently operates a 45-hour week. *You will, however, be required to work overtime* and *weekends* as *required by your contract* and payment will be as follows:
>
> Weekdays and Saturdays at a time and a half (1/2)
>
> Sundays and Public Holidays at double time (2) or as provided by the National Bargaining Council Agreement."

Under "Shift Work" the letter reads:

> "Employees will be required to work *shift work* in accordance with their contract. Your *starting times may vary from time to time as required by the needs of the contract* and you undertake to make yourself available to start at these times."

Both of Mr Mayekiso's letters of appointment contain the same provisions on hours of work, overtime and shift work.

[97] I referred earlier to the fact that, when the Shell contract expired, 31 of Unitrans' 110 drivers chose to continue in Unitrans' employ rather than take up

employment with the new contractor at Shell and that Unitrans transferred all the 31 drivers to different supplier contracts. This meant that they were going to continue to work as drivers but on different supplier contracts. However, Unitrans intended that they would be paid at lower wage rates than the rates at which they had been paid when they were attached to the Shell contract. This was because the wage rates at which drivers were paid, as already indicated, differed depending on how lucrative the supplier contract was to which a driver was attached.

[98] Unitrans asked the former Shell drivers whom it retained to sign new contracts of employment in terms of which their wage rates were reduced. Except for seven of the drivers, to whom I shall refer as the "Shell 7", those drivers signed new contracts of employment and agreed to be remunerated at lower rates than their Shell rates. The Shell 7 refused to sign new contracts of employment but performed their duties. Their stance seems to have been that they had contracts of employment with Unitrans which prescribed the rates at which they were to be paid and they were entitled to be remunerated at those rates and Unitrans should honour its obligation in terms of their contracts of employment. From the time the Shell 7 were transferred from the Shell contract, Unitrans did not pay them at the rates at which they were entitled to be remunerated in terms of their contracts of employment. It paid them at lower rates. Unitrans did not terminate the contracts of employment it had with each one of the Shell 7. Those contracts put the Shell 7 at higher wage rates than the rates which Unitrans now wanted to use.

[99] The majority trade union among Unitrans' employees when the Shell contract expired was the South African Transport and Allied Workers Union (SATAWU). Unitrans had dealt with SATAWU with regard to the transfer of the former Shell drivers to other supplier contracts. However, early in 2010 TAWUSA came into the picture. At that stage the position was that the Shell 7 were performing their duties in terms of their contracts of employment but were paid at wage rates that were lower than the ones at which they were entitled to be paid. This meant that Unitrans was continuing to act in breach of the contracts of employment it had with each one of the

Shell 7. Each one of the Shell 7 employees continued to hold Unitrans to the terms of his contract.

[100] The plight of the Shell 7 was one of the issues that TAWUSA took up with Unitrans. It made four demands to Unitrans. Two of them were referred to as the "wage discrepancies" and "wage cut". The "wage discrepancies" demand – which was later also called the "wage parity" demand – was the demand that Unitrans should pay the drivers at the same wage rate irrespective of the different supplier contracts to which the drivers were attached. TAWUSA was objecting to the then prevailing state of affairs at Unitrans in terms of which people doing the same job were paid at different wage rates just because they were attached to different supplier contracts. By way of the wage cut demand, TAWUSA and its members demanded that Unitrans restore the Shell 7 to the wage rates to which they were entitled in terms of their contracts of employment and pay them their backpay and increases since February 2009 when they were transferred from the Shell contract.

[101] TAWUSA and Unitrans exchanged correspondence and held meetings to discuss the four demands but could not reach agreement. A dispute then arose between the parties concerning Unitrans' failure to comply with the four demands. The dispute was referred to the bargaining council for a conciliation process. The conciliation process failed. The bargaining council then issued a certificate of outcome to the effect that the dispute was not resolved. Thereafter, TAWUSA gave Unitrans the prescribed 48 hour written notice of the commencement of a strike.[73] This meant that at the expiration of the 48 hours the workers would collectively refuse to work in support of their demands. That, in turn, entailed that, until Unitrans complied with the demands made to it by TAWUSA and its members, the workers would not be working. In a letter dated 28 October 2010 Unitrans' Attorneys, Glyn Marais Inc, *inter alia* conceded that TAWUSA's members were entitled to withhold their labour in support of the wage cut demand of the Shell 7. They put it thus:

[73] Such notice is required by section 64 of the LRA.

> "It therefore appears that the only issue that your members can effectively strike upon is with regard to the alleged wage cut of the seven former Shell contract employees who did not sign employment agreements, and certainly not in respect of all the employees as alleged."

[102] TAWUSA's members employed by Unitrans commenced a strike at 14h30 on 28 October 2010. That strike continued on 29, 30, 31 October 2010 and 1 November 2010. The individual applicants were dismissed at about 08h00 on 2 November 2010. The reason advanced by Unitrans for its decision to dismiss them and other workers that morning is that they participated in an unprotected strike over the period 14h30 on 28 October 2010 to 06h00 on 2 November 2010. It said that that was six days of an unprotected strike. That was actually not six days. It was four days and about 15 hours or so.

[103] The applicants contend that the strike was protected throughout. Unitrans contends that the strike was unprotected from beginning to end. However, it argued that, to the extent that the Shell 7 may have been entitled prior to 14h05 on 1 November to withhold their labour in pursuit of the wage cut demand, their right to do so ceased at that time when it issued its final ultimatum. The significance of the final ultimatum is that Unitrans said in the final ultimatum that it conceded the wage cut demand in so far as it related to the Shell 7. Unitrans contended that, after that, there was no demand that TAWUSA and the workers were permitted to pursue by way of a collective refusal to work. It is, therefore, necessary to start with the question whether the strike was protected.

Was the strike protected?

[104] Section 23(2)(c) of our Constitution entrenches every worker's right to strike.[74] The Labour Relations Act[75] (LRA) gives effect to this and other rights. Section 64 of

[74] Section 23(2)(c) reads:

> "(2) Every worker has the right—
>
> . . .

the LRA confers upon every employee the right to strike if certain conditions or requirements set out in that provision have been satisfied. Section 64(1) of the LRA reads, in so far as it is relevant:

> "(1) Every employee has the right to strike . . . 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—
>
> (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 . . ."

The term "issue in dispute" referred to in section 64(1)(a) is defined "in relation to a strike or lock-out" as meaning "the demand, the grievance or the dispute that forms the subject matter of the strike or lock-out." The word "dispute" is defined as including an alleged dispute. There was only one requirement which the parties were not agreed had been satisfied in order to render the strike protected. The applicants argued that it had been met whereas Unitrans contended that it had not been met.

[105] The requirement on which the parties were not agreed was whether the demands were the type of demands which TAWUSA and its members were entitled to pursue by way of a collective refusal to work. TAWUSA's position was that its members collectively refused to work in support of two demands, namely, the wage discrepancy demand and the wage cut demand.

> (c) to strike."

[75] 66 of 1995.

[106] Section 213 of the LRA defines a strike as follows in so far as it is relevant to the present matter—

> ""strike" is the partial or *complete concerted refusal to work*, or the retardation or obstruction of work, *by persons who are or have been employed by the same employer* or by different employers, *for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee* and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory."

There are four elements or components that make up a strike under the LRA. In everyday parlance people call every collective stay-away from work or work-stoppage a strike. Under the LRA a strike must have the four elements. These are: (a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by persons who are or have been employed by the same employer or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee. I also leave out for present purposes the reference to an overtime ban. In the present case the strike took the form of a concerted refusal to work. One should not talk about a strike in support of a certain demand because, in terms of the definition of the word "strike", a strike already includes a demand. One should speak of a collective refusal to work in support of a certain demand or in pursuit of a certain demand.

[107] After TAWUSA had given Unitrans the first strike notice in August 2010, Unitrans brought an urgent application in the Labour Court for an order interdicting the strike. TAWUSA then suspended the commencement of the strike pending the outcome of the urgent application. The Labour Court granted a rule *nisi*. On the return day or extended return day Van Niekerk J discharged the rule because he concluded that the strike was protected (the first LC judgment).[76]

[76] See first LC Judgment above n 2.

[108] It is important to point out that in the founding affidavit, which was deposed to by Mr Titus Sekano, in the application referred to in the preceding paragraph, Unitrans did not rely on any collective agreement concluded at the bargaining council nor did it rely on the constitution of the bargaining council for its case for an interdict. There was not even an averment that TAWUSA or its members were party to or bound by any collective agreement concluded at the bargaining council. Unitrans relied on other matters including its contention that there had been no unilateral change of the terms and conditions of employment of the Shell 7 and on what the conciliator should or should not have done at the conciliation meeting.

[109] When Unitrans applied to the Labour Court for leave to appeal, it relied on the collective agreement concluded at the bargaining council to contend that the Labour Court's decision was wrong and there were good prospects of success on appeal. It contended that TAWUSA was precluded by that collective agreement from seeking to negotiate the particular demands at plant-level as those types of demands should be negotiated at the bargaining council. It advanced this contention despite the fact that in the founding affidavit that had not been part of its case. It would appear that its new legal team – enlisted after the Labour Court discharged the rule *nisi* – argued that this was a point of law and they were entitled to raise it even though it had not been raised in the founding affidavit. It is not clear what the attitude of TAWUSA's legal team was to this but Van Niekerk J seems to have been persuaded that this was purely a point of law and that Unitrans was entitled to raise it. He, therefore, granted leave to appeal.[77]

[110] The appeal was heard by Mlambo JP, Waglay DJP and Tlaletsi JA. In that appeal, too, Unitrans' new legal team relied upon the collective agreement to argue that the strike would be unprotected. In a unanimous judgment by Waglay DJP[78] (the first LAC judgment) the Labour Appeal Court held in effect that Unitrans was entitled

[77] *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa and Another* [2010] ZALCJHB 370.

[78] See first LAC judgment above n 4.

to argue that the collective agreement precluded a concerted refusal to work in pursuit of the four demands that had been part of the dispute referred to the conciliation process. It held that the workers were entitled to withhold their labour in pursuit of the two demands referred to as the wage discrepancy and wage cut demands. The Court came to this conclusion on the basis that, where a collective refusal to work is resorted to in support of a number of demands, as long as any of the demands could be pursued by way of a concerted refusal to work, the workers would be entitled to withhold their labour and their strike would be a protected strike. A reading of the first LAC judgment and the founding affidavit in the August 2010 urgent application reveals that Unitrans' case as to why the strike would be unprotected and the case Unitrans argued on appeal before the Labour Appeal Court were two different things. The Labour Appeal Court specifically made an order that the workers could withhold their labour in support of the demands of wage discrepancy and wage cut.

[111] In *Afrox*[79] the Labour Court enunciated a principle that, if a group of workers have a dispute with their employer that directly affects them and they have complied with the statutory requirements that must be satisfied in order for them to be entitled to strike, not only will they be entitled to strike but also their colleagues who are not directly affected by the dispute will be entitled to withhold their labour in support of the demands of the group that is directly affected by the dispute. I would call this principle the "worker solidarity principle". I would call it that because the workers who are not directly affected by the dispute but are, nevertheless, entitled to withhold their labour do so in solidarity with their colleagues who are directly affected by the dispute. In my view the worker solidarity principle is crucial to the determination of the question whether the individual applicants were entitled to take part in the strike in this case. The Labour Appeal Court approved and applied the worker solidarity principle in a number of cases.[80] This Court, too, has endorsed the principle.[81]

[79] See *Afrox* above n 18.

[80] See *Early Bird Farm* above n 17. *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union & Others* [2009] ZALAC 3; (2009) 30 *ILJ* 1997 (LAC). *SA Clothing & Textile Workers Union v Free State and Northern Cape Clothing Manufacturers Association* above n 32. *Chemical Workers Industrial Union v Plascon Decorative Inland (Pty) Ltd* above n 32.

Application of the worker solidarity principle to this case

[112] As already indicated, one of the two demands that the first LAC judgment ruled could be pursued by TAWUSA and the workers by way of a collective refusal to work was the wage cut demand. TAWUSA's wage cut demand to Unitrans was that Unitrans should restore the Shell 7 to their agreed wage rates including increases and pay them their backpay from the time when they were transferred from the Shell contract. That would be from February or March 2009. It would appear that at some stage or another TAWUSA and the shopstewards put the wage cut demand to Unitrans as entailing that Unitrans meet this demand not only in respect of the Shell 7 but also in respect of other drivers who had been transferred from the Shell contract to other supplier contracts. Unitrans resisted this expansion of the demand and contended that it fell outside the wage cut demand permitted by the first LAC judgment.

[113] Unitrans was correct that the wage cut demand permitted by the first LAC judgment was limited to the Shell 7. However, the fact that TAWUSA and the workers expanded the wage cut demand to include other workers in addition to the Shell 7 did not mean that the correct wage cut demand was no longer on the table. That is the demand that the Shell 7 be placed on the agreed wage rates and be paid backpay and increases. It remained part of the expanded wage cut demand. Unitrans was entitled at any stage to take the position that it would comply only with the wage cut demand relating to the Shell 7. The demand that the Shell 7 be restored to their agreed wage rates and that their full backpay for the period starting from February or March 2009 be paid was never abandoned. As long as the wage cut demand in relation to the Shell 7 had not been abandoned and had not been complied with, the Shell 7 were entitled to withhold their labour from Unitrans. As long as the Shell 7 were entitled to withhold their labour in support of the wage cut demand, in terms of the worker solidarity principle the rest of the workers, including the individual applicants, were also entitled to withhold their labour from Unitrans in solidarity with the Shell 7.

