

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 817/2017

In the matter between:

WILLIAM LEDWABA AND 36 OTHERS

Applicants

and

BARLOWORLD TRANSPORT (PTY) LTD

Respondent

Heard: 8 and 9 September 2022, 23 January 2024, 29 January 2024.

Delivered: 28 February 2024

Summary: Dismissal for participating in an unprotected strike – serious offence that undermines collective bargaining, a process aimed at resolving interest disputes – rights disputes must follow a dispute resolution machinery of the LRA – ultimatums afford a cool-off period and are ignored at the peril of the striking employees – where there is proof that the striking employees are not at the same footing, inconsistency impute is untenable – sanction of dismissal is appropriate where there is blatant disregard for adverse consequences of an unprotected strike.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this action, the applicants, Mr Ledwaba and 36 others, were dismissed on 24 May 2017 for participating in unprotected strike action. They are challenging both the procedural and substantive fairness of their dismissal.

[2] The applicants' procedural challenge is based on the contention that the disciplinary hearing proceeded without the participation of the applicants. Alternatively, the applicants contend that they were not given an opportunity to record their plea as there was no formal hearing.

[3] When it comes to the substantive challenge, the applicants deny that they participated in an unprotected strike and/or failed to adhere to a Court Order that interdicted the unprotected strike. Instead, the applicants contend that they were locked out by the respondent. Alternatively, the applicants contend that the respondent acted inconsistently by dismissing them and exonerating Messrs Jan Maleka (Maleka), Abram Makubane (Makubane), Rudzani Tshikalaha (Tshikalaha) and Charles Mathambo (Mathambo) who were charged simultaneously with the applicants.

Pertinent facts

[4] It is common cause that the applicants' complaint was triggered by the respondent's decision to initiate disciplinary action against Mr Johannes Mankga (Mr Mankga), one of the Association of Mineworkers and Construction Union's (AMCU) shop stewards in April 2017. Displeased with Mr Mankga's disciplinary hearing, on 18 April 2017, the applicants lodged a group grievance against two of the respondent's managers, Messrs Lucas Themba (Themba), the Operations Manager and Venetius Shipalana (Shipalana), the Fleet Controller. They also demanded that the charges against all drivers should be cancelled with immediate effect and that Messrs Themba and Shipalana be dismissed.

[5] On 21 April 2017, the grievance hearing took place and was presided over by an external chairperson, Advocate Steyn Fourie (Advocate Fourie). Advocate Fourie exonerated Messrs Themba and Shipalana of alleged wrongdoing when they charged the drivers for transgressions as they were acting within the scope of their duties as Operations Manager and Fleet Control Manager.

[6] On 10 May 2017, the outcome of the grievance was communicated to AMCU, the shop stewards and the truck drivers at a meeting held at the respondent's

premises at around 11h00. The employees nonetheless demanded the removal of Messrs Themba and Shipalana from the operation, threatening to stop working if they were not removed. Subsequently, the employees engaged in various acts of intimidation on drivers who were working and on subcontractors of the respondent, including preventing them from entering and offloading at the respondent's premises.

[7] Mr. Stephan Vorster (Vorster) the respondent's General Manager, Employee Relations at the time, testified as follows:

7.1. On 10 May 2017, the respondent addressed correspondence to AMCU's Regional Organiser Mr. Kenneth Sekiti (Sekiti), alerting him of AMCU members' response to the outcome of the grievance hearing and their threat to embark on an unprotected strike action. The respondent further communicated to AMCU that, should its membership proceed with an unprotected strike action, the respondent would immediately commence with the issuing of ultimatums, approach the Labour Court for urgent interdictory relief, and further reserved its right to proceed with a civil claim.

7.2. Still, on 10 May 2017, the respondent's legal representatives at the time also addressed correspondence to AMCU and the drivers informing them of the actions that would be taken should they engage in unprotected strike action, and explicitly that the drivers were not entitled to intimidate or prevent from working any of the respondent's employees and subcontractors.

