

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1004/16

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING
AND ALLIED WORKERS UNION**

Applicant

and

TRANSEM (PTY) LTD

Respondent

Heard: 8 -11 October 2019

Delivered: 30 January 2020

Summary: Dismissal for participating in an unprotected strike – lockout subsequent to heeding the last ultimatum and return to work – leavening work place before knockoff time is not a strike but sheer misconduct – conduct of the employer in handling the conduct of the employees subsequent to the calling off of the unprotected strike created a confusion and to an extent provocative of further conduct by the employees – dismissal not appropriate sanction.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] The applicant, the South African Commercial Catering and Allied workers Union (SACCAWU), is challenging the dismissal of its members, the applicant employees, by the respondent, Transem Pty (Ltd) (Transem) for participating in an unprotected strike.

Factual background

- [2] Transem is a dairy plant with its main activities being milk processing, packaging and distribution of dairy products, including fruit juices mixed from concentrates. Milk is received from suppliers in the morning and processed during the day for the deliveries the next day.
- [3] On 21 October 2015, SACCAWU sought organisational rights. Despite discussions on the issue, the parties failed to conclude an agreement on organisational rights up until March 2016. In the meantime, Transem granted SACCAWU the right to stop order facility for the deduction of union subscriptions.
- [4] Although the parties had not concluded a recognition agreement, sometime in March 2016, SACCAWU sought to engage Transem in relation to its members' salaries and conditions of employment. Transem refused to bargain with SACCAWU, stating that it would rather conclude a recognition agreement before engaging in any collective bargaining with SACCAWU. This stance was confirmed on 24 March 2016.
- [5] Notwithstanding, on 31 March 2016, SACCAWU sent a communication to Transem seeking a feedback on its proposal in relation to the issues of mutual interest. On 1 April 2016, SACCAWU referred a mutual interest dispute to the Commission for Conciliation Mediation and Arbitration (CCMA).
- [6] The conciliation hearing was held on 28 April 2016. Transem raised a jurisdictional point, contending that it was not prepared to collectively bargain with SACCAWU as it had no recognition agreement with it and that it had not proved to be a legitimate bargaining agent. In response, SACCAWU

contended that Transem had already commenced engaging it before and only raised the issue of eligibility during the cause of negotiations hence it referred a dispute of mutual interest.

- [7] The commissioner, Ms Miranda Mokgosi, issued a jurisdiction ruling dated 5 April 2016, dismissing Transem's point *in limine*. She found that the CCMA had jurisdiction to entertain the dispute and issued a certificate of non-resolution of the dispute. It is not disputed that the ruling was only received by SACCAWU on 9 May 2016.
- [8] On 20 May 2016, SACCAWU members embarked on a strike which was not preceded by a strike notice to Transem. The striking employees were verbally informed that the strike was unlawful and unprotected. SACCAWU was also accordingly informed of its members' unprotected strike.
- [9] Transem issued three ultimatums. The first ultimatum was issued at 07h30 directing the striking employees to resume their duties by 10h00, but to no avail. At about 10h00, the second ultimatum was issued directing the striking employees to resume their duties by 12h30 and still with no success. The third and final ultimatum was issued at 12h45 directing the striking employees to resume their duties by 14h50. For expediency I deem it appropriate to quote the contents of the third ultimatum in full:
- '1. You are informed herewith that your refusal to work amounts to an unprotected strike. This conduct is unlawful and has serious consequences for you.
 2. You are therefore instructed to end your unlawful conduct and return to work. You must resume duties before 14h50 on this 20th May 2016.
 3. Should you refuse or neglect to return to work and resume your duties in terms of the Contract of Employment on or before the given date and time, you could be summarily dismissed due to your unlawful conduct.
 4. Please take note that the period of absence will be dealt with as absence without remuneration.

5. If you adhere to the ultimatum the employer still reserves the right to continue with disciplinary action against yourself for participating in an unprotected strike.
6. The employer further herewith gives you notice of its intention to lock you out in response to the protected strike should you not return to work on or before 14h50 on 20 May 2016.'

