IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 215/14 & JS 406/14

In the matter between:

AMCU obo LS RANTHO & 158 OTHERS **First Applicant**

TEBOGO MOSES MATHIBA **Second Applicant**

And

SAMANCOR WESTERN CHROME MINES **Respondent**

Heard: **25, 26, 27, 28 & 29 June 2018 & 23 July 2018**

Delivered: **17 April 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] On 13 December 2013, the respondent (Samancor), dismissed 650 employees who are members of AMCU following their participation in an unprotected strike. Following the dismissals, and in the course of processing and preparing for appeal hearings, Samancor and AMCU entered into a settlement agreement on 26 January 2014, in terms of which all but 159 employees (The individual applicants) were reinstated. Under the terms of the agreement, AMCU reserved its rights to pursue the dispute concerning those employees who were not reinstated.

[2] Following a referral of a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) and failed attempts at conciliation, the individual applicants as represented by AMCU approached this Court to challenge the fairness of the dismissals within the meaning of the provisions of sections 186(1) and 186(1)(d) of the Labour Relations Act (LRA)[1].

[3] The second applicant (Mathiba) had initially instituted a separate claim from the other individual applicants. The claims were subsequently consolidated by an order of this Court on 17 April 2015.

[4] Samancor opposed the applicants' claim and contended that they were dismissed for a fair reason pursuant to a procedural compliant process in which AMCU was an active participant.

Common cause facts:

[1] Act 66 of 1995 (as amended)

186 Meaning of dismissal and unfair labour practice

(1) '**Dismissal'** means that –

(a)…

(b)…

(c)…

(d) an employer who dismissed a number of *employees* for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

[5] The individual applicants were employed by Samancor at its Mooinooi and Millsell mining operations. The two mines are part of Samancor's Western Chrome Mining Division, which is in turn, a division of Samancor Chrome Limited.

[6] At the time of the strike, Samancor recognised three trade unions within the Western Chrome, namely, AMCU, NUM and UASA. The unions had full-time shop stewards and offices at the sites.

[7] The strike commenced at the start of the morning shift at Millsell and Mooinooi on 25 November 2013. Upon the commencement of the strike, members of AMCU approached the management of Samancor at both its Mooinooi and Millsell operations with a list of demands ('AMCU Members Demands'). At some point in the morning, the employees submitted a memorandum with further demands.

[8] During the course of the strike, management had then instructed non-striking employees at both mining operations to leave the sites due to safety concerns. The dismissed employees had failed to tender their services on that day, for the morning, afternoon and evening shifts.

[9] Several meetings were held between management and AMCU representatives during the course of the strike. When the employees failed to resume their duties, management then issued two ultimatums imploring the employees to return to work. The employees resumed their normal duties on 26 November 2013 at 06h30 instead of 06h00.

[10] On 6 December 2013, Samancor charged all its employees who had not rendered their services on 25 and 26 November 2013 with gross misconduct

for participation in an unlawful and unprotected strike. The notices[2] were sent to all the representatives of the three unions and the disciplinary enquiries were scheduled to be held on 11 and 13 December 2013. The notices were also placed on Samancor's notice boards. The individual applicants were then dismissed on 13 December 2013, under circumstances which will be elaborated upon later in this judgment.

[11] The representatives of Samancor and AMCU met on 7 January 2014 to discuss the processes of lodging and conducting the appeal. It was agreed that the appeal would be held on 22 January 2014 and 23 January 2104. Before the commencement of the appeal, the parties commenced settlement discussions surrounding the dismissed employees. This had resulted in a settlement agreement. Clause 2 of the agreement provided that;

> **2.1.1 Employees on leave**
>
> 2.1.1.1 The Company will reinstate 127 employees, as listed in **annexure B** of this agreement. These employees were identified to have been on leave or not required to be at work on 25 November 2013.
>
> 2.1.1.2 The re-instatement will retrospective to the date of dismissal and employees will be paid all outstanding salary due.
>
> **2.1.2 Employees who reported for work but did not proceed to their workstations**
>
> 2.1.2.1 The Company will reinstate 134 employees, as listed in **annexure C** of this agreement. These employees were identified to have reported for work, but did not proceed to their workstations.

[2] Which read:

> "…All employees who are members of a union will be represented by their appointed union representative at the hearing and are accordingly not required to attend the hearing.
>
> Those employees who are not members of a recognised union may amongst themselves elect not more than 4 (four) employees to represent them at the hearing. Management must be advised on or before 12h00 on 10 December 2013 whose representative will be"

2.1.2.2 The re-instatement will be retrospective to the date of dismissal and employees will be paid all outstanding salary due.

2.1.3 Employees not on a final written warning

2.1.3.1 The Company will re-instate 365 employees, as listed in **annexure D** of this agreement. These employees failed to report for work on 25 November 2013, but were not on a valid final written warning as at 25 November 2013.

2.1.3.2 The re-instatement will be retrospective to the date of dismissal and the employees will be paid all outstanding salary due.

2.1.3.3 The employees, as listed in **annexure D**, will be issued with a final written warning valid for a period of 12 months. The final written warning will commence on the date of the signature of this agreement.

2.1.4 **Employees with prior final written warnings.**

2.1.4.1 By the time the 159 employees were dismissed, as listed in terms of **annexure E**, the employees referred to had valid final written warnings for similar misconduct.

2.1.4.2 The employees, as listed in **annexure E** will not be reinstated, and their dismissals is effective from 13 December 2013.

2.1.4.3 The Union reserves its rights to refer a dispute as provided for in terms of the Labour Relations Act, and the employer will have the same right to challenge such a referral in terms of the Labour Relations Act.'

[12] The final written warnings referred to in the settlement agreement were those that were issued to the employees in July 2013, following upon their participation in another unprotected industrial action that took place on 28 and 29 May 2013 at the Mooinooi Shaft[3].

The trial proceedings:

[3] Page 23 of Vol 1 of Trial Bundle

[13] During the trial proceedings two judgments in regards to interlocutory applications were handed down on 8 November 2017 and 25 June 2018 respectively.

[14] The first related to *in limine points* raised by the applicants. A judgment was delivered in that regard on 8 November 2018, in terms of which the Court ruled that the applicants were precluded from challenging the validity of the final written warnings which were issued to them and other employees in July 2013. The applicants were however permitted to challenge the procedural fairness of their dismissals that took place on 13 December 2013. They were however barred from leading evidence to determine whether they were the 159 employees identified in clause 2.1.4.1 of the Settlement Agreement.

[15] Subsequent to the delivery of the above judgment, the applicants brought a further application seeking rectification of clause 2.1.4.1 of the Settlement Agreement. Upon the hearing of evidence in regards to the application for rectification, Samancor sought absolution from the instance. In a judgment delivered on 25 June 2018, the Court *inter alia* could not find a *bona fide* mistake, which was common to the parties, which would necessitate the rectification of the settlement agreement, in particular the impugned clause. The application for absolution in respect of the rectification application was thus granted.

<u>The evidence:</u>

[16] The applicants challenged the substantive fairness of their dismissal on a variety of grounds, including that the sanction was harsh and thus unfair; that Samancor provoked the strike by refusing to accord AMCU collective

bargaining rights at Western Chrome Mine, and also allowed one of its Human Resources Official (Francinah Nare) to recruit members on behalf of NUM. They further challenged Samancor's conduct of selectively reinstating other employees to their exclusion.

[17] The applicants also challenged the procedural fairness of the dismissals, on the grounds that the disciplinary chairperson proceeded with the enquiries in AMCU's absence, and further since appeal proceedings instituted by the employees were postponed for longer than the two days stipulated in Samancor's disciplinary code and procedure.

[18] Samancor led the evidence of Mr William Smart (Smart), its General Manager, in regards to events and the circumstances which led to the dismissal of the individual applicants. His evidence is summarised as follows:

18.1 In late May 2013, members of AMCU embarked on an unprotected industrial action for two days in support for a demand that it be the sole recognised union at the Mooinooi and Millsell mines. Flowing from that strike, all the employees that had participated in it were issued with final written warnings in July 2013. A dismissal could not be considered at the time due to the volatile conditions that prevailed at the time, which were exacerbated by trade union rivalry (mainly between NUM and AMCU).

