



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

REPORTABLE

Case no: JS857/20

In the matter between:

**ASSOCIATION OF MINeworkERS & CONSTRUCTION UNION** Applicant  
**OBO MAROGA AND 38 OTHERS**

and

**EASTERN CHROME MINES (SAMANCOR LTD)**

Respondent

**Heard:** 17 January 2025

**Delivered:** 23 April 2025

**Summary:** Mass dismissal of mineworkers for refusing to work in unsafe conditions. Whether such conduct constituting strike or withdrawal of labour under section 23(1) of the Mine Health and Safety Act. Court finding that conduct constituting strike, but that sanction of dismissal harsh. Accordingly, the dismissal is found to be substantively unfair.

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**JUDGMENT**

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**DANIELS J**

## Introduction

[1] The applicant, the Association of Mineworkers and Construction Union (“AMCU”) represents 39 employees (the “dismissed employees” or the “individual applicants”) dismissed by the respondent on 23 July 2020. The individual applicants contend that their dismissal was procedurally and substantively unfair. The respondent contends that they were fairly dismissed for participating in an unprotected strike. The applicant contends that there was no strike but a withdrawal of labour in terms of section 23(1) of the Mine Health and Safety Act No. 29 of 1996 (“MHSA”). However, even if there was an unprotected strike, the applicant contends, the sanction of dismissal was too harsh.

## Background facts

[2] The events in this matter occurred in the context of a global pandemic - the so-called novel coronavirus (“COVID19” or the “virus”). COVID19 is a highly contagious respiratory disease, which emerged during late 2019 in China. It spread rapidly across the world, and was declared a pandemic by the World Health Organisation during March 2020. It is spread through saliva, or discharge from the nose or mouth, when an infected individual talks, coughs or sneezes. It can also be contracted through touching surfaces where the virus is present. The virus has an incubation period, during which an infected person may not be aware they are infected, but can transmit the disease. Individuals with compromised immunity, respiratory or other conditions, such as diabetes, are particularly vulnerable. The disease can cause respiratory failure and death.<sup>1</sup>

[3] It has been noted, by our courts, that mineworkers in South Africa were particularly vulnerable to COVID19, given that lung diseases are common among them.<sup>2</sup> Furthermore, mineworkers typically operated in confined spaces where social distancing is difficult.<sup>3</sup>

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<sup>1</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

<sup>2</sup> *Nkala and Others v Harmony Gold Mining Co Ltd and Others* 2016 (5) SA 240 (GJ)

[4] On 15 March 2020, the President of South Africa announced a national state of disaster<sup>4</sup> and various measures to curb the spread of the virus.

[5] On 23 March, a three week long national lockdown was announced (commencing on 27 March) involving curfews and strict limits on travel and movement, to be enforced *inter alia* by the South African Police Services and the South African National Defence Force.<sup>5</sup> During this time, few were permitted to leave their homes, travel, or attend the workplace. On 16 April,<sup>6</sup> it was announced that the lockdown would be extended by a further two weeks, to 31 April.

[6] On 29 April,<sup>7</sup> the Minister of Employment and Labour published a directive in terms of Regulation 10(8) of the Disaster Management Act to adopt and implement measures to reduce and eliminate COVID19 infections in the workplace. The directive required employers, among other things, to establish a COVID19 policy, to screen employees for symptoms of the virus, to conduct testing where necessary, to ensure social distancing, to ensure the use of face masks in the workplace, and to ensure that employees have ready access to sanitisers. Importantly, the directive stated:

*“[23] If a worker presents with those symptoms, or advises the employer of those symptoms, the employer must [23.1] not permit the worker to enter the workplace or report for work; or [23.2] if the worker is already at work immediately – [23.2.1] isolate the worker ... [23.2.2] assess the risk of transmission, disinfect the area and the worker’s workstation, refer those workers who may be at risk for screening and take any other appropriate measure to prevent possible transmission” (own emphasis)*

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<sup>3</sup> *AMCU v Minister of Resources and Energy and Others* (2020) 41 ILJ 1705 (LC) at para 5

<sup>4</sup> GG 43096 (15 March 2020) as contemplated by the Disaster Management Act 2002

<sup>5</sup> GG 43148 (25 March 2020) - amendments to Regulations under the Disaster Management Act 2002

<sup>6</sup> GG 43232 (16 April 2020)

<sup>7</sup> GG 43257 (29 April 2020)

[7] On 29 April,<sup>8</sup> the Minister of Cooperative Government and Traditional Affairs announced that, with effect from 1 May, the country would move from Alert Level 5 to Alert Level 4 with a partial reduction of restrictions on movement and work. Mining was permitted to move to 50% of production capacity. From 1 June,<sup>9</sup> the Alert Level was further lowered to Level 3.

[8] On 4 June, the “*Consolidated COVID19 Direction on Health and Safety in the Workplace*”<sup>10</sup> was issued. Clause 48, echoed section 23(1) of the MHSA, and stated: “*An employee may refuse to perform any work if circumstances arise which with reasonable justification appear to that employee or to a health and safety representative to pose an imminent and serious risk of their exposure to COVID19*”. Clause 54 stated that no employee may be dismissed, disciplined, prejudiced, or harassed for refusing to perform any work in circumstances contemplated by clause 48.

[9] By July, the respondent had ramped up its production to between 80% to 90% of capacity.

[10] It was common cause that:

10.1 The respondent operates several underground mines from the same vicinity, collectively known as Eastern Chrome Mines. This includes Tweefontien mine, Lannex mine, and Doornbosch. These mines are managed centrally.

10.2 On 21 July, the morning shift, at Doornbosch, comprised of approximately 800 employees, refused to go underground because the shop stewards informed them that there had been a number of recent infections at the mine. They did not invoke the employer’s grievance

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<sup>8</sup> GG 43258 (29 April 2020)

<sup>9</sup> GG 43364 (28 May 2020)

<sup>10</sup> GG 434400 (4 June 2020)

procedures; or the procedure applicable to a withdrawal of labour contemplated in section 23(1) of the MHSA.

10.3 The Union met with management and complained, inter alia, about poor communication, by management, relating to infections. The Union requested that management test the entire shift.

10.4 When no agreement was reached, during the morning of 22 July, management issued an ultimatum. The ultimatum advised that a final written warning had been issued to the entire shift, and management required all employees to report to their work stations with immediate effect failing which drastic steps would be taken, which could include dismissal.

10.5 On 23 July, by 09h00, after being urged to do so by the Union, the majority of the shift went underground. Approximately 40 employees refused to do so. They were escorted off the mine by security, and informed of their dismissal by SMS.

