IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS995/20

In the matter between:

THE ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU) obo MADINANE AND 7 OTHERS **Applicant**

And

DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS **Respondent**

Heard: 18 to 21 JULY 2023

Closing arguments delivered: 6 & 10 NOVEMBER 2023

Judgment delivered: 26 January 2024 (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 is deemed to be 10h00 on 26 January 2024.)

JUDGMENT

PHEHANE, J

Introduction

[1] The applicants launch this referral in terms of section 191(5)(b)(iii) of the Labour Relations Act[1] (LRA) claiming that they were unfairly dismissed from the employment of the respondent for participating in an unprotected strike action. The applicants

[1] Act 66 of 1995, as amended.

allege that their dismissal was both procedurally and substantively unfair. They seek retrospective reinstatement and maximum compensation.[2]

[2] The respondent opposes the referral on the basis that the applicants were not unfairly dismissed.

Background

[3] The respondent (Ziziwe Open Cast Mining (Pty) Ltd) is a contractor at a mining site that mines for coal. It operates a four shift system, namely shift A, B and C. These are: the shift that is off, the morning (6 am to 2 pm), afternoon (2 pm to 10 pm) and night shift (10 pm to 6 am). The pleadings are unclear as the name of the shift that works these hours, barring shift C, as it is common cause that shift C is the morning shift (6 am to 2 pm). The evidence of Mr. Shakwane , one of the applicants, is that the shifts were as follows: shift A is the shift that is off work; shift B works 2 pm to 10 pm, shift C 6 am to 2 pm and shift D 10 pm to 6 am.[3]

[4] The applicants were employed by the respondent in different positions[4] and formed part of shift C. Mr. Sipho Tlou, the sole witness for the respondent and its contract manager, explained that the work that is undertaken by the respondent is to remove the waste of coal.

[5] Some of the respondent's operations were impacted by the Covid-19 pandemic. Consequently, the respondent claimed temporary employer-employee relief scheme (TERS) payments from the Department of Employment and Labour (DoL). It is common cause that the respondent's site where the applicants were employed, namely, the Impunzi site, was not affected by the lockdown restrictions imposed by the South African Government during the Covid-19 pandemic. Notwithstanding, the respondent erroneously claimed TERS payments for the applicants and paid these over to them. Aware of this error, the respondent took a decision to no longer claim and pay TERS payments to the applicants. The last TERS payment was in May 2020.

[2] Statement of claim at para 7, pp 6 to 7.
[3] Transcribed record, pp 244 to 245.
[4] Statement of claim at para 3.2, p 2.

All employees, including the applicants were informed that TERS payments would no longer be effected.

[6] It is common cause that on 16 June 2020, the applicants, disgruntled at not receiving the TERS payment, embarked on an unprotected strike action from 6am to 2 pm.

[7] According to the respondent, it was only the applicants in shift C that partook in the unprotected strike action. Shift C comprised of 13 employees. Only 8 of these employees participated in the unprotected strike action, being the applicants. Further, the applicants committed unlawful acts during the strike action.

[8] According to the applicants, employees in all the shifts participated in the unprotected strike action. The applicants allege the strike action was provoked by the respondent, as the respondent failed to provide the applicants proof that it repaid the TERS payments to the DoL.

[9] The respondent alleges that it issued two clear *ultimata* to the applicants, which were ignored. The applicants deny being issued with any *ultimata*, and *"in the event that they were issued, they did not come to the attention of the individual applicants'*.[5]

[10] The applicants deny that they committed any unlawful acts during the unprotected strike action.

[11] It is common cause that the National Union of Mineworkers (NUM) is a majority trade union recognised by the respondent with organisational rights. AMCU, the applicant union, is the minority trade union and does not have elected shop stewards at the respondent's site. The individual applicants are members of AMCU. The respondent does not take issue in its statement of response with the allegation that the applicants are members of AMCU, however, the evidence of Mr. Tlou, is that the

[5] Pre- trial minute, at para 4.7 on p A10.

payslips of at least two of the applicants (Amos Rakgalane and David Mnisi), are members of NUM, as their payslips indicate this.[6]

[12] Following the unprotected strike action, the applicants were called to appear before a disciplinary hearing to answer to charges of misconduct. The applicants contend that the respondent denied them the right to a representative from AMCU to represent them at the disciplinary hearing and they were informed that NUM would represent them. This was unpalatable for the applicants, as they are AMCU members and for this reason, they collectively represented themselves at the disciplinary hearing, barring one of the striking employees, Mr. Mnisi, who elected to represent himself. Mr. Mnisi's defence was that he was intimidated by his colleagues to participate in the unprotected strike action. The respondent denies dictating to the applicants that NUM would represent them at their disciplinary hearing.

