



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS903/15

In the matter between:

NEHAWU OBO SKHOSANA AND OTHERS

Applicant

and

DEPARTMENT OF HEALTH: GAUTENG

Respondent

Heard: 5 to 8 February 2018

Delivered: 24 May 2018

Summary: Dismissal for participating in an unprotected strike – appropriateness of the sanction – shop stewards not immune from discipline for misconduct committed during an unprotected strike.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant has instituted these proceedings on behalf of its members who were dismissed by the respondent mainly for participating in an unprotected

strike and related acts of misconduct. It seeks an order of reinstatement. The respondent is defending its decision.

[2] For convenience, the particulars of the applicant employees are as follows:

1. Ms Thoko Skhosana (Ms Skhosana), a Chief Administration Clerk employed on 15 April 1994;
2. Mr Jimmy Masilela (Mr Masilela), an Administration Clerk employed on 15 April 1994;
3. Mr Vusi Boikhutso (Mr Boikhutso), a Groundsman employed on 15 September 1994;
4. Ms Precious Mdhuli (Ms Mdhuli), an Administration Clerk employed on 12 August 1992;
5. Ms Aurelia Mahlangu (Ms Mahlangu), an Administration Clerk employed on 25 August 1992;
6. Ms Sibongile Nhlengethwa (Ms Nhlengethwa), a Cleaner employed on 26 October 1992;
7. Mr Jeremiah Tshabalala (Mr Tshabalala), a Store Assistant employed on 1 May 1993;
8. Mr Solomon Nkomo (Mr Nkomo), an Administration Clerk employed on 1 December 1998;
9. Aubrey Visagie, a Cleaner employed on 14 April 2008; and
10. Ms Nomsa Vilakazi, a Cleaner employed on 1 June 2006.

[3] Mr Nkomo was initially represented by the applicant. However, he subsequently launched his own application and distanced himself from the other applicant employees. Mr Nkomo was assisted by a yet to be registered

trade union called Bridge of Hope Union. They allegedly briefed a firm of attorneys to appear on his behalf. At the commencement of these proceedings, Mr Nkomo's legal representative disappeared in the corridors of the Court. It was only the next day that an official from Bridge of Hope appeared in Court and mentioned that the attorney they had briefed had a personal emergency to attend to and was no longer available. The details of the attorney were never divulged. The same union official disappeared without trace.

- [4] It became apparent that Mr Nkomo's union and legal representatives had bailed out on him. I requested him to indicate whether he would prefer that his matter be separated from the rest of the applicant employees in order to allow him time to seek legal representation. He preferred to abandon his individual claim and re-join the applicant's case. The applicant had no problem with including Mr Nkomo as part of its case. Similarly, the respondent had no qualms with the turn of events.

Issues for determination

- [5] The applicant is only challenging the substantive fairness of the applicant employees' dismissal. The applicant has since abandoned its claim that the applicant employees did not participate in an unprotected strike. Accordingly, there are two issues for determination; firstly, whether the respondent applied disciplinary measures inconsistently, and secondly, whether the dismissal was an appropriate sanction.

Background

- [6] The applicant employees were all employed at OR Tambo Memorial Hospital (the hospital), a secondary healthcare facility located in Boksburg, Ekurhuleni in Gauteng Province. It provides a 24-hour healthcare services to the underprivileged, critical and chronically ill patients. Also, it is a referral centre for the surrounding health institutions such as clinics, district hospital and community health centres.

