

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1655/22

In the matter between:

NUMSA obo RAMOTHIBE & 55 OTHERS

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

DIALWA ALPHEUS MATHALA N.O.

Second Respondent

UNIVERSAL TISSUE (PTY) LTD

Third Respondent

Heard: 10 January 2024

Delivered: 05 August 2024

JUDGMENT

DE HAAN, AJ

Introduction

[1] This is an application in terms of section 145, read with section 158(1)(g) of the Labour Relations Act¹ (LRA), to review the arbitration award dated 27 June 2022 by the second respondent (the arbitrator) under the auspices of the first respondent (the CCMA) under case reference GAEK6682-20.

Background facts

¹ Act 66 of 1995, as amended.

[2] The individual applicants were employed by the third respondent. On 3 and 4 February 2020 the individual applicants participated in a protected strike. According to the third respondent the whole strike was recorded on video. As a result of the content of the videos taken by the third respondent, disciplinary charges of gross misconduct were brought against the individual employees and a disciplinary enquiry was scheduled.

[3] There were seven charges:

‘GROSS MISCONDUCT: in that

[a] You acted knowingly and in collusion in physically assaulting a non-striking staff member on 04 February 2020.

[b] You acted with intent and collusion with the striking employees to intimidate, harass and threaten the safety (both physically and verbally) of non-striking employees of the Company thereby inciting fear in your fellow colleagues and management.

[c] You acted in collusion in actively visiting the homes of non-striking employees and threatened to burn their homes if they came to work.

[d] You further acted in collusion with striking employees to barricade the entrance of fellow employees, customers and visitors to the Company premises which has resulted in the company having to incur substantial financial expenses in procuring the services of a strike force security company to ensure the safety and security of employee, customers and visitors whilst entering and being present on the Company premises.

[e] Your conduct whilst on strike and under lock out has brought the name of the Company in disrepute.

[f] Your conduct has cost the Company financial loss as a result of having to close down the plant to ensure the safety of the non-striking staff members.

[g] As a result of your actions whilst striking and whilst under lockout the trust relationship has broken down irretrievably between the Company and yourself as well as the working relationships between yourself and the employees of the Company.’

[4] The disciplinary hearing was scheduled for 3 and 4 March 2020 at the Heidelberg City Hall. After the employer's witnesses testified, the hearing was postponed to 17 March 2020 at the Heidelberg Church Hall, which was apparently slightly smaller than the City Hall. In the meantime, the emergence of Covid-19 led to the declaration of a national state of emergency on 15 March 2020, although there were not yet regulated limitations on gatherings.

[5] On 17 March 2020, at the outset, the third respondent's representative, Deon Lubbe, raised an issue relating to Covid-19, in that the employees did not have face masks on and had not sanitized. He requested that, due to the inadequate size of the Church Hall, the individual applicants sit on the verandah with open doors where they would be able to hear, but not see the proceedings. As a result, the chairperson of the hearing eventually made a ruling that the individual employees should leave the Church Hall and observe the proceedings from outside.

[6] When the individual employees and their union representative refused to leave the Church Hall, heated exchanges ensued. After warning the applicants of her intention to do so if they did not leave the room, the chairperson and the employer's representative left the venue and continued the hearing at the premises of the third respondent in the absence of the applicants and their representative.

[7] The chairperson found all of the individual employees guilty on all the charges, except charge [c], and on 19 May 2020 the individual applicants were dismissed.

[8] An unfair dismissal dispute was referred to the CCMA and after conciliation failed arbitration was concluded on 7 June 2022. The arbitrator found the dismissal to be both procedurally and substantively fair. The applicant then brought the review application that is now before me.

The Award

[9] The arbitrator recorded in paragraph 4 of his award, that the applicants conceded to having blocked the main road to the company's premises. This also

appears from the founding affidavit at paragraph 21.1, although the averments are that it was unintentional and did not warrant dismissal.

