

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO. ☒ YES ☐ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO
(3) REVISED.

05/01/2024

DATE

SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 2086/20 AND JR 2111/20

CCMA CASE NUMBER: GATW 9558-19

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED
WORKERS ("NUPSAW") obo LUTENDO & 284
OTHERS

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION

First Respondent

COMMISSIONER KRUGER

Second Respondent

DIS-CHEM PHARMACIES LTD

Third Respondent

Heard : 23 November 2023

Delivered : 5 January 2024

JUDGMENT

NORTON AJ

Introduction

1. Between November 2018 and April 2019, approximately 2 500 Dis-Chem workers went on strike. It was a strike marred by widespread violence. Approximately 800 employees were dismissed for misconduct. This case concerns the fairness of the dismissal of 285 of those employees, all NUPSAW members.
2. There were two reviews before this court. One initiated by NUPSAW on 15 January 2021; and another (a cross review) initiated two weeks later by Dis-Chem on 29 January 2021.
3. NUPSAW seeks to review and set aside the arbitration award issued by Commissioner Kruger on 29 November 2020. The union simply seeks to remit the matter back to the CCMA for a re hearing before a different arbitrator. The union does not seek an order of substitution that the dismissals of their members was procedurally and substantively unfair, and accordingly do not advance the remedy of reinstatement or compensation.
4. NUPSAW takes issue with two aspects of the Commissioner's award: firstly the union submits that the Commissioner failed to apply his mind to the issue of inconsistency in the application of sanction (called the "inconsistency challenge"); and secondly that the Commissioner misconstrued the relevant elements of the doctrine of common purpose (the "common purpose challenge").
5. In turn Dis-Chem seeks to review the arbitration award only to the extent that the Commissioner failed to take into account relevant evidence which resulted in a finding that the dismissal of one employee, Mr Thabo Manyengisa, was unfair and reinstatement followed. Dis-Chem seeks an order that Mr Manyengisa was fairly dismissed.
6. At a case management meeting on 31 August 2023 before Acting Deputy Judge President Molahlehi, the parties agreed to consolidate the matter, and the reviews were argued before me on 21 November 2023.
7. This judgment will be structured in the following way:
 - 7.1. Firstly I will set out a chronology of the relevant facts;
 - 7.2. Secondly I will summarise NUPSAW's review, Dis-Chem's response, and the arbitrator's award;

- 7.3. Thirdly I will summarise Dis-Chem's review, NUPSAW's response, and the arbitrator's award;
- 7.4. Fourthly I will set out the relevant legal issues which arise from both reviews;
- 7.5. Fifthly I will apply the facts to the law; and
- 7.6. Lastly I will make concluding points, and hand down the order.

Chronology of facts

- 8. Dis-Chem Pharmacies Limited ("Dis-Chem") is in the pharmaceutical business and has approximately 150 stores nationwide. The company employs about 17 000 employees. NUPSAW had recruited about 1900 of these employees.
- 9. On 11 June 2018 NUPSAW referred a mutual interest dispute to the CCMA relating to wages and conditions of service.
- 10. On 29 October 2018, in anticipation of strike action, the parties met at the CCMA to negotiate picketing rules for approximately 50 stores, warehouses and distribution centres.
- 11. The parties met again on 7 November, and NUPSAW's National Organiser, Mr Solly Malema sought the recusal of Commissioner Blignaut, and when that was unsuccessful led a walkout of the union from the process. Despite being warned that the process of demarcating the picketing areas would continue without the union's participation, they never returned. As Malema left he stated, *"And we are telling you now that the strike will be violent."*
- 12. The next day, 8 November NUPSAW gave notice to Dis-Chem of its intention to commence strike action on 16 November at 05h00.
- 13. On 14 November 2018 the CCMA sent the parties the picketing rules. Picketing of a maximum of 20 – 30 employees was allowed in the demarcated areas, usually between 20 to 50 meters away from the entrance to the various Dis-Chem stores.¹ Picketers

