REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 215/10

In the matter between:

CHEMICAL, ENERGY, PAPER, PRINTING,

WOOD & ALLIED WORKERS' UNION **First Applicant**

KEETSO & 211 OTHERS **Second and Further Applicants**

and

CTP LIMITED **First Respondent**

THUTHUKA PACKAGING (PTY) LIMITED **Second Respondent**

Last date heard: **6 September 2012**

Delivered: **19 December 2012**

Summary: Mass dismissal for striking – strike found to be technically unprotected – sanction of dismissal disproportional and unfair – strikers reinstated with some deduction of back-pay.

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MYBURGH AJ

Introduction

[1] In this action, the first applicant ('the union') claims that the dismissal of the second and further applicants ('the individual applicants') was automatically unfair in terms of section 187(1)(a) of the LRA[1] because they were engaged in a protected strike, alternatively substantively and procedurally unfair insofar as their strike was unprotected. The relief sought is an order of full retrospective reinstatement.

[2] The matter involves a number of important issues of labour law, including when a party can withdraw an admission in a pre-trial minute, the distinction between a primary and a secondary strike, the determination of a strike as being unprotected, and the determination of the appropriate sanction in the case of a technically unprotected strike, including issues relating to strike violence and inconsistency in discipline.

[3] At the trial, the respondents commenced adducing evidence and called two witnesses – Holden (a director of the first and second respondents) and Backhouse (the general manager of CTP Packaging). The union closed its case without calling any witnesses. Voluminous documentation was placed before the court on the basis that it is what it purports to be and on the understanding that the court should have regard to all on it[2] in arriving at its judgment.

[4] There are six main issues to be determined:

(i) whether the first respondent should be allowed to withdraw an admission contained in the pre-trial minute that it was the employer of all of the individual applicants;

(ii) if so, whether the individual applicants engaged in the CTP Gravure and Thuthuka Packaging divisions (see below) were actually employed by the second respondent (and not by the first respondent);

[1] Labour Relations Act 66 of 1995. All references to sections herein are to the LRA.
[2] As opposed to just those documents referred to in oral evidence.

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(iii) whether the strike by the individual applicants was a protected strike so as to render their dismissal automatically unfair;

(iv) if not, whether the dismissal of the individual applicants was substantively fair;

(v) whether the dismissal of the individual applicants was procedurally fair; and

(vi) if the dismissal of the individual applicants was unfair on any basis, the appropriate relief to be granted to them.

Overview of facts and chronology of events

The different divisions at which the individual applicants worked

[5] The individual applicants worked (in different numbers) at four different divisions: (i) CTP Printers Web Offset and Gravure ('CTP Web'); (ii) CTP Packaging; (iii) CTP Gravure; and (iv) Thuthuka Packaging (referred to conjunctively as 'the four divisions').

[6] According to the respondents, the first two of these divisions were operating units of the first respondent, and second two operating units of the second respondent (which is a wholly owned subsidiary of the first respondent). (See further below.)

[7] CTP Web is situated in Isando, while CTP Packaging, CTP Gravure and Thuthuka Packaging are all situated in Elandsfontein.

The strike at CTP Stationary

[8] On 10 December 2008, the union tabled a list of 11 demands for 2009/2010 on CTP Stationary – it being another division of the first respondent, which is situated in Industria West. The demands included a demand for a 17% across-the-board wage increase, a 13th cheque at 4.33%, and centralised bargaining. In regard to the latter, what the demand entailed was a demand that CTP Stationary should agree to convert the Statutory Council for the Printing, Newspaper and Packaging Industries ('the statutory council'), under

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which it and the four divisions fell, into a bargaining council ('the bargaining council demand').

[9] On 23 April 2009, union members at CTP Stationary embarked on what was, at all material times, regarded by all concerned as a protected strike. The strike followed a referral by the union to the statutory council for conciliation, the issuing of a certificate of outcome, and the giving of 48 hours' notice of strike action to CTP Stationary. In both the referral and certificate of outcome, the employer / other party was described as CTP Stationary.

[10] The strike at CTP Stationary continued until 5 June 2009, when it was resolved by agreement (see below).

The 'secondary strike'

[11] On 5 May 2009, some two weeks into the strike at CTP Stationary, the union issued a secondary strike notice, which read as follows (the quotation is verbatim):

> 'We hereby serve the company with seven (7) days' notice,[3] starting from Wednesday 06 May 2009, meaning that workers will be on strike the 13th May 2009. The workers will be in support for the following demands: 12% across the board, 13th cheque at 4.33%, statutory council to be bargaining council / centralised bargaining.
>
> Thanking you in advance for your cooperation.'

[12] Although it was contended by the respondents that the secondary strike notice contains demands distinguishable from the demands that gave rise to the primary strike, this is clearly not the case. Instead, the secondary strike notice contained a pared down version of the primary strike demands as they stood at the time.

[13] The notice was received by CTP Web, CTP Gravure and Thuthuka Packaging on 5 May 2009, but was only received by CTP Packaging on 12 May 2009.

[14] On 13 May 2009, the secondary strike commenced at the four divisions.

[3] This being in compliance with the seven-day notice period provided for in section 66(2)(b).

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[15] The secondary strike was brought to an end by the dismissal of the individual applicants at the four divisions during the period 18 – 28 May 2009. Each dismissal is dealt with under a separate heading below.

The three Labour Court interdicts

[16] On 28 April 2009, this being before the commencement of the secondary strike, the first respondent obtained an interim order against the strikers at CTP Stationary interdicting them from, in effect, misconducting themselves during the course of the strike. The founding affidavit in support of the application (deposed to by the general manager of CTP Stationary, Hart) recorded that the strike itself was protected. (The interim order was confirmed on 12 August 2009.)

[17] On 14 May 2009, being the day after the secondary strike commenced, the first respondent obtained a further interim order interdicting the strikers at CTP Stationary and the individual applicants (engaged at the four divisions) from, in effect, misconducting themselves during the strike. This was the second interdict brought against the strikers at CTP Stationary and the first against the individual applicants.

[18] The founding affidavit in support of this application (deposed to by Holden) records that the strike at CTP Stationary was protected and that the individual applicants were employed by the first respondent, and reflects the only challenge to the legality of the secondary strike at that stage as being in relation to CTP Packaging – this on the basis that it had not received the prescribed seven days' notice thereof. (The interim order was confirmed on 11 September 2009.)

[19] On 20 May 2009, the first respondent obtained another interim order interdicting the strikers at CTP Stationary and the individual applicants (engaged at the four divisions) from coming within 500 metres of the main gate to the premises of CTP Web. This in circumstances where the CTP Stationary strikers and the individual applicants (from the four divisions) had

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gathered there on 19 May 2009. This was the third interdict against the CTP Stationary strikers and the second against the individual applicants.[4]

[20] The founding affidavit in support of this application (deposed to by the works director of CTP Web, Bain) reflects the first respondent as being the employer of the individual applicants (at the four divisions) and records that it 'had emerged' that the secondary strike was unprotected, but that no relief was sought in this regard. (The interim order was confirmed on 11 September 2009.)

CTP Packaging dismissal

[21] On 13 May 2009, CTP Packaging gave the union notice of a disciplinary enquiry scheduled for 09h00 on 18 May 2009, at which strikers would face the charge of having 'on Wednesday, 13 May 2009 … engaged in an unprotected industrial action in contravention of section 66 of the [LRA]'. (More strikers at CTP Packaging were charged the following day with the same charge.)

[22] Also on 13 May 2009, and in response to this, the union addressed a letter to CTP Packaging in which it alleged that notice of a secondary strike had been properly given on 5 May 2009 and that the strike was protected.

[23] On 14 May 2009, CTP Packaging suspended the strikers with full benefits pending the outcome of the disciplinary enquiry.

[24] At 09h00 on 18 May 2009, the disciplinary enquiry at CTP Packaging was convened before an external chairperson, Hutchinson. In circumstances where CTP Packaging objected to the composition of the union delegation that arrived,[5] the union refused to participate in the enquiry and left, whereupon the enquiry continued in the absence of the union.

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[4] It is difficult to understand how the first respondent could have obtained an interdict in the Labour Court against the individual applicants engaged by CTP Packaging on 20 May 2009, as they had been dismissed by then (see below).

[5] As Backhouse explained in evidence, in circumstances where CTP Packaging was run separately, he was only prepared to allow shop stewards and employees of CTP Packaging to attend the disciplinary enquiry. This resulted in the union deciding not to participate in the enquiry.

[25] On the basis of the evidence placed before him by Backhouse, Hutchinson delivered an *ex tempore* decision (which was tape recorded and subsequently transcribed) in which he found that the strikers were guilty as charged on the following basis:

> 'Secondary strikers should have no material interest in the demand of other employees against their employer, and should have no direct and substantial interest in the outcome of the dispute.
>
> The secondary strikers have, in fact, a material interest in the outcome of the primary strikers (sic) with particular reference to its demands: mainly of (1) a 12% wage increase across the board; (2) a 13th cheque of 4.33%; (3) the statutory council to be replaced by a bargaining council, with centralized bargaining as a function.
>
> The 7 days' notice required in terms of the [LRA], to be given to CTP Packaging, was not given.'

[26] The following warrants mention in relation to this finding by Hutchinson: having found that the strikers were not engaged in a secondary strike, he gave no consideration to whether their strike qualified as a protected primary strike; he was wrong in finding that the strikers had a material interest in anything more than the bargaining council demand (see further below); and his finding that the strike was not a secondary strike and, at the same time, that the strikers had not given the required notice of a secondary strike is incongruous.

[27] Turning to sanction, Hutchinson found as follows under the heading 'sanction':

> 'The aggravating factors are of a very serious nature.
>
> I find that the trust relationship between employer and employees has irrevocably broken down. All employees found guilty as charged should be dismissed, and that their dismissal should take place with immediate effect.'

[28] The aggravating factors relied on by Hutchinson do not appear from his outcome report, and he made no mention at all of any violence / intimidation by the strikers.

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[29] On the same day, 18 May 2009, CTP Packaging advised the strikers of their summary dismissal. A total of some 95 strikers were dismissed. They had been engaged in a strike for one day by the time of their dismissal (given that they had been suspended on 14 May 2009) and had not been issued with an ultimatum before being dismissed.

CTP Gravure dismissal

[30] Also on 18 May 2009, CTP Gravure addressed a letter to the union in response to its secondary strike notice of 5 May 2009.[6] In this letter, CTP Gravure advised as follows:

> 'No doubt you will appreciate that your members engaged at our workplace cannot, as a question of law and fact, embark upon and claim the protection of secondary strike action in accordance with the provisions of section 66 of the [LRA] where they have a direct and substantial interest in the subject matter forming one or more of the demands made of (sic) the primary strikers.
>
> Your notice of 5 May 2009 makes it specifically clear that two fundamental issues in respect of which your members have a direct and substantive interest will form the subject matter of the sympathy action embarked upon. These relate, in particular, to centralised bargaining and the establishment of a bargaining council in the industry in which we conduct our business.
>
> Under these circumstances, we will be persisting with and take appropriate disciplinary measures against your members. A notification convening a disciplinary hearing in this regard will be despatched to your offices shortly. We believe this is such a gross and significant violation of applicable legislation by your members acting under your advice, that we will be proposing that they be dismissed.'