7.3. Subsequently, at about 15h00, the respondent sent cell phone text messages (SMS) out to all drivers advising them that any strike action embarked upon, without following the procedures prescribed by the Labour Relations Act¹ (LRA), would be deemed to be unprotected and that disciplinary action would be taken for such conduct.

7.4. The drivers who had been rostered to work the 18h00 night shift on 10 May 2017 failed to report for duty. Thereafter, the respondent issued a first ultimatum to the night shift drivers. The ultimatum was communicated by placing it on the notice boards at the mine's main gate and by means of SMS to the drivers. The ultimatum was also sent to AMCU. The drivers were warned that their conduct constituted an unprotected strike and were given an ultimatum to return to work by no later than

¹ Act 66 of 1995, as amended.

01h00 on Thursday morning, 11 May 2017, failing which the respondent reserved the right to take further steps against them, including disciplinary action which could ultimately result in their dismissal. They failed to heed the call to go back to work.

7.5. The next day, 11 May 2017, the day shift drivers equally failed to report for duty. The respondent issued a first ultimatum to the day shift drivers which was communicated in the same manner as the previous one (affixed on the notice board, SMS to the drivers and correspondence to AMCU). The day shift drivers were given an ultimatum to return to work by no later than 13h00, failing which the respondent reserved the right to take further steps, including taking disciplinary action against them which could ultimately result in their dismissal.

7.6. On 11 May 2017, a special meeting was held between the respondent's management, AMCU officials and shop stewards at the Mokopane depot. AMCU intimated that the striking employees would only return to work once Messrs Themba and Shipalana were removed from the site. AMCU also confirmed that their members were aware that the strike action was illegal and that they might get dismissed.

7.7. On 11 May 2017, the respondent addressed correspondence to Sekiti, concerning the unprotected strike action, and the meeting held earlier that morning. The respondent reiterated that it had issued ultimatums to AMCU's members which they had not adhered to and, in the circumstances, the respondent would seek interdictory relief concerning such strike action.

7.8. A second ultimatum was issued to all drivers at the Mokopane depot, advising them that they were engaged in unprotected strike action and that they had been warned by the respondent to return to work but had failed to do so. The second ultimatum was also affixed to the main gate, the contents sent by SMS to all striking employees and was sent to AMCU. The second ultimatum gave all drivers the opportunity to return to work by no later than 13h00 on 12 May 2017. None of the striking employees reported for duty within the time stipulated in the second ultimatum.

7.9. On 11 May 2017, the respondent sent out an SMS to all striking employees informing and advising them that the respondent would be bringing an urgent application to the Labour Court on 12 May 2017, to interdict the unprotected strike action. On 12 May 2017, the Labour Court granted a *rule nisi* with an interim order which, *inter alia*, declared the strike action unprotected and interdicted the striking

employees from participating in the unprotected strike action. AMCU was ordered to disseminate a copy of the Court Order to all the shop stewards employed by the respondent and to ensure that it remained in circulation until such time as the employees had returned to work.

7.10. The Labour Court Order was served by the Sheriff on AMCU and its members. The respondent also affixed the Labour Court Order to the main gate and sent an SMS to all striking employees advising them that the Labour Court had issued an interim order declaring their strike action unprotected.

7.11. On 12 May 2017, the respondent issued a third and final ultimatum on all striking employees. In the ultimatum, the respondent stated that the striking employees had been warned repeatedly by the respondent to return to work and had failed to do so. The respondent indicated that if employees did not return to work by 06h00 on Monday, 15 May 2017, they would be given notice to attend a disciplinary hearing at which the company may seek the sanction of dismissal. The third ultimatum was affixed to the main gate, sent by SMS to the striking employees, and conveyed to AMCU. Still, none of the striking employees reported for duty before or at 06h00 on Monday, 15 May 2017.

