



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JS 878/17

In the matter between:

NUMSA obo AUBREY DHLUDHLU AND OTHERS

Applicant

and

MARLEY PIPE SYSTEMS (SA) (PTY) LTD

Respondent

Heard: 18 to 20 March 2019, 30 September, 1 and 2 October 2019

Delivered: 23 January 2020

Summary: Dismissal of employees participating in an unprotected strike action – substantive and procedural fairness – just and equitable compensation in terms of section 68(1) of the Labour Relations Act, Act 66 of 1995.

JUDGMENT

PHEHANE, AJ

Introduction

- [1] The Court is called upon to determine whether the dismissal of 145 individual employees of the Respondent in August 2017 was substantively and procedurally fair. If the dismissal is found to be procedurally and substantively unfair, the Court is called upon to reinstate the individual employees.¹
- [2] The Respondent has launched a counterclaim and calls upon the Court to order just and equitable compensation to the Respondent for any loss attributable to the strike or any conduct in contemplation or in furtherance thereto, as contemplated in section 68(1)(b) of the Labour Relations Act² (the LRA). In the alternative, the Respondent claims damages in terms of section 77 of the Basic Conditions of Employment Act³ (the BCEA)⁴.

Brief factual background

- [3] The factual background is common cause between the parties as appears from correspondence exchanged between the parties as well as internal memoranda by the Respondent.⁵
- [4] The Respondent operates in the plastics industry and falls under the jurisdiction of the Metal and Engineering Industries Bargaining Council (the MEIBC). Pursuant to the judgment of the Labour Appeal Court (LAC) in *Plastic Converters Association of South Africa (PCASA) obo Members v National Union of Metalworkers of South Africa and Others*⁶, the Respondent is obliged to bargain in the Plastics Negotiating Forum (PNF), being a recently established collective bargaining forum of the MEIBC.
- [5] An agreement relating to wage increases was concluded in the PNF on 5 May 2017, which was finalized on 13 July 2017 (the PNF agreement). The wage

¹ Pleadings, (Bundle 1), Statement of Case, para 15, p6.

² Act 66 of 1995.

³ Act 75 of 1997.

⁴ Pleadings, (Bundle 1) Counterclaim, p 28 to 30.

⁵ Respondent's Bundle (Bundle 3), pp 2 – 6; 21, 22 to 24.

⁶ (2016) 37 ILJ 2815 (LAC). The LAC declared the PNF as the exclusive negotiating chamber within the MEIBC for the public sector.

negotiations pertaining to the steel industry were ongoing and had not been concluded at this point in time.

- [6] In terms of the PNF agreement, employers who are party to the PNF could grant increases in excess of the minimum that was prescribed in the PNF agreement.
- [7] The Respondent elected to do this and proposed a wage increase of 7.5% on condition that if the MEIBC negotiations resulted in an increase in the industry in excess of its proposed 7.5%, then the Respondent would apply that higher wage percentage increase. It is common cause that the applicant (NUMSA) is not a party to the PNF agreement.
- [8] On 5 July 2017 the employees of the Respondent being NUMSA members, partook in a work stoppage which resulted in the Respondent agreeing to await the outcome of the wage negotiations under the auspices of the MEIBC.
- [9] On 13 July 2017, the management of the Respondent met with NUMSA shop stewards to communicate the Respondent's wage increase proposal. The proposal was communicated by the Respondent to its employees on the same date.
- [10] It is common cause that the following three shifts applied to the operations of the Respondent: 06h00 to 14h00; 14h00 to 22h00 and 22h00 to 06h00. On 14 July 2017, the employees commenced with strike action shortly before 07h00. The facts of this case pertain to the strike action that was embarked on at the Nigel plant of the Respondent.
- [11] On 14 July 2017 and during the strike action, the Respondent alleges that Mr Ferdinand Christiaan Steffens (Mr Steffens), its then Head of Human Resources, was assaulted by the employees who were on strike and who acted with common purpose. NUMSA denies that Mr Steffens was assaulted.

- [12] On the same day the employees were requested to leave the Respondent's premises for safety reasons. The employees left the premises at approximately 12h00. The Respondent obtained an urgent interdict on the same date, in which this Court, per La Grange J, *inter alia*, declared the strike action as unprotected and directed that the employees were interdicted from further engaging in the unprotected strike action and any conduct in furtherance thereto. A rule *nisi* was issued for 19 October 2017. On this date, the rule *nisi* was discharged with no order as to costs.
- [13] On 17 July 2017, the employees returned to the premises. The premises was locked and the employees were refused entry into the Respondent's premises.
- [14] During July to August 2017, a disciplinary hearing was held⁷, in terms of which the individual employees were charged and were found guilty for having participated in an unprotected strike action and for having assaulted Mr Steffens and acting with a common purpose in perpetrating the assault.
- [15] The individual employees were dismissed following the said disciplinary hearing. A conciliation hearing was held under the auspices of the MEIBC on 29 September 2017, at which a certificate of outcome of the non-resolution of the dispute was issued. The matter now comes before this Court to adjudicate.