[10] The striking employees returned to work at 13h00 after the intervention of the SACCAWU official, Mr Lebogang Masakale. However, the following employees did not resume their duties (Group A):

- 10.1. Bettie Vuyiswa Mangayi;
- 10.2. Lenyatso Lucas Tibakae;
- 10.3. Vusumzi Josias Pitch;
- 10.4. James Maruping Ntasi;
- 10.5. Thabiso Teddy Njalinjali; and
- 10.6. Goitsemanang Petrus Leshowe.

[11] Whilst the following employees did heed the call to return to work after the third ultimatum, it is alleged by Transem that they left before their work was completed (Group B):

- 11.1. Benjamin Kunupi
- 11.2. Sampi Mangaba;
- 11.3. Thabo Jonas;
- 11.4. Tshwarelo Mothupi;

11.5. Thami Johannes Nkosi;

11.6. Pitiri Nathaniel Qhazane; and

11.7. Papi Matthews Mokaleng;

[12] On 21 May 2016, at about 11h57, Transem sent lockout notices in relation to the above mentioned applicant employees to SACCAWU by email. That was followed by serving the lockout notices on the following employees by hand at about 12h00 on the same day:

12.1. Emmanuel Pakalitha Monaphathi;

12.2. Tshwarelo Mothupi;

12.3. Thami Johannes Nkosi; and

12.4. Papi Matthews Mokaleng.

[13] The above mentioned employees had commenced with their duties when they were served with lockout notices. Upon becoming aware that the four employees had been issued with lockout notices, the following employees abandoned their duties and gathered outside the premises of Transem (Group C):

13.1. Julia Motlalepule Mohapi;

13.2. Kaone Charles Koe;

13.3. Gregory Stoffel Lemek;

13.4. Vuyani Marman;

13.5. Aron Mgeshani;

13.6. Sina Moseki;

13.7. Boniwa Constance Msebi;

13.8. Sekwati Lazarus Thoane;

13.9. Phillemon Bokamoso Zikatile; and

13.10. Thebeetsile Gordon Seetelo.

[14] All the above mentioned employees were ultimately locked out. Transem then charged all the striking employees as follows:

- '1. Participation in an unprotected strike on 20 March 2016.
2. Participation and/or continuation of unprotected strike on 21 May 2016.'

[15] SACCAWU was allowed to represent the striking employees during the disciplinary enquiry. All the striking employees, through SACCAWU, admitted guilt in relation to the first charge. They were found guilty but only received final written warnings.

[16] When it comes to the applicant employees, classified as Groups A, B and C, above, they pleaded not guilty to the second charge. Nonetheless, all of them were found guilty and summarily dismissed on 27 July 2016 for participating in the unprotected strike under the circumstances where they either did not unconditionally return to work in terms of the third ultimatum or did not return to work at all or left work early on 20 May 2016 or walked out on 21 May 2016.

[17] SACCAWU referred an unfair dismissal dispute to the CCMA. Following an unsuccessful conciliation, the certificate of non-resolution directed that the matter be referred to arbitration. Indeed, SACCAWU referred the matter for arbitration. However, it later decided to withdraw the arbitration and launch this action as the reasons for the dismissal of the applicant employees stem from the unprotected strike. Even though, Transem initially took issue with

the turn of events, contending that this Court has no jurisdiction to deal with the matter as the dispute before it was never conciliated, it has since abandoned that pursuit, prudently so.

Issues to be decided

[18] The crisp issues for determination are as follows:

18.1. Whether the dismissal of the applicant employees was substantively fair; and

18.2. Whether the sanction of dismissal was appropriate.

Legal principles and application

[19] It is trite that section 68(5) of the Labour Relations Act¹ (LRA) grants the employer a right to dismiss employees who participate in a strike that does not comply with the provisions of the LRA.² However, as confirmed by the Labour Appeal Court (LAC) in *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*,³ the unlawfulness of the strike is not 'a magic wand which when raised renders the dismissal of strikers fair'. As such, the determination of substantive fairness of a dismissal pursuant to a strike must be undertaken in two stages; firstly, in terms of item 6⁴ of the Code of Good Practice: Dismissal, Schedule 8

¹ Act 66 of 1995 as amended.

² See: *Vodacom (Pty) Ltd v CWU* [2010] 8 BLLR 836 (LAC) at pars 10 and 11, where it was held that despite the procedural compliance with section 64, a strike will be unprotected if it is prohibited in terms of section 65 of LRA.