[31] Also on 18 May 2009, CTP Gravure addressed a letter to the union calling upon the union official and the two shop stewards at the division to attend a disciplinary hearing at 16h00 on 20 May 2009, 'in order to advance reasons as to why … your members engaged at our premises proceed to embark

[6] On the face of it, the finding made at CTP Packaging formed the basis of how the strike at the other divisions was thereupon dealt with.

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upon, specifically secondary strike action, in which they have a direct interest in the demands of the primary strikers engaged at CTP Stationary'.

[32] At about 15h00 on 20 May 2009, the general manager of CTP Gravure (Cormack) received a letter from the union which requested that 'the company … suspend the intended disciplinary hearing until the legal strike is resolved'. Cormack was not prepared to do so and pressed on with the disciplinary enquiry at 16h00 (in the absence of the union) before an external chairperson, Cook.

[33] On 22 May 2009, Cook issued his findings in terms of which he decided that the strike was unprotected on this basis:

> 'From the letter of 5th of May 2009 and the demands contained (sic), it is clear that the employees are striking in support of demands in which they have a clear material interest, namely "12% across the board, 13th cheque at 4.33%, statutory council to be bargaining council / centralised bargaining".
>
> I therefore am of the view that the employees are not participating in a secondary strike but are in fact participating in a primary strike. The employees have not complied with the requirements set out in section 64 and 65 of the LRA. The employees should therefore have referred the dispute in terms of section 64(1)(a). Accordingly, the notice of secondary strike is defective. Consequently the strikers are deprived of the protection afforded by the Act, and the strikes may be treated as misconduct and / or breach of contract.
>
> In light of my conclusions above, I am of the view that there was no valid reason to suspend the hearings [as per the union's request].'

[34] The following warrants mention in relation to this finding by Cook: his finding that the strikers had a material interest in anything more than the bargaining council demand is both at odds with CTP Gravure's letter to the union of 18 May 2009 and wrong (see further below); and, although finding that the strikers were engaged in a primary strike, he had no regard to whether they could 'piggy-back' off the referral for conciliation made by the strikers at CTP Stationary in line with the judgments addressed below.

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[35] Cook went on to make the following recommendation:

> 'The union has adopted the view that its members are engaging in a legitimate secondary strike, despite the fact that the employer clearly has informed them that their view is incorrect. However, the individual members have relied upon the advice of their union representatives. The employees were also only asked to come and explain why they engaged on a secondary strike in which they had a direct interest.
>
> In conclusion, I therefore make the following recommendation: That the employees are issued with a final written warning for their failure to advance reasons as to why the employees proceeded to embark upon, secondary strike action, in which they have a direct interest in the demands of the primary strikers engaged at CTP Stationary. The employees are to return to work immediately and advance reasons as to why the employees proceeded to embark upon, secondary strike action, in which they have a direct interest in the demands of the primary strikers engaged at CTP Stationary at a date and time to be determined by the employer, failing which they may face dismissal.
>
> My recommendation in no way should be seen as a limitation on the employer's right in (sic) to charge the employees for any misconduct that they may have been guilty of during the pursuance of their invalid strike action.'

[36] On the morning of 25 May 2009, CTP Gravure addressed a letter to the union advising it of Cook's findings, recording that the strikers were issued with a final written warning, and giving the strikers until 06h00 on 27 May 2009 to return to work, failing which they were to attend a further disciplinary enquiry at 15h00 that day on the charge of having 'continued to embark upon an unprotected secondary strike and … failed to report for work as instructed'. The letter ends by recording that it was CTP Gravure's intention to seek the dismissal of the strikers at this disciplinary enquiry.

[37] On 27 May 2009, the strikers at CTP Gravure neither heeded the ultimatum nor attended the disciplinary enquiry, which was conducted by another external chairperson, De Jager.

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[38] On 28 May 2009, De Jager handed down his finding, in which he decided that the strikers should be dismissed with immediate effect. In so deciding, he relied on Cook's finding that the strike was unprotected and that the strikers had been issued with a final warning. He made no mention of acts of violence / intimidation constituting an aggravating factor.

[39] Also on 28 May 2009, CTP Gravure addressed a letter to each of the strikers advising them of their dismissal with effect from that date.

[40] Also on 28 May 2009, CTP Gravure addressed a letter to the union advising it of the dismissal. The letter records the basis of the dismissal as being that 'your members have been summarily dismissed for failing to return to work as requested and continuing to participate in an unprotected strike'. A total of some 15 strikers were dismissed. They had been on strike for 12 working days by the time of their dismissal and were issued with a two-day ultimatum / final warning before being dismissed.

CTP Web dismissal

[41] On Friday, 15 May 2009, CTP Web issued a 'final ultimatum' calling upon the strikers to return to work by 06h00 on Monday, 18 May 2009. They failed to heed the ultimatum.

[42] On 18 May 2009, the union / strikers at CTP Web were notified to attend a disciplinary enquiry at 09h00 on 21 May 2009.[7]

[43] On 20 or 21 May 2009, and before the disciplinary enquiry commenced, the union sent CTP Web a letter requesting that the enquiry be postponed pending the conclusion of the strike.

[44] At 09h00 on 21 May 2009, given that the union was not in attendance, the disciplinary enquiry proceeded in its absence before an external chairperson, Swartz. This in circumstances where Swartz refused the union's request for a postponement.

[7] Although unclear, it appears that the notification was probably in the same form as used at CTP Gravure.

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[45] Also on 21 May 2009, Swartz handed down her decision. She found that the strikers were guilty of having engaged in an unprotected strike on this basis:

> 'In terms of the union's notice of the secondary strike dated 5 May 2009, the union's demands (sic) have a material interest in the outcome of the primary strike with reference to the salary demands of "… 12% across the board; 13th cheque at 4.33%".
>
> I therefore find that the secondary strike does not fall within the scope of s 66 of the LRA.
>
> Furthermore the notice of the secondary strike dated 5 May 2009 called for a one day strike.
>
> On 21 May 2009 union workers were still on strike.'

[46] The following warrants mention in relation to this finding by Swartz: different to Hutchinson and Cook, she did not find that the strikers had a material interest in the bargaining council demand; she was wrong in finding that the strikers had a material interest in the demands listed by her (see below); having found that the strike was not a secondary strike, she gave no consideration to whether it qualified as a protected primary strike; and her finding that the secondary strike notice provided for only a one-day strike is also wrong (the issue not having been pursued by the respondents at the trial).

[47] Regarding sanction, having made reference to acts of intimidation / violence, Swartz decided that summary dismissal was appropriate on this basis:

> 'In light of the above I find that the striker's conduct aggravating (sic) because of their aggressive conduct, ignoring the court order and staying away from their employment for over nine days.'

[48] It is common cause that the dismissal took effect on 21 May 2009. A total of some 64 strikers were dismissed. They had been on strike for seven working days by the time of their dismissal and had been given a one-day ultimatum before being dismissed.

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Thuthuka Packaging dismissal

[49] On 18 May 2009, Thuthuka Packaging addressed a letter to the union advising that the secondary strike was unprotected, and recording that it would seek the dismissal of the strikers.

[50] Also on 18 May 2009, the strikers at Thuthuka Packaging were notified to attend a disciplinary enquiry at 15h00 on 20 May 2009.[8]

[51] On 20 May 2009, in response to this, the union addressed a letter to Thuthuka Packaging requesting that the disciplinary enquiry be suspended pending the resolution of the strike.

[52] There was no appearance by the union at the disciplinary enquiry at 15h00 on 20 May 2009. After standing the matter down for a short while, the external chairperson, Martin, decided to proceed with the enquiry in the absence of the union – this after finding that the union's letter of earlier that day did not constitute a proper application for a postponement.

[53] On 22 May 2009, Martin handed down his decision, in terms of which he found that the strikers were engaged in an unprotected secondary strike on this basis:

> 'The submissions made to me by the employer are to the effect that the employees of Thuthuka Packaging, as secondary strikers, have a material, direct and substantial interest in two of the primary strikers' demands, being the conversion of the statutory council to a bargaining council and centralised bargaining.
>
> Insofar as the members of [the union] are engaging in a secondary strike and at the same time have a direct and substantial interest in the outcome of the demands of the primary strike, the strike is not a secondary strike as envisaged by the Act.'

[54] The following warrants mention in relation to this finding by Martin: of all of the disciplinary chairpersons, he was the only one who found that the strikers only

[8] Although unclear, it appears that the notification and preceding letter to the union was probably in the same form as used at CTP Gravure.

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had a material interest in the bargaining council demand; and having found that the strikers were not engaged in a secondary strike, he (like Hutchinson and Swartz) gave no consideration to whether they were engaged in a protected primary strike.

[55] Turning to the issue of sanction, Martin found as follows:

> 'A sanction of dismissal is the harshest penalty available. The employees have chosen not to avail themselves of the opportunity to present a case at the enquiry, and have proceeded with their industrial action, despite a warning that they would be dismissed as a result of their involvement in the so-called "secondary strike".
>
> I am of the opinion that a dismissal in the circumstances is warranted.
>
> Nonetheless, and in the light of the absence of the employees and trade union from the disciplinary enquiry, the employer may wish to avail itself of an opportunity to approach the Labour Court for an interdict against the secondary strike, prior to dismissing the employees. This may possibly allow the parties to engage in a more detailed and ventilated consideration of the dispute between the parties.'

[56] Martin makes no mention in his findings of violence / intimidation by the strikers having been an aggravating factor.

[57] It is common cause that the dismissal took effect on 22 May 2009 – this in circumstances where no attempt was first made to interdict the strike itself. A total of some 38 strikers were dismissed. They had been on strike for eight working days by the time of their dismissal and were not issued with an ultimatum before being dismissed.

Settlement talks and the resolution of the CTP Stationary strike

[58] On 1 June 2009, CTP Packaging invited the union to discuss the way forward with it.

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[59] On 2 June 2009, and following a meeting held between the union and CTP Stationary the previous day, the general manager of CTP Stationary (Hart) addressed a letter to the union reading in part as follows:

> 'My understanding is that the secondary strikes [at the four divisions] were deemed to be illegal and as such I believe that those of your members who continued to participate have been dismissed. It would appear that this situation has been further aggravated through acts of violence and intimidation.
>
> I would therefore recommend that if this situation is to be salvaged, meetings will need to be made (sic) without further delay. I have approached the MD's of the other divisions who have agreed to meet with you individually. You may have had contact from them already. If not please give them a call.'

