



**REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

JUDGMENT

Reportable

Case no: JR1982/2009

In the matter between:

HENRED FRUEHUAF (PTY) LIMITED

Applicant

and

HLONGWANE, R N.O.

First Respondent

(cited in his capacity as First respondent of the

Motor Industry Bargaining Council)

MOTOR INDUSTRY BARGAINING COUNCIL

Second Respondent

DISPUTE RESOLUTION CENTRE

NUMSA obo MSIMANG, N AND 2 OTHERS

Third and further Respondents

Heard: 12 July 2010

Delivered: 8 August 2012

JUDGMENT

DODSON AJ:

Introduction

- 1] This is an application for the review and setting aside of an award of an arbitrator declaring the dismissal of three shop stewards employed by the applicant to have been unfair and reinstating them with retrospective effect.
- 2] The shop stewards, being the third, fourth and fifth respondents, (“the respondents”) were dismissed for failing to honour a picketing agreement. The picketing agreement required them to act as marshals for a picket which turned violent.

Factual context

- 3] During September 2007, there was a strike in the motor industry. The strike was a protected strike as contemplated in section 67(1) of the Labour Relations Act No. 66 of 1995 (“the LRA”).
- 4] In anticipation of the strike, which was due to commence on 12 September 2007, the Retail Motor Industry Organisation (“RMI”) and the National Union of Metal Workers of South Africa (“NUMSA”) concluded a picketing agreement on Monday 10 September 2007.
- 5] The agreement included the following provisions:

‘2. PURPOSE OF THE PICKETING

The purpose of the picket must be peaceful demonstrations in support of any protected strike, to encourage non-striking employees and members of the public to support the strike....

...

4. WHERE CAN THE PICKETING TAKE PLACE

In respect of employees of the establishment, it may be on the company's premises or outside the company premises in the designated areas as agreed upon by the parties at enterprise level, provided that consent to picket on the employer's premises shall not be unreasonably withheld.

However, any picket by supporters of the picket who are not employed by the company must be conducted outside the company premises. Under no circumstances shall picketers not employed by the company be allowed within a 25 metres radius of the premises, gates, entrances and/or exists.

...

5. CONTROL OF THE PICKET

The unions appoint their shop stewards of Union Officials (sic) as convenors to oversee the picket.

The shop stewards shall act as marshals to monitor the picket and the trade unions shall instruct the marshals on the law and any picketing rules that may be decided upon.

The prime function of the convenor / marshal shall be to ensure that the picket is conducted peacefully.

...

During the period of the picketing management and employee representatives will meet as often as it is necessary and is reasonably practicable to discuss any matter which directly flows from these rules. Any misconduct by picketers or management shall be referred to the National Offices of the Employers Organisation and the trade unions, as the case may be, so that any misconduct might be resolved as soon as possible, provided that any apparent breach of law and order, will be reported to the SAPS.

6. FACILITIES AVAILABLE TO PICKETERS

...

Access shall be provided to employees (who are employed at the particular establishment) to water and toilet facilities which access will not be unreasonably withheld. Where this is not possible employers need to ensure availability of water and toilets in the way agreed to between the employer and its employees.

...

The Company shall make reasonable telephone and fax facilities available to union officials and union shop stewards of the said company under controlled circumstances in order to allow them to communicate with the Union.

7. CONDUCT

- Section 17 of the Constitution of the Republic of South Africa recognises the right to assemble, to demonstrate, to picket and to present petitions.
- *This constitutional right can only be exercised peacefully and unarmed.*
- Section 16 of the Bill of Rights [dealing with freedom of expression] shall also be observed.

...

- Recognition of the right to picket also reflects this society's commitment to the fundamental human rights of freedom of expression and freedom of assembly.
- *Picketing shall be carried out in a lawful manner.*
- Employees participating in the industrial action and

picketing *agree not to intimidate* non-striking employees or any other person who may enter upon the company's premises for the purpose of carrying out the business of the company. In particular, they may not compel people to stop and to listen to their demands.

- Picketers will not obstruct vehicles or traffic entering or leaving company premises.
- Those taking part in the picket, *under the leadership of their shop stewards*, shall ensure that they *yield right of way promptly and courteously* to any traffic moving on roads which may wish to pass (sic).

...

- Management of the company and picketers *will refrain from behaviour which is provocative or which could incite violence or intimidation*.
- *No weapons*, including but not limited to iron bars, knives, pangas, sticks, knobkerries, stones and firearms may be carried by a person who is picketing, or by any member of management who has contact with them.
- *The union must ensure that shop stewards are present at the picket from the start to the end of the picket each day*.
- If picketers are picketing at different locations, *a sufficient number of shop stewards* (no less than 2) must be present at each location.
- The shop stewards must ensure that the behaviour and conduct of the picketers are acceptable (sic).
- The shop stewards must wear an armband or vest

showing clearly that *they are the picket leaders*.

- Participation in a protected picket does not exempt picketers from their obligation not to commit [any] criminal offences. Accordingly any picketers who intimidate any person or who damage property or who assault any person or who engage in any criminal act may be liable to arrest and criminal prosecution.
- Picket organisers or their representatives, i.e. shop stewards, must ensure that the language which is used during a strike / picket is not insulting or defaming of any person.
- Pickets will not *damage or threaten to damage* the Company property or property of personnel or the property of customers or suppliers.

8. ROLE OF POLICE

The police have the responsibility to enforce criminal law, to protect the public and to assist where there is a breach of peace, law and order. The police have no responsibilities for enforcing the Labour Relations Act.

...

9. ISSUES TO BE DEALT WITH AT AN ENTERPRISE LEVEL

The following issues which are to be dealt with at enterprise level must be in terms of this agreement and agreed to prior to the picket between shop stewards and management representatives:

- Whether the picketing is inside or outside the premises.
- Designated picket area and number of picketers.

- Access arrangements.
- Designated union picket convenor, marshal and management liaison person.
- The company shall make reasonable telephone and fax facilities available to officials and union shop stewards of the said company...

10. IMPLEMENTATION

The union shall inform and explain the rules contained in the agreement and shall make all the necessary arrangements for the appointment of marshals and convenors.' (emphasis added)

- 6] As appears from the agreement, it was a central concern of both the trade union and the employers' organisation that picketing should take place in an orderly and non-violent manner under the leadership of the shop stewards.
- 7] The day after conclusion of the agreement, on Tuesday 11 September 2007, a meeting was held between the shop stewards (excluding Msimang, the third respondent) and management of the applicant. The purpose of the meeting was to discuss the strike which was due to commence the following day. Management insists that the meeting was held specifically and expressly pursuant to the terms of the picketing agreement. The shop stewards deny that any reference was made in the meeting to any picketing agreement and allege that they were unaware of it.
- 8] The minutes of the meeting kept by the applicant purport only to be a "summary of discussions" and provide in relevant part as follows:
 - Danie welcomed everybody and asked for feedback in terms of the meeting held at the union at 13h00 today.

