

SOUTH AFRICA / JUDGMENT

Bam and Others v BME (a member of Omnia Group (Pty) Ltd) (JS1181/2013) [2021] ZALCJHB 419 (17 November 2021)

[2021] ZALCJHB 419

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

JS1181/2013

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THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JS1181/2013

Of interest to other judges

In the matter between:

PATRICK BAM & 194 OTHERS Applicants

and

BME (A MEMBER OF OMNIA GROUP (PTY) LTD) Respondent

Date of Hearing: 18,19,20,21 and 22 November 2019; 22,23,24,25 and 26 June 2020, and 28 August 2020.

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 17 November 2021

Summary: (Trial – unprotected strike – substantive and procedural fairness – dismissals substantively and procedurally fair – strike planned - applicants able to respond to ultimatums and given opportunities to explain why they should not be dismissed as well as a channel for pursuing grievances, but misguidedly believing they could force the employer to the negotiating table - Claims of non-participation in the strike by certain applicants dismissed - Claim for compensation for damages under s 62(1)(b) of the LRA – facts do not justify a finding of culpability on the part of all applicants – one applicant identified as causing specific damage and found liable for that – Costs)

JUDGMENT[i]

LAGRANGE J

Introduction

- [1] This matter concerns the fairness of a dismissal of 195 employees of the respondent ('BME') on 10 September 2013 for their alleged participation in an unprotected strike. Of the 230 employees dismissed by the company 28 were reinstated.
- [2] The employees denied they participated in the strike and dispute the fairness of their dismissals. Initially they denied that there was a strike at all, but by the time the matter came to trial the applicants conceded that an unprotected strike had taken place, though they denied participating in it. BME brought a counterclaim for damages in the amount of R 16,096 million allegedly suffered during the strike and in consequence of damage to its property on 10 September 2013.
- [3] Although the separation of the determination of liability and quantum in the counterclaim was initially opposed by the employees, during the course of argument on that issue it was agreed that this court would only deal with the question of liability. The bulk of the damages claimed were for the damaged property and not lost production. In argument, BME only pursued the issue of liability for damage caused.
- [4] The trial proceedings only commenced on 18 November 2019 and proceeded on a staggered basis, owing to the constraints of the Labour court roll and the availability of the parties' legal representatives. Evidence was presented in open court but argument was heard by means of a virtual Zoom hearing, owing to Covid 19 constraints on normal court operations at that time.
- [5] The following persons gave evidence: Mr D Voogt ('Voogt'), Mr Z Limbada ('Limbada') and Ms K Huijsmans-Oussoren ('Oussoren') gave evidence for the respondent, and Mr J Rabi ('Rabi'), Mr J Mofokeng ('Mofokeng'), Mr M Mphela ('Mphela') and Mr S Mpofu ('Mpofu') testified for the applicants.

Background

- [6] BME Respondent manufactures commercial explosives, which are produced under license from the Department of Labour and authorised by the Chief Inspectorate of Explosives, a division of the South African Police Services.

- [7] The manufacturing facility, which was established in 1996, is situated on a large isolated site ('the Losberg Plant') situated on the Enselspruit road, about 5 km from Fochville an an hour's drive from Potchefstroom. Access to, and egress from, the complex is controlled by palisaded and boomed entry and exit points controlled and monitored by security personnel in a building between the two points. This main entrance is set back about 100 m from the main road leading to Fochville.[1]
- [8] For safety reasons, different phases of the production process are conducted in separate buildings spread out over the site, to prevent a detonation in one building causing a so-called 'sympathetic detonation' at another. Leading from the main entrance, the first cluster of buildings encountered near the road is an administration block [about 100 m from the entrance] and a bulk emulsifier plant situated on a road branching off to the right from the main road. The road then bends leftwards and approximately 300 m further along on the right-hand side lies the emulsion plant, also known as the HEF plant. A little beyond the emulsion plant and very close to it is the mess facility. The mess facility includes a mess hall where employees would gather to eat and where general meetings with employees were held. About 30 m beyond the mess facility, there is a road branching to the left which leads to the Megamite plant (otherwise known as the 'cartridge plant') where the emulsion is turned into polony-like tubes ('sticks') which are sensitised for detonation. It is in a highly secure fenced in area with access control known as the 'danger area'.
- [9] Just before the Megamite plant, there is a road branching off to the right which leads to the shock tube assembly building or Megadet plant, which is approximately 100 m down the road. Detonators for the explosive charges are manufactured at this plant. Following the road beyond the Megamite plant for a distance of about 500 m, are storage magazines for several tons of explosives.
- [10] At the time of the strike, BMegadet employed approximately 200 employees. BMegadet's operations fall under the scope of the Main Agreement concluded in the National Bargaining Council for the Chemical Industry (the 'NBCCI' or 'the council'). Wages and conditions of employment are regulated by the council's main agreement and are negotiated nationally at that level. BMegadet had implemented the national wage increases agreed to for the Industry in 2013. According to Voogt, the minimum salary payable by BMegadet at the time was approximately R5,000 which was more than twice the level of remuneration obtainable from alternative work in Fochville.
- [11] Although, Voogt was not challenged about his claim that substantive negotiations only took place at the centralized level of the bargaining Council, as far as Mpofu was concerned, the only negotiations which took place at the bargaining Council related to annual wage increases and did not concern workplace issues.
- [12] Other general provisions of the agreement stated inter alia:

“The terms of this agreement are in full and final settlement of substantive wages and conditions of employment as tabled and negotiated for the period 2013/2014 between the unions and participating companies.”

“The issues which are being dealt with in the current negotiating committee will remain at the national level until determined at which level these issues will be negotiated.”

[13] The bargaining Council agreement contained a peace obligation which read:

“Neither party to this agreement shall engage in any form of industrial action against the other party regarding any disagreement on wages and other substantive conditions of employment during the entire period of this agreement.”

[emphasis added]

Mpofu agreed that the agreement was applicable to all employers and employees in the industry and regulated not only wage increases but also minimum wages. However, he was reluctant to concede that the agreement prohibited negotiations between employer and employees at the company level.

[14] At the Losberg facility there was a communication forum consisting of representatives from the human resources department, production managers of the various facilities, shop stewards representing unionized employees and also representatives of non-unionized employees. Voogt did not see this as a decision-making forum but rather as a consultative body. Amongst the unionized workforce, there had been what Voogt described as a ‘considerable shift’ of union membership from the established union, SACWU, to CEPPWAWU resulting in the latter being the majority union at Losberg.

Narrative of events

Events preceding the strike

[15] In 2011 there was a serious accident in the Megamite plant’s processing room, in which an explosion killed three employees and extensively damaged equipment. As a result, the plant was forced to shut for a period of six months. An investigation revealed that foreign objects were introduced into one of the emulsion blenders causing a pump to overheat and detonate the emulsion contents of the line on which the pump was situated.

[16] When the damaged plant was rebuilt, the manually controlled system was replaced with a programmable logic control (‘PLC’) system, which allowed for much safer and more accurate control over the process using computer technology, instead of relying on manual control of the valves in the production process. Operators needed to be more skilled to operate the computerized system and to interpret the information provided by it. As a result, the position of manual operators in the plant became redundant and the company embarked on a retrenchment exercise in terms of section 189 of the Labour Relations Act, 66 of 1995 (‘the LRA’). This process took place in 2011 and 2012.

- [17] However, instead of recruiting the more skilled labour required externally, BME decided to 'upskill' existing process operators to the higher skill level required to operate the automated system. In keeping with the higher skills required, the newly trained operators' salaries were improved from the previous level of approximately R 9,000 or R 10,000 per month to R 18,000 per month. Voogt explained that because this reskilling process was confined to only one section of the Megamite plant, the earnings of other employees in the plant remained unaffected. Over time, unhappiness developed amongst workers over the pay disparities between the new process controllers and other workers. Voogt claimed that the company had called for volunteers for upskilling, but it was put to him that the staff believed people were handpicked.
- [18] It was put to Voogt that quality controllers salaries at Sasol were above R 14000 per month as opposed to the R 8,500 earned at BME. It was said that Mphela, a supervisor at HEF plant would testify that he was 'dejected and shocked' to learn what people reporting to him were receiving. Mphela, had previously worked at Sasol as a senior plant pyrotechnics operator. He was employed at BMegadet in July 2013 as a day shift supervisor, earning about R 19,000 per month.
- [19] When Mphela did testify, he was less forthcoming on the comparison between wages at Sasol and wages at BME, but eventually conceded that he understood that a process controller at Sasol and one at BME were not earning the same. Although he denied he had been dejected and shocked by this he had asked how persons doing the same duties could be earning different salaries, and he was sympathetic to the BME workers who were getting less. Even though he did not disagree with their demands, he maintained he was not part of the strike.
- [20] Voogt agreed that the monthly salary for quality controllers at BME was R 8,500, but it was not possible to compare their salaries with Sasol quality controllers without knowing what type of work a quality controller was doing, as it could vary from business to business.
- [21] A minute of a 'Megamite and CEPPWAWU Union meeting' dated 29 November 2012 recorded that management had given an update on the assessment process and that salary surveys would be conducted to ensure that the right salary was linked to the right position. It also recorded that vacancies in the plant would not be filled on a permanent basis, where assessments revealed that existing employees were not suitable for positions. The minutes reflect that the process would be completed by January 2013 and the next level of positions would be done in the following months. The applicants argued that this was evidence of plant level negotiations and the fact that management engaged in these discussions with local union representatives meant that management itself did not adhere to the principle of not discussing substantive conditions at the workplace. Voogt insisted that the discussion was in the context of the 189 process and did not amount to a negotiation process. A survey was conducted and was implemented in respect of the employees it applied to.

[22] In June 2013 the process was still ongoing. Mpofu surmised that there was a perception that because the assessments of the new positions at the Megamite plant had led to remuneration improvements, that any subsequent assessments would also have the same consequence. However, the later assessments were merely to benchmark existing positions. Voogt testified that management had never committed to share the survey results but simply to implement the outcome of the survey, which it did.

[23] During June 2013 productivity at the Megadet, which uses a manual assembly method, started to drop. At the Megamite plant where the process was automated, absenteeism increased dramatically. The effect was that work on the production line was retarded.

[24] On 17 June 2013 a letter was delivered to 'BME Management' from 'Losberg BME Employees'. It read:

"Salary Adjustment

We, as employees of BME Losberg, are requesting a meeting between ourselves, HR director and management. Our request is initiated by the recent salary adjustments done to some of our colleagues, which has the potential to cause division in the company, and many other issues that have been concerning us in the company. We are requesting that the meeting be done as soon as possible, before the end of the week, 21 June 2013. We hope you will find our request in peace, and it will be dealt with as requested.

Yours sincerely."

[25] On 18 June 2013, two further documents were submitted to management. The first was from a CEPPWAWU shop steward, Mr B Mthembu ('Mthembu') and read:

"After a long series of meetings between the management and the process team about the appointment and the salary adjustment, eventually on 14 June 2013 we got the feedback from management and HR. I, however, was not satisfied with the offer presented, and I therefore propose a meeting between myself and management and the HR Director. Hope my proposal will be urgently attended."

[26] Voogt was unclear about which particular discussions this message referred to. In any event, the second letter emanated from the authors of the previous day's message. This time, the message was more insistent and direct. It was addressed to Voogt and was from the 'HEF plant personnel'. It read:

"Request for urgent meeting.

We, HEF plant personnel, hereby request to meet with you no later than Wednesday, the 9 June, before the start of the afternoon shift.

We would like to have some answers concerning the alleged assessments done with us and the possible implementation of the agreed upon adjustments. This is in the wake of the recent developments at the Megamite plant. Allegedly the assessment with us were done before with them and they already have outcome, which makes us wonder if we are really taken into consideration and appreciated for all the commitment we give.

Regards”

The letter was signed by ten employees, who were also identified by name. Voogt testified that the assessments referred to in the letter were an extension of the benchmarking assessments conducted at the Megamite plant as part of the section 189 exercise. It was decided to extend the exercise to all employees not just at Losberg but also asked to other BME facilities to obtain an overall competency and talent profile of the workforce. In consequence of this exercise a few individuals wages were adjusted, but it was not an across the board revision of salaries. Mpofu confirmed that the assessment process was used as a way of identifying which positions a person could occupy and what salary level they should be on. As a result of the exercise he was made a process supervisor, earning about R 19,000 per month.

[27] On 21 June 2013, a further letter was issued this time addressed to the “HR Director” and purportedly from “All Losberg BME employees” and not just from HEF plant personnel. The letter was signed by thirteen named employees. The HR director at the time was Ms Siyotula (‘Siyotula’), who was based at the head office in Bryanston, Johannesburg.

““This is a follow-up letter to the one which we sent to you on 18 July 2013[2] requesting a meeting with yourself, the management and all Losberg employees, but we have however seen a memo written by the management,

which has requested a meeting with the communication forum. We are surprised, because we, as the employees, have made it clear to management that we felt that the communication forum does not represent our interest, and we therefore told them to abolish it.

We are pleading with you to come to Losberg as soon as possible to resolve this issue of salary adjustment because it is divisive and has the potential to cause problems. We request that you speak to the management to stop the communication forum meeting and arrange a meeting as per our previous letters demand.”

[28] Voogt recalled a meeting on the same day in which he would have explained to HEF employees that the assessment process underway at the time was not like the assessments done at the Megamite plant, nor were they linked to changes in remuneration. He also confirmed that in the forum meeting the representatives have indicated that the forum did not serve their needs and wanted a general meeting. It was suggested to Voogt that a list of names and signatures of purported attendees at a meeting with management, indicating that the signatories to the 18 June letter, together with a few others, were present at the meeting could not be a register, because the meeting never took place. This was not a contention pursued in cross-examination.

[29] In any event, a handwritten letter following up on the previous letters of 18 and 21 June, appears to have been received by management on 24 June. The letter was addressed to “All Plant Managers and the HR department” on behalf of “BME Employees”. The letter stated:

“Re: Follow-up on previous letters dated 18 and 21 June 2013.

It came to the employees’ attention that management has arranged a Losberg communication forum meeting regarding the two headings we sent the letters about. The meeting is scheduled for the 24 June

2013. As outlined in the previous letter submitted to management on the dates provided, we as the employees request a general meeting with management, not a communication forum meeting, as also discussed in the last forum meeting, that the employees will take no further part in that forum. The employees further request a general meeting with the plant manager and the HR Department between Tuesday, the 25 June 2013 and Friday the 28 June 2013, but preferably on the 27 June 2013 at 14h00, Thursday at 14h00. Hope our request will be taken into consideration.

BME’s written response to these various representations addressed to “All employees” was issued on 26 June 2013 and read:

“In reference to the letter received on 21 June with regards to the communication forum, management would like to note their disappointment at the decision that has been taken by the employees in the April 2013 meeting. We still feel that the communication forum had an important role to play in enhancing communication between all Losberg employees and management. The communication forum is the forum where issues can be raised and discussed.