[60] On 3 June 2009, it would appear that CTP Packaging and the union held a meeting, at which the union sought the reinstatement of the dismissed strikers. (Allied to this, Backhouse testified that, after the dismissal of the strikers at CTP Packaging on 18 May 2009, he met informally with a representative of the dismissed strikers (one Stanley), who conveyed to him that a settlement should include CTP Packaging conceding the bargaining council demand.)

[61] A meeting was set up between CTP Gravure and the union for 3 June 2009, but it is not clear from the documents whether it went ahead.

[62] On the morning of Friday, 5 June 2009, the union addressed a letter to: CTP Stationary advising that the strike had been resolved and that the strikers would return to work on Monday, 8 June 2009; and the four divisions advising that the secondary strike was over and that the secondary strikers would also return to work on the aforesaid date.

[63] Also on 5 June 2009, and in response to the union's letter calling off the secondary strike, CTP Packaging addressed a letter to the union recording that the strikers had been dismissed with effect from 19 May 2009, that it was not in a position to reinstate them and was not prepared to accept their tender

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of services, but that it was nevertheless willing to entertain settlement discussions.

[64] Also on 5 June 2009, CTP Gravure addressed a letter to the union in response to its letter calling off the secondary strike. In this letter, CTP Gravure advised that it was not in a position to reinstate the dismissed strikers and was not prepared to accept their tender of services, but that it was nevertheless 'fully committed to explore possible resolutions of this matter and in this regard we await to hear from you …'.

[65] On 8 June 2009, an agreement of settlement was entered into between CTP Stationary and the union in resolution of the strike at CTP Stationary, with the strikers having returned to work that day. The agreement records, *inter alia*, that the strike was protected, that the union withdrew the bargaining council demand, and that:

> 'The company reserves its rights to take such disciplinary measures as may be deemed appropriate against those individuals who are allegedly guilty of any acts of violence and intimidation during the strike engaged upon by the union's members.'

[66] It is common cause that, after having returned to work, certain union members at CTP Stationary were dismissed for acts of misconduct committed by them during the strike.

[67] On 9 June 2009, the union responded to the letters of CTP Packaging and CTP Gravure of 5 June 2009 by disputing that the secondary strike was unprotected and alleging that the dismissals were consequently automatically unfair.

[68] Also on 9 June 2009, CTP Packaging responded by inviting the union to a meeting at 15h00 the following day in the hope that a negotiated settlement was possible.

[69] On 10 June 2009, the union requested that an appeal hearing be held for all the dismissed workers on 15 June 2009.

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[70] Also on 10 June 2009, and following a meeting between the parties that day, CTP Gravure advised the union in a letter that it could not agree to reinstate the dismissed strikers, but that it would reconsider settlement at conciliation (in the event of a referral to the statutory council), and that its disciplinary code did not provide for an internal appeal process.

[71] On 11 June 2009, CTP Packaging addressed a letter to the union recording that: it had failed to attend the proposed meeting on 10 June 2009; 'it would be inappropriate, unreasonable and improper for all your members to be reinstated on any terms and conditions suggested in the meeting of 3 June 2009 and … we have not received any appropriate solutions subsequent to this meeting'; settlement may be reconsidered at statutory conciliation; and its disciplinary code did not provide for an internal appeal.

The statutory conciliation process

[72] On 15 June 2009, the union referred a separate dispute against each of the four divisions for conciliation to the statutory council, with the dispute being described as an automatically unfair dismissal in terms of section 187(1)(a).

[73] On 1 July 2009, and following the consolidation of the four referrals and an unsuccessful attempt at conciliation, the statutory council issued four separate certificates of outcome.

The memorandum of demands

[74] It would appear that, on 17 August 2009, a union delegation presented a memorandum of demands to management. The memorandum recorded a demand for the reinstatement of the individual applicants at the four divisions, and a 'demand that the statutory council be changed to a bargaining council'.

[75] On 20 August 2009, in response to the memorandum of demands, CTP Packaging addressed a letter to the union. The letter records that CTP Packaging was not in a position to reinstate the dismissed employees, and further that:

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> 'We trust that you will also appreciate that CTP Packaging, as an employer, have absolutely no authority or jurisdiction in order to convert a Statutory Council into a Bargaining Council. Furthermore, we have no doubt and trust that you appreciate the fact that this is a matter that should be addressed at a higher level through the appropriate employers' organisations and trade unions which are parties to the council concerned.'

<u>The condonation application and pleadings</u>

[76] The union's statement of claim was due on 30 September 2009.

[77] On 2 March 2010, the union launched an application for condonation for the late delivery of its statement of claim. In its founding affidavit, the union alleged that the individual applicants were all employed by the first respondent within the four divisions.

[78] Although dated 2 March 2010, the statement of claim herein was filed on 11 March 2010 – this being some five months late. In the statement of claim, it is again alleged that the individual applicants were all employed by the first respondent within the four divisions. As stated above, the applicants' cause of action is an automatically unfair dismissal in terms of section 187(1)(a), alternatively a substantively and procedurally unfair dismissal.

[79] On 16 March 2010, the first respondent filed its reply to the applicants' statement of claim ('the first respondent's reply'[9]). The reply is unorthodox in that it simply contains a rendition of the 'background' to the matter, and does not answer the applicants' statement of claim on a paragraph-by-paragraph basis.

[80] In any event, the first respondent's reply records the company structure as follows:

> '1.3 The application launched herein relates to certain divisions of the [first] respondent, namely CTP Web Offset and Gravure[10] situate at Isando, Gauteng and CTP Packaging, situate at Elandsfontein and Homestead, Gauteng.

[9] The second respondent was only joined during the course of the trial.
[10] Referred to herein as CTP Web.

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> 1.4 In addition, the two remaining entities forming the subject matter of the current application, namely CTP Gravure and Thuthuka Packaging were divisions of a separate alternative legal entity known as Thuthuka Packaging (Pty) Limited.'

[81] Significantly, although having pleaded this, no point is taken in the first respondent's reply that this structure had any bearing on whether or not the strike by the individual applicants was protected.

[82] Consistent with the position adopted throughout, the first respondent's reply records that employees at 'CTP Stationary embarked upon protected strike action in accordance with the provisions of section 64 of the [LRA]'.

[83] The first respondent's reply goes on to allege that the strike by the individual applicants in the four divisions was unprotected on this basis.

> '1.11 Following numerous interdicts issued by this Honourable Court against the violent, unlawful and intimidating conduct of the first applicant's members and having received legal advice on the matter, it emerged that the conduct of the first applicant's members insofar as their secondary strike action is concerned, was unlawful and improper. In this regard, aside from the short service of the notice contemplating secondary strike action served on CTP Packaging, it transpired that it was improper for the individual applicants to have embarked upon strike action in terms of section 66 of the Act in instances where they had a primary interest in the matter under dispute and which, to all intents and purposes, would affect them. Each one of the division's respective business interests fall within the registered scope, sector and area of the Statutory Council and accordingly, any conversion of the Statutory Council to a "Bargaining Council", as demanded by the first applicant, would have the effect of benefiting the individual applicants directly inasmuch as they, by virtue of any such contemplated conversion, would fall within the registered scope of such Council;
>
> 1.12 In addition, inasmuch as this, for all intents and purposes, would have related to a "refusal to bargain" as envisaged in terms of section 64(2) of the Act, an advisory award would have had to have been obtained

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> against each one of those particular business units and divisions concerned. No such award had been obtained in relation to that dispute in accordance with the provisions of section 135(3)(c) of the Act.'

[84] It was common cause at the trial that the first time that the first respondent raised the advisory award point was in its reply – it not having formed the basis of the decisions of any of the four disciplinary enquiry chairpersons.

[85] On 8 June 2010, the first respondent filed its answering affidavit opposing the application for condonation, which affidavit was deposed to by Holden. In this affidavit, and contrary to the first respondent's reply, Holden admitted that the individual applicants were all employed by the first respondent within the four divisions.

[86] On 7 June 2010, Lagrange J handed down judgment in the condonation application, with his full reasons having followed on 22 June 2010. In terms thereof, Lagrange J granted condonation and directed the parties to hold a pre-trial conference within 14 days.

[87] On 4 July 2010, the applicants' erstwhile attorneys of record appear to have provided the first respondent's attorneys of record (Fluxmans) with a draft pre-trial minute. With reference to the covering letter which accompanied the draft, it would appear that the draft was based in part on a 'list of common cause and disputed issues' which had been provided by Fluxmans. The minute was not concluded at this point in time, as the first respondent sought leave to appeal against the judgment of Lagrange J.

[88] On 1 November 2010, Lagrange J dismissed the application for leave to appeal.

[89] In February 2011, the LAC dismissed the first respondent's petition for leave to appeal.

[90] On 14 May 2011, Fluxmans (per Soldatos) signed and served the pre-trial minute under cover of a letter reading in part:

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> 'We confirm that certain "common cause" facts have been amended by ourselves, however, we do not believe that this would, in any way, change the nature and import of the matters under contention … .'

[91] Amongst the common cause facts which were agreed in the pre-trial minute – and went un-amended by Soldatos – are that the individual applicants were all employed by the first respondent within the four divisions.

<u>The events of the trial</u>

[92] Mr Cassim SC, who appeared together with Mr Boda for the first respondent, submitted a lengthy written opening address, which outlined the two parts to the first respondent's case: firstly, that the strike was unprotected, and, secondly, that the sanction of dismissal was fair and appropriate.

[93] In relation to the issue of whether or not the strike was protected, Mr Cassim submitted in opening that the strike was unprotected on the following four grounds:

(i) firstly, although styled a secondary strike, given that the individual applicants had a material interest in the bargaining council demand, the strike was actually a primary strike and was unprotected because there had been no referral of the dispute for conciliation to the statutory council by the individual applicants in terms of section 64(1) ('the first alleged ground of illegality');

(ii) secondly, given that the bargaining council demand qualified as a refusal to bargain as defined in section 64(2)(a), both the strike at CTP Stationary and at the four divisions was unprotected because an advisory arbitration award had not been obtained in terms of section 64(2) ('the second alleged ground of illegality');

(iii) thirdly, the individual applicants engaged within CTP Gravure and Thuthuka Packaging were actually employed by the second respondent, with the result that the strike by them was unprotected because no dispute against the second respondent had been referred

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for conciliation to the statutory council – this in breach of section 64(1) ('the third alleged ground of illegality'); and

(iv) fourthly, insofar as the strike at CTP Packaging was a secondary strike, it was unprotected because CTP Packaging had only received one day's notice (instead of seven days' notice) thereof in breach of section 66(2)(b) ('the fourth alleged ground of illegality').