[13] The applicants allege that their dismissal is unfair as they were "*cherry-picked*" for dismissal although all the shifts comprising of 80 employees participated in the unprotected strike action at the instance of NUM shop stewards during their shift. They state that they were remorseful and apologized to the respondent during the disciplinary hearing and yet, they were dismissed for a first offence. The applicants further allege that they were suspended at 7:30 am and thus it was impossible for them to render their services, adding to the unfairness of their dismissal.

Evidence

The respondent's case

[14] The evidence of Mr. Tlou is that the site manager informed him on the morning of 16 June 2020, that the applicants who form part of shift C, 13 in number, refused to render their services until such time that they were paid the TERS money.

[15] He rushed to the site with management. On arrival, he observed the applicants sitting in the tea room, not working. Management asked them why they were not

[6] Bundle C, p 69 to 71 (C 69 to C 71)

working. The applicant stated that they would not render their services if they did not receive the TERS money. Management attempted to explain to the applicants that they were not due to receive the TERS payments as the site on which they work was not affected by the Covid-19 restrictions. On hearing this, the employees demanded that they should receive the money as a bonus payment. Management did not agree to this. They informed the applicants that their refusal to work was improper.

[16] Management phoned the union office, that is, the office of NUM, and spoke to a certain Jacob (surname not provided), a full time shop steward of NUM and asked for his intervention. Jacob did not arrive at the site. Present at the site, was Mr. Sipho Tsotetsi, a shop steward of NUM, who partook in the strike action along with the striking employees.

[17] Management asked Mr. Tsotetsi to engage with the applicants, but he failed to do so. Management once again engaged with the applicants informed them to return to work. They refused. The applicants were informed that they would be disciplined for their conduct. In response, they stated that the law would protect them.

[18] On 16 June 2020, management issued the applicants with the first ultimatum[7] at 06h45, which stated that they should return to work by 7am, failing which, they would be disciplined. The ultimatum was read out in the English language to the applicants by Mr. Mpho Sithole. No one asked for a translation. The applicants refused to accept copies of the ultimatum where-after management left the ultimatum where the applicants were seated. The applicants still refused to return to work at 7am.

[19] Management issued the applicants with a second ultimatum at 7:03 am.[8] The applicants refused to return to work. After the employees refused to return to work, management drafted suspension letters and returned to the employees to speak to them once again. At this stage, the applicants proceeded to the South pit, where they worked and stood outside the security gate. Management attempted to speak to the

[7] Bundle C, p 2 (C 2).
[8] C 3.

employees but were unsuccessful. The suspension letters were not issued to the applicants at that point.

[20] At approximately 11 am Mr. Tlou approached the applicants and attempted to convince them to return to work. They informed him that they would not be dismissed for not working for one day and that the law would protect them.

[21] Management had requested the nightshift to continue working after their shift ended at 6 am, however there was opposition to this approach and the night shift worked until 8 am to keep production going. In addition, employees from a sister site, ATC Re-Mining (ATC), were called in as replacement employees.

[22] Mr. Tlou observed the applicants, in particular, Messrs Madinane and Shakwane intimidating the employees from ATC Mining by swearing at them. He stated that the applicants intimidated and prevented the employees from ATC to enter the respondent's premises, as they used a white VW Polo and taxis that were to return the night shift and collect the afternoon shift, to block the road from ATC to the respondent's premises. The photograph at C75 shows the said vehicles blocking the access road to the left of the vehicles, which is the road from ATC. These vehicles are parked on the road that leads to the entrance of the respondent. He explained that the taxis were prevented from leaving to drop off the night shift and collect the afternoon shift. Therefore, the afternoon shift was asked to start their shift at 6 pm.

[23] Security removed the striking workers who were preventing the replacement employees from ATC from entering the premises.

[24] After 1 pm, the applicants were issued with the suspension letters, but they refused to accept them - as a result they were issued to the applicants by short message system (SMS).

[25] Mr. Tlou's evidence was that the applicants wanted proof that the respondent had returned the TERS monies to the DoL. They were shown this proof but still refused to return to work. Further, that the strike was not peaceful as the applicants intimidated the employees from ATC Mining as well as the taxi driver who transports the

employees to and from work. Mr. Tlou denied that the applicants were "*cherry-picked*" for dismissal.