Salary Adjustment Concerns:

Management would like to express their concerns at the letter written by Losberg employees to the HR Director requesting a meeting with her to discuss salary adjustments. The purpose of this memo is to highlight the following issues to the employees:

1. Omnia Group has in place a grievance policy and procedure in place. It is therefore requested that the employees follow protocol and approve dispute resolution procedures to resolve internal disputes.
2. It is against company policies to ignore these internal grievance procedures, and furthermore to disclose internal Losberg plant issue without formally concluding the issues with Losberg management.
3. Omnia Group.

All matters related to salaries are strictly confidential. Any disclosure of personal and other salary information is not allowed, and action can be taken against the individuals found to be in breach of the company’s confidentiality clause, which is the contract of employment.

4. The employees who have queries on their salaries are urged to formally consult with their managers to resolve the issues.

With regards to the Megamite restructuring process, management is in the process of getting progress feedback, meeting with the relevant stakeholders as agreed in the previous meeting held at the Losberg plant. I trust that the above clarifies the process to be followed.”

[30] A few days later, management addressed the declining productivity issues in another letter addressed to all employees under the heading “Urgent Productivity and Business Status Alert”. The letter pointed out that the decline in underground mining since 2012 had resulted in a 30% loss in that line of BME’s business resulting in the loss of an entire production shift. It also emphasized that the business was at a marginal level and that the 40% reduction in productivity that had been experienced could jeopardize orders if the company could not provide reliable supplies. Employees were warned that failure to meet demonstrated productivity levels could result in disciplinary action and called on workers to maintain productivity levels in order not to lose customers. On the same day BME issued another letter under the heading ‘Losberg Communication Forum’ stating:

Management would like to confirm that a special general meeting was scheduled for 28 June 2013 at 14:00 but due to the clash with the CEPPWAWU Meeting and after consultation with the Shop Stewards (Patrick Bam) the Special General Meeting was requested to be set for Friday, 5 July 2013.

Due to time constraints, Management has thus rescheduled to:

Date: Tuesday, 2 July 2013

Time: 14H00

Venue: mess Room”

[31] Voogt testified that these written communications would typically be discussed with employee representatives and also posted on notice boards, one of which was on the entrance to the mess room and other noticeboards were at each of the plants and the administration building. On 2 July, Voogt and Ms. Van Schalkwyk the detonator assembly manager, met with employees at the venue. They gave a slide presentation dealing amongst other things with the Megamite restructuring, the pressing problems of reduced market sales, reduced productivity and the problem of not addressing these issues. A consequence of the reduction in sales was that BME was holding less stock so that any interruption in production would have a knock on effect on the company’s ability to supply customers timeously. There was evidence that by the time the industrial action began the company had only one or two days supply of various products. According to Voogt there were no comments or questions from the employees or their representatives attending the meeting. This was not disputed.

[32] Productivity levels remained at 40% lower than normal and did not improve after the meeting. Consequently, at 09h00 on 4 July, management issued an ‘ultimatum to restore productivity’ expressing the company’s dismay that productivity levels had not returned to normal and calling upon workers to restore them, failing which disciplinary action could be taken which might lead to dismissals. The notice also expressly called upon employee representatives to meet with management by no later than 13h00 the same day to give reasons why they might believe that the go slow industrial action was protected and why they should not be dismissed if it was not protected. Mpofu confirmed that at the time there was a go-slow and claimed negotiations were taking place between management and employees.

[33] A meeting to take place at 14h00 the same day with two CEPPWAWU shop stewards. Following the meeting, management issued the following letter at 08h00 on 5 July 2013:

“We have met (CEPPWAWU shop stewards) Bethwell Mthembu and Bernard Mostsumi at 14:00 on 4 July 2013 and again at 16:30 after time was given for a general site consultation meeting. During the meeting your representatives have raised the following points:

- That they are not aware of any slow strike or slowdown in productivity despite the general meeting held on the 2 July and subsequent memo issued on 3 July or increased absenteeism, and
- have not had time to consult with you.

After granting approximately 2 hours, in company time, to meet the following was raised by your representatives:

1. Various operational reasons for slower Megadet production in order to assure quality product is produced after an earlier customer complaint -company showed that measures referred to had been put in place at least two weeks prior to satin reduction in productivity and in those two weeks production output had been acceptable and quality of acceptable standards.
2. That the Megamite structure was not fully filled resulting in staff shortages-company showed that structure consulted on as part of the restructuring was indeed fully filled and provided a list of names showing employees in each position.

You have failed to respond to our previous requests calling upon you to correct your productivity to previously demonstrated levels.

We can no longer accept your failure to correct your productivity to previously demonstrated levels and you are advised that should you fail to correct your productivity to previous demonstrated levels by 12h00 on 5 July 2013 will result in disciplinary action to be taken against you, which could result in your dismissal.

We call upon you to take note of this ultimatum to restore your productivity as requested in order to avoid further disciplinary

action which could lead to your dismissal. Should you restore your productivity to previous demonstrated levels by the given time, the Company guarantees to continue discussion in order to resolve your grievances. Please approach management by 10:00 on 5 July 2013 as an individual if you wish to discuss your involvement in the situation and/or explain why your services should not be terminated.'

[34] Voogt testified that even though there was no improvement in productivity, the company did not follow through with disciplinary action to avoid inflaming the situation, but looked at other ways of minimizing the manual content of the assembly plant production through automation and the importation of partly assembled components. He agreed that there had been disciplinary action taken against employees for incorrectly labelling the contents of the boxes, but denied this was retaliation for the go slow. Rather it related to a quality control problem.

[35] In any event, on Sunday 14 July, an email was sent from 'Losberg Employees' at an email address 'losbergemployees@gmail.com' to Mr. Mynhardt, the Director: Production and Technical. The subject of the message was 'Grievance Letter' and stated:

We, as the employees of BME Losberg, would like to issue a grievance to you against our Losberg management, Dirk Voogt, Hazel Schalkwyk, Willie Serfontein and our HR Department. Our issues with management are as follows:

Dishonesty.

Our management has proven itself over and over again that they are not honest, changing arrangements of meetings in terms of memos they make to the employees after the meetings.

Intimidation.

Our management has been intimidating our employees in terms of memos; we will attach those memos.

Insults.

The employees have been insulted by management, specifically Hazel.

Demotivation.

Because of the management, people are demotivated, and management is doing nothing to solve the situation.

HR Department.

Instead of mediating, HR insist on defending management on every issue we raise.

We have lost confidence in the management of Losberg, and we are proposing a motion of no confidence in them. We are appealing to you to resolve these issues as soon as possible, as we feel we no longer want to work with Dirk Voogt, Hazel Schalkwyk and Willie Serfontein as our manager.”

The email was circulated to the HR director and Mr F Hay, who was the managing director of BME, but not sent to Voogt. Voogt testified that efforts had previously been made to engage with the unions to try and have a meeting with them and an email request for an ‘urgent’ meeting between the union and management to discuss the ‘Megamite restructuring and progress thereof’, was made by the Losberg HR Consultant, Mr Ngcongwane, on 24 June 2013, but the union did not respond to this at the time. Mpofu said that the allegation of dishonesty had been made by representatives because when the minutes of meetings were produced by management, the minutes did not reflect what they, as representatives, had reported back to their fellow employees, but did not elaborate on this.

[36] On 2 August there was a meeting held at which a review of salaries was mentioned. According to Mpofu the purpose of the review was to see that BME staff fell in the right salary categories associated with their jobs and that they met all the job requirements to earn that salary. He testified that after employees like himself in the Megamite plant had received salary adjustments, employees in the Megadet plant checked their salaries and found that their salaries of R 5,200 per month compared badly with municipal employees doing the same work but receiving R 8,000 per month. The housing allowance they received of R 550 per month was also insufficient when compared with rentals of R 800 per month. So they requested the employer raise their allowance and increase their salaries to at least R 8,500 per month. In his view, the R 18,000 demand recorded in the pre-trial minute as the impetus behind the strike did not make sense. If it had been demanded it would have been an unreasonable amount. It was a mistake and should have been R 8,500. Similarly, he denied the correctness of the pre-trial minute which recorded that a demand for an across-the-board increase of R 18,000 had been tabled at the Rengwe meeting on 10 September 2013 by the employee representatives.

According to him there were no discussions about salary issues at that meeting. He could not explain why this figure was mentioned

twice in the pre-trial minute. He had not participated in the meeting where the minute was concluded that he did participate in

consultations with the legal team and received the report back on what was in the pre-trial minute. Although the detail of what was in the minute had not been reported to them, the legal team knew that there were some things in the minute which would have to be rectified when the time arose. In any event, he could not explain why these alleged errors had not been raised with Voogt during his cross-examination.

- [37] It was only on 5 September 2013 that there was an email from Mr Aloni, a CEPPWAWU organiser, advising that he was not available for the 'urgent' meeting BMR had first requested at the end of June. He said he could not attend a meeting in the following week and that management should go ahead with the shop stewards.
- [38] Voogt testified that on Sunday 8 September he received an SMS from a SACWU shop steward, Ms E Makinta, that there would be a strike at the Losberg facility starting on Monday. He conveyed this to the rest of the management team and they decided they should arrive early at the site on Monday at 06h00 instead of between 07h00 and 08h00. Mpofu agreed that the workers themselves did not give management any warning of the strike beforehand, but management could simply have approached the workers to find out the reason for the strike once they realised it was in progress.

Monday, 9 September 2013

- [39] Voogt and other managers gathered in the production office opposite the entrance to the Megamite plant and the mess room at the designated time. He observed workers arriving and going to the mess room but not entering the Megamite plant through the turnstiles to start work. Normally, after being dropped by taxis outside the mess facility, they would enter the Megamite plant through the turnstiles where they would sign a register. Workers at the Megadet plant would sign a separate register there. Physically signing the register is a necessary safety requirement to have a record of who is present in the danger area at any time.
- [40] Mphela was still a trainee at the time of the events of the week of 9 September 2013 under the guidance of the shift supervisor Mr S Mpofu. When he arrived at work on company transport sometime between 06H00 and 07H00 on Monday he found most of the employees gathered at the mess room. Mphela was surprised to find people at the mess room when he arrived that morning. Even though he considered himself a junior member of management, nobody had forewarned him of the possible strike that day. Mpofu advised him that workers were not striking but wanted to speak to management over issues which had been going on for some time even before Mphela started working at BME. Mphela claimed that he then spoke to his plant manager, Mr V Coetzee, and asked him what he was supposed to do in a situation like that. Coetzee, said he was busy, but that he should not to enter the danger area. Mphela

understood this was because he was not supposed to enter the area without being in the company of a competent person, in terms of the explosive regulations. In the end he waited the whole day and remained at the plant to see how things would unfold as he was concerned about his employment having just left another company three months previously only to find himself working where a strike was in progress. He decided also to remain at the mess room as he was waiting for an instruction from his manager.

- [41] When Limbada arrived for work at 08H00 he noticed after checking in at the logistics office that some of the drivers had already returned from deliveries, even though they would normally have returned later in the day, after lunchtime. When he approached them and asked them why they were back, they told him that they had done some of their deliveries but decided to return to the site and would not be doing the remainder of their deliveries for the day. He could not remember whom he had spoken to. He tried to make plans for the Tuesday deliveries, to avoid deliveries coming to a standstill and communicated with drivers for this purpose. He contacted all the drivers but none of them were prepared to work the following day, except for Mr D Fourie, who contacted him later and said he was prepared to work. Fourie only returned to the site on 9 September in the afternoon, after his deliveries were complete. Arrangements were made to have his delivery vehicle with its consignment collected from the police station in Fochville. As he was the only BME driver willing to work on the Tuesday arrangements had to be made with third-party contractors and other BME sites to try and ensure continuity of deliveries. It would have been easy for drivers to communicate with him as he normally spoke to them on their mobile phones about 10 times during the course of the day to monitor the progress of their deliveries. Mr A Thema, Mr M Maluma, Mr J Motlolane, Mr S Mptsheni, Mr F Majola, Mr M Mabuza, Mr N Makamba, and Mr J Mofokeng were the drivers who were dismissed.
- [42] Mofokeng denied that Limbada ever contacted him on 9 September. If he wanted him to do deliveries he should have phoned him. He had no reason to report for duty on 10 September as he was not called. He also disputed normally hearing from Limbada several time a day. Since the trucks were fitted with cameras, he could not see the need for that.
- [43] Video footage of the turnstile where employees enter the danger zone of the Megamite plant showed that by 09h00, two hours after employees were due to start work, only four employees had passed through the turnstile to enter the plant. Other footage showed employees arriving by taxi or private vehicle, alighting, and heading for the mess room. Afterwards, they did not proceed to clock in as they normally would but remained gathered at the mess room. Voogt testified that only a few workshop personnel and managers had entered the facility but none of the shop floor employees.
- [44] A letter addressed to union officials of CEPPWAWU and SACWU at around 07h30 advising that their members had commenced an unprotected strike since 06H00 that morning. It requested the urgent presence of a union official to try and resolve the situation and give reasons why the strike should not be considered unprotected and workers dismissed. Shortly before this, Schalkwyk had emailed Mr D Mynhardt (a director) advising him that employees were sitting in the mess room and none of the shop stewards had approached management but they had been some communication between an HR officer, Ms G Siyotula, and the CEPPWAWU official, Aloni, who was unaware of the action. Mpofu testified that the unions were not involved in the matter which was being dealt with 'internally' as it only concerned the employees who were trying to resolve matters with management.

[45] As employees had not started work by 08h00, the first ultimatum was placed on the notice board of the mess room by HR staff. The HR staff can be seen on video footage crossing to the mess room at 08h10 and returning shortly afterwards to the production office. Mpofu confirmed that the first ultimatum read out to the workers gathered in the mess room around that time. The date and time on the ultimatum was 08h00 on 9 September 2013 It read:

‘ATTENTION: All BME Employees

FROM: BME Losberg Management

DATE: 09 September 2013

SUBJECT: WORK STOPPAGE/UNPROTECTED STRIKE

Since 06H00 today BME Employees have engaged in a Work Stoppage/Unprotected Strike.

Employee Representatives and/or Shop Stewards are requested to engage in communication with Management in order to

- Help resolve the situation, alternatively
- Show reasons why the strike should not be considered as an unprotected strike
- show good cause why the employee should not be dismissed.

All employees to return back to their duties within an hour thus resuming normal duties no later than 09H00 and produced as an acceptable rate.

We await your urgent response to the above.

Regards

Losberg Management ...’

(original emphasis)

Shortly after the HR officials leave the mess facility, the employees gathered outside can be seen entering it, on the video footage. MP said that he was not present when the first ultimatum was issued, and was focussed on how the matter would be resolved, but did not dispute it was issued. Mpofu said that he tried to assist workers to understand the reason for the ultimatum and indicated to them that it was a very serious issue and they needed to consider returning to their workstation because the ultimatum indicated that the employer was of the view that they were engaged in a strike. They were of the view that they were just ‘looking for a way to meet management’ to advance their demands on the issues that concern them. The workers decided to nominate him as a person who would represent them in any negotiations or dealings with management, together as part of a team with nine others.