[94] The third alleged ground of illegality was a new ground that had not previously been relied upon – and involved, in effect, an application to amend the common cause fact set out in the pre-trial minute that all the individual applicants were employed by the first respondent within the four divisions.

[95] In relation to the issue of the appropriate penalty, Mr Cassim submitted that dismissal was fair and appropriate in the light of a number of aggravating factors.

[96] Mr Cassim's opening address prompted the applicants to make three separate applications for the amendment of their statement of claim, all of which were unopposed and granted. The key features of these amendments were that the applicants:

(i) joined the second respondent as a party;[11]

(ii) allege that the strike by the individual applicants was not a secondary strike, but was instead a primary strike in support of the demands made by the CTP Stationary strikers and that it was protected;

(iii) allege that, insofar as it is found that the primary strike was not protected, the dismissal of the individual applicants was selective because the employees at CTP Stationary who participated in the strike were not dismissed; and

(iv) allege that, insofar as it is found that the individual applicants at CTP Gravure and Thuthuka Packaging were employed by the second respondent, it would be unfair to differentiate between them and the

[11] This being the first time that the second respondent became party to the proceedings.

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other strikers in that all the strikers were advised by the union that the strike was protected and they were at no stage advised by their employer that this was a differentiating feature.

[97] The parties also handed up a list of common cause facts in amplification of those set out in the pre-trial minute (they have been set out above).

[98] The respondents commenced adducing evidence, and, as stated above, called Holden and Backhouse. In summary, Holden's evidence mainly involved laying a basis for the amendment of the pre-trial minute by the respondents, while Backhouse's evidence related to the events at CTP Packaging. Aspects of their evidence are dealt with below.

[99] As stated above, further to the respondents closing their case, the applicants closed their case without calling any witnesses.

[100] After a day's break to allow counsel to prepare written heads of argument, the matter was then argued. I deal with the main arguments of the parties in the process of addressing the six issues for determination below.

<u>The first issue for determination: the first respondent's application to amend the pre-trial minute</u>

[101] The first issue to be determined is whether the first respondent's application to amend the pre-trial minute by withdrawing the admission that it employed all the individual applicants in the four divisions should be allowed. The issue is a significant one because, if the amendment is allowed and it is then found that the individual applicants engaged at CTP Gravure and Thuthuka Packaging were actually employed by the second respondent, this may have implications regarding whether the strike by them was protected.

[102] Before dealing further with the application, it is convenient to briefly consider the principles applicable to the withdrawal of an admission made at a pre-trial conference.

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[103] In *MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga and Another*[12] (*Kruizenga*), the SCA said the following about the role and importance of pre-trial conferences and the significance of admissions of fact made in the course thereof:

> 'The rule [i.e. rule 37] was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process.'[13]

[104] These findings made in relation to rule 37 of the High Court Rules are equally applicable to rule 6(4) of the Labour Court Rules.

[105] A pre-trial minute is a consensual document and, in effect, constitutes a contract between the parties.[14]

[106] It is precisely because of the critical importance played by pre-trial conferences / minutes in the litigation process that the SCA has twice held that, in the absence of special circumstances, a party cannot resile from the agreement. In *Filta-Matrix (Pty) Ltd v Freundenberg*[15] (*Filta-Matrix*), the SCA stated the principle as follows:

> 'To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation. [Authority omitted.] If a party elects to limit the ambit of his case, the election is usually binding [authorities omitted]. No reason exists why the principle should not apply in this case.'[16]

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[12] 2010 (4) SA 122 (SCA).
[13] At para 6.
[14] *Shoredits Construction (Pty) Ltd v Pienaar NO & others* [1995] 4 BLLR 32 (LAC) at 34E-F.
[15] 1998 (1) SA 606 (SCA).
[16] At 614B-D. Cited with approval in *Kruizenga* at para 6.

[107] *Filta-Matrix*[17] was one of the judgments considered by the LAC in *NUMSA v Driveline Technologies (Pty) Ltd and Another*[18] (*Driveline Technologies*) in arriving at this summary of the legal position:

> 'To my mind the cases are consistent that whether or not a party will be allowed to raise or rely upon or introduce a cause of action or issue after a pre-trial agreement or pre-trial minute has been concluded in a case depends on whether it can be said that the party seeking to rely upon or to introduce or raise such cause of action or issue *has abandoned that cause of action or has agreed either expressly or by implication (I would say necessary implication) not to pursue or rely upon such cause of action or point or has informed the court or the other party that such point or such cause of action or issue will not be relied upon. If he has, he cannot be allowed.* If he has not, he can be allowed. This is quite apart from those circumstances where a party would be able to resile from such an agreement *on the same basis as he would be able in law to resile from any other contract.*'[19] (Emphasis added.)

[108] As I interpret this judgment, where a party in a pre-trial minute abandons a point, or agrees (expressly or by necessary implication) not to pursue / rely on the point, or otherwise informs the opposing party that the point will not be relied upon, then he will not be allowed to do so at a later stage, unless he is able to resile from the agreement on a basis upon which he would in law be able to resile from a contract.[20]

[109] In *Rademeyer v Minister of Correctional Services*[21] (*Rademeyer*), the High Court found as follows regarding the requirements of 'special circumstances' in the present context:

> 'Applying the above criteria to the application now before me, the defendant in order to succeed, must show that special circumstances exist for this court to exercise its discretion in his favour. Three requirements must be met: firstly, the defendant must furnish an explanation sufficiently full of the circumstances under which the concession was made and why it is sought to

[17] Fn 15 above.
[18] [2000] 1 BLLR 20 (LAC).
[19] At para 91.
[20] See also *Driveline Technologies* at paras 16-17.
[21] [2008] JOL 21787 (W); [2008] ZAGPHC 141.

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be withdrawn; secondly, he should satisfy the court as to his *bona fides*; and thirdly, show that in all the circumstances justice and fairness would justify the restoration of the status *quo ante*.'[22]

[110] The court in *Rademeyer*[23] did not cite any authority for these being the requirements of special circumstances in the present context; nor have I been able to find any such authority. In my view, setting the test for special circumstances as being substantially equivalent to the test for the grant of condonation (as *Rademeyer* does) is too lenient and does not take account of the fact that a pre-trial agreement equates to a contract between the parties. Once this is accepted, then special circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract. To my mind, this interpretation accords with *Driveline Technologies*[24] and is consistent with *Kruizenga.*[25] In any event, in assessing the present application, I do so with reference to both tests.

[111] Turning to the facts, as stated above, Holden was called to give evidence on this issue. Early on in his testimony, Mr van der Riet SC (who appeared for the applicants) raised an objection to the effect that it was only the attorney who signed the pre-trial minute on behalf of the first respondent (Soldatos) who could lay a basis for the amendment. In response, Mr Cassim submitted that it was his intention to first establish the facts about the corporate structure and the identity of the employer through Holden. In the event, Soldatos – who was present in court during the opening address – was not called to testify.

[112] In summary, Holden testified as follows in-chief. With reference to certain certificates of incorporation and change of name, the first respondent came into existence in 1999 and the second respondent in 1997. In 2004, the first respondent sold CTP Gravure (then a division of the first respondent) to the second respondent as a going concern, with the result that from then onwards the second respondent operated two divisions – Thuthuka Packaging and

[22] At para 6.
[23] Fn 21 above.
[24] Fn 18 above.
[25] Fn 12 above.

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CTP Gravure. At all material times, the two companies operated independently of each other. The contention in the affidavits drafted during the strike and in the pre-trial minute that the first respondent was the employer of all the individual applicants within the four divisions was incorrect, with the correct position being as was pleaded in the first respondent's reply. According to Holden, the concession made in the pre-trial minute was probably a *bona fide* mistake on the part of Soldatos, which had been carried through from the affidavits drafted during the strike.

[113] Under cross-examination, Holden experienced difficulty in explaining how the alleged errors in the affidavits had come about. But, as far as he was concerned, the individual applicants engaged in Thuthuka Packaging and CTP Gravure were employed by the second respondent – this being knowledge that he said he acquired from his position as a director of the second respondent. Asked about the concession made in the pre-trial minute, he confirmed that it was consistent with the affidavits in the interdicts and opposition to the application for condonation. Asked how it had come about that Soldatos had entered into a pre-trial minute which was contrary to the first respondent's reply, Holden stated that he could not speak for Soldatos, but that Soldatos would probably have taken instructions from the heads of the various divisions (i.e. the general managers) and sent them a draft of the pre-trial minute for their input. He could, however, not recall whether Soldatos had sent him a draft before it was concluded. He had, however, given some input into the first respondent's reply. Asked then how he could contend that the pre-trial minute was concluded in error by Soldatos, Holden could do no more than fall back on his knowledge of the corporate structure.

[114] In argument, Mr Cassim submitted that the first respondent should be allowed to withdraw the admission for these reasons: (i) the objective facts demonstrate that there were two separate legal entities; (ii) the oral evidence of Holden also established this; (iii) no evidence was led to demonstrate that the admission was true or even probable; (iv) Lagrange J found in his judgment in the condonation application that there were two separate entities, each having two divisions; (v) the first respondent did not make the admission

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in its pleading but rather in the pre-trial minute, with the pleading being consistent with the evidence, which did not establish that the first respondent had abandoned its pleaded case; (vi) the evidence established that the pre-trial agreement was reached as a result of a *bona fide* error; (vii) justice dictates that the court adjudicate the matter on the true facts; and (viii) there is no prejudice to the applicants, as they were alerted to the amendment before the trial started.

[115] Mr van der Riet submitted, in turn, that the first respondent made out no case that they are entitled to resile from the agreement contained in the pre-trial minute. According to him, the fact that Soldatos was not called as a witness puts an end to the matter. It could not even be contended, according to Mr van der Riet, that Soldatos acted outside his instructions when he agreed on behalf of the first respondent that it employed all the individual applicants, given that a director of the first respondent, Holden, had on two occasions stated this under oath.[26] Mr van der Riet also submitted that the first respondent's reliance on the finding by Lagrange J in his judgment in the condonation application was misplaced because all the court had done was to paraphrase the first respondent's response in its judgment.

[116] To my mind, the predicament facing the first respondent is this. On the face of the pre-trial minute, it was deliberately entered into by Soldatos. This in circumstances where, having been in possession of a draft for more than a year, he made certain handwritten amendments to it before signing and sending it to the applicants' erstwhile attorneys. The pre-trial minute limits the ambit of the first respondent's case by recording as a common cause fact that the first respondent employed all of the individual applicants. In a labour law dispute involving a mass dismissal for strike action, this was obviously an important concession. Although contrary to the first respondent's reply, the concession was consistent with the first respondent's affidavits supporting the second and third interdict applications, and consistent with the first respondent's answering affidavit in the condonation application, which, significantly, was delivered after the first respondent's reply. Furthermore,

[26] In the second application for a interdict and in the answering affidavit in the condonation application.