7.12. On 15 May 2017, there was a further meeting between the respondent's management and AMCU. At this meeting, AMCU confirmed that they had consulted with their members and that their members were prepared to resume their duties provided that Messrs Themba and Shipalana were removed from the depot.

7.13. On 15 May 2017, the respondent addressed correspondence to Sekiti referencing the meeting held earlier that day. The respondent referred to the unprotected strike action, and that despite the ultimatums, repeated notices and SMS communication from the company, the employees elected not to return to work. The correspondence recorded that the respondent would be affording the striking employees an opportunity to show cause why they should not be dismissed for participation in an unprotected strike and failure to adhere to a Court Order.

7.14. On 15 May 2017, the respondent issued a notification by hand and SMS to all employees participating in the illegal and unprotected strike informing them of the disciplinary hearing that was scheduled to take place on 18 May 2017. The notification further informed employees, *inter alia*, that they would be required to attend the hearing to show cause as to why they should not be dismissed for participation in unprotected strike action and failure to adhere to a Court Order; that

they would be entitled to a representative; that they would be given an opportunity to present evidence in their defence; and that the hearing would be chaired by an independent chairperson. They were also warned that a failure to attend the hearing, in the absence of a good reason, would result in the hearing proceeding in their absence.

7.15. On 18 May 2017, there were three separate disciplinary hearings for the striking employees:

7.15.1. The first disciplinary hearing concerned three employees who had elected to represent themselves and who had disassociated themselves from the main group of striking employees:

7.15.1.1. Those three employees were Messrs Makobane, Maleka and Tshokalaha.

7.15.1.2. They pleaded not guilty to the charges and were able to show that they were either off from work or on leave during the period of the unprotected strike action.

7.15.1.3. The charges against these three employees were accordingly withdrawn.

7.15.2. The second disciplinary hearing concerned AMCU and its members that they represented:

7.15.2.1. The AMCU representatives were Messrs Wilson Tonga (Tonga), Kenneth Sipithi (Sipithi) and Ms Solophile Sethake (Sethake). There were also three AMCU shop stewards present at the second disciplinary hearing.

7.15.2.2. The AMCU representatives confirmed on record that they were representing their members.

7.15.2.3. The AMCU representatives, acting on behalf of their accused members, pleaded guilty to the charge of participation in unprotected strike action from 10 May 2017 until 15 May 2017.

7.15.2.4. As a plea of guilty had been entered, the parties agreed to submit written aggravating and mitigating factors by 19 May 2017 and 22 May 2017, respectively.

7.15.3. The third disciplinary hearing on 18 May 2017, concerned 16 employees that were not represented by AMCU:

7.15.3.1. These 16 employees did not attend their disciplinary hearing and were not represented.

7.15.3.2. The disciplinary hearing of these 16 employees accordingly continued in their absence, with the respondent presenting its case.

7.16. On 24 May 2017, the chairperson recommended a sanction of summary dismissal in respect of the second disciplinary hearing concerning AMCU and its members. When it comes to the third disciplinary hearing, the chairperson found the accused employees guilty as charged and recommended a sanction of summary dismissal as well. On 24 May 2017, the applicants were dismissed.

7.17. The unprotected strike action had an adverse financial impact on the respondent as the rendering of services to the client, Anglo Platinum, was severely curtailed. The overall estimated financial loss was about 9 million.

[8] Mr. Vorster's evidence was not seriously disputed. The high point of his cross-examination was that the applicants were locked out hence they could not comply with the various ultimatums. Mr Vorster was adamant that the applicants embarked on unprotected strike action and were unbedding in their stance despite the involvement of AMCU.

[9] Mr William Ledwaba (Ledwaba), one of the applicants, gave the following evidence on behalf of the applicants:

8.1 He was employed by the respondent as a truck driver and one of the AMCU shop stewards. The employees lodged a grievance against Messrs Themba and Shipalana. On 10 May 2017, they were informed of the grievance hearing outcome, and it did not sit well with them. They were upset by it, and the other employees did not want to accept the outcome.