- Steven responded that they would be on strike tomorrow and will enter the premises and meet at the Union Hall. Other sections will also enter the premises.
- The company explained that their position is that employees partaking in the strike will not be allowed on the premises.

The Picketing Agreement indicates that parties may agree to picketing on – or outside the premises. Management will not agree to picketing on the premises. Management reasons for disallowing strikers on the premises is [the reasons are then given as being that the company considered itself obliged to protect employees who wished to exercise their right not to strike and to protect the property of the company and that this was the only way in which employees who wished to work rather than strike could be clocked in so that the no work no pay rule could be applied during the strike period].

- The company's position is that the workers can report to the gates as of 06h00 am. The company will determine which employee wants to work or participate in the strike. Those employees who indicate that they are to work will be allowed on the premises and will sign that they are there to work.
- Should an employee want to participate in the strike the employee will not be allowed on to the premises.
- The union requested minutes of the meeting to forward the company's position to their official.
- The shop stewards are to act as Marshals during the strike and the company representative will be Rosita Lubbe.
- The aim of the marshals is to regulate the conduct of the workers and communicate any problems experienced.
- The workers can make use of the changing room bathrooms at Gate 1 and the women will be allowed to report to security that will then escort them to bathrooms closest to Gate 1 to make use of.

- Shop stewards need to communicate the position to the other employees as they move to their workstations and that no formal meeting with the workers will allowed to be called.
- The shop stewards indicated that they will first inform their official of the company's position and then communicate to the workers.

Signed on 11 September 2007 at Wadeville

Shop Steward Representative

I.R. Manager'

- 9] The provision for signature by the IR Manager is signed by Ms Rosita Lubbe. The provision for signature by the shop steward representative has the following noted in handwriting :

'Shop Steward informed not to sign. The official will be informed of meeting.'

- 10] It is common cause that the shop stewards were handed the minute on the same day, but were unwilling to sign it.
- 11] Attached to the minute is an attendance register from which it appears that 11 shop stewards attended. These included two of the respondent shop stewards, Messrs Lumkile Simon Tekane and Joseph Pule, but not Mr Msimang, the third respondent.
- 12] On Wednesday 12 September 2007, the strike commenced. Immediately there were difficulties with the picketing employees not allowing access into and from the company premises, notwithstanding this conduct being prohibited by the picketing agreement.
- 13] The respondents admitted that this was so but averred that the employees were provoked by the company's failure to pay their wages for the preceding week when they had not been on strike. On the respondents' version, these wages were due, insofar as employees banking with Absa were concerned,

on Wednesday 12 September 2007 and insofar as the remaining employees were concerned on Thursday 13 September 2007. The applicant did not dispute that the wages were not paid or that it gave conflicting reasons for such non-payment.

- 14] On the same day, 12 September 2007, the applicant addressed a letter to NUMSA, RMI and to the trade union official, Mr Eric Nyekemba. The letter is headed '*Conduct of picketers participating in strike*'. The letter commences –

'A meeting was held with Shop Stewards on 11 September 2007 wherein the area that picketing would take place was discussed. Such minute is attached for your attention. However we have met with dissatisfaction in terms of the identified areas.

In accordance with the agreement where parties are in disagreement such matters should be brought to the attention of the relevant involved parties.'

- 15] The letter then goes on to explain the dispute pertaining to where the picketing should take place and the parties' competing contentions in this regard. The concluding paragraphs of the letter then read as follows:

'We are experiencing problems as the union members are not honouring the agreement reached in that they are blocking the access to the premises and not allowing the vehicles to pass and are also obstructing the roads and not allowing the traffic through.

Should such behaviour continue, the Company will exercise its right to contact the local police station in order for them to assist with the regulation of traffic and ensure free access to the roads and premises.

Please feel free to contact the scribe hereof should there be a need to clarify any issues.'

- 16] The letter was signed by Rosita Lubbe, the IR Manager.

- 17] On Thursday 13 September 2007, the applicant procured the services of

some 150 temporary employees. The picketing employees then proceeded to threaten and swear at the temporary employees and to inform them that they knew where they lived and they would get them at home.

- 18] Again this is not disputed by the respondents, although they say that the picketing employees were provoked by the non-payment of wages.
- 19] On the same day, a meeting was held between management and the shop stewards. A minute of the meeting was kept by management. Management complained that they were not willing to accept the intimidation and the threats to burn trucks and insisted that the strikers must accept the right of the company to do business. It was suggested that the applicant was being targeted on account of differences between Cosatu and the ANC.
- 20] The minute records further that the respondent, Msimang, responded on behalf of the workers. According to the minute, “he started by indicating that nothing can be done by negotiations but that there would be results achieved only through iron and blood actions”. (This allegation is not disputed by the respondents in their answering affidavit). Msimang pointed out that the matter of negotiations was something for which the union officials and not the shop stewards were responsible. The minute goes on to record as follows:

‘Nephtal [Msimang] responded by stating that the company needs to remove the casual labour from the premises and that it is a request on behalf of the strikers. They know these people live in the location and are therefore at risk.’

- 21] The minute records that management responded by saying that they were entitled to ensure that the company remain profitable and that they would not allow such threats and intimidation. The final paragraph records that the shop stewards questioned why the wages had not been paid and management responded by saying that the staff responsible for payment had been redeployed to production away from the administration of wages. The minute does not reflect that any of the shop stewards sought to distance themselves from what had been said by Msimang. In their answering affidavits, the

respondents do not dispute the accuracy of the minute of the meeting.