[46] Sometime after the first ultimatum was issued, a handwritten note was delivered to the production office, which read:

From: All Losberg Employees.

Subject: Workers' demands/Not on strike.

1. Firstly, the issues on not union matters but are BME employees' matters, therefore no shop steward is allowed to engage with management, but employees are ready for any engagement from management, specifically directors of the company.
2. We are prepared to work, as indicated by the fact that we are all wearing our PPE and we are all here.

BME Employees"

Mpofu confirmed that the letter had been drafted on his advice. He explained that before the ultimatum was issued the workers might have been on strike but the letter made it clear that they were not on strike and simply wanted to meet with management. Voogt said he did not interpret the message to mean the company could not communicate with the unions. It was normal for management and the unions to communicate on matters concerning employees. It was put to him that as far back as June 2013, workers had been directing grievances in their own right to management without the involvement of union officials, so it should have been clear they were not relying on the union in their dealings with management. Mpofu claimed that because the issues involved members of both unions that was not appropriate to send shop stewards to meet with management, but did not explain why other representatives were not sent to meet with management instead, even though workers said they were ready to engage with management.

[47] Internal email correspondence between the production manager Ms H Schalkwyk ('Schalkwyk') and Mr. D Mynhardt ('Mynhardt'), the Head of Production: Technical, reveal that shortly before 07h30, management was preparing to issue an ultimatum and this had been done. The first email also indicated that Schalkwyk had spoken to the CEPPWAWU official, Mr L Aloni ('Aloni') and that he was aware of the situation.

[48] The next communication ['the second ultimatum'] issued to workers gathered in the mess room was on a company letterhead and read:

'COMPANY STATEMENT TO EMPLOYEES ENGAGED IN A STRIKE OR WORK STOPPAGE

Time: 09:15

Date: 09 September 2013

You are regarded as valued members of the Company and your continued help and assistance is important to the running of the Company and your job security.

We thus acknowledged the response to the first memo and would like to reiterate that the current activity is regarded as an Illegal Strike as per the Labour Relations Act.

Your present action ignores the system and does not help in settling grievances you may have.

Please return to work immediately and elect representatives to bring your problems to management. We will meet with your representatives and deal with these problems in the Production Office in one hour [10 H30].

Your representatives will report back to you after the meeting.

Please understand that for the time you are not working you will NOT be paid. No action is also unprotected in terms of the Labor Relations Act.

We once again request due to return to work.

Regards,

Losberg Management

Copy to: TRADE UNION'

(Original emphasis)

Mphela testified that he also did not witness this or the final ultimatum. He emphasised that his primary concern at the time was to see how the matter would be resolved so he would know what would happen the next day. He said he was updating his wife on the situation on his phone and might have been busy on such a call when the ultimatums were issued. Mpofu was present when the second ultimatum was issued around 09:15. He believed that the time between the first and second ultimatum was too short for them to have discussions and come up with a decision on the ultimatum. When the second ultimatum was issued it 'caused some confusion' because they had not yet finished dealing with the first one. There was also the process of nominating persons to represent them and they had to be mandated. However, later in his testimony he agreed that employees had been ready to engage with management. Initially, under cross-examination, Mpofu denied that management had indicated it was willing to meet representatives at a specific venue. When it was pointed out that the second ultimatum specifically made such an invitation, his response was that workers had specifically requested to meet directors of the company and the second ultimatum merely indicated that a meeting would be held with management. Management had already had its' chance to meet with them.

[49] According to Mpofu, when the second ultimatum was issued, workers decided to focus on ways of getting management to meet with them so they could advance their demands and explain that they were not saying they could not return to work. Hence they indicated in the emails that management should send someone to speak to them so they could have an opportunity to advance their concerns, whereafter they would be willing to return to their workstations.

[50] Voogt testified that the employees had been asked to elect representatives because management had an indication that the union leadership was asked not to participate as evidenced by the first handwritten note. In any event, the ultimatum was still faxed to both

unions shortly before 09h30. The notice was advertised on the mess room notice board like the first one. There was no response to the request to provide representatives and nobody approached management at the production office. It was suggested to Voogt under cross-examination that the reason there was no response by the workers to this was that it had been sent to the union and not to them, but he pointed out that all the notices had been placed on the mess room notice board.

[51] At 11:00, a third ultimatum was issued. This was referred to as the ‘final ultimatum’. In fact there was another ‘final’ ultimatum issued the following day after the Renqwe meeting. The third ultimatum read:

‘FINAL ULTIMATUM TO RETURN TO WORK.

To: ALL LOSBERG EMPLOYEES.

Copy to: TRADE UNION.

Date: 9 September 2013.

Time: 11:00.

You have been participating in an unprotected strike since 06:00 on the 9 September 2013. You have defied all requests that you return to normal work, including the ULTIMATUMS and opportunities. These included two requests to send a delegation to discuss your grievances: there was a memo on the

9 September at eight o'clock, and a memo dated the

9 September at 09:15.

You have also refused/failed to put forward any reasons as to why your services should not be terminated.

The Company is now issuing you with a FINAL ULTIMATUM, and requires that you return to work by 13h00 on the 09 of September

2013. No other ultimatums, invitations or warnings will be given. Should you fail to return to normal work by this time, the company will issue summary dismissals.

Dismissed employees will receive their outstanding salary on 30 September 2013.

Regards ...’

[Original emphasis]

The final ultimatum was signed by Voogt, Schalkwyk, the Omnia group HR director, Ms K Ramoupi (‘Ramoupi’) and the BME HR Director, Ms G Siyotula (‘Sityotula’). Voogt delivered the final ultimatum himself and video footage shows officials walking into the MAS room at around 09:40. Nobody approached him or the other officials when they placed the notice on the board.

[52] Mpofu said that workers were devastated when they received the third ultimatum as they could not understand what was going on. They had not even finished dealing with the previous ultimatums. They could not deal with them all in the time frames indicated. He believed that the intention of the company was to dismiss workers once a final ultimatum was issued. In his view there was no intention on the part of BME to have discussions with the employees or to get them to return to work, but simply to achieve a certain objective by issuing the ultimatums.

[53] As it happened, a few minutes after the final ultimatum expired an email was sent to Mynhardt , Schalkwyk and Siyotula, but only copied to Voogt. It was sent from an email address 'losbergemployees@gmail.com' and read:

'Subject: workers demands/not on strike

Attention: BME SENIOR MANAGEMENT

CURRENT SITUATION AT LOSBERG PLANT

1. From 0600 this morning, we as employees decided to stop production, pending the discussion with management regarding our grievances, management was not interested.
2. This action resulted from numerous discussions that we as employees try to have with management, but have failed to communicate with the employees.
3. This email again is a call from the employees to management for discussion regarding the following issues -salaries and unhappiness of the employees, Unfair treatment.

Regards: BME employees'

[54] Less than an hour later another email was sent to the same management personell from the same email address, but this time included the distribution manager, Mr W Serfontein ('Serfontein') as well. The email stated:

'Subject: EMPLOYEES ULTIMATUM

We're wrote a letter to you this morning around 9H00, requesting to meet with the company directors to engage on our issues as employees, but up to now request has not been met. This letter serves as a follow-up letter which is once more detailing our demands.

Our demands is to engage with one of directors with regards to wage demands and this ultimatum served to notify you that our demand will increase by thousand rand [R1000] per hour wasted.

Regards: BME Employees'

Mpofu agreed that these emails reflected that people were refusing to work and had demands which needed resolution. He said the indication that the demand would increase every hour was simply a strategy to get management's attention and if it was considered intimidatory, it was of the 'humblest' kind. He conceded that by 23h00 that night the demand would have amounted to a demand for an increase of R18,000 which was impractical and unreasonable, but it made sense as a way of getting management's attention.

- [55] Voogt said it was difficult to respond to a demand like this. Firstly, the company did not negotiate plant level and secondly, the starting demand was unknown. The 'initial' demand was only disclosed to management at a meeting the following day, at which they learned that the demand was for a minimum wage of R18,000 per month. Mphela pointed out that he had no personal reason to support the strike because he was earning R 19,000 per month.
- [56] The same afternoon the company obtained an interim interdict, with a return date on 7 November, declaring their conduct of the employees to be unlawful and un-procedural, ordering them to vacate the premises and remain 200 metres distant from the entrance. The interim order also specified that the return date could be anticipated on 48 hours' notice. Voogt testified that it was served on the employees early in the same evening in the company of the regional commander of the local police station, Colonel Maas. They encountered employees as they were leaving the mess facility. When he started addressing employees they began singing, but he still read the order and left copies in the road, some of which were read or thrown away or torn up. After that he and the Colonel returned to the office. The applicants' version was that they were not served with the interdict, nor was it read to them.
- [57] A photograph of a document being placed on the mess room notice board by a woman indicated that the document in question was the service. Voogt agreed that is what the photograph depicted, but was adamant that he had also placed the order on the board and at the entrance gate in sight of those gathered there. Voogt believed he had complied with the court order requiring the company to hand copies of the order to applicants attending the premises, by personally placing copies of the orders in the road in view of the applicants gathered outside the mess room, which were picked up by them. Voogt claimed that there were between 100 and 200 workers gathered there at the time. Despite the order being served and the presence of public order police personnel, employees were still gathered in and around the mess room at 23h00 and showed no signs of intending to leave the premises.
- [58] Contrary, to the pleaded version, Mpofu confirmed that Voogt had served the interdict and explained they had to vacate the premises. According to him, this was a further indication that the company was unwilling to have discussions with employees and that it simply wanted to get rid of them. Since workers had decided that senior management should come and meet them they decided not to leave.

- [59] Thereafter they were approached by the police together with the group HR director, Ramoupi. The police accepted that they were seated there peacefully but said they had to leave the premises in terms of the court order. They reiterated their demand to speak to management and it was at that point that Ramoupi listened to them. She responded saying that she understood the demands but it was late and they should go home and meet again the following day so the discussions could be taken further. She said that management was not unwilling to sit down with them to try and resolve their demands. After that most of the employees went home, though some remained outside the premises the whole night, waiting for the meeting which would take place the next day.
- [60] Voogt stated that most employees left the premises around 01h00 on 10 July. Management and HR personnel also left but a police unit remained on the premises.
- [61] Neither of the two shifts at the Megadet plant, nor any of the three shifts at the Megamite plant operated on 9 July 2013.

The night shift of 9 July

- [62] Footage was shown to Voogt of a single taxi carrying employees arriving at the premises being turned away at the main gates by security guards shortly before the start of the night shift at around on 9 September. It was put to Voogt that security staff had been advised to deny staff entry because of the court order and to advise them that they would be dismissed tomorrow. Voogt could not say if the taxi did contain 15 employees working the night shift at the Megamite plant, whose names were listed at page 62 of the applicants' evidence bundle. The footage did not give any indication of how many persons were in the taxi. Voogt said he still would have expected such workers to have phoned their managers if they could not gain access.
- [63] Mr J Rabi, a process controller testified that he was in a taxi which arrived with night shift workers. He denied they were told they could not enter the premises because of a court order. Rather he claimed that they were told they had been dismissed.
- [64] He confirmed that the taxi was stopped and two security guards had told them that they could not enter the premises until management instructed them to report for duty. Normally, the security guards would simply open the boom gate for the taxis to pass through to the plant to drop workers off, after they had first alighted to have their fingerprints recognised on the biometric sensor on a turnstile at the security office. Voogt agreed that normally the taxi would have been allowed to enter the premises with the employees, but could not comment on what they might have been told by security staff. Usually, after entering the premises, staff would then be dropped at the mess room where they would change and proceed to their plants where they would again clock in using biometric access at a turnstile at each plant.

- [65] Rabi claimed that he and two other colleagues, Ms C Maboja and Mr J Rabotapi, then tried to contact their respective plant managers, but there was no response. Rabi and Maboja worked in the Megamite plant and Rabotapi at the HEF plant. He and Maboja then decided they should contact the production manager, Mr Voogt, but he did not answer the call.
- [66] Rabi disputed that workers who were subsequently reinstated by BME were those who had spoken to their managers had explained that they could not gain access because the strikers would not allow them to enter. In particular, he denied that Rabotapi (who was reinstated) could have spoken to his production manager on both days, as BME alleged, because he had been with Rabotapi when he unsuccessfully called his plant manager. Under cross-examination, Rabi mentioned that he had attempted to contact Voogt again around 09h00 on 10 September, and was unsuccessful. Rabi's claim that he had tried to phone Voogt twice was not put to Voogt.
- [67] Rabi testified said he called his supervisor Sethlodi, after his attempts to speak to Voogt. Sethlodi told him he would call the employer and revert to them. Rabi vacillated considerably about the sequence of the calls he claims were made. Contrary to what had been put to Voogt, namely that Sethlodi was with Rabi when they were turned away, Rabi denied this.
- [68] Rabi said he had no knowledge of the strike, the ultimatums or the interdict when they had arrived at the premises that night. He went the same night to the Fochville police station and deposed to an affidavit. Rabi submitted the affidavit he had apparently deposed to at 22h00 on 9 September at the Fochville SAPS community service centre. Rabi said he had made the affidavit because he could not understand what they had been told by the security officials and he did not know the reason for his dismissal. He thought it might also assist him because when they were trying to gain entry at the plant, police vehicles were going in and out of the premises and they might actually help him to contact the employer to find out what was actually happening at the premises. It was only when the police said they were not going to phone the employer on his behalf that he deposed to the affidavit so he would have proof that he had a concern about being refused entry and being dismissed without doing anything wrong. The content of the affidavit read:

"I am an adult male residing at the above-mentioned address. I declare under oath that I was not involved in a strike during the protest at BME on the date of the incident."

I was returned at the gate by security officers and I was working nightshift by then. I returned home on the 9 September 2013 at about 21:45."

Under cross-examination he claimed he only learned of the strike from the police when he went to depose to the affidavit. He said did not want to burden the police by asking what the strike was about, nor did he ask Sethlodi. He could not give a plausible explanation why he had failed to mention in the affidavit that the security staff had told them they had been dismissed, claiming that he was more concerned about not being admitted to the premises. He also could not reconcile the time at which the police officer attested to the affidavit with his alleged presence at

the premises just a few minutes earlier. Rabi said it did not occur to him to leave a voice message or send an SMS message to Voogt. He felt an affidavit would be a more reliable record of his attempt to report for work.

[69] Rabi mentioned other taxis arriving, but the only other taxis appearing in the video footage were two taxis arriving simultaneously at about 22h20. The taxis can be seen reversing and parking beyond the gate, without anyone disembarking from them. Shortly after that a number of police vehicles can be seen entering the premises.

Tuesday, 10 September 2013

[70] On 10 July 2013 management and HR personnel returned to the plant. Some workers were gathered outside the entrance but nobody reported for work. Despite the ultimatum having expired the previous day, BME still responded to the collective email representations made after its expiry. Shortly after 12h00 the company issued the following invitation to discuss workers concerns. It was transmitted to the unions and was displayed outside the entrance gate to the premises. It read:

‘To: CEPPWAWU and SACWU Union Officials and all Losberg employees

From: BME (BULK MINING EXPLOSIVES)

Time: 12:20 a.m.