[10] In paragraphs 6 and 7 of the award, the arbitrator recorded that a settlement agreement was signed by the parties at the CCMA on 14 February 2020. This settlement was in respect of the breach of the picketing rules on 3 and 4 February 2020, which breach was referred to the CCMA for conciliation in terms of section 69 of the LRA.

[11] In paragraph 8 of the award, the arbitrator referred to the video footage of the strike as being challenged by the applicants, and that the evidence was led in respect of the video footage, before he finds that the challenge was unsustainable and accepted it as evidence.

[12] In paragraphs 9 to 12 of the award, the arbitrator deals with the challenge to the procedural fairness of the hearing. The arbitrator considered whether the chairperson's ruling to remove the applicants from the room was reasonable in view of the State of Disaster provisions regarding social distancing.

[13] In paragraph 14 to 18 of the award, the arbitrator recorded Dosani's testimony.

[14] In paragraph 19 of the award the arbitrator recorded Smalberger's testimony that he had copied clips from the video footage to present at the hearing and at arbitration. I cannot fail to note that the arbitrator did not record Smalberger's testimony that he had been specifically instructed by the third respondent to only compile clips of breaches of the picketing rules.

[15] In paragraph 20 to 22 of the award, the arbitrator records Lubbe's testimony as being that the chairperson of the hearing had requested some of the individual applicants to stand by the door and watch the proceedings. The arbitrator then records Lubbe's testimony as being that Friday Mamba could not testify at the hearing as he felt intimidated.

[16] In paragraph 31 of the award, the arbitrator holds that *“Just on the definition of a strike in accordance with section 213 of the LRA, such act is concerted in nature and therefore participants therein invariably act in coordination with each other. The video footages played in this arbitration was evident to the effect that the striking employees on the whole acted with complicity and invariably in collusion with each other”*. More on this later.

[17] In paragraph 33 of the award, the arbitrator held that the assault of Peter was related to the strike and in paragraph 34 he finds that Friday Mamba was also assaulted.

[18] In paragraph 35 of the award, the arbitrator finds that there was incontrovertible evidence that the company had to close down, that the applicants had consumed alcohol and showed their breasts to onlookers. He finds the third respondent's version more plausible than that of the applicants.

[19] In paragraph 39 of the award the arbitrator finds that, *“By being disrespectfully defiant towards the presiding officer and his reasonable ruling, the Applicants made the environment impractical to continue with the hearing”*, and in paragraph 40, he finds that, *“By their own doing, they waived their right to be heard”*.

Grounds for review

[20] In respect of the alleged procedural unfairness, the applicant's stated grounds for review are that the arbitrator committed a reviewable irregularity and that his award therefore falls outside the band of reasonableness, by failing to consider the applicants' evidence. The applicants allege that it is common cause that the hearing did not proceed at the Church Hall. The applicants allege that the employer and the chairperson abandoned the hearing and that no new notice was issued to the individual members or to their union that the hearing would proceed at the employer's premises. The applicants allege that it was unfair to expect the individual applicants to try to follow the proceedings from outside the Church Hall and that, in the instance, the individual applicants were not given the opportunity to state their case.

[21] As to substantive unfairness, the applicants aver that the award is not one to which a reasonable arbitrator could come on the facts before him, because the arbitrator, despite accepting the applicants' version that they were not involved in the acts enumerated in the charges, he nevertheless found that their dismissals were substantively fair. The arbitrator's finding that discipline was consistently applied was not consistent with the evidence, as Friday Mamba, who also participated in the strike, was not dismissed and Peter Lytton, who illegally participated in the strike, was also not dismissed. The video evidence does not support the conclusion that Lytton was assaulted during the strike, and according to the applicants, that assault took place on 31 January 2020. The arbitrator ignored the video evidence that shows that some of them were stopping Friday Mamba from assaulting another person, which is evidence that they were not acting in collusion with the violent strikers. Finally, the applicants aver that the arbitrator made an impermissible inference that the individual applicants colluded and made common purpose with the violence that was perpetrated by the strikers because they were singing strike songs and that he ignored evidence to the contrary. In respect of the charge of the breakdown of the relationship of trust, no evidence was presented by the third respondent and the arbitrator could therefore not make the inference that the relationship had in fact broken down in respect of each individual applicant. In coming to his award on sanction, the arbitrator did not consider mitigating factors relating to the individual applicants.