Legislative Framework

- [16] Section 64 of the LRA makes provision for the right to strike and sets out the jurisdictional grounds for protected strike action. Our Courts have frowned upon unprotected strike action and any conduct related thereto which results in violence, loss, destruction of property and harm to persons.

⁷ Bundle 4, the transcribed record of the disciplinary hearing.

[17] Section 68 of the LRA accordingly provides the mechanism for relief should a strike action (or lock out) fail to comply with the provisions of the LRA. One such mechanism is found in Section 68(1)(b) which provides as follows:

68.

(1) In the case of any *strike* or lock -out, or any conduct in contemplation or in furtherance of a *strike* or *lock -out*, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

.....

(b) to order the payment of just and equitable compensation for any loss attributable to the *strike* or *lock-out*, or conduct, having regard to-

(i) whether –

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the *strike* or *lock-out* or conduct was premeditated;

(cc) the *strike* or *lock-out* or conduct was in response to unjustified conduct by another party to the *dispute*; and

(dd) there was compliance with an order granted in terms of paragraph (a);⁸

(ii) the interests of orderly collective bargaining;

(iii) the duration of the *strike* or *lock-out* or conduct and;

(iv) the financial position of the employer, *trade union* or *employees* respectively.

[18] Item 6 of Schedule 8⁹ of the LRA provides as follows:

⁸ Section 68(1)(a)(i) provides for the granting of an interdict or order to restrain any person from participating in a strike or lock-out or any conduct in contemplation or in furtherance of a strike.

⁹ The Code of Good Practice: Dismissal.

- (1) Participation in a *strike* that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve *dismissal*. The substantive fairness of *dismissal* in these circumstances must be determined in the light of the facts of the case, including-
 - (a) the seriousness of the contravention of *this Act*;
 - (b) attempts made to comply with *this Act*; and
 - (c) whether or not the *strike* was in response to unjustified conduct by the employer.
- (2) Prior to *dismissal* the employer should, at the earliest opportunity, contact a *trade union official* to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the *employees* and what sanction will be imposed if they do not comply with the ultimatum. The *employees* should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the *employees* in question, the employer may dispense with them.

[19] Section 193(1) and (2) of the LRA provide for the remedies for unfair dismissal, which include re-instatement, re-employment or compensation, taking into account the considerations mentioned in the said sub-sections.

Evidence

Was the strike protected or unprotected?

[20] The pleaded case by the Applicant was that the individual employees were not involved in any strike action¹⁰. The case of the Applicant during the disciplinary hearing, was that the employees gathered in the canteen at approximately 06h55 to 07h00 and waited for Mr Steffens to address them on the wage negotiations. From the canteen, approximately 30 to 40 in number, the employees marched, danced and sang towards the security gate. In

¹⁰ Pleadings bundle (Bundle 1), Statement of case, para 13, p6.

addition, they “*went around the tree just to loosen up*” and they sat at the trees near the security gate, waiting for Mr Steffens to address them.¹¹

- [21] The video footage contained on a USB memory stick is accompanied by an explanatory list. The USB memory stick and explanatory list is marked “Exhibit 5”. “Exhibit 5” is to be considered together with “Exhibit 1”, entitled “Summary of Video Footage”. The video footage¹² clearly shows employees, more than 50 in number, marching, dancing, singing on the premises, towards and in front of the security gate. Three placards are seen in the video, carried by the striking employees. These placards contain the following words: “*Away with Ferdi we want 15%*”; “*7.5% se moer*”; “*We want 15% across the board*”.
- [22] The evidence of Mr Viro Darian Chinner (Mr Chinner), Ms Rosslyn Crowie (Ms Crowie) and Mr Steffens for the Respondent, was that none of NUMSA members were at their workstations on the morning of 14 July 2017 at approximately 06h55 and that they had gathered in the canteen¹³.
- [23] The evidence of Mr Chinner, Ms Crowie and Mr Steffens was that the employees, following the gathering in the canteen, proceeded to march, dance and sing on the premises.
- [24] Mr Chinner was the Manufacturing/Production Manager of the Respondent. Mr Chinner’s evidence was that he prepared and attempted to hand over an ultimatum to the striking workers while the employees were marching on the premises. He handed the ultimatum¹⁴ to two striking employees. He asked a striking employee, a shop steward by the name of Aubrey, as to who was in charge and Aubrey told him that all the employees were in charge. He was told by Aubrey to stop handing out the ultimatum.¹⁵

¹¹ Bundle 4 (transcript of disciplinary hearing), p 262, lines 7 to 29 to p263, lines 1 to 8; p 271 to 272; and p279 to 280.