³ [2014] 1 BLLR 31 (LAC) at para 29. See also *National Union of Mineworkers of SA v Tek Corporation Ltd and Others* (1991) 12 ILJ 577 (LAC).

⁴ Items 6 provides:

(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.

of the LRA (Code) where a strike related enquiry takes place and secondly, in terms of item 7⁵ of the Code where the enquiry into the misconduct *per se* takes place.

[20] In *SACCAWU obo Bonolo Mokebe and 71 Others v Pick n Pay Retailers*,⁶ relied on by the applicant, the LAC referred with approval to the judgment in *Hendor Steel Supplies v National Union of Metalworkers of SA and Others*,⁷ where the sanction of dismissal of employees who embarked on an unprotected strike for seven weeks was found to be disproportionate to the misconduct and accordingly unfair. The LAC stated:

‘[34] The Court in *Hendor* held as follows in relation to the principle of proportionality (at para 8):

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

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- (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.

⁵ Item 7 provides:

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

- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the 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; the rule or standard has been consistently applied by the employer; and
 - (iii) dismissal was an appropriate sanction for the contravention of the rule or standard.’

⁶ (2018) 39 ILJ 201 (LAC) at paras 34 and 35.

⁷ (2009) 30 ILJ 2376 (LAC).

conduct of the strike to test whether dismissal was proportional to the misconduct.'

It went on to hold (at para 14) that:

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

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

[21] In this instance, it is common cause that SACCAWU had referred a dispute of mutual interest to the CCMA. Consequent to the dismissal of Transem's point *in limine* challenging the jurisdiction of CCMA and the issuing of a certificate of outcome declaring the dispute as unresolved, the applicant employees were eligible to embark on a protected strike. The only misdirection was that SACCAWU failed to issue a strike notice, hence the strike was unprotected. Clearly, there was an attempt by SACCAWU and the applicant employees to comply with the provisions of the LRA.

[22] Nothing much turns on Transem's contention that the jurisdictional ruling was irregular and that the certificate of outcome that certified the dispute of mutual interest as unresolved was defective. Firstly, Transem failed to challenge the jurisdictional ruling and as such it is binding. Secondly, section 64(1)(a) of the LRA require that a 'certificate stating that the dispute remains unresolved has been issued or a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the Council or the Commission'. In essence, the issuing of the jurisdictional ruling gave the applicant employees a right to

strike even without an outcome certificate. As stated above, the illegality of the strike stems from the failure by SACCAWU and the applicant employees to comply with section 64(1)(b) of the LRA.

[23] The contravention of the LRA was not serious. It was the applicant employees' evidence that they were under the impression that the strike was protected. However, as soon as the SACCAWU official intervened, the strike was called off and the striking employees resumed duties. In my view, the fact that all the striking employees were given final written warnings in relation to the strike of 20 May 2016 gives credence to the inconsequential nature of the contravention.

[24] The crux of the matter is the conduct of the applicant employees in Groups A, B and C.

Group A applicant employees

[25] Group A employees, save for Ms Bettie Manganyi (Ms Manganyi), did not resume their duties as directed in terms of the third ultimatum. It is common cause that Ms Manganyi had to attend to her sick child and subsequently submitted a note from the hospital as proof of her whereabouts on 20 May 2016. Thus, Transem conceded that she should not have been dismissed.

[26] As for the rest of Group A applicant employees, Mr Vusumzi Josias Pitch (Mr Pitch) testified that they were all workshop employees. The reason they did not resume their duties on 20 May 2016 consequent to the final ultimatum is that they went to buy food and did not return. However, he was adamant that they were not on strike as it was called off at about 13h00. Since they did not work on Saturdays, they only returned to work on Monday 23 May 2016. They commenced with their duties and at about 09h30 they were told to leave the premises of Transem because they were locked out for participating in the strike on 20 May 2016.

[27] It is not disputed that that the Group A applicant employees were part of the strike action. However, their defence was that they went to buy food and did not resume their duties consequent to the third ultimatum.