18.2 On 25 November 2013, AMCU members embarked on another unprotected strike, and it was unclear at the time as to what could have triggered it. A meeting was convened by Smart with the AMCU shop stewards and a number of human resource management personnel.

18.3 In the meeting, a list of demands was handed over to Smart. The primary demand was that one of Samancor's Human Resources officers, (Ms Francinah Nare) be immediately removed from the

Mooinooi Mine, as she was accused of having acted in a biased manner against AMCU and its members in favour of NUM. This was the first time that such complaint or demand was brought to the attention of Samancor.

18.4 Other demands made were that NUM should be removed from the Western Mines, that AMCU should be accorded recognition, and that acting positions should be done away with. The strike according to Smart was further accompanied by acts of vandalism of NUM offices.

18.5 The demand for NUM's removal came about under circumstances where initial recognition agreements were entered into with NUM, Solidarity, NUMSA and UASA in May 2006. When AMCU gained substantial membership, an addendum to the recognition agreement was concluded in February 2013, in terms of which AMCU became party to that recognition agreement.

18.6 In terms of the recognition agreement, a trade union required 20% plus 1 to enjoy organisational rights; 30% plus one for bargaining rights and 20% plus one for bargaining purposes. In May 2013, AMCU had 20.5% in the operating unit.

18.7 As a result of employees changing allegiances from NUM to AMCU, the latter then demanded that Western Mines be separated from the Eastern Mines and to form an independent bargaining unit on its own. The membership figures at Western Mines which AMCU sought to make a separate bargaining unit had not however exceeded 30% plus one.

18.8 The meeting on 25 November 2013 held with AMCU representatives was concluded at about 15:00. The employees on the afternoon shift nevertheless failed to return to work after that meeting. An ultimatum was sent to the employees via 'SMS'. Employees on the night shift of 25 November 2013 failed to report for duty notwithstanding the ultimatum. A further ultimatum was issued to the employees on 26 November 2013, at 05:30 before the commencement of the morning

shift. The further ultimatum was sent to AMCU via fax. The employees reported for duty at 07:00 on the morning of 26 November 2013 as opposed to their normal time being 06:00.

18.9 Employees who were members of other trade unions were also charged for misconduct for participating in the unprotected industrial action. These were however exonerated, as it was established that they were intimidated into participating in the unprotected strike.

18.10 Under cross-examination by Mr Schöltz on behalf of Mathiba, Smart conceded that the ultimatum issued on 26 November 2013 had created the impression that those employees who had elected to return to work would be shielded from dismissal. He however, testified that notwithstanding that impression, the employees were still to be subjected to a disciplinary process, and those that were previously issued with a final written warning for similar transgression were dismissed.

18.11 According to Smart, all those employees who had not presented themselves for duty were assumed to have participated in the industrial action. The employees were nevertheless given a further opportunity to explain their whereabouts during the unprotected industrial action. There were about 2 000 employees that had participated in the industrial action.

18.12 Smart testified that some of the employees had tendered their services and proceeded to their workplaces during the strike. They together with some independent contractors were however prevented from resuming their duties by other employees who had blockaded access to the surface workplace. The employees were however given a further opportunity to explain their whereabouts during the unprotected industrial action.

18.13 In respect of Mathiba, the clocking records showed that on 25 November 2013, he went to the change-house at 07:27 in the morning. However, the timeline of his movements indicated that he

could not have gone underground because he had not clocked in. According to his clocking records, Mathiba was at the main gate at 05:53 and ought to have been at the change-house by 06:00. As an underground employee, he was supposed to have proceeded to the lamp-house to get his underground equipment. At 10:13 he went to the surface and at 11:27 he clocked in at the post to go underground. He clocked-out at 11:28 and at 11:59 he left the premises. The clocking system was therefore a tool used to determine whether an employee had in fact clocked in for duty and rendered his/her services.

18.14 Smart could not respond to the allegation that Mathiba was instructed (along with others) by his Foreman (Phindi) to return to surface. He was unaware of Mathiba's union affiliation and could not comment on his allegation that he had not participated in the strike. He was nonetheless advised to attend the internal disciplinary hearings through multiple notices placed at the premises. Smart conceded that other means of notification such as 'SMS' were not used to notify employees of the hearings.

18.15 Under cross-examination by Mr Redding on behalf of other individual applicants, Smart further testified that;

18.15.1 During the disciplinary preliminary proceedings, the implicated employees were divided into two groups, *viz*, those who were on leave of absence, and those who had reported for duty but did not proceed to their work station.

18.15.2 There was a general reinstatement of the employees who participated in the unprotected industrial action, with the exception of those that had a final written warnings on their records.

18.15.3 Following the lodging of appeals, that process was not pursued in the light of the conclusion of the settlement agreement. In terms of that agreement, employees were not

taken back based purely on the fact that they had final written warnings on their records.

18.15.4 The employees were disciplined notwithstanding assurances contained in the ultimatum that this would not be the case should they return to work on 26 November 2013.

18.15.5 A decision was taken at a management meeting held on 6 December 2016, that all the employees who failed to clock-in were to be disciplined on the charge of "*gross misconduct in that on 25 November 2016 [they] collectively, and common purpose, alternatively by association or making common cause with the collective participated in an unprotected/unlawful strike*".

18.15.6 Three separate disciplinary hearings were held in respect of members of the three different trade unions. The disciplinary hearings in respect of UASA and NUM members were held on 11 December 2013. The members of the two unions were not found guilty in terms of findings made on 13 December 2013.

18.15.7 AMCU however did not attend the disciplinary hearings. On 10 December 2013, AMCU sent an email to Samancor advising that it was not available to attend the hearings and that it would only be available on 16 or 21 January 2014. Samancor's response on 10 December 2013 was that the hearings would proceed as planned and in AMCU's absence.

18.15.8 The Chairperson of the hearings, Mr Andries Nieuwoudt on 11 December 2013, wrote to the Secretary of AMCU, Mr Mphahlele advising him that the hearings had proceeded in AMCU's absence; that the decision on the guilt of the employees was reserved, and would be handed down on 13 December 2013; and that he (Mphahlele) should attend on that date as the employees would be given an opportunity to plead in mitigation, whilst Samancor would present its

aggravating factors before a sanction was pronounced. AMCU however did not attend the hearings on 13 December 2013.

18.15.9 Smart conceded that Samancor was due for an annual shut-down on 13 December 2013, and that it could have been possible to hold the enquiries in the new year. He however denied that the dismissals were rushed with the objective of denying the employees their end of year bonuses.

18.15.10 Smart conceded that there was no indication that AMCU had no intention of attending the disciplinary hearings. Its stance however was that it was not available on that particular date. He contended that AMCU had not proffered an excuse or apology for not attending, and Samancor's view was that the hearings should proceed since there were AMCU shop stewards who could have represented the other employees.

18.15.11 Smart's contention was further that it was not unreasonable for Nieuwoudt to come to the conclusion that AMCU did not care to attend the hearings; that AMCU was arrogant and disrespectful of management authority; and that the strike was accompanied by violence.

[19] Samancor's Employee Relations Practitioner, Mr Kagiso Rakoma (Rakoma), testified in regards to how it was determined which of the employees had tendered their services; which employees had participated in the unprotected industrial action, and which ones were on a valid final written warnings. His evidence is summarised as follows:

19.1. When the employees were charged and had denied having participated in the unprotected industrial action, the Human Resource department had undertaken verification process utilising the clock

cards, the clocking system, the gang cards and interviews with concerned supervisors to determine which of the employees were on strike, which ones were on sick leave (and/or other form of leave of absence), and which ones were at training courses and/or medical evaluations.

19.2. After the verification process was completed, employees' disciplinary records were also looked at , particularly after the appeal process was initiated.

19.3. He confirmed that an instruction was issued to employees working on surface employees to go home at around 12:00 midday on 25 November 2013, but that a similar instruction was not issued in respect of employees working underground.

