



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 867/2006

In the matter between:

THE PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA

OBO OUPA JONAS MOTAPANYANE

Applicant

and

THE PREMIER: FREE STATE PROVINCE

First Respondent

MEC: DEPARTMENT OF HEALTH:

FREE STATE PROVINCE

Second Respondent

Heard: 27 November 2017

Heads of argument filed: 29 November 2017

Delivered: 01 December 2017

Summary: Applicant alleges unfair dismissal following dismissal for participation in an unprotected strike. Substantive fairness is the only issue to be decided. Dismissal was fair.

JUDGMENT

PRINSLOO; J

Introduction

- [1] The Applicant (PSA) on behalf of its member, Mr Motapanyane (the employee) approached this Court for relief after he was dismissed for participation in unprotected strike action. The employee claimed that his dismissal was substantively and procedurally unfair.
- [2] The Respondents opposed the matter.
- [3] Before turning to the merits of the case, it is necessary to give a brief overview of the pleadings, the pre-trial minute and the issues for the Court to decide.
- [4] At the commencement of the trial Mr Venter for the Applicant abandoned the challenge in respect of procedural fairness and indicated that the only issue to be considered and decided is the substantive fairness of the employee's dismissal.

The pleadings and pre-trial minute

- [5] It is common cause between the parties that the employee was employed by the Department of Health, Free State (the Department) at the Katleho District Hospital in Virginia. The employee was employed as an administrative clerk and was dismissed on 6 April 2006 pursuant to a disciplinary hearing where he was found guilty of misconduct for participation in unprotected and unlawful industrial action at the Katleho District Hospital on 14 November 2005. The employee's dismissal was confirmed in May 2006 when his internal appeal was dismissed.
- [6] The employee was a member and shop steward of the PSA at the Katleho District Hospital.
- [7] In the statement of case the Applicant's pleaded case is that the unions jointly wrote a letter to the Premier of the Free State on 10 November 2005 wherein they demanded a meeting with the Premier before 14 November 2005.
- [8] Also on 10 November 2005 the unions addressed a 'notice of action to be taken on 14 November 2005' to the Head of the Department (HOD). This notice informed the HOD that action would be taken at the Katleho Hospital on 14 November 2005.

- [9] The Department responded to the notice on 10 November 2005 and advised the unions that industrial action would be unprocedural and unlawful as the Department is designated as an essential service and the contemplated industrial action was viewed in a very serious light as it may compromise and disrupt essential services and result in loss of life. Upon receipt of this letter the PSA responded that it distanced itself from any illegal and prohibited action and that its members should refrain from such action.
- [10] The Applicant's case on substantive fairness is that the employee did not participate in the unprotected strike action, whereas the Department's case is that he participated in the strike action on 14 November 2005.
- [11] The issue this Court is required to determine is whether the employee participated in the strike action on 14 November 2005 and whether dismissal was an appropriate sanction.
- [12] The delay in this matter is a cause for concern. The employee was finally dismissed in May 2006 and his statement of case was filed on 15 December 2006. A first pre-trial minute was filed on 8 November 2012, almost 6 years later. The first pre-trial minute was defective and in January 2013 this Court issued a directive for the parties to file a supplementary pre-trial minute. The supplementary pre-trial minute, which still does not comply with the provisions of Rule 6(4)(b) or paragraph 10.4.2.2 the Practice Manual for the Labour Court, was filed in September 2013. It appears that the Court file was archived at some point due to the delay and it contributed significantly to further delays and difficulties to proceed with the matter. The matter was eventually enrolled for trial in April 2017.
- [13] Mr Venter for the Applicant conceded that there was no active effort to pursue the matter to trial since the statement of case was filed in December 2006 and the first pre-trial minute was filed in November 2012. The challenges and prejudice in proceeding to trial in respect of a dismissal that took place more than 11 years ago are obvious.