¹² Video 3, entitled “After canteen meeting”, from 07h30; Video 4, entitled “Before the assault”, from 08h30.

¹³ Transcribed Record, Vol 1, p 173, lines 13 to 25; p174, lines 1 to 20; Vol 4, p 316 to 317 and Vol 4, p 398 lines 1 to 30.

¹⁴ Respondent’s Bundle (Bundle 3), p 27.

¹⁵ Transcribed record, Vol 3, p 174 to 177.

- [25] Mr Chinner's evidence was that he noticed that the striking employees were moving towards the administration building. He tried to stop them from entering the office and was told "*saubulala*", in his interpretation, meaning "*I will kill you*".¹⁶
- [26] Mr Chinner's evidence was that after being told "*saubulala*", he retreated as he had been threatened. He later heard that Mr Steffens was hurt and saw him shaken and being escorted off the premises. He asked Mr Steffens if everything was okay, to which Mr Steffens told him that he was leaving the site.¹⁷
- [27] Mr Chinner stated that after Mr Steffens left the Respondent's premises, two employees, named Ralf Sekele (Mosikidi) and Agatha Tshabalala met with the striking employees and Ms Tshabalala noted their demands.¹⁸
- [28] Ms Crowie is a team leader in the valves assembly department of the Respondent. Ms Crowie's evidence was that she walked to the security gate after the striking workers proceeded to the administration building. She heard glass break and saw the striking employees throw Mr Steffens on the floor and kicking him.¹⁹
- [29] Ms Crowie is seen in the video footage walking to the security gate. She disappears behind a tree and later emerges walking away from the security gate.²⁰
- [30] Mr Steffens' evidence is that he was assaulted at work by the striking employees on 14 July 2017. Mr Steffens referred to the medical examination report pertaining to the injuries he sustained during the assault.²¹

¹⁶ Transcribed record, Vol 3, p 177.

¹⁷ Transcribed record, Vol 3, p178 to 179.

¹⁸ The demands appear at p 19 of the Respondent's Bundle (Bundle 3). See also: Transcribed record, Vol 3, p 183 to 184.

¹⁹ Transcribed record, Vol 4, p 320 to 321.

²⁰ Video 5 entitled "After assault" from 08h23.

²¹ Respondent's bundle (Bundle 3), p 36.

- [31] His evidence was that the striking employees entered the administration office block. He went out of the office to speak to them and to convince them to return to work. He was attacked by a group of employees. He was pushed to the ground several times and was pushed through an office window of an office adjacent to his office. With the assistance of security officers, he was lifted to his feet and managed to exit the premises through the security gate.²²
- [32] The video footage shows Mr Steffens exiting the premises through the security gate. The striking employees are seen returning from the same direction that Mr Steffens came from and are seen dancing and singing and still carrying the placards.²³
- [33] In his evidence, Mr Ronnie Motebejane (Mr Motebejane), a witness for the Respondent, who was at the time employed by the Respondent as the Head of Manufacturing Operations overseeing all production and support services including safety and security, confirmed the WhatsApp messages on p 273 to 286 of the Respondent's Bundle (Bundle 3).²⁴ His evidence was that following the unprotected strike action and assault, the employees were requested to leave the site for safety reasons. He referred to a memorandum by the Respondent to all staff to leave the premises.²⁵
- [34] Mr Motebejane further referred to the strike register that is kept by the Respondent. Extracts appear at p 12 to 14 of the Respondent's Bundle (Bundle 3), in which the unprotected strike action is recorded, the assault by the striking workers on Mr Steffens, the window that was broken on the premises by the striking employees and the locked premises on 17 July 2017 when the employees returned for duty and were handed out the Court interdict (of 14 July 2019).

²² Transcribed record, Vol 4, p 399.

²³ Video 5 entitled "After assault" from 08h23.

²⁴ Transcribed record Vol 1, p 35, lines 10 to 14.

²⁵ The memorandum appears on p20 of the Respondent's Bundle (Bundle 3).

[35] Mr Ledwaba, the only witness for the applicant, made a concession that the strike was unprotected.²⁶ In view of the afore-going, I find that a strike took place on 14 July 2017 and that the strike action was unprotected.

Was Mr Steffens assaulted during the strike action?