¹ For example at Cresta Mall, the designated area was described as "area indicated on map 2, in the parking lot, not closer than 30 m from the entrance"; maximum number of picketers 20; for Rosebank the designated area was "Rosebank park, corner Sturdee Avenue and the entrance – 20 meters from the corner, closer to the shopping centre"; maximum number of picketers -20; at Princess Crossing the

could enter the malls two at a time to access water and sanitation facilities, and were required to do so peacefully and orderly and not intimidate members of the public, or disrupt the activities of businesses. Clause 2.3 of the rules read, *"No picketing, demonstrating, singing, protesting and / or toy-toing shall take place outside Designated areas and any picketing outside of the demarcated area is prohibited as a contravention of the rules."*

14. The employees were informed of the picketing rules before the commencement of the strike.²
15. On 16 November 2018 the strike began, it was a protected strike. It was violent. Later that day Dis-Chem approached the Labour Court for an order that the striking employees comply with the picketing rules and confine themselves to the designated areas. Van Niekerk J, granted the order and others. Workers were interdicted and restrained from perpetrating acts of violence and intimidation against fellow employees, workers, suppliers or members of the public. The court also ordered the union to communicate the content of the court order to their members, and to confirm by way of affidavit, three days later that they had done so. This court order is referred to as the "first court order".
16. The court order had little effect and striking workers continued to assault none striking workers, damage delivery vehicles, throw stones at passers by, and blockade access to Dis-Chem stores such as at Canal Walk, Cavendish Square, Ghandi Square, Park Station and other sites. The CCMA sought to intervene, also with little effect.³
17. On 5 December 2018, Dis-Chem approached the court for further relief. The urgent application came before Acting Justice Snyman. He granted an order suspending the picketing rules; and restraining the strikers from continuing with *"any further picket, gathering, assembly or protest action"* at Dis-Chem or any public place outside the stores. This court order was referred to as the "second court order".

demarcated area was described as "Not less than 50 meters away from the Dis-Chem entrance in the middle of the car park" Maximum number of picketers – 10.

² Pre arbitration minutes, para 3.17

³ Refer to Snyman AJ's "Reasons for judgment" dated 7 November 2018 under case number J 4124 / 15.

18. On 10 December over 100 employees boarded a hired bus, apparently destined for Ghandi Square. It never got there and instead about 90% of the employees on the bus approached the Woodmead store and thereafter the Sunninghill store, throwing stones, interfering with traffic and continuing with protest action leading, to their arrest by the SAPS. (Known as the "bus incident").
19. On 10 and 11 January 2019 striking workers targeted Dis-Chem Head office. They continued with protest action, picketing and hindering traffic (the "head office incident")
20. In March 2019, the strike came to an end.
21. Disciplinary action proceeded thereafter, with individual employees implicated in alleged misconduct facing individual disciplinary enquiries chaired by independent chairperson, as well as group hearings where warranted and with consent from employees. Approximately 800 strikers were dismissed in April 2019.
22. On 24 June 2019 NUPSAW referred an unfair dismissal dispute to the CCMA. The employees who had committed misconduct in the bus incident of 10 December 2018, and employees who had committed misconduct in the head office incident of 10 and 11 January 2019 incident, were the members represented by NUPSAW.
23. On 13 March 2020 the parties signed a pre arbitration minute. Paragraph 3.25 is particularly pertinent and reads, "*The Applicants (ie the union and members) admit to the contents of the charges levelled against them at the disciplinary enquiries including video footage and photographs that were utilized as evidence at the disciplinary inquiry.*"
24. The union raised the inconsistent application of discipline as a substantive fairness issue in dispute in the minutes and mentioned two of their members Ms Cynthia Mndebele and Ms Margaret Jaxa as examples. Later in the arbitration the list was extended.
25. An arbitration continued under the auspices of the CCMA, led by Commissioner Werner Kruger. The arbitration was held over a number of days and finalised on 26 November 2020.
26. On 1 December 2020 Commissioner Kruger handed down his award. He found the dismissals of all the employees to be fair except for Mr Thabo Manyengisa and Johannes Senoamadi. They were both reinstated to the date of dismissal.

