IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
NOT REPORTABLE
Case Number: C658/2008
In the matter between:
SACTWU First Applicant
L M DLAZA & 53 OTHERS Second & Further Applicants
and
AHLESA BLANKETS (PTY) LTD Respondent
JUDGMENT
MOSHOANA AJ
INTRODUCTION
[1] This is a referral in terms of Section 191 of the LRA. The respondent, a blanket manufacturing company dismissed its employees for participation in an unprotected strike action. The demand was to have the respondent not to 2

implement the two weeks leave policy and or practice. The respondent had introduced a short time in terms of the applicable collective agreement. In terms of the collective agreement, there is no obligation to consult on the part of the respondent. The first applicant held a view that the practice was to hold a consultation with it before implementation. Decision on this issue-whether consultation was required or not- is of no moment, given the view I take at the end of the matter. The strike lasted for about eight hours. There were three shifts involved. The morning shift was to commence at 07H00 and complete at 15H00. The afternoon shift was to commence at 15H00 to 22H00 and the night shift to commence at 23H00 to 07H00.

[2] In terms of the two weeks leave policy, which was to be implemented from the 17th, a number of employees were not required to work for two weeks from the 17th. They were to be followed by another batch in two weeks to come. On 17 June 2008, employees gathered at the canteen and refused to commence work until the system is changed. The effect of the two weeks leave was that in December employees would take one week leave as opposed to three weeks leave. This did not suit employees from the Eastern Cape, who only finds an opportunity to see family during that time of the year. Whilst gathered at the canteen a first verbal ultimatum was issued by a factory manager for the employees to return to work. This was not heed. Four written ultimatums were issued. At 17H00, all the employees left the premises as they were told that they were dismissed at or around 16H00. The night shift did not turn up at all. 3

[3] The following day they reported at the premises but were refused access. A letter was dispatched to the first applicant confirming the dismissal. Aggrieved by the dismissal, the applicants launched this referral. At pre-trial, the parties agreed that there are three categories of dismissed employees. About 44 employees were dismissed for participation in a strike action. 24 were dismissed for so-called leave absconsion and 14 for absconsion. The ones dismissed for the so-called leave absconsion are not before me. In respect of the absconsion ones I raised an issue of jurisdiction with the parties at the commencement of the trial.

BACKGROUND FACTS AND EVIDENCE.

[4] Both parties chose to lead evidence of one witness each. It is worth mentioning at this stage that for the respondent the evidence of the supervisor who issued the first verbal ultimatum was necessary but not tendered for reasons unknown to the court. For the applicants, the evidence of the shop stewards was necessary but not tendered for reasons also unknown to the court. For the respondent's favour, the evidence that the supervisor issued a verbal ultimatum was not challenged. However, he would have assisted the court on the issue of the mood and behaviour when the ultimatum was issued taking into account that this was at the very beginning of the action. However, for the applicants the evidence of the shop stewards was critical in view of the evidence by Mr. Buckle that they agreed to the two weeks leave arrangement.

[5] The respondent's business is subject to seasonal variations in demand for blankets. Respondent services big corporations like Woolworths. Between May 4

and September months there is always slackness in the business of the respondent. The only way to deal with that was to introduce short times. It is common cause that there is no obligation to consult. The dispute centred on the practice since 2006. According to Buckle, the practice has been to discuss the details with the shop stewards and only inform the first applicant thereafter. According to De Bruyn, this issue was a subject of consultation. When the issue was introduced, he (De Bruyn) had a telephonic discussion with Buckle. The terms of the discussion were reduced to writing in a letter of 3 July 2008. The essence of which was that the short time would be a day or two as opposed to straight two weeks. Buckle conceded that the two weeks issue does not appear in the letter but he discussed that with the shop stewards who did not have an objection thereto. All he did on 12 June 2008 when he met De Bruyn at the national wage negotiations was to remind him that the two weeks would be starting. However De Bruyn testified that the issue was mentioned to him informally and he requested it to be done formally. He was not aware of an agreement by the shop stewards. The shop stewards knew only of the terms as set out in the letter of 3 July 2008.