8.2 On 10 May 2017, drivers were instructed to bring the trucks back to the depot and they remained outside of the respondent's premises. The employees were effectively locked out, and only the shop stewards were allowed to enter the premises. The employees informed AMCU about the lockout and on 11 May 2017, a meeting was arranged between management and AMCU.

8.3 The employees received SMSs to report for duty, but they were locked out by the respondent. On 13 May 2017, the Sheriff attended at the premises and affixed a document to the gate but did not speak to them. A meeting had been arranged for 18 May 2017 to review the employees' concerns and grievances.

8.4 On 15 May 2017, the drivers received SMSs to attend a disciplinary hearing on 18 May 2017. On 15 May 2017, two SMSs were received, with the other being in

respect of a review of the grievance. On 18 May 2017, the union representatives were called into the respondent's premises, while he and the other employees remained outside of the company's premises.

8.5 The union representatives came back to them later and gave the employees feedback that they were awaiting the result. He was unaware of any mitigating factors having been submitted on his and the other AMCU members' behalf. No mandate had been given to the AMCU representatives to do so as they had never participated in an unprotected strike action.

8.6 He denied that the Sheriff had served the applicants with the Order of the Labour Court interdicting the unprotected strike action. He also denied that the strike action was characterised by violence.

8.7 He was adamant that the financial loss suffered by the respondent was due to its failure to deal with the concerns that the employees had raised in the grievance and the fact that they implemented a lockout.

8.8 Under cross-examination, he made the following concessions:

8.8.1 The applicant employees were not happy with the outcome of the grievance hearing as they wanted Messrs Themba and Shipalana to be removed.

8.8.2 There was engagement between the respondent and AMCU on 10 May 2017 up until 15 May 2017.

8.8.3 The various ultimatums had been received by SMS and they provided a reasonable amount of time for them to reflect on their conduct.

8.8.4 He accepted that a version that the ultimatums were not placed on the notice boards or not given to AMCU had never been put to Mr Vorster.

8.8.5 The Sheriff had made several attempts to effect service of the Court Order on the striking employees. One return of service shows that the Court Order had been duly served on him and the other shop steward. He, however, maintained that he had never been served with the Court Order.

8.8.6 He accepted that, on 15 May 2017, he was notified by SMS of the disciplinary hearing that was scheduled for 18 May 2017 and that he was entitled to a representative.

8.8.7 He maintained that he remained outside of the disciplinary hearing on 18 May 2017, despite him having signed the attendance register and the transcript indicating that the AMCU shop stewards, of which he was one them, attended the disciplinary hearing.

8.8.8 AMCU represented him and other AMCU members at the disciplinary hearing on 18 May 2017. He understood that if a plea of guilty was entered then aggravating and mitigating factors would need to be submitted.

8.8.9 He did not know that AMCU had agreed to submit mitigating factors on their members' behalf.

8.8.10 He accepted that according to the chairperson's outcome report on the sanction, AMCU seemingly did submit mitigating factors on behalf of the accused members.

8.8.11 He accepted that the respondent's disciplinary code listed participation in unprotected strike action as a very serious offence, that could warrant a sanction of summary dismissal, but denied that they had participated in an unprotected strike action.

8.8.12 He accepted that the first disciplinary hearing involving Messrs Makobane, Maleka and Tshokalaha was different from his and the AMCU members, as they had pleaded not guilty to the charge. He, however, disagreed that the three employees were either off or on leave and accused them of lying.

8.8.13 He was not aware of the third disciplinary hearing involved the 16 employees who were not members of AMCU and did not know that, because they had failed to attend the hearing, it had continued in their absence.

Was there a strike or lockout?

[10] The first issue to be decided is whether the applicants participated in a strike action from 10 May 2017 to 15 May 2017. The applicants disavowed participating in an unprotected strike action. Instead, they assert that they were locked out by the respondent.