The evidence adduced

- [14] The Respondents called two witnesses. The first witness was Mr Jacob Rakatsinyana (Rakatsinyana) who testified that he has been employed by the

Department for 35 years and in November 2005 he was employed at the Katleho Hospital. He knows the employee as he was employed by the Department and was his subordinate at the hospital where the employee was responsible for admissions and accounts.

- [15] Rakatsinyana testified that he saw the employee participating in the strike action on 14 November 2005. The witness described the events of 14 November 2005 as that 40 – 50 people were singing and chanting in front of the administration building and the employee was one of them. He further testified that when he went to the employee's office, he was not there as he was outside singing with the striking employees.
- [16] Rakatsinyana testified that the employee was supposed to be in his office performing his duties for the day, which included the admission of patients and receipt of admission fees but on 14 November 2005 the employee was not in the office and he did not perform those duties. Rakatsinyana explained that on 14 November 2005 he had to perform some of the employee's functions and when the cash up was done between 15:30 and 16:00, the employee was not there to do it. The employee should have been in his office from 07:30 until 16:00 but on 14 November 2005 he was not in his office as he was singing with the strikers.
- [17] In respect of the employee's version that he did not participate in the strike action, but merely went there to tell the PSA members not to participate, Rakatsinyana was adamant as to what he saw and he reiterated that the employee was amongst the strikers and he was singing with them. If the employee went to call the PSA members, he could have done so and went back to work, which he did not do. This version Rakatsinyana also disputed in cross-examination and he testified that the employee did not go back to the office to the extent that Rakatsinyana had to do the cash up at the end of the day.
- [18] In cross-examination it was put to Rakatsinyana that a union management meeting was scheduled for 14 November 2005 at 10:00 and if the employee was not in his office on 14 November 2005, it was because he was attending the said meeting. Rakatsinyana disputed this and testified that he saw the employee with the strikers from 09:30 – 13:00. Rakatsinyane explained that he

was not in his office the entire duration of the strike action as he had to take care of other duties in the administration department to ensure that the services were running smoothly.

- [19] It was also put to Rakatsinyana that the PSA distanced itself from the strike action on 14 November 2005. Rakatsinyane agreed that the PSA did not participate in the strike action but he insisted that the employee and other PSA members indeed participated.
- [20] Rakatsinyana testified that his office was next to the area where the striking employees were singing and he could see them from his office as his office window faced in the direction of the parking area where the strikers were.
- [21] The Respondent's second witness was Ms Moletsane (Moletsane) who testified that she worked at the Katleho Hospital in November 2005 as a patient care manager. She explained that she started to work at 07:00 and her duty was *inter alia* to get reports from the nurses. On 14 November 2005 whilst she was busy to receive reports from the nurses, she heard noise outside and when she investigated, she found that the hospital staff members were singing and dancing. She checked the wards and the patients and found that many nurses were not in their allocated wards but that they were participating in the singing and dancing. She went back to her office to write down the names of the nurses who were supposed to report for duty but failed to do so. Moletsane testified that she saw the employee as he was part of the group singing and dancing.
- [22] In respect of the employee's version that he was only there to stop the PSA members from striking, Moletsane conceded that she could not say what he had said to the strikers, but she insisted that he was participating in the strike and that she saw him singing and dancing.
- [23] In cross-examination Moletsane testified that she was unable to state the exact time she saw the employee singing with the striking employees, but she estimated that it was around 07:45 and she explained that she saw the strikers as she passed them as she went to and from her office. It was put to Moletsane that Rakatsinyana testified that the strike only commenced at

09:30. Moletsane could not explain that and responded that she could only state the facts that she knows.