[26] His evidence is that although the duration of the strike was short, production was lost for the whole day, as the respondent is required to be productive 24 hours and seven days a week. Mr. Tlou confirmed during cross-examination, that there is no evidence before this Court of any loss of production and he maintained during re-examination, that there was no work from 8 am to 11 am as the plant was at a standstill.

[27] Mr. Tlou confirmed that dismissal is the appropriate sanction as the respondent's disciplinary code makes provision for dismissal as a sanction for a first offence of sabotage or refusal to work and intimidation. His evidence was that the five employees in shift C who did not participate in the unprotected strike action were intimidated and insulted by the striking applicants.

[28] During cross-examination, Mr. Tlou stated that management engaged with all the employees about the TERS payments *before* 16 June 2020 and that all the other shifts understood the position, except the employees in shift C. He further stated that all the employees were shown proof that the TERS monies were returned to the DoL before 16 June 2020. The engagements with the employees in shift C on 16 June 2020 centred around management informing them that they were not entitled to the TERS payments when they demanded such payments before rendering their services. It was pointed out to Mr. Tlou that his evidence is at odds with paragraph 3.4 of the pre-trial minute, which states that it was during the subsistence of the strike action that management had engaged with the employees and advised them that they were not entitled to the TERS payments which had been paid back to the DoL.[9] Mr. Tlou insisted that this discussion was held before 16 June 2020.

[29] Further, Mr. Tlou stated that the respondents proof of payment that it repaid the TERS monies to the DoL was contained in a printed document, which document is not before the Court. It was put to Mr. Tlou that no such proof of payment exists and that the respondent failed to repay the TERS monies to the DoL.

[9] See: pre-trial minute para 3.4, A2.

[30] It was also put to Mr. Tlou that contrary to his version during cross-examination that NUM was contacted before the first ultimatum was issued, the respondent's pleaded case[10] is that NUM was contacted after both *ultimata* were issued. Mr. Tlou distanced himself from the respondent's case as pleaded in this respect.

[31] Mr. Tlou confirmed that only shift C employees were on strike on 16 June 2020 and they held up the nightshift in the taxis as well as the taxi drivers.

[32] Mr. Tlou denied that the applicants were given insufficient time to comply with the *ultimata.* His evidence is that although the *ultimata* did not specify that the applicants would be dismissed if they did not comply with them, the *ultimata* were clear that non-compliance would result in a disciplinary enquiry and that dismissal is one of the outcomes of a disciplinary enquiry.

[33] He confirmed that the employees of the night shift were not charged because they worked their shift and the employees of the afternoon shift were not charged because they started their shift later, at 6 pm as was requested by management due to the strike action. He denied any provocation by management. He confirmed that NUM members who participated in the strike action were disciplined and ultimately dismissed.

The applicants' case

[34] The applicants called three witnesses: Mr. Godfrey Shakwane, one of the applicants and a truck operator, Mr. Herbert Lubisi, a taxi driver at the respondent and Mr. David (Joseph) Mnisi, one of the applicants.

[35] The evidence of Mr. Shakwane was that Mr. Tsotetsi kept the employees abreast of the TERS payments. This payment was not received on 16 June 2020.

[10] Statement of response at B15.

[36] When he arrived at work on 16 June 2020 at approximately 5:30 am, he noticed other shift employees had parked their private cars in the parking area on the respondent's premises at the security gate. There were approximately 50 employees on site. When he entered the premises, he saw shift B employees and Mr. Tsotetsi engaging with management.[11] He confirmed that Mr. Tsotetsi was a NUM shop steward who worked in shift B. The employees wanted proof that the respondent had paid back the TERS monies to the DoL; the employees were only prepared to return to work once they were shown proof to their satisfaction, that the monies had been paid to the DoL.

[37] He stated that management held up a piece of paper which they claimed was the proof of the repayment, but the piece of paper was at a distance and the applicants could not read it. He later stated that the proof of payment was not visible because it was dark as it was approximately 5:30 am. When asked why the applicants did not ask to see the piece of paper, his response was that they did not, due to social distancing (a preventative measure during the Covid-19 pandemic).

[38] Mr. Shakwane did not dispute that the employees were not entitled to the TERS payments - he stated that the applicants were aware that the respondent was claiming the TERS payments for them and in the circumstances, they wanted these payments to be paid to them as a bonus.

[39] He denied receiving any ultimatum and denied that the *ultimata* were read out to the applicants in the English language. His evidence was that English is not his first language and he has little knowledge of the language and it is difficult to read.