- [7] On Thursday, 22 October 2009, there was an incident concerning Ms Matshidiso Mokoena (Ms Mokoena), who had been appointed and placed as an intern. The applicant and its members were not happy with her appointment and placement. There were allegations that she had falsified her personal details and colluded with one of the officials at the hospital in order to be appointed. The applicant's shop stewards reported these allegations to Dr Naidoo, the Chief Executive Officer of the hospital. Dr Naidoo agreed to release Ms Mokoena and together with the shop stewards they escorted her out of the premises.
- [8] On Saturday, 24 October 2009, Ms Mokoena returned to the hospital to fetch her personal belongings. The applicant's members were not happy to see her and called Ms Nhlengethwa, one of the applicant's shop stewards, who in turn reported the incident to Ms Mdhuli, the applicant's regional shop steward. Ms Mdhuli contacted Dr Naidoo who agreed to meet with the shop stewards on Monday, 26 October 2009. Ms Mokoena was again escorted out of the hospital premises by security.
- [9] On Monday, 26 October 2009, a group of about 60 employees, most of whom were applicant's members, stopped working and approached the hospital management's offices. They demanded answers on Ms Mokoena's issue. Dr Naidoo and his management team were escorted out of the hospital premises. The patients were told to return home as no services would be provided.
- [10] Dr Naidoo and the management team returned to the hospital the next day, escorted by the police. The applicant employees were charged and dismissed for participating in an unprotected strike and various transgressions emanating from the unprotected strike incident.
- [11] The applicant challenged its members' dismissal at the Public Health and Social Development Sectoral Bargaining Council (the PHSDSBC). It disputed that the incident that led to their dismissal amounted to an unprotected strike. Commissioner Serero issued a ruling that the PHSDSBC

had no jurisdiction. The ruling was successfully reviewed and set aside. The matter was remitted back to the PHSDSBC. The second ruling by commissioner Ferreira confirmed that the PHSDSBC had no jurisdiction to arbitrate that matter as the applicant employees were dismissed for participating in an unprotected strike. In these proceedings, the applicant conceded that this Court has jurisdiction since the dismissal of the applicant employees emanated from an unprotected strike and related incidences.

The respondent's case

[12] The respondent led the evidence of the following witnesses:

1. Dr Naidoo; Chief Executive Officer.
2. Ms Precious Molefe (Ms Molefe), Chief Administration Clerk;
3. Mr Emmanuel Ngcobo (Mr Ngcobo), Director: Supply Chain Management at that time; and
4. Ms Lindiwe Ndlovu (Ms Ndlovu), Executive Manager: Administration at that time.
5. Mr Julius Sadiki, Buyer who has since left. His evidence was irrelevant.

[13] The crux of the hospital's case is that the applicant employees were part of a group of employees who participated in an unprotected strike. Dr Naidoo testified that the applicant employees were easily identified as they played a prominent role during the strike. On 26 October 2009, he was in his office preparing for a hand over round with the Senior Executive Management when he was informed that Ms Skhosana was on a loudhailer next to the Patient Admission Area urging patients to leave the hospital premises as there was no management and healthcare services. This was subsequently confirmed by Dr Anastasia Christoforou, Senior Clinical Manager and Mrs Thoko Moloko, Deputy Nursing Manager.

- [14] Soon thereafter, a group of striking employees approached the management offices. Mr Masilela, Ms Skhosana, Ms Mdluli and Mr Boikhutso (the key shop stewards), stormed into Dr Naidoo's office. The purpose was not to discuss any issue but to demand that Misses Ndlovu and Molefe be dismissed. When Dr Naidoo refused, the key shop stewards demanded that all the members of the hospital management should vacate the hospital premises with immediate effect or would be forcefully removed or 'caterpillared'. They made it clear that 'there would be blood on the floor' if their demand was not acceded to. Dr Naidoo was prevented from making calls.
- [15] He gave an ultimatum to the key shop stewards to call off the unprotected strike and return to work but they refused to do so. They continued harassing him and the other Executive Managers until they acceded to their demand.
- [16] Thereafter, all the Executive Managers and Middle Managers who were present were frog-marched through the Patient Admission Area situated in the Administration Block to the garage where some parked their motor vehicles. The striking employees damaged the garage gate as they escorted the hospital management out of the premises through the main entrance. Theirs cars were banged and insults hailed at them on their way out. The hospital management lingered at the visitors' parking outside the premises. In effect, the hospital was managed from the parking area that day.
- [17] The intervention by the respondent's regional office did not bear any fruit. The applicant's members, led by the key shop stewards, were not indulgent and harassed Mr Paul Musa from the respondent's Labour Relations Directorate. At about 15:00 the hospital management was released to go home. The next day they entered the hospital premises under escort by the police.
- [18] During cross examination, Dr Naidoo was adamant that, given the fact that the hospital provides an essential service, interruption of administration and cleaning services would have adverse effect to the provision of health care