[22] In response, the third respondent avers that, due to the inadequate size of the Church Hall and the concerns about Covid 19, the chairperson was reasonable in her ruling that the individual applicants should observe the proceedings from the verandah. The union representative shouted at Lubbe. The chairperson then informed those present in the Church Hall that she would continue the hearing in their absence if they refused to leave the room. The respondent contends that the chairperson did not abandon the hearing - the applicants waived their right to be present at the hearing when they refused to adhere to the chairperson's ruling that the individual applicants should leave the Church Hall and observe proceedings from outside. In this instance, the individual applicants were given a fair hearing.

[23] Before me, Ms Masondo argued for the applicants that none of the individual applicants were identified. It is not clear who committed the offences, as nobody was identified by the employer. It was incumbent on the employer to identify the individuals and to link them to the offences. Ms Masondo referred me to *S v Mgedezi and Others*² and the five step enquiry to be undertaken to establish common purpose, as well as to *NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd*³ and the judgment of Whitcher J in *African Meat Industry and Allied Trade Union (AMITU) and Others v Shave and Gibson Packaging (Pty) Ltd*⁴ in support of her submissions. In respect of procedure, Ms Masondo submitted that the applicants were not afforded the opportunity to be heard, nor the opportunity to respond to the evidence presented by the third respondent. The issue of mitigation was never canvassed.

[24] Mr Du Toit for the third respondent relied on *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v Commission for Conciliation, Mediation and Arbitration and Others*⁵ (KFC) in support of his submissions relating to team liability. Mr Du Toit argued that proof of collusion and association by the applicants is to be found in the fact that they were singing songs, they sat around doing nothing about the assault on Friday Mamba and they persisted in singing songs even after Friday Mamba was assaulted. If nobody made any effort to disassociate themselves, the inference to be drawn is that they associated themselves with the individuals who committed the offences. Mr Du Toit referred me to *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another*⁶ (Oak Valley Estates) in support of his argument that the applicants formed a cohesive group committing ongoing unlawful conduct. He submitted that it is common cause that there was violence and exposing of breasts. In respect of procedure, Mr Du Toit submitted that a disciplinary hearing was held and that the chairperson simply requested the individual applicants to sit outside. The third respondent did not deny the applicants their right to a hearing – the applicants

² [1988] ZASCA 135; [1989] 2 All SA 13 (A).

³ [2022] ZACC 30; (2022) 43 ILJ 2269 (CC).

⁴ [2023] ZALCD 17; (2024) 45 ILJ 79 (LC).

⁵ [2014] ZALCD 70; (2015) 36 ILJ 1375 (LC).

⁶ [2022] ZACC 7; [2022] 6 BLLR 487 (CC).

forfeited the right to state their case when they refused to leave and became abusive.

[25] In respect of procedural fairness, the third respondent's counsel in his written heads of argument relied on the judgment of the SCA in *Old Mutual Life Assurance Co SA Ltd v Gumbi*⁷ (*Old Mutual*) and on the judgment of the LAC in *The Foschini Group v Maidi and Others*⁸ (*Foschini*) in support of the submission that the applicants were themselves to blame for the hearing being conducted in their absence, because they refused to leave the room when the chairperson asked them to do so.

Evaluation

[26] It is by now trite that the test on review of an arbitration award is whether the decision is one that falls within the band of decisions to which the arbitrator, acting reasonably, could come on the evidence before him.⁹ This court's jurisdiction to review arbitration awards is limited to the grounds for review set out in section 145 of the LRA.