[28] In *County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers Union and Others*,⁸ the LAC held that it is well within the employers powers to differentiate between the striking employees who responded to the ultimatums to resume their duties and those who simply ignored those ultimatums. In that matter, the employer issued the first ultimatum and several employees responded and resumed their duties. It was followed by a final ultimatum and again another group of employees responded. The group that ignored the final ultimatum and the extended time to resume their duties were dismissed. The LAC upheld the employers appeal and found that:

[29] While the appellant suffered economic harm as a result of the strike, the evidence show that this harm was chiefly experienced for first 1½ days after the commencement of the strike and was therefore attributed to the conduct of all striking employees and not the respondent employees alone. However, in concluding that dismissal was too harsh a sanction to be imposed on the respondent employees, in my view the Labour Court did not have appropriate regard that the unprotected strike was embarked upon in a critical business period; the final ultimatum had been issued calling on the respondent employees to return to work; the final ultimatum had been extended to provide the respondent employees additional time within which to comply with it; the final ultimatum was ignored by the respondent employees with no bona fide reason put up to explain why this was so; that no remorse was shown for this conduct by the respondent employees; and the conduct of the respondent employees at the disciplinary hearing.'

[29] In my view, the *County Fair Food*⁹ dictum is distinguishable. In the matter at hand, even though the Group A employees did resume their duties as per

⁸ (2018) 39 ILJ 1953 (LAC).

⁹ Ibid.

the third ultimatum, their conduct was not deliberately aimed at sabotaging Transem operations. They just simply disappeared and never returned to work that day not because they were furthering the strike. At most, they just went AWOL. In any event, even if their conduct was a furtherance of a strike, the deadline to resume their duties as per the third ultimatum was 14h50. Most of the Group A applicant employees worked at the workshop. It is not disputed that they commenced their duties at 07h00 and knocked off at about 16h00. Therefore, they were on a strike longer than the rest of the striking employees by only an hour or two. On Monday 23 May 2016, they reported for duty as usual and were prevented by Transem's lockout from continuing with their duties.

- [30] To my mind, the sanction of dismissal was clearly disproportionate to the misconduct committed, especially in light of the fact that there was an attempt to comply with the provisions of the LRA, the strike was not eventful and SACCAWU's intervention was successful as the strike was called off. Transem failed to give a cogent reason for distinguishing between those who resumed their duties consequent to the third ultimatum and the Group A applicant employees.

Group B applicant employees

- [31] Group B applicant employees did heed the call to return to work on 20 May 2016, but were accused of leaving before finishing their lot for the day. Mr Thami Johannes Nkosi (Mr Nkosi) testified that he worked with Messrs Emmanuel Pakalitha Monaphathi (Mr Monaphathi), Tshwarelo Mothupi (Mr Mothupi) and Papi Matthews Mokaleng (Mr Mokaleng). On 20 May 2016, they were given an order to pack and upon finishing the allocated duties they knocked off. Transem conceded that Mr Thabo Jonas (Mr Jonas) was not supposed to be dismissed as he was on the 13h00 shift and had resumed his duties on 20 May 2016, albeit after 13h00. He was also prevented by Transem's lockout from resuming his duties on 21 May 2016.

- [32] Mr Sampi Mangaba (Mr Mangaba), a Tanker Assistant, testified that he knocked off when he had finished his duties. Normally, it was not required of him to report to Mr SP Dunker (Mr Dunker), the Production Manager, when he was done with his duties and ready to knockoff. On the particular day, he was never asked to assist anyone with their duties. Mr Mangaba was adamant that he did respond to the third ultimatum but had forgotten to clock out.
- [33] Benjamin Kunupi (Mr Kunupi), a Truck Driver, testified that he went to the restroom after clocking in response to the third ultimatum at about 13h00. When he returned, he found that his stock had been given to another driver. He remained in the premises and knocked off at 16h00. On 21 May 2016, he reported for duty as usual. Mr Dunker told him not to take his truck but wait for him in the office. Later, he was served with a strike lockout.
- [34] On the other hand, Mr Dunker testified that it was highly improbable that the applicant employees could have finished their duties when they knocked off because at that stage there was a huge backlog due to the strike. However, he conceded during cross-examination that he had no proof of what was the outstanding workload when the Group B applicant employees knocked off on 20 May 2016.
- [35] The issue for determination in relation to the Group B applicant employees is whether their conduct constitutes a strike or furtherance of a strike and as such constitutes either a breach of the contract of employment or a breach of a workplace rule. In *Transport and Allied Workers Union of SA on behalf of Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd*,¹⁰ defining a strike, the Constitutional Court stated that:

[161] The definition of the word 'strike' in the LRA includes the phrase 'concerted refusal to work'. That part of the definition – as opposed to the reference to the 'retardation or obstruction of work' – is the part applicable to a case such as the present where the workers

¹⁰ See: *Transport and Allied Workers Union of SA on behalf of Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd* (2016) 37 ILJ 2485 (CC) at para 160.

completely refuse to work. It is a basic principle of our law that, for employees to be said to be on strike, they must be collectively refusing to work at a time when, in terms of their contracts of employment, they are obliged to be working. 95 If the time when the workers are not working is a time when they are not obliged to be working, they cannot be said to be on strike except when their conduct constitutes an overtime ban. This is why, if workers who take their lunch break from 13h00 to 14h00 collectively stop working at 13h00 on a particular day and spend their lunch break singing, toying and carrying placards outside of or by the gate of the employer demanding a wage increase, they are not in law engaged in a strike. However, once they do that at a time when they are obliged to work, they will be on strike and, if the prescribed statutory procedures have not been followed, the strike will be an unprotected strike.'

[36] Clearly, the Group B applicant employees did respond to the third ultimatum and abandoned the strike. Their subsequent conduct could not have been a furtherance of a strike as they did perform their duties. To the extent that they were accused of leaving before finishing their allocated duties, that constituted a desertion of duties but not a strike. Also, Mr Dunker conceded that he had no proof that they had left their duties incomplete but a sheer speculation based on the general average work load allocation.

[37] It not disputed that the truck drivers and their assistants commenced work at about 05h00 and knocked off as and when they were finished with their duties. In my view, Transem failed to prove that the conduct of the Group B employees constitutes a strike or furtherance of a strike.

Group C applicant employees

[38] It is common cause that on 21 May 2016 at about 12h00, Messrs Nkosi Monaphathi Mothupiti and Mokaleng were served with lockout notices for allegedly continuing with the strike when they knocked off on 20 May 2016. Mr Nkosi testified that Mr Gordon Seetelo (Mr Seetelo) asked Mr Dunker as to how was he expecting the rest of the employees to continue with the production after locking out the four employees. Mr Dunker told him that they

were free to join their friends who had been locked out. Thereafter, there was confusion as to who was locked out and hence all the Group C employees left the premises. At about 12h30 they were locked out as well.

[39] Mr Dunker denied that he told the Group C employees to join their friends who had been served with locked out notices. When he asked them why they were leaving the premises, they just ignored him.

[40] Mr Bernard Myburgh (Mr Myburgh), Transem's legal advisor, testified that he advised Transem to lock out the Group B applicant employees because their conduct in knocking off early on 20 May 2016 constituted a furtherance of a strike. Also, he advised Transem to lock out the Group C applicant employees because their conduct in abandoning their duties on 21 May 2016 constituted a furtherance of the strike that commenced on 20 May 2016. That is so, despite the fact that the strike had been called off at about 13h00, on 20 May 2016. It is also clear that these applicant employees had responded to the third ultimatum by resuming their duties and had not been accused of knocking off early on 20 May 2016.

[41] When Mr Myburgh was teased about his understanding of a strike and what was the demand on 21 May 2016, he was found wanting. In my view, Mr Myburgh's advice to Transem was the source of confusion. He clearly misconceived the purpose of a lockout. It is mindboggling that the employer would target individual employees who had resumed their duties and lock them out retrospectively as a result of a strike that had been called off. It is even more telling in this instance as Mr Myburgh asserted himself as a legal expert.

[42] If indeed the conduct of the Group C applicant employees constituted a strike, it was clearly consequent to the ill-conceived advice by Mr Myburgh to lock out employees when there was no strike. As such, it could not have been a furtherance of the unprotected strike that was called off on 20 May 2016. In fact, Mr Myburgh conceded under cross examination that the

conduct of the Group C applicant employees constituted a new strike. However, he failed to involve SACCAWU or issue new ultimatums.