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[81] See *Moloto* above n 21 at para 89.

[114] As at 28 October the issue in dispute in the form of the wage cut demand had been referred to the conciliation process, that process had failed to produce an agreement between the parties, a certificate of outcome had been issued, a strike notice had been given to Unitrans and the prescribed 48 hours written notice had expired by 14h30. The Shell 7 were entitled as at that time to collectively withhold their labour in pursuit of the wage cut demand. The fact that the Shell 7 were entitled to withhold their labour also meant that, on the basis of the worker solidarity principle, the rest of the workers, including the individual applicants, were also entitled to withhold their labour in pursuit of the wage cut demand in respect of the Shell 7. Therefore, the strike that commenced at 14h30 on 28 October was a protected strike. The strike continued on 29, 30, 31 October and on 1 November. Therefore, Unitrans' contention that the strike was unprotected from beginning to end falls to be rejected. The concession made by Unitrans in its attorneys' letter of 28 October that the workers were entitled to withhold their labour in support of the wage cut demand of the Shell 7 was properly made. Unfortunately, for some reason Unitrans did not, at the trial before the Labour Court, the Labour Appeal Court and before this Court, present its case on the basis of this concession despite the existence of clear authorities in our law[82] that that was the correct legal position. In the Labour Court, the Labour Appeal Court and this Court, Unitrans argued the case on the basis that the strike was unprotected from beginning to end. The next question to consider is whether the strike ceased to be protected and became unprotected after Unitrans had issued its final ultimatum on 1 November.

Did the strike become unprotected on 1 November?

[115] At about 13h30 on 1 November Unitrans sent its final ultimatum to TAWUSA by telefax. At about 14h05 it issued the final ultimatum. The ultimatum informed TAWUSA and its members that the strike was unlawful and unprotected. It called upon the workers to return to work and resume their duties at 06h00 on Tuesday, 2 November, failing which they would be dismissed unless they or their

[82] See above n 80.

representatives furnished sound reasons why the strike was protected. In that final ultimatum Unitrans first set out its understanding of the wage cut demand and then undertook to restore the Shell 7 to their agreed wage rates with increases and to pay them their backpay from when they were transferred from the Shell contract. Here is how the relevant two paragraphs read in the final ultimatum:

> "Your demand regarding "wage cut" remains that all Drivers from the former Shell contract that ended in February 2009 be paid wage rates according to their wage rates valid at that time. This also involves that adjustments of the wage rates as result of increases be determined according to the former wage rates and back pay of the wage rate variance be paid. Kindly note that this demand is not lawful as, in terms of previous court rulings, only 7 employees can be affected by this demand.
>
> As *a gesture of goodwill and in order to end the current unlawful strike action, management has acceded to your demand pertaining to the 7 employees in issue*. The *7 employees' wage rates will be re-instated from the time they transferred from the former Shell contract*. They will *also be paid the variances in wage rates due as result of wage increases since their transfers*. The *aforesaid payments will be backdated for the full period since their transfers*. Your demand has therefore been fully resolved with regard to these 7 employees. Your demand pertaining to the 7 employees in issue can thus not form the subject matter of any continued strike action. Kindly note that should you continue to strike in support of your "wage cut" demand pertaining to the other former Shell contract employees, your strike action will remain unlawful."

[116] The first judgment holds that, although the strike was initially protected, it ceased to be protected at about 14h05 on 1 November when Unitrans issued the final ultimatum.[83] The first judgment takes the view that from that time up to 2 November, when the workers were dismissed, the strike was unprotected and the workers participated in an unprotected strike at that stage. It goes on to hold that Unitrans was entitled to issue its final ultimatum when it did because the strike had become unprotected and the workers should have returned to work at 06h00 on 2 November.[84]

[83] See [41] and [66].

[84] See [67] to [69].

In my view, the first judgment goes wrong on this point. The strike was protected from beginning to end and its legal status never changed. I explain this below.

[117] It is not clear to me that Unitrans argued that, even if the strike was initially protected, it ceased to be protected after Unitrans had issued its final ultimatum. In its written submissions it did not advance such a case and was content to simply argue that the wage cut demand could no longer be pursued as it was no longer an issue. However, whether or not Unitrans did argue this point is neither here nor there because the Court is obliged to consider whether the issuing of the ultimatum – containing as it did the paragraphs on the wage cut demand – had any effect on the status of the strike. This is so because, if that did affect the legal status of the strike and the strike changed from being protected to being unprotected, that would be a factor to be taken into account in determining whether the individual applicants participated in an unprotected strike from about 16h00 on 1 November to 06h00 on 2 November.

[118] The question that arises is how a protected strike changes from being a protected strike to an unprotected strike. This is a critical question to consider before deciding whether, by making the promise that it made or giving the undertaking that it gave, Unitrans changed a protected strike into an unprotected strike. It is necessary to go back to the basic principle of our law on strikes. I have quoted the definition of the word "strike" above.[85] The definition reveals that a strike is a concerted refusal to work or retardation or obstruction of work that is initiated for a specific purpose. The definition makes it clear that the concerted refusal to work or retardation or obstruction of work must be resorted to "for the purpose of *remedying* a grievance or resolving a dispute" in respect of any matter of mutual interest between employer and employee.

[119] Where the concerted refusal to work is resorted to in support of a demand made by a trade union or workers to an employer, the employer would need to comply fully

[85] See [106].

and unconditionally with the demand in order for a protected strike to turn into an unprotected strike. Once the employer has remedied the grievance or complied with the demand or once the dispute has been resolved, the workers may not continue with their concerted refusal to work because the purpose for which they would have been entitled to withhold their labour would have been achieved. Any continued refusal to work would lack an authorised purpose. Therefore, the strike would be unprotected.

[120] Another way in which a protected strike would cease to be protected would be if the union or employees abandoned the authorised purpose of the concerted refusal to work and sought to achieve a different purpose that is not authorised. Yet another way would be if the employer and the union or workers were to reach an agreement that settles the dispute even if the employer has not complied fully and unconditionally with the original demand of the union and the workers. Absent any of these methods of turning a protected strike into an unprotected strike, a protected strike remains protected. I shall apply these principles to the facts of this case shortly but, before I do so, I need to deal with a prior question that arises from the relevant paragraph of the final ultimatum.

A promise made as a gesture of goodwill

[121] In the relevant paragraph of the final ultimatum, Unitrans makes a promise or undertaking to restore the Shell 7 to their agreed wage rates, including increases and to pay their backpay since their transfer from the Shell contract. However, it made that promise or undertaking as a gesture of goodwill and in order to end the strike. It put its position thus: "As a gesture of goodwill and in order to end the current unlawful strike action, management has acceded to your demand pertaining to the 7 employees in issue". This means that Unitrans made this promise not because it accepted that it had unilaterally changed a term or condition of employment of the Shell 7 or that from February or March 2009 when the Shell 7 were transferred from the Shell contract, it had been in breach of their contracts of employment and was obliged to restore the Shell 7 to their agreed wage rates and to pay them their backpay. It was only promising to do what it promised to do out of its own goodwill and only to

bring the strike to an end. It did not accept liability to restore the Shell 7 to their contractually agreed wage rates and to pay them the back pay that it was legally obliged to pay them.

[122] The South African Concise Oxford Dictionary gives two meanings for the word "goodwill". They are: "1. friendly or helpful feelings or attitude 2. the established reputation of a business regarded as a quantifiable asset". Obviously, the first meaning is the one applicable in the context of Unitrans' promise or undertaking. The Cambridge International Dictionary of English gives the following meanings for the word: "'goodwill' n. [u] friendly and helpful feelings. *The school has to rely on the goodwill of the parents to help it raise money.* There was a *consistent feeling of goodwill throughout the games. Releasing the hostages has been seen as a gesture of goodwill / a goodwill gesture*". This means that, in the relevant paragraph of the ultimatum, Unitrans was saying it was as a friendly gesture that it was going to restore the Shell 7 to their wage rates and pay them their backpay. TAWUSA and its members had demanded that Unitrans restore the Shell 7 to their wage rates and pay them their backpay because they were contractually entitled to those things and Unitrans had been in breach of their contracts of employment and was continuing to be in breach thereof.

[123] In my view the phrase as "a gesture of goodwill" has the same legal status as the phrase "*ex gratia*" as in an *ex gratia* payment. A person who makes an *ex gratia* payment to someone else does not accept liability to make that payment but makes it as a favour. The first-mentioned dictionary explains the term "*ex gratia*" as follows: "adv adj (with reference to payment) *done from a sense of moral obligation rather than because of any legal requirement*." In *Marine and Trade Insurance*[86] the Court said about a payment made *ex gratia*:

> "An *ex gratia* payment is a payment made by favour. It is a payment which is made on the basis of there being no liability on the part of the insurance company, but on

[86] *Marine and Trade Insurance Co Limited v Haug* 1961 (3) SA 658 (W) (*Marine Trade and Insurance*).

> the basis of it being paid in order to avoid, as was stated in the discharge, the litigation. The £600 was not paid as a compromise of the claim for damages. It was paid to avoid litigation in respect of the claims which are set out in the document."

In the present case it is reflected in the relevant paragraph of the final ultimatum that Unitrans' promise was made "as a gesture of good will and in order to end the current unlawful strike action . . .".

[124] The workers were aggrieved by the fact that in terms of the Shell 7's contracts of employment, the Shell 7 were entitled to be paid at a certain wage rate and from February or March 2009 Unitrans was acting in breach of their contracts of employment by paying them at lower wage rates. The workers wanted Unitrans to restore the Shell 7 to their correct wage rates and pay them their backpay to which they were entitled as a matter of law. They never asked Unitrans to do these things as a friendly gesture or out of its goodwill. In effect Unitrans was making an offer of settlement to TAWUSA and its members which TAWUSA and its members were not obliged to accept. I say this because Unitrans was not acceding to TAWUSA's demand as it stood. It sought to make an offer "as a gesture of goodwill and in order to end the current unlawful strike action". If TAWUSA and its members accepted that promise and the basis on which it was made, namely, as a gesture of goodwill and not as an acceptance of legal liability, that would have been prejudicial to their rights. Once TAWUSA and its members had accepted that offer, Unitrans could then have called upon the workers to return to work and they would have been obliged to return to work. Before they had accepted the offer made on the basis of a gesture of goodwill Unitrans had no right to call upon the workers to return to work or to resume their duties and they were not obliged to return to work. Accordingly, I am of the view that the promise made by Unitrans as a gesture of goodwill and in order to end the strike did not in law have the effect of changing the status of the strike. The strike remained protected. It was not, as Unitrans suggested, unprotected and unlawful. There was no acceptance by Unitrans that it was in breach of its contractual obligations.

[125] The first judgment does not attach any weight to the fact that the promise or undertaking made by Unitrans in respect of the wage cut demand was made on the basis that it was Unitrans' "gesture of goodwill and in order to end the current unlawful strike action". In my view this is very important. In the final ultimatum Unitrans said that, in making the promise that it made, it had acceded to the wage cut demand of the Shell 7. That was not true. In fact what it promised was not what TAWUSA and the workers wanted. TAWUSA and the workers' demand was in effect for Unitrans to honour, recognise, give effect to or comply with its contractual obligation to keep the Shell 7 on their agreed wage rates and to pay them their backpay. The Shell 7 had a contractual right to be on those wage rates.

[126] Did Unitrans promise to put them on their wage rates in terms of their contracts of employment? No. It promised them something much less. It promised them that they would be put on those wage rates as a gesture of its goodwill and in order to end the strike. This means that, whereas, prior to that promise, the Shell 7 had a contractual right to be on those wage rates, if they accepted Unitrans' promise, the basis for their continued presence on those wage rates would no longer be their contractual rights but it would be Unitrans' goodwill. This means that, whereas they embarked upon a collective refusal to work in order to put pressure on Unitrans to honour its contractual obligations that were enforceable in a court of law, Unitrans promised them a benefit that was not based on an enforceable right in law but something based on its goodwill that could not be enforced in law. If TAWUSA and the workers had accepted Unitrans' promise, they would not have got what they had demanded but would have been short-changed. Therefore, the basis upon which Unitrans made its promise showed that it was not giving the workers what they were demanding.

[127] Going back to the definition of the word "strike", it cannot be said that Unitrans' promise, based as it was on its gesture of goodwill, could have remedied the grievance of the workers nor could it be said to have complied with the wage cut

demand or resolved the dispute. Unitrans was not prepared to accept or acknowledge that it was contractually obliged to do what was envisaged in the wage cut demand in respect of the Shell 7. Whatever Unitrans was prepared to do, it was prepared to do as a gesture of its goodwill.