- [24] It was also put to Moletsane that the PSA did not participate in the strike action on 14 November 2005. Moletsane testified that she was not aware that the PSA did not participate in the strike action but insisted that she saw that the employee indeed participated.
- [25] Mr Venter posed questions to Moletsane about Rakatsinyana's office and his ability and the possibility to see the employee from the said office. Moletsane testified that it would be possible to see the strikers from the said office but that it would not be possible to identify the employee from Rakatsinyana's office.
- [26] The employee testified that on 10 November 2005 the unions demanded a meeting with the Premier before 14 November 2005 and he was a signatory to the letter.
- [27] He also testified that a union management committee meeting was scheduled for 14 November 2005 but this meeting however never took place.
- [28] The PSA's position was that its members should not participate in the strike as the strike was illegal. On the day of the strike the employee went to the group of striking employees and called the PSA members to tell them that their conduct was unlawful and he had to shout because the employees were singing.
- [29] The employee testified that he did not sing with the strikers. When he realised that the employees were singing outside he called the PSA's Mr Victor Nqanda (Nqanda) who said he would send one Judy, a full time shop steward to assist the employee to make sure that the PSA members did not take part in the strike action.
- [30] The employee was asked whether it was possible to see the strike from Rakatsinyana's office and he responded that it was not possible as it was too far and because the windows faced in another direction. This version was however not put to Rakatsinyana and Rakatsinyana's evidence that he could

see the strikers from his office and that his office windows faced in the direction of where the strikers were, was not challenged.

- [31] In respect of Rakatsinyana's evidence that the employee was not in the office the whole day the employee testified that he was in the office the whole day and he only went out to speak to Judy outside his office. The difficulty with this version is twofold. Firstly, it was not put to Rakatsinyane. The version put to Rakatsinyane was that if the employee was not in his office on 14 November 2005, it was because he was attending the union management committee meeting which was scheduled for 14 November 2005. Secondly, on the employee's own version the union management committee meeting did not take place on 14 November 2005 and he was not attending such a meeting.
- [32] The employee seeks re-instatement.
- [33] In cross-examination Ms Britz for the Respondents took the employee through his entire working day on 14 November 2005. In summary the employee testified that he arrived at work at 07:30 and started with his normal duties to fetch the admission fees and place it in the store room. This task was completed by 08:00. The employee heard people singing at the admission block and he phoned Nqanda and had a five minute conversation with him. Nqanda said he would phone Judy to assist the employee to ensure that PSA members do not participate in the strike. Judy arrived approximately an hour and a half later and when she arrived, they went to the strikers to tell the PSA members not to participate in the strike as it was unprotected. They approached the striking employees somewhere between 09:30 and 09:45 and it took them approximately 10 minutes to address the PSA members.
- [34] The employee testified that while he was waiting for Judy, he carried on with his normal duties.
- [35] The employee testified that there were 4 PSA members who participated in the strike but after the employee and Judy spoke to them, they listened to them and they abandoned the strike.
- [36] Afterwards the employee and Judy went back to his office to observe how long the singing would continue and to ensure that the PSA members do not return to join the strike. Judy left at 13:30 when the singing stopped.

- [37] The employee testified that after Judy left he was back in his office and proceeded with his daily tasks until 16:00 when he knocked off. The employee disputed that Rakatsinyana had to do the cash up on 14 November 2005.
- [38] Subsequent to his dismissal the PSA in a notice of appeal made representations on behalf of the employee to the Department. It was put to the employee that the same representations that were made in respect of other PSA members who participated in the strike were made on his behalf and there was no difference in the submissions. Ms Britz stated that this was so because the employee participated in the strike and the PSA knew that, because if that was not the case the PSA and more specifically Judy and Nqanda would have informed the Department that the employee did not participate in the strike but he went there on instruction and to stop PSA members from participating in the strike. The employee conceded that he has nothing in writing from Judy or Nqanda to support his version and they were also not going to testify for him in this trial.
- [39] It was put to the employee that no different submissions were made on his behalf and no explanation was tendered to the employer because the version presented by the employee never happened. If it happened the employee and his union would have told the Department about the fact that the employee was instructed to address the striking PSA members and that he did not participate but merely spoke to the employees for approximately 10 minutes.
- [40] Ms Britz referred to the employee's testimony that on 14 November 2005 he arrived at work at 07:30, waited for Judy to arrive, that he addressed the workers with Judy and went back to his office with reference to his pleaded case and specifically paragraph 9 of his statement of case. In the said paragraph the employee pleaded that on 14 November 2005 a union management committee meeting was scheduled and when he saw officials from other unions entering the office of the chief executive officer at the hospital, he also entered the office under the impression that it was to have the scheduled meeting and he then heard that the other unions were proceeding with the strike action. This meeting never took place and the employee never testified that he attended such meeting or went to the chief executive officer's office on 14 November 2005, despite being asked specifically to describe his working day of 14 November 2005. In fact, in