[40] Mr. Shakwane stated that the respondent's HR manager confirmed that the TERS monies would not be paid to them. When no proof of payment was provided, management told them to vacate the premises at 1 pm. They proceeded to the South pit parking area and stood there. After a while, he saw a security guard telling the drivers to move the cars from the parking area as they were prohibited from gathering due to social distancing. The employees then proceeded to park on the road that

[11] Transcribed record, pp 178 to 179.

appears at C75. He confirmed that the employees who had gathered as depicted in C75 were the night shift, shift C and other shifts. He confirmed that the VW Polo vehicle in the photograph at C75 belongs to Mr. Tsotetsi. He denied that shift C held the night shift and the taxi drivers, including one Mr. Herbert Lubisi (taxi driver), hostage.

[41] On 24 June 2020 at the disciplinary enquiry, the applicants were told by the respondent that they would be represented by NUM. They did not agree with as they are AMCU members. Therefore, they represented themselves. He confirmed that the applicants were remorseful and they wrote a letter apologising for their conduct for not going to work. He confirmed that the letter at page C 44 was drafted by him. He denied that the applicants intimidated the employees from ATC by swearing at them or preventing them access to the respondent's premises. He further denied that the applicants intimidated any employee who tendered services. Further, that there was no evidence during the disciplinary hearing regarding any intimidation by the applicants.

[42] During cross examination, Mr. Shakwane confirmed that all four shifts were on strike.[12] He was directed to the document at C36, which initially, he stated he knew nothing about it, and ultimately, he capitulated and read it without any difficulty in the English language and stated that he knows the document: he wrote and signed it. When asked why the document says that only shift C and D were on strike, when the applicant's version before this Court is that all the four shifts were on strike. His response was: "*We were still confused".*

[43] Mr. Shakwane changed his version and stated that the people in the photograph at C75 are employees who work shift C and D who were on strike and not shift A and B employees.

[44] Mr. Shakwane confirmed receipt of the suspension letter on 17 June 2020 and did not recall when he received the notice to attend the disciplinary hearing, which is dated 18 June 2020. He confirmed being aware of his right to bring his own representative to the hearing. His reason for not bringing a representative was

[12] Statement claim at para 5 and its subparagraphs, A 4 to A 5.

because he believed it was the responsibility of the respondent to contact AMCU to inform the union that "*your people… did not do the right thing*". He explained that he did not contact the union because "*Maybe… we did not understand what was written …because English is not our language*".[13]

[45] Mr. Shakwane stated that Mr. Tsotetsi was the NUM shop steward for the applicants, this after Jacob was transferred to Middelburg. He confirmed that the applicants trusted Mr. Tsotetsi more than they trusted the respondent - they reported everything to Mr. Tsotetsi and acted in concert with him.

[46] In a series of questions in cross –examination as to whether Mr. Shakwane trusts the respondent, he answered in the negative, citing reasons that to date, the respondent has not provided proof of the repayment of the TERS monies to the DoL and that it proof is provided, they will return to work. Shortly afterwards, he contradicted himself and said he trusts the respondent.

[47] Mr. Shakwane admitted that he pleaded guilty to the charge against him, which was gross misconduct for participation in an unprotected strike action and intimidation of non-striking employees.[14]

[48] Mr. Lubisi's evidence was that he transported the employees of the respondent for four years. On 16 June 2020, he transported employees in two shifts: "*Shakwane's shift*" and "*Tsotetsi's shift".* He collected them at 4:30 am and he dropped them at the main gate of the respondent at approximately 5:30 am as they were to attend a meeting. He later stated that he took the shifts to a meeting at the South pit from 5:30 am to 1 pm.

[49] He was aware that Shakwane's shift starts at 6 am and Tsotetsi's at 2pm. He confirmed that one of the taxis he drove appears in the photograph at C75, and inside his taxi were 3 shifts. He denied being held hostage by these employees and denied blocking ATC employees.

[13] Transcribed record at pp 253 to 254.
[14] Mr. Shakwane's charge sheet appears at C14 and the plea, at C 29.

[50] Mr. Lubisi stated that the second taxi transported a "*mixed shift*". He was unsure how long the vehicles were parked on the side of the road. His evidence is that the vehicles were on the side of the road after 1 pm. He does not know when he left the area and when he collected the afternoon shift – he stated that they started late.

[51] Mr. Mnisi's evidence is that he was part of shift C and felt threatened by Mr. Tsotetsi who told him that if he does not participate in the strike action, he will be a sell-out. He did not intend to, nor want to participate in strike action and he suggested Mr. Tsotetsi and his shift remain and speak with management while shift C went to work, but he was threatened by him. Mr. Mnisi asked someone to write his apology at pages C 37 and 38 during the disciplinary hearing.