to patients. Also, the conduct of the key shops stewards in his office was abusive and aggressive to the extent that they feared for their lives. Mr Masilela shook Dr Naidoo's chair, refused him to allow him to make calls and threatened that there would be blood on the floor if they (hospital management) refused leave the premises. Mr Boikhutso, on the other hand, threatened to use a caterpillar to remove the Executive Management. In the end, the key shop stewards were acting in cahoots in insulting and Executive Management.

- [19] Dr Naidoo's evidence was corroborated by Ms Ndlovu, in so far as the incident that took place in his office. All the respondent's witnesses confirmed the incidents that took place as they were escorted.
- [20] Ms Molefe testified that she was in a meeting in Ms Ndlovu's office, situated not far from Dr Naidoo's. In attendance was Mr Ngcobo, amongst others. It was the applicant employees who were leading the striking employees who were singing insulting songs and one of the songs was directed at her in person. They demanded that she and Ms Ndlovu should leave the hospital premises. All who were in the meeting were frog-marched out of the hospital premises. These incidents were confirmed by Mr Ngcobo.
- [21] Ms Ndlovu testified that the cleaning component was essential to patient care without which disease and infection would be prevalent causing harm and death to patients and the hospital being sued. The hospital management was insulted and humiliated by the striking employees as led by the key shop stewards. They all feared for their lives. Mr Masilela wrote a letter to the Labour Relations Personnel, demanding that the hospital management should not be allowed back into the premises. The applicant employees were the only ones that could be identified amongst that crowd because they played a leading role.

The applicant's case

- [22] The applicant called only three witnesses (Mr Tshabalala, Mrs Mariam Mtshweni (Mrs Mtshweni) and Ms Buhle Sibisi (Ms Sibisi)).

- [23] Mr Tshabalala testified that he was never part of the group that participated in the unlawful strike. He had been identified as one of the striking employees because he was on the way to deliver medications to the wards and met the crowd next to the admission area. He conceded under cross examination that he did not testify during the disciplinary hearing.
- [24] Ms Mtshweni testified that she is the one who saw Ms Mokoena on 24 October 2009. She then informed Ms Nhlengethwa. The workers were incensed by her presence at the hospital. She conceded under cross examination that there was nothing untoward with Ms Mokoena's presence since she had authority to collect her personal belongings. However, it was her presence that triggered the strike.
- [25] Ms Sibisi testified that she was part of the striking employees but still in the employ of the hospital. She testified that Ms Ndlovu told her that the reason she was not identified as one of the striking employees and dismissed is because she, Ms Ndlovu, knew her mother. However, she conceded under cross examination that this version was never put to Ms Ndlovu. She was also adamant that it was the members of the applicant who instigated the strike and the shop stewards intervened in order to defuse the situation as the striking employees were threatening the hospital management. She also conceded that the striking employees were singing derogative songs which according her were struggle songs that are typified by insults.

Legal principles

- [26] The applicant concedes that the conduct of its members on 26 October 2009 constitutes an unprotected strike. By the same token, it disputes that its members were rendering essential services. Section 64 of the Labour Relations Act ('LRA')¹ provides:

'(1) Every employee has the right to strike and every employer has recourse to lock-out if –

¹ Act 66 of 1995 as amended.

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that –
- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless –
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
- (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
- (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).'

- [27] Section 65(1)(d)(i) of the LRA limits a right to strike by proscribing persons engaged in an essential service from taking part in a strike. Section 213 of the LRA defines essential service as 'a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population'.
- [28] On 1 September 1997, the Essential Service Committee (the ESC) designated the services rendered by different units of the hospital essential services.² The services declared essential included services in support of emergency health services and the provision thereof the community or part thereof, nursing, medical and premedical. The designated support services include catering, medical records, porter, reception, laundry and waste removal. In January 2016, the ESC dismissed the applicant's application to vary or rescind the 1997 determination.
- [29] Even though the general cleaning service is not designated as essential, the applicant's witnesses conceded that its disruption would have dire consequences on patient care and health services.