evidence in chief the employee's version was that he was in his office the entire day, except when he went to address the striking PSA members.

[41] The employee conceded that he had no problems with Rakatsinyana or Moletsane and he could not provide any plausible reasons as to why they would come to Court and testify that they saw him participating in the strike action.

[42] The employee testified that he was the only PSA member who was dismissed. The other four members who participated in the strike was suspended without pay for a month.

Arguments and analysis

[43] The first question to be considered in determining the substantive fairness of the employee's dismissal is whether he took part in unprotected strike action on 14 November 2005.

[44] On the evidence before me, there are two conflicting versions.

[45] On the one hand the employee's pleaded case is that he did not participate in the strike at all on 14 November 2005. His pleaded case is that he wrongly attended a union management meeting and that he proceeded to ensure that the PSA members do not embark on strike action.

[46] His evidence before Court was that he was in his office the entire day on 14 November 2005, executing his duties except when he addressed the striking PSA members and advised them not to participate in the strike action.

[47] On the other hand, the Respondents' case is that the employee participated in the strike action, which he knew was unprotected, when he joined the strikers in singing and dancing and that he was not in his office and did not execute his duties on 14 November 2005.

[48] In *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others*¹ the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms at para 5:

¹ 2003 (1) SA 11 (SCA)

The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

- [49] *In casu* it is common cause that there was strike action on 14 November 2005 and that it was unprotected. What is disputed is whether the employee participated or not.
- [50] Mr Venter for the Applicant submitted that the evidence the employer adduced to show that the employee committed misconduct by participating in the strike action was not credible as it was contradictory.
- [51] The first aspect Mr Venter referred to is Rakatsinyana's evidence that the strike commenced at 09:30 versus Moletsane's evidence that she heard the strikers singing shortly after she reported for duty at 07:00. The employee testified that he arrived at work at 07:30 and he fetched the admission fees and placed it in the store room, which took him approximately 30 minutes. He then heard people singing at the admission block and phoned Nqanda around 08:00 to report this.
- [52] I am alive to the fact that the strike happened in 2005 and that the witnesses have to rely on their memories in respect of an event that happened more than 12 years ago. On the evidence before me and on the versions presented by Moletsane and the employee I accept that the strike action commenced somewhere between 07:00 and 08:00 on 14 November 2005.

- [53] Rakatsinyana testified that he saw the employee participating in the strike action at 09:30 and Moletsane testified that she saw the employee participating at around 07:45. Mr Venter submitted that this is a material discrepancy. In my view this is not a discrepancy as the witnesses testified independently and in respect of different occasions when they saw the employee. Rakatsinyana did not testify that he was with Moletsane or vice versa when they observed the employee participating in the strike. They testified as to their own observations and recollections of when they saw the employee. It would have been a discrepancy if the Respondents' version was that Rakatsinyana and Moletsane were together when they observed the employee and there was a material difference in the time, but that is not the case *in casu*.
- [54] Mr Venter further submitted that Rakatsinyana testified that he was able to see the striking employees from his office and to identify the employee and the discrepancy is that Moletsane testified that it would not have been possible to identify individuals from Rakatsinyana's office. The difficulty with this submission is that Rakatsinyana was called as a witness and his direct evidence was that his office was next to the place where the employees were singing and his office windows faced in that direction. The questions posed to Moletsane about whether Rakatsinyana was able to identify the employee from his office should have been posed to Rakatsinyana and I cannot attach much weight to Moletsane's evidence in this regard. These issues were not canvassed with Rakatsinyana during his cross-examination and it can hardly be said that there is a material contradiction in the evidence when it was never put to Rakatsinyana that he was not able to see or identify the employee from his office.
- [55] Mr Venter further submitted that the employee testified that that the strikers could not be noticed from Rakatsinyana's office. The difficulty here is that this version was never put to Rakatsinyana during his evidence and Rakatsinyana was never afforded the opportunity to respond to that. I cannot attach much weight to a version that was not put to the pertinent witness, Rakatsinyana, in respect of an aspect Rakatsinyana had direct and personal knowledge of.
- [56] Mr Venter submitted that Moletsane testified that she noticed that the employee was part of the group of striking employees but she was not sure