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according to Holden, in finalising the pre-trial minute, Soldatos would probably have taken instructions from the general managers and sent them a draft of the minute. If this was so, then, on the face of it, and consistent with what had gone before, they would appear to have agreed (expressly or by implication) that the first respondent was the employer of all the individual applicants.

[117] Against this backdrop, it was, to my mind, imperative for Soldatos to testify in order to establish special circumstances for the withdrawal of the admission / concession. Given that he concluded the pre-trial minute, he was the person required to provide this court with a full explanation of the circumstances under which the concession was made and why it is sought to be withdrawn, and to vouch for the first respondent's *bona fides* in seeking to withdraw the concession made by him (these being the first two requirements of 'special circumstances' set in *Rademeyer*[27]). These two requirements are interlinked and cannot be satisfied without it first being established how the concession (sought to be withdrawn) was made in the first place. In the absence of Soldatos having testified, this court has only the evidence of Holden, which does not address these issues to any material degree. Indeed, as stated above, Holden testified that he could not speak for Soldatos, and had no personal knowledge of how the concession came to be made by him.

[118] Read *mutatis mutandis*, the following extract from *Rademeyer*[28] is apposite:

> 'In my view the defendant has not come anywhere near to satisfying any of these requirements. The defendant has failed to explain the circumstances under which the concession was made. No basis for the attorney's alleged erroneous belief has been tendered. Nor has the defendant dealt with the instructions the attorney was furnished with regarding this aspect. But it does not end there: the allegation of a *bona fide* mistake stands on its own and nothing further is stated allowing for an assessment thereof. … Finally, the *bona fides* of the attorney being under scrutiny one would have expected him to set out the facts from which an assessment as to his *bona fides* could be made.'[29]

[27] Fn 21 above.
[28] Fn 21 above.
[29] At para 6.

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[119] Turning to the requirement of justice and fairness (being the third and final requirement set in *Rademeyer*[30]), in the absence of the first respondent having satisfied the first two requirements for 'special circumstances', the broad dictates of justice and fairness cannot, in themselves, serve as a basis for allowing the amendment. In any event, insofar as the first respondent contends that justice / fairness dictate that the amendment should be allowed because, as a matter of fact, the individual applicants at Thuthuka Packaging the CTP Gravure were employed by the second respondent, it is by no means clear to me that this was established in evidence. This in circumstances where Holden's testimony to that effect stands in conflict with two affidavits deposed to by him, an affidavit disposed to by Bain, and the concession made in the pre-trial minute, which was apparently approved by the general managers.

[120] Furthermore, seen through the lens of the approach adopted in *Driveline Technologies*, the first respondent clearly agreed in the pre-trial minute not to contest that it was the employer of all the individual applicants. That being the case, it cannot resile from the agreement, unless it establishes a basis to do so in the law of contract, which it has clearly failed to do.

[121] In all the circumstances, the application for the amendment of the pre-trial minute is accordingly refused.

<u>The second issue for determination: the identity of the employer of the individual applicants engaged at Thuthuka Packaging and CTP Gravure</u>

[122] In circumstances where the first respondent's application to amend the pre-trial minute has been refused, it is, as recorded therein, a common cause fact that the first respondent employed all of the individual applicants, including those engaged in Thuthuka Packaging and CTP Gravure

[30] Fn 21 above.

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<u>The third issue for determination: was the strike protected so as to render the dismissals automatically unfair?</u>

The strike was a primary and not a secondary strike

[123] Section 66(1) defines a secondary strike as follows:

> '… a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of that council, have a material interest in that demand.'

[124] The label that a party attaches to a strike does not affect the true nature thereof. If a strike is a primary strike, it does not become a secondary strike simply because someone calls it a secondary strike (and *vice versa*).[31]

[125] The phrase 'in support of a strike by *other* employees against *their* employer' (emphasis added) has been interpreted to mean that secondary strikers must be employed by a different employer from that of the employees whom they seek to support. Employees who strike in support of co-employees (i.e. employees of the same employer) are primary and not secondary strikers, even if they are employed in different locations.[32]

[126] It was, no doubt, in realisation of this that the union accepted that the strike by the individual applicants was a primary and not a secondary strike – this in circumstances where the individual applicants were employed by the same employer as the strikers at CTP Stationary, namely the first respondent.

[127] Properly construed, the individual applicants were engaged in a primary strike, in that they were striking in support of the strikers at CTP Stationary and in support of one of the demands made by the CTP Stationary strikers in respect of which they (i.e. the individual applicants) had a direct interest, namely the bargaining council demand.

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[31] *Afrox Ltd v SACWU & others* [1997] 4 BLLR 375 (LC) at 379D-E (*Afrox*); *SACTWU v Free State & Northern Cape Manufacturers' Association* [2002] 1 BLLR 27 (LAC) (*Free State & Northern Cape Manufacturers' Association*) at para 22.

[32] *Free State & Northern Cape Manufacturers' Association* at paras 17-18.

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The first alleged ground of illegality: absence of a referral to conciliation by the individual applicants of the bargaining council demand / dispute

[128] In circumstances where the individual applicants were engaged in a primary strike and where it is common cause that no separate referral to conciliation was made on their behalf in relation to the bargaining council demand / dispute, the issue under this head is whether such a referral was required in order for the strike to be protected or whether the referral made in relation to CTP Stationary suffices.

[129] Once the statutory requirements for a protected strike have been met by a union and a group of its members commence with a protected strike, the union is entitled to call out other of its members – in other branches,[33] divisions[34] or bargaining units[35] of the employer – to join the strike over the same dispute without having to again comply with the requirements of section 64 of the LRA.[36]

[130] In *Afrox*,[37] the LAC held as follows in this regard:

> '*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*. Once SACWU acquired the right to call a strike against the Applicant in respect of that dispute, its members who are employed by the Applicant acquired the right to strike if called upon by SACWU to strike. Once in that situation a union is under no obligation to call its members out on strike at the same time and it is free to commence the strike with a small group of members and increase the number of its members participating in the strike as and when it considers that to be appropriate unless it has waived such a right. In this case the union started by calling out

[33] *Afrox* at 379H-380C.
[34] *Early Bird Farm (Pty) Ltd v FAWU & others* [2004] 7 BLLR 628 (LAC) (*Early Bird Farm*) at para 48.
[35] *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC) (*Plascon Decorative*) at para 29.
[36] See also *Equity Aviation Services (Pty) Ltd v SATAWU & others* [2009] 10 BLLR 933 (LAC) (*Equity Aviation* (LAC)) at paras 13, 27-29, 161-163 and 188.
[37] Fn 31 above.

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on strike its members who are employed by the Applicant in its Pretoria West branch. Now it has called its members in the other branches out on strike.

The new Act does not require that before a member of a union can go on a protected strike, they should have been the ones who referred the issue in dispute to a council or to the Commission for Conciliation, Mediation and Arbitration. What is required is that the issue in dispute is that which is the subject-matter of their strike should have been referred to conciliation and the other statutory requirements should have been met.'[38] (Emphasis added.)

[131] This *dictum* (or part of it) has been repeatedly quoted with approval by the LAC in a line of judgments dealing with comparative situations, which I refer to herein as the '*Afrox* line of judgments'.[39]

[132] During the course of argument, I raised with Mr Cassim that, on the face of it, what occurred in this matter is precisely what occurred in *Afrox*[40] – the union first called out one division and later on called out others. Mr Cassim's response boiled down to the submission that the difference was that, in the present case, the union deliberately elected to refer a dispute not against the first respondent, but rather against CTP Stationary specifically and that it was bound by that election – and could thus not roll out the strike further without complying again with section 64. As Mr Cassim put it, in circumstances where CTP Stationary had been targeted, the first respondent (as a whole overall) had not been put on guard about the prospect of the strike spreading to other divisions. Along similar lines, Mr Cassim's heads of argument records the submission that it is apparent from the settlement agreement concluded on 8 June 2009 that only CTP Stationary was party to the primary dispute. (It is, however, noteworthy that the 'company' is defined in that agreement as 'CTP Stationary, a division of CTP Limited'.) Allied to the aforegoing, Mr Cassim also submitted that, for the purposes of section 64, the employer was actually CTP Stationary.

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[38] At 379H - 380C.
[39] *Free State & Northern Cape Manufacturers' Association* at para 23; *Plascon Decorative* at para 29; *Early Bird Farm* at para 42; *Equity Aviation* (LAC) at para 28. *Plascon Decorative* was cited with approval by the Constitutional Court in *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 ILJ 2549 (CC) (*SATAWU*) at paras 56, 69 and 76.
[40] Fn 31 above.

[133] In response, Mr van der Riet submitted, *inter alia*, that the fact that the employer's trading name was used in the referral for conciliation did not mean that the actual employer was not involved in the referral. In support of this, Mr van der Riet submitted, with reference to *Mathoe & another v BS Auto Service (Pty) Ltd t/a Kwaggasrand Motors*,[41] that it is trite law that the owner of a business trading under a trading name is the actual employer.[42]

[134] That, in the case of a strike, section 64 contemplates a referral by employees of a dispute involving their employer to conciliation is clear.[43] To my mind, in the referral in this matter, what the union sought to do was to refer a dispute against the employer of its members at CTP Stationary to conciliation. That the union described 'the other party' to the dispute as being CTP Stationary did not serve to make it the employer. It is clear from the documents, and it was confirmed in evidence, that the 'proprietor' of CTP Stationary is the first respondent. In the circumstances, it is the employer.

[135] Consistent with this, in the second application for an interdict, Holden stated as follows in para 6.2 of the founding affidavit regarding the dispute that was ultimately referred by the union to the statutory council:

> 'A dispute was subsequently declared between the second respondent [i.e. the employees] and *the applicant* [i.e. CTP Ltd, the first respondent herein] in consequence of which the dispute was referred to the statutory council … .' (Emphasis added.)

[136] In these circumstances, I am of the view that the referral was in substance against the first respondent and that, in line with *Afrox,*[44] the union was entitled to call out its members at other divisions without having to separately refer a dispute on their behalf to conciliation. Seen thus, the answer to Mr Cassim's contention that the first respondent (as a whole) was not put on guard that a strike could spread to other divisions is that – on a proper application of the law – it was put on guard, but failed to recognise this. (As

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[41] (1992) 13 ILJ 976 (LAC).
[42] At 977I - 978B.
[43] Although para 2 of LRA Form 7.11 provides for the insertion of the details of 'the other party', the blocks that follow require the referring party to tick whether the other party is, *inter alia*, an 'employer'. Consistent with this, section 64 is replete with references to 'the employer'.
[44] Fn 31 above.

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the analysis undertaken above reveals, all four of the disciplinary chairpersons failed to consider the *Afrox* line of judgments.)