Inconsistency

- [30] It is common cause that the respondent did not pursue the other striking employees. The applicant employees were the only ones identifiable because they played a leading role during the strike and they committed various acts of misconduct, so went the respondent's evidence.
- [31] The applicant, on the other hand, disputes that the applicant employees played a prominent role during the strike. Ms Sibisi testified that it was the ordinary members who started the strike. On 26 October 2009, they called the shop stewards to account for Mr Mokoena's presence at the hospital on 24 October 2009. The shop stewards intervened in order to dissuade them from striking. There are serious discrepancies in Ms Sibisi's evidence. Although she testified that she could easily identify all employees who

² Notice 1216 published in the Government Gazette 188276 dated 12 September 1997.

participated in the strike, she could hardly recall who exactly were the shop stewards she had seen escorting the hospital management. Also she failed to avail the list of the employees who participated in an unprotected strike to the respondent or assist the applicant to identify them as part of its defence.

- [32] What is clear from the respondent's uncontested evidence is that the key shop stewards led the unprotected strike. In the process, they committed acts of intimidation and forcefully removed the hospital management from the premises. The other applicant employees were identified simply because they associated themselves with the key shop stewards. Contrary to Ms Sibisi's evidence that the shop stewards were protecting the hospital management, Mr Masilela, the chairperson of the applicant's branch at the hospital, and his deputies, addressed a letter dated 26 October 2009 to the respondent's labour relations office and the contents are as follows:

'RE: REQUEST FOR CONTROL OF MOVEMENT

We kindly request you to give directives to the security to control the movement of the following officials who are on the alleged misconduct till everything resolved with the MEC:

1. DR NAIDOO
2. MS LINDI NDLOVU,
3. MR NDUNYELAWA MS ELIZABETH MOLEFE

NB: The following officials they voluntarily left the institution,

1. CHRISTOFOROW
2. MATRON MOLOKO

YOUR ASSISTANCE IN THIS REGARD WILL BE HIGHLY APPRECIATED.'³

- [33] Clearly, the contents of this letter corroborates the respondent's case that the hospital management was forcefully removed and locked out under the leadership of the key shop stewards. It is curious that the timing of the strike coincided with the morning management meeting as testified by Dr Naidoo.

³ See page 201 of the respondent's bundle.

- [34] Tritely, parity of treatment in the circumstance of an unprotected strike entails that disciplinary rules should be applied consistently and like cases should be treated alike.⁴ Item 3(6) of the LRA Code of Good Practice: Dismissal ('the Code') provides:

'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

- [35] Employees participating in an unprotected strike should accordingly be treated similarly when it comes to discipline and sanction. There is one caveat, though; consistency is an element of disciplinary fairness and is not a rule unto itself.⁵ In *SACAWU and Others v Irvin & Johnson Ltd*,⁶ the Labour Appeal Court (the LAC) stated:

"...In my view too great an emphasis is quite frequently sought to be placed on to the "principle" of disciplinary consistency, also called the "parity principle".. There is really no separate "principle" involved. Consistency is simply an element of disciplinary fairness... Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced

⁴ *Member of the Executive Council: Department of Health, Eastern Cape Province v Public Health and Social Development Sectoral Bargaining Council and Others* [2016] 6 BLLR 621 (LC); *ABSA Bank Ltd v Naidu* [2015] 1 BLLR 1 (LAC); *National Union Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC); *Cape Town City Council v Mashito and others* (2000) 21 ILJ 1957 (LAC); *SACCAWU v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC), ⁴ [1999] 8 BLLR741 (LAC).

⁵ See H Cheadle *at al*, *Strikes and the Law*, LexisNexis (2017) at pages 210 to 2011.