10.6 An appeal hearing was held, and the fairness of the dismissals reconsidered. The respondent dismissed the appeals.

10.7 After the dismissals, the NUM and management concluded an agreement that the final written warnings issued to the employees on 22 July, in respect of those employees who had not been dismissed, would be withdrawn. The document recording the agreement did not set out reasons why management agreed to withdraw the warnings.

#### Evidence presented by the parties

##### *Testimony of Pieter Ernst Brits*

[11] The respondent commenced with the leading of evidence and called three witnesses. Its first witness, the human resources manager, Mr Pieter Ernst Brits (“Brits”) testified as follows:

11.1 There are two recognized unions, which have as their members the vast majority of the employees at Eastern Chrome Mines. They are UASA, and the National Union of Mineworkers (the “Union” or the “NUM”). The shop stewards involved in this matter were all drawn from the ranks of the NUM, and included the fulltime health and safety representative. The health and safety representatives worked with the manager in the mine responsible for Safety, Health, Environment and Quality, Murendeni Ngobeneni (“Murendeni”).

11.2 Employees who work underground enter the mine through an access point where they clock in. They collect their PPE from the laundry and go to the change house where they dress. They then go to the lamp room, where they collect their self-rescue packs. Thereafter, they proceed underground, by way of a chair lift.

11.3 He testified, in broad strokes, about the measures taken during 2020, by the respondent, to limit the spread of the virus. Though unclear when exactly each measure was implemented, provision was made to screen all employees, test employees who displayed symptoms, quarantine employees awaiting test results, and isolate employees who tested positive. The respondent’s COVID19 policy made provision for deep cleaning of the change house bi-monthly and the disinfection of the change house following every shift. Turnstiles, and counter tops, in the change house were disinfected every two hours. The respondent appointed an individual to control access to the change house, and implemented a token system to limit the number of employees using the change house at any particular time. These measures were required by the directions, and regulations, issued under the Disaster Management Act.

11.4 Brits conceded that he had no knowledge of the state of the change house, because he never goes there.

11.5 He explained the contents of the policy document titled *“Procedure to Leave a Dangerous Working Area”*.<sup>11</sup> In summary, the procedure stated that, if circumstances arise which, with reasonable justification, appears to pose a serious danger to health and safety, the employee must notify co-workers of the risk or hazard and leave the area. The risk or hazard must be reported to the health and safety representative who, in turn, must report it to the supervisor. The supervisor must investigate the unsafe condition and rectify it. If the condition cannot be immediately resolved, the area must be barricaded off and fixed. There should be no entry to the area until the condition is fixed and the area declared safe. The procedure refers to the right of employees to protect their own health and safety, and the duty of every employee to protect the safety of others. Importantly, clause 8 reads: *“Employees have the right to leave any area that they may consider dangerous in terms of the possibility of COVID-19 infections and report such occurrences in line with section 23 of the Mine Health and Safety Act 29 of 1996.”*

11.6 The respondent established a safety committee, which included elected representatives from employees. The committee scheduled weekly meetings, to be held every Tuesday. Meetings of the committee (the “safety committee”) were also attended by the full-time health and safety representative. Brits was the usual chairperson.

11.7 Meetings of the safety committee were held on 18 June, 25 June, and 2 July.<sup>12</sup>

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<sup>11</sup> The document, effective from April 2012, was last reviewed, and signed, in July 2022. Though the Procedure, as at July 2020, was not made available, it was clear that an earlier version of the same Procedure was in effect as at July 2020.

<sup>12</sup> Para 8.1.4 of the pre-trial minute records as follows: *“If after a two (2) week period, no record has been made with regards to the authenticity and/or true contents of the documents it will be*

11.8 Minutes of the safety meeting, on 18 June,<sup>13</sup> reflect the following discussion:

*“[4.1] Currently 385 mines taking part in the Dashboard. These statistics may have changed during the course of today. MN discussed the global vs South Africa. Positive cases and recovery cases were discussed. Total of deaths are currently 3. ... We are entering a peak stage. MN will distribute the statistics to all attendees.”*

*[5.2] Doornbosch*

*[5.2.1] PM commented that they are experiencing issues with social distancing at Doornbosch change houses. Stickers were discussed. The system that controls the social distancing is currently not working. MN will follow up with the Mining Manager. The new employees do not all have access to lockers.*

*[5.2.2] PPE – issue of dust masks being re-used instead of being disposed of. ...”* (own emphasis)

11.9 Minutes of the safety meeting on 25 June<sup>14</sup> reflect the following:

*“[5.2] MN commented that last week Thursday – our first positive COVID-19 case (an employee from TWF). The whole process of contact tracing, self-isolating, feedback etc was handled very well. Employee is still in isolation, we will keep monitoring him.”*

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*accepted that the other party admits the aspects as to the true contents and/or the authenticity of the documents.”* There was no record of any objection to the authenticity or contents of the documents. Accordingly, I accept that the parties had agreed that the documents are authentic and they are a true record of what they record.

<sup>13</sup> Minutes of meeting, Respondent’s Preliminary Trial Bundle (B1) at pp 363 – 366

<sup>14</sup> Minutes of meeting, Respondent’s Preliminary Trial Bundle (B1) at pp 368 – 370

[6.1] NT commented on the communication on the systems – they are in place. The stigma around the COVID – employees are afraid. Employees to be educated regarding the treatment of others.

[6.3] MN – if employees follow guidelines and procedures – primary contact will not be an issue. Employees must take accountability for their own lives as well.” (own emphasis)

11.10 Minutes of the safety meeting on 2 July,<sup>15</sup> reflect:

2.1] PB gave feedback on the Safety....

[2.2] COVID-19 Policies and Regulations – we’ve observed that there is an increase of leave due to the COVID pandemic. It’s up to the doctor’s integrity to issue sick leave. This however adds additional strain on employees working underground. To date we have 3 positive cases. 2 employees are in self-isolation. 1 employee is currently in hospital in Polokwane.

[2.3] TT – the nature of this COVID pandemic puts responsibility on all employees as individuals. There is a huge increase in affected employees. Samancor is trying to minimize infections. We are at the lowest number of positives currently. Management is trying to manage this pandemic in every way possible. We need to acknowledge that this condition exists. The pandemic has devastating effects on many people; thus, this is a very serious challenge we are facing.

[2.5] PB advised that we need to be very cautious – keep to the rules and regulations of sanitizing, social distancing etc.”