19.4. In respect of his analysis of the individual employees' movement on the day of the unprotected industrial action, Rakoma testified as follows:

19.4.1. The procedure for underground workers is that they should proceed to the green area, where safety issues were to be addressed and clocking cards issued. The employees would then proceeded to the workplace where a supervisor would mark the gang card to confirm the employee's attendance.

19.4.2. In respect of one of the applicants, Ms Elizabeth Matsena (Matsena), the clock card reveals that at 05:04 she had entered the main gate and, had clocked in to be paid and at 05:14 and proceeded to the charge-house. At 06:03 she clocked in the lamp-room to receive her equipment. She then clocked-out at 09:39 and she remained in the respondent's premises until 17:34 in the afternoon. Her shift was scheduled to end at 15:00 that day.

19.4.3. In respect of Ms Sylvia Mafaladi (Mafaladi), the clocking system revealed that she had clocked-in at 05:58 and entered the

change-house and 07:32, she proceeded to the crush house (green area). At 07:44, she went underground and at 09:32, she left the underground area. It usually takes about one hour 30 minutes for an employee to leave the underground area through (entrance/passage) MG1. She was supposed to proceed to underground between 0600 and 06:15 but she only went there at 07:32 and thus could not have worked that day.

19.4.4. In respect of Mr Lindile Kubashe (Kubashe), he clocked in at 06:02 at the mining attendance area which is designated for underground employees. However those employees scheduled to undergo training should not be reporting to that area. Kubashe was scheduled to attend training on 25 November 2013 (the day of the unprotected industrial action). There was a further obligation on Kubashe to clock-out but he did not do so.

19.4.5. It could not be verified whether Kubashe had attended the scheduled training through the attendance register, hence he was included in the list of employees who had participated in the unprotected industrial action.

19.4.6. The same holds for Mr Mthokozisi Noguda (Noguda) who was equally scheduled to undergo training on 25 November 2013. The clocking records show that he accessed the mine at 05:34 by vehicle and proceeded to clock-in at 05:38 at the crush area and accessed the underground area at 05:39. He then left the respondents premises at 17:36 in the afternoon. An employee scheduled for training did not need to go to the crush office as he did not need equipment to attend the training centre.

19.4.7. Rakoma confirmed that employees at the training centre were at some point during the strike instructed to leave due to the unprotected industrial action. He however contended that

Noguda's movements did not indicate that he attended the training.

19.4.8. In respect of the second respondent (Mathiba), he was an underground employee and the clock system showed that he accessed the premises through the main gate at 05:53, and at 07:24 he proceeded to the changing-house and exited at 07:30. Rakoma's view was that it was impossible to change into the requisite clothing within three minutes. Moreover, his shift ought to have commenced at 06:00 and there is no indication that he went underground. If he had gone underground, his clocking card would have indicated as such.

[20] The evidence on behalf of the individual applicants is summarised as follows:

20.1. Mfaladi testified that on 25 November 2013, she arrived at the workplace at 5:58 and proceeded to the change-house. At 07:32, she went to the crush area to pick-up her working equipment for use underground. She further went to another area to pick-up material and/or equipment for use underground.

20.2. At 07:45 she proceeded to enter the underground section. There are two shafts being MG1 and MG2 and those shafts were connected underground. She proceeded to go to her underground station through MG1. Upon her arrival, she realised that there were no other employees in that section. She testified that employees are generally not permitted to work on their own, and she thus proceeded to the MG2 section of the shaft. When she arrived at MG2, there was a crew at the waiting area having a safety meeting. The crew, included Matsena, and they had all signed an attendance register, a copy of which formed part of the trial bundle.

20.3. Thereafter, the team leader allocated work to the employees and they then proceeded to another work area. Moments later, another

employee came and informed them that there was a radio communication which instructed all the employees to leave the underground area. This was because they were told there was commotion on surface.

20.4. At 09:32, Mfaladi and others left the underground area and went to the crush area. They were then called to the shift boss' office, who had instructed them not to leave immediately whilst the situation was being monitored. She the clocked-out at the Survey area where she had earlier clocked-in and left the premises. She contended that she did not participate in the strike.

20.5. Mr Lucas Molaulwa (Molaulwa), testified that he should not have been dismissed as his name appeared on the attendance register of the training course scheduled to be held between 25 to 28 November 2013.

20.6. He had attended the training course on the day of the unprotected industrial action, and clocked-in at 06:22 and proceeded to the training centre at 07:00. During the course of the training, other employees who were on strike interrupted the training and told them to go and join a march to management to hand in a memorandum. They were then told to leave the training centre by the striking employees.

20.7. Mr Mphahlele, AMCU's General Secretary testified in regards to the circumstances and background leading to the unprotected industrial action on 25 November 2013 and the employees' main demands. He was involved in the negotiations to return to work in respect of the 28-29 May 2013 industrial action and confirmed that the employees were issued with final written warnings for their participation in that strike.

20.8. Central to the employees' demands was the recognition of AMCU for bargaining rights, which Samancor had not agreed to. Samancor had entered into a recognition agreement with other trade unions in May 2006. AMCU subsequently became party to the recognition agreement by signing an addendum to that agreement in early 2013 AMCU.

Obstacles however remained as Samancor contended that AMCU had not met the threshold for other rights. At the time, AMCU enjoyed 20% representation.

20.9. The obstacles were as a result of recognition agreement having been designed in such a manner that the Eastern and Western mines constituted one bargaining unit, even though the Eastern mine was in Mpumalanga Province while the Western mines were in the North-West Province. He contended that there was no operational interaction between the two components.

20.10. AMCU according to Mphahlele had always disputed the membership figures of NUM, and it was of the view Samancor refused to grant it recognition rights at the mines due to the influence of its Mr Archie Palane, and his allegiance to NUM. (Palane is a former NUM official).

20.11. The recognition agreement as it stood was to the benefit of NUM which could organise at the lower levels. The membership numbers of AMCU were strong in the Western mines, while the NUM numbers were strong in the Eastern mines.

20.12. Mphahlele further testified that the membership threshold was unfairly calculated by combining the two mines, leading to AMCU's demands that NUM be de-recognised as holder of bargaining rights, as it had more membership at the mines, but could still not negotiate on behalf of its members.

20.13. A further complaint by Mphahlele related to Samancor's junior officials, who took time to process AMCU's stop-order forms. He confirmed that the industrial action of May 2013 was in relation to the recognition agreement, and AMCU's stop-orders not being processed in time.

20.14. The employees according to Mphahlele, took it upon themselves to deal with the issue of the recognition agreement with the management directly, as they were of the view that AMCU was slow in resolving the issue.

20.15. Mphahlele had attended at the premises at around midday on 25 November 2013 to attempt to resolve the strike secure a date for the discussions on the recognition agreement. Following from his discussions with management, it was agreed with Smart that the employees would return to work the next day, hence the employees did so the following day. There was no indication thereafter, that Samancor contemplated taking disciplinary steps against the employees.

20.16. When the disciplinary hearings were scheduled to take place on 11 December 2013 and 13 December 2013, AMCU had requested a postponement of the hearings its head of legal, Mr Phillipus Marais, was not available, and only he would have dealt with such complex matters.

20.17. A further consideration was that AMCU was due to close down its offices on 13 December 2013. It had requested a meeting with the management to be held on 12 December 2013 and had not received a response in that regard.

20.18. The disciplinary hearings according to Mphahlele were a witch-hunt to weaken AMCU, as there was no need rush the holding of the disciplinary hearings in December 2013. He further contended that the rush to hold the hearings was a further ploy by management to avoid paying the employees their end of year bonuses.

20.19. Under cross-examination, Mphahlele conceded that he became aware of the set-down dates for the disciplinary enquiries after receiving correspondence in that regard on 6 December 2013. He however contended that he or AMCU representatives could not attend the enquiries to even seek a postponement as he was in constant contact with management; that AMCU was pressed for time and short staffed. He however testified that the Full-Time Shop Steward, Mntombi, attempted to get a postponement, and that the matter needed the attention of AMCU's head office.

20.20. Mphahlele further confirmed that the email from Nieuwoudt was received and that he had not responded as he did not ordinarily deal with disciplinary matters.

20.21. In regard to the demand concerning Nare, Mphahlele confirmed that management's response was that the union should lodge a formal grievance. He however contended that the demand in respect of Nare was ancillary.