⁶ *Supra* n 4 at para 29.

by improper motives or, worse, by a discriminating management policy... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself'. (Emphasis added)

- [36] In the present case, the applicant employees were the only employees that the respondent's witnesses could identify among a group of about 60 striking employees. The respondent's evidence that the situation had degenerated into rowdy, hostile and intimidating, hence its witnesses could not identify all the striking employees, was never challenged.
- [37] Messrs Tshabalala and Nkomo were identified by Ms Ndlovu despite disputing that they were part of the strike. Ms Ndlovu testified that Messrs Tshabalala, Nkomo, Visagie and Misses Mahlangu and Vilakazi, even though they were not shop stewards, they associated themselves with the shop stewards and were conspicuous as they played some role in signing and swearing at the hospital management. The rest of the shop stewards were identified by all the respondent's witnesses as instigators and leaders of the strike. That evidence stands unchallenged.
- [38] The applicant, despite having the details of the other striking employees, failed to come forward with their identity during the disciplinary hearings nor at any other time before these proceedings. Nine years later, Ms Sibisi opportunistically identified herself as one of the striking employees and also claimed to have knowledge of other striking employees. As correctly conceded by Ms Sibisi, it is typical that employees would not voluntarily identify themselves as transgressors, especially within the context of a collective misconduct, for fear of being dismissed. However, there is nothing sinister or untoward in pursuing the applicant employees as they had been identified as transgressors. Notably, there is no evidence that the respondent

acted capriciously or was induced by improper motives when it identified the applicant employees.

- [39] Therefore, the applicant employee's claim that discipline was inconsistently applied is untenable.

Appropriateness of the sanction

- [40] Item, 6(1) of the Code provides that participation in an unprotected strike constitutes misconduct. Yet, as is the case with all other forms of misconduct, it does not justify dismissal as a matter of course.⁷ In *SACCAWU obo Bonolo Mokebe and 71 Others v Pick n Pay Retailers*,⁸ relied on by the applicant, the LAC referred with approval to the judgment in *Hendor Steel Supplies v National Union of Metalworkers of SA and Others*,⁹ where the sanction of dismissal of employees who embarked on an unprotected strike for seven weeks was found to be to be disproportionate to the misconduct and accordingly unfair. The LAC stated:¹⁰

'[34] The Court in *Hendor* held as follows in relation to the principle of proportionality:

'Dismissal is manifestly the sanction of the last resort (*WG Doney (Pty) Ltd v National Union of Mineworkers of SA* (1999) 20 ILJ 2017 (SCA) at paragraph 18). Hence there is a need to examine the arguments of both parties as to the matter and conduct of the strike to test whether dismissal was proportional to the misconduct.'

It went on to hold that:

⁷ Item 6(1) provides, also, that '[t]he 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.'

⁸ [2017] ZALCJHB 345 at paras 33-36.

⁹ (2009) 30 ILJ 2376 (LAC).

¹⁰ *Supra* at paras 32-36.

'In summary, the use of the most extreme sanction, dismissal in this case was manifestly disproportionate to the "misconduct" of the second and further respondents.'

[35] The principle that was established in *Hendor* is not that the dismissal of employees because they were on a short duration strike will inevitably be found to be disproportionate and thus substantively unfair. Rather, the principle established there is that when determining whether the dismissal of striking employees is proportional to the misconduct, a court must examine the conduct of both the employer and employees "as to the matter and conduct of the strike".

[36] This Court has, in the past, confirmed the sanction of dismissal in relation to employees who had participated in a short duration strike. *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*, (CBI) is one such case where it was found that the dismissal of employees, who had engaged in a two-hour strike (while on a final written warning) in response to the employer short paying them their wages, was substantively fair because the employee's decision to strike was:

'[D]eliberate and calculated. It undermined the process of collective bargaining as a tool to resolve industrial disputes. When [the employees] reported for their shift they were appraised of the nature of the problem regarding short payment of their wages and were told that it was being attended to by the respondent's management. They were told to report for their shift and warned that if they failed to do so they faced the risk of dismissal. They were given an ultimatum which they ignored. They decided to walk off at 22h00 to show solidarity with the day shift. Their collective decision to walk off at 22h00 was taken before they filed any grievance. There was no attempt at all on their part to comply with the provisions of the Act regarding the handling of grievances. The employee's contention that they were justified in leaving their shift early because of the [employer's] failure to pay them correctly, is accordingly rejected.'