(own emphasis)

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<sup>15</sup> Minutes of meeting, Respondent’s Supplementary Trial Bundle (B2) at pp 29 - 33

11.11 No minutes were produced for safety meetings on 9 July or 16 July and it became clear that no meetings were held on those days.<sup>16</sup> The parties removed pages 379 and 380 from the documents bundle marked B1 – which purported to be minutes of the meeting on 16 July. An agenda for the meeting on 9 July was wrongly identified, in the index to documents, as minutes.

11.12 Between 9 July and 21 July, at Doornbosch, approximately fourteen employees had tested positive for the virus.<sup>17</sup> By 21 July, none of these individuals had recovered and returned to work. It remains unclear when the test results of these employees became available to the employer, though Brits speculated that the results would likely have been received 2 to 3 days after the test. Regardless of when the test results became available, the common cause facts showed that there was a marked increase in infections between 25 June and 21 July.

11.13 At the safety meeting on 21 July, respondent made a presentation on how the spread of the virus would be limited. The respondent indicated that primary contacts of employees who test positive would not be sent for testing unless they exhibited symptoms. Brits testified that, at the meeting, no concerns were raised that it may be unsafe to go underground.<sup>18</sup>

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<sup>16</sup> Transcript 2 December 2024: p56 (lines 19 – 23) p122 (line 22) to p123 (line 1 - 16)

<sup>17</sup> Covid19 Report: Respondent's Preliminary Trial Bundle (B1) at page 433A

<sup>18</sup> Minutes of meeting, Respondent's preliminary trial bundle (B1) at pages 381 – 383

11.14 On 21 July, the following occurred:

11.14.1 At 07h30, the morning shift, comprised of approximately 800 mineworkers, refused to go underground.

11.14.2 When this was reported to Brits, he contacted the shop stewards. This led to a meeting between management and the shop stewards, at which management stated that the refusal to work constituted an unprotected strike.

11.14.3 After the meeting, the shop stewards engaged with the employees. The shop stewards reported back to management that the employees would not go underground until they had all been tested. The shop stewards complained that a team leader, Mr Kenneth Lerutla (“Lerutla”) had tested positive but there was no communication about this from the health and safety manager, Murendeni. Brits said that Lerutla had only been tested the previous day and, while awaiting his test results, had been admitted to the respondent’s quarantine facility. Brits testified that the policy, if an employee tested positive, was to withdraw the “full crew” and do contact tracing for those employees who worked with that person.

11.14.4 A further meeting was held between 10h00 and 12h00. The Union stated that the employees were not participating in a strike, but had withdrawn their labour in terms of section 23 of the MHSA. The Union said that the employees were too afraid to go underground. The Union contended there was poor communication of infections by management. Management responded that it always communicated positive cases to the shop stewards and, in fact, Murendeni had done so that same morning. Brits advised that management could not release personal information, because of the POPI Act.<sup>19</sup> The Union asked if management would withdraw all employees in close contact with Lerutla.

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<sup>19</sup> The Protection of Personal Information Act 4 of 2013 has come to be known as the “POPI”

Management responded that it would be willing to send the four teams<sup>20</sup> who had worked with Lerutla for screening; with testing reserved for those who displayed symptoms.<sup>21</sup> The Union complained that it experienced difficulties communicating with members because gatherings were not permitted. Brits made notes of ideas as to how management could improve communication about infections.

11.15 On 22 July, several meetings were held, at which the following occurred:

11.15.1 The Union reiterated, to management, the position adopted the previous day that the employees felt unsafe because of the increase in infections, and were exercising their rights to withdraw their labour in terms of section 23. Thereafter, the Union engaged with the employees once again.

11.15.2 The Union reported back to management at approximately 09h00. The regional secretary of NUM attended. The regional secretary stressed that the employees felt vulnerable. He made suggestions relating to the cleaning of machinery, disinfecting of the area, and the use of contract tracing. Thereafter, the Union engaged with the employees again.

11.15.3 Management handed a letter to the Union titled "Ultimatum to resume normal duties." In it, management advised the employees that their failure to "immediately" resume their duties would result in drastic steps which could include dismissal. Management stated that all the employees, who engaged in the unprotected strike on 21 and 22 July, were issued with a final warning. The Union met with the employees thereafter.

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<sup>20</sup> According to Brits, four teams comprised twenty four individuals. See transcript of 2 December 2024: p155 at line 5

<sup>21</sup> Transcript 2 December 2024: p152 (line 10) to p154 (line 15). The transcribers on occasion, incorrectly, transcribed the words "four teams" as "40" and "14".

11.15.4 The Union reported back at approximately 11h20. It no longer persisted with its initial request that all employees (on the morning shift) be tested.<sup>22</sup> The Union called on management to engage with it on how to manage the virus and requested random testing.<sup>23</sup> Management responded that it could only offer to test ten employees.

11.15.5 When the employees left the mine that afternoon, they did not clock out. It was put to Brits that the reason why the employees did not clock out was to demonstrate, to management, that they were willing to work if they had a safe work environment.

11.16 On 23 July, the following occurred:

11.16.1 The Union began engaging with the employees from 07h05, encouraging them to return to work.

11.16.2 By 07h30 some employees began to go underground, but the majority refused to do so.

11.16.3 Management informed the shop stewards that it would lock the gates, and begin to dismiss employees if they had not returned to work by 08h00. The shop stewards again met with the employees and urged them to return to work.

11.16.4 By 09h00, the vast majority of the employees (on the morning shift) had returned to work. However, approximately 40

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<sup>22</sup> Transcript 3 December 2024: p8 (line 8) to p9 (line 10)

<sup>23</sup> Transcript 3 December 2024: p9 (lines 15 - 23); Note that, in the respondent's opening address, the respondent conceded that the Union shifted from its initial demand that all employees on the morning shift must be tested – see Transcript of 12 December 2024 at p12 lines 17 – 21

employees refused to do so and were escorted off the mine by security. Once again, the employees did not clock out.<sup>24</sup>

11.16.5 The employees escorted from the mine were informed of their dismissal via short message service ("SMS"). It was put to Brits<sup>25</sup> that Mr Mashishi was one of the dismissed employees and, at his suggestion, the employees (who had been escorted off the mine) had recorded their names on a piece of paper.<sup>26</sup> It was suggested to Brits that the paper identified three employees who were dismissed but subsequently re-employed, namely Messrs. Mashishi, Nkuna, and Matlala. Brits denied this.

11.17 Brits confirmed that, at no time during the stoppage, did anyone from management address the employees, where they were gathered, at the green area.<sup>27</sup>

11.18 Brits testified that before the strike neither the employees, nor the Union, raised safety and communication complaints, through the grievance procedure. Nor did the employees try to follow the procedure one is required to use when there is a withdrawal of labour in terms of section 23(1).