[36] The pleaded case for the Applicant was that no assault took place²⁷. The evidence on behalf of the Applicant at the disciplinary hearing was that Mr Steffens was not assaulted. Further, that the employees did not march to the administration building.²⁸

[37] Counsel for the Applicant sated that Mr Lodwin Matsheke would come and testify before this Court that he did not assault Mr Steffens and that he did not witness any assault.²⁹ This witness was not called to testify before this Court.

[38] In *ABSA Investment Management Services (Pty) Ltd v Crowhurst*³⁰, the LAC stated that the failure to call an available witness may result in an adverse inference being drawn, i.e. that the witness will not support and may even damage that party's case.

[39] Mr Ledwaba's evidence was that Mr Steffens was not assaulted.³¹ His evidence was that the employees did not march to the administration building. His evidence, heard for the first time during cross examination, was that the striking employees marched to an open space where there was a platform that was erected for Mr Steffens to stand on to address the employees³², which platform Mr Ledwaba stated was far³³ from Mr Steffens' office, a distance of about 20 meters³⁴.

²⁶ Transcribed record, Vol 4, p 443, lines 1 to 24.

²⁷ Pleadings bundle (Bundle 1), para 13, p6;

²⁸ Bundle 4, p 266, lines 1 to 11; p 268, lines 1 to 16 and p 281, lines 1 to 13.

²⁹ Transcribed record, Vol 4, p 421 lines 18 to 21.

³⁰ (2006) 27 ILJ 107 (LAC) at para 14.

³¹ Transcribed record, Vol 4 p443, lines 1 to 24.

³² Transcribed record, Vol 4, p 469, lines 1 to 19.

³³ Transcribed record Vol 4, p 473, lines 18 to 20.

³⁴ Transcribed record, Vol 4, p 474, lines 1 to 12.

[40] The evidence on behalf of the Respondent in relation to the assault of Mr Steffens is dealt with in paragraphs [28] to [34] above and in the footnotes referred to in these paragraphs. As is apparent, these are mutually destructive versions presented to this Court regarding the assault of Mr Steffens by the striking employees.

[41] When a Court is faced with two irreconcilable versions, the best technique to deploy in dealing with a factual dispute was set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*³⁵ where the Court described the technique as follows:

'[5] ... To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities'.³⁶

[42] On making a finding on the credibility of the witnesses that testified, the Court in *Stellenbosch supra* stated the following:

'... the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.'³⁷

[43] Thereafter, a Court will make an enquiry into the reliability of the witnesses that testified. The Court in *Stellenbosch supra* stated the following:

³⁵ 2003 (1) SA 11 (SCA).

³⁶ Ibid at para 5.

³⁷ Id fn 35 at para 5.

‘... a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.’³⁸

[44] Once a witness is found to be both credible and reliable, the Court in *Stellenbosch supra* found that probability usually follows. It ended the test with the following:

‘... this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it ...’³⁹

[45] I find that the witnesses who testified about the strike action and the assault on Mr Steffens, being Messrs Chinner, Steffens, Motebejane and Ms Crowie were credible and reliable witnesses. Their versions were consistent. Further, their versions were consistent with the video footage.

[46] Mr Ledwaba was not a credible or reliable witness. He could not explain why his version on the strike being protected or unprotected contradicted the pleaded case of the Applicant. His version is odds with the employee’s version at the disciplinary hearing in relation to whether or not a strike took place. His evidence that the number of people who participated in the strike were 35 to 40 people⁴⁰ is at odds with the video footage.

[47] Mr Ledwaba’s evidence was fabricated. He stated that the employees waited at a platform to hear the expected address by Mr Steffens. This version was not put to the Respondent’s witnesses when they testified and neither was it put before the chairperson of the disciplinary hearing.

³⁸ Id fn 35 at para 5.

³⁹ Id fn 35 at para 5.

⁴⁰ Transcribed record, Vol 4, p441, line 1.

[48] Mr Ledwaba's evidence was that when he noticed the employees gathering in the canteen after his shift ended (being the third shift), he was "*curious*" and he followed the workers to the canteen to find out what was taking place.⁴¹ This evidence is at odds with the video footage,⁴² in which Mr Ledwaba is seen leading the crowd of striking workers and addressing them after Mr Steffens had left the premises. Mr Ledwaba is identified in the Respondent's Additional Identification Bundle Two.⁴³ He did not dispute that that was him as identified.⁴⁴

[49] I therefore find that the version of Mr Ledwaba is full of internal and external contradictions, and is improbable. On a balance of probabilities, I find that the version of the Respondent in relation to the assault that took place on Mr Steffens probable.

[50] In view of the afore-going, I find that the dismissal was substantively fair.