[27] In *Old Mutual* at paragraph 5, Jafta JA, as he then was, on behalf of a unanimous court, confirmed an employee's right to a pre-dismissal hearing:

'In *Slagmont (Pty) Ltd v Building, Construction and Allied Workers' Union and Others* 1995 (1) SA 742 (A) this court stated the principle in the following terms at 755B-C:

"It is within the province of the employer who holds a disciplinary enquiry to determine its form and the procedure to be adopted, provided always that they must be fair. Fairness requires, inter alia, that the employee should be given an opportunity of meeting the case against him: the employer must obey the injunction *audi alteram partem*."

⁷ [2007] ZASCA 52; [2007] 4 All SA 866 (SCA).

⁸ [2010] ZALAC 5; (2010) 31 ILJ 1787 (LAC).

⁹ ***Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*** [2004] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC); ***Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*** (2015) 36 ILJ 968 (LAC); [2015] 2 BLLR 105 (LAC).

[28] And at 8:

‘The right to a pre-dismissal hearing imposes upon employers nothing more than the obligation to afford employees the opportunity of being heard before employment is terminated by means of a dismissal. Should the employee fail to take the opportunity offered, in a case where he or she ought to have, the employer’s decision to dismiss cannot be challenged on the basis of procedural unfairness (*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & Others* (1991) 12 ILJ 806 (LAC) at 813C-D).’

[29] In paragraph 16 of the judgment, Jafta JA writes:

‘[16] The court below held that the representative’s ‘consent’ that the hearing should continue in their absence did not constitute waiver of the right to a hearing. I agree. The employee’s conduct as a whole was inconsistent with waiver. At the moment he challenged the first dismissal, the employee’s complaint was that he had been denied a hearing and therefore that the dismissal was invalid for that reason alone...’

[30] In *Modise and Others v Steve’s Spar Blackheath*¹⁰ Zondo AJP as he then was, analysed the whole ambit of case law relating to the right of striking employees to a pre-dismissal hearing. The LAC held:

‘The only situation which I am able to envisage where it can be said that an employer’s failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: We are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is, indeed, the case. However, in my view, the latter scenario falls within the ambit of a waiver. Accordingly, the normal requirements of a waiver must be present.’

¹⁰ [2000] ZALAC 1; [2000] 5 BLLR 496 (LAC) at para 53.

[31] It is clear from the judgment in *Old Mutual* that a waiver as claimed by the respondent must be unequivocal. However, If the employee intentionally frustrates the hearing, his actions can be held to constitute a waiver of his right to be heard. I understand the respondent's argument to be that the applicants, by refusing to leave the room, intentionally frustrated the hearing and that this constituted a waiver of their right to be present at the hearing.

[32] In *Foschini* the employees and their representative left the disciplinary hearing when their objection to the initiator was dismissed. Revelas AJA, with Davis and Jappie JJA concurring, held that:

'[58] On the evidence accepted by the arbitrator, the respondents' refusal to attend the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed their objections on record. It is a trite principle in our law that a party, who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the outcome of the hearing.'

[33] The principle that a party who chooses not to attend a disciplinary hearing does so at his own peril, is indeed trite. But the third respondent's reliance on *Foschini* is misplaced for the simple fact that the applicants did not fail to attend - they refused to leave. It seems in such circumstances that the third respondent's argument is akin to the so-called 'crisis zone' cases, but refusing to leave a disciplinary hearing is far removed from the levels of violence and disruption associated with a 'crisis zone' case. I can find nothing in the opposing affidavit or the record to support a finding that the disciplinary hearing of 17 March 2020 descended into a so-called 'crisis zone' and the third respondent did not purport to make out such a case. There was no violence at the hearing, only heated exchanges in response to the employer's representative asking the chairperson to have the applicants removed from the room.

[34] The record shows that the arbitrator repeatedly asked Lubbe whether the applicants received a fair hearing, to which he repeatedly replied with reference to

the minutes of the hearing compiled by the chairperson that she said she would continue the hearing in the absence of the applicants. Lubbe did not provide evidence that the applicants threatened the chairperson, or that the hearing descended into violence, nor that the applicants were at any stage given the opportunity to make oral or written submissions in response to the respondent's evidence received by the chairperson during her continuation of the hearing in the absence of the individual applicants.