27. In January 2021, NUPSAW and Dis-Chem launched their respective reviews.

NUPSAW's review, Dis-Chem's defence, and the arbitrator's award: the inconsistency challenge

28. Success Mataitsane, the General Secretary of NUPSAW deposed to the founding affidavit. He pointed to two grounds of review: firstly the commissioner misconceived the rule against inconsistency (in other words the parity principle), and secondly he misconceived the concept of common purpose.
29. Mr Mataitsane submitted that the Commissioner had neglected to take relevant evidence into account, particularly with respect to inconsistency regarding disciplinary sanctions for employees implicated in the same / similar misconduct. He explained that some employees received Final Written Warnings ("FWWs"), whilst others were dismissed.
30. With respect to the first ground he drew attention to: Cynthia Mndebele, Margaret Jaka, Ms Ramovha, Ms Ngwepe and Ms Kekae who were issued with FWVs. Mr Matatsaine also referred to decisions in the Western Cape and Gauteng where employees had received FWW for being outside of the demarcated areas, and did not commit violent acts or carry dangerous weapons.⁴ In particular he referred to the CCMA award of Senior Commissioner Jamodien who found that employees who were only guilty of breaching picketing rules by being outside of the demarcated area and had committed no violent acts were unfairly dismissed, and he ordered their reinstatement.⁵
31. Mr Mataitsane referred to evidence presented by one of Dis-Chem's witnesses (Ms Samantha Schafer – the HR Litigation Manager) that the company argued that their application of discipline and sanction was consistent, in that employees who were outside of the demarcated areas before the second court order, and who did not commit material misconduct were sanctioned with a FWW. Those who committed misconduct after the second court order of 5 December, or who engaged in serious acts of misconduct were dismissed.
32. He confirmed that there were no disciplinary hearings for Cynthia Mndebele and Margaret Jaka and they had committed misconduct, which according to Schafer

⁴ See paragraph 7.1.10 of the Founding Affidavit

⁵ See paragraph 8.25 of the Founding Affidavit

warranted dismissal, but they were sanctioned with FWWs. In paragraph 7.1.7 of his Founding Affidavit he writes, *"If the employer was consistent in the application of discipline, it should have also dismissed those employees, but did not, giving rise to the unfairness of a dismissal of the other employees in exactly and / or substantially the same circumstances."*

33. The union submitted that as these identified employees (as well as others not identified) were issued with FWW, so should the employees who had been dismissed. The union argued that the Commissioner erred by not finding that the differences in treatment amounted to unfairness. The Commissioner had misconceived the relevant legal principles, so argued the union, and in so doing had *"committed a grossly reviewable irregularity which warrants interference by this court."*⁶

34. Dis-Chem explained, with respect to the attack on inconsistency that:

34.1. Ms Jaxa and Ms Mndebele were given a FWW, although it appeared that they could have committed further misconduct than simply picketing outside the demarcated area, and that if there was evidence to this effect Dis-Chem would subject them to a disciplinary enquiry (and by inference could be dismissed if found guilty).

34.2. With respect to Ms Ramovha, Ms Ngwepe and Ms Kekae, different chairpersons chaired their enquiries, and independently came to the conclusion that a FWW would be an appropriate sanction.

35. The evidence before the Commissioner on this issue was presented by Ms Schafer: She said:

35.1. *"...if it is that there was an additional breach....we will take those two individuals into an inquiry."*⁷

35.2. *"...we had independent chairperson when hearing matters, so each case is based on its own merits..."*⁸

⁶ See paragraph 7 of the Founding Affidavit.

⁷ Transcript, pg 545, lines 16 and 17 (with reference to Ms Jaxa and Ms Mndebele)

⁸ Transcript pg 550, lines 5 – 10, and 18 – 19.