[52] Mr. Mnisi confirmed that he was in the taxi driven by Mr. Lubisi on 16 June 2020 and the first meeting began at South pit. Messrs. Tlou and Sithole arrived and asked them to return to work – they were given time within which to return to work, failing which, they would be asked to leave the premises. He confirmed that the ultimatum at C2 was issued to the striking employees. Mr Mnisi suggested that two representatives remain with management, that there was no agreement. He confirmed that management informed the striking employees that they must conclude their discussions and return to work. He confirmed that the second ultimatum at C3 was issued to the striking employees and they were once again informed to return to work, failing which, they would be disciplined. Mr. Mnisi confirmed that the *ultimata* were issued in front of all the applicants. His evidence was that three shifts were present and the fourth shift was off work.

Legal framework

[53] Section 68(5) of the LRA provides as follows:

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

[54] Item 6 of Schedule 8 of the Code of Good Practice: Dismissal (the Code) provides as follows:

'6. Dismissals and industrial action

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

(*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.'

[55] And item 7 of the Code reads:

'**7. Guidelines in cases of dismissal for misconduct**

Any person who is determining whether a dismissal for misconduct is unfair should consider—

(*a*) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(*b*) if a rule or standard was contravened, whether or not—

(i) the rule was a valid or reasonable rule or standard;

(ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) *dismissal* with an appropriate sanction for the contravention of the rule or standard.'

Analysis

[56] It is common cause that the applicants, employees of shift C participated in an unprotected strike action on 16 June 2020, from 6 am to 2 pm and during the hours of their shift. It is also common cause that is not the entire shift C comprising of the 13 employees participated in the strike action, but only 8, being the applicants.

[57] It is in dispute as to whether *only* the employees in shift C participated in the strike action. The evidence of Mr. Tlou is that it was only shift C employees who participated in the unprotected strike action, whereas the evidence of the applicants' witnesses is that it was not only the shift C employees who participated in the strike action. Their evidence is contradictory. Their pleaded case is that *all four* shifts participated in the strike action. Mr. Shakwane's changed between all shifts participating, to only two shifts (C and D), and later, to "*others*" drove their own cars. The evidence of Messrs. Lubisi and Mnisi is that only three shifts were on strike, excluding the fourth shift, which was off work. In light of these material contradictions, the applicants' version that more than one shift was on strike is rejected. Mr. Tlou's version is more probable that only some employees in shift C participated in an unprotected strike action. On the undisputed facts, the night shift had completed their duties and worked extended hours (until 8 am) and were prevented from being transported home because the applicants were on strike and used the taxis to prevent the ATC miners from entering the respondent's premises. The photo images of the strike action do not support the applicant's pleaded version that 80 employees comprising of all shifts were on strike.

[58] The reason for the strike is that the applicants demanded payment of the TERS monies that were not due to them. This is not in dispute. Their demand that they be paid bonuses from funds that they were not entitled to, is untenable. The applicants' version that they went on strike because the respondent failed to produce proof that they repaid the TERS monies to the DoL is rejected for the reason that follows below.

[59] On the applicants' own version, the respondent showed them proof of payment contained in a document. Mr Tlou's evidence is that the applicants were shown a PDF

document. Mr. Shakwane did not dispute this, although the date on which the employees were shown the document is disputed. The date they were shown the document is of no moment, as the version of the applicants is that they refused to work on 16 June 2020 until such time they were shown the proof of repayment. It was shown to them – that is not disputed. Mr. Shakwane's version that the applicants could not see the document at it was dark at 5:30 am and at a distance and that the applicants did not ask to see the document at close proximity because of social distancing restrictions is improbable.

[60] Mr. Shakwane is not a reliable witness. He is also dishonest. His version is contradictory and inconsistent. He changed his version from initially stating that all four shifts were on strike, to only two shifts when he was confronted with the statement that was written by him at C 36. He feigned ignorance about his own document. After admitting that he wrote the document, he stated that perhaps they were confused about the number of shifts that partook in the strike action. He was dishonest about not knowing the English language, when he wrote the document in English and read it with no difficulty. He also changed his version about the employees who were photographed in the image at C 75 as stated above.

[61] On Mr. Shakwane's version, he implicated shift D (night shift) in the unprotected strike action in the applicants' statement at C 36, however, in responding as to why shift D must be disciplined as they worked their shift, Mr. Shakwane stated that shift D ought to have been disciplined because they did not remain at their workstations until they were relieved by the next shift.[15] This version is an afterthought as Mr. Shakwane agreed that the nightshift were to work until 6am. The respondent's version is more probable that the night shift continued working until 8am because of the next shift, Shift C.