11.19 Brits testified that COVID19 cases are communicated to the safety committee, and communications from the general manager's desk.

11.20 Brits denied that respondent selectively re-employed any dismissed employees. He testified: (1) Mr Mashishi was not dismissed because his clocking history reflected that he had worked on 21 July, did

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<sup>24</sup> Transcript 3 December 2024: p14 lines 14 – 25

<sup>25</sup> Transcript 3 December 2024: p26 lines 1 – 8

<sup>26</sup> The handwritten list is found in the applicant's trial bundle (A1) at p32. None of these employees testified. It was therefore hearsay that they were dismissed together with the individual applicants.

<sup>27</sup> Transcript 3 December 2024: p22 lines 8 – 14

not work on 22 and 23 July, and was booked off sick on 24 July (2) Mr Nkuna worked every day between 21 and 23 July, (3) Mr Matlala completed his medical on 21 July and continued with his induction on 23 and 24 July.

*Testimony of Mr Paul Mahlako*

[12] Mr Mahlako (“Mahlako”) testified as follows:

12.1 During July 2020, he was a shop steward of the NUM, and the full-time health and safety representative. When there is an immediate safety problem, the employees are required to inform their supervisor and contact the health and safety representative. If the issue cannot be resolved by the supervisor, the team leader must be contacted. If this did not resolve the matter, the miner must be contacted, and if that did not resolve the matter the chief boss must be contacted. Employees must follow the established procedure for the withdrawal of labour contemplated by section 23. The Department of Mineral Resources (the “DMR”) may become involved and, following an inspection, they may declare the area unsafe and close it off.

12.2 After the return to work, in May, the respondent held regular safety meetings. However, because gatherings were prohibited, Mahlako would distribute the minutes of the safety meetings to the part time safety representatives and request them to convey the content of such meetings to mine employees. None of the part time safety representatives testified.

12.3 On 21 July, he was contacted by the chairperson of the shop stewards, Mr Mashabela, who informed him that there was a strike and he must address the employees. Mahlako addressed the strikers, but he did not inform them that it was safe to continue

working.<sup>28</sup> Instead, Mahlako informed them that they should follow the correct procedure before they could stop working. The employees demanded testing and complained they were being treated unfairly because previously, when an employee had tested positive, the work station for that individual had been closed off.

12.4 He testified that, ordinarily, testing is conducted for those employees working in the same section as the employee who tested positive.<sup>29</sup> Mahlako testified, “if memory serves me well”, the number of persons infected by the virus is pasted on the notice board.<sup>30</sup>

12.5 Mahlako was reluctant to admit that, when it is unsafe underground, employees (who work underground) may go to the surface. Instead, he insisted that, in those circumstances, employees must proceed to the area (located underground) designed for meetings.

12.6 He testified that the respondent had implemented a sticker system to ensure that no more than 30 employees could enter the change house at any one time.

12.7 Mahlako confirmed that every locker in the change house is divided into two, with an upper locker and a lower locker, with each being allocated to different employees. When asked if two employees may use the same locker, at the same time, when the change house was crowded, he said that this “never” happened.<sup>31</sup> He subsequently amended this by stating that he could not recall a time when two employees, allocated the same locker, used the lockers at the same time.

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<sup>28</sup> Transcript 3 December 2024, p75 at lines 15 - 20

<sup>29</sup> Transcript 3 December 2024, p74 at lines 20 - 25

<sup>30</sup> Transcript 3 December 2024, p78 at lines 4 – 14; Brits did not mention that management communicated with employees through use of the notice board.

<sup>31</sup> Transcript 3 December 2024, p88 at lines 9 - 25

12.8 Mahlako testified that the change house was “always clean.”<sup>32</sup> However, he was then confronted with the minutes of the safety meeting, on 18 June, where he stated that: “*they are experiencing issues with social distancing at Doornbosch change houses. Stickers were discussed. The system that controls the social distancing is currently not working.*”<sup>33</sup> He then confirmed that he had received complaints from employees about the change house.

12.9 Mahlako confirmed that the DMR had issued an inspection report, on 18 August 2020, in which it identified problems including the failure of some employees to use face masks in the change house, and the discarding of face masks on the shower floor. The DMR noted that the respondent permitted only 18 employees to enter the change house at any time.

12.10 Not unsurprisingly, Mahlako was keen to distance himself from any failures by the respondent in the area of safety.<sup>34</sup>

#### *Testimony of Mr Mashaledi Ratshoshi*

[13] Mr Ratshoshi (“Ratshoshi”) testified next. He was the full-time shop steward of the Union. He testified as follows:

13.1 He was booked off sick on 21 and 22 July, but returned to work on 23 July. He was asked to speak to the striking employees, and persuade them to work.

13.2 He met with Mr Mashabela, the chairperson of the shop stewards committee, and asked him to encourage the employees to return to work. He told Mr Mashabela that the employees did not have the right to withdraw their labour using section 23 unless they followed the correct

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<sup>32</sup> Transcript 3 December 2024, p89 at lines 3 - 16

<sup>33</sup> Respondent's Preliminary Trial Bundle p365 clause 5.2.1

<sup>34</sup> Transcript 3 December 2024, p92 at lines 17 – 25

procedure. Mr Mashabela addressed the morning shift, and after his address, the majority of the employees began returning to work. Under cross, it was suggested to Ratshoshi that he had addressed the entire shift not Mr Mashabela, which he denied.

13.3 He met with the remaining (approximately 40) employees and tried to persuade them to return to work, but they persisted in their refusal. Under cross, it was suggested to Ratshoshi that he had never met with the remaining employees, which he denied.

13.4 Ratshoshi testified that company policy dictated that, if an individual tested positive, that work station must be sanitised and disinfected. If the work station is not made safe, it must be closed off.<sup>35</sup>

#### *Testimony of Mr Steph Tebele*

[14] The applicant called its only witness, Mr Steph Tebele ("Tebele") who testified as follows:

14.1 He was one of the individual applicants on the morning shift between 21 and 23 July. He arrived at work and found that employees were gathering in the green area, the assembly area. He heard a whistle being blown. Mr Mashabela addressed the employees there and informed them that there were employees underground who had been infected and this had been brought to management's attention. The employees were frightened and confused. The shop stewards informed them that they would speak to management and report back, but they never returned.<sup>36</sup> The employees wanted management to make sure that the place was safe before they could begin work.<sup>37</sup> The employees wanted the area fumigated and sanitised.<sup>38</sup>

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<sup>35</sup> Transcript 3 December 2024, p109 at lines 2 - 10

<sup>36</sup> Transcript 4 December 2024, p10 at lines 13 - 15

<sup>37</sup> Transcript 4 December 2024, p11 at lines 17 - 21

<sup>38</sup> Transcript 4 December 2024, p13 at lines 9 - 18

14.2 Tebele testified that the change house was crowded, and unsafe.<sup>39</sup> There was no social distancing. The floors were always dirty. There were masks lying around. Two employees were required to use a single locker and they would have to change their clothes in a “tight manner.” There was no room to move freely.