35.3. "... in a disciplinary process we ask aggravating and mitigating (factors) ...that could influence the potential outcome."⁹

36. The Commissioner in his award referred to:

36.1. "individual disciplinary hearings,"¹⁰

36.2. Advocate Mkhize's argument that the workers had not breached workplace rules, as court orders and picketing rules do not constitute workplace rules¹¹

36.3. Advocate Mkhize's argument that many employees were dismissed for single incidents, being protesting outside the demarcated area.¹²

37. In the Commissioner's analysis, he maintained

37.1. That Adv Mkhize was wrong that a breach of court orders and picketing rules does not constitute misconduct because it is not codified in the company's rules.¹³

37.2. Whilst some employees were dismissed for a single incident, this involved the breach of two court orders and the picketing rules.¹⁴

37.3. Whilst 5 employees received FWW for misconduct which had seen other employees dismissed, that did not mean that the company had conducted itself inconsistently in the application of the sanction, but simply that chairpersons exercised their discretion differently. It certainly did not mean that the vast majority of employees were now entitled to the lesser sanction.¹⁵

⁹ Transcript pg 551, lines 5 - 7

¹⁰ Para 23,

¹¹ Para 38

¹² Para 49

¹³ Para 45

¹⁴ Para 46

¹⁵ Para 47

NUPSAW's review, Dis-Chem's defence, and the arbitrator's award: the common purpose challenge

38. With respect to the second ground of review the union argued that the Commissioner had misconceived the relevant principles of common purpose when he found that employees on the bus in the Woodmead and Sunninghill incident of 10 December 2018, who stayed seated, and did not get off the bus and did not commit acts of vandalism, did not share the common purpose of the employees who did, and should have been found not guilty and reinstated.
39. Mr Mataitsane refers to the fact that no evidence was led that employees who returned to the bus discussed the matter with their fellow employees who had opted to remain in the bus; and that those who remained did so of their own volition.
40. Mr Mataitsane also noted that there was no distinction between those who alighted from the bus and misconducted themselves, from those who remained on the bus and did not misconduct themselves.¹⁶
41. Mr Mataitsane argued that the Commissioner erred by finding that those who remained on the bus and sang struggle songs, demonstrated their allegiance and association with those who disembarked and protested outside the stores, but that this association (according to the union) did not amount to "common purpose" as there was no intention to commit misconduct.¹⁷
42. The union makes the point that employees were en route to a union meeting at Ghandi Square (and by implication those who remained on the bus never knew that the bus was heading to Woodmead and Sunninghill for the purpose of union members disembarking to vandalise Di-Chem stores there).
43. NUPSAW concludes their heads of argument with:

"In summary, there was no evidence before the Second Respondent (ie the Commissioner) that the employees that remained on the bus...intended to commit the misconduct. Failure to leave the bus is not a requirement to

¹⁶ Founding affidavit, para 8.1 to 8.5

¹⁷ Para 20 and 21 of the Supplementary affidavit

establish common purpose in the misconduct. The finding of guilty on the grounds of common purpose constitutes a gross irregularity".¹⁸

44. Dis-Chem noted (as per the Answering Affidavit of Mr Johan Ochse, the Employee Relations Manager) that:

44.1. From the outset, the gathering was unlawful and in contravention of Snyman's second court order, and the union members knew this;

44.2. The bus did not depart to Ghandi Square but to Woodmead;

44.3. The union members who remained on the bus saw the strikers running across the street; and they sang struggle songs *"in solidarity with the transgressors who left the bus"*

44.4. The conduct of the people on the bus *"fell withing the ambit of common purpose and same was correctly concluded by the Commissioner".¹⁹*

45. The arbitrator wrote:

"With respect to the bus incident the evidence is clear. The employees got on the bus and they attacked two Dis-Chem stores. There were 116 employees that were arrested. On the video there were at least 70 employees that got off the bus. Ms Tshivadhulu's evidence that she didn't know what they were doing is highly improbable; but even if I accept that she did no know that the employees were going to throw stones at the store, it is almost impossible to believe that when the employees got back on the bus that they did not discuss the incident themselves. Therefore when the bus stopped at Sunninghill she had the opportunity to get off the bus and distance herself from this conduct. She did not do so and sang struggle songs. This is a clear indication that she and the other employees associated themselves with this conduct."

46. He went on to write:

¹⁸ At paragraph 42

¹⁹ Para 6.54 of the Answering Affidavit.