[41] In the present case, the unprotected strike lasted for almost the whole day. There was no attempt to comply with the provisions of the LRA or discuss the grievances with the hospital management. Despite Ms Sibisi's evidence

that the shop stewards were not part of the strike but were trying to stop the group of employees from attacking the hospital management, all the positive facts and the respondent's undisputed evidence points otherwise.

[42] All the applicant employees were found guilty of the following charges:

42.1 Charge one – participating in an unprotected and unlawful strike.

42.2 Charge two – singing next to the Admission Area and Administration Department, urging patients to leave the hospital and interrupting the Executive and Administration management meetings.

42.3 Charge three – forcefully removing management from the hospital.

[43] It is common cause that a group of about 60 employees participated in the strike, chanting insulting songs next to the Admission Area and Administration Department. However, it was only the key shop stewards who took the centre stage. The respondent's evidence also locates them in Dr Naidoo's office where they interrupted the Executive Management meeting and committed various acts of misconduct, including forcefully removing the hospital management from the premises.

[44] To my mind, since all other employees who participated in the unprotected strike could not be identified and be brought to book, the hospital could not justify the dismissal of the applicant employees in respect of charge 1. A less drastic sanction could have sufficed in the circumstances. Dr Naidoo conceded under cross examination that, even though the hospital services were interrupted, there were no fatalities as a result of the unprotected strike.

[45] I now turn to the acts of misconduct committed by individual applicant employees during the unprotected strike.

- [46] With regard to charges 2 and 3, there was no evidence linking Mr Tshabalala, Ms Nhlengethwa, Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu to charge to these charges. Even though they were part of the group of employees, they were following their leaders, the key shops stewards. Ms Molefe testified that Ms Skhosana and Mr Boikhutso came to Ms Ndlovu's office where they were holding a meeting and went outside to tell others that she was in. They then proceeded to Dr Naidoo's office and when they come back the key shop stewards demanded that all of the managers who were in Ms Ndlovu's office to move out as well.
- [47] Clearly, the key shop stewards where in control of the whole incident; they interrupted the hospital management meetings and forcefully removed the hospital management. I am not convinced that Mr Tshabalala, Ms Nhlengethwa, Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu were guilty of charges 2 and 3. Even if I am wrong, I am of the view that their role was not instrumental as they were part of the group of the striking employees who were following their leaders, the key shop stewards. Therefore, their conduct could not have warranted a sanction of dismissal.
- [48] Ms Mahlangu was also found guilty of charge 6, i.e. banging hospital management cars. Since she was a first offender with 17 years of service, dismissal was very harsh, I recon.
- [49] When it comes to the key the shop stewards (Mr Masilela, Ms Skhosana, Mr Boikhutso and Ms Mdhluli), they were collectively accused of serious acts of aggression and threats to the life and safety the Executive Managers who were in Dr Naidoo's office. The respondent's undisputed evidence is that the hospital management acceded to the demand to leave the premises because they had to protect themselves as the shop stewards were aggressive and not indulgent.
- [50] The key shop stewards treated the Executive Management of the hospital in an abusive and demeaning manner unprovoked. Dr Naidoo had agreed to meet with the shop stewards to discuss Ms Mokoena's issue. Instead of

engaging in a meaningful discussion, they frog-marched the hospital management out of the hospital premises and locked them out for the whole day. Ms Ndlovu testified that they had to hand over their office keys to Mr Masilela.