[6] On the morning of the 17th June 2008, Buckle received a call from his supervisor, who advised him that employees are gathered at the canteen and are refusing to work. He instructed him to issue a verbal ultimatum for them to return to work. He did so but was allegedly ignored. At or around 08h45, Buckle arrived and found the employees at the canteen not working. He spoke to the shop stewards advising them that the strike was unprotected. He then issued the first ultimatum, calling the employees to return to work at 09H45 or face dismissal. This he 5

handed to the shop stewards. Later he picked up the phone and called De Bruyn to come to the premises. On arrival, De Bruyn was told of the conduct of the employees. De Bruyn also told the employees that their actions amounted to an unprotected strike. They did not return to work nonetheless.
[7] At or around 11H45, an almost similarly worded ultimatum was issued for the employees to return at 13H45. This was not heed. At or around 15H00, another similarly worded ultimatum was issued calling the employees to return at 16H00. At or around 17H00 all the employees left the premises as they were dismissed. Between 09H00 to about 16h00, De Bruyn and Buckle attempted to find a solution. The proposals of the applicants were not acceptable to the respondent.
[8] Buckle stayed on to see if the night shift reported. Six employees were to report and only one did, who allegedly feared to be fired. Five did not report. No ultimatum was issued in respect of the night shift workers owing to the fact that the employees concerned did not report and a fax to the first applicant's offices would not have been attended to by anybody at that time of the night.
[9] On 18 June 2008, the individual applicants reported at the premises and were refused entry. The respondent sought and obtained an interdict against the employees. A letter was addressed to the first applicant advising it of the dismissal. A right to appeal was extended. A collective appeal took place, the outcome of which was confirmation of dismissal. About 15 employees were reinstated after they pleaded their own individual cases days before the appeal hearing. The applicants were aggrieved by the dismissal and referred this 6

dispute. On 5 August 2008, the CCMA could not resolve the dispute, hence the referral to this court. With regard to the absconsion, Buckle testified that those employees were not on short time but decided to not tender their services for three days.

[10] The cross-examination of Buckle largely concentrated on the fact that the respondent was at all times aware of the unhappiness by the employees yet it acted with haste. It should have suspended the employees with a view to hear them the following day or so. There were no demonstrable losses. On that Buckle referred to fixed costs lost, production losses and late deliveries. Customers like Woolworths would go to the extent of cancelling orders.

[11] On the other hand, cross-examination of De Bruyn was characterised by accusations that certain versions were not challenged. He was adamant though that the two weeks issue was not discussed with him at all. He awaited a formal meeting. He was informed by employees and shop stewards that it was to take effect. He was not present at the meeting where a decision was taken to tender services on 17th June 2008 and hold discussion with the respondent to seek an understanding on the issue. He was only told by the shop stewards as to what happened at that meeting.

ISSUES REQUIRING DECISION BY THE COURT.

[12] In the minutes, the parties raised a number of disputed facts. Given the view I take at the end, some may not require an in-depth consideration. Others were 7

resolved before commencement of trial, the issue of good standing members was one such. The issue whether there was a historical practice is to my mind of no consequences. I am prepared to accept that the practice was as testified by Buckle. This is, to discuss with the shop stewards. De Bruyn accepted in this regard that when he had discussions with Buckle before 3 July 2008, he was later to be advised of the agreement with the shop stewards. This clearly supports the evidence of Buckle that in the past he will discuss with the shop stewards.

[13] Again whether the practice was complied with is of no moment too. However, the only evidence before court is that of Buckle. The shop stewards did not testify to dispute the fact that he discussed the issue with them. Moreso, in his testimony, he discussed that with them before the letter of the 3rd of July 2008, which as conceded does not contain the two weeks issue. On the probabilities, the practice was complied with. On the periods of business, I have no other evidence to suggest that Buckle was not truthful when he testified that December is the busiest.