"Furthermore even if I accept the version that the original plan was to attend a gathering at Ghandi Square, this would have been in contravention of the second court order. The employees therefore had the common purpose, the moment they got on the bus, to contravene a court order and by doing so to commit misconduct."²⁰

Dis-Chem's review, NUPSAW's defence, and the arbitrator's award: gross irregularity by misconstruing evidence on the fairness of the dismissal of Mr Thabo Manyengisa

47. Dis-Chem seeks to review the award, only with respect to one aspect, and that is the commissioner's finding that the dismissal of Mr Manyengisa was unfair, which led to his reinstatement. Dis-Chem challenges this finding and seeks an order of substitution that his dismissal was fair.
48. On the last day of the hearing, and in closing argument Adv Mkhize for NUPSAW handed in a list of 111 employees whom he argued ought to be reinstated because they had committed one offence. The offence related to the targeting of Dis-Chem head office (blocking of entrance, hindering traffic) on 10 and 11 January 2019. Whilst resisted by Dis-Chem's legal representative, the Commissioner accepted the list into evidence. Mr Manyengisa was included on the list, but his offence was different, and related to misconduct committed on 16 November 2018, which was firstly blocking the movement of traffic affecting business operations by throwing bricks on the road; and secondly threatening members of the public.
49. The commissioner found with respect to Mr Manyengisa:

"I do however find that Adv Mkhize's argument of the people that were dismissed before the second court order is in line with the testimony of Schaffer. The testimony was clear, people that were found outside the demarcated area before the second court order were not dismissed if it was a single incident. There was no evidence before me why Thabo Manyengisa was treated differently and why he was dismissed. I therefore find that his dismissal was unfair. He was therefore guilty of misconduct and for that reason I find that it would be fair to reinstate him with limited backpay."²¹

²⁰ Paragraphs 49 and 50 in the arbitration award

²¹ Paragraph 48 of the arbitration award

50. Dis-Chem argues that the commissioner misconstrued the evidence of Schafer. In short she testified that striking employees were sanctioned with a FWW if their only offence was straying outside of the demarcated area before the second court order. If the nature of the misconduct was more serious, then dismissal was the result. Manyengisa's offence, whilst committed before the second court order, was of a gravity justifying dismissal.
51. Dis-Chem argues that the commissioner committed a gross irregularity by misconstruing or disregarding material evidence in respect of differentiation between dismissible offences and those warranting a final written warning.

52. Ms Schafer testified:

"...So initially we were not on a witch hunt, you know to subject everyone to disciplinary enquiries. We (drew) a distinction between less serious misconduct and misconduct of a serious nature...So if a person was just on one day outside of the picketing area...and that was before the second court order ... we will issue a final written warning"

53. Ms Schafer testified in the Supplementary affidavit that:

*"it is clear that the Commissioner completely ignored my testimony by concentrating merely on the fact that Mr Manyengisa's offences were committed on one day, and not on the fact that there were more than one offence on that day, both of a serious nature."*²²

54. In NUPSAW's response in the Answering affidavit, attested to by Mr Manyengisa, he fails to respond to the submissions that the list submitted by Adv Mkhize, referred to one charge and not both charges; and that he was being *"untruthful and misleading."*²³ He also cannot deny that in the pre arbitration minutes NUPSAW admitted to the *"correctness of the minutes that were kept in respect of the individual hearings."*²⁴

²² Supplementary Affidavit, para 5.12

²³ Refer to clauses 64.8; 64.9 and 64.10 of the Founding Affidavit, read with paragraphs 77 and 78 of the Answering Affidavit.

²⁴ Paragraph 3.24 of the pre arbitration minutes.

Relevant legal issues

55. There are three legal issues warranting attention in this matter: firstly the test of review, secondly the law in relation to inconsistent application of sanction; and thirdly the law of common purpose. Each will be addressed in turn.
56. According to section 145(2) of the LRA, an arbitration award may be reviewed and set aside if a commissioner committed misconduct in relation to his duties or committed a gross irregularity in the conduct of the arbitration proceedings; or he exceeded his powers; or an award has been improperly obtained.
57. The principle of reasonableness infuses the review test, and as oft quoted is expressed as "Is the decision reached by a commissioner one that a reasonable decision-maker could not reach" (ie the "Sidumo test")²⁵
58. The Supreme Court of Appeal in *Heroldt v Nedbank Ltd*²⁶ concludes that,

*"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."*²⁷

59. NUPSAW's review challenges the reasonableness of the Commissioner's finding regarding inconsistency; and engages the question of whether or not the Commissioner committed a material error of law with respect to common purpose and the finding of guilt and the sanction of dismissal for employees who remained seated

²⁵ *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

²⁶ [2013] 11 BLLR 1074 (SCA)

²⁷ At para 25

on the bus whilst the majority of employees disembarked and committed acts of vandalism.