Subject: Unprotected Strike

This serves to inform you that we wish to meet with you as requested. We cannot meet with everyone and for this reason request that you select people to represent employees from every shift to represent you.

Please nominate ten [10] employee representatives and/or union officials or representatives and we will meet them at 13:00 p.m., 10 and September 2013 to discuss your concerns. We will meet you at the Rengwe Guest house, R 500, Fochville.

Kind regards

Management’

[71] Mpofu confirmed that the memorandum was issued to workers gathered outside the premises, who were waiting for the meeting that was promised the previous night. Because they had been waiting for the promised meeting the strikers agreed that representatives should go to the Rengwe meeting. It should be noted that workers were gathered outside the entrance to the premises despite the interdict which

[72] The meeting venue was at a guest house approximately one kilometre from the plant and 5 km from Fochville. Mpofu said it started at about 13h45. The company was represented at the meeting by Voogt, Koos Engelbrecht [‘Engelbrecht’], IR advisor to the Omnia Group, Mr D Tuinsma, the site engineer, Siyotula and Ramoupi. Ten employee representatives were

present including Mpofu. Engelbrecht asked them on what basis they believed the action was not an unprotected strike, but they did not respond to this. Voogt's account of the meeting follows.

- [73] The representatives tabled the following three demands: an across-the-board minimum salary of R 18,000, the dismissal of Voogt and that no disciplinary action would be taken against them. Engelbrecht rejected these demands and gave them another opportunity to return to work no later than 16h00 that afternoon, failing which the company would proceed to summarily dismiss them. The representatives simply restated their three demands and insisted they were non-negotiable. At no point did they indicate they were willing to return to work or that they needed to first consult with members.
- [74] Mpofu claimed that the demand for Voogt's dismissal was simply that he should be removed from working at the Losberg plant, not that he should necessarily have been dismissed altogether from the company's employment. He did not dispute that the demand meant Voogt should be immediately removed without a hearing. To the extent the demand meant he should be dismissed without a hearing he agreed that that was a demand the company could not agree to, but argued that management should have removed him from the plant to maintain a good employer-employee relationship.
- [75] According to Mpofu, before discussion started Engelbrecht asked when workers were going back to work. Mpofu responded that workers were more than willing to resume their duties but could not do so until their demands have been discussed.
- [76] According to Voogt, the meeting became chaotic and rowdy and ended inconclusively. Voogt heard his name mentioned during the meeting but did not understand what was being said about him because of the language used. He claims colleagues informed him afterwards that clear threats had been made against him. Under cross-examination, he said that what was conveyed to him was that if they got hold of him they would kill him. He could not recall if Siyotula or Ramoupi had conveyed this to him. The applicants dispute that such comments were made and suggested that these would have been included in the minutes if that was the case. Mpofu denied hearing any threats been made that Voogt would be killed or harmed in any way.
- [77] The applicants' version was that there was no discussion at the meeting of their demands and they were simply told to return to work. It was this which prompted the representatives to start talking to each other in their own languages. They claimed that despite the invitation to discuss their grievances, management refused to entertain them. Voogt claimed management had explained they could not accede to the demands for the increase, or undertake not to take disciplinary action over the strike. Further, the demand for his dismissal was something that should have been referred to the grievance procedure.
- [78] Mpofu said that at some point in the discussions management asked for a caucus. Engelbrecht responded after speaking with Voogt. He said people should return to work and the company would deal with issues when workers returned to their workstations. Mpofu

said he replied by saying that there was sufficient number of management representatives present at the meeting to deal with their issues and they had been waiting for this moment to advance their demands and the opportunity to do so and to resolve matters should be taken. Once these issues were resolved people could return to work.

[79] Instead of the discussions continuing, management told them that they should return to their workstations by 16h00 and if they failed to do so they would be dismissed thereafter. The meeting adjourned at that point. Voogt said the management representatives returned to the plant at 14h30.

[80] Mpofu testified that, shortly before 15h00, the employee delegation went back to report to the other employees, who were still gathered outside the premises. They decided that they needed a direction from management as to how they were going to go back to their workstations while the interdict was in place which prevented them from entering the premises. They thought that maybe management would approach them and present them with a document to sign whereafter they would be allowed to enter. He suspected that perhaps management's strategy was to encourage strikers to contravene the interdict by entering the premises. Instead management came and presented them with the letters of summary dismissal. Mpofu confirmed that the notices were placed on the ground. They picked them up and discussed how they were going to challenge the dismissal. They decided that their dismissal was unfair and that they should approach the CCMA.

[81] The ultimatum issued by management, like the previous one, was addressed to union officials and the employees under the heading 'Unprotected Strike'. It read:

'This serves as confirmation we have met with your 10 representatives who are representatives of all plants and all three shifts and given you a final Ultimatum to return to work at 16:00 p.m. today 10 September 2013 on the following conditions:

1] No work no pay for the period not worked.

2] Disciplinary action will be taken against employees who were identified in misconduct during unprotected strike.

3] Management will follow business plan as usual:

3.1] Recruitment drive including but not limited to appointment of fixed term employees.

3.2] Management will not consult on the normal running of the business.

4] We revert to the establish communication structures i.e. representatives unions and that all communication in future will follow through the structures.

5] Any go slow will be considered as continuation of the unprotected strike.

6] The business is under pressure and we need a speedy resolution.

Further this serves to confirm that the following issues were addresses during the meeting:

- 1] Management gave the union a chance to raise their concerns
- 2] Management confirmed that the three concerns raised are noted and that it cannot be addressed immediately and that a different meeting would be arranged to address the concerns.
- 3] Management confirmed the strike was unprotected one and therefore management is not required to consult with employees. Management has made numerous attempts to address the employees concerns in an attempt to assist the return to work and this was met with no cooperation and retaliation from the employees' side.
- 4] Management informed the 10 employee representatives that this is the final ultimatum to return to work and the need to return to work by 16:00 p.m. on 10 September 2013. They were further informed that should they not return to work management will have no other choice than to go ahead with dismissal.

(sic)

- [82] During cross-examination of Voogt it was accepted that the ultimatum had been issued to workers assembled at the main entrance shortly after the Rengwe meeting ended. Mpofu's testimony also was that the ultimatum was discussed amongst them.
- [83] Under cross-examination, Mpofu reiterated that management did not want to listen to the workers demands at the Rengwe meeting even though a director was present at that meeting. Management was only interested in when workers would returning to work, and not in listening to their demands. He confirmed that workers were unhappy with this response when the representatives reported back to them after the meeting. Despite this, they decided that the strategy they had pursued was not been successful and it would be better to accept management's request to return to work and they would come up with an alternative way of raising their concerns.
- [84] It was only under cross-examination that Mpofu first claimed that management was told at the Rengwe meeting that workers were willing to return to work, but the interdict presented an obstacle to them doing so. However, management's response was 'unsatisfactory' because they did not explain how workers could resume their duties in those circumstances. They then decided to remain and wait for management to give them an assurance that they could enter the workplace despite the interdict. When it was suggested to Mpofu that it was absurd to think that management was telling strikers to return to work while simultaneously contemplating contempt proceedings against them if they did, his response was that if management was acting in good faith they should have given strikers a reassurance in the form of a document that would not happen. In conflict with this version, Mpofu stated elsewhere during his testimony, that it was only after reporting back to employees waiting at the premises, that they decided to return to work. Accordingly, they remained at the gates to the plant as an indication that they were willing to return to work while they waited for some directive from the employer to say they could do so.

- [85] Under cross-examination, Mpofu could not provide an explanation why no effort was made to contact management to advise them that workers had decided to return to work, nor could he shed any light on why this critical version of the case was never pleaded. Under re-examination, he testified that no communication was sent to management because it was apparent from the Rengwe meeting that the employer was not willing to give them an opportunity to advance their demands and had failed to respond them. Accordingly they believed any communication to management would be ignored in the same way.
- [86] It was not disputed that at some time around 17h20, dismissal letters addressed to 'All Losberg employees' were placed under a rock by Mr K Engelbrecht and Mr M Klaassen in front of the applicants outside the main gate of the premises. This was well over an hour after the ultimatum to return to work had expired. . On being shown the video clip of the dismissal letters being set down on the ground by Engelbrecht and Klaassen, Mpofu said that they thought the documents would be directives on how they could resume their duties, only to find they were dismissal notices. Engelbrecht and Klaassen did not explain the letters nor give them an opportunity to offer their services.
- [87] The letter of summary dismissal stated that the workers had taken part in an unprotected strike since 06h00 the previous day and despite numerous attempts by management to assist them to return to work, they had failed to do so. It also claimed that they had failed to send representatives to discuss their grievances as requested, or to provide reasons why they regarded their strike as protected and why they should not be dismissed, even though they were given an opportunity to do so. It also stated they had not heeded the advice of "your union" to return to work, and that they were summarily dismissed. Voogt explained that the company was aware of communications between employees and the union's and there was a rumour that the unions were not aligned with the employee's actions. He claimed that Aloni had advised that he had offered to assist representatives going to the meeting at Renqwe but his offer had been declined by them.
- [88] Voogt said that the company took the decision to dismiss strikers because there was no indication from any of the strikers that they were willing to return to work nor of the strike ending at any stage. That said, a few individuals had contacted their managers during the course of the strike. If workers had contacted management and offered their services they would have been taken back, or if they had responded to the ultimatums before the dismissal decision was taken. Mpofu said he could not understand how BME could dismiss everyone without first establishing whether they were participating in a strike or not, for which evidence of attendance registers or the biometric clocking records was required.
- [89] The standard contracts of employment contained a provision that permitted the employer to summarily dismiss an employee who materially breached the contract, if they failed to remedy the breach within a reasonable period of receiving a notice from the company requiring them to do so subject to a seven day limit.[3] Voogt agreed that employees were not given seven days before been dismissed for striking, but maintained that anyone who had produced a lawful reason for not being at the premises, was re-employed. Workers also

had the option of phoning the Omnia HR department

- [90] Voogt said that after the attempts to destroy facilities on 11 September, the company could not envisage how striking employees could be trusted to return to work with hazardous materials.

11 September 2013

- [91] Shortly after 9 AM on Wednesday, 11 September, a crowd can be seen on video footage approaching the main gates. The security personnel can be observed retreating from the security office up the road towards the plant. After a few minutes, the crowd then succeeds in breaking the palisade gate open and entering the premises. Shortly afterwards, the boom gate behind the palisade gate is also bent backwards at an angle of about 120 degrees and shortly after that the camera filming the event appears to be interfered with and the footage ends abruptly.
- [92] Voogt was a couple of hundred meters away at the so-called 'boardroom' further up the road towards the plant and saw the events at the gate. He alerted staff to leave the building to avoid being trapped and headed towards the main plant. On his way up the road, Voogt notified staff at the emulsion plant and the administration office to evacuate the premises. After a while, the crowd that had entered the premises could be seen on the footage making its way up towards the production area. Staff on the premises retreated to the production office, and security staff deployed around the entrance to the danger area. Some members of the crowd removed fire extinguishers from vehicles parked in the road and discharged the contents thereof. Footage revealed a veldt fire being started and a van being pelted with stones. A fire could be seen burning next to one of the parked tankers, and police departing from the scene. Voogt said they were evacuating in accordance with the procedures for dealing with potential explosives fires. During the footage, the colour of smoke from the fire changes to a dark black colour, which Voogt testified was a result of burning chemicals. He and other staff managed to escape from the production office by exiting the premises through the

fence onto the public road.

- [93] Further photographic evidence was provided of the final damage that was inflicted, showing burned-out vehicles including tankers, burnt out drums of flammable chemicals stored on the perimeter of the chemical plant, which were ignited by the veldt fire, and fire damage within the danger area close to the emulsifier plant which could have extended to the magazines. The contents of another tanker containing about 30 tons of oxidiser had been dumped in front of the entrance to the premises on the Fochville road. A number of private and company vehicles were damaged or destroyed by fire, and certain buildings and equipment were damaged. At first glance, one might be forgiven for thinking the photographic evidence of the damage reflected property destruction in a war zone. Voogt confirmed that he had subsequently surveyed the damage himself with Tuinsma, police, fire brigade officials and security staff. Management was attempting to restart operations on that

day with staff members who had come to assist as the company was running out of stock to supply clients.

- [94] Voogt pointed out that it was not just the physical damage caused on 11 September which the company suffered but also the lost production of the previous two days.
- [95] In terms of the pre-trial minutes the parties agreed “a number of applicants some of whom were wearing balaclava’s, forcefully broke into the premises and committed acts of violence, malicious damage to property arson and assault against members of management, to wit.” There was no agreement on the identity of any of the applicants. Voogt conceded that it was not common cause that all the applicants were involved in the incident, but he felt that if others knew in advance what was going to happen on Wednesday 11 September, they should also be held to account for the damage for not warning the company beforehand. He agreed that at that at that stage he could not say which of the applicants had been part of the crowd who forced their way into the premises.
- [96] Mpofu had testified that he had no knowledge of the identity of any employees had come to the premises that day. As far as he could recall, on that morning there had been a meeting of employees at the location in Fochville to discuss how they would take their concerns to the CCMA. In any event, he could not have come onto the property because of the interdict and he was already dismissed by then. He claimed that nobody in the applicants’ team who had instructed the applicant’s attorneys had said that some applicants had been part of the group that went to the premises that Wednesday, but could provide no explanation how that came to be agreed upon in the minute.
- [97] Following the mayhem on Wednesday morning, BME obtained a further court interdict that after noon in which the employees were prevented from approaching within 2 kilometers of the premises. This order varied the initial restriction in the first interdict which had prevented them from being closer than 200 metres to the plant. They were also called upon to show cause on the return day why they should not be found guilty of contempt for failing to comply with the first order.

Evaluation

- [98] The substantive merits of the case are assessed below. Before dealing with that, it is necessary to deal with a bone of contention which arose during the proceedings regarding a concession made by the applicants in the pre-trial minute.

Variation of a concession made in the pretrial minutes

- [99] The applicants claim that a bona fide a mistake was made when the following clause in the pre-trial agreement was concluded:

“2.28. On Wednesday, 11 September 2013 a number of Applicants (some of whom were wearing balaclavas), forcefully broke into the Premises and committed acts of violence, malicious damage to property, arson and assault against members of management, to wit:

Vehicles belonging to the Respondent's management were stoned while they tried to flee the Premises;

- The Applicants also forced their way into the Respondent's offices while damaging office furniture and equipment;
- The Respondent's vehicles, tanker and forklift equipment were set alight, including an attempt to set alight a truck carrying ANCN solution necessitating intervention from the SAPS; and

The rear entrance to the Respondents Premises was blocked where some of the management were attempting to flee.”