[35] I am not persuaded by the third respondent's argument that the applicants waived their right to be heard. By presenting themselves at the Church Hall at the appointed time on the appointed date the union and the individual employees clearly expressed their intention to be present at the hearing. Their refusal to leave the room can under no possible interpretation of their actions be regarded as a clear and unambiguous waiver of their right to be heard. The opposite is true – it was a clear expression of their insistence to remain present in order to be heard and to state their case.

[36] To my mind the enquiry was not whether the applicants could hear the proceedings from outside under ideal circumstances, but whether it was reasonable for the chairperson to insist on the individual applicants leaving the room in the first place; and when they refused to do so to then proceed in their absence while also excluding the union representative.

[37] The chairperson's minutes of the hearing reflect that she failed to consider alternatives to ordering the applicants to leave the room, and when her ruling resulted in heightened emotions, she failed to consider alternatives to proceeding in the applicants' absence. The chairperson then failed to offer the applicants or their union representative an opportunity to make written submission in response to the employer's evidence.

[38] All things considered, the unsatisfactory situation on 17 March 2020 was created by the third respondent. It evades me as to why the obvious solution of a postponement of the hearing to secure an appropriately larger venue to

accommodate all the applicants considering Covid-19 concerns, or continuing the hearing via a virtual platform, was not considered.

[39] Even if the chairperson was justified in continuing the hearing in the absence of the applicants, of which I am not convinced, it would have been appropriate, and in my view was required of the chairperson in the specific circumstances, to consider alternative means by which the requirements of the *audi alterem partem* principle could be achieved. Such an alternative process is not without precedent - *BEMAWU and Others v SABC and Others*¹¹. To simply proceed with the disciplinary hearing in the absence of the applicants in the face of their clear intention to remain present without thereafter giving them an opportunity to state their case by alternative means, such as at least inviting written submissions from the union and/or the individual applicants in response to the evidence presented by the employer in their absence, deprived the applicants of their right to be heard.

[40] By holding an inspection *in loco* and investigating the reasonableness of the chairperson's ruling that the applicants should leave the building, and basing his findings of procedural fairness on that inspection *in loco*, the arbitrator misconstrued the enquiry he was required to undertake. The unfairness of the procedure stemmed from the failure by the chairperson to explore alternative ways to ensure that the applicants were afforded their right to be present at the hearing and to state their case.

Substantive Fairness

[41] The right to strike is enshrined in section 23(2)(c) of the Constitution and in section 65 of the LRA.¹²

[42] The respondent relies on the doctrine of common purpose for holding the individual applicants accountable for the incidents that gave rise to the charges

¹¹ [2016] ZALCJHB 74.

¹² *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (2) BCLR 182.

against them. The development of the doctrine of common purpose in the criminal law and in labour disputes, and the distinction between team liability, derivative misconduct and common purpose is well documented.¹³

[43] *KFC* and the cases dealing with team liability do not apply to the facts of this matter. The third respondent expressly relied on common purpose, not on team liability, other than in argument before me. Neither team misconduct as defined in *Snip Trading*, nor derivative misconduct as contemplated in *Chauke* assists the third respondent in apportioning guilt to the individual applicants. The third respondent did not allege or provide evidence that the applicants were part of a team that was to blame for losses in a closed environment, nor were any of the individual applicants asked to identify the perpetrators of the violence and refused to do so. What remains is the third respondent's reliance on common purpose.