[62] Mr. Shakwane's explanation as to why the applicants did not approach AMCU to represent them in the disciplinary hearing is unconvincing. Nothing prevented the applicants from approaching AMCU their union, or Mr. Tsotetsi for assistance. On Mr. Shakwane's version, the applicants reported everything to Tsotetsi and acted in

[15] Transcribed record, p 222.

concert with him, although he was a NUM shop steward. Mr. Shakwane stated that Jacob, the NUM shop steward, was transferred to Middleburg and Mr. Tsotetsi was chosen to be their shop steward. On Mr. Shakwane's own version, they trusted Mr. Tsotesti more than their own employer.

[63] Mr. Shakwane contradicted himself as to whether or not he trusts the respondent. He is a witness who speaks with a forked tongue. Although stating that the employees apologized for their conduct of not rendering their services, he stated, three years later, that he would only return to work if the respondent produced proof of repayment of the TERS monies. This is demonstrative of the lack of remorse for misconduct and in circumstances where on his own version, proof of payment was shown to the employees three years ago.

[64] Mr. Shakwane pleaded guilty to the charges of participating in an unprotected strike action and committing acts of intimidation. His attempt at distancing himself from his plea of guilt in relation to intimidation is unconvincing in light of the guilty plea to one charge.

[65] Mr. Shakwane did not dispute the evidence of Mr. Tlou that him and Mr. Madinane swore at the ATC employees, other than denying, in general terms, that any acts of intimidation took place.

[66] Mr. Lubisi is a witness who was coached. He is not a reliable witness. He knew to say which shift he collected at what time, the time he dropped them off and the time they moved to the road side. Yet, he was unable to say what time he left to collect the next shift that started "later". His evidence contradicts that of Mr. Shakwane, who said he arrived at the respondent's premises and saw Mr. Tsotetsi and shift B talking to management, while Mr. Lubisi said he transported both Shakwane and Tsotesti's shifts on 16 June 2020.

[67] In order to paint himself out of a corner with regard to the shifts that partook in the strike action, he stated that the second taxi carried a "mixed shift" and that other employees in other shifts were walking. He knew to say what time the meeting started on 16 June 2020 at South pit and that the employees were told to vacate and reached

the roadside after 1pm. He could not explain what time he left to collect the afternoon shift – he could not because on his version, "mixed shifts" were at the road side and others were on foot.

[68] Mr. Mnisi's evidence is that he took a different stance from Mr. Tsotetsi and was threatened. The applicants state that Mr. Mnisi was not threatened by them but was threatened by NUM members. In my view, Mr. Mnisi's election to conduct his own defence at the disciplinary hearing shows that he distanced himself with the conduct of his fellow workers. Mr. Mnisi is a reliable witness. He was honest in his evidence that *ultimata* were issued and that the striking employees refused to heed to them.

[69] In *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell and Cie SA and Others*[16], the Court gives guidance as to how a trial Court is to deal with mutually destructive versions.

[70] In light of the aforesaid contradictions and inconsistencies that permeate the evidence of Messrs Shakwane and Lubisi, I find that they are unreliable witnesses who lack credibility. Mr. Tlou's evidence was consistent. Mr. Mnisi's evidence corroborated that of Mr. Tlou in respect of the issuance of the *ultimata.*

[71] I find the respondent's version more probable that the applicants prevented the ATC employees from accessing the respondent's premises on the road, by parking the taxis and Mr. Tsotetsi's vehicle at the access road that runs perpendicular to the road (main road) that is *en* route to the respondent's premises. I find the applicant's version that they parked on the side of the road because security told them to observe social distancing and to prevent them from gathering improbable, as they gathered on the side of the road at the access road.

[72] I find the respondent's version probable that it was only shift C employees who were on strike and they prevented the taxis from transporting the night shift home. The number of persons in the taxis do not support the applicant's version that all shifts were on strike comprising of about 80 as pleaded by the applicants, let alone 50

[16] (427/01) [2002] ZASCA 98 (6 September 2002) 2003 1 (SA) 11 (SCA).

people, as is the evidence of Mr. Shakwane. Mr. Lubisi's version that other employees were on foot is unconvincing and an afterthought.

[73] I find the respondent's version probable that the applicants were not suspended at 7:30 am. On the applicants' own version, they were suspended the following day, 17 June 2020. On Mr. Lubisi's version, the employees' meeting commenced at about 5:30 am until 1pm. Not only is the version that the applicants were prevented from working because they were suspended not pleaded, is also not supported by any evidence.