- [51] Clearly, they were not concerned about the effect of their conduct to the rendering of the essential services when they forcefully took over the hospital management. Dr Naidoo testified that they had to run the hospital from the visitors parking for the whole day.
- [52] Dr Naidoo testified that he was always approachable and indulgent to the applicant's shop stewards. When confronted with Ms Mokoena's issue, he did not hesitate to acceded to the shop steward's demand and released her in order to maintain harmony. Therefore, there was no justification for the key shop stewards' their behaviour on the day in question. They were expected to display leadership and engage the hospital management, given the parties historical collective bargaining relationship, but they dismally failed. Oddly, not even a single key shop steward was willing to take a stand and challenge the respondent's evidence.
- [53] The Courts have tritely recognised that shop stewards do indeed enjoy some indemnity from discipline for the conduct ancillary to the exercise of their functions as representatives of a union.¹¹ Parallel to that is a stern warning that such a privilege must not be allowed to operate as a canopy or an excuse for conduct which ordinarily would justify dismissal.¹²
- [54] In *NUM and Others v Black Mountain Mining (Pty) Ltd* (Black Mountain),¹³ faced with a similar situation, the court remarked as follows:

¹¹ *Adcock Ingram Critical Care v CCMA and Others* [2001] 9 BLLR 979 (LAC); *BIFAWU and another v Mutual and Federal Insurance Company Ltd* [2006] 2 BLLR 118 (LAC); *CEPPWAWU and others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC); *NUM and Others v Black Mountain Mining (Pty) Ltd* [2010] 3 BLLR 281 (LC); *Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and Another* (1994) 15 ILJ 778 (LAC).

¹² *Adcock* at para 15.

¹³ *Black Mountain* at paras 42 and 43.

'It thus appears that the legislature (and the LAC in *Adcock Ingram supra*) recognizes that there must be a balance between the right of shop stewards to exercise their functions as representatives of a union (and of its members) and the right of employers to discipline shop stewards even when exercising their duties as shop stewards for acts of misconduct. On the one hand it is thus recognized that employers cannot abuse their position to badger shop stewards into submission. On the other hand, it is also recognized that employees who abuse their position as shop stewards may be subjected to disciplinary action by their employers. The LAC further recognized that judges and arbitrators can scrutinize such abuse. What should also not be left out in the equation is the fact that once negotiations end, the employment relationship resumes. The "*anything goes*"-approach can therefore not be accepted at face value and employers must have the right to take disciplinary action against employees who brandish weapons, threaten management or make false allegations of racism to exert their will during negotiations. It is, however, accepted that employers are expected to tolerate a certain level of insolence on the part of shop stewards and even a degree of disrespectful behaviour on the part of shop stewards especially during negotiations during a strike which otherwise may have been regarded as unacceptable.

It is, therefore, in the borderline situations (excluding obviously situations which involve violence, intimidation or racism) involving insolent or even disrespectful behaviour that it is left to the court or to the arbitrator to make a value judgment between what is considered to be tolerable conduct during negotiations (especially during a strike situation as in the present case) and what is not. In making this value judgment, all the circumstances of each particular case will have to be taken into account. This was recognised by the LAC in *Adcock* as follows:

"[17] It may be accepted that an employee enjoys greater leeway than normal when he acts as a negotiator. This flows from his dual capacity (as an employee and as negotiating representative). But it would be wrong to lay down that he has free rein to do or say whatever he wants. He remains an employee, and that relationship has to be taken into account as well."

[55] In *Adcock Ingram Critical Care v CCMA* (Adcock),¹⁴ referred to with approval in *Black Mountain*, the LAC upheld the dismissal of a shop steward who had uttered threats directed at management during a meeting which was discussing the possible end to a strike. Again in *Mondi Paper Co Ltd v PPWAWU and Another*,¹⁵ a shop steward was dismissed for deliberately disrupting a meeting with management. The LAC remarked as follows:

'No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However, this is no license to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to 'mitigate' conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.'

[56] In the present case, I have seriously considered the fact that the key shop stewards had 15 and 17 years of service respectively. Also, all had a clean disciplinary record. However, they have not been open with the Court nor showed any remorse. The respondent's evidence on the gross acts of misconducts remains unchallenged. That conduct cannot be condoned. It is clear from the authorities mentioned above that the key shop stewards are employees and, like any other employee, are bound by the rules of discipline. Therefore, they could not be allowed to do or say whatever they want with impunity. In this instance, the key shop stewards threatened to harm, verbally abused, humiliated, fog-matched and locked out the Executive Management of the hospital that renders essential services. They even refused to engage with the officials from the Regional Office.