[137] I am fortified in my conclusion by the recent judgment of the Constitutional Court in *SATAWU*,[45] which was handed down after argument was heard in this matter. The issue at stake in that matter was whether, in terms of section 64(1)(b), a strike notice by the majority union covered all employees or whether non-unionized employees had to give notice separately in order for a strike by them to be protected. The majority of the court found that notice by the majority union was sufficient.

[138] There are two passages from the majority judgment which are of particular relevance for present purposes. The first passage is this:

> 'The point of departure in interpreting section 64(1)(a) is that we should not restrict the right to strike more than is expressly required by the language of the provision, unless the purposes of the Act and the section on "a proper interpretation of the statute … imports them" [footnotes omitted]. The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used.'[46]

[139] This is important because the *Afrox* line of judgments is based on precisely this principle.

[140] The second passage is this:

> 'The regulatory scheme of the Act and the provisions of section 64 envisage only one strike in respect of one "issue in dispute" or "dispute". The definite article, "the", before the words "issue in dispute" and "dispute" in section 64(1)(a) and before the second use of the word "strike" in section 64(1)(b) makes this plain. "[T]he strike" in section 64(1)(b) can only be in relation to "the [unresolved] dispute" of section 64(1)(a). And if there can only be one strike in relation to one dispute, there seems to be little in language or logic to

[45] Fn 39 above.
[46] At para 55.

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suggest that more than one notice in relation to the single strike is necessary.'[47]

[141] By parity of reasoning, if there can only be one strike in relation to one dispute, then to require multiple referrals by groups of employees engaged in different divisions in respect of the same strike is equally incongruous (and is also not supported by the language of section 64(1)(a)).

The second alleged ground of illegality: the failure to obtain an advisory award

[142] A 'refusal to bargain' is defined in section 64(2) as including a refusal to agree to establish a bargaining council. The bargaining council demand herein thus qualified as a refusal to bargain, with the result that, in terms of the aforesaid section, the issuing of an advisory arbitration award was a procedural pre-condition to the strike being protected.

[143] In circumstances where it is common cause that an advisory arbitration award was not obtained, it follows that the strike by the individual applicants was unprotected as a consequence.[48] Although it was argued by Mr Cassim that this served to taint the entire strike, it seems to me that, properly construed, the strike was protected insofar as the individual applicants engaged therein in sympathy with the wage and 13th cheque demands made by the CTP Stationary strikers, but was unprotected in relation to the bargaining council demand. Put differently, if the first respondent had sought to interdict the strike by the individual applicants, it would not have succeeded overall, and, at best, would have secured an order that the individual applicants were not entitled to persist with the strike over the bargaining council demand.[49]

[144] Although I return to this in the context of the determination of the fairness of the sanction of dismissal, for present purposes it warrants mention that the strike at CTP Stationary (which was always considered protected and which was resolved by agreement without resort to dismissal) was also unprotected

[47] At para 65.
[48] *FGWU & others v The Minister of Safety & Security & others* [1999] 4 BLLR 332 (LC) at paras 31-33.
[49] *Unitrans Fuel & Chemical (Pty) Ltd v TAWUSA & another* [2011] 2 BLLR 153 (LAC) at paras 26-28; *Digistics (Pty) Ltd v SA Transport & Allied Workers Union & others* (2010) 31 ILJ 2896 (LC) at para 14.

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on this basis. The fact that the employees at CTP Stationary escaped dismissal, while the individual applicants were dismissed, gave rise to the union's inconsistency challenge addressed below.

The third alleged ground of illegality: no referral of dispute against the second respondent by employees engaged at CTP Gravure and Thuthuka Packaging

[145] Given my finding on the second issue for determination (see above), there is no merit in this alleged ground of illegality.

The fourth alleged ground of illegality: insofar as the strike at CTP Packaging was a secondary strike, it was unprotected because CTP Packaging got short notice of the strike

[146] While I accept the testimony of Backhouse that he only received the secondary strike notice (dated 5 May 2009) on behalf of CTP Packaging on 12 May 2009 and thus only received one day's notice of the secondary strike, given that I have found that the strike at CTP Packaging was a primary and not a secondary strike, there is also no merit in this alleged ground of illegality.

[147] Once it is accepted that the strike by the individual applicants was a primary strike, there was, in law, no need for the union to give the first respondent notice of the fact that the individual applicants were joining the strike over and above the notice given on 17 April 2009 in relation to CTP Stationary.[50]

Conclusion and summary under this head

[148] In conclusion and summary under this head, I find that the strike by the individual applicants was unprotected on account only of their failure to obtain an advisory arbitration award in terms of section 64(2). It follows from this that the dismissal of the individual applicants was not automatically unfair in terms of section 187(1)(a).

[50] Reference is made in this regard to the *Afrox* line of judgments referred to above.

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The fourth issue for determination: was the sanction of dismissal substantively fair?

Relevant legal principles

[149] The onus of proving that the sanction of dismissal was fair rest, of course, on the first respondent.[51]

[150] As a point of departure, it is convenient to quote section 68(5):

> '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.' (Emphasis added.)

[151] Item 6(1) of the Code of Good Practice: Dismissal ('the Code') provides, in turn, as follows:

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

[152] In addition to this, the general provisions of item 3(4), (5) and (6) of the Code are applicable. Item 3(4) provides that 'generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'. Item 3(5) provides, in turn, that 'when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances

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[51] Section 192(2).

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(including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself'. And item 3(6) provides that 'the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration'.

[153] Determining whether dismissal was an appropriate sanction thus involves three enquiries: an enquiry into the gravity of the contravention of the disciplinary rule; an enquiry into the consistency of application of the disciplinary rule and sanction; and an enquiry into factors that may justify a different sanction (commonly referred to as factors in mitigation and aggravation).[52]

[154] Recently, in *NUM obo Employees v CCMA*[53] (*NUM obo Employees*), the LAC affirmed the position that participation in an unprotected strike does not necessarily warrant dismissal:

> 'However, the unprotected nature of this strike is not a license to dismiss without a careful consideration of the surrounding circumstances. In determining whether those workers who participated in an unprotected strike should be dismissed, a number of considerations must be part of the decision. Item 6(1) of the Code of Good Practice provides as follows: … [see above].
>
> This provision of the Code affirms earlier law where the illegality of the strike did not automatically result in the dismissal of unprotected strikers.'[54]

[155] Along the same lines, a few years earlier, in *Hendor Steel Supplies (a division of Argent Steel Group (Pty) Ltd formerly named Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of SA and Others*[55] (*Hendor*), the LAC held as follows:

[52] See item 94 of the CCMA guidelines: misconduct arbitrations.
[53] [2012] 1 BLLR 22 (LAC).
[54] At paras 21-22.
[55] (2009) 30 ILJ 2376 (LAC).

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> 'Mr Redding correctly conceded that an unprotected strike did not automatically justify dismissal as the only appropriate sanction. Dismissal is manifestly the sanction of the last resort. [Authority omitted.] Hence there is a need to examine the arguments of both parties as to the manner and conduct of the strike to test whether dismissal was proportional to the misconduct.'[56]

[156] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[57] (*Sidumo*), the Constitutional Court determined how a commissioner (and this would apply equally to this court) should go about determining whether the sanction of dismissal is fair. In the majority judgment, the court held as follows:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record.
>
> To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'[58]

[157] Along similar lines, Ngcobo J held (in a separate concurring judgment in *Sidumo*) that the determination of the fairness of a dismissal involves a value judgment, which stands to be undertaken in this manner –

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[56] At para 8.
[57] [2007] 12 BLLR 1097 (CC).
[58] At paras 78-79.

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> '… fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.'[59]

[158] How the balancing requirement is to be applied in practice was the subject of the judgment of Tip AJ in *Theewaterskloof Municipality v SALGBC (Western Cape Division) and Others*:[60]

> 'Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair.'[61]

[159] In his article, *Dismissal for misconduct – Ghosts of justice past, present and future*,[62] Van Niekerk J puts things as follows:

> 'At the centre of the enquiry therefore is a need to balance the employer's interests (as expressed by the reasons for dismissal) with the employee's interests (as expressed by the basis of the challenge to the fairness of dismissal). Implicit in the enquiry is the assumption that both the employer and employee are the beneficiaries of the constitutional right to fair labour practices, and that the enquiry commences with the scales evenly balanced. It is for the commissioner, having regard to the relevant circumstances and

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[59] At para 180.
[60] [2010] 11 BLLR 1216 (LC).
[61] At para 8.
[62] Published in *Reinventing Labour Law*. Van Niekerk J terms this the 'justice as balancing approach' or 'balancing metaphor'. He is critical of this approach and goes on to contend for an alternative approach rooted in proportionality. His conclusion captures his thesis: 'A utilitarian analysis does not meet the demands that dignity and autonomy require – ultimately, in the process of weighing interests, it has permitted commissioners (and the courts) to make value choices that are controversial and which have not encouraged an open and candid consideration of conflicting interests. A more coherent concept of justice in dismissal requires the employer to establish that the sanction of dismissal is a rational response to its goals of economic efficiency, and that a relationship of reasonable proportionality exists between the sanction of dismissal and those goals. While not replicating the constitutional test of proportionality in relation to the limitation of fundamental rights, it is an approach that is more closely aligned to the constitutional values than that which is applied by the labour courts in the post-*Sidumo* era.'

after weighing all of the relevant factors, to determine where the balance finally falls.'[63]

[160] Given that the union relied on the contention that the individual applicants laboured under the misapprehension that their strike was protected (see below), there are two findings of the LAC which warrant mention. The first is this passage from *Coin Security Group (Pty) Ltd v Adams and Others*[64] (*Coin Security*):

> 'It was argued by Mr Trengove for the respondents that they *bona fide* but mistakenly believed their strike to be protected. Whilst a *bona fide*, and reasonable, yet mistaken, belief by strikers in the legality of their strike action may have a bearing on the fairness of any subsequent dismissals (especially if the illegality is technical) that is not the case in circumstances where strikers have been warned that their belief is mistaken. In those circumstances the strikers, as the collective entity that they are when they undertake concerted action, must bear the risk that their union is wrong and their employer is right. In the present case, the union and the respondents were warned on a number of occasions that, since they had the right to refer the underlying dispute to arbitration, their strike would be and was unprotected.'[65]

[161] The second and contrasting finding is this in *NUM obo Employees*,[66] in which the LAC considered the strikers' misapprehension to be strongly mitigating:

> 'Assuming in favour of appellants on both of these questions [i.e. that the strike was unprotected], it remains clear that second and further respondents genuinely believed the strike to be protected. The managing director of the appellant, Mr Daniel, conceded as much as is evident from the following passage of evidence when Daniel was under cross-examination: "And you understood that it was their belief that they were going on a protected strike - Absolutely. I knew that they believed that it was protected, but that was not my view."'[67]

[63] At 112-113.
[64] [2000] 4 BLLR 371 (LAC).
[65] At para 18.
[66] Fn 53 above.
[67] At para 10.