[14] Whether there was short time or compulsory leave? The evidence of Buckle was that in asking the employees to take two weeks leave he was doing so because of the slackness of trade. He was not challenged on this. The applicants' contention is that one or two days is acceptable but two weeks not. The collective agreement does not set out the number of days that will qualify as short time. Therefore any less work time would by definition amount to short time. Of course if one has regard to the letter of 3 July 2008, it seems that the short time was to take the shape of one or two days as contended by the first applicant. However, 8

the complication is that the evidence of Buckle that when he discussed with the shop stewards the issue was two weeks. Yes on the face of it, it appears to be forced leave but the evidence of Buckle, which could have been contradicted by the shop stewards remains a stumbling block. Equally the question whether it was done on a unilateral basis and for reasons related to the demands, the uncontradicted evidence of Buckle sticks out like a sore thumb.

[15] The issue of consultation in June 2007 is irrelevant. According to both Buckle and De Bruyn discussions happens with the shop stewards. Buckle said it was done like that since 2006 and he was not challenged. De Bruyn suggested that it was for the first time that the two weeks was introduced. This he said after Buckle had testified and was not challenged. The fact that discussions took place with the shop stewards was testified to and not contradicted. De Bruyn relied on what the shop stewards told him. Therefore his evidence on that score is not admissible.

[16] The informal discussion of 12 June 2008 takes the matter no further in the light of uncontradicted evidence by Buckle that he discussed the issue with the shop stewards. According to him he only reminded De Bruyn. Of course De Bruyn disputes this. However, having accepted the version of Buckle that he discussed the issue with the shop stewards; it seems probable that he only reminded De Bruyn. It became common cause that the short time commenced on the week of the 16th June 2008. The evidence revealed that employees gathered at the canteen and refused to work. No other evidence of acts of misconducts was lead. The question of who tendered and did not tender seem academic. Equally the refusal and acceptance of the tender is academic. 9

[17] No shred of evidence was led with regard to request for documentation regarding the need to implement the short time. All what the court heard was the toing and froing when proposals were exchanged. None of the witnesses who testified before me was asked about documents pertaining to the need to implement the short time. At best Buckle gave oral evidence as to the need for the introduction of short time.
[18] As to the legality of short time and or compulsory leave, none of the parties suggested that the exercise is unlawful, in particular the applicants. According to uncontested evidence of Buckle, what was introduced was short time and not compulsory leave as it were. That being so the issue of legality does not occur. Fact that the second to further applicants embarked on unprotected strike is common cause according to *Mr Whyte* appearing for the applicants. The issue whether dismissal was an appropriate sanction will be considered later. The same applies to the fair hearing issue.

ARGUMENT

[19] Both parties submitted written arguments. They are not worth repeating. In addition, parties made oral submissions. *Rautenbach* for the respondent argued that in deciding this matter, the court should not be guided by the duration of the strike, which was for eight hours, but by the fact that the applicants' refusal to work amounted to defiance of authority. The individual applicants *threw down the gauntlet*, he submitted. At all times they knew and were advised that the strike is 10

unprotected and may lead to their dismissal, so the argument went. Regarding the night shift employees, he argued that although they were not specifically served with ultimatums, having being present from the morning they should have been aware of what the consequences would be. They made common cause with the morning and afternoon shifts, so he argued. The night shift employees did not testify before court to set out the reasons why they should not have been dismissed. They had an opportunity on appeal but did not make use of it.