whether he was merely present or part taking and that she conceded that it is possible that he was there to remove striking PSA members. Mr Venter argued that the employee's version must be favoured because Moletsane explained that it was possible that the employee 'merely assisted PSA members.'

- [57] This argument holds no water for a number of reasons. Firstly, Moletsane testified specifically that she saw the employee participating in the strike and in cross-examination when it was put to her that the employee did not participate but went there to stop the PSA members from participating in the strike, she re-iterated that she saw him participating as he was singing and dancing with the strikers. What she conceded was that she was unable to say what the employee said as it was noisy and that she did not hear him say anything to the strikers. Upon the question whether it was possible that the employee went to the strike to stop the PSA members from striking, Moletsane's response was that she did not know.
- [58] Secondly, the employee's version was that he was in his office the entire day, except for the approximately 10 minutes when he went out to address the strikers with Judy at around 09:30. This version was not put to Moletsane who testified that she saw the employee participating in the strike at around 07:45, instead the proposition was put to Moletsane that the employee went to the strikers to stop the PSA members from striking. By placing reliance on Moletsane's evidence in support for his case that he merely went to stop the PSA strikers, the employee is effectively accepting that Moletsane saw him at the strike, but his version is that it was not to participate. This is in conflict with the employee's own version that he only went to address the strikers at 09:30.
- [59] Mr Venter further took issue with the fact that Moletsane testified in the disciplinary hearing where she made no mention of the employee, yet she is now able to identify the employee as a striker. Moletsane explained in her testimony that she was responsible for the nurses and when the strike commenced, she wrote down the names of the nurses who participated. She testified in respect of the nurses as she only concentrated on the nurses as they were her responsibility and the employee was not a nurse. I accept this explanation as reasonable and plausible. Rakatsinyana who was in charge of the administration department testified as to the employees who participated

in the strike he was able to identify in the disciplinary hearing and it was evident that those all fell under his supervision in the administration department. Apart from this Moletsane testified that she knows the employee and I accept that as she knows him, she would be able to identify the employee and the fact that she focussed on the nursing staff who fell under her supervision at the time of the disciplinary hearing, does not affect her ability to identify the employee and not much turns on the fact that she did not identify him in the disciplinary enquiry. It was never put to Moletsane that she could not or was unable to identify the employee.

[60] Mr Venter submitted that the probabilities favour the employee because the PSA indicated that it would not participate in the strike and this was communicated to the employee who, as a shop steward, was well aware that the PSA was not part of the strike. Judy assisted him to ensure that PSA members did not participate.

[61] In my view this is not sufficient to sustain an argument that the probabilities favour the employee. The employee is well aware of the fact that the Respondents' case is that he participated in the strike and his case is that he did not participate but went to the strikers with Judy for 10 minutes to ensure that PSA members do not strike. The obvious thing to do was to call Judy to testify and to corroborate this version. This Court is not told why Judy is not called as a witness and I am left with no explanation and no option but to make a negative inference from the fact that Judy, a crucial witness, is not called to support the employee's version.

[62] Mr Venter argued that the employee's version was credible and most probably the preferred version. The employee was present when the strike took place but this was because he was sent to collect the PSA members from the strike. He had no intention to strike and his specific task was to ensure that the PSA members did not participate in the strike.