[Emphasis added]

[100] The applicants claim that it was a unilateral mistake on their part to concede to the emphasised portion of the paragraph bona fide. It appears that the basis for saying so is that it was never the intention of the applicants or their counsel to include such a concession. Moreover, they contend that the concession is unsustainable on the basis of the evidence of the video footage at the trial, which did not reveal a single applicant who was part of the crowd that stormed onto the premises on 11 September and then caused extensive damage to company property once they had entered.

[101] The respondent argued that in the absence of a successful application to rescind the pre-trial agreement, the applicants remain bound by it. The issue of the applicants recanting on the concession first came up during the trial during the cross-examination of Voogt. An extensive debate then arose in court and the court adjourned the proceedings for approximately twenty minutes to give the parties an opportunity to consult with their clients see whether they could reach any agreement on the issue. When the court reconvened, the applicant’s counsel, Mr Kufa, stated:

“MR KUFA: Thank you, M'Lord, for the indulgence, we can proceed. We remain bound by the Pre-trial Minute, and I would like to ask questions on the Pre-trial Minute.”

[102] Despite this, the applicant’s discomfort with the concession came up again during the testimony of Mpofu. Once more, it was suggested that the concession had been made in error when the minute was concluded. Be that as it may at no stage during the proceedings that the applicants bring an application to resile from that portion of the pretrial minute and accordingly they remain bound by it, as Mr. Kufa acknowledged.

[103] In the alternative to arguing that the concession should be removed from the minute, but without formally applying to resile from it, or amend it, the applicants argue that the concession is in conflict with clause 10 of the minute which states:

“The Applicants maintain that not a single one of them were involved in any form of violence, intimidation or destruction of property at the Respondents premises.”

- [104] This issue also only came to the fore late in the proceedings during the applicants' case. Plainly, on the face of it there is a contradiction between the two provisions. On the one hand, clause 2.28 records as a matter of agreement between the parties that an unspecified number of the applicants were part of the group, which stormed the premises on 11 September. On the other, all the applicants deny any involvement in the undisputed conduct of the crowd. If the two provisions could be read to mean that the applicants admits that some of them entered the premises as part of the crowd but none of those who did were instrumental in any of the mayhem which followed, the two clauses might conceivably be reconciled, but that seems a strained interpretation. The difficulty is that clause 2.28 does not merely talk about the crowd entering the premises and then embarking on various destructive activity, but described the very act of entering the premises as breaking into the property and causing destruction at the entrance gate.
- [105] As the provisions cannot be plausibly reconciled, the court cannot selectively apply them and, in my view, it remains a matter to be determined on the evidence. The relevance of the events of 11 September is twofold. To the extent that the applicants were involved in it, it might serve as an aggravating factor in evaluating the conduct of the strikers. It is also relevant to whether any of them are liable for the damage caused. However, the latter question would require the identification of those involved. As things turned out, only one individual applicant was identified as causing damage to the respondent's property.

The parties' submissions on the fairness of the dismissals.

The applicants' argument

- [106] In general, the applicants deny participating in the unprotected strike and, even if it were found that some of them participated in the strike, the following individuals, in particular, were not on the premises of BME on 9 September and therefore could not have participated in the strike action:

106.1 Paul, Mokele;

106.2 Alpheus Thema

106.3 Samuel, Mbetsheni;

106.4 Michael, Mabuza;

106.5 Makhamba, Mceba;

106.6 Jack, Mafokeng;

106.7 Jacob Maboe;

106.8 Lesego, Morapedi;

106.9 Lesetja, Mongalo;

[107] The applicants pleaded that their dismissals were substantively unfair for the reasons set out below.

107.1 Despite the court orders, there was no strike and if it is found that the applicants had engaged in strike action, then such action was protected strike action.

107.2 To the extent there was an unprotected strike, BME provoked the industrial action because it never made available a salary survey report that was to have been the basis of adjusting employees' salaries and arbitrarily adjusted the salaries of certain groups of employees without explaining this to the others which caused dismay and confusion. Further, management refused to engage with employees during the month of August about arbitrary salary adjustments.

107.3 To the extent that they might have been guilty of participating in an unprotected strike, the sanction of dismissal was inappropriate because they had attempted to comply with internal grievance procedures in July 2013 and had attempted to engage with management on their 'wage demands' on the morning of 9 September.

107.4 Applicants, particularly those on the 14h00 and 22h00 shifts, were prevented from returning to work on 9 September.

107.5 BME acted in bad faith in dismissing them on the basis of a court order which had not been properly served on them and did so without holding disciplinary hearings.

[108] They claim their dismissals were procedurally unfair because they were denied disciplinary hearings prior to their dismissal and the ultimatums were not properly served so, by implication, they could not have adequately reflected on them.

[109] By the time the closing arguments were presented, some additional themes had crept into the applicants' case, namely:

109.1 The court interdict prevented them from approaching the premises and BME provided no clarification how they could tender their services under the circumstances. Accordingly, they were unable to comply with the final ultimatum to return to work.

109.2 The ultimatums were delivered in quick succession, giving them no time to digest and consider how to respond.

109.3 The final ultimatum gave employees too little time to consider. It was also not in clear and unambiguous terms as required by item 6 [2] of Schedule 8 of the LRA because: it did not explain how to circumvent the court orders; employees who had been denied entry the previous night were not aware what was happening; it had typing errors which made it suspect, and it was issued in defiance of the agreement that discussions would be held with the employee representatives.

The respondent's argument

- [110] BME submits that the unprotected status of the industrial action which took place cannot be placed in dispute in view of two interim court orders finding that was the case, which were confirmed on the return days and have not been set aside.
- [111] The applicants were given a reasonable opportunity to consider returning to work by the three ultimatums issued, all of which invited the applicants to elect representatives to meet with management while the rest of the strikers returned to work.
- [112] The wage demand of R 18,000 per month was completely unreasonable and the demand to negotiate at company level was contrary to the centralized collective bargaining arrangement in the bargaining Council. Moreover, the wage demand was far in excess of the minimum wages applicable.
- [113] The applicants also acted unreasonably in threatening to escalate their demands by R 1,000 “per hour wasted” and insisting on speaking to directors of the company. They acted in bad faith, when they refused the invitations to send a delegation to speak with management.
- Comment

Substantive fairness

Legal principles

- [114] Schedule 8 to the Labour Relations Act, 66 of 1995, sets out the following guidelines for the fair dismissal of employees participating in an unprotected strike in Item

“6 Dismissals and Industrial Action

Participation in a strike that does not comply with the provisions of chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including—

- (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.
- (2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.”

- [115] In NUMSA v CBI Electric African Cables[4] the Labour Appeal Court noted that:

"[29] ...[T]he determination of substantive fairness of the strike related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not 'a magic wand which when raised renders the dismissal of strikers fair' (National Union of Mineworkers of SA v Tek Corporation Ltd (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair.

[30] In his work Grogan expresses the view that item 6 of the code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the code.”

The unprotected status of the strike and the seriousness of the contravention of the LRA.

[116] The existence and unprotected status of the strike has already been established by the court in the final court order handed down on 7 November 2013.

[117] The LRA promotes a system of orderly collective bargaining within a hierarchy of bargaining levels. Where centralised collective bargaining is conducted through a bargaining council, the LRA provides various mechanisms to support negotiations taking place at that level. One of the inducements to parties to participate in such forums is that the agreements reached in such a forum can be extended to non-parties falling within the scope of the bargaining council, subject to certain thresholds of representation being met. This prevents competitors undercutting wages set in the negotiations to the detriment both of the employer parties to the bargaining council and to the detriment of employees of those competitors. The LRA also leaves it up to the collective bargaining partners to determine whether the centralised forum is going to be the sole channel for negotiating terms and conditions of employment, or whether some matters can be dealt with at plant level. In the case of BME and its employees all negotiations on terms and conditions of employment are conducted at a centralised level in the bargaining council. If an employer and employees are able to negotiate issues at plant level, notwithstanding such a centralised bargaining arrangement, it undermines the integrity of the existing centralised bargaining process and encourages a fragmentation of bargaining. To strengthen collective bargaining the LRA gives legal force to agreements concluded between representative registered trade unions and employers. It also promotes industrial peace for the duration of a collective agreement by declaring strike action on an issue dealt with in the agreement to be unprotected.

- [118] In this instance, there were two unions in the workplace which were both represented at the bargaining council, though CEPPWAWU was the majority union at the plant. The collective agreement reached at the bargaining council was in full and final settlement of substantive wages and conditions as tabled and negotiated for 2013/2014 and all other terms and conditions were to remain unchanged. Most importantly, the peace obligation prohibited “any industrial action regarding any disagreement on wages and other substantive conditions of employment during the entire period of this agreement”. Any dispute about the implementation or interpretation of the agreement had to be referred to the Bargaining Council for the Chemical Industry to be dealt with in terms of its dispute resolution processes.
- [119] At plant level, BME and the unions nonetheless participated in a consultative forum in which they dealt with plant specific matters, but it was not a negotiating body.
- [120] In that forum, the parties were consulting on the impact of changes in the new production process implemented following the tragic incident in 2011 at the Megamite plant. The new process required the creation of posts with skill requirements which did not exist before and a restructuring exercise was embarked on to place existing staff in the new structure. The more advanced skill requirements of some of the process operator posts necessitated payment of higher wages to the incumbents of those posts. Ancillary to that process, the company also conducted a benchmarking exercise which was ongoing. The only other variation of salaries occurred, if it was found that someone was incorrectly paid for the work they were performing. These issues were discussed in the consultative forum, but did not entail negotiation of any wages.
- [121] Nonetheless, because of the dramatic rise in the salaries of process operators, owing to the much more demanding skill requirements of the new posts, other employees felt they too should receive similar salary adjustments even though the skill requirements of their jobs remained unchanged. The benchmarking process which continued after the restructuring of the Megamite plant was used as a basis for demanding improvements in salaries even though job functions remained unchanged, as reflected in various communications directed to management in June.
- [122] The insistence that management improve other workers’ salaries was underpinned by a ‘go-slow’ and wide scale absenteeism, which amounted to industrial action. At the same time it was evident that workers wanted direct engagement with management and no longer accepted union representatives of the majority union as spokespersons, nor the consultative forum as a legitimate body for resolving their unhappiness over the lack of widespread wage improvements. Management expressed its dismay at the de-legitimation of the communication forum, but nonetheless tried to persuade workers to follow proper grievance procedures and dispute resolution processes. They also warned that disciplinary action could be taken over the industrial action.

- [123] The demand for a basic minimum wage of R 8500 was first articulated in the task team meeting on 2 August. Any negotiation of this would be in direct conflict with the collective agreement which had determined all changes to substantive conditions of employment and frozen all existing terms for the rest of the agreement. The salaries of the new process operators arising from the restructuring were for newly created posts, which did not exist before, and the vastly different technology introduced and technical expertise the new jobs required must have been obvious. It is implausible to argue that other employees could have held a bona fide belief that the establishment of those new posts and setting a salary appropriate to the expertise required, meant that management was engaged in altering existing conditions of employment of existing jobs and that all employees' salaries were open for review. Moreover, it would also have been obvious that the reason this had come about was not because management was selectively and arbitrarily favouring a group of employees but because of a forced need to make a production process safer, which resulted in significant technological change and the creation of job functions which did not previously exist. The ongoing benchmarking exercise of pre-existing jobs could not reasonably have created expectations of wage alterations of the magnitude which applied in the case of the new process operator posts.
- [124] The attempt to force management into negotiations over increased basic wages was in direct conflict with the prevailing collective agreement and undermined the value of the centralized bargaining arrangement, which the LRA supported. The strike action embarked on in clear breach of the prohibitions in collective agreement and the LRA against strike action during the period of the agreement was a serious contravention of the provisions and designed to promote and underpin orderly collective bargaining. Although it had been suggested that workers were willing to return to work if only management would meet with them, it was clear that it was not merely engagement they were seeking, but the implementation of the wage demand. This is dealt with in more detail below.

Attempts to comply with the Act.

- [125] It stands to reason that as long as the strike continued the strikers were not complying with the Act. The question is whether they made any efforts to do so. They made it very clear that they were not interested in either of the unions being involved in the dispute and did not accept their status as their representatives. Nonetheless management did contact both unions immediately it became known that workers were on strike and asked them to attempt to resolve the situation and motivate why the actions should not be treated as an unprotected strike. Although there was also telephonic communication with Aloni of CEPPWAWU, who acknowledged he was aware of the situation, the unions were either unwilling or unable to assist. That is not altogether surprising, because even prior to the strike the workers mobilizing around the wage increase had made it clear they did not regard the issue as a matter for the unions and rejected the communication forum in which they participated. In keeping with the workers 'de-recognition' of the unions as their authentic representatives, at no stage during the entire episode, even after

they were dismissed, was there any evidence to suggest that they expected, or sought, assistance from either of the unions.

- [126] Notwithstanding the representative status of CEPPWAWU, which BME was required to respect, from the inception of the strike management was nevertheless open to engage with shop stewards and, or alternatively, representatives of the workers on strike, provided everyone else returned to work. When workers responded to the first ultimatum that shop stewards were effectively forbidden to meet with management because the issue was not a union matter, management acknowledged the memorandum and called on workers to elect representatives to raise their problems with management at a meeting at 10h30. Instead of responding positively to this by electing representatives while others returned to work, they were not willing to use the opportunity because management had not undertaken that directors would be in such a meeting. In any event, management had not closed the door on engaging with a sizable delegation of the strikers' chosen representatives, provided they return to work in the meantime.
- [127] BME also obtained the interim interdict which should have underlined how serious matters had become, but workers drowned Voogt out with singing when he tried to read it out.
- [128] The stance of the strikers was intractable. They were unwilling to engage with management except entirely on their terms. Even though management had agreed to meet with representatives who were not shop stewards, the strikers wanted to also determine the composition of the management team their delegation would meet with.
- [129] Once the final ultimatum was issued, they did not become more amenable to meet with management as proposed. They no longer referred to their concerns as generalized grievances, but now articulated them clearly as a wage demand which would increase hourly. In short, the strikers raised the stakes for their return to work rather than compromising their demands to any extent. By issuing ultimatums, management was attempting to comply with the course of action recommended in item 6
- [2] of Schedule 8 before resorting to dismissal. As we know, management gave strikers a further opportunity to return to work after it met with them following the expiry of the first ultimatum. At no stage, in their response to management's ultimatums, or at the meeting held at Rengwe before the very last ultimatum was issued, did the strikers or the leadership indicate any willingness to call off the strike and return to work. In discussing the ultimatums below, the question whether there was any intention to return to work after the Rengwe meeting will be addressed, but for present purposes it can be stated that the conclusion reached is that they never offered to return to work at the Rengwe meeting or afterwards unless their demands were negotiated first.

[130] What emerges from the above is that management tried to bring the unprotected strike to an end by warning employees of the risks if they continued with it and at the same time agreeing to engage with their chosen representatives if they returned to work. The strikers remained inflexible and hardened their position during the course of Monday. When given a reprieve on Tuesday, their position did not alter.

Was the strike in response to some unjustified action by the employer?