60. Dis-Chem's review challenges whether the Commissioner committed a material irregularity by failing to properly analyse the evidence with respect to misconduct, guilt and sanction as it applied to one employee, Mr Manyengisa.
61. Moving now to the law on consistency, it is appropriate to record item 3(6) of the Code of Good Practice: Dismissal, *"The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration."*
62. It is obvious that optimally, and for fair reasons, employees who commit the same or substantially similar misconduct should receive the same (or substantially similar) sanction. What must be borne in mind however is the case of *SACCAWU & other v Johson Ltd* which confirms that when faced with large numbers of offending employees *"the best that one can hope for is reasonable consistency... (and that) some inconsistency is the price to pay for flexibility, which requires the exercise of a discretion in each individual case..."*²⁸
63. In other words, there may be good reasons to differentiate between employees who have misconducted themselves similarly; there could be different personal circumstances (such as length of service, number of warnings etc); and individual chairpersons may decide when exercising their discretion, on different sanctions on a reasonable basis (reasonable people may differ reasonably). Provided there is a justifiable reason for differentiation fairness does not necessarily arise.
64. With respect to the concept of "common purpose", the recent Constitutional Court decision in *NUMSA obo Dhludhlu and 147 others v Marley Pipe Systems (SA)(Pty) Limited*²⁹ is authoritative. In factual summary, this case dealt with the dismissal of 41 employees, on the basis of common purpose for the assault on the Head of Human Resources, during an unprotected strike. NUMSA claimed their members had been unfairly dismissed as they had not made common purpose with the actual perpetrators

²⁸ Para 44

²⁹ 2023 (1) SA 338 (CC)

of the physical assault, but the Labour Court and Labour Appeal Court disagreed. NUMSA appealed to the Constitutional Court which upheld the appeal, and found the members not guilty of the assault. The court ordered the matter to be remitted back to the Labour Court to consider a sanction for participation in an unprotected strike.

65. The reasoning of the Constitutional Court is relevant to the matter before this court. The principles which emerged³⁰ are the following:

65.1. Mere presence and watching does not suffice (merely "being there" cannot constitute association);

65.2. There must be evidence, direct or circumstantial that employees in some form or another associated themselves with the violence before it commenced or even after it ended;

65.3. The employee must perform some act of association with the unlawful conduct;

65.4. An intention in relation to the violence is required;

65.5. Singing during an assault is not enough to demonstrate an act of association.

66. The Constitutional Court concluded with,

*"Sympathetic though I am of the difficulties facing employers, individual complicity in the commission of acts of violence must be established. This is what the principles of common purpose have always required. If it were to be otherwise, the law would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having the "necessary intention" in relation to the complicity."*³¹

Application of the law to the facts

67. It is true that there were a handful of employees who committed misconduct, which according to Schafer's analysis, should have been met with dismissal, but instead was met with a FWW. Those employees were "lucky" to benefit from a lesser sanction. Ms

³⁰ Refer particularly to paragraphs 25 and 26

³¹ Paragraph 36

Schafer explained the differential by saying that Dis-Chem was not aware of further misconduct (with respect to Ms Mndebele, and Ms Jaka), and if so investigated they could be charged and further disciplined (by implication dismissed). For other employees, Ms Ramovha, Ms Ngwepe and Ms Kekae, different chairpersons had exercised their discretion in such a way that they found that a sanction less than dismissal (ie a FWW) would be appropriate. There is no unfairness in this context, reasonable chairpersons differ reasonably. Furthermore there could well have been compelling mitigating factors justifying a lesser sanction for these employees.