14.3 He testified that it was hurtful and frightening to hear that fellow employees were infected. He testified that what made matters worse was that *“we will on a daily basis watch on television, and listen on radios, about people who would be losing life due to this.”*<sup>40</sup>

14.4 On 22 July, the employees gathered, and were approached by Mr Mashabela, who provided feedback from the meeting with management. Mr Mashabela told the employees that management wanted them to work. Tebele testified that some employees were raising their hands but were not noticed. When they were noticed, they asked Mr Mashabela to request management to assure them that the work area was safe.<sup>41</sup>

14.5 Tebele testified that the employees remained at the assembly point until knock off time, 14h00, to demonstrate to management that they respected their jobs and were willing to work.

14.6 On 23 July, Ratshoshi addressed them and told them that they must go underground or they would be dismissed.

14.7 Tebele testified about the context of the refusal to work, and the employee’s fear of infection, in the following manner:

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<sup>39</sup> Transcript 4 December 2024, p13 (line 13) to p14 (line 11)

<sup>40</sup> Transcript 4 December 2024, p14 at lines 19 – 23

<sup>41</sup> Transcript 4 December 2024, p15 (line 15) to p16 (line 17)

14.7.1 The reason we felt frightened was *“due to the fact that we knew for a fact that the whole world was standing on its feet due to this particular virus which was a problem.”*<sup>42</sup>

14.7.2 He continued: *“... the majority of the employees, because they were somehow frightened, they then decided to proceed to the change rooms and they changed their clothing to their work clothing and they proceeded to their work stations. We remained there, standing; because we were frightened.”*<sup>43</sup>

14.7.3 He added: *“we hear on a daily basis that the virus is infecting a lot of people.”*<sup>44</sup>

14.7.4 He stressed the fear of the employees in the following terms: *“M’ Lord, we were so frightened due to the number that we had of our colleagues who were infected underground by this Corona virus. Also the fact that we would hear on a daily basis about the deaths of our brothers and sisters, who lost their lives through this pandemic.”*<sup>45</sup>

14.8 In chief, Tebele did not give the exact number of individuals that the employees believed were infected, but he stated that they had been informed, by the Union, that more than one person was infected.<sup>46</sup> Under cross, Tebele indicated that they had heard, from the Union, that there were 22 infected employees.<sup>47</sup>

14.9 On 24 July, following their dismissal, the individual applicants returned to the mine hoping to work, provided the work area had been made safe. Instead, they found their access cards had been blocked.

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<sup>42</sup> Transcript 4 December 2024, p19 lines 8 - 12

<sup>43</sup> Transcript 4 December 2024, p19 lines 14 - 19

<sup>44</sup> Transcript 4 December 2024, p20 lines 6 - 10

<sup>45</sup> Transcript 4 December 2024, p21 lines 13 - 17

<sup>46</sup> Transcript 4 December 2024, p9 (lines 9 – 14), p11 (lines 4 – 7)

<sup>47</sup> Transcript 4 December 2024, p28 lines 3 – 11

14.10 Tebele testified that he was amazed by the address of Ratshoshi that they should return to work because the Union knew how many people were infected, and died, on a daily basis. Furthermore, he noted, when employees approach management, there is a glass screen which separates them from the employees, demonstrating that management is also scared of infection.<sup>48</sup>

14.11 Tebele testified that he recalled Messrs Mashishi, Nkuna and Matlala signing the list of dismissed employees on 23 July.

14.12 Tebele pointed out that, in his view, there was no strike. He testified that the employer had trained the employees that they had a right to remove themselves from an unsafe work area.

14.13 Tebele testified, if this court finds that there was a strike, he was sorry for his conduct.

14.14 Under cross, when questioned about how he could say that he was frightened to work when, ultimately, over 700 employees returned to work, Tebele explained that he lives with his father, a diabetic, and he was concerned about infecting him. Thereafter, he stated that, in fact, both his parents had chronic medical conditions.

14.15 When questioned if the employees would only work when the area was safe, Tebele confirmed that, and stated: *"The reason I am saying this M' Lord is due to the fact that we regard the employer as our parent. As and when a child approaches a parent to advance some complaint, the parent will obviously listen to the son, or the daughter."*<sup>49</sup>

14.16 Under cross examination, Tebele became muddled about whether the employees had asked the Union to address the issue of

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<sup>48</sup> Transcript 4 December 2024, p24 (line 1) to p25 (line 4)

<sup>49</sup> Transcript 4 December 2024, p40 (line 18) to p41 (line 2)

communication with management. Initially, he stated that, aside from making the area safe, there were other requests from other employees<sup>50</sup> but later said there were no other requests. Under re-examination, he testified that he could not be sure what all 800 of the employees had stated over the three days.

### *Evaluation of the evidence*

[15] Brits testimony was reasonably clear, straightforward, with few contradictions. Of course, it must be noted, he had the benefit of having made his own contemporaneous notes which greatly assisted him with his recollection.

[16] On the other hand, Tebele was less confident, and assured. Occasionally Tebele became confused, and contradicted himself, particularly under cross-examination. It is unclear to what extent this could have resulted from the interpretation. There can be little doubt that witnesses, who are not proficient in English, are disadvantaged by the absence of a highly professionalized and skilled interpretation service. On one occasion, upon enquiry of the court, the interpreter indicated that the indigenous language used by the witness was less specific than the English language, and he (the interpreter) would have to make the responses more specific. Naturally, contradictions by Tebele opened his evidence up to challenge. For example:

16.1 Mr Redding argued that Tebele's evidence must be rejected because he could not explain why it had not been put to Brits that the Union failed to provide feedback to the employees. I do not accept this. The submission fails to take into consideration that Brits had no personal knowledge of whether the Union reported back to the employees. In any event, in his evidence in chief, Tebele had been clear that while the Union did not report back on 21 July, it did report back on 22 July.