[131] The circumstances which led to management to introduce new jobs and commensurate salaries has been discussed in some detail above. That process was not a prelude to, or justification for, a revision of all basic salaries, which had just been increased in terms of the recent collective agreement. The strikers' attempt to leverage very large increases based on the new jobs in the emulsion plant was opportunistic. It certainly was not a response to some provocative conduct by management. It must also be mentioned that it was not a situation where management had unexpectedly and unilaterally done something that was interpreted as detrimental to workers. The restructuring of the emulsion plant was the subject of extensive discussions. The "impatience" of workers which Mpofo had spoken of with the process, was simply an impatience that they were unable to succeed in advancing their wage demands in forums such as the task team or the communication forum.

The ultimatums

[132] During the early stage of the trial an issue arose about whether the ultimatums had been issued and, if so, if they had been effectively conveyed. As things turned out by the time Mpofo testified, it had been acknowledged that the ultimatums had been issued, but the main complaint was the time workers had been given to consider them.

[133] In keeping with the requirements of item 6 [2] of Schedule 8, at the earliest opportunity after the strike began on Monday management advised the unions of the situation and requested their assistance. As discussed above it then served two ultimatums calling on strikers to return to work and offering to meet with their representatives once they returned to work. The first ultimatum called on workers to return to work in under an hour. The second ultimatum simply called on them to return to work immediately and promised to meet with their representatives an hour later.

[134] Mpofo testified that there was not enough time for workers to consider the ultimatums. However, before the second ultimatum was issued the workers had already formulated their response. This was to the effect that shop stewards could not represent them but they were willing to engage with management and expressed their willingness to work, but stopped short of agreeing to do so on condition that management met with their chosen representatives. It must be emphasised that even in the initial invitation to meet management once workers returned to work, BME specifically provided that employee representatives, other than shop stewards, could meet with management. It was Mpofo's own evidence that he had explained the seriousness of the ultimatum

to the strikers and they had nominated him and nine others to represent them in any negotiations with management. The memo submitted to management in response to the first ultimatum did not request any additional time to consider how to respond. The thrust of the responses that they were willing to meet with management but were not offering to return to work at that stage. Given this response,

the claim that there was not enough time to deliberate on the first ultimatum does not ring true. We also know that the strikers were very intent on pressurising management to agree to various demands, even if they did not articulate them at that stage, and there is no reason to suggest they would have simply returned to work and lose the leverage of the strike even if they had more time to consider the ultimatum.

[135] Mpofu testified that when the second ultimatum was received workers decided to focus on ways to get management to meet with them so they could advance their demands and explain that they were not unwilling to return to work. Issuing the third ultimatum did not deter the strikers from pursuing their demand for management to address their salaries and unfair treatment. Once again, the response of workers was unequivocal and no request for additional time was made. Although Mpofu claimed that employees could not understand what was going on, there was no evidence of any confusion amongst them about what the company was expecting and what they wanted.

[136] In any event, after the third ultimatum was issued, the company still met with their chosen representatives the following day and they were given another opportunity to return to work. Mpofu testified that after the Rengwe meeting, the strikers decided to return to work and pursue their demands by other means, despite the fact that they were unhappy with management's failure to engage with their demands at Rengwe. It was not disputed that management clearly was demanding that workers return to work by 16h00 and that it was the applicant's own evidence that this was reported to the strikers when their delegation returned from Rengwe. Importantly, it was never part of the applicants pleaded case that workers had decided to return to work and were simply waiting for some direction from management as to how they could do it. If, after discussion with the workers assembled outside the plant, they had indeed agreed to return to work, it is inexplicable why no attempt was made to communicate this to management either telephonically or by email, which had been the form of communication favoured by the strikers. When the dismissal letters

were placed outside the gate, that also did not prompt any intervention by the leadership to communicate with management that management had misunderstood that workers were waiting outside to enter the plant. Likewise, if there was a genuine doubt in their mind as to how they could report for without being accused of breaching the interdict, it is inconceivable why they would not have raised this dilemma directly with management, instead of passively waiting to see how management would resolve the dilemma they had not expressed to management. The silence of the strikers and their representatives in conveying their alleged decision to return to work is completely at odds with the ease, speed and confidence with which they previously had

communicated their position to management. The more reasonable inference to draw, is that they still believed that they could pressurize management to negotiate before they resumed work and had no intention of returning to work before that happened. In this regard, it should be noted that their presence in front of the premises on Tuesday was already in breach of the interdict to remain more than 200 meters away from the entrance.

[137] In summary, there was no evidence to suggest that there was any confusion on the part of the strikers as to the implications of the ultimatums and their stance did not alter over the two days. It was clear they still expected their demands to be met, before they would return to work.

[138] In the circumstances, it is difficult to see how management could have done more to persuade the strikers to return to work. They had an adequate opportunity to reflect on whether or not they should moderate their demands. They also had another opportunity to return to work despite the third ultimatum issued on Monday.

Other factors

[139] The strike was planned and the strikers gave no forewarning of it to management. At least two day's production could not take place. The opportunistic nature of the wage demands has already been dealt with. By the time the demand was articulated at the Rengwe meeting it stood at R 18,000 as a minimum wage, whereas the first time it had been mentioned before the strike began, it was R 8,500 per month. Even the latter amount entailed an increase of approximately 70% on the prevailing minimum wage. By any standard, these demands were unrealistically high. Mpofu tried to minimise the impact of the R 1,000 hourly escalation in the demand, as being merely a tactic and not something meant seriously, but it was something which had been reduced to black-and-white and conveyed as a serious response to management. At Renqwe Voogt's dismissal had been demanded. Mpofu claimed that, in fact, the demand was merely that workers wanted Voogt's removal from Losberg, but that is not the way it

expressed at the time. When his dismissal was demanded no complaints of dismissible misconduct on his part were raised to justify it. It was only claimed that he was detrimental to maintaining a good employer-employee relationship. No coherent evidence was provided to substantiate why Voogt was singled out by the strikers as personally responsible for their discontent. In the light of this, I am satisfied that the strikers' demands were not reasonable.

[140] Inconsistent treatment as a ground of substantive unfairness was not pleaded by the applicants, but Mr Kufa argued that the court could nonetheless entertain it based on the evidence at the trial because in any event the employer bore the onus of proving the fairness of the dismissals, including consistency. Despite not being pleaded, it was argued that BME had been inconsistent in its treatment of specific groups of employees relative to their peers. These were:

140.1 The drivers amongst the applicants who were dismissed for striking whereas Fourie, who was not.

140.2 The dismissal of Mongalo on account of him advising Oussoren he was not coming to work on account of the risks, whereas another employee who asked whether they should come to work was advised not to.

140.3 The dismissal of applicants who drove their own vehicles to work, whereas others who did so were not dismissed.

140.4 The failure to dismiss Mr SD Mbuli, who was visible in video footage of the mess room on 9 September, and Mr W Nieuwenhuizen, who was seen leaving the danger area after signing the register, just as Mpofu had.

140.5 The reinstatement of Rabotapi, whom Rabi claimed was on strike (discussed above)

[141] The cases in question amount to a very small proportion of the number of workers dismissed for striking. Even if grounds of inconsistent

treatment had been pleaded, and if there was some inconsistent treatment to the extent of the specific cases alleged, that was not be sufficient to render all the other dismissal substantively unfair. Inconsistency is an element in determining substantive fairness but not decisive on its own.[5] Inconsistent treatment which is neither selective nor capricious cannot be regarded as unfair.[6] If the employer would not have been aware of the anomalous treatment at the time, it is less likely to carry as much weight than when it is timeously brought to the employer's attention at the time and the employer fails to correct it.

[142] To some extent the unpleaded claims of inconsistent treatment overlapped with claims that some of the applicants who were dismissed were not at work for legitimate reasons or were prevented from working, and not because they were participating in the strike. However, since the fairness of their dismissals hinges on whether or not they were participating the strike, rather than whether they were unfairly dismissed even though they participated, their cases are dealt with separately.

[143] In respect of two individuals whom the applicants mentioned in paragraph 140.4 above, the case for inconsistent treatment can be summarised thus:

143.1 Mbuli, whom the company had accepted did not participate in the strike, was identified in video footage of the mess room as being present there with the other strikers on 9 September. Mpofu claimed Mbuli also participated in the strike. Voogt conceded that DME had not identified him in the footage and accordingly had not regarded him as participating in the strike on the basis of the footage in the way that it had identified PM. He reiterated that Mbuli was taken back because he had been recorded as asking for leave from his supervisor and agreed that if other workers had also been granted unpaid leave by their supervisors, they would also have been reinstated.

143.2 Nieuwenhuizen, was visible on video footage of the danger area turnstiles entering, signing registers, and then exiting the turnstile area in the same direction as Mpofu. Voogt said Nieuwenhuizen was not attached to a particular production facility because he was a mobile employee on the site. On the morning of 9 September he was either going to the IS Laboratory or the R&D Laboratory, both of which were some distance from the Megamite plant. Such individuals would sign in and out simultaneously to show that they had reported for work but were not entering the danger area. Accordingly, his departure from the security area in the general direction of the mess room, did not mean he was not reporting for work to his supervisor. Voogt clarified that because some places of work, such as the Megadet plant, were quite a distance from the security office, a separate register was maintained

at that workplace to record attendance and entry into that danger area.

[144] The applicants argue that BME failed to prove who was on strike and who was not. It was submitted that employees who were seen gathered outside the premises in the photographic evidence should be taken to have been there because they were reporting for duty. The situation after the meeting at Renqwe has been discussed above. Apart from the specific instances discussed below, there was no other evidence led by the applicants that they had all tendered their services but had been turned away. In fact, when the ultimatums expressly called upon workers to provide reasons why they strike action should not be considered as unprotected strike action, their response was simply that they were not on strike. However, this was not because they were actually working, but because they were willing to work, provided management met with them. For the duration of the strike there was no evidence that any of the employees, who were absent from work, unambiguously and unconditionally tendered their services in one form or another.

[145] To the extent the applicants argue they had reported for work after the Renqwe meeting, no concrete steps were taken either by individuals or by their delegated representatives to communicate to management that they wished to return to work unconditionally. In the circumstances, it is reasonable to infer that the applicants were participating in the strike unless their absence from work was due to specific personal circumstances unconnected with the strike.

[146] On Mpofu's own evidence, he personally made workers aware of the serious implications of the first ultimatum when it was issued. They could have been little doubt that continuing with their course of conduct would only make matters more serious. In any event it was not the applicant's case that they did not understand the implications of the ultimatums.

[147] In consideration of all the factors above, except in the case of those applicants who could establish that there were special circumstances distinguishing their conduct from the rest who were on strike, the dismissal of the applicants for participating in the unprotected strike action was substantively fair.

Procedural fairness

- [148] It is now trite law that the procedural fairness of a dismissal is not measured by whether or not it complies with a disciplinary code.[7] Moreover, the provisions of disciplinary codes designed for dealing with individual cases of misconduct are not a benchmark for measuring procedural fairness in cases of mass action, in particular participation in an unprotected strike.
- [149] In *Modise & others v Steve's Spar Blackheath* [8], it was emphasised that the main intention of an ultimatum is to “give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making a decision whether to heed the ultimatum or not”. It was also held that in keeping with the *audi alteram partem* rule, unprotected strikers must be given a hearing as well as an ultimatum prior to dismissal. The only justification for failing to hold a hearing is if the strikers impliedly or expressly waive their rights to a hearing. “Such waiver cannot however be inferred from the strikers’ non-compliance with the ultimatum, as the hearing and the ultimatum serve different purposes” . The Court went on to explain that:

“The purpose of the hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to illicit any information or explanation from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and if need be, seek advice before making a decision whether to heed ultimatum or not The nature and formality of the hearing will depend on the circumstances. It can be collective in nature.”

- [150] The very first ultimatum issued specifically called for an engagement with representatives of the strikers for two purposes. The first was to try and resolve the situation. Secondly, if that failed, the representatives were invited to provide reasons why the strike should not be considered unprotected and why those participating in it should not be dismissed. Accordingly, before a decision was taken to dismiss the applicants, BME provided an opportunity for them to argue why they should not be dismissed. Because of the stance adopted by the applicants, they did not make use of that opportunity. Their sole concern was to pursue their demands. In terms of the requirement to provide *audi alteram partem* before dismissing participants in an unprotected strike, it cannot be contended that opportunity was not given.
- [151] Consequently, the failure of the company to convene a disciplinary inquiry before taking the decision to dismiss applicants for their participation in an unprotected strike was not procedurally unfair.

Cases of individual applicants

- [152] Even if the dismissal of applicants who participated in the strike was fair, the applicants contend that the dismissal of some of them was not fair precisely because they did not participate in the strike. The individual cases have been outlined in the narrative above and details mentioned there will not be repeated here. For convenience some of them may be grouped together. Before going through them, it must be stressed that only nine individuals

were identified by name as being present or on duty at the premises on 9 September, in the supplementary pre-trial minute filed in February 2019. In that minute it was also alleged that employees arriving on the afternoon and night shifts of 9 September at 13h30 and 19h30 respectively were prevented from going to work by BME security personnel. It was only on the third day of the trial that it was suggested to Voogt that there were applicants who had driven their own vehicles to work and therefore should have been treated the same as other employees who

drove their own vehicles to work and were not dismissed. That line of questioning was abandoned when objections were raised to the fact that it was not part of the applicants' pleaded case that such applicants had also reported for work. Nonetheless, the applicant still pursued the issue in argument.

Drivers

- [153] It was common cause that this group of employees did not work regular hours like the production workers. They did not have to report for duty until they were assigned to make a delivery and would generally be given some time off work between deliveries depending on whether they had just been engaged in short or long distance deliveries. They would receive assignments telephonically from Limbada. It was not uncommon for them to start their delivery trip in the small hours of the morning, as was the case with Mofekeng on the first day of the strike.
- [154] The individual applicants in question were Mr A Thema, Mr M Mabuza, Mr M Mceba, Mpetsheni and Mofokeng. These four employees were drivers working in the distribution department under Mr W Serfontein ('Serfontein') the manager of the department. As previously mentioned, their supervisor was Limbada. Limbada had testified that he had phoned all the drivers to confirm their availability for work on Tuesday 10 September but none of them were prepared to report for work and he had to make contingency arrangements using other drivers,
- [155] Video footage showed Mofokeng collecting keys at the security office shortly after 08h00 on 9 September. Mofokeng testified that he had to make a delivery in Rustenberg, leave the vehicle there and then drive a bakkie to Lenasia for servicing. After delivering the bakkie, it transpired that it was going to take a while to service it. Accordingly, he phoned Limbada who arranged for another driver to collect him and they returned to BME's premises, after which he knocked off around 15h00. According to him, Limbada made no mention of the strike in progress when they spoke. He felt that Limbada should have mentioned the strike and warned him not to come to the premises. Contrary to what was put to Limbada and Voogt, Mofokeng denied that, after completing his work on Monday, he had asked Limbada when his next delivery was, and that Limbada had replied that he was done with his work and could 'go and rest'. He reaffirmed his evidence that Limbada would be the one who phoned him if there was further work.