[20] *Whyte* for the applicants argued that the decision to dismiss was rushed. The employees were not allowed to *sleep on it* so to speak, he argued. He emphasised that one of the factors when considering the seriousness of the contravention of the LRA, is the duration of the strike. He sought reliance from the judgments of this court and the LAC. He argued that the court must sympathise with the individual applicants given that the respondent acted over hastily. On procedure, he argued that in line with *Modise Spar* judgment, the individuals should at least have been suspended and then brought to a hearing. The toing and froing did not deal with whether the employees should be dismissed or not but with an attempt to find a solution to the two weeks issue. The respondent knowing full well that the two weeks issue had caused an unhappiness in the past should have treaded carefully and not cause confusion, so he argued. It was possible for the respondent to have held a hearing before dismissal. A hearing after dismissal is unfair in his argument. There was no evidence of breakdown of relationship, therefore dismissal was inappropriate. A final written warning would have been an appropriate sanction. In substantiation of an argument that the evidence of Buckle on the agreed two weeks should be reject as being 11

improbable, he argued that the letter to De Bruyn did not make mention of it and if the shop stewards knew, the employees would have downed tools on the 12th June 2008. He referred to failure to call the shop stewards as witnesses a *calculated risk* the applicants took.

ANALYSIS OF EVIDENCE AND ARGUMENT.

[21] It is common cause that the strike action in which the individual applicants participated in was unprotected. I may pause and say this aspect was agreed upon in the pre trial meeting. However, it is not clear to the court how could it have been said and agreed to that the night shift employees also participated in the strike action. At 17h00, the evidence revealed that those who were gathered at the canteen left since they were dismissed. The five night shift employees just did not report for duty at the time their shift commenced. According to Buckle once they did not he dismissed them on the 18th June 2008. Nonetheless the applicants agreed that they participated in the strike action. I suppose, *Rautenbach* is right when he argued that they made common cause with the actions of the others, therefore they "participated". The meaning of participate is "*to take part in or become involved in an activity.* The evidence that they were there from morning, much as it has not been sufficiently disputed, in my mind does not mean to participate within the context of the Act. At best they joined in the strike. The one who reported for duty and was not dismissed also joined the others at the canteen. The fact that she reported for duty at the time the shift commenced can only mean she did not participate in the strike action. Same would have been the case for the five had they reported for duty at 23H00. The 12

fact that in the day they joined others does not mean they participated within the meaning of the Act. In my view, the participation should be in tandem with failure to resume duty when so obliged. The ultimatums issued were meaningless to them. Even if they were to heed them, they would not have resumed work at the appointed times.

[22] In terms of item 6 (1) of Schedule 8, participation in a strike that does not comply is misconduct. The common cause fact means that all the individual applicants committed misconduct. In terms of Section 188 of the LRA, a reason for dismissal is fair if it is related to an employee's conduct. Section 188(2) prescribes that any person, a judge contemplated too, considering whether or not the reason for dismissal is a fair reason must take into account any relevant *code of good practice* issued in terms of the Act.

[23] In *casu,* the relevant provisions are those of item 6 (1) and 7 (a) (iv). Starting with item 6 (1), it provides that the substantive fairness of dismissal in these circumstances must be determined in the *light of the facts* of the case including the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer. The three factors are to be considered in the light of the facts of the case. Therefore I cannot agree with *Rautenbach* that the fact that a strike action was for a short duration is not an important consideration. The facts of this case are such that the strike was for duration of eight hours at the time when the respondent was experiencing slackness in trade, hence the need to not use all the available resources. The employees reported at the premises and sat at the 13