[21] Mathiba's testimony was that:

21.1. He commenced his employment in August 1994, and at the time of the dismissal, he was employed as an electrician. He was previously a member of UASA and had joined AMCU in September/October 2013.

21.2. Having arrived at the premises on 25 November 2013, he went to the change-room, collected his job card from his supervisor (Phindile Ngakane), proceeded to the crush area to collect his equipment, and thereafter went to the lamp-house. He then clocked-in and proceeded to underground. In his experience it is possible that the clocking system may be faulty fail for whatever reason.

21.3. Having proceeded underground, he and another employee came across a miner at the 10th level station, who informed them that the other employees had not reported for duty. They then had to wait for other employees to arrive as they could not commence with their duties before the other employees had cleared the section.

21.4. Between 10:00 and 11:00, his supervisor called him over the radio and informed him and others that they must return to the surface. They had complied with the instruction. They first went to the lamp-house and then continued to the supervisor's office, who had informed them that they should remain at the workplace whilst waiting for a decision by

management about what to do, as there was a strike. At some point, he and the other employees then left the premises and came back the following day after having received an 'SMS' from management.

21.5. Mathiba further testified that he was not aware of the disciplinary hearings having taken place, and only became aware of them on 8 January 2014 when he attempted to clock in and was advised that he was dismissed. He further testified that other people (Lucas and David) he was with on 25 November 2013 were however not dismissed. From his group that was underground at the time, he and the miner were dismissed. Following their referral of a dispute, the miner was subsequently reinstated.

21.6. Under cross-examination, reference was made to his clocking record/card and movements as attested to by Makoma. Mathiba disputed the correctness of the records in respect of some of his movements. When it was put to him that the clock card did not show that he did not go underground or the lamp-room, his response was that the records were not a true reflection of what took place.

The legal framework:

[22] The strike embarked upon by the employees in this case was unprotected. In considering whether the dismissals were fair, section 68(5) of the LRA[4] enjoins this Court to have regard to the provisions of the Code of Good Practice: Dismissal in Schedule 8.

[4] Section 68(5) of the LRA provides that;

'(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account'

[23] Item 6(1) of the Code provides that while participation in an unprotected strike amounts to misconduct, a dismissal does not need to necessarily follow, as the substantive fairness of the dismissal must be measured against:

(i) the seriousness of the contravention of the LRA;

(ii) the attempts made to comply with the LRA; and

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

[24] In *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited*[5], it was held that where striking workers engage in unprotected strike action, the onus rests on them to tender an explanation for their unlawful conduct, failing which their dismissal will be regarded as substantively fair, provided dismissal was an appropriate sanction.

[25] There can be no doubt that the strike in this case was clearly in serious contravention of the provisions of section 64 of the LRA, as no attempt was made whatsoever to comply with those provisions. To the extent that there might have been allegation that the strike was provoked, the demands that led to the strike as submitted to Smart on 25 November 2013 were as follows[6];

'AMCU MEMBERS DEMANDS (Sic)

1. *"Francinah (Nare) must go now – No Procedure!!*
2. *Recognition Agreement date demand*
3. *No acting position, RDO's, T/Leaders etc*

[5] [2016] 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC) at para 46
[6] Page 193 – 194 of the Agreed bundle

4. *Labour Hires signed on*

5. *NUM out as AMCU majority*

We want to go underground to perform our duties, so solve this issues . Now!' (Sic)

[26] A subsequent memorandum submitted by the employees as already attested to by Smart read;

'MEMORANDUM.

We need the separation of Eastern and Western Chrome Mine

NUM Asiyifuni apha

Willem Koekemoer and Jimmy Mokoka asibafuni apha' (Sic)

[27] Arising from the above, Mphahlele's contentions were that central to the demands of the employees was that the long standing recognition agreement entered into with the other unions be amended so as to accord AMCU recognition for collective bargaining purposes. The demand went further as the employees wanted NUM to be de-recognised, that the two mines be separated, and that individuals such as Nare, Koekemoer and Mokoka be removed from the workplace.

[28] The demands are nonetheless were unlawful and impermissible. If AMCU sought to have the recognition agreement amended or NUM be derecognised for whatever reason, an unprotected strike in pursuit of those demands was clearly not the option, as various other legal options were available to AMCU to achieve those objectives.

[29] The demand in regards to the removal of Nare and other individuals was also impermissible, particularly in the light of Mphahlele's concessions that AMCU or its members could have lodged a formal grievance in that regard. Not much evidence was led in regards to the other demands, and I will not burden this judgment with a determination as to whether they were permissible or not.

[30] On the whole however, there is no basis for any conclusion to be reached that the strike was provoked or precipitated by any unlawful, unacceptable or unreasonable conduct on the part of Samancor. The employees' demands or grievances could have been addressed by alternative means other than through an unprotected strike. This was even moreso given the fact that the issues surrounding the recognition agreement had been on-going as evident from the May 2013 unprotected strike.

<u>The individual applicants alleged not to have participated in the strike.</u>

[31] Central to the defence of Mathiba, Mfaladi, Matsena, Molaulwa, Noguda, and Kubashe, is that they were not participants in the strike, and therefore ought not to have been dismissed. It was also common cause that these individuals were also issued with final written warnings previously for similar misconduct.

[32] It is accepted that AMCU made certain concessions in the pre-trial minute which impact on these individuals, including that they had participated in the strike. An amendment to the statement of claim or the pre-trial minutes was also not forthcoming. Fairness however requires that the evidence in regards to these individuals be looked at holistically in determining whether they had participated in the strike or not. This is so in the light of the criteria agreed to in the settlement agreement leading to the selective reinstatement of other employees.

[33] The evidence of Rakoma and Smart was that Samancor's Human Resources department had done verification utilising the clock cards, gang cards and interviews with supervisors to determine which of the employees were on strike, which were on sick leave (and/or other form of leave of absence), or at training courses and/or medical evaluations.

[34] To the extent that there is a claim of selective non-re-employment/reinstatement, the provisions of the settlement agreement leading to the reinstatement of other employees need to be looked at. In accordance with these provisions, and for the purposes of reinstatement, it had to be established whether employees were on leave on 25 November 2013; whether they had reported for work but had however not proceeded to their workplaces; whether even though they had participated in the strike, they were not a valid final written warning as at 25 November 2013, and whether they had valid final written warnings as at 25 November 2015.

[35] As I understood these individuals' case, it is predicated on the provisions of Clause 2.1.2 of the settlement agreement, which provided that;

> **'Employees who reported for work but did not proceed to their workstations.**
>
> 2.1.2.1 The company will reinstate 134 employees, as listed in **annexure C** of this agreement. These employees were identified to have reported for work, but did not proceed to their work stations
>
> 2.1.2.2 The re-instatement will be retrospective to the date of dismissal and all employees will be paid all outstanding salary due"

[36] At first glance, these provisions required of an employee to have reported for work, but to not have proceeded to the workstation. It was argued on behalf of Samancor that mere clocking in did not equate to reporting for duty. I agree with this contention, in that it is not far-fetched to conclude that in the course of a strike, employees could simply clock in and thereafter join the strike rather than proceed to their workplaces.

[37] In regards to Mfaladi and Matsena, the former had clocked in at the premises at 05h58, she then went to the changeroom at 06h03, and proceeded underground at level 10 at 07h44. She went back to the changeroom at 10h10 and exited the premises at 10h25. On her evidence, she found no one at level 10 and proceeded to another workplace where she found Matsena and her crew having a safety meeting. Mfaladi had signed the attendance register together with Matsena to show that they had attended the safety meeting. Mfaladi continued working until 09h30 when she and others were told to return to surface by the Miner. She clocked out at 09h32 and left the mine at 10h25.

[38] It is further my view that unlike other individuals to be dealt with shortly, the fact that Matsena had not testified in these proceedings did not make her case weaker in the light of it not being disputed that she and Mfaladi had indeed reported underground and had signed the safety meeting attendance register. On Mfaladi's evidence, which cannot be said to have been disputed, she and other were instructed by their Miner to evacuate from underground in the light of the volatile situation on surface. It was thus common cause that they did not leave underground on their own volition.