[128] If TAWUSA and the workers had accepted Unitrans' promise and the Shell 7 were then placed on the agreed wage rates but no longer because they were contractually entitled to be on those wage rates but because of Unitrans' goodwill, they would have lost a justiciable contractual right to be on those wage rates and accepted a regime to be there at the pleasure of Unitrans. Therefore, the basis upon which Unitrans made its promise is enough to justify the conclusion that that promise could not and did not change the protected strike into an unprotected strike.

Did Unitrans restore the Shell 7 and pay their backpay?

[129] It is now appropriate to deal with the second part of Unitrans' promise or undertaking. Even if the phrase "as a gesture of good will and in order to end the current unlawful strike action" had no adverse legal effect for Unitrans, the question would still arise whether what Unitrans said in the relevant paragraph in the final ultimatum had the effect of changing the strike from being a protected strike into an unprotected strike. Once it is accepted that the strike was protected from 28 October onwards and it is argued that midway its status changed, the onus would be on Unitrans to show that what it said in the ultimatum converted the protected strike into an unprotected strike. This requires an application to the facts of this case of the principles I discussed earlier on how a protected strike can be converted into an unprotected strike. In my discussion of those principles I said in effect that the demand in support of which a concerted refusal to work has been resorted to must either have been abandoned or complied with fully, unconditionally and unequivocally or the parties must have reached an agreement in full and final settlement of the dispute or the grievance that gave rise to the concerted refusal to work must have been remedied or the dispute must have been resolved. This flows from the definitions of "strike" and "issue in dispute" in the LRA.

[130] If the protected strike did change from being protected to being unprotected, it could not have changed at 14h05 because that is when the final ultimatum was signed. Unitrans did not lead any evidence as to what time the workers were given the final ultimatum. It ought to have done so. The workers operated from different places or parts of the country. Indeed, they operated from even different provinces. Some of the places from which the workers operated were Alrode, Nigel, Pretoria, Kroonstad, Secunda and Tulisa Park. We do not know when the workers based in, for example, Nigel or Secunda or Alrode or Pretoria got the final ultimatum, or were informed of its contents. We actually do not even know where the individual applicants were based.

[131] Unitrans is the party that should have led evidence about all this but it did not. In the trial the witnesses mentioned that there were workers at the gate or outside the gate of Tulisa Park in Gauteng where Unitrans' Head office is. However, they did not know which workers were there and which workers were elsewhere. As the workers who were on strike were about double the number of individual applicants before us, if not more, we do not know whether the individual applicants are some of the workers who used to congregate next to the gate or not. So, we do not know when the individual applicants received the final ultimatum or became aware of Unitrans' promise concerning the wage cut demand. Nevertheless, I am prepared to assume that they got the ultimatum or heard about Unitrans' promise concerning the wage cut demand at about 16h00 or 17h00 or thereabout on 1 November.

[132] Bearing in mind the principles I have discussed above on when a protected strike may change from being a protected strike into an unprotected strike, the question to be asked is whether Unitrans complied with TAWUSA's and its members' wage cut demand. Another way of putting this would be to say that the question is whether by its promise Unitrans remedied the grievance relating to the wage cut demand. If the position is that Unitrans complied with the wage cut demand or that it remedied the grievance relating to the wage cut demand, then the making of the promise or the giving of the undertaking that Unitrans made or gave would have

changed the protected strike into an unprotected strike. In order to determine whether Unitrans complied with the demand or remedied the grievance, it is necessary to first go back to the wage cut demand to understand what exactly it was. Fortunately, there is no dispute between the parties on what the wage cut demand entailed.

[133] I have said earlier that the wage cut demand was that Unitrans should restore the Shell 7 to their agreed wage rates and pay them the backpay from the time when they were transferred from the Shell contract to other contracts. In the form used to refer the dispute concerning the unilateral change of terms and conditions of employment (which is the wage cut dispute) TAWUSA had to answer the question: what outcome do you require? The answer given was: "maintenance of previous *status quo* and *backpayment* as from the date of ongoing concern in terms of section 197". This made it clear that part of what they wanted Unitrans to do in terms of the wage cut demand was to pay the Shell 7 backpay from the date when they were transferred from the Shell contract. It also made it clear that they wanted Unitrans to honour its obligations in terms of the contracts of employment. In his evidence Mr Ngedle, a shopsteward, also testified that what the workers and TAWUSA wanted in terms of the wage cut demand was that the Shell 7 be restored to their wage rates and be paid backpay. When he was asked about the wage cut demand, he said: "[We want] that the money that was taken from us without an agreement to be brought back". The minutes of the meetings held between TAWUSA and Unitrans on 21 and 25 October also reflect that part of the wage cut demand was that Unitrans pay the Shell 7 their backpay arising from the underpayment from February 2009. In the minutes of the meeting of 25 October TAWUSA reported thus: "The union stated that their wages should be adjusted *and back-pay be paid*".

[134] In its final ultimatum issued at 14h05 on 1 November Unitrans *inter alia* recorded that TAWUSA's and the workers' wage cut demand was that—

> "all drivers from the former Shell contract that ended in February 2009 be paid wage rates according to their wage rates valid at that time. This also involves that adjustments of the wage rates as result of increases be determined according to the

> former wage rates *and backpay of the wage rate variance be paid*. Kindly note that this demand is not lawful as, in terms of previous court rulings, only 7 employees can be affected by this demand."

[135] I draw attention to the fact that Unitrans itself makes it clear in this paragraph of its final ultimatum that its understanding of the wage cut demand was that part of what TAWUSA and the workers were demanding by way of the wage cut demand was that Unitrans pay the backpay arising out of the underpayment of the Shell 7 since February 2009. It is true that in the above passage Unitrans said in effect that TAWUSA and the workers added other former Shell contract drivers to this demand. However, even if that were so, the fact remained that the Shell 7 were included in that demand and, in so far as there was the demand that the Shell 7 be restored to the correct wage rate and be paid their backpay and increases, the wage cut demand was being pursued.

[136] In the next paragraph Unitrans wrote:

> "As a gesture of good will and in order to end the current unlawful strike action, management has acceded to your demand pertaining to the 7 employees in issue. The *7 employees' wage rates will be re-instated from the time they transferred from the former Shell contract.* They will *also be paid the variances in wage rates due as result of wage increases since their transfers.* The aforesaid payments will be *backdated for the full period since their transfers.* Your demand has therefore been fully resolved with regard to these 7 employees. Your demand pertaining to the 7 employees in issue can thus not form the subject matter of any continued strike action. Kindly note that should you continue to strike in support of your 'wage cut' demand pertaining to the other former Shell contract employees, your strike action will remain unlawful."

In the next paragraph in the final ultimatum Unitrans called upon the workers to resume their normal duties at 06h00 on 2 November failing which they would be dismissed unless they or their representatives gave reasons why their strike was lawful and protected. It also said that employees who failed to comply with the final

ultimatum and who were dismissed would "be paid any monies due to them by the company by not later than 17 November". There was no indication when the Shell 7 would be paid their backpay.

[137] It is clear from the final ultimatum that Unitrans adopted the position that by promising that "[t]he 7 employees' wage rates [would] be reinstated . . .", that "[t]hey [would] be paid the variances in wage rates due to wage increases since their transfers" and that these payments would be backdated for the full period since their transfers, it took the view that it had complied with the wage cut demand. It then took the attitude that the individual applicants and the other workers, to the extent that it may previously have been argued that they were entitled to withhold their labour in support or pursuit of the wage cut demand, were no longer entitled to withhold their services in support thereof. That is why it then called upon them to return to work at 06h00 the following morning to perform their work in terms of their contracts of employment and threatened them with dismissal if they failed to do so.

[138] The question that arises is: did Unitrans' promise or undertaking constitute compliance with the wage cut demand of the workers and, thus, entitle it to call upon the workers to perform in terms of their contracts of employment? I am not sure whether Unitrans' statement that it would reinstate the wage rates of the Shell 7 had the effect of restoring the Shell 7 to the wage rates they enjoyed prior to their transfer from the Shell contract. My uncertainty arises from the fact that I do not know whether at a practical level there were any specific measures or steps that Unitrans was required to take in order to effect their restoration for purposes of future payments. What I am sure about is that Unitrans' promise or undertaking to pay the Shell 7 the backpay did not constitute compliance with that part of the wage cut demand that required Unitrans to pay the backpay. That part of the wage cut demand required Unitrans to actually pay the backpay and not to promise to pay or to make a promise to pay it at some stage in the future. A promise to pay the backpay does not equate to the payment of the backpay. There was no full compliance with the wage cut demand. An example to illustrate this may help. If a court orders an

employer to reinstate an employee to his position and pay him his backpay and the employer reinstates him but does not pay him his backpay but promises that he or she will pay it in due course, there is no full compliance with the order of the court. There will only be full compliance when the employee has actually been paid his or her backpay as well.

[139] That what was required of Unitrans was to actually pay the backpay is understandable when regard is had to the following facts: (a) there were existing contracts of employment in terms of which Unitrans had already made the undertaking to each one of the Shell 7 to pay him at the agreed wage rate; (b) when the strike started, Unitrans had been defaulting on this obligation for the previous 18 months; and (c) after waiting for about 18 months for Unitrans to comply with its obligation in terms of their existing contracts of employment, the Shell 7 must have wanted actual compliance by Unitrans with its obligation and not a promise to comply. Unitrans understood full well that the wage cut demand had a component in terms of which it had to actually pay the Shell 7 their backpay. In its final ultimatum this understanding is reflected in the paragraph above the one in which Unitrans elected to make a promise to pay.

[140] Unitrans appears to have been in too much of a hurry to get the workers back at work with the result that it failed to comply with the wage cut demand in full. Full compliance meant the restoration of the Shell 7 to their wage rates and the actual payment of their backpay. If Unitrans had done this, it would have complied with the wage cut demand and, assuming that the workers could not continue withholding their labour in pursuit of the wage discrepancy demand, the strike would have ceased to be protected and Unitrans would have been entitled to call upon the individual applicants and other workers to return to work and perform their normal duties. However, until Unitrans had restored the Shell 7 to their agreed wage rates and actually paid them their overdue backpay, it had no right to call upon them and the other workers to return to work and they were not under any obligation to heed any such call. This is because, where a collective refusal to work is resorted to in support of a certain

demand upon an employer, the workers are entitled to continue to withhold their labour as long as the employer has not complied with that demand. It is only when the employer has complied with the demand or the demand has been abandoned or a settlement agreement has been concluded that the workers' right to withhold their labour ceases to exist. Partial compliance with the demand is not good enough. What is required is full and unconditional compliance with the demand.

[141] In the present case part of the demand was that Unitrans pay the Shell 7 their backpay and Unitrans has failed to show that it met or complied with this part of the demand. The onus was upon Unitrans to show that it met or complied with the wage cut demand in full. The result of this is, therefore, that what Unitrans did in making the promise to restore the wage rate of the Shell 7 and the promise to pay them their backpay some time in the future did not interrupt or terminate the protected status of the strike. Therefore, the strike continued to be protected. That being the case, Unitrans had no right in law to issue the final ultimatum to TAWUSA and its members and to call upon the workers to return to work. Therefore, Unitrans did not dismiss the individual applicants and the other workers for participating in an unprotected strike but dismissed them for participating in a protected strike. That means that it dismissed them for exercising their right to strike. That rendered the dismissal automatically unfair.

[142] Another way of approaching the matter is that Unitrans had been in breach of the contracts of employment between itself and each one of the Shell 7 employees and its performance of its obligation was long overdue as the Shell 7 had performed their part of the bargain all along. An employee's obligation to work and the employer's obligation to pay the employee the agreed wage are reciprocal obligations. Once an employee has performed the work, the employer is obliged to pay the employee the agreed wage. As long as the employer owes the employee his or her wages or part of his or her wages, the employee is entitled to refuse to work and the employer is not

entitled to the services of the employee and has no right in law to call upon the employee to perform. In *Coin Security (Cape)*[87] the Court *inter alia* said:

> "Just as the employer is entitled to refuse to pay the employee if the latter refuses to work, so the employee is entitled to refuse to work if the employer refuses to pay him the wages which are due to him."[88]

That being the case, Unitrans was not entitled to call upon the Shell 7 in its final ultimatum to perform their obligations until it had performed its long overdue obligations. As long as the Shell 7 were entitled to withhold their services, the rest of the workers were entitled to also collectively refuse to work in support of the demand of the Shell 7. On this basis, too, the dismissal would be automatically unfair.

The wage discrepancy demand

[143] My Colleague, Jafta J, has written a judgment (third judgment) in which he expresses support for the order that I propose but does so for different reasons. He expresses the view that on 1 November Unitrans met or complied with the wage cut demand. The third judgment implies that, to the extent that the workers may be said to have continued to withhold their labour in support of the wage cut demand after they had become aware of Unitrans' promise, support for that demand could not have entitled them to withhold their labour anymore. I have dealt fully above with the issue of why Unitrans' promise did not constitute compliance with the wage cut demand or why it did not remedy the grievance based on the wage cut demand. Nothing more needs to be said about this aspect of the matter.