[11] Section 213 of the LRA defines a strike as a:

'...partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and

every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory.² [Own emphasis]

[12] In *Transport and Allied Workers Union of SA on behalf of Ngedle and others v Unitrans Fuel & Chemical Co (Pty) Ltd*³, the Constitutional Court observed that there are four elements that constitute a strike under the LRA, stating that:

'...In everyday parlance people call every collective stay-away from work or work stoppage a strike. Under the LRA a strike must have the four elements. These are: (a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by persons who are or have been employed by the same employer or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee.'

[13] While a lockout is defined as:

'...the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion.'⁴

[14] In my view, the evidence and the probabilities prodigiously favour the respondent's version that the applicants participated in a strike action.⁵ The applicants collectively refused to work from 10 May 2017 to 15 May 2017. They conceded that, on 10 May 2017, they rejected the outcome of the grievance hearing against Messrs Themba and Shipalana as they were discontented. It was not Mr Ledwaba's evidence that they still went back to work despite their disgruntlement. He seemed to suggest that they converged outside the premises in order to discuss the

² Section 213 of the LRA.

³ [2016] ZACC 28; (2016) 37 ILJ 2485 (CC) at para 105; See also *City of Johannesburg v Democratic Municipal & Allied Workers Union of SA and others* [2019] ZALCJHB 370; (2020) 41 ILJ 1959 (LC) at para 6.

⁴ Id.

⁵ *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5.

outcome of the grievance hearing. This evidence is implausible and cannot be accepted for the reasons hereunder.

[15] Mr Vorster, on the other hand, was clear that the applicants' refused to return to work and to report for duty from 10 May 2017 to 15 May 2017, despite being warned that such conduct would be unlawful and AMCU's intervention being sought. All the ultimatums from 10 May 2017 to 12 May 2017 were unheeded as the applicants unrelentingly refused to return to work. In fact, both AMCU's shop stewards and officials made it clear that the striking employees would not return to work until Messrs Themba and Shipalana were removed from the depot in Mokopane.

[16] Mr Vorster testified that the strike action by the applicant was also reported in the local newspaper, Bosveld News.⁶ The striking workers were reported to have stated that they would not return to work until their matter was resolved. Mr Ledwaba did not dispute the contents of the newspaper article, save to distance himself from approaching the newspaper.

[17] The assertion that the applicants were locked out and hence they could not heed the ultimatums is nothing but a desperate attempt to escape from the consequences of the choice they made at the time. There is no iota of evidence to show that the applicants took up the issue of a lockup with AMCU. Notably, the alleged lockout has never been raised in any of the meetings AMCU had with the respondent leading to the disciplinary hearing. It is even more curious that AMCU would enter a plea of guilty on behalf of its members for participating in an unprotected strike action when its members had been unjustly locked out.

[18] Accordingly, the applicants' refusal to work from 10 May 2017 to 15 May 2017 constitutes a strike action as defined in section 213 of the LRA. Since the applicant failed to comply with section 64 of the LRA, the strike action is unprotected.

Legal principles on unprotected strike action

⁶ See: Newspaper article, main trial bundle, p 141.

Substantive fairness of a dismissal

[19] Section 68(5) of the LRA provides that the employer has a right to dismiss employees who participate in a strike action that does not comply with the provisions of the LRA.⁷ In *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*,⁸ the Labour Appeal Court (LAC) confirmed that the mere fact that the strike is unprotected is not “*a magic wand which when raised renders the dismissal of strikers fair*”⁹. Thus, the determination of substantive fairness of a dismissal pursuant to an unprotected strike must be undertaken in two stages and in accordance with items 6 and 7 of Schedule 8 of the Code of Good Practice: Dismissal (Code).

[20] Item 6 provides:

‘(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.’

⁷ See: *Vodacom (Pty) Ltd v CWU* [2010] ZALAC 31; [2010] 8 BLLR 836 (LAC) at paras 10 and 11, where it was held that despite the procedural compliance with section 64, a strike will be unprotected if it is prohibited in terms of section 65 of LRA.