Ultimatum

[51] Mr Chinner's evidence as stated above, is that he handed the first ultimatum to two striking employees and was told to stop handing out the rest. The ultimatum⁴⁵ records that the employees are participating in an unprotected strike action and the employees are instructed to return to work by no later than 08h30; further that the unprotected strike action may constitute a fair reason for dismissal.

[52] His evidence was that the ultimatum was not delivered to NUMSA. This was his evidence at the disciplinary hearing⁴⁶. Mr Chinner's evidence was that he

⁴¹ Transcribed record, Vol 4, p 440, lines 1 to 10.

⁴² Video 3 entitled "After canteen meeting" from 07h30 and Video 4 entitled "Before Assault" from 08h19 and Video (unnumbered) entitled "Meeting after assault" from 08h32.

⁴³ p1, as number 2.

⁴⁴ Transcribed record, Vol 4, p 445, lines 1 to 30.

⁴⁵ Respondent's bundle (Bundle 3), p 27.

⁴⁶ Transcribed record, Vol 3, p218 to 220.

prepared a final ultimatum⁴⁷ but did not dispatch it because the strike became violent.⁴⁸

[53] The Applicant relies on item 6 (2) of Schedule 8 to the LRA and contends that the Respondent's failure to comply with the provisions of item 6 (2) renders the dismissal of the individual employees procedurally unfair.

[54] The Respondent contends that the dismissal of the employees was procedurally fair, as firstly, the ultimatum was issued and Mr Chinner was prevented from further distributing the ultimatum by NUMSA's shop steward; and secondly, that the Respondent held a hearing before dismissing the employees.

[55] On the evidence, I find that the Respondent issued the ultimatum to the striking employees and was prevented by a NUMSA shop steward from further distributing the ultimatum.

[56] In *NTM obo Shadrack Molema and 224 Others*⁴⁹, the Court stated the following at paragraphs [57] and [58]:

[57] The ultimate test however is whether the strikers were given a fair opportunity to state their case before a decision was taken to dismiss them. In *Karras t/a Floraline v SASTAWU and others* the Labour Appeal Court followed the approach in *Modise* and held that section 188(1)(b) requires the observance of the audi rule in all instances of dismissal, regardless of the reason. According to the Court, the only difference would be that in a case of collective misconduct, the opportunity to state a case will ordinarily be given to the collective, usually the trade union, if one is involved...

[58] Ultimately, the consideration is whether the strikers of the union were given a reasonable opportunity to make representations before the

⁴⁷ Respondent's bundle (Bundle 3), p 28.

⁴⁸ Transcribed record, Col 3, p 226 lines 19 to 25 to p227, lines 1 to 7.

⁴⁹ Unreported decision. (J1006/2016) [2019] ZALCJHB 347 (29 November 2019).

strikers were dismissed for participating in an unprotected strike. The circumstances faced by both the employer and the employees should dictate what procedural steps are reasonably practical and fair in the context’.

[57] The evidence of Mr Steffens is that it was practically impossible for the Respondent to hold hearings for the individual employees.⁵⁰

[58] During cross examination, it was put to Mr Chinner that NUMSA had requested that their members make oral submissions at the disciplinary hearing. Further, that NUMSA was denied this opportunity and was restricted to a maximum of 5 representatives.⁵¹ In re-examination, Mr Chinner clarified that NUMSA was limited to five representatives and not 5 witnesses; further, that NUMSA did not request the chairperson to call further witnesses⁵². The evidence was corroborated by Mr Steffens.⁵³

[59] I find that a disciplinary hearing was held prior to the dismissal of the employees, at which the individual employees were represented by NUMSA and were given the opportunity to state their version.

[60] In the circumstances, I find that the procedure was fair and therefore, I find that the dismissal was procedurally fair.

Identification of employees

[61] The evidence of Mr Motebejane, Mr Chinner and that of team leaders, Ms Crowie, Mr Dirk Jansen and Mr Riaan Janse van Rensburg was that prior to the disciplinary hearing, an identification of the employees who participated in the unprotected strike action took place by means of viewing the video footage and identifying the persons on video with team leaders and the

⁵⁰ Transcribed record, Vol 4, p 419.

⁵¹ Transcribed record, Vol 3, p 256 to 259 and Respondent's Bundle (Bundle 3), p55 to 56 and p134 to 135.

⁵² Transcribed record, Vol 3, p 262 to 263.

⁵³ Transcribed record, Vol 4, p 434.

confirmation of the Respondent's clocking records.⁵⁴ Their evidence was that members of the Union, Solidarity, were at work and assisted with the switching off of machines that had been left running.