[144] The third judgment concludes that Unitrans did not comply with the wage discrepancy demand which was one of the two demands in support of which the first LAC judgment permitted the workers to withhold their labour. Therefore, continues the third judgment, after Unitrans' promise in regard to the wage cut demand the

[87] *Coin Security (Cape) v Vukani Guards Allied Workers Union* 1989 (4) SA 234 (C) (*Coin Security (Cape)*).

[88] Id at 239I-J.

workers were entitled to withhold their labour only in support of the wage discrepancy demand which had been permitted by the first LAC judgment. While I agree that the workers were entitled to withhold their labour in support of the wage discrepancy demand permitted by the Labour Appeal Court, note must be taken of the fact that there are different versions of the wage discrepancy demand. Therefore, the question is not so much whether the workers were entitled to withhold their labour in support of the wage discrepancy demand but whether the version of the wage discrepancy demand in support of which they may have withheld their labour was the one permitted by the Labour Appeal Court. They were not entitled to withhold their labour in support of a different version of the wage discrepancy demand. I say they may have withheld their labour because there is no evidence that they were obliged to work between 16h00 on 1 November and 08h00 on 2 November when they were dismissed. However, for purposes of this part of the judgment I shall assume that they were obliged to work that night but they collectively refused to work in support of a certain version of the wage discrepancy demand.

[145] For the proposition that the version of the wage discrepancy demand in support of which the workers withheld their labour was permitted by the first LAC judgment, the third judgment relies simply on the fact that in their strike notice of 26 October TAWUSA and the workers included a demand called wage discrepancy. The third judgment does not inquire into what TAWUSA and the workers meant by that term and what they wanted under the wage discrepancy demand. The third judgment also refers to the contents of TAWUSA's letter of 27 October to Unitrans. However, the contents of that letter do not affect the question of what TAWUSA and the workers meant by the wage discrepancy demand.

[146] In looking at the first LAC judgment, the third judgment confines itself to the fact that one of the demands the first LAC judgment permitted the workers to pursue by way of a collective refusal to work was a demand called wage discrepancy. The third judgment does not analyse the first LAC judgment to establish precisely what it contemplated under the wage discrepancy demand. On what TAWUSA and the

workers wanted under the wage discrepancy demand, the third judgment confines itself to TAWUSA's and the workers' say so in the strike notice. In the strike notice they said in effect that the collective refusal to work would be in support of the demands permitted by the first LAC judgment. The third judgment fails to take into account statements made by TAWUSA and the shopstewards which throw light on what they wanted under the wage discrepancy demand and what they understood that term to mean or entail. In this regard I am referring to statements that they made before the commencement of the strike and during the strike. The third judgment also ignores the evidence given by Mr Ngedle at the trial in the Labour Court on what TAWUSA and the workers wanted under the wage discrepancy demand.

[147] A proper analysis of the first LAC judgment reveals that the demand that the first LAC judgment permitted the workers to pursue by way of a collective refusal to work under the wage discrepancy or wage parity demand is something different from what TAWUSA and the workers pursued under the wage discrepancy demand or wage parity demand. Therefore, what TAWUSA and the workers pursued under this demand fell outside what was permitted by the first LAC judgment. This, therefore, means that the workers were not entitled to pursue their version of the wage discrepancy demand by way of a collective refusal to work. In what follows I provide the analysis of both the first LAC judgment and the statements made by TAWUSA, the shopstewards and Mr Ngedle.

The first LAC judgment: what it permitted and what it did not

[148] The key to understanding what version of the wage discrepancy demand the first LAC judgment permitted the workers to pursue is understanding what Unitrans' contention was before the Labour Appeal Court and the fact that the Labour Appeal Court accepted Unitrans' contention. Unitrans' contention was that clause 50(1) and (3) of the Main Collective Agreement precluded TAWUSA from pursuing, outside the bargaining council, the four demands by way of withholding their labour. Clause 50(1) and (3) read as follows:

> "(1) The forum for the negotiation and conclusions of substantive agreements on wages, benefits and other conditions of employment between employers and employers' organisations on the one hand and trade unions on the other hand, shall be the Council.
>
> . . .
>
> (3) No trade union or employers' organisation shall attempt to induce, or compel, or be induced or compelled by, any natural or juristic person or organisation, by any form of strike or lock-out to negotiate the issues referred to in subclause (1) above at any level other than the Council."

The Main Collective Agreement defined "substantive issues" as "all issues involving costs and affecting the wage packets of employees".

[149] The first LAC judgment recorded[89] Unitrans' contention as having been that the demand labelled as "wage discrepancies", the demand labelled as "wage reduction" (which was the wage cut demand) and the demand labelled as "[c]oupling R500 pw" "[were] all related to and connected with wages and [were] substantive issues and as such [TAWUSA] [was] prohibited in terms of clause 50(1) and (3) read with s 65(1)(a) and (3)(a)(i) from calling upon its members to strike in order to secure these demands". What Waglay DJP then said in the next two sentences after this is critical. He said:

> "I accept that where a demand is made for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demands relate to wages and are substantive issue[s]. If the demands as we have them here are about wages and substantive issues then, as [Unitrans] has properly argued, [TAWUSA] is prohibited from calling on its members to embark upon a strike in respect of those issues."[90]

What the Labour Appeal Court said in the above passage is that TAWUSA was prohibited from calling its members out to collectively withhold their labour in

[89] See first LAC judgment above n 4 at para 18.

[90] Id.

support of any demand that related to an increase in wages or to payment of remuneration in relation to a particular aspect of employment.

[150] In line with the principle captured in the above passage, the first LAC judgment later concluded that the demand referred to as "[c]oupling R500 pw" related to an increase in wages and was, therefore, a substantive issue. It held that the workers could not withhold their labour in support of that demand. The Labour Appeal Court said:

> "This demand in my view is clearly an issue which falls within the ambit of clause 50(1) and (3) as it is an issue that is connected and related to substantive issues because it involves costs and affects wage packets. The demand is therefore hit by the provision contained in s 65(1) of the LRA."[91]

[151] The basis upon which the Court held that the workers could not pursue the "[c]oupling R500 pw" demand by way of a collective withdrawal of labour was that it involved costs and affected employees' wage packets. From this, it is clear that Waglay DJP held that a demand that involved costs and affected employees' wage packets was not permitted to be pursued by way of a collective refusal to work.

[152] What did TAWUSA and the workers want under the wage discrepancy demand? The answer is simple and straight forward because TAWUSA and the shopstewards made statements at meetings held with the Unitrans management in which they explained what they wanted under this demand. At the meetings held between TAWUSA and Unitrans on 21 and 25 October – which was a few days before the commencement of the strike – TAWUSA said that the demand in respect of the "wage discrepancies" was a demand for an across the board increase for all drivers, general workers and administrative staff to the rate at which the highest paid staff were paid at the time. Unitrans' attorneys, Glyn Marais Inc, put this on record in a letter dated 26 October addressed to TAWUSA. TAWUSA has never disputed that

[91] Id at para 23.

it said this in those meetings concerning what it and the workers wanted under the wage discrepancy demand.

[153] The minutes of the meeting of 27 October between TAWUSA and the Unitrans management reveal that, after Unitrans had asked TAWUSA to clarify what exactly they wanted under the wage discrepancy demand, TAWUSA's explanation was the following:

> "The union explained that it wanted all employees to go from a lower rate to a higher rate. For example all code 14 licenced drivers should earn the same nationally. There are employees in Cape Town who are earning R47,00 per hour and those in Gauteng earning R27,00. It is the union's demand that all should be equal in terms of rate."

A little later the minutes record:

> "The question was posed to the union four times about the same demand of the wage discrepancy and parity, and the standard answer was that all employees who are on a lower rate in any category including the administrators should be paid at the highest rate in the company."

TAWUSA repeated this stance at the meeting of 28 October which was the first day of the strike. The accuracy of the minutes was accepted by TAWUSA and the individual applicants at the trial.

[154] There was another meeting between TAWUSA and Unitrans on 1 November. This was during the course of the strike. At the trial Mr Ngedle confirmed that at that meeting TAWUSA and the shopstewards demanded under the wage discrepancy demand that, as a compromise, Unitrans should pay R38,00 per hour. When it was put to Mr Ngedle under cross-examination that this would have meant an increase for a large number of employees, he conceded this. He said that some of the drivers were paid R27,00 per hour, others R31,00 per hour and others R35,00 per hour. Those drivers would have been some of the employees who would have got an increase.

Throughout the meetings TAWUSA made it clear that it did not want any employees' wages to be reduced in order to achieve wage parity. It follows that under the wage discrepancy demand TAWUSA and the workers wanted a wage increase for at least some of the workers. Therefore, their version of the wage discrepancy demand was one that entailed an increase in wages. It was a version of the wage discrepancy demand that the Labour Appeal Court held the workers could not pursue by way of a collective refusal to work. The demand was also hit by clause 50(1) and (3) of the Main Collective Agreement.

[155] What I have referred to above in respect of the first LAC judgment reveals what that judgment did not permit. It did not permit the workers to withhold their labour in support of a demand that related to an increase in remuneration or wages or that affected the wage packets of the employees. The Labour Appeal Court made this clear in paragraph 18 which has been quoted above.[92] What did it permit in regard to the wage discrepancy demand? What the Labour Appeal Court held the workers could pursue by way of a collective withdrawal of labour under the wage discrepancy demand is to be gathered from a reading of paragraphs 18, 19, 20, 21 and 25 of the first LAC judgment. In paragraph 19 of the first LAC judgment, the Court said in the first sentence: "I am however not persuaded that the first two demands made by [TAWUSA] are demands which relate to an increase in wages." The two demands to which the Court was referring were the wage discrepancy demand (which the Court also called wage parity) and the wage cut demand. From this statement it can be concluded that the wage discrepancy demand that the first LAC judgment permitted the workers to pursue by way of a collective refusal to work was one that did not relate to an increase. This has to be so because in paragraph 18 of its judgment the Court had just laid down the principle that workers would not be entitled to withhold their labour in support of a demand that related to an increase in wages or that affected the wage packets of employees and in the first sentence of the following paragraph the Court said it was, however, not persuaded that these two demands related to an increase in wages.

[92] See [149].

[156] Waglay DJP then went on to say:

> "As counsel for [TAWUSA] argued *the demand for wage parity is not a demand for an amount of money* but requires of [Unitrans] to adjust wages so as to arrive at a uniform level of remuneration for employees performing the same work *albeit* on different contracts."[93]

This paragraph reveals that Waglay DJP was persuaded by Counsel for TAWUSA that the wage discrepancy demand or the demand for wage parity "[was] not a demand for an amount of money but require[d] of [Unitrans] to adjust wages so as to arrive at a uniform level of remuneration for employees performing the same work albeit on different contracts". In the next paragraph,[94] the first LAC judgment concluded that "[t]he demands of 'wage discrepancy' and 'wage cut' [were] not demands that [fell] within the purview of clause 50(1) and/or (3) of the Main Collective Agreement and [were] therefore not issues in respect of which [TAWUSA] [was] prohibited from calling upon its members to strike".

[157] In the first LAC judgment the Labour Appeal Court did not explain what the adjustment of wages to which it referred meant or what it understood it from TAWUSA's counsel to mean. Counsel for TAWUSA – who was the same counsel who appeared before us – never said that Waglay DJP had not accurately recorded that he had argued that the demand for wage parity was not a demand for an amount of money.

[158] Given this, I am of the view that the first LAC judgment did not permit a version of the wage discrepancy demand that entailed an increase in the wages of the workers. It only permitted a version that did not entail an increase in wages of any of the workers. I conclude that TAWUSA's and the workers' demand articulated as the wage discrepancy demand was not permitted by the first LAC judgment.

[93] See first LAC judgment above n 4 at para 20.

[94] Id at para 21.

Accordingly, the workers, including the individual applicants, were not entitled to pursue it by way of a collective refusal to work. The third judgment concludes that the workers were entitled to pursue the wage discrepancy demand by way of a collective refusal to work but that proposition is not supported by anything said in the first LAC judgment. In fact the third judgment's conclusion flies in the face of the first LAC judgment, particularly paragraphs 19, 20, 21 and 25.

Assuming that the strike ceased to be protected

[159] I am unable to agree with the first judgment that from 14h05 on 1 November onwards the individual applicants and other workers participated in an unprotected strike and that at a substantive level Unitrans acted fairly in dismissing them. In dealing with this part of the matter, it must be borne in mind that, where the employer relies on misconduct on the part of employees to justify their dismissal, the employer bears the onus to prove the misconduct and to show that dismissal was the appropriate sanction. Section 192(2) of the LRA provides that "[i]f the existence of the dismissal is established, the employer must prove that the dismissal is fair".

[160] In labour law parlance the term "misconduct" refers to conduct on the part of an employee that constitutes either a breach of the contract of employment or a breach of a workplace rule. Participation in an unprotected strike constitutes a breach of the contract of employment of the employees and is, therefore, misconduct. However, before one can talk about whether employees took part in an unprotected strike, it must first be shown that the conduct of the employees constitutes a strike. In my view, on this aspect, too, the first judgment goes wrong. I explain below.