[74] I find that the applicants were charged for misconduct as they withheld their labour and refused to work their shift from 6 am to 2 pm. The other shifts worked their shifts – the night shift was extended by two hours; the afternoon shift started late, at 6pm and the off shift was off duty. There was accordingly no reason to charge them for participating in an unprotected strike action.

Did the striking workers commit acts of intimidation?

[75] Although no video evidence was made available of acts of intimidation by the striking workers, in circumstances where a guilty plea was entered for a single charge (participating in an unprotected strike action and intimidation) and a signed written apology was tendered by the applicants during the disciplinary hearing,[17] there would have been no need for the respondent to lead evidence on the charge. Further, in circumstances of undisputed evidence of swearing by Messrs. Shakwane and Madinane to intimidate the ATC employees, I find that these aforesaid two applicants were guilty of such acts. I have already stated my reasons above, for finding the version of the respondent more probable.

Were the striking workers provoked by the respondent?

[76] I do not find that there was any provocation by the respondent for the strike action. The respondent provided proof of the repayment to DoL.

[17] C 24.

[77] The applicants' conduct amounted to misconduct. The contravention of the provisions of Chapter IV of the LRA are serious, more-so that they demanded what was not due to them and were not provoked.

Were the applicants issued with an ultimatum/s? If so, was it clear and sufficient to allow them to reconsider their actions?

[78] The applicants deny being issued with *ultimata*. Much was made by Mr. Cook on behalf of the applicants that even if the *ultimata* were issued, they did not give the applicants sufficient time to reconsider their position and were unclear, as the applicants were not informed what consequences would follow for failing to heed to the *ultimata.* None of this was pleaded. The statement of case is silent about *ultimata.*

[79] Despite denying that any *ultimata* were issued, the applicants rely on *National Union of Metalworkers of South Africa v GM Vincent Metal Services (Pty) Ltd*[18] (*NUMSA v GM Vincent*) and *Nelspruit Drycleaners (Pty) Ltd v South African Commercial Catering and Allied Workers Union and Others*[19] to demonstrate that the *ultimata* were unfair and insufficient and therefore contend that a determination of whether the dismissal pursuant to the issuing of the ultimatum is unnecessary, as an unfair ultimatum renders the dismissal substantively unfair.[20]

[80] I find the applicant's version untrue that they were not issued with *ultimata*. The applicants were issued with two clear *ultimata* and did not heed to them. The applicant's version that no *ultimata* were issued is therefore, rejected. Mr. Mnisi's evidence is that *ultimata* were issued and the striking employees were aware that they were required to resume their duties. His voice of reason was drowned out by threats of being a sell-out.

[81] The *ultimata* are not without problems. In my view, they were issued in quick succession, and NUM was not notified at the earliest opportunity to intervene. I do not find that there was any duty for the respondent to contact AMCU, as, on the applicant's

[18] (1999) 20 ILJ 2003 SCA at para [21].
[19] (1994) 15 ILJ 283 (LAC).
[20] See paras 52 and 53 of the applicants' heads or argument and the authorities cited therein.

own version, Mr. Tsotetsi was their shop steward, *albeit* a NUM shop steward, they trusted him and danced to his tune and at no stage called upon AMCU to represent them (even at the stage of the disciplinary hearing). Mr. Tsotetsi was part and parcel of the strikers and he therefore, was not in a position to dissuade the striking workers from their conduct. However, I find that the *ultimata* were clear, as they warned the striking employees that their conduct would result in '*no work, no pay'* and disciplinary action. Although there are shortcomings in the *ultimata* as indicated above, the applicants were provided with sufficient time to reconsider their actions – this being the voice of reason of Mr. Mnisi, which they ignored.

[82] The applicants were subsequently notified to attend a disciplinary hearing and were provided with an opportunity to bring a representative in the form of a union or fellow employee. They chose not to do so – the evidence of Mr. Shakwane confirms this. It was not the responsibility of the respondent to inform AMCU to represent their members at a disciplinary hearing. The applicants to their own detriment, did not call upon AMCU to represent them.

[83] I therefore, find that the applicants were provided with a fair opportunity to state their case in answer to allegations of misconduct and to raise a defence to the charges as aforesaid.

[84] In *Modise and Others v Steves Spar Blackheath*[21] the Labour Appeal Court drew a distinction between the purposes of an ultimatum and a disciplinary hearing. The former affords the striking employees an opportunity to reconsider the actions and to seek advice. The latter affords the employees to be heard in explaining their conduct and observes the *audi alteram partem* principle before steps that prejudice their rights are taken.