[62] Counsel for the Applicant confirmed the Respondent's clocking records indicated that all employees thereon were on site, save for two, Sonnyboy Mokoena and Klaas Ledwaba.⁵⁵

[63] Mr Motebejane's evidence was the Respondent contacted NUMSA and requested that a drop box be put in place in order for employees to confirm whether or not they participated in the strike action and the assault of Mr Steffens. Only one employee responded to this offer. He was not charged with misconduct. No other employee came forward to distance him or herself from the alleged misconduct. Mr Motebejane confirmed that the final list⁵⁶ of employees charged and dismissed appears at Annexure A and B on p 244 to 247 and p 248 respectively of the Respondent's Bundle (Bundle 3).

[64] The Respondent contends that Employees listed in Exhibit 3 or C and Exhibit 4 did not come forward to state whether or not they participated in the unprotected strike action and assault of Mr Steffens⁵⁷.

[65] The Applicant contends that Sonnyboy Mokoena arrived late and he was not on duty on 14 July 2017. Further, that Mr Ledwaba knocked off duty at 06h00 on 14 July 2017.⁵⁸ In the circumstances, the Applicant contends that the Court should conclude that Messrs Mokoena and Ledwaba are not guilty of participating in the strike action.

[66] It is astounding that the Applicant contends that Mr Ledwaba should not be found guilty of participating in the strike action. Mr Ledwaba's evidence places him at the forefront of the unprotected strike action, which he conceded. In the

⁵⁴ Respondent's Bundle (Bundle 3), pp 60 to 121.

⁵⁵ Transcribed record, Vol 4, p 314.

⁵⁶ Transcribed record, Vol 3, p 166 lines 17 to 21.

⁵⁷ Respondent's Main Heads of Argument, sub-paragraph 38.7.

⁵⁸ Applicant's Heads of Argument, para 10, p 4 to 5.

circumstances, I find that there is no basis for reinstating or compensating Mr Ledwaba.

- [67] Mr Sonnyboy Mokoena, who is a NUMSA shop steward⁵⁹ entered the premises at approximately 09h00 on 14 July 2017.⁶⁰ According to the evidence, this was after the assault on Mr Steffens. The Respondent contends that Mr Mokoena did not distance himself from the events of 14 July 2017 and should thus not be reinstated. Mr Chinner's evidence was that Mr Mokoena *"entered the strike zone, without informing management that he was going to go and talk to the people. He just entered the strike zone, becoming part of the people"*.⁶¹

I find that Mr Mokoena participated in the unprotected strike action, as he is seen in the video entitled *"Strike leaders gathering"* from 10h03.⁶² This is the same person identified as being him on p15 of the Additional Identification Bundle 2. Although not on the scene, in light of the decision in *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*⁶³, I find that he acted with common purpose in the assault of Mr Steffens. In the circumstances, I find no basis for reinstating or compensating Mr Mokoena.

Common purpose

- [68] Apart from the 12 employees who have been identified assaulting Mr Steffens, the Respondent alleges that the remaining employees acted with common purpose in perpetrating the assault on Mr Steffens and are guilty of derivative misconduct.⁶⁴

⁵⁹ Transcribed record, Vol 3, p 235, lines 23 to 25.

⁶⁰ Video entitled "Sonnyboy walking in" from 09h00.

⁶¹ Transcribed record, Vol 3, p 260 lines 5 to 7.

⁶² A still shot of this video appears on p 20 of the Additional Evidence Identification Bundle Two.

⁶³ (2019) 40 ILJ 1957 (CC).

⁶⁴ See Evidence of Mr Chinner, Transcribed record, Vol 3, p 214.

- [69] In *NSCAWU and Others v Coin Security Group (Pty) Ltd t/a Coin Security*⁶⁵ the Court held that the doctrine of common purpose applies when two or more people associate themselves in a course of conduct that results in a criminal act by one or more of them, but by chance or design, the others do not physically perform the actions which brought about the result or act. The Court further held that when people actively associate themselves with the result and share the perpetrator's guilty state of mind, the guilt for the actual perpetrator extends to them. The Court held that the doctrine of common purpose should not be confused with the concept of collective guilt.
- [70] Common purpose needs to be proved, that is, there must be evidence to show that all the employees associated themselves with the conduct of the principal offender or offenders. It is not sufficient to warrant inference that all who had been actively participating in a strike had actively associated themselves with the few that had caused isolated damage to property during a strike. The Court further held that because the employer had chosen to deal with the matter by means of a disciplinary hearing, that then presupposed that the perpetrators of the alleged misconduct had been identified and linked to the misconduct on a balance of probabilities.
- [71] In *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*⁶⁶, in a majority decision, the Constitutional Court held that it was unnecessary to place an employee on the scene to prove common purpose and indicated that common purpose could be established by inferential reasoning having regard to the conduct of the workers before, during and after the incident of violence.
- [72] The Constitutional Court stated the following at paragraph [46]:

[46] Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the

⁶⁵ [1997] 1 BCLR 85 (IC).