- 22] Following on the threats directed at and the intimidation of, the temporary employees that had been recruited, the majority of them left the applicant, with only about 30 remaining.
- 23] On Friday 14 September 2007 the striking employees continued to block access to the premises and to intimidate non-striking employees. The respondents contend they could not contain the employees from this conduct.
- 24] On Monday 17 September 2007 a complete blockade was imposed on the applicant's premises, with any customer or person attempting to enter the premises being turned away. A meeting was held between management, the shop stewards and Mr Nyekemba. Management alleges that the shop stewards and Nyekemba refused to discuss the issue of the violence and intimidation and left the meeting. The respondents contend that the meeting ended because the person responsible for payment of salaries was not present. (The versions are not necessarily mutually exclusive.) Later that day, the police had to be called to intervene to enable the administrative personnel on the premises to leave because the striking employees were preventing them from doing so.
- 25] On Tuesday 18 September 2007, the shop stewards and Mr Nyekemba entered the premises without the applicant's permission and entered the reception. The police were then called to escort them off the premises. The respondents said they were there to discuss the non-payment of wages.
- 26] While this was going on, a vehicle seeking to enter the premises was stopped and the driver was assaulted. One of the applicant's managers attempted to intervene but he too was assaulted and the vehicle was also damaged.
- 27] On Wednesday 19 September 2007, a truck belonging to a supplier attempted to enter the premises but was stopped by the striking employees from doing so. The applicant's managing director, Mr Coetzer, arrived at the premises

while this was happening and instructed the striking employees to allow the truck to enter. They allowed Mr Coetzer to enter but still prevented the truck from entering and threatened to kill Mr Coetzer. The truck driver was eventually intimidated to the extent that he left without entering. Several other trucks were also stopped and stoned that day. Mr Coetzer's vehicle was also stoned. Whenever members of management emerged from the building, they were pelted with stones by the striking employees.

28] None of this is disputed by the respondents, although they say that they were not able to prevent the conduct from taking place.

29] On the same day, the applicant brought an application to the Labour Court to interdict the unlawful conduct on the part of the striking employees. An order was duly granted on Thursday 20 September 2007 *inter alia* interdicting the striking employees from coming within 100 metres of the perimeter of the premises, from barring access to the premises and from-

‘interfering with, threatening, harming, or damaging, intimidating, harassing and/or assaulting any clients, customers, suppliers, vehicles, non-striking employees, replacement labourers, and goods of the applicant.’

30] Pursuant to the order, a semblance of normality returned to the applicant's premises.

31] Following on these events, all 14 shop stewards employed at the applicant were charged with misconduct and disciplinary enquiries held before an independent chairperson. They faced three charges. The first charge was that they failed to honour the picketing agreement in their capacities as marshals appointed in terms of that agreement for the period of the strike. The second charge was that the shop stewards were grossly negligent in that they failed to ensure order and compliance with the picketing rules, such negligence leading to numerous incidents of misconduct causing prejudice and loss to the company (the various incidents referred to above were then listed). The third charge was a charge of instigation and intimidation by the shop stewards

themselves resulting in unacceptable conduct on the part of the picketers.

- 32] A disciplinary hearing took place over a period of 12 days commencing on 27 November 2007 and finally ending on 27 March 2008. The end result was that all of the shop stewards were found guilty on the first two charges. They were found not guilty of the third charge of having been guilty of instigation and intimidation themselves.
- 33] As far as sanction was concerned, save for the three respondents who form the subject matter of this review, all the remaining shop stewards were given a final written warning. The three respondents were summarily dismissed. Essentially, the independent chairperson found dismissal to be the appropriate sanction in their case because they had earlier been issued with two separate final warnings for participation in an unprotected strike and related issues in September 2002 and again in November 2006. The trade union had argued that the November 2006 warnings had lapsed, but the independent chairperson held that, at the time that the conduct complained of took place, the 12 month period of the warning had not lapsed.
- 34] An unfair dismissal dispute was then referred to the Motor Industry Bargaining Council, the second respondent. When conciliation failed, it was referred for arbitration before the first respondent.

Arbitration Proceedings

- 35] Arbitration proceedings took place during March and April 2009. The applicant, then respondent, led the evidence of Lubbe, Mr Daniel Fourie, its group HR manager, Ms Christel Esterhuizen, its HR manager and Ms Elmarie Grant, the independent chairperson. The three respondents testified themselves and in addition led the evidence of Mr Eric Nyekemba and another shop steward, Mr Simon Machaka.
- 36] Unfortunately, the transcript of the evidence of the first three witnesses called by the applicant and of one of the respondents, Tekane, is missing. The

parties are nonetheless agreed that the matter must be decided on the available evidence.¹ It is also of assistance in this regard that much of the factual evidence is common cause, as appears from the founding and answering affidavits in the review application.

37] The only issues before the first respondent as first respondent were whether or not the dismissal of the respondents was substantively fair and, if not, what the appropriate relief should be. It was common cause that the dismissals were procedurally fair.

38] In his award, the first respondent analysed the evidence and the arguments with reference to the following questions:

38.1 whether the respondents contravened a rule or standard regulating conduct in the workplace (he found that they had not);

38.2 whether the respondents were aware of the rule or could reasonably be expected to be aware of the rule (he appeared to find that the respondents were unaware of the picketing agreement and of the consequences of its breach);

38.3 whether the rule has been consistently applied (he found that it had not been inconsistently applied because most of the shop stewards were only issued with a final written warning);

38.4 whether dismissal was an appropriate sanction for the contravention of the rule (the first respondent found that it was not because management had acted provocatively by failing to pay wages and the respondents had been available when management wanted to talk to them).

39 Accordingly, the first respondent held the dismissal of the respondents to have been substantively unfair and ordered their retrospective reinstatement

¹ See in this regard, for example *Bapane v Van Aarde NO & Others* (2007) 28 ILJ 2561 (LAC) at para 28.

which, at that stage, required back pay equivalent to 14 months' salary. No order was made as to costs.

Legal Context

Picketing

- 40 Section 69(1) of the LRA expressly protects the right to picket in the following terms:

'A registered trade union may authorise a picket by its members and supporters for the purposes of *peacefully demonstrating* ... in support of any protected strike.' (emphasis added)

- 41 In terms of section 203(3) of the LRA, any person interpreting or applying the LRA must take into account any relevant code of good practice. NEDLAC issued a code of good practice on picketing.²

- 42 In terms of item 1(1) the code is 'intended to be a guide to those who may be contemplating, organising or taking part in a picket, and for those who as employers or employees or members of the general public may be affected by it.'

- 43 In item 1(2) of the code there is an express cross-reference to section 17 of the Constitution. Section 17 provides that –

'Everyone has the right, *peacefully and unarmed*, to assemble, to demonstrate, to picket and to present petitions.' (emphasis added)

- 44 Item 1(3) provides that the code does not impose any legal obligations, but item 1(4) requires various institutions, including this court, to take the code into account when "applying the Act in respect of any picket".