[63] There are a number of factors I have to consider in determining the probabilities of the versions presented. One such factor is the credibility of the various factual witnesses and in deciding this, I have to consider contradictions in the evidence in what was testified and what was put and pleaded as a version.

- [64] The Respondents' witnesses both testified that they saw the employee participating in the strike action on 14 November 2005 by singing and dancing with the strikers. The employee testified that he had no issues with Rakatsinyana or Moletsane and that they had no issues with him or scores to settle. Rakatsinyana and Moletsane both observed the employee participating in the strike and they had no reason to testify to that effect other than that it was what they indeed observed. They had no issue with the employee, they displayed no bias or prejudice towards the employee, they do not stand to gain or lose anything by testifying against the employee and throughout their testimony they stood by their version that they saw the employee participating in the strike action. I find Rakatsinyana and Moletsane to be credible witnesses and their testimony to be reliable. I accept their testimony that they saw the employee participating in the strike on 14 November 2005 as probable.
- [65] The employee's version on the other hand had many contradictions. His pleaded case is that that on 14 November 2005 a union management committee meeting was scheduled and when he saw officials from other unions entering the office of the chief executive officer at the hospital, he also entered the office under the impression that it was to have the scheduled meeting and he then heard that the other unions were proceeding with the strike action. According to the notice of the union management meeting the meeting was scheduled for 10:00 on 14 November 2005. In cross-examination it was put to Rakatsinyana that a union management meeting was scheduled for 14 November 2005 at 10:00 and if the employee was not in his office on 14 November 2005, it was because he was attending the said meeting.
- [66] The employee's own version however was that the said meeting never took place and he never testified in accordance with what his pleaded case was or in accordance with his version as was put to Rakatsinyana. In fact, in evidence in chief the employee's version was that he was in his office the entire day, except when he went to address the striking PSA members with Judy at around 09:30.
- [67] It is evident that there are material contradictions in the employee's pleaded case, his version as put to the Respondents' witnesses in cross-examination and his own testimony. His version varied from he was in his office the entire

day and when he was not there, it was because he attended the union meeting at 10:00 to a version that the union meeting never happened and he was in his office the entire day except for the 10 minutes he went to address the strikers with Judy at around 09:30.

- [68] The employee's version that he was instructed by Nqanda to go to the strike and to address the strikers and that he was accompanied by Judy is not corroborated to any extent. Rakatsinyana testified that he did not see the full time shop steward on 14 November 2005 assisting the employee in ensuring that PSA members did not participate. Neither Nqanda nor Judy was called as witnesses to corroborate this version. The appeal notice filed on behalf of the employee after his dismissal also did not mention the fact that he was instructed by his union to go to the strike and that he was accompanied by Judy. In fact, the appeal submissions are exactly the same as the submissions filed on behalf of the other PSA members who participated in the strike.
- [69] In my view it is telling that the employee's own union did not present the version he seeks to introduce in Court namely that he was instructed to go to the strike and that he was accompanied by Judy. The PSA treated the employee's case exactly the same as it treated the cases of its other members who participated in the strike action and the PSA at no point sought to differentiate the employee's situation or the merits of his case from that of the members who participated in the strike action.
- [70] I find it improbable that the union would not have put forward the version that the employee was instructed to go to the strikers and that he was assisted by Judy if that indeed happened and where such an explanation could have exonerated the employee. Instead, the PSA treated the employee's case the same as the case of the other strikers and made no effort to file a statement or call a witness in support of the employee.
- [71] Considering the inherent probabilities of the versions presented, I find the Respondents' version to be more probable for the reasons I dealt with *supra*. I have considered the fact that the Respondents bear the onus to prove that the employee was indeed guilty of misconduct by participating in unprotected strike action and I am satisfied on the facts before me that the Respondents discharged this onus.

Was the dismissal substantively fair:

[72] The legal principles to be applied in a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6(1) of the Code of Good Practice contained in Schedule 8 of the Act (the Code) provides as follows in respect of substantive fairness:

‘Dismissals and industrial action.