[39] Further in the light of the provisions of clause 2.1.2 of the settlement agreement, they had indeed reported for duty. In the circumstances, there is no basis for a conclusion to be reached that Mfaladi and Matsena participated in the strike. They had reported for duty and went underground, but could

however not carry out their duties as a result of having been told to leave underground. Accordingly, their dismissal was unfair.

[40] In regards to Molaulwa, his clock card showed that he clocked in at 06h22 and an attendance register shows that he had attended Basic Rigging Training on 25 November 2013. His evidence was that the training was interrupted by other employees who were on strike, who told them to go and join a march to management to hand in a memorandum.

[41] The fact that Molaulwa had reported for duty and attended the training in question is not placed in dispute. Samancor however takes issue with the fact that having clocked in, he went to the change and lamp rooms and thereafter left the premises at 09h54. In my view, once it is accepted that Molaulwa was scheduled to attend training on that day, and that he had signed an attendance register to confirm that he had indeed attended that training, it follows that he should not have been dismissed. His testimony was further that other employees on strike had ordered them to leave the training and join a march, which testimony could not be disputed. Rakoma went further and confirmed that employees on training were told by management to leave due to safety concerns. It was therefore unfair for Molaulwa to have be deemed to have participated in the strike, as under the requirements of clause 2.1.2, he had reported for duty (at the training as scheduled), and did not leave the training out of choice. He therefore ought to have been reinstated.

[42] Mthokozisi Noguda was equally scheduled to undergo training on 25 November 2013. The clocking records show that he accessed the mine at 05:34 by vehicle and had proceeded to clock-in at 05:38 at the crush area. He had accessed the underground area at 05:39, and then clocked out or left the premises at 17:36 in the afternoon.

[43] Noguda did not testify in these trial proceedings and on Rakoma's version, it is not known the reason he had proceeded underground when he was scheduled to go for training. His clock record also shows that having proceeded underground at 06h39, he accessed and left the crush area between that time and 09h46. His movements between 09h46 and when he clocked out and left at 17h36 are unknown.

[44] To the extent that there is no evidence to support any contention that Noguda had attended the training as scheduled (which was the place he was supposed to have reported to on that day), it cannot be said under the provisions of clause 2.1.2 of the settlement agreement that he had reported for work. Further to the extent that his case was distinguishable from that of the other individual applicants, particularly Molaulwa, who was also scheduled to attend training, the onus was upon him to explain his movements for the day and the reason there was no evidence that he had attended the training. In the absence of any such evidence, there is no reason to reject Samancor's version that Noguda had not reported for work for the purposes of reinstatement under clause 2.1.2 of the settlement agreement.

[45] Kubashe did not also testify in these proceedings. His case is similar to that of Noguda, as he was also scheduled to attend training on 25 November 2015 according to Rakoma. Kubashe clocked in at 06h02. His further movements thereafter are unknown, as the clock card does not record the time that he knocked off or any further movements. Rakoma's view was that Kubashe had an obligation to clock-out, but that he did not do so.

[46] According to Rakoma, the only reason that it was concluded that Kubashe had participated in the strike was that it could not be verified whether he had attended the scheduled training, nor could it be ascertained through the attendance register that he had attended the training.

[47] It is my view that as with Noguda, there was an obligation on Kubashe to explain his movements for the day. Clause 2.1.2 cannot be read to imply that an employee must only clock in, as central to the fairness of the dispute is whether an employee participated in the strike or not. Even if Kubashe was scheduled to attend training, there was however no indication that he did so, and again, in the absence of evidence from him to explain his conduct for the day, it follows that there is no basis for a conclusion to be reached that his non-reinstatement under the provisions of clause 2.1.2 of the settlement agreement was unfair.

[48] Mathiba's case is even more curious. He attacked Samancor's reliance on his clock card on the basis that a copy in that regard was not discovered or used as part of Samancor's trial bundle. The copy however formed part of his own trial bundle. He nonetheless questioned the accuracy of his clock card, and contended that Samancor had initially accepted that he had not participated in the strike, as was evident from him being paid for the day in question despite the principle of 'no work no pay' having been applied.

[49] Rakoma had testified in regards to Mathiba's clocking record and movements for 25 November 2013, which demonstrated that even though he had entered the premises at about 05h53, and proceeded through the main gate and changing house, there was no record of him having gone underground, or entering the lamp room. Smart's contention was further that the timeline of his movements indicated that he could not have gone underground because he had not clocked in. As an underground employee, he was supposed to have proceeded to the lamp-house to get his underground equipment. At 10:13 he went to the surface and at 11:27 he clocked in at the post to go underground. He however clocked-out at 11:28 and left the premises at 11:59.

[50] Several difficulties are glaring with Mathiba's case. His attack on the accuracy of the clock card was belated and without merit, particularly since he had discovered a copy in that regard in his trial bundle. Furthermore, to the extent

that he had testified that he had always contested the accuracy of the clock card, and further that there were people who were with him at the time that he was underground, it is my view that since the onus was on him to fully explain his conduct during the strike, nothing prevented him from calling upon those individuals he was allegedly with underground, particularly since it was his version that those individuals have since been reinstated.

[51] A distinguishing factor with his case as compared to Mfaladi, Matsena and Molaulwa is that there was evidence that these other individuals had clocked in, but could not continue with their normal duties or activities for the day due to the strike. As it was already indicated, it was not sufficient for an employee to simply have clocked in. To that end, a mere contention that the clock card was not accurate is not sufficient for a conclusion to be reached that Mathiba ought to have been reinstated in accordance with the provisions of clause 2.1.2 of the settlement agreement.

Evaluation of the substantive fairness of the dismissal of the other individual applicants.

[52] Item 7 of the Code, to the extent that participation in an unprotected strike is viewed as misconduct, provides guidelines and a consideration of various factors[7] in determining whether the dismissal was fair.

[53] In regards to the substantive fairness of the dismissal, it was submitted on behalf of AMCU and the individual applicants that dismissal is a serious

[7] Namely,

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
(b) if a rule or standard was contravened, whether or not –
    (i) the rule was a valid or reasonable rule or standard;
    (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
    (iii) the rule or standard has been consistently applied by the employer; and
    (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.'

sanction which is imposed only as a last resort, and that the test is whether the employees' conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable.

[54] It cannot be doubted that indeed a sanction of dismissal is the most severe form of punishment. The Constitutional Court in *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited* re-emphasised this point by stating that in determining the appropriateness of a dismissal as a sanction for the striking workers' conduct, consideration must be given to whether a less severe form of discipline would have been more appropriate, as dismissal is the most severe sanction available[8]

[55] Reference was also made to *Sidumo* on behalf of the individual applicants, for the proposition that in determining the fairness of the dismissal, the court is required to consider all the circumstances of the case, including the seriousness of the alleged misconduct, the harm caused, the employer's reason for the dismissal, the alternatives to dismissal and the effect of the dismissal upon the employee[9].

[56] In *National Union of Metalworkers of SA and Others v CBI Electric African Cables*[10], it was held that;

> 'In his work Grogan expresses the view that item 6 of the code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm

[8] At para [50]
[9] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 78
[10] (2014) 35 ILJ 642 (LAC) at para 30

caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the code'

[57] As already indicated, it was common cause that the dismissed employees had participated in an unprotected strike, and somewhere in this judgment it has already been stated that no attempts were made to comply with the procedural requirements in the LRA prior to embarking on that strike. It has further been found that there was no basis for any conclusion to be reached that the strike was provoked, particularly in the light of the unlawful or impermissible demands made by the employees. On the whole, participation in the strike in view of these and other factors to be dealt with shortly, constituted gross misconduct.

[58] On Mphahlele's version, the employees took upon themselves to raise the alleged grievances with management in the manner that they did, as they were of the view that AMCU was slow in tackling those issues. This in a way confirmed Samancor's contentions that the employees embarked on strike, which was a deliberate strategy *albeit* for one day. In my view, even if the strike could be classified as wild-cat, on the whole however, it appeared to have been coordinated, as employees in their individual capacity could not have woken up on 25 November 2015 and decided to embark on that strike. This is particularly so as the issue on recognition had been on-going.