- 45 Item 3 of the code deals with the "purpose of the picket". Item 3(1) records

² Government Notice 765 in Government Gazette No. 18887 of 15 May 1998.

that:

‘The purpose of the picket is to *peacefully* encourage non-striking employees and members of the public ... to support strikers involved in a protected strike. The nature of that support can vary. It may be to encourage employees not to work during the strike ... It may be to dissuade replacement labour from working. It may also be to persuade members of the public or other employers and their employees not to do business with the employer.’
(emphasis added)

46 Item 4 of the code deals with “picketing rules”. Item 4(1) provides that-

‘The registered trade union and employer should seek to agree to picketing rules before the commencement of the strike or picket.’

47 Item 4(2) of the code provides for factors which should be considered when a collective agreement is negotiated to deal with picketing. A number of these factors coincide with what was canvassed in the picketing agreement which forms the subject matter of this case.

48 Item 6 of the code deals with “conduct in the picket”. Item 6(4) states that the registered trade union should appoint picket marshals to monitor the picket. It provides further that-

‘The marshals should wear armbands to identify themselves as marshals. The trade union should instruct the marshals on the law, any agreed picketing rules ... this code of good practice and the steps to be taken to ensure that the picket is conducted *peacefully*.’ (emphasis added)

49 This item goes on to include the following provisions:

(5) Although the picket may be held in any place to which the public has access, the picket *may not interfere with the constitutional rights of other persons*.

(6) The picketers must conduct themselves in a *peaceful and lawful*

manner and must be unarmed. They may-

- (a) carry placards;
- (b) chant slogans; and
- (c) sing and dance.

(7) Picketers may not –

- (a) physically prevent members of the public, including customers, other employees and service providers, from gaining access to or leaving the employer's premises;
- (b) commit any action which may be unlawful, including but not limited to any action which is, or may be perceived to be *violent*.' (emphasis added)

50 Item 8 deals with "general rights, obligations and immunity". Item 8(1) provides that-

'A person who takes part in a picket protected in terms of the Act does not commit a delict or a breach of contract.'

51 Item 8(2) provides that-

'The employer may not take disciplinary action against an employee for participating in a lawful picket. Where the employee's conduct during a picket constitutes misconduct the employer may take disciplinary action in accordance with the provisions of the Act.'

52 The emphasis in a number of the provisions referred to is that picketing is required to be conducted in a peaceful, non-violent manner. Also of significance is that the protections or immunity provided for in item 8 of the code apply to the circumstances of a lawful picket. By contrast, the right of an employer to take disciplinary action where an employee's conduct during a

picket constitutes misconduct is expressly protected.

Test on review

53 The arbitration in the present matter was conducted under the auspices of a bargaining council. In terms of section 51(8) of the LRA, section 145 applies to such an arbitration. Having regard to section 145(2)(a) of the LRA and the decision of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,³ the Labour Appeal Court in *Andre Herholdt v Nedbank Ltd*⁴ and of this court in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,⁵ amongst others, the decision of an arbitrator in an arbitration subject to section 145 is reviewable with reference to-

53.1 the substantive reasonableness of the decision, with the focus being on whether the result or outcome of the decision-making process was one which a reasonable decision-maker might reach; and

53.2 the dialectical or procedural or “process-related” reasonableness of the decision, with the focus being on the logical path by which the decision-maker arrived at his or her decision.

54 With reference to dialectical reasonableness, the Labour Appeal Court in *Herholdt v Nedbank* approved the following extract from the decision of this court in *Southern Sun Hotel Interests*-

‘If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.’⁶

3 (2007) 28 ILJ 2405 (CC) at paras 109 – 110.

4 Unreported judgment of the Labour Appeal Court under Case No. DA20/2010 dated 4 May 2012 at paras 33 – 41.

5 [2009] 11 BLLR 1128 (LC).

6 *Herholdt v Nedbank* above at para 36. *Southern Sun Hotel Interests* above at para 17.

55 The Labour Appeal Court concluded as follows:

‘In short, if the conduct of the commissioner prevents a fair trial of the issues, even if perfectly well-intentioned and *bona fide*, but mistaken, then such conduct will amount to a gross irregularity, and that will be enough to successfully found a review under section 145(2) of the LRA. The court by necessity must scrutinise the reasons of the commissioner not to determine whether the result is correct; or for that matter substantively reasonable, but to determine whether there is a latent irregularity, that is, an irregularity that has taken place within the mind of the commissioner, which will only be ascertainable from his or her reasons.’⁷

Was the first respondent’s decision reasonable?

56 In analysing the first respondent’s decision, I will follow the headings under which he analysed the evidence and arguments, which were based on item 7 of the Code of Good Practice: Dismissal contained in schedule 8 to the LRA.

Whether the applicants contravened a rule or standard regulating conduct in the workplace

57 In dealing with this aspect, the first respondent’s reasoning incorporated *inter alia* the following elements:

57.1the respondents gave corroborative evidence that they continuously tried to speak to their members to tell them that their actions were unlawful and there was no evidence that the shop stewards did nothing when the strikers were acting violently;

57.2there was uncontrollable anger on account of management’s failure to pay wages;

57.3the fact that the police as experts in crowd control could not control the employees behaviour is evidence which goes to show that the shop

⁷ [Herholdt v Nedbank \(supra\)](#) At para 40.

stewards could not be criticised for failing to do so;

57.4 the shop stewards version that there were 400 strikers was truthful (and the applicant's version that there were around 50 was, by implication, untruthful) because the strikers included solidarity strikers;

57.5 the rule contended for by the respondents that the applicants were required to marshal the picketers does not form part of the disciplinary code.

58 I will deal with each of these elements in turn.

The respondents continuously spoke to the strikers

59 With reference to the first respondent's finding that the respondents continuously urged the strikers to act lawfully, there is no attempt in this part of the award to conduct any weighing up whatsoever of the competing evidence and contentions advanced by the applicant on the one hand and the respondents on the other.

60 The finding that there was no evidence that the shop stewards did nothing when the strikers were violent is in error. In the first respondent's own summary of the evidence of Rosita Lubbe he himself records that-

'It was her testimony that the shop stewards failed to act as marshals because on some occasions, she could not see even one of them when there was chaos. She testified that this was in violation of the picketing agreement, which clearly states that shop stewards must be present at the picket from start to the end of each picket day.'

61 Later, again in his own summary of her evidence, he says that-

'The witness testified that she did not agree with the evidence given by the shop stewards during their hearing ... that they also tried to control picketers, but failed.'