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<sup>50</sup> Transcript 4 December 2024, p46 (line 23) to p47 (line 4)

16.2 Mr Redding argued that Tebele's evidence should be rejected because he could not say, with confidence, if there was a single request or multiple requests, nor could he identify the primary request. However, in re-examination, Tebele clarified that he could not identify all contributions made at the meetings. This is hardly surprising given that, on the second day, there were several meetings. Furthermore, in a meeting with several hundred individuals, it is unfair to expect that he would hear, let alone recall, every contribution.

[17] The approach to evidence which requires a simple tally of the internal contradictions is improper. It is trite that not every error, or contradiction, affects credibility. In *Santam Bpk v Biddulph*<sup>51</sup> the Supreme Court of Appeal said:

*'However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf. R v Kristusamy 1945 AD 549 at 556 and H C Nicholas 'Credibility of Witness' (1985) 102 SALJ 32 especially at 32 – 35).*

[18] Furthermore, in *S v Mkhle*<sup>52</sup>, the Appellate Division held that:

*"Contradictions per se do not lead to the rejection of a witness' evidence... [T]hey may simply be indicative of an error... [N]ot every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence."*

[19] In my view, the contradictions in the testimony of Tebele, do not warrant the complete rejection of his evidence. Contradictions must be understood in context. He attended a meeting with hundreds of other employees, in what was likely a chaotic meeting. His demeanour did not demonstrate any of the telltale marks of dishonesty. I therefore accept that the essential features of his evidence are reliable and true.

<sup>51</sup> 2004 (5) SA 586 (SCA) at para 10

<sup>52</sup> 1990 (1) SACR 95 (A); [1990] 3 All SA 1087 (A).

[20] Further, unlike Brits, Tebele did not have the benefit of contemporaneous notes. At the time of the events, unlike Brits, Tebele did not have a meeting room in which to comfortably gather his thoughts. Instead, he was part of a meeting of several hundred anxious and confused employees. In addition, he was under some stress. He was faced with the extremely unfortunate decision of having to choose between risking his safety, or potentially forfeiting his livelihood.

[21] As previously mentioned, Tebele was one of some 800 employees gathered in the green area. No evidence was presented of the nature of the area, its acoustics, its facilities, or its suitability for such a large gathering. Mr Redding did not suggest the meetings were organised and orderly events where every speaker was afforded an opportunity to talk uninterrupted, and every speaker could be clearly heard. The meetings occurred in the context of confusion, and uncertainty. The meetings were hastily convened, in circumstances where the employees, who had intended to go underground, were rather abruptly informed that their safety was at risk. On the probabilities, these meetings were chaotic events. Tebele's evidence that some employees struggled to be heard confirmed this.

[22] Based on an evaluation of the probabilities, as well as the oral testimony, I make the following findings of fact:

22.1 I accept that the individual applicants were genuinely fearful for their health and safety. The respondent's witnesses did not contradict this. Indeed, Mr Redding conceded as much during argument.

22.2 It is probable that the individual applicants were informed by the Union that there were twenty-two infected employees. The respondent's records indicated that, as of 21 July, there were approximately 15 infected employees. I therefore accept that the number of infected employees had increased considerably between 21 June and 21 July.

22.3 Management did not address the individual applicants to reassure them that the working area was safe. Brits testified that management did not address the employees, and Mahlako confirmed this evidence. Importantly, Mahlako himself, as the safety representative, did not inform the employees it was safe to return to work. In fact, communication overall appears to have been poor.

22.4 The change house was dirty, overcrowded, and unsafe. Mahlako confirmed that the change houses were dirty, overcrowded, and a source of concern to the employees. This was raised as a concern by employees at the safety meeting on 18 June, and noted by the DMR in its inspection report on 18 August. This situation would hardly have assured employees that the employer was genuinely concerned about their health and safety.

[23] I accept Brits version of the requests, or demands, as they were relayed to management by the Union. However, this does not mean that Tebele was dishonest. Tebele was not present in the meetings with management and Brits was not present in the meetings between the Union and the employees. Witnesses, who attended both sets of meetings, did not testify that Tebele was incorrect in his description of the meetings between the Union and its members.

#### Issues arising

[24] The following questions arise for determination:

24.1 Whether the individual applicant's refusal to work was lawful in terms of section 23(1) of the MHSA?

24.2 If their refusal to work was not justified under section 23(1), whether the individual applicants engaged in an unprotected strike?

24.3 If so, whether dismissal of the individual applicants was substantively fair?

24.4 Whether the dismissal of the individual applicants was procedurally unfair?

24.5 The appropriate relief if the dismissal of the individual applicants was substantively and/or procedurally unfair?

Section 23(1) of the Mine Health and Safety Act

[25] Section 23(1) states:

*“(1) The employee has the right to leave any working place whenever-  
 (a) circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee; or  
 (b) the health and safety representative responsible for that working place directs that employee to leave that working place.*

[26] Naturally, by leaving the dangerous work place, an employee will be unable to perform his or her usual duties. Clearly, the purpose of the subsection is to permit an employee the right to refuse to work that is unsafe.

[27] Firstly, and fairly obviously, the MHSA relates only to employees of a mine. Here, the individual applicants were employed by a mine. So far, so good.

[28] Second, section 23(1) applies only when circumstances arise which pose a “serious danger” to the health, or safety, of the mineworker.<sup>53</sup> The danger must be serious, and it relates to the health and safety of the employee, not his or her family or relatives. The question therefore arises whether infection by COVID19 posed a “serious danger” to the health and safety of the employee. This merits some scrutiny.

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<sup>53</sup> In *AMCU v Minister of Mineral Resources and Energy and others* (2020) 41 ILJ 1705 (LC) the court recognized that there is no true distinction between public health and occupational health. The court recognized that the COVID19 pandemic was a public health concern and an occupational health issue.

[29] Finally, the employee's belief that there is a serious danger must have "reasonable justification". This includes a subjective as well as an objective element. This too merits consideration.

[30] The right of an employee to refuse to do work that is unsafe and poses a serious danger is recognized internationally. During 1981, the parties to the International Labour Organisation ("ILO") adopted the Convention on Occupational Safety and Health (No. 155); article 13 of which states:

*"A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice."*

[31] There can be little doubt that article 13 imposes a high bar. There must be "reasonable justification"; the danger must be a "serious danger", and the danger must be "imminent".