⁶⁶ Id fn 63.

misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required. And as Grogan aptly remarked in RSA Geological Services (Arbitration), “[i]n any event, a refusal to disclose information relating to an offence can in certain circumstances make a person an accessory”.

- [73] The employees acted with common purpose with the perpetrators by associating themselves actively with their acts and omissions.⁶⁷
- [74] Before the assault, the individual employees partook in an unprotected strike action, assembling in the canteen and marching and singing on the Respondent’s premises carrying placards inscribed with words, as stated above.
- [75] During the unprotected strike action, the employees acted with common purpose in approaching the administration building offices, threatening Mr Chinner and assaulting Mr Steffens. Mr Steffens confirmed⁶⁸ his evidence at the hearing regarding the “mob attack”. Mr Steffens was led to safety by a team leader and security officer.⁶⁹
- [76] After Mr Steffen’s assault and after he had left the Respondent’s premises, the employees acted with common purpose by dancing and singing. The employees continued to do so at the security gate with the police on the other side of the gate and continued to assemble and hear the address of their leaders⁷⁰.
- [77] The employees acted with common purpose in presenting their demands to Mr Mosikidi and Ms Tshabalala.

⁶⁷ *S v Mgedezi and Others* 1989 (1) SA 687 (A).

⁶⁸ Transcribed record, Vol 4, p 407 to 408.

⁶⁹ The evidence of Mr Chinner, Transcribed record, Vol 3, p 254, lines 2 to 4. Mr Steffens’ evidence is that he was assisted by two security officers and an employee – Vol. 4, p 399, lines 20 to 30.

⁷⁰ Video 8 entitled “2nd gathering – police arrival” from 09h20 and Video, unnumbered, 08h30 entitled “Meeting after the assault”.

[78] The employees acted with common purpose in offering a bare denial relating to the strike action and assault on Mr Steffens during the disciplinary hearing. In their pleadings before this Court, the employees' case was with a bare denial of the strike action and assault on Mr Steffens, until the concession made by Mr Ledwaba regarding their participation in an unprotected strike action.

[79] The employees acted with common purpose is not making use of the opportunities offered by the Respondent to come forward and distance themselves from the strike action and assault on Mt Steffens.

Appropriateness of the sanction of dismissal

[80] The individual employees were dismissed for participating in an unprotected strike action and for acting with common purpose in assaulting Mr Steffens.

[81] In *Scaw Metals Ltd v Vermeulen*⁷¹, the LAC held as follows:

'A further consideration... weighs with me. We live in a society wracked by violence. Where an employer seeks to combat that evil, even by harsh measures, this court ought not to be astute to find unfairness'.

[82] In *Pailprint (Pty) Ltd v Lyster NO and Others*⁷², the LAC held that dismissal is the appropriate sanction where employees are guilty of assault and intimidation.

[83] At the disciplinary hearing, the employer led evidence in relation to the employment relationship having broken down irretrievably. This was also Mr Motebejane's evidence before this Court.⁷³

⁷¹ [1993] 14 ILJ 672 (LAC) at 675.

⁷² [2019] 10 BLLR 1139 (LAC).

⁷³ Transcribed record, Vol 1, p 99, lines 14 to 23.

[84] During cross examination, it was put to Mr Ledwaba, given his serious accusation against senior management of the Respondent⁷⁴ i.e. that they were all lying, that the employment relationship had broken down. Mr Ledwaba was evasive and did not respond to the question. I find that given this serious accusation and the evidence before this Court, the employment relationship has broken down irretrievably.

[85] In the light of firstly, the assault on Mr Steffens, which is a serious misconduct and the bare denial by the employees, secondly, the statement by Mr Ledwaba on behalf of the Applicant and the individual employees, that senior managers of the Respondent are lying in relation to the assault on Mr Steffens, thirdly, the refusal of the employees to heed to an instruction in the ultimatum to return to work and fourthly, the evidence at the disciplinary hearing that the relationship has broken down irretrievably, I find that dismissal is the appropriate sanction.

Counterclaim

[86] The Respondent's counterclaim is for the amount of R18 028 908.00, for loss in the period July 2017 to October 2017, claimed as just and equitable compensation in terms of section 68 (1)(b) of the LRA, alternatively, the said amount is claimed as general damages for breach of contract under section 77 of the BCEA⁷⁵.