⁸ [2013] ZALAC 25; [2014] 1 BLLR 31 (LAC) at para 29. See also *National Union of Mineworkers of SA v Tek Corporation Ltd and Others* (1991) 12 ILJ 577 (LAC).

⁹ Id.

[21] While item 7 provides:

‘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 was an appropriate sanction for the contravention of the rule or standard.’

[22] It must be echoed that most of the applicants were represented by AMCU throughout the events that led to the unprotected strike action. Mr Ledwaba himself was one of AMCU’s shop stewards who were engaging with the respondent on behalf of the striking employees. It was not his evidence that the process undertaken by the respondent in dealing with the group grievance was unjustifiable. Notably, the respondent warned the striking employees and AMCU to avail themselves of the dispute resolution processes of the bargaining council since they were not happy with the outcome of the group grievance hearing.

[23] Therefore, it cannot be said that the unprotected strike action was a response to an unjustified conduct of the respondent. Put otherwise, the applicant’s actions were not a response to the respondent’s provocative and unjustifiable conduct. Moreover, the applicants made no attempts to comply with the provisions of section 64 of the LRA, despite being represented by AMCU at that time. I note with curiosity that AMCU is not involved in this litigation.

[24] The applicants did not dispute the fact that they were aware of the disciplinary code and that the offence of participation in unprotected strike action was a very serious offence that may warrant summary dismissal. If there was any doubt whether

the applicants were aware of the rule against unprotected strike action, the ultimatums categorically warned them of the seriousness of their conduct and the consequences thereof. Still, as correctly contended by the respondent, they obstinately persisted with their demand for over a period of five days, fully aware of the potential consequences and prepared to accept them.

[25] Mr Ledwaba tried to pour scorn on the respondent's evidence that the five day long unprotected strike action caused substantial financial harm to its business; and attributed it to the alleged lockout, if at all. Having found that there was no lockout, the evidence that the unprotected strike action had an adverse financial impact on the respondent's business remains unchallenged. I have also considered the uncontroverted evidence of the respondent that the applicants blockaded the ingress to the depot and intimidated the contractors and non-striking employees.

[26] The respondent's efforts to get the applicants back at work were fruitless. The applicants disregarded the Court Order issued on 12 May 2017, interdicting the strike action. The Court Order was duly served on the applicants by SMS and was also communicated to AMCU, which was ordered to ensure that its members were duly notified. The Sheriff's return of service shows that the Court Order was read to the striking employees by a loud-hailer and a copy was affixed at the entrance. Mr Ledwaba and the other shop stewards were also duly served. Therefore, any suggestion that the applicants did not receive and/or comprehend the contents of the Court Order is devoid of merit.

[27] Mr Ledwaba conceded during cross-examination that the respondent gave the applicants sufficient time to reflect on the ultimatums and respond to them. In *Mndebele and others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)*¹⁰ (*Mndebele*), the LAC observed that:

'The purpose of an ultimatum is not to elicit any information or explanations from the employees but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum must be issued with the sole purpose of enticing the

¹⁰ (2016) 37 ILJ 2610 (LAC) (*Mndebele*) at para 27.

employees to return to work, and should in clear terms warn the employees of the folly of their conduct and that should they not desist from their conduct they face dismissal. Because an ultimatum is akin to a final warning, the purpose of which is to provide for a cooling-off period before a final decision to dismiss is taken, the *audi* rule must be observed both before an ultimatum is issued and after it has expired. In each instance, the hearing may be collective in nature and need not be formal.’ [Own emphasis]

[28] Obviously, in this instance, the applicants chose to reject the ultimatums despite being advised of the serious consequences that would follow.

Inconsistency

[29] The nub of the applicants impugn turns on the allegation that the respondent acted inconsistently by dismissing them while it spared Messrs Maleka, Makubane, Tshikalaha, and Mathambo who were charged in consort with the rest of the applicants.