[32] The term "reasonable justification" is not defined in the MHSA. However, the term is defined in the *"Guideline for the Compilation of a Mandatory Code of Practice for the Right to Refuse Dangerous Work and Leave a Dangerous Working Place"* published by the Chief Inspector of Mines<sup>54</sup> where the following definition appears: *"the employee has some objective information that makes him or her believe there are unsafe conditions at the working place or the work to be done is unsafe to the extent that there is an imminent and serious danger to the health or safety of person at that working place. The employee does not have to be correct in his or her knowledge or belief, but such belief should be reasonable given the information of the employee."* (own emphasis)

[33] I note that the Guideline issued by the Chief Inspector talks of an imminent danger. This factor, or requirement, appears to have its origins in ILO

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<sup>54</sup> GN R148 in GG 39656 dated 5 February 2016

Convention No. 155. However, neither section 23(1), nor the respondent's Procedure to Leave a Dangerous Working Area, requires that the danger must be "imminent". I therefore do not accept that there is any requirement, in section 23(1), that the danger must be imminent.

[34] On the probabilities, I accept that there was a significant risk of infection to the individual applicants if they went underground. They were informed by the Union, which held regular safety meetings with the respondent, that there were numerous recent infections and, objectively, there was a significant number of employees who had been infected. They were not provided with the identities of the infected, because management believed their health status constituted private information. Further, it was well known that the virus was highly contagious (though there was no evidence of how closely the employees worked from one another other, or whether they all regularly used masks underground).

[35] Section 23(1) requires that there must be a serious danger to the health and safety of every employee who withdraws from the work place. This required an individual assessment of each applicant. Unfortunately, only one of them testified. The term "serious" relates to the potential degree harm. No evidence was presented in that regard either. The consequences of infection varied widely, depending on factors such as the level of immunity and presence of comorbidities.

[36] Though it is documented that mineworkers suffer from disproportionately high rates of lung disease it is impermissible to take judicial notice thereof. It is also impermissible to infer that all the individual applicants suffered from comorbidities, or compromised immune systems.

[37] In the circumstances, while I accept that there was a high risk of infection, I cannot accept that there was any serious danger to the health and safety of each of the individual applicants. For this reason, the threshold in section 23(1) has not been met.

[38] The individual applicants collectively refused to work. Their refusal to work was coupled with a grievance, or demands.<sup>55</sup> Plainly, this meets the definition of a strike in section 213 of the Labour Relations Act No. 66 of 1996 (the “LRA”). It was common cause that there was no attempt to comply with section 64. Accordingly, the conduct of the individual applicants amounted to an unprotected strike which is misconduct. I must now consider the appropriate sanction.

#### Sanction for unprotected strike action

[39] It is trite that participation in an unprotected strike constitutes serious misconduct. However, this does not mean that dismissal is always fair.<sup>56</sup> Our courts have stated that the illegality of the strike is not a magic wand which makes the dismissal of the strikers fair. Dismissal has been described as the industrial relations equivalent of capital punishment<sup>57</sup> and is a measure of last resort. A fair sanction will depend on all the relevant facts and circumstances. Item 6 of the Code of Good Practice: Dismissal (Schedule 8 of LRA) states that the substantive fairness of the dismissal of the strikers will depend on the seriousness of the contravention of the LRA, attempts made to comply with the LRA, and whether the strike was in response to unjustified conduct by the employer.

[40] In addition, the court must consider the duration of the strike, the harm caused by the strike, the legitimacy of the demands, the timing of the strike, the conduct of the strikers, and the parity principle.<sup>58</sup>

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<sup>55</sup> *TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others* (2006) 27 ILJ 1483 (LAC) at paras 25 – 27

<sup>56</sup> *National Union of Metalworkers of South Africa and others v CBI Electric African Cables* (2014) 35 ILJ 642 (LAC) at para 29

<sup>57</sup> M Brassey “The Dismissal of Strikers” (1990) 11 ILJ 213 at p223

<sup>58</sup> *CBI Electric* cited in fn. 56

[41] The strike began in the early morning of 21 July, and ended at about 09h00 on 23 July. The strike was therefore just over two days in duration. This was a short strike.

[42] The respondent presented no evidence of the harm caused by the strike. I therefore accept that the harm was relatively minor. The respondent did not submit that the timing of the strike was calculated to cause it harm.

[43] It was common cause that the individual applicants did not intend to engage in an unprotected strike. They relied on section 23(1) to withdraw their labour. They genuinely believed that they had a right to withdraw their labour. They acted in accordance with their training, by the respondent, who had informed them of their duty to protect their own health and safety and that of their fellow employees. This is a significant factor indicating that the penalty of dismissal was exceedingly harsh.

[44] There can be no doubt that the fear held by the individual applicants was genuine. The entire world was in the throes of extreme panic. The country had recently come out of an extended, and unprecedented, “hard” lockdown in which virtually all activities, both economic and social, had been brought to an abrupt halt. There had been a marked increase in the number of infections in the period preceding the strike. In addition, as Tebele testified, without contradiction, the individual applicants were confronted daily by radio and television announcements, informing them of the dangers of the virus, and the vast number of people who lost their lives to the virus. Perhaps to ensure compliance with the rules, regulations, and directives, the extremely unpleasant consequences of infection were repeatedly stressed by Government, and the respondent.<sup>59</sup> Furthermore, in the context of the mining industry, where there are large numbers of employees (who typically work in confined spaces) the risk of infection is higher. These factors also indicate that dismissal was too harsh. In their minds, the individual applicants were being required to choose between

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<sup>59</sup> Transcript 2 December 2024, p116 lines 9 – 11

their lives, and their livelihoods. This was an indignity, a situation that no employee should ever have to confront.

[45] Mr Redding contended that the fact that the majority of the employees returned to work, on 23 July, permits the court to draw an inference that the individual applicants' belief that their safety was at risk was unreasonable. It is trite that the process of inferential reasoning calls for "*an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be consistent with all the proved facts.*"<sup>60</sup> The inference must be the most natural, or plausible, conclusion, from all those that are conceivable. The evidence was clear that the majority of the employees, who returned to work on 23 July, did so under threat of dismissal. With the risk of dismissal increasing daily, they prioritized their livelihoods over their safety. The inference proposed is not the most natural, or plausible, and I must decline the invitation.

[46] It was common cause that the conduct of the individual applicants was peaceful, and respectful. Tebele testified that the individual applicants were forced from the mine by armed security. This was provocative, but it still did not move the applicants to misconduct themselves.

[47] While I accept that the initial demand, that all the employees be tested, was unreasonable, this demand was dropped in the morning of 22 July when the employees requested only random testing. On the whole, the grievances and demands of the employees were reasonable. The demands related to improved communication, and methods to minimise the risks to employees' health and safety, a legitimate matter. In addition, it is necessary to bear in mind that, on 29 April, the Minister of Employment and Labour issued a directive<sup>61</sup> that where an employee, at work, displays symptoms of infection, that employer should disinfect his or her workstation. Furthermore, in terms of that directive, any employees at risk must be referred for screening. Indeed, had the respondent taken these steps, the strike may have been avoided.