canteen until they were dismissed. There was no violence at the canteen. The above make up the facts of this case, which ought not to be ignored.
[24] I agree that failure to comply with the provisions of the Act is serious in itself. If it was the only factor to be considered, I would agree with *Rautenbach* that sympathising, by reinstating employees, who contravenes the Act is some form of encouragement to take the law into own hands. Of course when considering the question of contravention, one bears in mind that the Constitution guarantees workers a right to strike. There has been no attempt to comply with the Act. The strike was a wild cat. The decision to withdraw labour was taken on the 13th June 2008 at a meeting in the township. However, it seems so that when the employees resorted to report at the canteen they may have had the intention to resume duties if their demand was met. Then the question is-was the respondent unjustified in implementing the two weeks leave policy? *Rautenbach* argued that unjustified in this instance should be referring to an egregious conduct. The implementation of an agreed two weeks leave policy cannot be such, he argued.
[25] An unjustified conduct would be one that is unfair or unnecessary as it were. It does not need to be bad *per se*. Before me there is unchallenged evidence by Buckle that there was a commercial rationale for the two weeks leave policy. This policy was entering its third year at the time, although De Bruyn gave a different version, which I reject. Most importantly, the shop stewards agreed to it before implementation. The applicants took a *calculated risk* not to testify in order to dispute this. In my mind the strike was not in response to unjustified conduct by the respondent. 14

[26] This being a misconduct matter, I ought to consider whether dismissal was an appropriate sanction for the contravention. (See *Hendor Steel Supplies v National Union of Mineworkers of SA and Others (2009) 30 ILJ 23376 (LAC) and W G Davey (Pty) Ltd v Numsa 1999 (3) SA 697 (SCA))*. Determining appropriateness involves own sense of fairness. There may a number of factors to be taken into account in that exercise. An attempt to provide a closed list would be a futile exercise. In the matter before me the duration of the strike weighed heavily with me. The fact that there was no violence also played a major role in my determination. I agree with *Whyte* that the respondent acted with haste. By so saying, I do not wish to determine what would be an appropriate time to wait before dismissing. A strike for eight hours could in appropriate circumstances justify dismissal. In this matter, the respondent was experiencing slackness of trade. The respondent could, as argued by *Whyte,* have waited until the following day at least. The situation of night shift employees was worse. They were dismissed the following day without any ultimatum directed to them to resume work. Dismissing the individual applicants was clearly disproportionate with their actions. Where dismissal is not appropriate as a sanction, the dismissal is bound to be substantively unfair. The issue of procedural fairness of the dismissal becomes academic. Suffice to mention that the dismissal of the morning and afternoon shift was procedurally fair but not that of the night shift employees.

[27] The primary remedy for substantively unfair dismissal is reinstatement. The applicants are seeking it. No evidence was led to suggest that continued employment relationship would be intolerable. Buckle was prepared to continue 15

with employment relationship had they heed the 16H00 ultimatum. Fifteen or so of the employees who participated were reinstated. The fact that they had an acceptable explanation does not detract from the fact that they were in the same misconduct with the employees who remained dismissed. Therefore no impediment exists for reinstatement. However the individual applicants deserve a punishment. It is so that they completely ignored the Act. They ignored advice from their union. To allow reinstatement to operate from 17/18 January 2008 would be to encourage such conducts in future. Therefore allowing reinstatement to take effect on 1 December 2009 would not be excessive to use the words of His Lordship Davis JA in *Hendor*. Unlike the employees in *Hendor*, there was no *bona fide* believe that the strike was protected. Their union official, much as he found reason in their demand, admonished them that their conduct is unprotected.

[28] On the issue of costs, I favour the approach in *NUM v Ergo.* I would not make an order as to costs.

[30] In the result, I make the following order:

[30.1] the dismissal of the individual applicants is substantively unfair but procedurally fair in respect of the morning and afternoon shift. The dismissal of the night shift employees is both substantively and procedurally unfair. 16

[30.2] the respondent is ordered to reinstate the individual applicants with effect from 1 December 2009, without loss of benefits from the effective date of reinstatement.
[30.3] there is no order as to costs.

_____

G.N MOSHOANA
Acting Judge of the Labour Court
Date of Hearing: 8 and 12 March 2010
Date of Judgement: 19 March 2010

APPEARENCES

For the Applicant: Mr Whyte of Cheadle Thompson and Haysom Inc, Cape Town.
For the Respondent: Adv Rautenbach instructed by M Z Barday and Associates, Athlone.