- [156] Limbada did not dispute that he might have done a delivery that Monday, but was not willing to work on the Tuesday. Mofokeng's version which was put to Limbada was that he had phoned Limbada after completing deliveries on Monday to ask if there was any further work for him and was told that there was none. Consequently he was waiting for the next call to report for work, but the next communication he had was about his dismissal. Limbada said he could not understand why Mofokeng would not have contacted him immediately if that was the case. He had not heard from him since Mofokeng told him he would not work on 10 September. It was never put to Limbada that Mofokeng had contacted the HR department instead, as Mofokeng later testified.
- [157] Mofokeng denied any knowledge of the strike until he received his dismissal letter a week after the strike. He did agree under cross-examination that when he had returned to the plant he had noticed a crowd of persons gathered outside the mess room and had made inquiries about what was going on. He was told that they were concerned about their pay and were looking for a way to approach management with their concerns, but he did not realize that they were engaged in a strike even though they were not working. If they had been on strike he would have expected them to be singing and chanting in a violent manner. He denied that Mr Mahambo, who had come to collect him from the Lens had mentioned any problems at the plant and they were just discussing their deliveries. He agreed that if Mahambo knew about the strike he would have mentioned it to him.
- [158] He said he had no opportunity to make any representations before his dismissal because he was not at the company premises, and never received any ultimatums, nor any advice from the union to return to work. He also had no grievances with management at the time. He contacted Nzunza about why he got the dismissal letter and was told that the company claimed he participated in the strike and therefore he was summarily dismissed. She told him that the HR department had been instructed to draft the letters. Later in his testimony, Mofokeng said he could not understand how he could be dismissed for being on strike on 9 September when the company would have known he was on duty that day. He did not contact Limbada because he had already received the letter. Reflecting on the replying affidavit of Schalkwyk in the application to extend the perimeter of the picketing area, in which she stated that the process decided upon was that all calls from employees should be referred directly to Nzunza and Mashaba

in the HR function, Mofokeng felt that he had followed the correct procedure in communicating with the company after his dismissal,

though the letter did not identify an HR person as the signatory. His experience the previous companies he workforce that the HR department to dismissal decisions, but he was not sure.

- [159] Mofokeng did concede that the management person he spoke to most was Limbada, with whom he was on good terms, but did not phone him because he had not informed him of his dismissal, even though he understood that Limbada would be the best person to explain that he had been unfairly treated and that the HR department could not assist him. He denied that the reason he not contacted Limbada was because he had told him on Tuesday, 10 and September, that he was not going to work.
- [160] Limbada did not dispute that Mptsheni clocked in on the morning of 9 September, but the issue was that he also was not willing to work on 10 September. It was put to Limbada that Thema and Mptsheni were only scheduled to report for duty on 10 September after 23h00, but they were dismissed before they could report for work. Limbada said that he would not have made any contingency plans for third-party contractors if the drivers had all said that they were willing to work. Moreover, if they were supposed to report at that time later on Tuesday it would have been to make deliveries very early on Wednesday morning and the trip would have been scheduled as part of the delivery scheduled for Tuesday, which would have been communicated to them on Monday.
- [161] I agree that merely because Mptsheni was seen on video footage of the strikers in the mess room does not mean that his explanation that he went there to change after knocking off was implausible. The same applies to Mofokeng being there at some stage on 9 September. The critical evidence implicating this group as participants in the strike was that Limbada phoned all of them but they told him they were not willing to work on 10 September and he had to make contingency arrangements. It is highly improbable in a situation where Limbada had to deal with a shortage of drivers that he would simply have told Mofokeng to go and rest, as the latter alleged. The only driver who was willing to work was Mr S Fourie, who was not dismissed. Apart from Mofokeng's evidence, none of the other drivers testified to contradict Limbada's claim that he had phoned them.
- [162] In effect, Mofokeng's claim was that he was not on strike but simply waiting to be assigned a delivery. What is implausible is that he was content to wait ten days without a word from Limbada, in circumstances where he had sat in the mess room during the first day of the strike and subsequently had received reports of people being dismissed at the plant over pay issues and of the plant catching fire. It is difficult to believe that he would not have contacted Limbada earlier to find out what was going on and, more particularly, to be reassured that he was going to be assigned work. If he had been waiting at home for an assignment and instead of receiving it had received notice of his dismissal it is inconceivable that he would not have phoned Limbada to understand why he had been dismissed when Limbada would have known he was not expected to work during the whole ten day period. The more probable scenario is that far, from being a detached and indifferent to what was going on at the plant, he made common cause with the other applicants after completing his delivery in Rustenburg and Lens.

[163] It was also argued that there was a disparity between drivers who were dismissed and another driver, Mr S Fourie. Mr Kufa conceded that the issue of inconsistency as a ground of substantive fairness had not been pleaded, but claimed that it was the employer's

responsibility to prove it had acted consistently. It has already been mentioned that Limbada said that Fourie was the only driver

willing to work. The fact that he was seen in the crowd outside the main gate on 10 September at about 12h45, did not mean that he was not making any delivery that day, given the irregular hours that drivers worked. As mentioned earlier, Limbada had testified that special arrangements were made for Fourie's delivery vehicle to be parked overnight at Fochville police station so he could make his delivery the following day.

[164] I am satisfied that, on the probabilities, Limbada had called the drivers to confirm their willingness to work on 10 September and they had refused to make themselves available because they were on strike.

Staff who drove their own vehicles to work

[165] I mention this group solely for the sake of completeness. The basis for alleging that some applicants who drove their own vehicles to work should not have been dismissed was some of the summary entries in the annexure provided by the company of the 28 employees who had been reinstated after the strike. Five of the individuals had the following reasons recorded as the reason for being reinstated: "Did not participate in strike drove to work in his own vehicle."

[166] It was contended that approximately four of the applicants also drove their own vehicles to work and therefore should not have been dismissed. Mr. Kufa argued that Mr K Motseng ought not to be dismissed. Like other workers who travelled to work in their own vehicles, he had arrived for work in his own vehicle but was turned away when he tried to enter the premises. Motseng did not testify to confirm this. Mpofu identified D Ntuntu, B Tambe and S Sibutu as other employees who drove their own vehicles to work, whereas one G Van der Merwe, who also drove his own vehicle to work was not dismissed.

[167] Mpofu testified that an employee such as Van der Merwe also could not be at his workstation because they were also not rendering services as access to the work area was not permitted. He saw no difference between someone who was sitting in the mess room and another employee sitting in the production office.

[168] However, even the cryptic summary reason for reinstatement stated in the annexure did not merely say that the individual was reinstated because they drove their own vehicle to work, but also that they did not participate in the strike. None of the applicants who allegedly drove their own vehicles to work came forward to give evidence about what transpired with them, which would have justified the conclusion that their cases were comparable not merely because they drove their own cars to work but also that they did not participate in the strike. In any event, as mentioned above, these individual exceptions

were not pleaded as part of the applicants' case.

Other individuals

Mr P Mokhele, M Mphela, Mr J Mabuwe, Mr L Morapedi and Mr L Mongalo.

[169] Voogt said that Mongalo was a process controller in the emulsion department who did not report for work from Monday to Wednesday inclusive, while the strike was in progress. Oussoren said that she received a call from Mongalo, most probably on Friday 6 September. He advised her that he would be coming in a little bit later on Monday but on Monday phoned her again and said he did not want to come to work after he heard about the strike. Since she did not tell him not to come to work she advised him to call the HR department, but as far as she knew he never did and she did not hear from him again, nor did he return to work. Oussoren denied that she had sent him a Whatsapp message asking if he was part of the strike. She did not see it would be unsafe for him to have come to work at the emulsifier plant when he phoned, and told him so. Oussoren assumed he was participating in the strike because he did not come to work. She agreed that someone who was absent from work without leave would normally be issued with a warning, but declined to comment on the submission that Mongalo should have been charged with absconding rather than participating in the strike. She had only followed up on the cases of persons who provided sick notes and the HR department was expected to deal with the others. At the time it was very hectic as she was trying to keep the two plants running.

[170] Oussoren was challenged why she did not react as she had in relation to workers at the HEF plant. When he was phoned and SMS'ed by Mr A Moboti, who was due to work on the afternoon shift, about what he should do, she advised him to stay away felt that was different because the strike was taking place right in front of the HEF plant, whereas the emulsifier plant, a few hundred meters away, still seemed safe at that stage. The other workers who had contacted her made it clear that they wanted to come to work. In another instance, Mr Monama was due to work on the night shift of 9 September. Oussoren recalled that he phoned her before taking the taxi to work and when he arrived at the premises he asked what he should do and she told him he should rather go home because it was not safe because strikers were singing and dancing at the entrance to the HEF plant where he worked.

[171] Morapedi, who worked in the HEF plant, and was supposed to work the morning shift on 9 September, called Oussoren that morning before she went to work to say that he had been booked off sick for three days. She sent him a WhatsApp or SMS message asking for the certificate but never received anything from him. The normal practice was that a person booked off sick should phone in before the end of the shift and present a sick note by the end of the next one. That week he was scheduled to work on Monday or Tuesday but not Wednesday. The undisputed evidence was that he never contacted Oussoren to explain his absence on Tuesday or to ask for any instruction about what he should do. In the absence of an explanation for this, it is reasonable to assume he had joined the strike.

- [172] Ousseron also testified that Mabuwe, a HEF plant assistant, was not scheduled to work on Monday but was supposed to work on the afternoon shift on Tuesday. She never heard anything from him and he did not report for work on Tuesday or Wednesday. Voogt and Oussoren identified Mabuwe as one of the workers gathered at the mess hall on 9 September appearing in one of the photographs of the gathering. It seemed odd that he was in the mess hall that day given that it was his day off. When it was suggested to her that Mabuwe was in the mess room because he had just knocked off the night shift and was going to collect his belongings from his locker, she observed that he was just standing there with the rest of those gathered there and did not appear to be going to his locker. Since the video showing him standing in the mess room did not have a time on it, it was also difficult to know how long it was taken after he would have knocked off.
- [173] In Oussoren's view what distinguished the conduct of those who were re-engaged and those who were not, was that the former group of employees clearly said they wanted to work and were not part of the strike.
- [174] It was claimed that on the first day of the strike, Mokhele was on sick leave. It was also suggested that he had been told by his supervisor not come to work because of the strike action. Voogt could not comment on this version, but noted that the sick leave certificate presented for Mokhele covering the period 9 until 16 September, was only issued in December
2013. Video footage taken by an unknown person in a crowd of people standing near the public entrance to the premises were shown in which Mokhele appears wearing a red T-shirt and a multicoloured hat. Voogt said there was no record of working any shifts on Monday and Tuesday and it was only on Tuesday that workers were gathered in such a crowd outside the premises. It was put to Voogt that Mokhele would say that the reason he was present on Tuesday was that he had been alerted the previous day by his supervisor that there was strike action and he was looking for his colleagues such as Mr S Sebute to dissuade them from being part of the action because he had been unable to reach Sebute the previous day on his cellphone. As he never testified, this version was unsupported by any evidence.
- [175] The only evidence about Mongalo's absence was that he first warned Oussoren he would be late on Monday. On Monday he informed her he would not be coming to work after hearing of the strike. In the absence of some express explanation for his behaviour by Mongale himself, it is reasonable to conclude he was a participant in the strike.
- [176] Mphela had no reason to strike in pursuit of his own personal interest, but admitted he was sympathetic to the strikers' wage demand. When he arrived at the premises on 9 September, his supervisor, Mpofu explained what was happening. As a trainee he could not enter the danger area without his supervisor. He spoke to his production manager, Coetzee, who was walking nearby. Coetzee confirmed he could not enter the danger area under the circumstances.

- [177] He spent most of his time in the mess room that day, waiting to see how things unfolded, until leaving the premises at 23h00. He stayed beyond his normal knocking off time of 16h00, because he wanted to make sure he still had a job and whether they could return to work as normal the following day. Paradoxically, despite claiming to have been there to see first hand how matters developed he claims to have been unaware of any of the ultimatums issued or the court order. Under re-examination, Mphela denied that by remaining at the premises after his normal working hours meant he had was participating in the strike.
- [178] The next morning when he came back to work he found employees gathered not far from the entrance to the premises who told him that they could not enter. He never contacted Coetzee again to ask what he should do. He was waiting for information conveyed to the strikers about the progress of the strike. When he phoned Nzunza on 10 September she told him he could not enter the plant.
- [179] Despite showing an intense interest in what transpired the day before, he left the premises on Tuesday around 14h00 without waiting for the outcome of the Rengwe meeting. Later that day he learned from Lesetja that summary dismissals had been “issued” to workers. He phoned Nzunza again to understand what the implications were for him and she advised him that he was also dismissed, even though he had explained to her that he had only been there three months and was still new. It was only under cross-examination, that he claimed for the first time he had also told Nzunza he was not on strike and was innocent.
- [180] On a preponderance of the evidence, it is more likely that Mphela made common cause with the strikers and did not seek guidance from the most obvious source about what he should do if he did not intend to join the strike. Quite apart from this, his version was never put to Voogt, as it should have been, and that substantially weakens its reliability on account of being untested.

The afternoon and night shifts of 9 September

- [181] In relation to the afternoon shift the first point that must be made is that other than claiming in the pre-trial minute that workers due to work at 14h00 on 9 September were refused entry to the plant, no evidence of any of those employees was led to support this claim. Secondly, even if it had occurred, they ought to have returned to work the following afternoon after the Rengwe ultimatum was issued as they would normally still have been on duty by the time the ultimatum expired at 16h00. Accordingly, in the absence of evidence that they did, the most probable reason is that they were unwilling to return to work.
- [182] The situation regarding the night shift starting at 22h00 on 9 September is more complicated. Rabi's evidence in many respects did not match what was put to Voogt. In particular, he did not say they were told that workers could not enter because of the interdict or that they going to be dismissed the following day. Rather, he claimed they were turned away because they were told they had been dismissed or that they should not return to work until management told them to. The affidavit he made at Fochville police station that night after returning, strangely did not mention being told he was dismissed but

merely records being turned away. Yet he claimed it was his confusion of the reason for being dismissed that made him depose to the affidavit as proof he had gone to work.