- [43] In my view, the sanction of dismissal was disproportionate to the misconduct if regard is had to the circumstances of this matter. The Group C applicant employees resumed their duties when the strike was called off on 20 May 2016; they were busy attending to their duties on 21 May 2016 when their colleagues were called out of their work stations and served with lockout notices; they were caught in the confusion that was brought about by the locking out of their colleagues on 21 May 2016; and Transem did not involve the union or issue fresh ultimatums as the work stoppage on 21 May 2016 had nothing to do with the strike of 20 May 2016. Put otherwise, the strike that was embarked upon on 20 May 2016 had been called off and the conduct of the Group C applicant employees was prompted by the conduct of Transem when it issued lockout notices for Group B applicant employees. Also, these employees had commenced with their duties and were about to knock off at 13h00. In essence, the strike was less than two hours at most.

Conclusion

- [44] In all the circumstances, Transem failed to show that the dismissal of the applicant employees was substantively fair. Transem clearly ignored the well-established principle that dismissal should only be considered as a last resort.¹¹

Remedy

- [45] On the issue of the remedy, Mr Dunker testified that it is not possible for Transem to reinstate or re-employ any of the Applicants, due to the fact that no vacancies exist, and that it is currently downscaling its business. On the other hand, the applicant employees submitted that, in the absence of

¹¹ *Pick 'n Pay Retailers supra* n 6; see also *W G Davey (Pty) Ltd v National Union of Mineworkers of SA* 1999 (3) SA 697 (SCA); (1999) 20 ILJ 2017 (SCA) at para 18.

evidence that the continued relationship is rendered intolerable by breach of trust, they are eligible to reinstatement.

[46] Strangely, despite Transem's concession that Ms Manganyi and Jonas were not supposed to be dismissed, it opposes their reinstatement as well.

[47] The defence of 'Not reasonably practicable' must mean more than inconvenient, troublesome or uncomfortable;¹² but refers to that which is effectively fair, calling for an objective value judgment predicated on evidence.¹³ In *SACCAWU v Woolworths (Pty) Ltd*,¹⁴ the Constitutional Court held that 'not reasonably practicable' requires evidence of a compelling operational burden.

[48] To this extent, I find the works of *Kanamugire* and *Chimuka*¹⁵ apposite when they say '*The fact that an employer has replaced an employee does not render reinstatement "not reasonably practicable" and "was not a factor to be taken into account as the respondent had created the situation by its own unfair conduct"*'. Similarly, in *Volkswagen SA (Pty) Ltd v Brand NO*,¹⁶ Landman J referred with approval to the statement of Brassey that:

'[reinstatement] will also be invoked when the employee's job has been filled by a replacement, but care must be taken lest this become a ready means by which an employer can escape her obligations. In cases of this sort, an employee should normally be reinstated and the employer be left to do what he or she traditionally does when there are too many employees on the payroll – commence the process of dismissal for operational requirements.'

(Footnotes omitted)

[49] In the matter at hand, there is no evidence of compelling operational burden that would justify an order denying the applicant employees the primary remedy of reinstatement. Any submission to the contrary is negated by the

¹² *Equity Aviation Services (Pty) Ltd v CCMA* (2011) 32 ILJ 590 (LC) at para 36.

¹³ *NUMSA obo Members v Aveng Trident Steel* [2018] 5 BLLR 500 (LC) at 520.

¹⁴ [2019] 4 BLLR 323 (CC).

¹⁵ *Reinstatement in South African Labour Law: Mediterranean Journal of Social Sciences*: Vol No.9, May 2014.

¹⁶ (2001) 5 BLLR 558 (LC at para 102).

fact that the other striking employees were issued with final written warnings for participating in an unprotected strike that lasted almost half a day.

[50] On the issue of back payment, I am of the view that a 12 months back payment would be fair under the circumstances.

Costs

[51] I am disinclined to award costs. In any event, it is now an established principle that costs do not follow the result in this Court¹⁷.

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

Order

1. The dismissal of the applicant employees whose names appear in annexure A of the Notice of Motion is substantively unfair.
2. The applicant employees are reinstated with a backdated period of 12 months from the date of this order.
3. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Mr P Ngoato, SACCAWU Official

¹⁷ See: *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC).

For the Respondent:

Mr H Wissing of Henk Wissing Incorporated

LABOUR COURT