[30] Tritely, the parity principle is one of the basic tenets of fairness; requiring that employees who have committed similar misconduct be treated similarly.¹¹ This tenet is succinctly articulated in *County Fair Foods (Epping), a division of Astral Operations Ltd v Food & Allied Workers Union and others*¹² (*Country Fair*) as follows:

‘[25] Our courts have repeatedly stated that fairness generally requires that like cases should be treated alike and that disciplinary consistency is the hallmark of progressive labour relations. While discipline should be neither capricious nor selective, this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with fairness remaining a value judgment. There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, albeit that they have engaged in the similar conduct, having regard to the material facts applicable.

¹¹ *Chemical Energy Paper Printing Wood & Allied Workers Union & others and others v Metrofile (Pty) Ltd* (2004) 25 ILJ 231 (LAC) at para 35.

¹² [2018] ZALAC 9; (2018) 39 ILJ 1953 (LAC) (*County Fair*) at paras 25 - 26; see also *Gcwensha v Commission for Conciliation, Mediation & Arbitration and others* (2006) 27 ILJ 927 (LAC) at para 36.

[26] The appellant was neither capricious nor selective in its approach to the misconduct committed by the respondent employees. The collective activity of the respondents could, unlike in *Metrofile*, be legitimately differentiated from the employees who complied with the final and earlier ultimata. The striking workers were, therefore, not all on the same footing given the respondent employees' failure to comply with the final ultimatum given to them. As much was not in dispute. This constituted a material distinguishing feature between the different groups of strikers which provided a legitimate factual basis which permitted the appellant to differentiate between the conduct of the respondent employees and that of those striking workers who had complied with the ultimata issued.' [Own emphasis]

[31] By the same token, striking employees were not on the same footing in this instance. Messrs Maleka, Makubane and Tshikalaha elected to represent themselves at a separate disciplinary hearing; pleaded not guilty to the charge of participating in an unprotected strike action; and were able to show that they were either on leave or off duty during the unprotected strike action. In essence, they distanced themselves from the conduct of the striking employees. The charges against them were accordingly withdrawn.

[32] Thus, it cannot be said that the respondent acted capriciously. Besides, the applicants' generalised allegation of inconsistency does not meet the threshold and, as such, must fail.¹³

Appropriateness of the sanction

[33] Tritely, the overall circumstances of the case must be considered in order to justly scrutinise the appropriateness of the sanction of dismissal.¹⁴ That does not entail a fresh scrutiny of what transpired or what could be done but to decide on the fairness of what the employer did without deferring to the employer's decision.¹⁵ To the extent that the constitutional rights are implicated, the observations by the

¹³ See: *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALAC 4; (2017) 38 ILJ 860 (LAC) at para 31.

¹⁴ See: *County Fair Foods supra* fn 13 at para 27. See also *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] ZACC 22; 2008 (2) SA 24 (CC) at para 79.

¹⁵ *Id.*

Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town and others*¹⁶, referred with approval in *County Fair*¹⁷, are pertinent:

‘[T]he focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.’¹⁸

[34] In the present case, similar to what transpired in *County Fair*¹⁹, the applicants participated in a disruptive unprotected strike action for five days with apparent contempt for the authority of the respondent as the employer. They neither gave a thought to the adverse financial impact of their actions nor the damage caused to the employment relationship. They disingenuously persisted in denying they participated in an unprotected strike action, contrary to the concession made by AMCU. Clearly, they are not penitent.