[161] The definition of the word "strike" in the LRA includes the phrase "concerted refusal to work . . .". That part of the definition – as opposed to the reference to the "retardation or obstruction of work" – is the part applicable to a case such as the present where the workers completely refuse to work. It is a basic principle of our law that, for employees to be said to be on strike, they must be collectively refusing to work at a time when, in terms of their contracts of employment, they are obliged to be

working.[95] If the time when the workers are not working is a time when they are not obliged to be working, they cannot be said to be on strike except when their conduct constitutes an overtime ban. This is why, if workers who take their lunch break from 13h00 to 14h00 collectively stop working at 13h00 on a particular day and spend their lunch break singing, toyi-toying and carrying placards outside of or by the gate of the employer demanding a wage increase, they are not in law engaged in a strike. However, once they do that at a time when they are obliged to work, they will be on strike and, if the prescribed statutory procedures have not been followed, the strike will be an unprotected strike.

[162] That is also why, if a group of workers who are on annual leave join their colleagues who are not on leave when the latter collectively refuse to work in support of a demand for a wage increase and they join in the singing and dancing and in the demand for a wage increase, in law they are not striking but their colleagues are. The difference is that they are not obliged to work whereas their colleagues are obliged to work. If their colleagues' strike was unprotected, their colleagues would be guilty of misconduct but they would not be. If their colleagues were dismissed for taking part in an unprotected strike, they could not be dismissed. Against this background, we have to establish whether the individual applicants were obliged to work between 16h00 on 1 November and 06h00 on 2 November.

[163] The individual applicants were employed as shift workers. That is what their letters of appointment say. The letters also say that the workers work a 45 hour week. They then say on shift work:

> "Employees will be *required to work shift work in accordance with their contract[s]*. Your *starting times may vary from time to time as required by the needs of the contract* and you undertake to make yourself available to start at these times."

[95] Although in *SA Breweries Ltd v Food and Allied Workers Union and Others* 1990 (1) SA 92 (A) this was held in regard to an overtime ban, the principle will also apply where one is not dealing with overtime but with a time like lunch break or, any day when the employees concerned are not contractually obliged to work. It was in response to this case that in the current LRA the definition of strike was formulated in such way as to make it clear that where there is a collective overtime ban that will be a strike even if the working of overtime is voluntary.

[164] There were just under 200 or so workers who were dismissed by Unitrans at about 08h00 on 2 November. Only 94 of those are individual applicants in this matter. All the others were re-employed by Unitrans after it had advertised the vacancies which arose out of the dismissals. They were re-employed (not reinstated) on lower wage rates. On the assumption that the final ultimatum was received by the workers at about 16h00 or so, the question that arises is whether, in terms of their contracts of employment, the individual applicants were obliged to work between 16h00 on 1 November and 06h00 on 2 November. If they were obliged to work but collectively refused to work in support of their demand, they were striking.

[165] Whether the individual applicants were obliged to work during that time will depend upon whether or not they were supposed to work a night shift on that day or during that week. If they were not supposed to work a night shift that day or during that week, they were not obliged to work between 16h00 or 17h00 or so on 1 November and 06h00 on 2 November. If they were not obliged to work during those hours, they cannot be said to have been striking. Obviously, if they cannot be said to have been striking, they also cannot be said to have taken part in an unprotected strike. If they cannot be said to have taken part in an unprotected strike, they cannot be said to have acted in breach of their contracts of employment and can therefore not be said to have been guilty of the misconduct for which they were dismissed. This would mean that they were dismissed for no fair reason but, because the strike on four of the five days on which Unitrans thought they participated in an unprotected strike was a protected strike, the dominant reason for their dismissal would be participation in a protected strike. That still renders their dismissal predominantly automatically unfair because the dominant reason for dismissal was participation in a protected strike.

[166] The next question is: were the individual applicants obliged to work a shift from about 16h00 on 1 November to 06h00 on 2 November? In other words, were they on the shift that was obliged to work during those hours? The answer is that on

the record before us we do not know the answers to these questions. Unitrans was obliged to have led evidence on these aspects of the case about the individual applicants' conditions of employment or the shift or shifts on which they were obliged to be on that day or that night. It did not do so. It may well be that all the workers who were on the shift that was obliged to work during those hours are among those who were re-employed and are not among the individual applicants. It may also well be that some of the individual applicants were on the shift that was obliged to work during those hours. We simply do not know. Unitrans, therefore, failed to prove this.

[167] It seems to me that the reason why Unitrans did not lead this evidence is that its attitude was that the strike was unprotected from beginning to end. That is why its case was that the individual applicants took part in an unprotected strike for six days. If, indeed, the strike had been unprotected from beginning to end, it may not have mattered that we do not know whether the individual applicants were obliged to work the night shift from about 16h00 or 17h00 on 1 November to 06h00 on 2 November because their participation in an unprotected strike over four or five other days may have been enough at a substantive level to justify their dismissal. However, if the strike is taken to have ceased to be protected around 16h00 on 1 November, the need to know whether the individual applicants were obliged to work night shift that day arises.

[168] The fact that Unitrans failed to prove that the individual applicants were obliged to work between 16h00 on 1 November and 06h00 on 2 November means that it cannot be said that the individual applicants were on strike – not to speak of an unprotected strike. If they did not participate in an unprotected strike during those hours, it means that the only strike they participated in was a protected strike. This means that the dominant reason why they were dismissed is participation in a protected strike. Therefore, on this approach they were dismissed for exercising their right to strike. That renders their dismissals automatically unfair.

[169] Even if Unitrans had proved that the individual applicants had been obliged to work between 16h00 on 1 November and 06h00 on 2 November, and, therefore, did participate in an unprotected strike when they collectively refused to work during those hours, their dismissals would not have been substantively fair. In this regard we must recall that, according to Unitrans, the conduct for which Unitrans dismissed the individual applicants is their collective refusal to work from 14h30 on 28 October to 06h00 on 2 November which it believed constituted an unprotected strike. Firstly, Unitrans was wrong to say that that was six days. It is less than five days because the refusal to work started at 14h30 on 28 October and from that time on that day to 06h00 on 2 November was four days 16 hours or so. Secondly, the individual applicants' refusal to work from 14h30 on 28 October to about 16h00 on 1 November – which was four days and two hours or so – was part of a protected strike and, therefore, Unitrans could not dismiss the individual applicants for their refusal to work during that period.

[170] Only the refusal to work from 16h00 on 1 November to 06h00 on 2 November would constitute misconduct but, even that misconduct, would not justify the dismissal. One would be talking about an unprotected strike lasting about 14 or 15 hours. The position is that Unitrans would have dismissed the individual applicants without having held any discussions with TAWUSA or the workers after the commencement of the unprotected strike. The individual applicants would have been dismissed without any ultimatum having been issued after a discussion with the union about the development that rendered the strike unprotected. Indeed, the workers would not have been allowed enough time to digest the latest developments and discuss it and seek legal advice before deciding what to do.

[171] This is a case that required the workers and TAWUSA to be given a lot of time to reflect on the legal implications of Unitrans' promise. This is so because whether the strike was protected or not was a complex legal issue. This can be seen from the fact that out of eight Judges of the Labour Court and Labour Appeal Court who dealt with the question whether or not the strike was protected, four who heard the matter

after the first LAC judgment got it wrong. In the Court a quo three Judges of the Labour Appeal Court held that the strike was unprotected and yet it was protected. Prior to that, the trial Judge in the Labour Court had also held that the strike was unprotected. Even in this Court, the Court is divided on the issue. Therefore, TAWUSA and the workers deserved to have been given no less than 48 hours to seek legal advice on the effect of Unitrans' promise on the legal status of the strike. The workers on their own – in fact even with the help of the union – could not reasonably be expected to have appreciated the legal effect that Unitrans' promise would have had on the legal status of the strike. Unitrans itself got the legal status of the strike wrong. Throughout, it said that the strike was unprotected and we have held that it was protected.

[172] Other factors that support the view that the dismissal would still have been predominantly automatically unfair or substantively unfair even if the individual applicants had been obliged to work between 16h00 on 1 November and 06h00 on 2 November and can, therefore, be said to have participated in an unprotected strike between 16h00 or 17h00 on 1 November and about 06h00 on 2 November are the following:

(a) for the best part of its duration, the strike was protected;

(b) the strike was peaceful – the only witness of Unitrans to testify did not give any evidence that there was any violence by the workers during the strike;

(c) the unprotected strike would have been of short duration;

(d) the strike would have been caused by Unitrans' unlawful conduct in acting in breach of the contracts of employment between itself and each one of the Shell 7;

(e) whatever financial loss Unitrans may have suffered could not be taken into account because it largely flowed from the protected part of the strike;

(f) the workers had complied fully with the statutory procedures required to be followed to render strikes protected and it was only Unitrans' promise

that may have changed the strike from a protected strike to an unprotected strike;

(g) Unitrans had not yet paid the Shell 7 the backpay which it owed them which was a major cause of the strike;

(h) the workers have no bad disciplinary record;

(i) there is no indication that in the past the individual applicants had ever been involved in any unprotected strike;

(j) in effect Unitrans subsequently condoned participation in the strike by the workers whom it re-employed without giving them even a disciplinary warning;

(k) TAWUSA and its members co-operated fully with Unitrans and suspended the commencement of the strike on three occasions: (i) when Unitrans sought to obtain an interdict from the Labour Court; (ii) when it sought to pursue an appeal to the Labour Appeal Court; and (iii) when Mr Badenhorst was not available and was travelling; and

(l) TAWUSA and the workers *bona fide* believed that the strike was protected and this fact was conceded by Mr Badenhorst under cross-examination.

[173] A strong factor that shows that dismissal was not a fair sanction in this case and would not have been a fair sanction even if the strike had been unprotected is that a few days after the dismissal of the workers Unitrans re-employed every dismissed employee who applied for re-employment but employed them at a lower wage rate than their previous rates. There is no suggestion that upon re-employment the employees were given a disciplinary warning of any kind. Dismissal as a sanction for misconduct is a sanction of last resort. It has sometimes been referred to as the "death penalty". This is said in the light of the harsh consequences it may have on an employee who is dismissed. For that reason dismissal is only appropriate as a sanction for dismissal in those cases where the misconduct of which the employee is guilty is one that at least the employer considers to render a continued employment relationship intolerable or unacceptable.

[174] It is clear from Unitrans' statement of defence in the Labour Court that Unitrans was prepared to re-employ any of the dismissed workers a few days after it had dismissed them. That means that it was also prepared to re-employ the individual applicants if they applied for re-employment. Unitrans' preparedness to re-employ all the workers it had dismissed if they applied for re-employment is irreconcilable with the notion that it dismissed them because it found their conduct so serious or unacceptable that a continued employment relationship with them would be intolerable.

[175] The first judgment concludes that the individual applicants' dismissal was justified and substantively fair. We must at this stage remember what the individual applicants and many other colleagues of theirs were dismissed for. Unitrans said it dismissed them for participating in an unlawful and unprotected strike for six days. As I have said elsewhere in this judgment,[96] at worst for the workers the strike can only be said to have been for four days and 14 or so hours, if one takes the view that between 16h00 on 1 November and 06h00 on 2 November the workers participated in a strike. Unitrans believed that the strike was unlawful and unprotected from beginning to end. It was within this context that Unitrans believed that the dismissal was justified and substantively fair.

[176] The first judgment's conclusion that the dismissal was justified and substantively fair is not based on the view that the strike was unprotected from beginning to end. It is based on the view that for the period 28 October to 14h05 on 1 November the strike was protected and that for the period from 14h05 on 1 November to 06h00 on 2 November the strike was unprotected. That means that, for over 80% of the strike period, the strike was protected and it was unprotected for only less than 20% of the period. We know this because *four days* out of *four days and just over half of the fifth day* is over 80%.

[96] See [169] and [170].

[177] The first judgment's conclusion is based on the proposition that for 20% of the strike period the individual applicants participated in an unprotected strike. The first judgment reaches its conclusion notwithstanding the fact that for 80% of the strike period the strike was protected. In my view, such a conclusion evokes the same feeling as I think would be evoked if one was told that a teacher failed a student who got 80% in an examination paper just because he or she failed to get 100% that the teacher wanted the student to get. The conclusion that the dismissal was justified and substantively fair is irreconcilable with the fact that for four days the strike in which the individual applicants participated was protected and the period in which it was not protected was only about half a day.

[178] I would have thought that, if 80% of the conduct for which the workers were dismissed was lawful or protected and only 20% was unlawful or unprotected, the conclusion would be that the dismissal was not justified and was substantively unfair. In my view the conclusion that in such circumstances the dismissal was justified and substantively fair is difficult to understand. In reaching its conclusion, the first judgment fails to take into account the context in which the allegedly unprotected part of the strike took place. It ignores the fact that, if between 14h05 on 1 November and 06h00 on 2 November, it can be said that the individual applicants took part in an unprotected strike, for the four days before that, the strike had been protected and it was only for part of the fifth day (14 or 15 hours) that it was unprotected. The first judgment overlooks the fact that this was one strike and, if for the first four days the strike was protected and the unprotected portion of the strike was a little over half a day, then for more than 80% of the strike period, the strike was protected.