62 A careful, fair scrutiny of the evidence given by the applicant's witnesses, on the one hand, and that given by the shop stewards and their witnesses, on the other, was required, including an assessment of the credibility of the witnesses of both the applicants and the respondents. Reasonable scrutiny of this nature would have required the following to be taken into consideration:

62.1 The abovementioned evidence of Lubbe as to the failure of the shop stewards to fulfil their duties as marshals.

62.2 In fact, closer scrutiny of the evidence of Msimang shows that he did not testify that he continuously tried to speak to the union members about their conduct being unlawful. It is so that at the commencement of his evidence he testified that –

'I was doing the marshalling of the strikers showing them the demarcation showing them that they didn't need to pass there. I was the one that was ... directing them.'

62.3 However, in his evidence under cross-examination, he backed away from that version and described himself as a shop steward and not a marshal and repeatedly insisted that he was only responsible for ensuring that traffic was not disrupted and motorists were not distracted. He was at pains to avoid any concession of an assumption of responsibility in relation to preventing violence by picketers.

62.4 Significantly, he went on to concede that –

'I don't remember talking to the employees not to disturb or to maybe block the gate I don't remember talking to them about that, but what I know is that as a ... veteran I know what to do on a daily strike.'

62.5 Had he taken any steps to prevent the violence, and had these then been disregarded by the strikers, he no doubt would have had a strong and lasting recollection of that.

62.6 Moreover, in evaluating Msimang's evidence, the first respondent was required to deal with the events that took place at the meeting on 13 September 2007 when, on the undisputed evidence, he indicated that nothing could be done by negotiations but results would only be achieved through "iron and blood actions", and when he also conveyed the demand of the strikers that the casual labour be removed from the premises because the picketers knew where they lived in the location and their lives were therefore at risk.

62.7 If regard is had to the transcript, when referred to the minute of the meeting on 13 September 2007 in his evidence in chief, Msimang responded evasively. He abandoned his attempt to explain the paragraph of the minute dealing with the threats. He referred instead to the portion of the minute where management had spoken about differences between the ANC and Cosatu. He then apparently attempted to justify the threats by claiming that management acted provocatively in mentioning the ANC and Cosatu.

62.8 Msimang's evidence that he was simply conveying a request on behalf of the strikers was also manifestly unreasonable. A shop steward who was properly carrying out his duties would never have conveyed threats of that nature to management. Instead, he would immediately have pointed out to the striking employees that the threat was entirely unlawful and under no circumstances should the striking employees threaten or contemplate violent action against temporary employees in their homes. If there was to be any report to management, it should have identified which employees were making the unlawful threats with a view to disciplinary action being taken against them. That is certainly not the context in which Msimang conveyed the threats.

62.9 In any event, it emerged under cross-examination that on his own version, Msimang had not had any opportunity before the meeting to speak to the employees and it was therefore difficult to understand how he could have been acting simply as a messenger. The version that he

was acting as messenger is also difficult to reconcile with his complaint in evidence that management acted provocatively by referring in the meeting to the ANC and Cosatu.

62.10 If then the threats were made by Msimang, not as a messenger, but of his own accord, as seems probable, there was no basis for finding or inferring that he was attempting to dissuade the strikers from unlawful action. On the contrary, he was at the forefront of it.

62.11 Also of considerable significance is that the meeting was a meeting with the shop stewards generally. Yet there is no suggestion either in the minute or in the evidence that the other shop stewards distanced themselves from what Msimang had to say.

62.12 Coming to the evidence of Pule, in response to a leading question, he said that 'I tried to ... do my level best to warn the ... workers', an answer that he repeated again later in his evidence.

62.13 Having regard to the detailed evidence that was given about the various incidents of violence that took place, a reasonable decision-maker could hardly have concluded on this basis that there was a continuous and on-going effort by the shop stewards to dissuade their members from unlawful action.

62.14 A reasonable decision-maker would have required evidence from the respondents in relation to each of the incidents which took place, how they developed, how the shop stewards each claim to have acted in order to prevent the violence and how it came about that their efforts in this regard were not successful.

62.15 Moreover, Pule's evidence in this regard is contradicted by his insistence in his evidence that he had no duties whatsoever in relation to the picket different from that of an ordinary participant. If he was of the view that he had no supervisory obligations whatsoever in relation

to the picket arising from his position as shop steward, then the question arises why he found it necessary to testify that he warned the strikers to behave? A reasonable decision-maker would have examined this question.

62.16 His evidence that he warned the workers is also inconsistent with his evidence and that of the other shop stewards that they were completely unaware of the picketing agreement or of any obligation on their part to act as marshals and saw themselves as being in the same position as any of the other strikers participating in the picket.

63 None of this evidence, or its implications, was dealt with at all by the first respondent in his award. Nor is there any fair attempt to make a rational assessment of the credibility of the witnesses.

64 Insofar as the witness Tekane is concerned, it is so that we have no record of the transcript of his evidence. However, from the first respondent's summary in his award, it followed almost exactly the same pattern as that of Pule and ought accordingly to have been subject to the same critical scrutiny required in respect of Pule's evidence. Yet there was no such analysis on the part of the first respondent. Nor is Tekane's credibility assessed.

65 A further difficulty with the first respondent's reasoning in finding that the respondents continuously tried to dissuade the strikers from unlawful action is his complete failure to deal with the countervailing, common cause evidence, that there were a series of extremely violent incidents throughout the strike. Crowd violence takes place when a crowd is out of control. The fact of the repeated incidents of violence was *prima facie* evidence of an absence of control of the picket by those responsible for doing so. A reasonable decision-maker would have appreciated that.

66 Although the onus ultimately lay on the applicant to prove misconduct on the part of the respondents, the fact of the violence, along with the evidence of threats conveyed at the meeting with management on 13 September 2007,

placed an evidentiary burden (as distinct from an onus) on the respondents to adduce evidence in rebuttal showing with a reasonable degree of precision what steps were taken to exercise control and how it transpired that those steps failed.

- 67 Even if the first respondent was of a different view, at the very least, reasonable decision-making required him to deal with this evidence, which formed a central strut of the applicant's case, and to give reasons why he did not consider this evidence as giving rise to a *prima facie* case on the part of the applicant. On the other hand, if he agreed that this evidence gave rise to a *prima facie* case against the respondents, an analysis was required as to why the evidence led by the respondents was sufficient to rebut the *prima facie* case. Instead, there is a void in the first respondent's reasoning in this regard.