[87] In the further alternative, the Counsel for the Respondent stated that the Respondent claims R 829 835.00 for loss incurred on the day of the strike, 14 July 2017 and the days immediately thereafter.⁷⁶ The Respondent maintains that the damages in the amount of R18m is the just figure, as the impact of the strike lasted until December 2017.⁷⁷

⁷⁴ Transcribed record, Vol 4, p 446 to 448.

⁷⁵ Pleadings, Bundle 1, paras 22 to 24, p 29 to 30.

⁷⁶ Transcribed record, Vol 4, p 270, lines 20 to 23.

⁷⁷ Evidence of Mr Thom, transcribed record, Vol 4, p 270 to 271.

- [88] The Applicant, in its pleadings, denies that the Respondent is due any damages, as it denies that the individual employees partook in any unprotected strike action.⁷⁸
- [89] Mr Motebejane's evidence was that the Respondent lost key customers as a result of the unprotected strike action and that the company had to take measures to restore production to its required capacity.⁷⁹ He further confirmed the amounts of loss to the Respondent as claimed.⁸⁰
- [90] Mr Chinner's evidence was that no production occurred on 14 July 2017 as a result of the strike action.⁸¹
- [91] The evidence of Mr William Louis Thom, the financial director of the Respondent, was that he quantified the loss of the Respondent as claimed in its counterclaim. This he did, together with the assistance of the Respondent's financial controller and the source of such calculations was the accounting system of the Respondent.
- [92] Mr Thom quantified the loss amounting to R18m from July 2017 until December 2017, as the warehouse facility in Germiston from which the Respondent operated was in place until December 2017.⁸² Mr Thom further quantified the loss over the period 14 July 2017 and the days immediately after. The amount of such loss is R829 835.⁸³
- [93] This evidence is unchallenged. The Applicant states that Mr Thom is an expert witness and that his evidence amounts to hearsay.⁸⁴ I disagree that Mr Thom is an expert witness. No notice was served in terms of Rule 6(10) (a) in this regard. Further, the pre-trial minute⁸⁵ states that that parties do not

⁷⁸ Pleadings, Bundle 1, p36.

⁷⁹ Transcribed record, Vol 1, p 99.

⁸⁰ Transcribed record, Vol 2, p 104 to 106.

⁸¹ Transcribed record, Vol 3, p 239, line 21 to p 240, line 24.

⁸² Transcribed record, Vol 4, p 258 and 266 and Additional Evidence, Quantification Bundle, p 1.

⁸³ Additional Evidence – Quantification Bundle, p 1.

⁸⁴ Applicant's heads of argument.

⁸⁵ Pleadings, Bundle 1, Minute of Pre-trial Conference, para 14, p 94.

foresee the need for expert evidence. Mr Thom's evidence was based on information extracted from the Respondent's accounting management system. This was unchallenged.

- [94] I have considered Mr Thom's evidence including the calculations from p 264 to 272 of the Respondent's bundle (Bundle 3), that the major impact on the Respondent's business was the reduction in gross profit which was felt in August 2017. I have considered his evidence that the armed vehicle to secure the site was paid for until the end of August 2017 and that the logistical and rental expenses in relation to the warehouse on Germiston continued until December 2017. I have considered that the employees were dismissed following the conclusion of the hearing in August 2017.
- [95] I have taken into consideration, that there were no attempts by the employees to comply with the provisions of Chapter IV of the LRA. I find on the evidence, that the unprotected strike was premeditated given the assembly by the striking workers in the canteen, the placards that were carried by the striking workers during the unprotected strike action with words that related *inter alia* to Mr Steffens, the assault on Mr Steffens, the rejoicing when he left the premises and the list of demands at page 19 of the Respondent's Bundle (Bundle 3).
- [96] I find that the unprotected strike action and assault on Mr Steffens was not in compliance with orderly collective bargaining. I have also considered the duration of the strike, which Mr Chinner stated was 6 hours. I have taken into consideration the financial position of the Respondent in light of the loss suffered by the Respondent as a result of the unprotected strike action. I have taken into consideration the return of the employees on 17 July 2017 and that they were prevented entry onto the premises in the light of the court interdict of 14 July 2017.
- [97] In the light of my afore-going considerations, I find that the just and equitable compensation to the Respondent is the amount of R 829 835.00 for the loss

incurred on the day of the unprotected strike action and days immediately thereafter.

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

Order

1. The Applicant's claim is dismissed.
2. The dismissal of the individual applicants is both substantively and procedurally fair.
3. Just and equitable compensation in the amount of R829 835.00 is awarded to the Respondent, which amount is to be paid by the Applicants jointly and severally, the one paying and the other to be absolved.
4. There is no order as to costs.

MTM Phehane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: S Mabaso of Mabaso Attorneys

For the Respondent: F Boda

Instructed by: Cliffe Dekker Hofmeyr Inc