[179] The first judgment treats the individual applicants as if they participated in a wildcat strike and never followed the dispute resolution procedures of the LRA when in fact they did. TAWUSA and the individual applicants may legitimately ask: what is the point of taking the trouble to follow the statutory procedures if in the end those who follow the statutory dispute procedures are treated as if they went on a wildcat strike? Under the LRA the approach of the courts when assessing the substantive

fairness of a dismissal for participation in a strike should be to encourage trade unions and employees to utilise the dispute resolution mechanisms of the LRA to resolve their disputes with their employers because that is good for not only our labour relations but also for our economy. Therefore, the courts must deal with cases of dismissal for participation in strikes in a manner that encourages unions and workers to utilise the statutory mechanisms and procedures and discourages them from engaging in wildcat strikes.

[180] The first judgment fails to take into account the short duration of the unprotected portion of the alleged strike. The result of this is that the first judgment implies that the duration of the strike is irrelevant when assessing the substantive fairness of a dismissal for participation in an unprotected strike. In terms of our labour law jurisprudence the duration of an unprotected strike has always been an important factor to take into account in assessing the substantive fairness of a dismissal. The first judgment's failure to take the duration of the unprotected strike into account means that, according to it, whether the unprotected strike took one hour or five hours or a whole week is not a factor to be taken into account.

[181] The first judgment's conclusion that the individual applicants participated in an unprotected strike from 14h05 on 1 November to 06h00 on 2 November is reached despite the absence of evidence showing that the individual applicants were obliged to be on a shift during those hours. That conclusion is legally untenable. In terms of the definition of a strike in the LRA, a strike is a refusal by employees to work[97] but, as I have said, that is only if the employees are obliged to work. Their refusal to work when they are not obliged to work cannot be a strike. Since the first judgment does not inquire into this issue in regard to this period, it is difficult to understand how it can be said that the individual applicants were striking during those hours.

[97] I am deliberately leaving out for present purposes a strike where the conduct is retardation or obstruction of work.

[182] A court cannot conclude that workers are participating in a strike unless it first inquires into whether or not they are obliged to work. The first judgment ought to have inquired into this issue. If it had, it would have concluded, as I have done, that Unitrans did not produce any evidence that indicated that the individual applicants were on the shift that was required to work between 14h05 on 1 November and 06h00 on 2 November. Without that evidence, the conclusion that the individual applicants were participating in an unprotected strike during those hours is legally unsustainable. In fact we do not even know whether the individual applicants were on a shift that was required to work between 06h00 and 14h05 on 1 November when the final ultimatum was issued. It may be that the workers who were supposed to be working on those shifts are not among the individual applicants but are some of those who were re-employed after the dismissal. How can one then say that the individual applicants participated in an unprotected strike during those hours when one does not know whether they were on a shift that was to work that night?

[183] The first judgment also says that, after 14h05 on 1 November, the individual applicants' participation in a strike was in breach of Basson J's order. In fact the first judgment says that the individual applicants defied Basson J's order. This is incorrect. Basson J's order could only have interdicted the workers from withholding their labour when they were otherwise obliged to work. It did not and could not have applied to a situation where the workers were not obliged to work. In law it simply cannot be said that the workers defied Basson J's order if it is not known whether during those hours they were under any obligation to work. The statement that the individual applicants defied Basson J's order creates the impression that TAWUSA and the workers knew that, to the extent that the workers could be said to have been on strike between 14h05 on 1 November and 06h00 on 2 November, their conduct was in breach of Basson J's order but they, nevertheless, continued with their conduct. This is simply not so.

[184] The statement that the workers defied Basson J's order is unjustified. In its strike notice of 26 October TAWUSA said in effect that the withdrawal of labour

would be in support of the two demands permitted by the Labour Appeal Court. What the first LAC judgment permitted and what it did not permit under the wage discrepancy demand can be confusing. TAWUSA and the workers genuinely believed that they were within their rights under the first LAC judgment in withholding their labour in support of their version of the wage discrepancy demand. As I have said, that they genuinely believed that they could continue to withhold their labour beyond 1 November was conceded by Unitrans' only witness, Mr Badenhorst. If they acted in the genuine belief that they were entitled to continue to withhold their labour, they cannot be said to have defied Basson J's order. Defiance of an order of court implies acting maliciously. The first judgment fails to take this into account in their favour in assessing whether their dismissal was substantively fair.

Dismissal for operational requirements?

[185] Mr Badenhorst testified that Unitrans dismissed the workers because it wanted to end the strike. He said that dismissing the workers was the only way to end the strike. This evidence proves that Unitrans' decision to dismiss the workers was not really because it took the view that a continued employment relationship with the workers was intolerable in the light of their conduct. Unitrans was quite happy to continue the employment relationship with each and every one of the workers as long as they stopped participating in the strike.

[186] The conclusion I have reached above that the strike was protected from beginning to end means that Unitrans used a dismissal to end a protected strike. That is destructive of our system of collective bargaining which remains the preferred method of the resolution of labour disputes under the LRA. It must be viewed in a serious light. Mr Badenhorst was asked in his evidence in chief whether there was any reasonable alternative to the dismissal of the workers "in the circumstances of the fifth or sixth day of the strike"? His answer was telling. He said:

> "In our opinion not, unfortunately. The only way to end the strike, that was clear to us was that, first of all . . . in terms of what we saw and experienced leading up to the strike and during the strike, that it would have been a protracted strike. It would not

> have been one where the union or the applicants or the employees rather would have very quickly come back to work. After six days there was no, no intention or signs that these employees would come back."

[187] Mr Badenhorst also said that Unitrans could not continue with "the unprotected strike". He said that Unitrans would have "literally closed down the business inland and obviously if we affect inland we would have affected the coastal regions and others". He said:

> "So, the only way to protect the business and try to normalise and continue would have been to end the strike, and the only way to end the strike at that stage was dismissal. I want to again reiterate, there was no indication whatsoever that these employees intended to stop soon, or at the time on the 1st and 2nd."

This evidence by Mr Badenhorst amounted to him saying that the dismissal of the workers was for operational reasons to protect Unitrans' business as opposed to a dismissal for the misconduct of participating in an unprotected strike. Participation in an unlawful or unprotected strike is the reason for the dismissal that Unitrans advanced at the time of the dismissal.

[188] The dismissal of employees taking part in a protected strike for the operational reasons of a business faced with an ongoing protected strike may be permissible but in such a case the employer is required to meet a very stringent test. This is so because the law must protect the workers' right to take part in a protected strike without fear of dismissal for participation in a protected strike disguised as a dismissal for operational reasons. As long ago as April 1993 – a year before the advent of democracy in our country the Labour Appeal Court created by the 1988 Amendments to the Labour Relations Act 1956, said in *Blue Waters Hotel*:[98]

> "If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no

[98] *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC) (*Blue Waters Hotel*).

> purpose. It would merely jeopardize the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.
>
> The Act contemplates that the right to strike should trump concerns for the economic losses which the exercise of that right causes. That is because collective bargaining is necessarily a sham and a chimera if it is not bolstered and supported by the ultimate threat of the exercise of economic force by one or other of the parties, or indeed by both."[99]

The Act to which the Court was referring was the precursor to the current LRA. However, what the Court said in this passage would hold true under the current LRA.

[189] In regard to a dismissal of strikers for operational requirements when faced with a lawful or protected strike, the old Labour Appeal Court went on to say in the same case:

> "If the respondent wished to justify dismissing the employees engaged in their lawful strike it might have done so on the basis of the operational requirements of the enterprise, if its financial circumstances truly warranted that step. It would then have been required to negotiate bona fide with the appellant union on the financial impact of the strike, alternatives to the termination of the services of the strikers and related matters. Only if that process proved fruitless would the respondent have been justified to terminate the services of the employees. It would then have done so, not on grounds of misconduct, but for reason of genuine economic necessity after following a fair procedure . . . no such case was made out by the respondent."[100]

[190] Part of Unitrans' difficulty in trying to justify the dismissal on operational grounds is that it did not present evidence before the Labour Court that showed that the strike had already caused it so much damage that it would be justified in dismissing workers taking part in a protected strike. Mr Badenhorst only made some unsubstantiated statements. The financial position of Unitrans was not proved. It was

[99] Id at 972C-D.

[100] Id at 964J to 965B.

simply said that Unitrans had lost about R3 million and yet there was no evidence to show what R3 million represented to a company such as Unitrans. In fact Mr Badenhorst was not employed by Unitrans as part of management or in any capacity that would have enabled him to tell the Court about Unitrans' financial situation as a result of the strike.

[191] Mr Badenhorst was an outsider to Unitrans and was a representative of an employer's organisation. In any event, Unitrans would have had to follow the statutory consultation process applicable to dismissal for operational requirements if it relied upon operational requirements and in this case it made no attempt to initiate such a process. So, even if Unitrans sought to justify dismissing the workers on operational requirements, it would have failed. The dismissal would still be substantively unfair.

[192] The conclusion I have reached that the dismissal was automatically unfair makes it unnecessary to inquire into whether the dismissal was also procedurally unfair. The position would be the same even if I had reached the conclusion that the dismissal was substantively unfair. This is because, if a dismissal is automatically unfair or substantively unfair, a finding that it was also procedurally unfair does not at a practical level grant the employee any additional remedy in addition to the remedy arising out of the finding that the dismissal was automatically or substantively unfair.

[193] The first judgment is to the effect that Unitrans was entitled to issue the final ultimatum when it issued it but takes the view that the ultimatum did not afford the workers an adequate opportunity to reflect on and digest the matter. From my conclusion that the strike was protected from beginning to end it follows that I think that Unitrans had no right to issue any of the ultimata it issued including the final one. Therefore, the question of whether it was adequate does not even arise on my approach. However, even if I had concluded that the strike ceased to be protected around 16h00 on 1 November and became unprotected, I would have held that Unitrans was not entitled to issue the final ultimatum at the time it did. This is

because it was issued before the strike could become an unprotected strike. An ultimatum should be preceded by discussions once an unprotected strike has commenced so that the parties may try to avoid dismissal. In this case no discussions took place after the time when the strike would have become unprotected. Unitrans simply issued the final ultimatum at the same time as when it made its promise or undertaking in regard to the Shell 7.

Remedy

[194] With regard to the remedy, the first judgment proposes that the matter be remitted to the Labour Court to fashion a remedy. This is after that judgment has concluded that the dismissal was substantively fair but procedurally unfair. The decision that the matter be remitted to the Labour Court to fashion a remedy arises from the fact that there was a delay of about a year on the applicants' part in delivering the record of appeal to the Registrar of the Labour Appeal Court. The judgment suggests that it would be unfair to expect Unitrans to pay wages or compensation for that period since it was the applicants who were responsible for that delay.

[195] In my view there is no justification for the decision that the matter should be remitted to the Labour Court. First, as an appellate court we have to decide the matter in the same way in which, in our view, the Labour Court should have decided it at the time when it made its decision. Both the Appellate Division in *Performing Arts Council*[101] and this Court in *Billiton Aluminium SA*[102] made it clear that as a general rule an appellate court will not take into account facts that arose after the judgment of the court of first instance. The delay in the lodging of the appeal record with the Registrar of the Labour Appeal Court happened after the judgment of the Labour Court. There are no exceptional circumstances to justify a departure from this

[101] *Performing Arts Council* above n 40 at 219H-I.

[102] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & Others* [2010] ZACC 3; (2010) 31 *ILJ* 273 (CC); 2010 (5) BCLR 391 (CC) (*Billiton Aluminium SA*).

general rule. Non-compliance with the Rules in prosecuting appeals is something that, unfortunately, happens with regularity in almost all our appellate courts.

[196] Furthermore, a remittal will be unfair to the workers. It postpones the finality in this matter. As we all know, labour matters need to be dealt with expeditiously. It will not even be competent for the Labour Court to reinstate the workers because reinstatement is not competent if a dismissal, as the first judgment finds in this case, is only procedurally unfair.[103] The parties will be forced to incur further legal costs as evidence may have to be led in the Labour Court in regard to compensation. After the Labour Court has made a decision on compensation, there could be another appeal to the Labour Appeal Court and, maybe, even to this Court. If a remittal occurred, the parties would be going to the Labour Court about this case for the fourth time. If there is an appeal to the Labour Appeal Court, the parties would be going to the Labour Appeal Court about this case for the third time. This cannot be right.

[197] The conclusion that the individual applicants' dismissal was automatically unfair because they were dismissed for exercising their right to strike means that they should be reinstated unless there are exceptional circumstances that would preclude that remedy. It was not argued that there were any such circumstances in this case. Even if their dismissal was not automatically unfair but was substantively unfair, reinstatement is the remedy that a court is required by section 193 to order unless one of the situations listed in section 193(b) to (d) is present. It was not argued that any of those situations is present in this case. It is, therefore, appropriate that we grant the order that, in our view, would have been granted by the Labour Court if it had reached

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[103] See section 193(2)(d) of the LRA which provides:

> "(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—
>
> . . .
>
> (d) the dismissal is unfair only because the employer did not follow a fair procedure."