Uncontrollable anger due non-payment of wages

- 68 The next element of the first respondent's reasoning was his finding that the crowd was uncontrollable on account of anger generated by management's failure to pay wages. Once again, there is no logical path setting out the first respondent's reasoning in arriving at this finding. The common cause evidence is that there was violence from the inception of the strike on 12 September 2007. Nyekemba's evidence was that the only employees due to be paid that day were those who banked with Absa. Employees who banked with other banks were only due to be paid on Thursday 13 September 2007, so for them it would not have been an issue. There was no evidence as to the time of day at which payment was usually made. However, it is unlikely that this would have been a burning issue and a cause of uncontrolled violence from the moment that the strike commenced on the morning of 12 September 2007.

- 69 It is also unclear how employees actively engaged in a picket would have been able to know from the commencement of the strike that morning that their bank balances did not reflect their salaries as having been credited. Also of significance is Nyekemba's evidence that he advised the employees

through the shop stewards at least to wait until Friday 14 September 2007 to see if the payments did not come through.

- 70 Once again, any analysis of these considerations is entirely lacking in the first respondent's award. Even if it is accepted that the employees were aware of the non-payment from the inception of the strike, there is no rationalisation as to why the first respondent considered that this was a sufficient basis to infer that the strikers became so angry that they were beyond the control of the shop stewards. There is no evidence on the part of the shop stewards of any attempt on their part to explain to the strikers that whilst management's conduct was unacceptable, it did not justify a violent response and that there were lawful avenues for challenging management's conduct. A reasonable decision-maker would have had regard to this.

Comparison with the police

- 71 The next element of the reasoning was that if the police as experts in crowd control were not able to control the strikers, it could not have been expected of the respondent shop stewards to do so.

- 72 This represents an uncritical and unexamined acceptance of a contention advanced by the respondents.

72.1 In the first place, there was no analysis of precisely what transpired when there was a police intervention. On the available evidence the police were at least able to exercise some control at the times when they were there.

72.2 In any event, a reasonable decision-maker would have scrutinised the contention that inability on the part of police to control a crowd necessarily meant that the shop stewards would have been unable to do so.

72.3 In fact, shop stewards are in a unique situation and are perhaps better

placed than anyone else to exercise control over striking employees. Shop stewards are elected by, and have the trust of, their fellow employees. They are elected to those positions because they are considered to have leadership qualities. Msimang, for example, had been a shop steward since 1994 and described himself as a veteran in that position.

72.4 Moreover, shop stewards exercise a well-recognised liaison function between the trade union organising the strike and the strikers. That too placed them in a unique position to exercise control over the manner in which the strike was conducted.

73 The award does not grapple with these matters.

The number of strikers

74 The next element of the first respondent's reasoning is his finding that the respondents were truthful in their evidence as to the number of people in the picket, and, by implication, that the applicant's witnesses' version was untruthful. This was important because it formed part of the basis for the respondents' contention that they were unable to control the crowd.

75 Once again, there is no attempt to conduct any detailed analysis of the evidence. At least three of the respondents' witnesses gave evidence about the number of strikers at the picket. Their estimates of the numbers varied considerably. In the case of Pule the number moved from "480 something" to more than 500 as between his evidence in chief and his evidence under cross-examination.

76 If regard is had to the photographs which formed part of the documentary evidence before the first respondent, these tended to support the version of the applicant. A reasonable decision-maker was required to explain why in the face of that evidence, the applicant's witnesses were found not to be truthful. The first respondent makes no reference to the photographic evidence.

No reference to the rule in the disciplinary code

77 The next component of the first respondent's reasoning related to his finding that the rule that the respondents were required to marshal and control the picketers, did not form part of the disciplinary code and that for this reason the respondents could not be considered to be in breach of a workplace rule.

78 Implicit in this finding was a rejection of the applicant's contention that the conduct was covered by clause 1.2.1 of the disciplinary code which stipulated that-

'Employees must comply with the various rules of the company, and must carry out reasonable instructions given to them, and at all times behave in a lawful and orderly manner.'

79 Again, no reason is provided by the first respondent as to why the applicant's contention in this regard was rejected.

80 The first respondent also failed in his award to have regard to the fact that a disciplinary code is not the only potential source of a workplace rule. Contracts of employment and collective agreements are also sources of workplace rules.⁸ The duties contemplated by such agreements may be either express, implied or tacit. The picketing agreement was a collective agreement which defined the rights and duties of the respective parties surrounding picketing. It was a potential source of workplace rules.

81 Again, none of these considerations were factored into the first respondent's reasoning in his award. A reasonable decision-maker was required to consider them.

Whether the applicants were aware of the rule or could reasonably be expected to be aware of the rule

82 In the second paragraph under this heading, the first respondent held that

⁸ Grogan *Dismissal* pp143-144.

there was 'no conclusive evidence that [the respondents] were aware or unaware of the picketing agreement'. In the next paragraph of the award, the first respondent referred to "the fact that the applicants were not aware of the picketing agreement". These two conclusions are contradictory. Having arrived at the first conclusion, it was not open to him to arrive at the second conclusion.

83 In any event, both conclusions were unreasonable. Three of the applicant's witnesses testified at the hearing that they were present at the meeting held on 11 September 2007, that the picketing agreement was shown to the shop stewards in the course of the meeting and that the meeting on 11 September 2007 was specifically held in order to discuss the implications and implementation of the picketing agreement at the applicant's enterprise.

84 The circumstantial and documentary evidence corroborated the applicant's version. The picketing agreement was signed between NUMSA and RMI on 10 September 2007, the day before the meeting between management and the shop stewards. As appears from the extracts quoted above, the picketing agreement included in clause 9, 'issues to be dealt with at enterprise level'. If regard is then had to the minute of the meeting held between management and the shop stewards on 11 September 2007, it closely corresponds with the items required to be discussed under the bullets in clause 9 of the agreement.

85 The respondents faced a further difficulty. It was common cause that the shop stewards, which included Pule and Tekane, were provided with the minute shortly after the meeting on 11 September 2007, but refused to sign it because of its content. Whether or not they agreed with its content, it quite clearly referred to the picketing agreement. Thus even if one was to accept the unlikely version of the respondents that there was no reference to the picketing agreement during the meeting, they were alerted to the fact that the picketing agreement existed at the latest when they received and read the minute. Any reasonable shop steward would immediately have demanded of his or her trade union that it furnish him or her with a copy if it had not hitherto been provided.