[59] It was further common cause that following the strike, at least four meetings were held between management and AMCU on 25 November 2013, with a view of getting the employees to resume their duties. Samancor's contention is that notwithstanding those discussions, and its understanding thereafter

that the employees would return to work, they had refused to do so, specifically those who were supposed to be on the afternoon shift from 14h00, and the evening shift. Those on the morning shift started an hour late.

[60] Mphahlele's version that he had agreed with Smart that the employees would return to work the next day should be rejected as correctly pointed out on behalf of Samancor, as it was neither pleaded nor put to Smart during his cross-examination. The fact that ultimatums followed after those meetings to implore the employees to report for work at certain times further belies Mphahlele's contentions, and this Court should accept that flowing from those meetings, employees were to resume their normal shifts starting from the 14h00 shift.

[61] It was common cause that Samancor had on 25 November 2013, sent an 'SMS' to employees at 18h53, advising them to report for duty on 26 November 2013 as normal. The 'SMS' was followed by an ultimatum on the same date at 19h58, which instructed all employees on night shift at Mooinooi and Millsell to return to work at the commencement of the next shift on 26 November at 22h00. Another 'SMS' to all employees followed at 19h58 on the same date, instructing the employees to report for duty 'tonight as normal'. It is common cause that the employees did not heed the 'SMS' as they did not report for night shift.

[62] A second ultimatum was issued on 26 November 2013 at 05h30 to all employees on morning and afternoon shifts, instructing them to return to work at 06h30 for the morning shift and 14h00 for the afternoon shift. Employees did resume their normal duties on 26 November 2013, *albeit* they started their morning shift an hour later.

[63] Flowing from the above, it should be concluded that the employees had not returned to work after meetings held with Mphahlele which had ended at

about 15h00 on the day in question, necessitating the 'SMS' and the ultimatums. To the extent that the employees returned to work on 26 November 2013, it can be accepted that they had heeded the ultimatums, but this does not imply that Samancor was not within its rights to institute disciplinary proceedings against them. After-all, they had participated in an unprotected strike.

[64] To this end, Mphahlele's contentions that management had not in the meetings indicated an intention that disciplinary action would be taken against the employees did not however imply that management could not do. The fact that the employees had resumed their normal duties on 26 November 2013 did not imply that it was the end of the matter.

[65] A decision to discipline employees who had embarked on an unprotected strike (which act constitutes misconduct), even if they had agreed to return to work, remains a management prerogative. Furthermore, the reliance by AMCU on 'ambiguous/confusing' messages in the ultimatum as to whether management would take disciplinary action or not does not assist its case in the light of the prerogative enjoyed by management. To this end, there is further no merit in the contentions made on behalf of Mathiba, that Samancor was estopped from disciplining the employees by virtue of any impression it had created through the ultimatums.

[66] What remains to be determined is whether the dismissals were appropriate, taking into account that such a sanction ought to be reserved for the most serious forms of misconduct.

[67] It is correct as the applicants had contended, that the dismissals were in two phases. In respect of the dismissal of 13 December 2013 following the disciplinary hearings and the sanction, AMCU attacked Nieuwoudt's reasons for confirming their dismissals. Nieuwoudt had reasoned that AMCU did not

care to attend the hearings and thus not accepted management authority; that AMCU's behaviour suggested that it would participate in an illegal strike again; that the employees showed lack of respect for any rule or procedure; and that the conduct of the striking AMCU members showed lack of respect for any company rule or law or society, as they had intimidated other employees and made themselves guilty of violence and damaged property.

[68] It was submitted that Samancor and Nieuwoudt had not approached the dismissal on the basis of progressive discipline, as there was nothing to support the argument that the behaviour of AMCU seemed to suggest that they would participate in another illegal strike, or that the union showed lack of respect for procedures, or that there was no evidence to support the conclusion that any of those who were dismissed were engaged in or made common purpose with others who engaged in violence and intimidation. It was submitted further that by reinstating other employees, Samancor forgave or overlooked the misconduct of even those who were actively engaged in the strike provided that they were on final written warning, and that on the whole, Samancor's reasons for the dismissal were woefully insufficient and thus not valid.

[69] It is my view that whether the dismissals of 13 December 2013 were fair needs to be assessed within the context of the subsequent events. Upon these dismissal, and whilst the parties were preparing for an appeal hearing, a settlement agreement was reached, in terms of which certain employees were reinstated, whilst others were not. Central to Smart's evidence was that employees were not reinstated due to two main reasons, *viz*, participation in the unprotected strike action, and the fact that the employees were on valid final written warnings.

[70] In my view, an attack on the reasons cited by Nieuwoudt does not take the matter any further, particularly since his outcome[11] made it clear that the guilt

[11] Page 258 Vol 1 of the Trial Bundle

finding was based on the employees' absence from work on 25 November 2013; that they had made demands, refused to work, and failed to follow procedures to engage management on the issues or lodge a dispute with the CCMA. Effectively, the employees were found guilty on the basis of participation in the unprotected strike and the final written warnings[12]. It cannot therefore be correct as argued on behalf of Mathiba and AMCU, that the issue of final written warnings did not play a part in the justification of the dismissals, or that a distinction between those on final written warnings and not, was merely drawn during the negotiations leading to the settlement agreement.

[71] The reasons proffered by Nieuwoudt for the dismissal were advanced within the context of aggravating and mitigating factors that he had to consider, but were not in themselves the primary reasons for the dismissal. AMCU as shall further become clearer, had not submitted any mitigating factors as to the reason a sanction of dismissal should not be imposed.

[72] The question that remains is whether the dismissal on account of participation in the unprotected strike and the fact that the employees were on final written warnings was appropriate. It is my view that questions surrounding the inter-union rivalry between AMCU and NUM, or the fact that Samancor's approach to the recognition agreement and its amendment was slow or biased cannot serve as mitigating factors. Inter-union rivalry as a result of proliferation of unions at a workplace will always be unavoidable. It does not however imply that members of rival unions should not conduct their affairs with management and raise grievances in a peaceful and procedurally permissible manner. Where a union in a workplace is of the view that it is entitled to more rights of engagement with management, legal processes are in place for those ends to be achieved. If a union is of the opinion that management and/or its senior employees conduct themselves in a biased manner in favour of its rivals,

[12] Email to AMCU on 13 December 2013 at page 259 of Vol 1 of the Trial Bundle

there are equally processes and procedures to be followed, rather than simply making those allegations and engaging in unprotected industrial action.

[73] It was further submitted on behalf of the individual applicants that the strike took place on 25 November 2013 as a result of spontaneous explosion of frustration by AMCU members. I have already addressed the issues surrounding alleged frustrations by the employees and the rules of engagement in that regard. The fact that the strike only took one day or that the employees had offered to work extra hours to make up for lost production is equally not an excuse to exonerate the employees. A whole range of factors need to be looked at in assessing fairness[13]. In this case it is significant to point out the following;

(i) The strike was unprotected and unprovoked.

(ii) In terms of the provisions of Samancor's disciplinary code, participation in an unprotected strike was to be met with a dismissal even if it was a first offence.

(iii) The strike was essentially in respect of the same issues that led to final written warnings in July 2013, coupled with other impermissible or unlawful demands.

(iv) The final written warnings remained valid as at the time of the unprotected strike.

(v) The employees following a meeting between AMCU and management, ought to have immediately (at least the afternoon shift) returned to work and had not done so. Mphahlele's contentions that there was an agreement that the employees would resume work the following day has been found to be contrived.

[13] *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers' Union and Others* [2018] 8 BLLR 756 (LAC); (2018) 39 ILJ 1953 (LAC)

(vi) Aligned to the issues of the gross nature of the misconduct in question is the conduct of the employees during the strike. It was not contested that damage was done to the offices of NUM during the strike. The offices were thrashed with damage done to equipment. Smart had further testified that upon the AMCU members having thrashed and vandalised NUM's offices, they had then marched the NUM shop stewards off the premises. Mphahlele was hard-pressed to concede that there was violence on the day of the strike. He could only admit having seen torn NUM T-shirts, but had denied that the strike was accompanied by violent conduct.