See further, *H M Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* [2002] ZALAC 1; (2002) 23 *ILJ* 278 (LAC) and *Mzeku* above n 39.

the conclusion that it should have reached. That is the conclusion that the individual applicants' dismissal was automatically unfair or alternatively substantively unfair.

[198] In my view, the Labour Court would have granted reinstatement with retrospective effect to the date of dismissal. Accordingly, both orders of the Labour Appeal Court and Labour Court should be set aside and the order of the Labour Court should be replaced with a reinstatement order with retrospective effect to the date of dismissal.

Order

[199] In the result I would make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Appeal Court and the Labour Court are set aside and that of the Labour Court is replaced with the following:
   "(a) The dismissal of the individual applicants by the respondent on 2 November 2010 was automatically unfair.
   (b) The respondent is ordered to reinstate each one of the individual applicants in its employ on terms and conditions of employment not less favourable to him or her than the terms and conditions that governed his or her employment when the individual applicants were dismissed on 2 November 2010.
   (c) The order of reinstatement will operate with retrospective effect to 2 November 2010.
   (d) The respondent is to pay the applicants' costs."
4. The respondent is to pay the applicants' costs both in this Court and in the Labour Appeal Court.

JAFTA J

Introduction

[200] I have had the benefit of reading the judgment of Mhlantla J (first judgment) and the judgment of Zondo J (second judgment). I agree that leave to appeal should be granted; the appeal be upheld and that orders of the Labour Court and the Labour Appeal Court be set aside; and that the individual applicants be reinstated.

[201] I agree with Zondo J that the individual applicants were dismissed for participating in a protected strike. But my reasons for reaching this conclusion are different from his. In contrast, I am unable to agree with Mhlantla J that the strike was protected up to the stage of Unitrans's capitulation on the wage cut demand in respect of Shell-7 employees. I also disagree that, at the meetings on 27 and 28 October 2010 between TAWUSA and Unitrans, the union altered one of the demands to one other than that which was authorised by Waglay DJP in the first Labour Appeal Court judgment.

[202] It has become necessary for me to write separately because my reasons for supporting the order proposed in the second judgment differ from it. Moreover, I have reservations on some of the conclusions reached by the second judgment in relation to whether Unitrans by acceding to the wage-cut demand as a gesture of goodwill, met that demand. The second judgment holds that by promising to restore the Shell-7 employees to the wage-rate that was paid under the Shell contract retrospectively, Unitrans did not meet the demand but made a unilateral promise as a gesture of goodwill. The second judgment concludes that what was promised was not what the workers demanded. It described their demand thus:

> "TAWUSA and the workers' demand was in effect for Unitrans to honour, recognise, give effect to or comply with its contractual obligation to keep the Shell 7 on their

> agreed wage rates and to pay them their back pay. The Shell 7 had a contractual right to be on those wage rates."[104]

[203] This suggests that after the termination of the Shell contract, Unitrans continued to be under a contractual obligation to pay all 110 drivers, for the duration of their employment, at the wage-rate that applied to the Shell contract. My doubts about the correctness of this conclusion stems from the fact that the wage-rate payable to drivers, as the second judgment itself states, was linked to the contract between Unitrans and its client. For example, the 110 drivers who were engaged to service the Shell contract were paid at a rate higher than the other drivers because the Shell contract was more lucrative. It seems to me that when that contract was terminated the effect of the term that linked the wage-rate to that contract was that those drivers were no longer entitled to the higher rate.

[204] To hold otherwise would suggest that the contractual term that linked the payable wage-rate to the Shell contract had no force and effect. I am not so confident that this is what the record establishes. Nor do I read the strike notice that rendered the strike protected to be supporting this conclusion. Moreover, it appears to me that the conclusion that the Shell-7 employees had a contractual right to be paid at the wage-rate that applied to the Shell contract would make theirs not a dispute in respect of a matter of mutual interest which is the kind of dispute over which the LRA permits workers to strike.

[205] Happily the view I take of the matter makes it unnecessary for me to determine these issues. Therefore, I leave them at a level no higher than that of having misgivings.

[206] In order to determine the demands in respect of which members of TAWUSA went on strike, recourse must be had to the strike notice issued by TAWUSA on 27 October 2010 and not the minutes of the meeting of 29 October 2010 because that

[104] Second judgment at [125].

meeting was convened after the strike action had commenced. In terms of the notice, and this fact is common cause, the strike action started at 14h30 on 28 October 2010.

[207] The minutes of the meeting of 25 October 2010, on which the first judgment relies, are also immaterial to the enquiry because that meeting preceded the notice which activated the strike. And more importantly these minutes were not part of the notice that preceded the strike. But before considering the relevant notice I propose to briefly outline the facts as they appear to me.

Facts

[208] Unitrans conducts the business of haulage of petroleum and gas products some of which are hazardous. To facilitate the operation of the business, Unitrans concludes fixed term contracts with clients in terms of which it undertakes to convey their goods to various destinations by road. Unitrans uses trucks to carry out its business, for a fee payable in respect of each contract. It employs truck drivers in the operation of the business.

[209] The employment contracts between Unitrans and its drivers are linked to the contract under which each driver is employed and the rate of wages paid is determined in a manner relative to the contract price paid by the client. A more lucrative contract meant a higher wage rate would be offered to drivers.

[210] In similar vein Unitrans concluded a fixed term contract for a period of five years with Shell Petroleum Company of South Africa (Shell). It employed 110 drivers under this contract whose wage-rate was linked to the contract with Shell. This contract terminated in February 2009 and the employment of some of the 110 drivers also ended. The majority of them found employment with another company. Thirty one drivers were offered new employment contracts by Unitrans. Seven of them declined to sign new contracts but apparently took up the offer to remain in Unitrans' employ, without signing new contracts.

[211] The seven objected to the reduced wage rate they were offered under new contracts between Unitrans and other clients and which were not as lucrative as the Shell contract. This resulted in a dispute between these employees and Unitrans. They described the dispute as the unilateral reduction of wages. TAWUSA took up the dispute on behalf of the employees and incorporated it into other demands it made to Unitrans on behalf of its members. Four demands in all were made in respect of which TAWUSA threatened that its members would go on strike.

[212] The matter was taken to court until it reached the Labour Appeal Court. In a judgment written by Waglay DJP, the Labour Appeal Court determined that members of TAWUSA were entitled to go on strike in respect of only two of the four demands. These were the wage-discrepancy and the wage-cut demands.

[213] Following the judgment of the Labour Appeal Court, members of TAWUSA wanted to embark on a strike in respect of the two demands on which they were allowed to strike. To this end, a notice to go on strike was issued to Unitrans but the strike did not materialise because the parties were engaged in negotiations. These parties held meetings from 21 to 25 October 2010.

[214] When resolution of the disputes eluded them, TAWUSA issued a notice on 26 October 2010, notifying Unitrans that its members would commence the strike on 28 October 2010 at 14h30. In the notice TAWUSA relied on the same demands in respect of which the Labour Appeal Court had permitted it to pursue a strike action. In response Unitrans instituted an urgent application for an interdict in the Labour Court. That Court granted an order which interdicted TAWUSA from embarking on a strike in respect of the demands contained in the strike notice dated 26 October 2010. TAWUSA issued another notice following the Labour Court's order and unsuccessfully sought to appeal against that order. The notice of 27 October 2010 reflected the wage-discrepancy demand and the wage-cut demand which had been endorsed by Waglay DJP. It also stated that the strike will commence on 28 October 2010 at 14h30.

[215] Indeed the strike commenced on 28 October 2010 and on 29 October 2010, the parties met again in an attempt to find a solution and end the strike. The minutes of this meeting which ended at 17h30 on 29 October 2010 reveal the following. The parties discussed both demands but in so far as the wage-discrepancy demand was concerned, Unitrans took the view that "the demand should be channelled at national Bargaining Council" and that it should not be dealt with at that meeting. In relevant part the minutes reflect these sentiments by TAWUSA:

> "It is illegal that the company reduce employees rates without any reasons. It entails that some people's wages will be reduced and increased. It is not the mandate to reduce and increase the rates of employees as and when the company sees it fit to do so."

[216] It appears that Unitrans responded as follows:

> "Let us all understand what the court says:
>
> Some employees who are on higher rate will come down and those on a lower rate will go up."

[217] With regard to the wage-discrepancies demand, the minutes reflect these views by TAWUSA:

> "In wage discrepancies, eg 20-40 (everyone should be paid equally). We did not anticipate the strike, we have identified the strike, we are prepared to adjust to A to B. Employer not paying the same different rate of pay-qualification is same and time in different. We are prepared to deal with parity in the long term on the wages from a certain level to another. We are requesting to review the parity and come with the idea. This will help."

Legal principles

[218] Before the issue arising for determination is addressed it is necessary to outline the relevant principles. First and foremost, we must recall that the 94 employees were

punished with dismissal for exercising their right to strike which is guaranteed by section 23 of the Constitution.[105] We must also remember that section 23 safeguards this right without any limitation. Limitations on it are imposed by the LRA and the validity of those limitations is not at issue here. So, we must proceed from the assumption that those limitations are justified within a clear understanding that by so doing we do not suggest that these limitations are constitutionally compliant.

[219] We will also do well to recall that those limitations make the right to strike, the only right the exercise of which may lead to punishment despite the fact that it is guaranteed with no limitations by the Bill of Rights. There is no other right conferred by the Bill of Rights which one may be punished for exercising. The dichotomy here is stark and dramatic. Employees lose their jobs for nothing but exercising a constitutional right.

[220] This sobering reality which befell the 94 employees in this case is what informs our jurisprudential approach to interpreting the LRA. In this regard, I can do no better than citing what was stated by this Court in Zuma.[106] There, borrowing from other jurisdictions whose constitutions entrenched fundamental rights, this Court declared that "constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them". This ought not to be done so as to bring those rights in line with either unwritten customary law and the common law or written law like statutes. This is so because our Constitution is the supreme law from which all laws derive their validity.

[221] However, it is the Constitution itself that ordains the limitation of rights enshrined in the Bill of Rights by other laws, including statutes if certain conditions

[105] Section 23(2) provides:

> "Every worker has the right—
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike."

[106] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

prescribed by it are met.[107] It is in this context that, without a challenge to the limitations imposed by LRA, we assume that its limitations are justified, despite the punitive outcomes they introduce for exercising a guaranteed right.

[222] Recently in *Moloto*[108] this Court expanded on the principle laid down in *Zuma*. It pronounced:

> "The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning. The procedural pre-conditions and substantive limitations of the right to strike in the Act contain no express requirement that every employee who intends to participate in a protected strike must personally or through a representative give notice of the commencement of the intended strike, nor that the notice must indicate who will take part in the strike."[109]

[223] Later the Court repeated this statement as an interpretative approach. It said:

> "As mentioned earlier, the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should

[107] Section 36 provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[108] See *Moloto* above n 21.

[109] Id at para 44.

> be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning. These are general interpretative principles that are also applicable to the interpretation of provisions of the Act, as explicitly affirmed in section 1(a) of the Act."[110]

[224] What emerges from *Moloto* is that the right to strike is conferred without any limitation and that legislation like the LRA that limits it must be construed in a manner least intrusive of the right if the text is reasonably capable of bearing that meaning. What this means is that in determining whether the strike that started as protected in the contemplation of the LRA became unprotected at some point, we must interpret the relevant provisions of the LRA "in a manner least intrusive of the right" to strike.

[225] A good point at which to start the interpretation process is section 64(1) of the LRA which prescribes conditions for exercising the right to strike. It provides:

> "Every employee has the right to strike and every employer has recourse to lock out if—
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> (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—
>
> (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

[110] Id at para 53.

> (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."

[226] Apart from recognising that every employee has a constitutional right to strike, this section stipulates conditions which must be met before the right may be exercised. First, it obliges the employees to refer the issue in dispute to conciliation under the auspices of the Commission for Conciliation, Mediation and Arbitration (the Commission), established in terms of the LRA. The section precludes such employees from going on strike until the Commission has issued a certificate to the effect that the dispute remains unresolved or a period of 30 days has elapsed if the parties did not agree on an extension. Once these conditions are met and the employees have elected to strike, they are required to give the employer a written notice, at least 48 hours before the strike commences. In this case all these conditions were satisfied hence it is common cause that the strike was protected when it commenced.

[227] The crucial issue for determination is whether at some point it became unprotected and as a result the affected employees lost the protections in section 67 of the LRA and became vulnerable to dismissal for exercising their constitutional right. Allied to this is the difficult question whether the mere loss of those protections means that employees should lose their jobs for exercising a constitutionally guaranteed right. I am not aware of any provision in the LRA which authorises this abnormality apart from section 68(5). A dismissal like the one imposed here constitutes punishment. The employees were punished for being on strike. It is not so clear to me whether this punishment was authorised by the LRA and if so whether it amounts to a limitation envisaged in section 36 of the Constitution. For this section permits limitations of guaranteed rights but not punishment for exercising those rights.