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

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

[73] The distinction between a protected and unprotected strike is not an academic one. It is one that ought to have consequences. Be that as it may, I have to consider the factors as aforesaid.

[74] The contravention of the Act is serious where the employer is an essential service and participation in strike action is prohibited by section 65 of the Act. There was no attempt to comply with the provisions of the Act, in fact the strike action was in direct contravention of the provisions of the Act.

[75] Item 7 of the Code regulates dismissal for misconduct more generally and as participation in unprotected strike action is misconduct, it should logically applies. Item 7 requires the determination of whether dismissal was an appropriate sanction for contravention of the relevant rule or standard.

[76] Item 7 of the Code provides that:

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

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

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

- (i) the rule was a valid or reasonable rule or standard;
- (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- (iii) the rule or standard has been consistently applied by the employer; and
- (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

[77] The employee participated in unprotected strike action and it constituted misconduct. The employee was aware that the strike was unprotected and that he should not participate.

[78] The only remaining issues to be decided therefore are whether discipline was consistently applied and whether dismissal was an appropriate sanction.

[79] The employee challenged the fairness of his dismissal on the ground that discipline was applied inconsistently in that there were other employees who participated in the strike who were not dismissed but who received lesser sanctions.

[80] The Respondents submitted that shop stewards of unions who participated in the unprotected strike action were dismissed and the others who were only union members and not shop stewards received lesser sanctions. The rationale behind this decision was that shop steward should set an example and were therefore not treated the same as normal union members when an appropriate sanction had to be determined.

[81] In *SA Commercial Catering and Allied Worker's Union and others v Irvin and Johnson Ltd*² the LAC held that:

In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see eg Grogan *Workplace Law* (4 ed) at 145 and Le Roux & Van Niekerk *The SA Law of Unfair Dismissal* at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (*Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others*(1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious.

[82] In *Absa Bank Ltd v Naidu and others*³ the LAC held that:

² (1999) 20 ILJ 23-2 (LAC).

"However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:

'[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'"

- [83] The Labour Appeal Court in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*⁴ held that:

This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly.

- [84] Consistency is but an element of fairness and not decisive of the outcome on the determination of the fairness of a dismissal. There was no evidence or argument that the Respondent acted capriciously or with bias in dismissing the employee. The argument is that the Respondents applied discipline inconsistently by not dismissing the other PSA members who participated in the strike action and therefore the employee's dismissal was unfair.
- [85] *In casu* discipline was not consistently applied. Whether that renders the employee's dismissal unfair is a separate question.
- [86] In my view dismissal was an appropriate sanction for the misconduct committed by the employee and he cannot escape the consequences of his misconduct because others who participated in the strike received lesser sanctions.
- [87] The Respondents' provided a justification for imposing a lesser sanction for union members and a more severe sanction for shop stewards who participated in the same unprotected strike action. This differentiation was valid as the employee in his capacity as a shop steward, who knew that the

³ (2015) 36 ILJ 602 (LAC).

⁴ (2017) 38 ILJ 860 (LAC)

strike action was unprotected, was expected to assume a leadership role and set an example and not participate in the strike action.

[88] It follows that the employee's dismissal was substantively fair.

Costs

[89] Costs should be considered against the provisions of section 162 of the Act and according to the requirements of the law and fairness.

[90] Mr Venter made no submissions on the issue of costs and Ms Britz submitted that the Applicant's case be dismissed with costs but no specific submissions in respect of costs were made.

[91] This Court has a very wide discretion in awarding costs. In his testimony the employee stated that he was unemployed since the date of his dismissal and that he was funding his own litigation.

[92] In my view this is a matter where the interest of fairness will be best served by making no order as to costs.

[93] In the premises, I make the following order:

Order

1. The Applicant's case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate P M Venter

Instructed by Lovius Block Attorneys

For the Respondent: Advocate C Britz

Instructed by State Attorney Bloemfontein

LABOUR COURT