(vii) It can be accepted for the purposes of the determination of this dispute that Samancor could not or had not identified the perpetrators of the violence. At the same time however, in the light of Mphahlele's reluctant concessions, the Court should accept the evidence of Smart and Rakoma that indeed there was damage to NUM's offices and that some non-striking employees were chased from their workstations. Any dispute in that regard is put to bed on the evidence of Molaulwa, who had testified that their training was interrupted by striking employees who told them to join a march to management to hand in a memorandum of demands. Furthermore, it was not placed in dispute that some employees on surface were told by management to leave the premises in consideration of their safety.

(viii) Smart had testified in regards to the financial harm caused by the unprotected industrial action, which included a loss of R2.3m for the 25 November 2013, and a loss of R1.3 per day per mine on 26 November 2013. I did not understand AMCU's case to be that this financial harm was disputed.

[74] In the light of the above factors, I fail to appreciate the reason any conclusion can be reached that any employment relationship was not rendered intolerable. It has been held that whether a relationship is deemed to be

intolerable or irretrievably broken down can be gleaned from the gross nature of the misconduct itself, and that it may not be necessary to lead direct oral evidence of that breakdown.[14]

[75] In this case, I fail to appreciate what other alternatives were available to Samancor, in circumstances where the dismissed employees had failed to heed the final written warnings issued to them two months earlier, which ordinarily in terms of Samancor's disciplinary code, would have led to a dismissal. Having had regard to the factors outlined in paragraph 73 above, it is my view that it cannot be said that Samancor had other alternatives other than a dismissal to consider. The conduct of the individual applicants and the nature of the strike itself rendered an employment relationship intolerable, and accordingly, the sanction of dismissal was appropriate.

[76] To round off in regards to the arguments surrounding selective reinstatement, I have already dealt with those employees that were specifically identified as having disputed that they had taken part in the industrial action. Other than these employees, it was contended on behalf of the other individual applicants that their exclusion from reinstatement was unfair as the previous strike was only for two days; that they had undertaken to work overtime to offset any prejudice to Samancor, and further that it was unreasonable to have selected them particularly since Samancor forgave a majority for their strike action.

[77] Most of the arguments as above have been addressed, safe to reiterate that selective dismissal and re-employment of employees is not per se unfair as circumstances may justify such conduct[15]. In *Fidelity Guards Holdings (Pty) Ltd v Transport and General Workers Union and Another*[16], it was held that a duty was upon an employer when selectively taking back other employees, to demonstrate that a legitimate basis of differentiation between those reinstated

[14] See *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC)
[15] *Rickett & Colman (SA) (Pty) Ltd v CWIU* 1991 12 ILJ 806 (LAC)
[16] [1998] JOL 3333 (LAC) at para 45.

and those not reinstated existed. In this case, it was argued on behalf of AMCU that the fact that Samancor had reinstated other employees who were on strike implies that these were forgiven. The decision to selectively reinstate other employees was based on certain criteria that was agreed to by both parties flowing from negotiations leading to the settlement agreement. The criteria as evident from the settlement agreement itself was *inter alia* whether or not the employees had participated in the strike, whilst at the same time having valid final written warnings. Those that were not reinstated had not only participated in the unprotected strike, but had also been on valid final written warnings for similar conduct in accordance with the provisions of the settlement agreement. It cannot therefore be correct for AMCU to suggest that the failure to reinstate the employees based on the previous final written warnings was unfair. The distinguishing factors between those that were reinstated even though they had participated in the strike was primarily that they did they have final written warnings.

Procedural fairness of the dismissal:

[78] It was common cause in this case that following four meetings held between management and AMCU officials on 25 November 2013, which were followed by two ultimatums, the employees resumed their normal duties with effect from 26 November 2013.

[79] On 6 December 2013, written notices to attend disciplinary hearings scheduled for 11 and 13 December 2013 were then issued to all the employees who had participated in the strike action on 25 and 26 November 2013. The written notices were further sent to all the respective union officials, handed to union shop stewards and further displayed on notice boards.

[80] In regard to representation at the disciplinary enquiries, employees who were members of a union were to be represented by their appointed union representative, whilst those who were not members of a union were required to elect not more than four colleagues to represent them.

[81] Mphahlele had conceded that he was aware of the notices of the disciplinary enquiry issued on 6 December 2013. He had sent correspondence to Samancor on 10 December 2013, requesting a meeting to be held on 12 December 2013 to discuss the 'strike action'. On the same day, Mr Phillip Mntombi a representative of the local branch of AMCU communicated with Samancor's Human Resource Manager, Ms Anele Janse van Rensburg informing her that the representatives of AMCU were not going to be available to attend the disciplinary hearing scheduled for 11 December 2013. He had provided two alternative dates for the hearing.

[82] In a response to Mr Mntombi's communication, Ms Janse van Rensburg indicated that all the unions were issued with a 48 hours' notice of the disciplinary hearing and as such, the disciplinary hearing would continue in the absence of AMCU.

[83] On 11 December 2013, the representatives of AMCU were not present at the hearing. The internal disciplinary hearing accordingly proceeded in their absence. On the same day, the Chairperson of the hearing Nieuwoudt, sent an email to Mphahlele, and advised him that since no application for a postponement was received, and further since no apology was tendered by AMCU for its non-attendance AMCU, the hearings had proceeded in its absence. AMCU was further advised that the outcome of the hearing was to be made on 13 December 2013, where the parties would have an opportunity to make representations in regard to mitigating and aggravating circumstances.

[84] Mphahlele did not respond to Nieuwoudt's email. On 13 December 2013, AMCU again did not attend the hearing on the outcome and the sanction. Parties present at those proceedings had presented mitigating and aggravating circumstances. At the conclusion of the process, all members of AMCU were found guilty of misconduct and a sanction of dismissal was imposed. However, the rest of the other employees, including members of other unions and non-unionised employees were not found guilty.

[85] In terms of Samancor's disciplinary code and procedure, an employee who is aggrieved by an outcome of an internal disciplinary hearing, may lodge an appeal within two (2) business days from the date she/he becomes aware of the disciplinary outcome. On 13 December 2013, correspondence was forwarded to AMCU with a list of members of AMCU who were dismissed as a result of the internal disciplinary hearing. AMCU was also advised that due to the impending end of the year break, the period in which to lodge an appeal will begin on 6 January 2014 and the deadline for lodging the appeal would be 8 January 2014.

[86] It is common cause that subsequent meetings between the parties' representatives resulted in the settlement agreement in terms of which other employees were reinstated.

[87] AMCU contends that since Samancor chose to conduct a formal disciplinary hearing, there was no evidence to suggest that a separate enquiry was conducted in its absence, and that Nieuwoudt appears to have simply taken account of the evidence obtained from the separate enquiries concerning other union members and made a decision.

[88] AMCU further contends that the enquiry was procedurally unfair as the dismissed employees failed to receive effective representation, and Nieuwoudt wrongly believed that AMCU had deliberately failed to take part in the hearings. It further contended that on the evidence of Smart, there was no

need to rush to hold the enquiries on 11 and 13 December 2013, and that Mntombi had specifically on 10 December 2013 requested a postponement and proposed alternative dates in the new year, which request was declined by Samancor without giving reasons. It was submitted that it was clear that AMCU had not refused to attend the hearings and had indicated that it was unavailable on the dates scheduled and proposed alternative dates.

[89] Submissions made on behalf of Mathiba were that; he was unaware of the disciplinary proceedings conducted in December 2013; that he only became aware of his dismissal in January 2014 when he reported for work; that Samancor by virtue of only affording the respective unions the right to be heard, effectively deprived Mathiba and others of their Constitutional Right to be heard, and that this came about as a result of AMCU's non-attendance and Samancor's election to proceed and finalise the hearings in AMCU's absence without notifying the affected employees. It was further submitted that AMCU was not afforded an opportunity to make submissions in relation to the merits of the matter or to show cause for its non-attendance at the hearings.