[228] But, happily, here we do not have to resolve the vexed issue whether punishment may be imposed for exercising a right entrenched in the Bill of Rights. This issue must be left open for determination on another day and where it is fully

addressed. Suffice here to mention that the concept of a protected strike was introduced by section 67 of the LRA. That section affords striking employees protection if their strike complies with Chapter IV of the LRA and as a result it is a protected strike. Participation in such a strike does not amount to a delict or breach of contract and civil proceedings may not be instituted against a person for participating in a protected strike. An employer may not dismiss employees for participating in a protected strike, even though the employer is not obliged to remunerate them. Dismissing an employee for taking part in a protected strike constitutes an automatically unfair dismissal, for which reinstatement is the appropriate remedy.

[229] Section 68(5) in permissive language allows dismissal for participating in an unprotected strike. It provides:

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

[230] What emerges from the text of this section is that the LRA does not directly authorise dismissal of employees who were involved in an unprotected strike but does so impliedly. The implication arises from the provision's recognition that participation in an unprotected strike may, in appropriate circumstances, constitute a fair reason for dismissal. This suggests that such a dismissal may be taken to have been substantively fair because it was based on a valid reason.

[231] Since it cannot be gainsaid that section 68(5) intrudes into the right to strike, we are duty-bound to interpret it in a manner least restrictive of that right if its language is reasonably capable of bearing that construction. In doing so we have to pay close attention to the language. But we must proceed from the premise that the protections in section 67 are not available to cases where section 68(5) applies. Therefore employees to whom the provision applies are not insulated against dismissal for

participating in a strike. This is because those protections are afforded only to the employees who took part in a protected strike.

[232] There can be no doubt that where it applies, section 68(5) has an extensive impact on the constitutional right to strike. Whether that impact may appropriately be described as a limitation in the contemplation of section 36 of the Constitution is something we need not determine here because no attack was mounted against its validity. We must approach the matter on the assumption that the provision is valid and that it does constitute a justifiable limitation of the right to strike, for present purposes only.

[233] It does not appear to me that the language of this section is reasonably capable of a meaning that least intrudes into the right to strike. Where it applies, it justifies a dismissal for exercising a constitutionally guaranteed right. The punishment of dismissal it permits has as its consequence, the outcome of disabling a worker from exercising the right to strike because this right may be enjoyed by only those who are fortunate enough to be in employment. If one is unemployed, she cannot withhold her labour for the purpose of putting pressure on an employer to resolve a grievance or a matter of mutual interest. Consequently for as long as the dismissed 94 workers here are unemployed, they cannot exercise the right.

[234] But the antecedent question is whether the strike was not protected with the result that these workers did not enjoy the protections in section 67 and further that section 68(5) applied to their case. As mentioned, TAWUSA complied with all preconditions prescribed by the LRA for the exercise of the right to strike. We know that, when the strike started, it is common between all three of this Court's judgments, that it was protected. But Unitrans contends that the strike was unprotected. Unitrans argues that as soon as the workers were notified of its tender to meet the wage-cut demand the strike became unprotected.

[235] This argument would have merit if TAWUSA on 27 October 2010 issued notice in respect of a single demand, the wage-cut demand. But we know from the perusal of the notice itself that there were two demands relied on and that those were the demands which were endorsed by Waglay DJP.

Notice to Strike

[236] As mentioned, the notice issued by TAWUSA on 27 October 2010 is crucial to this enquiry. It reads:

> "RE UNITRANS FUEL AND CHEMICAL (PTY) LTD /TAWUSA
>
> 1. We refer to the Labour Appeal Judgment under case number JA55/10, the outcome of Urgent Application today and more particularly the remarks of Her-Ladyship Judge Basson where she indicated that the Respondent (Employees) may proceed with their strike on the 28th October 2010 provided they do not introduce new issues, and that they stick to their issues as contemplated in the Judgment of the Labour Appeal Court, since her Judgment will not change or interfere with the Labour Appeal Court ruling.
> 2. We confirm that our members will proceed with the strike on the basis of the very same demands, as were during Labour Appeal Court Judgment, and as contained in annexure "C" to the founding affidavit of your urgent application (today) being as follows:
>   (I) Wage discrepancies— there must been wage discrepancy between employees who perform work but on different contract.
>   (II) Wage cut— Former Shell contract employees must earn what they used to earn under Shell contract plus annual increases.
> 3. We further confirm that as initially notified the said strike will commence on the 28 of October 2010 at 14h30 in the afternoon.
> 4. We trust that you find the above in order."

[237] Like any written document this notice must be construed with reference to its language. The extraneous evidence on what was said by the parties at meetings before the strike resumed or afterwards is irrelevant to this exercise. For evidence plays no

part in the objective process of interpretation except evidence on context which is admitted in special circumstances which do not arise here.

[238] In *Kubyana* this Court stated:[111]

> "The process of interpretation, I emphasise, does not involve a consideration of facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are given a general meaning that applies to all cases, falling within the ambit of the statute."

[239] Although this principle was affirmed in the context of interpreting a statute, it applies equally to the interpretation of other written documents including contracts and statutory notices. The proper approach to interpretation of written documents was restated by the Supreme Court of Appeal in *Endumeni Municipality*:[112]

> "Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.* The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible

[111] *Kubyana v Standard Bank of South Africa* [2014] ZACC 1; 2014 (3) SA 56; 2014 (4) BCLR 400 (CC) at para 78.

[112] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

> for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[113]

[240] In its own terms the notice of 27 October commences by summarising the judgment of Basson J in the urgent application brought by Unitrans to prevent the employees from going on strike. It notes that the learned Judge had allowed them to strike provided that they confine themselves to the two demands endorsed by Waglay DJP. It proceeds to state in paragraph 2 that TAWUSA's members would go on strike "on the bases of the very same demands, as were during Labour Appeal Court Judgment, and as contained in annexure 'C' to the founding affidavit of your urgent application today being as follows".

[241] The notice continues to expressly set out those demands in these terms:

> "(i) Wage discrepancies – there must [have] been [no] wage discrepancy between employees who perform [same] work but on different contracts.
>
> (ii) Wage cut - Former Shell contract employees must earn what they used to earn under Shell contract plus annual increases."

[113] Id at para 18.

[242] The notice concludes by informing Unitrans that the strike will commence on 28 October 2010 at 14h30.

[243] It is significant in paying attention to the demands to start with the wage-cut demand. We know that Waglay DJP had limited it to the Shell-7 employees and not "former Shell contract employees" in respect of whom the demand was made. As defined in the notice this demand could be read as encompassing all employees under the Shell contract and yet Unitrans found no difficulty in reading this demand as being restricted to the Shell-7 employees and tendering to meet it. At the relevant meetings Unitrans resisted TAWUSA's attempt to extend the demand to all employees who were engaged under the Shell contract. It did not argue that this constituted an expansion of the demand which rendered the strike unprotected. Yet the language of the demand did not restrict it to the Shell-7 employees.

[244] But the wage-discrepancy demand was treated as having been expanded, even though in essence it merely stated that there must be no wage discrepancy between employees who performed the same work but on different contracts. In its written argument Unitrans described this demand as the wage parity demand which notionally could be realised by adjusting wages so that no employee received an increase and all were paid the same wages.

[245] The assertion that the demand was changed to the one that fell foul of the parties' collective agreement and that consequently was not approved by Waglay DJP, was based on what was said by TAWUSA at the negotiation meetings. In this way Unitrans and the Labour Appeal Court which upheld this argument, misconstrued the strike notice of 27 October 2010 and the wage-discrepancy demand defined in it. There was no basis in logic and principle for taking what was said at negotiations as amending the statutory notice.

[246] When the strike commenced, there were two demands in respect of which the employees went on strike. There was a tender to meet one of them but not the other.

For as long as the second demand was not met, the strike could not have changed from being protected to being an unprotected strike.

[247] If Unitrans wanted to render the strike unprotected, it should have tendered to meet both demands. It could have met the second demand by doing what it says could be done in its written submissions. In respect of that demand, Unitrans was required to eliminate disparities in wages by discontinuing its policy of paying higher wages in lucrative contracts and ensuring that there was parity in wages. The choice was that of Unitrans to determine the method to be followed to realise parity. It depended on Unitrans to achieve this goal by either cutting down the wages of employees in lucrative contracts or increasing the wages of the lower earning employees. Yet Unitrans followed none of these options. Instead it did nothing to meet the second demand.

[248] At the very least Unitrans must have offered to meet the wage discrepancy demand, as it understood it in the context of the judgment of Waglay DJP. This is what it did in respect of the wage-cut demand, even though at the meetings TAWUSA expanded that demand to include all employees who were formally engaged in the Shell contract.

[249] In these circumstances Unitrans' inaction in respect of the second demand could not change the strike that was protected into an unprotected strike. Consequently the 94 employees continued to enjoy the protections in section 67 of the LRA and section 68(5) found no application to their conduct. As a result they were dismissed for participating in a protected strike and that dismissal was automatically unfair.

[250] Moreover, notice is issued so as to meet requirements of section 64(1) which imposes pre-conditions for exercising the right to strike. As mentioned all those conditions were satisfied before the strike commenced on 28 October 2010. Section 64 does not regulate negotiations between the striking workers and their

employer during the strike. Nor does the LRA prescribe the issues to be covered in such negotiations. It is open to negotiating parties to raise whatever issues they wish to place on the agenda. At those negotiations workers may even expand the dispute in respect of which the strike was undertaken. It will be up to the employer to reject the expansion of the demand. This is what happened here in respect of the wage-cut demand.

[251] The fact that the dispute is expanded at the negotiations during a strike does not detract from the fact that the strike was pursued in order to resolve a particular and defined dispute. It is not open to the employer to simply regard the strike as unprotected because the dispute was expanded. What the employer needs to do to end the strike is to meet the demand encapsulating the dispute that was unsuccessfully conciliated and led to strike. In doing so the employer may reject the expanded part of the dispute and confine itself to the part in respect of which the workers are entitled to strike.

[252] In this matter Unitrans needed to meet not only the wage-cut demand but also the wage-discrepancy demand, as defined in the judgment of Waglay DJP. This was so because the strike was pursued in respect of the two demands on which the learned Judge had allowed the employees to go on strike. If at the meetings the parties had, TAWUSA attempted to expand or alter that demand, Unitrans was entitled to reject the attempt. But such attempt did not relieve Unitrans from the obligation to meet the wage-discrepancy demand as defined if it wished to end the protected strike.

[253] Unitrans' failure to meet the wage-discrepancy demand as defined by Waglay DJP did not change what was a protected strike into an unprotected one. To say that TAWUSA pursued under this demand something other than what was endorsed by Waglay DJP is to overlook the notice of 27 October and its text. This is the notice that activated the strike and it states expressly that members of TAWUSA would go on strike in respect of specific demands: the wage-discrepancy demand and the wage-cut demand. Both of which were endorsed by Waglay DJP. There is simply

no legal basis for disregarding the contents of this notice. Without it, the strike could not have been protected.

[254] If TAWUSA had failed to issue the notice and had relied on statements alluded to it at the various meetings, the strike could have been unprotected. There is no basis for regarding what was said at negotiations as having altered the nature of the strike from being protected to an unprotected strike. There are no grounds also for holding that what rendered the strike protected was wage-cut demand only. The notice listed both demands and even Basson J in the Labour Court on 27 October 2010, had confirmed that they could proceed with their strike on 28 October 2010 provided they did not introduce new issues but confined themselves to the demands approved by Waglay DJP. This is the context in which the notice of 27 October 2010 must be understood.

[255] Unitrans having been a party to the proceedings before Waglay DJP needed only its own lawyers to explain to it what that order meant with regard to the wage-discrepancy demand. Consequently, it ought to have known what was required of it to meet that demand. Yet it did nothing other than insisting that the demand must be referred to the bargaining council. This was wrong and its failure to meet the wage-discrepancy demand could not have rendered the strike unprotected.

[256] Moreover, determining the demands in respect of which TAWUSA went on strike with reference only to what it said at negotiations and not the notice of 27 October 2010 loses sight of reality. That reality is that in negotiations parties start by advancing their highest demands and as negotiations proceed, compromises are made at the end of negotiations each party may have obtained less than what it sought to achieve. This is the nature of negotiations and the present were no different. These negotiations like any other negotiations were not regulated by any statutes and no issue was excluded from the agenda.

[257] Besides, when TAWUSA issued the notice on 27 October 2010, it was exercising a statutory power. The relevant provision authorises employees or their union to issue notice before commencing a strike action. There is nothing in the provision which suggests, even remotely, that a union which has issued the notice has the power to vary, amend or alter such notice and least of all to do so orally at a negotiation in these meetings. Had TAWUSA purported to alter the notice by advancing a new demand, it would have acted without power. What Unitrans was obliged to do to end the protected strike was to meet both demands on the notice. This it failed to do.

[258] It is for these reasons that I support the order proposed by Zondo J.

For the Applicant:	F J Wilke instructed by Masango Attorneys
For the Respondent:	A Redding SC instructed by Cliffe Dekker Hofmeyr Inc