[44] The requirements for a finding of common purpose were confirmed in *S Mgedezi*¹⁴ as follows:

'In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct

¹³ *Chauke and others v Lee Service Centre CC t/a Leeson Motors* (*Chauke*) (1998) 19 ILJ 1441 (LAC); *Federal Council Retail and Allied Workers v Snip Trading* (2007) 7 BLAR 669 (T); *The Foschini Group v Maidi and Others* [2010] ZALAC 5; [2010] 7 BLLR 689 (LAC); *Food and Allied Workers Union obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River; Premier Foods Ltd t/a Blue Ribbon Salt River v Food and Allied Workers Union obo Kapesi and Others* [2012] ZALAC 46; *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* (Dunlop) [2019] ZACC 25; 2019 (8) BCLR 966 (CC); *NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* (Marley Pipe Systems) [2022] ZACC 30; (2022) 43 ILJ 2269 (CC); *South African Commercial Catering and Allied Workers Union and Others v Makgopela and Others* (Makgopela) [2023] ZALAC 8; [2023] 6 BLLR 509 (LAC).

¹⁴ Note 2 *supra* at para 86.

of the others. Fifthly, he must have had the requisite mens rea [criminal intent]...’

[45] The arbitrator found that the individual applicants were all in collusion for the simple reason that they participated in the protected strike. In the same vein, the third respondent relies on *Dunlop* in support of its assertion that all the individual employees associated themselves with the misconduct perpetrated by some individuals, as they were all members of NUMSA, they were singing songs and they were all participating in the strike. In *Dunlop*, Froneman J held:

‘Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required.’

[46] By contrast, the LAC judgment in *Makgopela* supports what the applicants asserted throughout:

‘[29] This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal. This is so given that workplace discipline must at all times be fair and just. As much is required by the Labour Relations Act in giving meaning to the constitutional right to fair labour practices. Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon there must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer’s rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists.’

[47] In *Oak Valley Estates*¹⁵, the Concourt held:

¹⁵ *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC).

[45] As the High Court noted in **Mondi Paper**, “the production of proper proof either directly or by circumstantial evidence is not beyond the ingenuities of employers, given the modern technology that is available” to them. Likewise, in **Durban University of Technology**, the High Court remarked that—

“with the modern methods of access control, CCTV cameras, etc, there is ample opportunity for the applicant’s security services to be able to identify those persons who were on the campus when the violence occurred, and steps could be taken to identify them”.’

[48] In **Marley Pipe Systems**, after pointing out the distinction in **Oak Valley Estates**, which was concerned with interdictory relief, the Concourt held:

‘[34] On the other hand, it would definitely be a non-starter to suggest that an employee could be dismissed on the basis that – through common purpose – she or he was “involved” in acts of violence without linking that employee to those acts. A verdict of guilt cannot appropriately be returned for merely being where the acts of violence took place. An employee could simply have been there as a spectator or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there. As was held in **Polyoak**¹⁶, “[o]ur law knows no concept of collective guilt”. Maqutu¹⁷ aptly puts it thus:

“Employers find it particularly difficult to prove the participation of each individual in the impugned conduct where misconduct is alleged to be collective. Nonetheless, no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group.”

[49] And at paragraph 36:

‘Sympathetic though I am to the difficulties facing employers, individual complicity in the commission of acts of violence must be established. That is

¹⁶ **Polyoak (Pty) Ltd v Chemical Workers Industrial Union** 1999 20 ILJ 392 (LC) at 393C.

¹⁷ **Maqutu** “Collective Misconduct in the Workplace: Is ‘Team Misconduct’ ‘Collective Guilt’ in Disguise?” (2014) 25 Stell LR 566 at 568.

what the principles on 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.’

[50] In paragraph 31 of the award, the arbitrator in effect held that anyone participating in a protected strike can be dismissed for the transgressions committed by another striking employee on the basis of common purpose. This flies directly against the judgments of the Concourt in **Marley Pipe Systems** and the LAC in **Makgopela**. In departing from this defective premise, the arbitration manifestly committed a material error of law, which directly led him to the unreasonable decision that the individual applicants acted in collusion and that their dismissals were substantively fair, even though none of the individual applicants were identified as participating in, being present at, or associating themselves with any of the transgressions.¹⁸

[51] In respect of the first, second, and fourth items raised by the applicants under their grounds for review, I return to the video evidence presented by the third respondent. The video footage showed that two people consumed a beer and that one lady exposed her breasts. Those individuals were never identified. By Dosani’s own admission, they could not be identified. There was nothing before the arbitrator to show that any of the individual applicants consumed alcohol or exposed their breasts or were even present at, or aware of the consumption of alcohol or the exposure of breasts until long after the fact.