- 86 It is also telling that in Nyekemba's version of the telephone call that he received from the shop stewards to discuss whether or not the minutes should be signed, the only objection to the minute he refers to as having been raised by them was that the company was not allowing picketing to take place on its premises. This corresponds neatly with the minute which, upon analysis, shows that as being the only issue on which agreement could not be reached at the meeting and as being the issue which they wished to take up with Nyekemba and for which purpose they 'requested minutes of the meeting to forward the companies (sic) position to their official'.
- 87 It is so that Msimang was not present at the meeting on 11 September 2007. However he was cross-examined on the basis that he must have learned of the information emanating from the meeting from his fellow shop stewards who did attend. He denied this but could not provide a cogent reason for his denial.
- 88 Notwithstanding all of this corroboration, the first respondent rejected the applicant's version of what took place at the meeting on 11 September 2007 and accepted that the respondents were unaware of the picketing agreement, on the basis that the minute did not expressly record that the picketing agreement was shown to the shop stewards. This notwithstanding the fact that the minute specifically states that it is a "summary of discussions".
- 89 The finding of the first respondent in this respect is manifestly unreasonable and in disregard of the evidence before him.

Whether the rule has been consistently applied?

- 90 The first respondent found inconsistency in the sanctions imposed insofar as the remaining shop stewards were only issued with a final written warning, yet the three respondents were dismissed. The applicant's reliance on the final written warnings pertaining to the three respondents was rejected on the basis that these related to conduct constituting an unprotected strike and were therefore irrelevant.

91 Again, the first respondent's award reflects no attempt to analyse the evidence relating to each infringement or to explain why he rejected the applicant's contentions as to why the misconduct on each occasion was similar.

92 The earlier final warnings on which the applicant relied for the more severe sanctions imposed on the respondents pertained to their participation in an unprotected strike during scheduled working hours on 19 October 2006. The warnings included the following express provisions:

'The accused are informed that any further transgressions of this nature may result in the termination of his services. (sic) The accused are further informed that this warning is valid for a period of 12 months from receipt of this recommendation and covers all aspects relating to the charges of which he has been found guilty including but not limited to the following: ...

any refusal to comply with ... reasonable and lawful instructions;

any failure to observe agreed upon procedures in respect of the convening of meetings, union or otherwise.'

93 Above the place where the respective respondents signed the final written warning appear the following words:

'I acknowledge receipt of this warning and understand that, in the case of a final warning, further similar offences may lead to my dismissal.'

94 Chapter IV of the LRA delineates what constitutes lawful conduct both in respect of the procedure to be followed preceding a lawful strike and the actual conduct of a lawful strike. Both the earlier final written warning and the dismissal pertained to conduct in the context of a strike which fell outside of the protections provided by chapter IV of the LRA.

95 The first respondent was required to provide cogent reasons why, in these circumstances, the misconduct was dissimilar. None are provided.

Whether dismissal was an appropriate sanction for the contravention of the rule?

96 In holding that dismissal was not the appropriate sanction, the first respondent referred to his finding that the applicant's failure to pay wages had provoked the violent conduct and held that this mitigated the conduct of the respondents. I refer to what I have already said above in regard to the finding regarding provocation on the part of the applicant.

97 He also referred to the fact that the shop stewards were at all times available to speak to management and that they were not in his view negligent. However, this does not address the fact that the picketing agreement also required them to act as marshals to ensure that the picket was conducted in a lawful manner.

First respondent's conclusion

98 As pointed out above, the first respondent concluded that the dismissal was substantively unfair and ordered retrospective reinstatement in terms of section 193(1)(a) of the LRA. He found that none of the circumstances contemplated in section 193(2)(a) – (d) of the LRA were present, thereby leaving him with no discretion to refuse reinstatement. The applicant challenges the finding in this respect and insofar as he awarded reinstatement with full retrospectivity to the date of dismissal.

99 For reasons which will become apparent below, it is not necessary for me to consider the applicant's argument in this regard.

Conclusion on the reasonableness of the award

100 For the reasons outlined above, the award of the first respondent was neither dialectally nor substantively reasonable. The extent of the departure from what was reasonable prejudiced the applicant and precluded a fair trial of the issues. The award finding the dismissal to be substantively unfair stands to be reviewed and set aside.

101 In those circumstances, it is not necessary for me to consider the reasonableness of the award insofar as it pertained to the relief granted by the first respondent.

Substitution or remittal

102 In *Sidumo* the Constitutional Court held as follows:

[98] The powers of the Labour Court set out in section 158 of the LRA differ significantly from the powers of a court set out in section 8 of PAJA. The powers of the Labour Court are directed at remedying a wrong and, in the spirit of the LRA, at providing finality speedily. If an application in the normal course for the review of an administrative action succeeds an applicant is usually entitled to no more than the setting aside of the impugned decision and its remittal to the decision-maker to apply his or her mind afresh. Section (1)(c)(ii) of PAJA provides that only in exceptional cases may a court substitute the administrative decision or correct a defect resulting from the administrative action. This is a significant difference between the LRA and PAJA.⁹

103 It is apparent from this extract from *Sidumo*, that this court is not subject to the same constraints as a court performing the judicial review function under the Promotion of Administrative Justice Act No. 3 of 2000, when it comes to substitution of its own decision for that of the original decision maker. An important consideration in this regard will be the need for finality in the context of labour disputes.

104 In the circumstances of this particular matter, the strike which gave rise to the events took place during September 2007. The respondents were dismissed on 3 April 2008. The arbitration award was handed down on 5 June 2009. In less than two months' time, five years will have passed since the strike took place. To remit the matter for a fresh, lengthy arbitration will lead to a further lengthy delay, with the potential for further review and appeal proceedings.

⁹ *Sidumo* (supra) at para 98. See also in this regard *Pick 'n Pay Retailers (Pty) Ltd v The Commission for Conciliation, Mediation & Arbitration & Others* unreported judgment of Basson J under Case No. JR2289/07.

105 Against that there is the difficulty, for purposes of substitution of this court's decision for that of the first respondent, that the transcript of a significant part of the evidence led at the arbitration has been lost.

106 Given the delays and the need for finality, I am of the view that if substitution is possible without any party being seriously prejudiced by the missing portions of the transcript, this court should substitute its decision for that of the first respondent. I return to this issue below.