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[162] A further issue that requires mention is that, in order for the employer to satisfy the onus of proof that the sanction of dismissal was fair, it is encumbent on it to lead evidence to establish a breakdown in the trust relationship. As the SCA put it in *Edcon Ltd v Pillemer NO and Others*[68] (*Edcon*):

> 'In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage, Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair.'[69]

[163] Turning to the law on inconsistency, reference should be made to this often quoted passage from *SACCAWU and Others v Irvin & Johnson Ltd*[70] (*Irvin & Johnson*):

> 'Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy [authorities omitted].'[71]

[164] Recently, in *CEPPWAWU,*[72] the LAC confirmed that an employer does not act inconsistently where it only disciplines employees who it knows to have

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[68] [2010] 1 BLLR 1 (SCA).

[69] At para 23. The SCA held similarly in *Myers v National Commissioner of the SAPS* (425/2012) [2012] ZASCA 185 (29 November 2012) at para 24.

[70] [1999] 8 BLLR 741 (LAC).

[71] At para 29. Cited with approval recently in *CEPPWAWU v NBCCI & others* [2011] 2 BLLR 137 (LAC) (*CEPPWAWU*) at para 21.

[72] Fn 71 above.

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misconducted themselves, and takes no action in relation to employees against whom it has no evidence.[73] With reference to *Irvin & Johnson*,[74] the court went on to find as follows:

> '… where a number of employees are dismissed consequent upon a collective wrongful conduct, a wrong decision by the employer resulting in an acquittal of an employee who did commit the wrong can only be unfair if it is a result of some discriminatory management policy.'[75]

The parties' main contentions

[165] In argument, Mr Cassim advanced six main points in support of the contention that the sanction of dismissal was fair, namely that:

(i) firstly, the individual applicants embarked on a power play and pursued a strike in an interest dispute, with the employer being entitled to adopt remedial measures to protect its own legitimate interest;

(ii) secondly, the individual applicants spurned the opportunity to attend a disciplinary enquiry and advance reasons why they should not be dismissed and cannot now seek to address the court on matters which they had the opportunity to present prior to the decision by the employer to dismiss them;

(iii) thirdly, the strike action was marred by violence, with the effect of the final order granted by this court in the interdict applications being to confirm that the individual applicants participated in unlawful conduct;

(iv) fourthly, the individual applicants were assisted by the union, which was called upon to intervene but failed to do so, and had thus to bear the consequences of the union's approach in the matter along the lines of *Coin Security Group*;[76] and

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[73] At para 21.
[74] Fn 70 above.
[75] At para 21.
[76] Fn 64 above.

(v) fifthly, the union failed to pursue the matter timeously – this in circumstances where the union's statement of claim was delivered five months late, by which time, according to Backhouse, permanent replacements had been employed at CTP Packaging (it having waited out the 90 days provided for in section 191(11)(a) before doing so); and

(vi) sixthly, the strike had a negative impact on production.

[166] Mr van der Riet, in turn, relied on three main submissions in support of the contention that the sanction of dismissal was unfair:

(i) firstly, in circumstances where the CTP strikers were not dismissed, the dismissal of the individual applicants at the four divisions amounted to selective dismissal without there being any basis for differentiating between the two groups of employees;

(ii) secondly, the employer accepted that the union advised their members that the strike by the individual applicants was protected; and

(iii) thirdly, the employer had made out no case why it was necessary to dismiss the strikers at the stage that it did. The individual applicants were dismissed simply because the employer thought that the so called secondary strike was unprotected, with the dismissal being disproportionate to the strikers' misconduct. .

[167] In relation to the issue of inconsistency, Mr Cassim submitted in response, with reference to *Irvin & Johnson*[77] and *CEPPWAWU*,[78] that there are two reasons why the failure to dismiss the strikers at CTP Stationary was not unfair *vis-à-vis* the individual applicants:

(i) firstly, the union and CTP Stationary laboured under a *bona fide* misunderstanding that the strike was protected – it being submitted that, in the absence of a discriminating management policy having been established, there can be no inconsistency in circumstances where one

[77] Fn 70 above.
[78] Fn 71 above.

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group of employees is not dismissed for a reason that may be wrong, but is *bona fide*; and

(ii) secondly, the settlement agreement reached at CTP Stationary compromised the employer's right to take disciplinary action against the strikers for striking *per se* – it being submitted that the fact that a dispute was settled with some cannot give rise to an argument of inconsistency by others.

Evaluation and findings

[168] As set out above, on the prevailing authorities, this court is required to consider the totality of circumstances and balance the parties' interests in the process of exercising a value judgment on whether the sanction of dismissal was fair.

[169] A convenient point of departure is a consideration of the factors mentioned in item 6(1) of the Code, which serve as a basis to establish the gravity of the strikers' misconduct – this being the first enquiry that should be undertaken. Although the strike herein was not in response to any unjustified conduct by the first respondent, it is clear that the contravention of the LRA by the individual applicants was on the lower end of the continuum of seriousness and that substantial attempts were made to comply with the LRA. This is so for three main reasons: firstly, the contravention (i.e. the failure to obtain an advisory arbitration award) was of a procedural nature only, with the strike not being hit by any of the substantive limitations in section 65; secondly, there was a high degree of compliance with the provisions of section 64, in the form of a referral to conciliation, an attempt at conciliation, and the giving of 48 hours' notice of the strike;[79] and, thirdly, the failure to obtain an advisory arbitration award related to only one of the strike demands, with the strike being otherwise protected. The aforesaid considerations operate so as to establish that the misconduct of the individual applicants was not particularly

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[79] This all in relation to CTP Stationary, which served as a basis for the strike by the individual applicants.

serious. (Judged in its overall context, it may well be described as a technical contravention of the LRA.)

[170] On the facts analysed above, the individual applicants were dismissed for having engaged in an unprotected secondary strike – a dismissal which the first respondent now seeks to defend[80] on the basis that the individual applicants were actually engaged in a primary strike, which was unprotected (in part) for a reason that did not emerge until ten months after their dismissal (i.e. that an advisory arbitration award was not obtained). Assuming in favour of the first respondent that it is permissible for it to do so in the context of this being a hearing *de novo*,[81] what cannot be lost from sight is the real possibility that – if the correct legal position had been known at the time – the individual applicants may not have been dismissed at all, particularly in the absence of the strikers at CTP Stationary being dismissed.

[171] Significantly in this regard, neither Holden nor Backhouse suggested in evidence that dismissal would have followed on the correct assessment of the legal position. This is not surprising as it would, of course, have been exceedingly difficult for them to defend the individual applicants' dismissal in evidence on the basis of something which was not thought of at the time of dismissal. Allied to this, neither Holden nor Backhouse led any material evidence to establish a breakdown in the trust relationship as a consequence of the individual applicants' misconduct, as required by *Edcon*.[82]

[172] Having assessed the gravity of the individual applicants' misconduct, the next enquiry is into the consistency of application of the disciplinary rule (prohibiting unprotected strike action) and sanction. Taken together *Irvin & Johnson*[83] and *CEPPWAWU*[84] establish that an employer will not be guilty of contemporaneous inconsistency where the decision not to dismiss some

[80] In the light of this court's findings on the basis for the strike being unprotected.
[81] It is, however, arguable that this amounts to the first respondent seeking to justify the dismissal on a basis different to the actual reason for dismissal – see *Fidelity Cash Management Service v CCMA & others* [2008] 3 BLLR 197 (LAC) at para 32. But no finding is made in this regard given that the issue was not raised by either party.

[82] Fn 68 above.
[83] Fn 70 above.
[84] Fn 71 above.

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employees (while dismissing others) was an aberration (and should thus not be held against it) or was caused by the fact that the employer was unaware that they had misconducted themselves or was otherwise unable to prove that they had done so – provided, in both instances, that the employer acts *bona fide* and does not consciously advantage the one group over the other.

[173] From an inconsistency point of view, the present matter is unusual because at the time of the strike, the first respondent was legitimately unaware that the strike by *either* group of employees (i.e. the CTP Stationary strikers and the individual applicants) was unprotected on account of a failure to obtain an advisory arbitration award. The moment critique (which sets this case apart from typical inconsistency challenges and defences) is when the first respondent elected in its pleadings and before this court to raise this ground of illegality – a ground which it then came to realise rendered the CTP Stationary strikers and the individual applicants guilty of precisely the same misconduct. In taking the point and seeking to uphold the dismissal of the individual applicants on the basis thereof, while taking no action against the CTP Stationary strikers,[85] the first respondent consciously elected to hold its historical misapplication of the law against the individual applicants, but not against the CTP Stationary strikers.

[174] In my view, *Irvin & Johnson*[86] and *CEPPWAWU*[87] do not assist the first respondent, not only because this case actually does not fall into either of the exceptions set therein, but also because it is hard to conceive of the first respondent being *bona fide* in circumstances where the parity principle cried out for the first respondent to either not take the point or not rely on it in seeking to uphold the sanction of dismissal imposed on the individual applicants, when the CTP Stationary strikers got away scot free. This is particular so given that the CTP Stationary strikers were on an unprotected strike for six weeks (23 April to 5 June 2009) in comparison to the individual applicants whose strike endured for between one and 12 days. I accordingly

[85] The first respondent may have been able to resile from the settlement agreement on this basis. But if it could not do so, the parity principle dictated that it should then not take the point against the individual applicants or otherwise not press for their dismissal on the basis thereof.
[86] Fn 70 above.
[87] Fn 71 above.

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find that the dismissal of the individual applicants was inconsistent *vis-à-vis* the CTP Stationary strikers.

[175] The last of the three enquiries into the fairness of the sanction of dismissal involves a consideration of aggravating and mitigating factors. Although they do not necessarily all fit under the heading of aggravating factors, it is convenient to here deal with the six main submissions made by Mr Cassim in advancing the first respondent's case that the sanction of dismissal was fair. I deal with the points in the order in which they were raised and using the same numbering.

(i) I accept the first point as a matter of principle. But this, of course, did not absolve the first respondent of its duty to act fairly in dismissing the individual applicants.

(ii) I do not agree that because the individual applicants did not attend their disciplinary enquiries they are now, in effect, barred from contesting the fairness of the sanction of dismissal. It is trite that this is a hearing *de novo* and that this court must itself decide on the fairness of the sanction of dismissal on the basis of the evidence before it.