68. Whilst Adv Mkhize on the last day of the arbitration submitted a list of some 111 employees who he argued had only committed one offence, and should have received a FWW and not the sanction of dismissal, I find the list mischievous for two reasons: Firstly the list should have been the subject of the arbitration and evidence led directly relating to those employees. To make a submission in conclusion of argument is tantamount to evidence by ambush, - and should be ignored; but secondly and more importantly the misconduct of which the employees had been found guilty concerned the protest action outside Dis-Chem Head office, and occurred after 2 court orders had made prohibiting such conduct, and as such was unlawful. In no ways does the conduct warrant a FWW as according to Dis-Chem's Ms Schafer, such a sanction applied to employees who had strayed past the demarcated area before the second court order, and that that constituted their only misconduct (ie there was no further misconduct such as throwing stones, blockading roads, intimidating members of the public etc). With respect to the 111 employees there was protest action hindering the movement of traffic, and a violation of two court orders – dismissal was the appropriate sanction – no inconsistency here.
69. In short I am unpersuaded that Dis-Chem misapplied the parity principle and that to the extent there were minor examples of differentiation with respect to sanction, those differences were reasonable and justifiable. No interference from this court is warranted. The review challenge by NUPSAW on this point thus fails.
70. I am though persuaded that the Commissioner misconceived the principles of common purpose when finding that the unidentified employees who never left the bus acted in concert with those who alighted and attacked the Woodmead and Sunninghill Dis-Chem stores. I say so because there was no evidence that those who remained behind had the intention to commit violence, and they showed no outward manifestation of support except to sing struggle songs. Singing struggle songs is part and parcel of the

culture of resistance, and is a feature in labour disputes, political rallies and service delivery protests.

71. I concur with Savage AJA in *South African Commercial Catering and Allied Workers Union and others v Makgopela and others*³² when she said "our law does not allow a determination of guilt simply by association."³³
72. Nonetheless, the conduct of those who stayed on the bus, still amounted to serious misconduct in that they knowingly violated two court orders. Furthermore it is reasonable to infer that they were well aware of what their comrades were doing when they alighted from the bus and threw stones and vandalised the stores. Whilst they did not participate in the unlawful action, they showed solidarity by singing struggle songs. I need to make the point clearly that whilst the singing of songs does not pass into the threshold of common purpose, the action does indicate an allegiance with the misconduct. Noting these concerns and bearing in mind Dis-Chem's differentiation between serious and less serious offences (and the corresponding sanctions of dismissal and FWW), I am of the view that the dismissals should stand. The arbitration award, with the finding of a fair dismissal for all the employees (except two) may be sustained on the totality of the evidence before the Commissioner, despite the error of law regarding the application of the doctrine of common purpose.
73. I concur with Dis-Chem that the Commissioner materially erred when finding that Mr Manyengisa had committed one offence before the second court order, and that dismissal was an inappropriate and unfair sanction. In fact Mr Manyengisa had committed two offences, both of a serious nature, and the Commissioner had made the error presumably influenced by the mischaracterisation of the charges by NUPSAW's representative. The outcome was unreasonable and reviewable and warrants this court's intervention.
74. In the circumstances I make the following order:

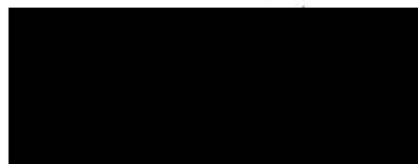
Order

75. NUPSAW's review application is dismissed.

³² [2023] 6 BLLR 509 (LAC)

³³ Paragraph 29

76. Dis-Chem's review application succeeds.
77. Paragraph 54 and paragraph 56 of the arbitration award is reviewed and set aside and replaced with, "*the dismissal of Mr Thabo Manyengisa is fair*". His dismissal is to take immediate effect.
78. There is no order as to costs.



D Norton

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant

Instructed by

For the Respondent

Instructed by

: Advocate Nobuntu Mbelle

: Ndumiso Voyi Incorporated

: Advocate Riaz Itzkin

: Cliffe Dekker Hofmeyr Inc