[90] To the extent that Samancor chose to convene formal disciplinary enquiries, Item 4(1) of the Code of Good Practice provides:

> 'Normally, the employer should conduct an investigation to determine whether there are grounds for *dismissal*. This does not need to be a formal enquiry. The employer should notify the *employee* of the allegations using a form and a language that the *employee* can reasonably understand. The *employee* should be allowed the opportunity to state a case in response to the allegations. The *employee* should be entitled to a reasonable time to prepare the response and to the assistance of a *trade union representative* or fellow *employee*. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'

[91] To the extent that Mathiba was a member of AMCU at the time of the unprotected strike and the dismissal, there is no basis for this Court to treat his case differently from that of others insofar as his contentions on procedural unfairness are concerned.

[92] It can be accepted that flowing from the unprotected strike, Samancor had cause to convene disciplinary enquiries in respect of those employees who were party to the misconduct. It can further be accepted that the notices to attend the enquiries as scheduled for 11 and 13 December 2013 were issued on 6 December 2013, which was timeous enough for AMCU to prepare for those hearing.

[93] AMCU however had not attended the hearings leading to a finding of guilt and the ultimate sanction on 13 November 2013. Members of other unions as represented by their officials had attended those hearings. Central to this issue is whether AMCU and the individual applicants had a legitimate reason for absenting themselves from the hearings, and whether Samancor or Nieuwoudt had acted unreasonably and unfairly in proceedings with their hearings in AMCU's absence.

[94] Several explanations were proffered by Mphahlele, which I seek to swiftly dispose of. Having conceded that the notices were received timeously, his explanation for AMCU's non-attendance was that;

94.1 A postponement of the hearings was sought as AMCU's head of legal, Mr Phillipus Marais, was not available, and was the only one who would have dealt with such complex matters at the level of head office.

94.2 AMCU was due to close down its offices on 13 December 2013, and had requested a meeting with the management to be held on 12 December 2013 and had not received a response in that regard.

94.3 Mphahlele or other AMCU representatives could not attend the enquiries to even seek a postponement as he was in constant contact with management.

94.4 AMCU was pressed for time and short staffed. He however testified that the Full-Time Shop Steward, Mntombi, attempted to get a postponement.

94.5 Mphahlele further confirmed that the email from Nieuwoudt was received and that he had not responded as he did not ordinarily deal with disciplinary matters.

[95] In the light of the above explanations, it is my view that Nieuwoudt's contentions that AMCU did not care to attend the hearings and defend its members cannot be said to be far-fetched or unreasonable. In the light of the number of employees involved and the likely consequences to follow from the disciplinary proceedings, surely it was not sufficient for Mphahlele in particular to simply wash his hands of the matter on the basis that Marais was not available. If Marais was not available for whatever reason, there was even more of an obligation on AMCU or Mphahlele in particular to attend the hearings and put up a case as to the reason a postponement of the disciplinary proceedings was necessary.

[96] An excuse that the union's offices was short staffed or that they were due to close at the end of the year is equally not reasonable. Other Unions had attended to the disciplinary hearings even if it was the end of the year as they took the interests of their members seriously knowing the consequences of

non-attendance. AMCU's approach on the other hand was on the whole *laissez-faire* and nonchalant.

[97] Circumstances would have been different had AMCU made an attempt to at least attend the disciplinary proceedings and make out a case for a postponement before Nieuwoudt. Neither Mphahlele nor the Full-Time Shop Steward, Mntombi saw it fit to make such endeavours. As if that was not enough, Van Rensburg had warned AMCU that the hearings would proceed in AMCU's absence if it did not attend. Following the disciplinary hearing on 11 December 2013, AMCU was again implored by Nieuwoudt to attend the disciplinary hearings for the purposes of delivery of the verdict on 13 December 2013. AMCU did not bother to respond to Nieuwoudt's correspondence, let alone attend the enquiry.

[98] Any contention in the light of the above circumstances that Samancor or Nieuwoudt acted procedurally unfairly clearly lacks merit. The hearings had proceeded in AMCU's absence because it failed to answer to invitations to attend those hearings. It was not for Nieuwoudt to simply postpone the proceedings in order to accommodate AMCU when it had not sought an indulgence, other than merely sending correspondence, and further when other unions had attended the hearings to defend their members.

[99] It follows from the above that through AMCU's nonchalant approach to the disciplinary enquiries, it invariably waived its rights and those of its members to an opportunity to state their case in respect of the misconduct in question, the right to place mitigating factors before Nieuwoudt, and/or an opportunity to address Nieuwoudt on the question of an appropriate sanction. As it was correctly pointed out on behalf of Samancor, it is a trite principle in our law that a party, who chooses not to attend a hearing, does so at his or her own

peril, and is precluded from later complaining about the outcome of the hearing.[17]

[100] AMCU's arguments that the disciplinary enquiries were rushed in order to deprive the employees of their year-end bonus are in my view a red-herring. The claim is unsubstantiated. It was common cause that Samancor was due to close for the end of season on 13 December 2013. There is no basis for any conclusion to be reached that the hearings were rushed for whatever reason, as the employees and their unions were notified on 6 December 2013 of the hearings to be held on 11 December 2013. On 13 December 2013, Nieuwoudt had issued a sanction.

[101] To repeat, to the extent that AMCU and its members needed the disciplinary proceedings to be postponed for whatever reason, all it needed to do was to attend the hearings as scheduled and make their case in that regard. To the extent that they had not done so, any complaints of the dismissals being procedurally unfair on the grounds advanced on behalf of AMCU and Mathiba are unsustainable.

[102] Any further contentions surrounding the appeal and failure to convene such hearings within the time limits provided in Samancor's disciplinary code are equally unsustainable. The final decision to dismiss having taken place on 13 December 2013, which was the last day of the year for Samancor's operations, it is apparent that any appeal could not have been convened in the remainder of that month. Furthermore, I fail to appreciate any unfairness pertaining to appeals, as it was common cause that the parties met in January 2013 to make arrangements for the convening of appeal hearings. Those meetings had resulted in the settlement agreement. The agreement in turn made any appeal superfluous in the light of its clause 3.2, which provided that;

[17] *The Foschini Group v Maidi and Others* [2010] ZALAC 5; (2010) 31 ILJ 1787 (LAC) ; [2010] 7 BLLR 689 (LAC)

'The Union has elected not to exercise the right of the dismissed employees to appeal their dismissal and the appeal on behalf of the dismissed employees is hereby withdrawn'

[103] In the light of the above, it is concluded that the dismissal of the individual applicants, including that of Mathiba, was procedurally fair.

Relief in respect of the other individual applicants and costs:

[104] It has already been determined that the dismissal of Mfaladi, Matsena and Molaulwa was unfair, as the evidence demonstrated that they had indeed reported for work under the requirements of clause 2.1.2 of the Settlement Agreement, and ought therefore to have been reinstated. Under the circumstances, they are entitled to an order of retrospective reinstatement from the date of dismissal with full benefits.

[105] I have had regard to the requirements of law and fairness in regards to the issue of costs. There is an on-going relationship between AMCU and Samancor, and the latter had agreed that there should be no order as to costs. In regards to Mathiba, even though he had decided to pursue his claim on his own, I see no reason in law or fairness why a costs order should be made against him.

[106] Accordingly, the following order is made;

Order:

1. The dismissal of the following individual applicants, *viz*; Ms Sylvia Mfaladi, Ms Elizabeth Moyahabo Matsena and Mr Lucas Molaulwa was unfair.

2. The Respondent is ordered to retrospectively reinstate the individual applicants mentioned in (1) above into its employ, on the same terms and conditions as applicable to their employ prior to their dismissal on 13 December 2013.

3. The Respondent is ordered to pay to the individual applicants mentioned in (1) above, back pay retrospective to 13 December 2013.

4. The dismissal of the other individual applicants represented by AMCU was substantively and procedurally fair.

5. The dismissal of the Second Applicant (Mr Mathiba) was procedurally and substantively fair.

6. There is no order as to costs

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the First Applicant: A. Redding SC with D. Greyling-Coetzer, instructed by Larry Dave Incorporated Attorneys

For the Second Applicant:	Mr F. Schöltz of Scholtz Attorneys
For the Respondent:	M.J Van As, instructed by Solomon Holmes Attorneys