[52] Dosani testified on the content of video clips compiled from the company’s CCTV footage by Smalberger, a contractor to the third respondent who works as a Close Protection Officer. In effect, Smalberger was a personal bodyguard to Dosani. Smalberger testified that he had compiled the video evidence by copying clips from the footage taken of the strike over three days. The third respondent had asked him

¹⁸ *Head of Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) at para 33.

to look at the footage and compare it with the picketing rules to identify any breaches of the picketing rules.

[53] I note that Friday Mamba was not called as a witness at arbitration, although he was still in the third respondent's employ. In view of the direct challenge to Dosani's version Mamba's testimony was crucial to corroborate the third respondent's allegation that Mamba had felt too intimidated to testify at the disciplinary hearing and that he was assaulted on 3 or 4 February 2020 by any of the individual applicants.

[54] When Dosani was shown the video footage that appeared to show that Friday Mamba was also striking, which was later corroborated by two witnesses for the applicants, Lubbe objected on the basis that it did not matter whether or not Friday Mamba was a striker or a non-striker. According to him, the only issue was whether or not there was an assault, as that was against the picketing rules. This submission by Lubbe was in stark contrast to the charge, which was that the applicants acted in collusion to *"intimidate, harass and threaten the safety (both physically and verbally) of non-striking employees"*. The applicants denied that there was any assault at all and persisted in that denial in their affidavits in this review application.

[55] The arbitrator failed to consider that the video evidence was directly challenged and that Dosani's uncorroborated testimony did not amount to admissible evidence. The third respondent did not call Friday Mamba as a witness to confirm that he was assaulted, even though Dosani's hearsay testimony in this regard was expressly challenged. In view of the above, there does not appear to have been any admissible evidence before the arbitrator that Friday Mamba was in fact assaulted,

[56] The challenge to Dosani's testimony did not spur the arbitrator into carefully considering Dosani's credibility as a witness. It should have, if he followed the correct approach to resolving disputes of fact and the analysis of probabilities as set out in ***Stellenbosch Farmers Winery***.¹⁹

¹⁹ ***Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*** [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

[57] The applicants' main contention in the founding affidavit and supplementary affidavit is that none of the individual applicants were identified as participating in any of the offending acts. This is confirmed by Dosani's testimony on pages 73, 90 and 92 of the transcribed record where he repeatedly admitted that he could not identify any of the employees participating in the events that led to the charges. Dosani was the third respondent's only witness regarding the events that led to the charges against the individual applicants.

[58] As to the admission that the applicants had blocked the road, I agree with Ms Masondo that that in itself does not warrant dismissal. In respect of the alleged closure of the company due to that blockade, the evidence before the arbitrator was that the company has a second entrance, and that that entrance was not blocked or barricaded. This fact appears to contradict the third respondent's contention that the company had to shut down because the road was blocked.

[59] It is common cause that the strike was protected - the third respondent did not argue that the strike became unprotected due to the contravention of picketing rules and the third respondent did not approach the Labour Court for interdictory relief until 7 February 2020.

[60] There was no evidence before the arbitrator that any of the individual applicants were involved in perpetrating, or present when any of the incidents that led to the charges occurred, other than blocking the main entrance road. Similarly, there was no evidence before the arbitrator that any of the individual applicants were even aware of the incidents that led to the charges; or that any of them actively associated with any one of the offences before or after the fact other than by participating in the protected strike and blocking the road. The respondent's argument and the arbitrator's finding that, by participating in the protected strike, the individual applicants actively associated with and therefor formed a common purpose with the incidents that led to the charges against them, is tantamount to dismissing the applicants for participating in a protected strike.