(iii) While I accept that the strike was marred by violence and that a final order was obtained against the individual applicants in the interdict applications, this cannot, in my view, be elevated to the contention that each one of the individual applicants necessarily participated in the violence, such as to aggravate their misconduct. Indeed, a perusal of the second and third interdict applications does not reflect that the first respondent established this at all. It also warrants mention that, despite having obtained a final order against the CTP Stationary strikers, they were not all dismissed on account of having misconducted themselves during the strike. Instead, they were all allowed to return to work following the resolution of the strike, with the first respondent then having brought charges of misconduct against and dismissed those of them who it could identify as having misconducted themselves.

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(iv) I do not consider the passage from *Coin Security*[88] quoted above as a basis to sustain the fairness of the sanction of dismissal in the circumstances of this matter for the following reasons: no warning was issued to the individual applicants engaged within CTP Packaging and Thuthuka Packaging before they were called to a disciplinary enquiry and dismissed; the warning / ultimatum issued at CTP Web and CTP Gravure was based on the strike being unprotected on an erroneous basis; and, allied to the aforegoing, the individual applicants were never warned that their strike was unprotected (in part) only on account of an advisory arbitration award not having been obtained – this because (different to *Coin Security*[89]) the first respondent did not know this at the time.

(v) I do not consider the fifth submission as being relevant to the fairness of the sanction of dismissal – it rather being relevant to the issue of relief (see below).

(vi) While I do accept that the strike caused a loss of production and that this is potentially aggravating, the submission takes no account of the fact that the strike by the individual applicants was in part protected, with the result that such loss was not necessarily caused unlawfully.

[176] In short, in my view, the first respondent's main submissions on sanction do not serve to establish any factor that substantially aggravates the gravity of the individual applicants' misconduct.

[177] Turning now to the issue of mitigating factors, there are two of some significance. The first is that there was no evidence presented of the individual applicants having any previous disciplinary record in relation to unprotected strike action. The second is that, as submitted by Mr van der Riet, it is clear that the union was of the view that the strike was protected, and that this

[88] Fn 64 above.
[89] Fn 64 above.

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would have been conveyed to the individual applicants. Reference is made in this regard to *NUM obo Employees.*[90]

[178] Although neither party contended for a different outcome in relation to the different divisions or placed any particular reliance on the duration of the strike and the handling thereof, the following warrants repetition: the strike at CTP Packaging endured for one day and the strikers were dismissed without an ultimatum; the strike at Thuthuka Packaging endured for eight days and the strikers were dismissed without an ultimatum; the strike at CTP Web endured for seven days and the strikers were issued with a one-day ultimatum; and the strike at CTP Gravure endured for 12 days and the strikers were issued with a two-day ultimatum / final warning. While it is so that the misconduct of the strikers at CTP Gravure is capable of being construed as more serious than that of the strikers at CTP Packaging (the dismissal of whom borders on the alarming), this does not detract from the overall analysis undertaken above. (It warrants repetition that the unprotected strike at CTP Stationary endured for six weeks.)

[179] To sum up, the three enquiries applicable to the determination of sanction reveal that: individual applicants were not guilty of particularly serious misconduct (such as may typically warrant dismissal for a first offence); their dismissal was inconsistent *vis-à-vis* the CTP Stationary strikers (whose misconduct was more serious than theirs); and there exist no material factors in aggravation warranting the sanction of dismissal for a first offence, while there are, at the same time, significant mitigating factors in favour of the individual applicants.

[180] When the first respondent's interests (as expressed by the reason and motivation for the dismissal) are balanced up against the individual applicants' interests (as expressed by the basis for the challenge to the fairness of the dismissal),[91] this is clearly a case where the balance finally falls in favour of the individual applicants. To borrow from the words of the LAC in *Hendor*:[92]

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[90] Fn 53 above. See the quotation at para 161 above.
[91] See para 159 above.
[92] Fn 55 above.

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> 'In summary, the use of the most extreme sanction, dismissal in this case was manifestly disproportionate to the "misconduct" of the second and further respondents, for the reasons that have been outlined.'[93]

[181] In the result, the dismissal of the individual applicants is held to have been substantively unfair.

[182] I should add that even if I am wrong in finding that the strike by the individual applicants was only unprotected on account of an advisory arbitration award not having been obtained, I would nevertheless not have upheld the fairness of the sanction of dismissal in the present matter.

<u>The fifth issue for determination: was the dismissal of the individual applicants procedurally fair?</u>

[183] In argument, Mr van der Riet contended that the dismissal of the individual applicants was procedurally unfair for two reasons: firstly, because there was no reason for not allowing the union delegation who arrived at the first disciplinary enquiry at CTP Packaging to attend the enquiry; and, secondly, because the union's request for the disciplinary enquiries to be suspended 'until the legal strike was resolved' should have been acceded to.

[184] I am not persuaded by either of these grounds of compliant. Backhouse explained why he did not consider it appropriate to have a wider union delegation at the disciplinary enquiry at CTP, which explanation is accepted. It was also in keeping with the prevailing authorities[94] for the first respondent to seek to conduct a disciplinary enquiry during the course of the strike before resorting to dismissal, and it was under no obligation to suspend same pending the resolution of the 'legal strike', when the legality of the strike was the very subject of the disciplinary enquiry.

[185] In the result, the dismissal of the individual applicants is held to have been substantively unfair.

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[93] At para 14.
[94] *Modise & others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC).

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The sixth issue for determination: appropriate relief

[186] In circumstances where the dismissal of the individual applicants has been held to have been substantively unfair, they must be reinstated or re-employed unless any of the applicable exceptions listed in section 193(2) apply.

[187] In seeking to ward off reinstatement (either on the basis that a continued relationship would be intolerable or that reinstatement would not be reasonably practicable), the first respondent relied on the following:

(i) the violence that occurred during the course of the strike;

(ii) the fact that permanent replacements were hired at CTP Packaging after the elapse of the 90-day period provided for in section 191(11)(a); and

(iii) the elapse of time since the dismissal of some 3 ½ years, and the fact that the union was to blame for some of the delay.

[188] To my mind, none of these factors is a sufficient basis to deprive the individual applicants of the primary statutory remedy in unfair dismissal disputes of reinstatement.[95] The issue of the strike violence and the manner in which the first respondent would be at liberty to deal with it has been dealt with above. The fact that permanent replacements have been employed does not *per se* render the reinstatement of the individual applicants not reasonably practicable,[96] and the same applies to the elapse of time of 3 ½ years since the dismissal of the individual applicants. On both of these scores, the first respondent led no evidence to establish any impracticability.[97]

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[95] *Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC) (*Equity Aviation* (CC)) at para 36.
[96] Indeed, in virtually all mass dismissal cases, the workforce has been replaced by the time of the trial.
[97] *Mediterranean Textile Mills (Pty) Ltd v SACTWU & others* [2012] 2 BLLR 142 (LAC) (*Mediterranean Textile Mills*) at para 29.

[189] In *Republican Press (Pty) Ltd v CEPPWAWU & Gumede and Others,*[98] the SCA held as follows:

> 'In the present case, the passage of six years from the time the workers were dismissed, all of which followed consequentially upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate or re-employ the workers.'[99]

[190] In the present matter, the delay was significantly less than six years,[100] and the union can by no means be blamed for any material portion of the delay beyond the initial five-month delay in the delivery of its statement of claim.

[191] In all the circumstances, an order of reinstatement is appropriate.

[192] Turning now to the issue of back-pay, the court has the discretion to determine the extent thereof (or put differently, the extent of the retrospective effect of an order of reinstatement).[101] As held in *Equity Aviation* (CC),[102] in the exercise of its discretion -

> '… a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring, however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded.'[103]

[193] Recently, in *Mediterranean Textile Mills*,[104] the LAC overturned on appeal a judgment of this court in which dismissed strikers had been reinstated with full back-pay of 27 months' salary, and reduced the back-pay to 12 months' salary. It did so not on account of any delays in the determination of the matter, but rather on account of the fact that this court (according to the LAC) had not taken into account the company's precarious financial position and

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[98] [2007] 11 BLLR 1001 (SCA).
[99] At para 22.
[100] In *Mediterranean Textile Mills* at para 40, the LAC held that a delay of some 27 months between dismissal and reinstatement was 'not an essential factor in determining whether or not retrospective reinstatement was the appropriate sanction in this case'.
[101] *Equity Aviation* (CC) at para 36.
[102] Fn 95 above.
[103] At para 43.
[104] Fn 97 above.

did not take cognisance of the employees' conduct which deserved some form of censure as a mark of the court's disapproval thereof.[105]

[194] Another judgment of the LAC in point is *Seardel Group Trading (Pty) Ltd t/a Cape Underwear Manufacturers v SACTWU and Others*,[106] in which the LAC reduced this court's award of back-pay to dismissed strikers reinstated by it from 12 months' salary to three months' salary. It did so on account of the fact that the employees had been on a final warning at the time of the strike and on account of the employer's precarious financial position.

[195] In the present matter, however, the first respondent did not lead any evidence of financial distress. This then leaves three main factors militating against a full award of back-pay: firstly, the initial delay of five months in the delivery of the union's statement of claim; secondly, the fact that a number of the individual applicants have secured some alternative employment since their dismissal;[107] and, thirdly, the fact that a light form of censure is warranted. At the same time, it must be borne in mind that to deprive the individual applicants of too greater extent of back-pay would be to place them in a substantially worse position than the strikers at CPT Stationary who were not dismissed, despite also having engaged in an unprotected strike.

[196] In all the circumstances, it would, to my mind, be just and equitable to reinstate the individual applicants with effect from 1 June 2010 (effectively a year after their dismissal) and to provide that any monies earned by them since their dismissal should be deducted from the back-pay due to them.

<u>The individual applicants</u>

[197] Before turning to the order that I intend to make, it is necessary to identify the individual applicants.

[198] Although there are 212 individual applicants cited in the heading to this matter, there are actually 222 individual applicants – they being the 212 listed in annexure 'A' to the statement of claim and the 10 listed in exhibit 'G4'.

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[105] At para 45.
[106] [2009] 11 BLLR 1051 (LAC).
[107] This appears from the affidavits contained in exhibit 'G'.

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[199] Of the 222 individual applicants, five of them are deceased – they being listed in exhibit 'H'.

Order

[200] In the premises, the following order is made:

1) the dismissal of the individual applicants is declared procedurally fair, but substantively unfair;

2) the first respondent shall pay to the first applicant 12 months' remuneration in respect of each of the deceased individual applicants;

3) the first respondent shall reinstate the balance of the individual applicants with effect from 1 June 2010 without any loss of benefits;

4) any amounts earned by the balance of the individual applicants since their dismissal in May 2009 shall be deducted from the back-pay due to them;

5) the balance of the individual applicants shall report for duty on 9 January 2013;

6) the first respondent shall pay the costs of the action.

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A.T. Myburgh

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANTS:	JG van der Riet SC on the instruction of Cheadle Thompson & Haysom
FOR THE RESPONDENTS:	NA Cassim SC and F Boda on the instruction of Fluxmans Inc

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