[57] Clearly, they exceeded the acceptable bounds of robustness expected of shop stewards within the context of collective bargaining. In fact, the key shop stewards impenitently shunned joint problem solving process inherent

¹⁴Adcock *supra* n 10.

¹⁵ (1994) 15 ILJ 778 (LAC) at 780.

in a collective bargaining relationship and opted for hooliganism. Regrettably, the sacrifice of courtesy and restraint at the altar of strike related hooliganisms among the trade union shop stewards and members is becoming an order of the day. This Court must begin to show its repulse at this conduct as it does not only destroy the trust relationship, but offends one of the core objects of the LRA which is the creation of labour peace through orderly collective bargaining.¹⁶

[58] I'm a persuaded that the key shop steward, other than charge 1, are guilty of all the other charges, individually and collectively. They, essentially, incited other employees to join the unprotected strike, urged patients to leave the hospital, interrupted of the management meetings, acted in an insolent manner, intimidated, verbally abused and forcefully removed the hospital management.

[59] In the circumstances, I am of the view that the sanction of dismissal in relation to the key shop stewards is merited.

Relief

[60] The applicant seeks the primary remedy of reinstatement. In *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,¹⁷ the Constitution Court reaffirmed reinstatement as 'the primary statutory remedy in unfair dismissal disputes...aimed at placing an employee in the position he or she would have been but for the unfair dismissal... by restoring the employment contract...The extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may

¹⁶ Section 1 of the LRA provides that it's the primary objects include:

'(c) to promote-

- (i) orderly collective bargaining;
- (ii) collective bargaining at sectoral level;
- (iii) employee participation in decision-making in the workplace; and
- (iv) the effective resolution of labour disputes.'

¹⁷ [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC); 2009 (2) BCLR 111 (CC) at para 36.

thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal.’

[61] There is no evidence that militates against reinstating Mr Tshabalala, Ms Nhlengethwa Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu. In deciding the date from which their reinstatement would run, I have considered the fact that nine years have passed since the dismissal of the applicant employees. The delay is attributed to the applicant as it persistently denied that the applicant employees had participated in an unprotected strike. It referred the matter to the PHSDSBC and refused to accept the first jurisdictional ruling. Instead, it was challenged successfully in this Court but was confirmed by another commissioner in the second jurisdictional ruling.

[62] Accordingly, I deem it just and equitable to order reinstatement of Mr Tshabalala, Ms Nhlengethwa Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu with a backdated period of 12 months.

Conclusion

[63] It follows that the dismissal of Mr Tshabalala, Ms Nhlengethwa, Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu is substantively unfair. They stand to be with a backdated period of 12 months.

[64] On the other hand, the dismissal of key shop stewards, Mr Masilela, Ms Skhosana, Mr Boikhutso and Ms Mdhluli, is substantively fair.

[65] To the extent that I proceeded to deal with the allegations of misconduct committed during the unprotected strike, which must ordinarily be adjudicated by the PHSDSBC, I do so in terms of section 158(2)(b) of the LRA and, given the history of this matter, it is also expedient.¹⁸

Costs

¹⁸ *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) at paras 18 and 19.

[66] Owing to persisting relationship between the parties and the fact that both are partially successful, I make no order as to costs.

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

Order

1. The dismissal of Mr Masilela, Ms Skhosana, Mr Boikhutso and Ms Mdhluli is substantively fair.
2. The dismissal of Mr Tshabalala, Ms Nhlengethwa Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu is substantively unfair.
3. Mr Tshabalala, Ms Nhlengethwa Mr Nkomo, Ms Vilakazi, Mr Visagie and Ms Mahlangu are reinstated with a backdated period of 12 months from the date of this order.
4. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr YF Saloojee

Instructed by: Thaanyane attorneys

For the respondent: Mr R Ram

Instructed by: MNS Attorneys

LABOUR COURT