[61] Dosani was the only one who testified that the company was brought into disrepute and that the relationship of trust was broken as a result of the events, but that testimony seems contrived in view of the fact that he could not identify any of the individual applicants as having been guilty of, or associated themselves with the offending actions.

[62] The third respondent's failure to identify any one of the individual applicants as being involved in any of the alleged offences and its failure to prove their active association with the events, is fatal to the third respondent's case.

[63] In the instance, the arbitrator came to a decision to which no arbitrator, acting reasonably on the facts before him, could come.

Remedy

[64] In terms of section 193(1) of the LRA, the primary remedy in the case of an unfair dismissal is reinstatement. This has repeatedly been confirmed by the Concourt²⁰. It is well-established that compensation as a remedy under section 193(1)(c) of the LRA is fundamentally distinct from back-pay for reinstatement.²¹ In deciding on an appropriate remedy, the court is enjoined to make a just and equitable order. Back-pay is not intended to enrich an employee, or to punish an employer, but "*is intended to "offset" the financial loss suffered as a result of a wrongful act*".²²

[65] There was no averment before the arbitrator or before this court that any of the individual applicants were gainfully employed or derived an income after their dismissal by the third respondent. There is further no indication that the applicants

²⁰ ***Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*** [2008] ZACC 16; 2009 (1) SA 390 (CC); ***South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*** [2018] ZACC 44; (2019) 40 ILJ 87 (CC); ***Booi v Amathole District Municipality and Others*** [2021] ZACC 36; [2022] 1 BLLR 1 (CC).

²¹ ***Booi*** supra at para 54.

²² ***Maroveke v Talane N.O. and Others*** [2021] ZACC 20; (2021) 42 ILJ 1871 (CC).

were to blame for any delays in finalising this matter. However, the applicants admitted contravening the picketing rules by blockading the main road to the third respondent's premises. Picketing rules form an integral part of an orderly collective bargaining dispensation. In ***Clover SA (Pty) Ltd v General Industries Workers Union of South Africa and Others***²³ Tlhotlhamajie J echoed the SCA in ***Hotz and Others v University of Cape Town***²⁴ and noted that:

‘Fundamental to the right to picket as can be gleaned from section 69(1), is the requirement of ‘peaceful demonstration’. I therefore agree with the sentiments expressed in ***Dis Chem Pharmacies Ltd v Malema and Others***²⁵ that unlawful conduct, violence, harassment, are inimical to the principle of ‘peaceful demonstration’.

[66] In view of the admitted breach of the picketing rules, which cannot be condoned, I consider that it is just and equitable that back-pay should be limited to twelve months' remuneration.

Costs

[67] Having considered the requirements of law and fairness, together with the provisions of section 162 of the LRA and that there is an ongoing employment relationship between the individual applicants and the third respondent, I am of the view that a cost order is not merited.

[68] In the result, the following order is made:

Order

1. The arbitration award by the second respondent under case reference GAEK6682-20 is reviewed and set aside and replaced with the following:

‘1. The individual applicants' dismissals were procedurally and substantively unfair.

²³ [2020] ZALCJHB 226; [2021] 4 BLLR 419 (LC); (2021) 42 ILJ 1111 (LC) at paras 6 to 8.

²⁴ [2016] ZASCA 159; [2016] 4 All SA 723 (SCA).

²⁵ [2018] ZALCJHB 451; (2019) 40 ILJ 855 (LC).

2. The third respondent is ordered to reinstate the individual applicants retrospectively from the date of their dismissal on terms no less favourable than those that applied prior to their dismissal.
3. The third respondent is ordered to pay the individual applicants back-pay for their retrospective reinstatement equal to twelve months' remuneration.
4. The individual applicants must present themselves for duty on 01 September 2024.
5. There is no order as to costs, including in respect of the reserved costs of 14 November 2023.'

L. de Haan

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: NM Masondo, Mabaso Inc Attorneys

For the respondent: NJ du Toit, Chantell Timm Incorporated