- [183] Notwithstanding the problems with his version, the video footage of the taxi arriving before the start of the shift and not being allowed to enter is consistent with the occupants being turned away for whatever reason at the instance of the employer. When Rabi testified he did not confirm which of the persons listed on page 62 of the applicants' bundle were in the taxi apart from himself.
- [184] As a result, even if it can be confidently said that a group of some night shift workers in the taxi were reporting for work and were turned away, the identity of the other occupants of the taxi, besides Rabi, was never confirmed during the trial. I agree it is difficult to understand why none of them would have approached their supervisors when they learned of their dismissals, because if they were turned away on the first night, they would not have been due to work until the following night. They could hardly have been blamed for not presenting themselves for work by the time the ultimatum expired at 16h00 on 10 September if they would not have reported for their shift until 6 hours later.
- [185] The only person who was identified in the course of evidence as reporting for work that night was Rabi. The identity of the others in the taxi remains indeterminate.
- [186] Was it unfair of BME to dismiss the night shift workers because they did not tender their services by 16h00 on 10 September? Although it was never pleaded as one of the reasons why the dismissals were allegedly unfair, it was suggested that night shift workers would not have been due to work until 22h00 that day, and accordingly they ought not to have been dismissed. When this was put to Voogt his response was that the employee delegation at the Rengwe meeting comprised representatives from all shifts. This was the composition of the delegation requested in the company invitation to the meeting. His contention that the delegation comprised representatives from all shifts was never disputed at any stage in the trial. It was further suggested that it was absurd and therefore unreasonable to have required night shift employees to return to work by 16h00 on 10 September. This too was never pleaded, so it was not part of the case which BME was required to address, and the court does not have to decide this in the absence of an amended statement of case.
- [187] Even if this had been pleaded, if it was the intention of all the employees to return to work, but the timing was impractical, it would have been a simple matter for the representatives to tender the return of workers on an agreed schedule if the timing of the return was a genuine problem confronting the employees, or to propose a modification of the timing of the return to work. There was no evidence of any of the applicants on night shift tendering to return to work, but only at their normal time at the start of their shift. It stands to reason that if there had been a genuine willingness of night shift workers or any others to work on 10 September they or their representatives would not have remained mute and would have made that wish known to management, and made a request to only report for work later.

[188] In parenthesis, it should be noted that by that stage, all employees had been dismissed, so prior to the Rengwe ultimatum it was an open ended question if and when any of the employees might be given any chance of returning to work at all.

The counter-claim

[189] The LRA permits an employer to seek compensation for any loss arising out of an unprotected strike, subject to the provisions of s 68(1)(b), viz:

‘68 Strike or lock-out not in compliance with this Act

(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does

not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) ...

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.’

[190] For the purposes of these proceedings it is only necessary to determine if any of the applicants are liable for causing the damage to BME’s property giving rise to the financial loss claimed. Any determination of the quantum of an award of compensation will be the subject matter of further proceedings. This is not a case where the only damage suffered was as a result of the loss of production. In this case it was also, and principally, the physical damage inflicted on BME’s property, which was a major source of the loss. In my view, many of the factors mentioned in s 68(1)(b) will carry less weight in making an award of compensation, where the damage inflicted is malicious and not simply a natural consequence of employees withholding their labour. The damage caused was plainly intentional and appears to have been the sole purpose of the crowd entering the plant.

- [191] BME contends on the strength of the pre-trial minute and the fact that the applicants did not contest the second urgent application on 11 September 2013, or come to court to deny their involvement in the incident on 10 September, that it must be accepted that all the applicants invaded the premises.
- [192] The difficulty with contradictions in the pre-trial minute relating to this incident has already been discussed above. It is therefore necessary to factually determine if the crowd which invaded the premises and wrought havoc on the property did consist of one or more of the applicants. It was argued by the applicants, though not forcefully, that the crowd did not consist of any applicants but of members of the Fochville community. No evidence was led to support this contention. Considering that BME had finally dismissed strikers the day before and given the strikers' level of confidence at that point that they would still prevail with their demands, persons who would have been most obviously aggrieved with BME on the day after the dismissals, would have been applicants. It is most probable that a group of them were so angered that they sought to deal BME a counter blow against BME for the dismissals. In all probability, the crowd would have consisted mainly of applicants, even allowing for the theoretical possibility that some community supporters may have joined in.
- [193] That said, the crowd clearly was not big enough to comprise all the applicants. Consequently, not all the applicants can be held liable for the damage to property caused. It then becomes a question whether any members of the crowd could be identified causing damage to property. Voogt could not personally identify anyone in the footage. It was argued that the principles of common purpose as applied in disciplinary matters, justified a finding that all the applicants were complicit in causing the damage notwithstanding the failure to identify applicants participating in the incident.
- [194] In *National Union of Metalworkers of SA on behalf of Dhludhlu & others v Marley Pipe Systems SA (Pty) Ltd* (2021) 42 ILJ 1924 (LAC) the LAC recapped the approach to the doctrine of common purpose or derivative misconduct in the employment context:
- "[16] The difficulties inherent in determining the individual culpability of an employee in the context of collective misconduct were considered by the Constitutional Court in Dunlop [National Union of Metalworkers of SA on behalf of Nganezi & others v Dunlop Mixing & Technical Services (Pty) Ltd & others (Casual Workers Advice Office as Amicus Curiae) 2019 (5) SA 354 (CC); (2019) 40 ILJ 1957 (CC)] In that matter, the court stated at para 46 that:*
- 'Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required.'

- [17] The court recognised that employees may participate in and associate with misconduct in many ways, both direct and indirect, while cautioning that ‘no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group’.
- [18] In *Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd*, [(1994) 15 ILJ 1057 (LAC)] which predated the current LRA, more than 100 employees emerged from a room in which a driver was left seriously injured after an assault. In that matter, the court, relying on *R v Blom* [1939 AD 188] found that all the evidence presented was consistent with the inference that all of the employees had been part of the group which perpetrated the assault. This was so although on an abstract appreciation of the evidence this inference was not the most probable in that no alternative inferences had been advanced by the employees which had a foundation in the evidence. As a result, the court had to select that inference which was the more plausible or natural one from those that presented themselves. It was found that the inference drawn that all employees were involved became the most probable only because none of the individuals concerned came forward, either at the individual disciplinary hearings, or in the Industrial Court, to absolve themselves, a failure which was weighed in the balance against them. With no evidence that it was only a majority of the appellants who were present, the court found that the evidence was equally consistent with all employees having been present at the scene.
- [19] In the current matter reliance was placed by the Labour Court on the doctrine of common purpose to find all of the appellant employees responsible for the misconduct. All of the employees had embarked on an unprotected strike. There was direct evidence which proved that 12 employees had engaged in the assault. The remaining 95 employees were identified as having been in the group of strikers and to have directly associated with the misconduct. The 41 remaining employees, in respect of whom the appeal is pursued, were not identified through direct evidence as having been part of the group. It follows that for the inference to be drawn that they had associated themselves with the assault including before it commenced, or after it ended, whether through direct participation or association, such an inference must be consistent with all the proved facts.
- [20] The proven facts were that all employees had reported for duty, left their workstations and embarked on the strike. All employees, save for Mr Mokoena, were on the respondent’s premises and away from their workstations at the time of the assault. The striking employees, all of whom were NUMSA members, moved together towards Mr Steffens’ office, holding placards and presenting written demands which sought his removal. The employees sought out Mr Steffens and remained present on the scene during the course of and after his assault, with none of the striking employees coming to his aid. Apart from Mr Ledwaba no employee took advantage of the opportunities availed, both prior to and during the disciplinary hearing or before the Labour Court hearing, to distance themselves from the events of the day.

[21] In its approach to the circumstantial evidence available to it, it is the task of the court to select that inference which is the more plausible or natural one from those that present themselves. In having regard to the possible inferences available to be drawn, it is noteworthy that, as in FAWU, no alternative inferences founded in the evidence were advanced by the employees. There was no evidence that it was only 107 of the appellants, in respect of whom the appeal is no longer pursued, who were present on the scene of the assault. The undisputed evidence was that all the appellant employees had left their workstations and participated in the strike. The employees wanted to speak to Mr Steffens in the canteen and, when he did not arrive, they moved to the main gate and towards his office with demands that included his removal. There was no evidence that any of the 148 appellant employees distanced him- or herself from the actions of the group and the clear evidence was that the assault on Mr Steffens was perpetrated by members of the group of striking employees. None of the employees intervened to stop the assault and assist Mr Steffens, nor did they disassociate in any way from the assault before, during or after it. In fact, the undisputed evidence was that the striking

employees celebrated the assault after the fact. It followed in the circumstances, having regard to the proven facts, that the inference drawn that all employees were involved in or associated themselves with the assault became the most probable and plausible.

[22] In *KPMM Road & Earthworks (Pty) Ltd [Association of Mineworkers & Construction Union & others v KPMM Road & Earthworks (Pty) Ltd (2019) 40 ILJ 297 (LAC)]* this court took issue with the failure of the Labour Court to have careful regard to the established principles of common purpose in the context of collective misconduct. In *Makhubela v S [2017 (2) SACR 665 (CC)]* the Constitutional Court, relying on *S Mgedezi & others [1989 (1) SA 687 (A)]*, set out the requirements necessary to prove common purpose, namely that the individual must have been shown to have been

present at the scene where the assault occurred; to have been aware of the assault; have intended to make common cause with those who perpetrated the assault; have manifested some common purpose with the perpetrators of the assault by performing an act of association with the conduct of the others; and have possessed the requisite mens rea. These requirements were also considered in *S v Thebus & another*

[2003] ZACC 12; [2003 (6) SA 505 (CC)] and in *Dewnath v S Dewnath v S [[2014] ZASCA 57]* it was held that:

‘The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.’

[23] In Dunlop, the court stated that association with the misconduct before it commenced or after it ended may be sufficient to establish complicity

in the workplace context, with it not required that an employee be present at the scene. However, prior or subsequent knowledge of the misconduct and the necessary intention in relation to it is still required. This moves the requirements to prove common purpose in the workplace outside of the strict requirements set out in the case law from Mgedezi. It allows an employee to be held to account for collective misconduct where the employee associated with the actions of the group before or after the misconduct, even if not present on the scene; where the employee had prior or subsequent knowledge of the misconduct; and he or she held the necessary intention in relation to it.”[9]

[195] What distinguishes Marley Pipe from this case is that the group of strikers acted as a coherent and identified group on the day of the assault. In this instance, it is known that the group which invaded the plant was considerably smaller than the number of applicants on strike, and there is no basis for assuming applicants who were not part of it, knew of, and supported the smaller group’s actions. Furthermore, even within the smaller group the members of the group remain unidentified. Accordingly, the basis for applying the principle of individual culpability for collective misconduct is insufficient.

[196] However, during the cross-examination of Mpofu the question of his personal involvement in the damage came to the fore in examining the video footage of the crowd entering the premises and other photos produced under cross-examination.

[197] He denied his participation, claiming to have been attending a meeting of dismissed employees in Fochville on the morning of 11 September. Although he denied participation, the video footage taken at the main gate at about 09h11 when the crowd forced their way into the premises was revealing.

[198] The person seen bending the boom pole backwards until it was wearing a beret, a red T-shirt and light blue trousers. He had what appeared to be a mainly white handkerchief tied in a triangular shape covering his nose and mouth. He was brandishing a sjambok. A number of other members of the crowd were wearing cloth masks over their faces and a few were wearing red T-shirts, but no others can be seen on the footage wearing a beret or wielding sjamboks. The individual wearing the beret disappeared out of sight behind the camera after bending back the boom. From the footage at that point it then appears that someone else was interfering with the camera, and the beret wearing individual appeared for a fraction of a second and could be seen waving his sjambok in the direction of the camera, just before the camera stops filming.

- [199] Mpofu admitted to being in other photos taken outside the premises, which were handed up during his cross-examination[10], wearing the same attire as the person in the video and brandishing a sjambok. However, he denied the photograph could have been taken on the day the gate was stormed and claimed it must have been taken the previous day, 10 September.
- [200] If that were the case that the photograph was taken the day before, it would mean that on the following day when the premises were stormed it was another individual, who was dressed just as Mpofu had been dressed the day before, and also carrying a sjambok. It is noteworthy that on the footage, no-one else could be seen wearing a red beret and a red shirt with similar coloured trousers, though a few others did have the same T-shirts. Similarly, in the photos, there is no-one else wearing a beret and red shirt, quite apart from wearing trousers of a light blue or charcoal colour. Moreover, on one of the photos in which Mpofu admitted he appeared, and in which he was wearing the same clothes, it is evident that plumes of smoke can be seen rising from the premises in the background, which supports the probability that the still photos in which he appeared were taken on 11 September

when the damage was caused and not the previous day.

- [201] As a matter of probability, it most likely that Mpofu was amongst the group who stormed the entrance to the premises on 11 September 2016 and that he intentionally damaged the vehicle boom and is liable for causing that damage. It was not clear from the footage that he also personally damaged the camera.

Costs

- [202] The respondent asked for a cost order against the applicants on the basis that their unfair dismissal claim was without merit. There was no union which was a party to the litigation or ongoing relationship between the parties, and the merits were poor. I also appreciate that the respondent has been put to considerable expense in running a lengthy trial. However, the court cannot discount that the applicants might still have believed that, even if the strike was unprotected, that they might succeed on one or more of the grounds of unfairness they pleaded. In the circumstances, as a matter of law and fairness, no cost award against the applicants will be made.

Order

- [1] The dismissal of the applicants for participating in an unprotected strike was substantively and procedurally fair.

[2] Mr S Mpofu is liable to the Respondent for the damage caused to the boom gate at the main entrance to the Respondent's premises on 11 September 2013. The Respondent may enrol the matter for determination of the payment of any just and equitable compensation due by Mr Mpofu under s 68(1)(b) of the Labour Relations Act, 66 of 1995, arising from the aforesaid damage.

[3] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives -

For the Applicant: M Kufa assisted by T Munyai instructed by Machaba Attorneys

For the Third Respondent: A Redding SC instructed by Cliffe Dekker Hofmeyr

[i] * As varied on 17 November 2021 under s 165(b) of the Labour Relations Act, 66 of 1995, to correct patent errors in paragraph [201] of the judgment and paragraph [2] of the order in which the year 2013 was incorrectly stated as '2016'. [1] Voogt testified that the distance was about 200 m but when viewed against the aerial map and scale provided on that map, this was a significant exaggeration.

[i] * As varied on 17 November 2021 under s 165(b) of the Labour Relations Act, 66 of 1995, to correct patent errors in paragraph [201] of the judgment and paragraph [2] of the order in which the year 2013 was incorrectly stated as '2016'.

[1] Voogt testified that the distance was about 200 m but when viewed against the aerial map and scale provided on that map, this was a significant exaggeration.

[2] This appears to be a typographical error and was meant to read 18 June 2013.

[3] Viz: "4.2.1 If the employee commits a material breach of any of his obligations other than this agreement, and fails to remedies such breach within a reasonable period of receipt of notice from the company requiring him to do so, provided such period shall not exceed seven days."

[4]

[2014] 1 BLLR 31 (LAC), para 29.

[5] Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2017) 38 ILJ 860 (LAC) at para [31].

[6] County Fair Foods (Epping), a division of Astral Operations Ltd v Food & Allied Workers Union & others (2018) 39 ILJ 1953 (LAC)

[7] Highveld District Council v CCMA (2003) 23 ILJ (LAC)

- [8] [2000] 5 BLLR 496 (LAC) at para 73.
- [9] At 1930-33 [case references included in quotation are instances where the full citation of the judgment was footnoted in the LAC judgment, but not all subsequent references are included]
- [10] Pages 201-204 of the Respondent's Evidence bundle.
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