[35] The evidence before me also shows that the applicant’s decision to participate in an unprotected strike action was deliberate, calculated and clearly undermined the process of collective bargaining as a tool to resolve interest disputes and the dispute resolution machinery of the LRA aimed at resolving rights disputes. As aptly cautioned by this court, per Van Niekerk J, as he was then, in *South African Airways (Pty) Ltd v South African Transport and Allied Workers Union*²⁰, the right to strike should be construed within the objects of the LRA, one of which is the promotion of orderly collective bargaining. He correctly observed that “[t]he right to strike, fundamental as it is, is thus not an end in itself – the resolution of disputes through collective bargaining remains the ultimate objective”.²¹

¹⁶ [2002] ZACC 27; (2003) 24 ILJ 95 (CC) at para 40.

¹⁷ *County Fair Foods* above fn 13 at para 28.

¹⁸ *Id.*

¹⁹ *County Fair Foods* above fn 13 at para 28.

²⁰ [2009] ZALC 113; (2010) 31 ILJ 1219 (LC) at para 22.

²¹ *Id.*

[36] In the circumstances, I am satisfied that the sanction of dismissal is appropriate.

Procedural fairness

[37] Mr Ledwaba stubbornly asserted that he and the other shop stewards were not part of the disciplinary hearing. Yet the transcript of the disciplinary hearing placed them in the room where the hearing was held on 18 May 2017.²² Worse still, he was constrained to concede that the AMCU official and shop stewards did sign the attendance register as recorded in the transcript.²³ Instead, he came up with a lame explanation as to why they, AMCU shop wards, ended up sitting at the reception area after signing the attendance register, hence they did not participate in the disciplinary enquiry.

[38] Be that as it may, Mr Ledwaba was constrained to concede during cross-examination that the AMCU officials were representing the accused members, of which he was one of them. When the AMCU officials entered a plea of guilty and filed written submissions in mitigation of the sanction on behalf of the accused members, they were acting as mandated agents.²⁴ If the applicants take issue with the conduct of the AMCU officials who represented them, the fight should be directed at AMCU and not the respondent.

[39] Instructively, in *Mndebele*²⁵, the LAC opined that the notion for the pre-dismissal hearing after the expiry of the ultimatum is to observe the *audi alteram partem* rule and the nature of the hearing may be collective and informal, depending on the circumstances of each case.²⁶ In the present instance, the respondent charged the AMCU members collectively and it follows that the plea of guilty was collectively entered on their behalf.

[40] There are nine applicants who were not AMCU members. Their disciplinary hearing was held separately on 18 May 2017. Mr Vorster testified that these

²² See: Trial bundle, p 181, lines 11-23.

²³ *Id.*

²⁴ See: Trial bundle, p 198, lines 10-23; and p 199, lines 24-25.

²⁵ *Mndebele* above fn 11.

²⁶ *Id.*

applicants failed to attend the disciplinary hearing despite having been duly served with the notice through SMSs. The hearing proceeded in their absence. The chairperson of the disciplinary hearing found them guilty for participating in unprotected strike action and recommended a sanction of dismissal. This evidence was not refuted.

[41] It bears mentioning that there was no evidence led by the applicants to specifically deal with the nine applicants who were not AMCU members in this regard. The applicants closed their case after the evidence of Mr Ledwaba per the advice of their attorneys of record. On caution, I asked the applicants who were in attendance in Court whether they confirmed the instruction to close their case; they conceded. I, therefore, accept that these applicants shunned the opportunity to be heard before they were dismissed.

[42] It follows that the applicants' procedural impugn is untenable.

Conclusion

[43] In all the circumstances, the respondent successfully showed that the dismissal of the applicants was both procedurally and substantively fair. The applicants' claim stands to be dismissed accordingly.

Costs

[44] The respondent sought costs against the applicants. While it is clear that the applicants acted incautiously in instituting this litigation, I am disinclined to saddle them with costs as it will offend the notion of fairness and equity.

[45] In the circumstances, I make the following order:

Order

1. The dismissal of the applicants is procedurally and substantively fair.
2. The applicants' claim is accordingly dismissed.

3. There is no order as to costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr MP Phooko of Moloko Phooko Attorneys

For the Respondent:

Advocate Z Navsa

Instructed by:

Poswa Incorporated Attorneys