[85] The applicants, barring Mr. Mnisi, blatantly lied that no *ultimata* were issued and denied that they came to their attention, if issued. The *ultimata* are clear and were understood. So much so that when Mr. Mnisi suggested the employees work while representatives resolve the TERS issue with management, he was threatened by Mr.

[21] [2000] 5 BLLR 496 (LAC).

Tsotetsi. On the facts, the applicants had no intention of returning to work. They wanted payment of monies not due to them, at any cost and refused to return to work, even when proof of repayment to DoL was shown to them. On the facts, they wanted such payment as a "*bonus*", which as I have said, is untenable. The applicants at no stage, gave any indication of seeking time to obtain advice from their own union. They were happy to follow the instructions of Mr. Tsotetsi.

[86] The union (NUM) was not called at the earliest opportunity to intervene – when he was contacted, he did not arrive at the respondent's premises. AMCU was not contacted, this, in circumstances where on the applicants' own version, they chose Mr. Tsotetsi as their union representative trusted him more than their own employer. Time was of the essence, as the duration of the shift was on strike, was 8 hours. In the circumstances of this case, I find that the *ultimata* were reasonable.

[87] I find that the facts of the present case are distinguishable from *NUMSA v GM Vincent,* as, in that case, the employees were dismissed for failing to heed to an ultimatum, which called upon them to heed thereto failing which they were to consider themselves dismissed and were ultimately notified of their dismissal.

[88] In *casu*, the applicants were afforded an opportunity to appear at a disciplinary hearing to hear allegations of misconduct. They pleaded guilty to the charges. In the circumstances of a guilty plea, it is unnecessary to lead evidence on the merits of the offence. In my view, on the facts of the present case, the applicants were afforded an opportunity to explain their conduct and to state their case. I have dealt with whether they were given a fair opportunity to do so, above and I reiterate that they were afforded a fair hearing.

[89] On the surrounding circumstances of the case as set out above, I find that the *ultimata* were reasonable.

Did the applicants breach a workplace rule they were aware of or ought to have been aware of and was such rule consistently applied?

[90] The applicants were aware or ought to have been aware that their conduct is in breach of a rule of the respondent. Mr. Tlou's evidence is that he pleaded with the applicants and they told him the law will protect them as they cannot be dismissed for striking for one day. There were clearly no attempts by the applicants to comply with the law.

[91] The applicants were charged for gross misconduct pertaining to participating in an unprotected strike action and sabotage and intimidation. The disciplinary code of the respondent, which is a guideline, provides for dismissal for the aforesaid acts of misconduct. The employees refused to work for monies they were not entitled to and demanded that the monies be paid to them as a bonus - such conduct elicits corruption and is frowned upon.

[92] I find that only shift C and only the applicants participated in the unprotected strike action. They were therefore, not '*cherry-picked'* as they allege. Inconsistency in the application of discipline does not arise.

[93] The applicants do not trust the respondent. That is clear from the statements by Mr. Shakwane, who to this day, still wants to see proof of repayment of the TERS monies. It is trite that the lack of trust irretrievably breaks down the employment relationship. The lack of remorse by the applicants, baring that shown by Mr. Mnisi, is glaring.

[94] In the circumstances, I find that dismissal is the appropriate sanction for the applicants, barring Mr. Mnisi, who is to be commended for his honesty in not wasting the Court's time in admitting that *ultimata* were issued and trying to be the voice of reason. His was threatened by Mr. Tsotetsi to participate in the strike action, but it was not his intention to participate in the strike.[22] He stated that he could not report to the respondent, Mr. Tsotetsi's threat against him as his access card was blocked following the strike action. He showed remorse. His evidence is that he did not intimidate anyone. The respondent did not contest this evidence. I am of the view that dismissal in his instance, was harsh. It transpired during his evidence, that Mr. Mnisi is 63 years

[22] Record, p 311, p 313 to 314.

old. Reinstatement would in the circumstances, be impracticable. I am of the view that 12 month's compensation is an appropriate remedy for Mr. Mnisi in light of all the circumstances of this case.[23]

[95] In view of the afore-going, the following order is made:

Order

1. The applicants' claim is dismissed, save for Mr. Mnisi's claim.
2. The dismissal of Mr. Mnisi is substantively unfair.
3. The respondent is to pay Mr. Mnisi 12 months' compensation calculated at the rate of his remuneration on the date of his dismissal.
4. There is no order as to costs.

M. T. M. Phehane
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. A Cook
Instructed by: LDA Inc.

For the Respondent: Adv. M. Lukhele (Trust Account Advocate)

[23] Section 193 read with section 194 of the LRA.