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<sup>60</sup> See *SA Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35.

<sup>61</sup> See para 6 above

[48] The respondent's conduct was far from salutary. Not once, over three days, did it take steps to reassure the striking employees that the working area was safe. Instead, the respondent sought to coerce them to work, in what the employees genuinely believed to be unsafe conditions.

[49] An additional factor must be considered and that is the formulation of clause 8 of respondent's policy document, the "Procedure to Leave a Dangerous Working Area". Clause 8 thereof states that employees have the right to leave any area that "*they may consider dangerous in terms of the possibility of COVID-19 infections*". The policy does not require that there must "reasonable justification" or "serious danger". This suggests that management understood the fear arising from the pandemic, and further suggests that management would be tolerant and compassionate.

[50] In the circumstances, I find that the sanction of dismissal was too harsh, and the dismissal of the individual applicants was substantively unfair.

#### Inconsistency in the application of discipline

[51] The applicant argued that the respondent failed to apply discipline in a fair and consistent manner. Though, for the abovementioned reasons, I believe that the dismissals were too harsh, for the sake of completeness this issue must also be considered. The Code of Good Practice states that consistency is a consideration in deciding the fairness of the dismissal.<sup>62</sup> Where instances of inconsistency are raised, this must form part of the value judgment to be exercised in deciding whether the dismissal was fair.<sup>63</sup>

[52] The principles relating to consistent discipline are aptly summarised by excerpts from the authorities.

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<sup>62</sup> Schedule 8 Item 3(6) reads: '*The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.*'

<sup>63</sup> See *SVR Mill Services (Pty) Ltd v CCMA and others* (2004) 25 ILJ 135 (LC) at para 23

52.1 The overarching principle is captured in *NUMSA and others v Henred Fruehauf Trailers (Pty) Ltd*<sup>64</sup> where the Appellate Division held:

"Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word 'equity' as used in the United Kingdom statute dealing with the fairness of dismissals, 'comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment' (Post Office v Fennell (1981) IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice." (own emphasis)

52.2 In *SACCAWU and others v Irvin and Johnson Ltd*<sup>65</sup> the court clarified: "Discipline should not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or

<sup>64</sup> (1994) 15 ILJ 1257 (A) at 1264A – D; *Cape Town City Council v Mashitho* (2000) 21 ILJ 1957 (LAC) at paras 11 and 12

<sup>65</sup> (1999) 20 ILJ 2302 (LAC) at para 29.

induced by improper motives or, worse, by a discriminating management policy” (own emphasis)

52.3 Objective differences in circumstances is an important consideration. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others*<sup>66</sup> the court held:

*‘... An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors ...’*

52.4 In *Bidserv Industrial Products (Pty) Ltd v CCMA and others*<sup>67</sup> the court had the following to say:

*‘This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. ...’* (own emphasis)

[53] The principles may be summarized as follows: (1) in general, employees must be measured against the same standards, (2) the court must consider if the chairperson (of the disciplinary enquiry) conscientiously and honestly determined the sanction; (3) the decision by the employer not to dismiss other employees for the same or similar misconduct must not be arbitrary, capricious, or induced by improper motives; (4) inconsistency is not dispositive of the issue of an appropriate sanction and all relevant factors must be considered, (5) a

<sup>66</sup> (2010) 31 ILJ 452 (LC) at para 10.

<sup>67</sup> (2017) 38 ILJ 860 (LAC) at para 31.

value judgment must be exercised, (6) the onus lies with the employer to prove that there was no inconsistent application of discipline.<sup>68</sup>

[54] The respondent argued that the employees who returned to work on 23 July were not punished, because they returned to work in response to an ultimatum. This was not supported by the evidence, nor was it pleaded. Brits testified that, on 23 July, a SMS was sent to Ratshoshi that if employees did not resume work by 08h00 they would be dismissed. Thereafter, at 08h00, management read the Union a memorandum.<sup>69</sup> Management pleaded with the Union to have the employees return to work by 08h30 but the majority of them only did so by 09h00.<sup>70</sup>

[55] Following a dispute, on 24 July, the respondent reached an agreement with the NUM to withdraw the final warnings issued to its members. Thus, the vast majority of the employees, who had participated in the strike on 21 and 22 July were not disciplined. The letter recording the withdrawal of the warnings does not identify the reason for the withdrawal of the warnings.<sup>71</sup> Even if the evidence supported the version of the respondent (that the strikers who were not dismissed had complied with an ultimatum) this did not mean that no sanction was appropriate. The fact remains that the strikers, who returned to work, also participated in the unprotected strike.

[56] In the circumstances, the respondent has not adequately explained why it chose not to discipline all the employees who participated in the unprotected strike. The implication is that inconsistency in the application of discipline was capricious and marred by improper motives. In my view, the respondent failed to apply discipline consistently.

#### Alleged procedural unfairness

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<sup>68</sup> *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (2011) 32 ILJ 715 (LC) at para 10

<sup>69</sup> The memorandum was not produced in evidence

<sup>70</sup> Transcript of 2 December 2024, p89 lines 13 – 25

<sup>71</sup> Respondent's preliminary trial bundle at p432

[57] The evidence established that there was a fair appeal hearing. There was no challenge to the version by the respondent that the appeal was a wide appeal, which afforded the individual applicants an opportunity to present evidence. This version was unchallenged. Accordingly, I find that the dismissal of the individual applicants was procedurally fair.

### Remedy

[58] The individual applicants sought reinstatement. Given that none of the factors in section 193(2)(a) – (d) are applicable, there is no reason to refuse such relief. Accordingly, the individual applicants must be reinstated. It is trite that, in labour disputes, costs do not follow the result. In any event, neither of the parties vigorously pursued costs. There is no reason in law and fairness to award costs.

### Conclusion

[59] In the circumstances, for the reasons above, I make the following order:

59.1 The dismissal of the thirty nine individuals, identified in annexure A to the statement of claim, is declared substantively unfair;

59.2 The thirty nine individuals, identified in annexure A to the statement of claim, are reinstated into respondent's employ, with effect from the date of their dismissal, without loss of earnings or benefits.

59.3 There is no order as to costs.

**Reynaud Daniels**  
**Judge of the Labour Court of South Africa**

Appearances:

For the Applicant:  
Adv S Saunders

Larry Dave Inc

For the Respondent

Adv Redding SC

Cliffe Dekker Hofmeyr Attorneys

LABOUR COURT