107 In my view the applicant proved on a balance of probabilities that the shop stewards, including Pule and Tekane, were indeed aware of the picketing agreement. It is most improbable that they were not alerted to it prior to the meeting with management on 11 September 2007, particularly bearing in mind that it manifestly provided the very basis and impetus for the meeting. Even if they were not aware of the picketing agreement beforehand, the applicant showed in its evidence that the shop stewards were made aware of its material provisions in that meeting. At the latest they were alerted to the existence of the picketing agreement shortly after the meeting when the minute of the meeting was handed to them and they read it. Msimang's version that he never discussed what took place at the meeting with the shop stewards was not plausible.

108 Moreover, Mr Cartwright who appeared on behalf of the respondents in this court, correctly submitted that, regardless of whether or not there was a picketing agreement, the shop stewards by virtue of their position as such owed a duty of care to the applicant employer to ensure that the picket was properly controlled and marshalled. Indeed he went so far as to say that the existence or otherwise of the picketing agreement was for this reason largely irrelevant.

109 Accordingly, I am satisfied, on a balance of probabilities, that the respondents were well aware of their duty to act as marshals and to ensure that the picket was conducted in a peaceful manner, as required by the Constitution, the Labour Relations Act, the picketing agreement and their employment

contracts.

110 Further, I am satisfied that in proving the specific range of incidents of uncontrolled crowd violence which took place and the threats which were conveyed by the shop stewards at the meeting on 13 September 2007, the applicant made out a *prima facie* case for the failure by the shop stewards to exercise the control over the picket which they were required to exercise. In coming to this view, I have taken into account that what did or did not take place on the part of NUMSA and the shop stewards in relation to the organisation of the picket, are matters peculiarly within the knowledge of the respondents. Whilst this does not excuse the applicant of its onus it enables it to discharge it with:

‘less evidence than otherwise would suffice to establish a *prima facie* case’.¹⁰

111 Faced with a *prima facie* case, the respondents failed to put up any detailed or convincing evidence to rebut the case of the applicant that they failed in their duty to marshal and control the picket. On the contrary, the respondents sought to advance a case that they bore no duty to control the picket at all and contended that they were in the same position as any other striker on the picket. The most probable inference to be drawn from this approach was that the respondents were conscious of the fact that they failed to exercise any control over the picket and sought to justify their omission by contending that they had no duty to do so.

112 If the respondents were to have put up a case in rebuttal one would have expected detailed evidence from each respondent as to his whereabouts at the time of each of the admitted incidents of violence, if he was absent, why this was legitimately so, if he was present, what reasonable steps he took to prevent the particular incident of violence from occurring and why those steps failed to prevent the violence.

¹⁰ *South African Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA) at para 30, referring to *Union Government (Minister of Railways) v Sykes* 1913 AD 156 and *Venter and Others v Credit Guarantee Insurance Corporation of Africa Ltd and Another* 1996 (3) SA 966 (A).

113 Nothing approximating this was put up by the respondents Msimang or Pule or by the witness and fellow shop steward Simon Machaka. The transcript of Tekane's evidence is missing. However, if regard is had to the summary of his evidence in the award, it is clear that his evidence followed exactly the same pattern as that of Pule. There is no reference to any detailed evidence of the kind required. Nor was any such evidence put up in the answering affidavits filed by the three respondents in the review application. This represented an opportunity for Tekane to supplement his evidence if he was concerned that the award did not fairly summarise his evidence.

114 It was not open to the respondents to ignore their duty to put up cogent evidence in rebuttal and then to complain that disciplining them amounted to the imposition of collective guilt, as was argued before this court.

115 Further, the conduct of Msimang in making threats of violence at the meeting of 13 September 2007, without any objection or contradiction from his fellow shop stewards, supports the conclusion that they failed to take any proper steps to exercise control over the conduct of the strikers.

116 It is significant that the Labour Appeal Court in the case of *Adcock Ingram Critical Care v Commission for Conciliation, Mediation and Arbitration & Others*¹¹ rejected an argument that a threat of violence conveyed by a shop steward at a negotiation meeting with management was protected by the context in which it was made and therefore precluded the company from dismissing the shop steward for misconduct. In particular, the Labour Appeal Court held as follows:

'One cannot divorce the bargaining situation from reality. The negotiation pertains to the workplace and the employment situation. The employer negotiates as employer and the employee as employee and the fact that both negotiating teams represent their principals does not alter this. The fact that meetings often degenerate does not mean that one should jettison the principle that as in the workplace also at the negotiation table the employer and the employee should treat each other with the respect they both deserve.

11 (2001) 22 ILJ 1799 (LAC) at paras 4 and 12.

Assaults and threats thereof are not conducive to harmony or to productive negotiation ... To me it is unacceptable to hold, as the Commissioner did, that when one acts in a representative capacity anything goes.’¹²

117 Having regard to –

117.1 what I have said above regarding the evidence of Tekane;

117.2 the extent to which the evidence about the incidents of violence was common cause; and

117.3 the fact that most of the missing portions of the transcript pertain to the applicant’s evidence at the arbitration,

I am satisfied that no party is unduly prejudiced by the missing portions of the transcript.

118 Accordingly, on a balance of probabilities, I find that –

118.1 the respondents were guilty of a breach of the picketing agreement as alleged in the first charge which they faced;

118.2 the respondents were guilty of gross negligence on the basis alleged in the second charge which they faced;

118.3 there was a causal connection between their gross negligence and the incidents of violence which took place; and

118.4 the misconduct of which the respondents were guilty was of a similar nature to that in respect of which they had already received a final written warning. Both involved conduct falling outside the specific protections conferred by chapter IV of the LRA;

118.5 the events which took place during the course of the picketing,

¹² [Id at Pparas 14 and 15.](#)

including the events at the meeting on 13 September 2007, taken together with the existence of a similar final written warning against the three respondents concerned, must have had a seriously deleterious effect on the trust relationship between the applicant and the respondents; and

118.6 dismissal was a fair sanction.

119 The applicant did not press strongly for a costs order and I am not convinced that such an order is appropriate in all the circumstances.

120 I accordingly make the following order:

120.1 The arbitration award issued by the first respondent on 5 June 2009 under Case No. MINT14409D, pursuant to the arbitration proceedings between the third and further respondents and the applicant, is reviewed and set aside;

120.2 The arbitration award is substituted with the following award:

‘It is declared that the dismissal of the applicants [individual third and further respondents in the review proceedings] was procedurally and substantively fair.’

120.3 No order is made as to costs.

DODSON AJ

Acting Judge of the Labour Court

APPEARANCES:

For the applicant: AJ Posthuma of Snyman Attorneys

For the third and

further respondents: David Cartwright of David Cartwright Attorneys.