IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 1598/22

In the matter between:

SOUTHERN AFRICAN CLOTHING AND TEXTILE WORKERS' UNION	Applicant
and	
PLUSNET GEOTEX, A DIVISION OF MASTER PLASTICS LTD	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION, AND ARBITRATION	Second Respondent
MARK HAWYES *N.O.*	Third Respondent

Heard: 30 April 2025
Supplementary Heads of Arguments: 07 and 20 May 2025
Delivered: 28 August 2025

JUDGMENT

Introduction

[1] After the dismissal of 50 employees ("the Individual Employees"),[1] who are members of the South African Clothing and Textile Workers Union ("Applicant Union"), a dispute concerning unfair dismissal was referred to the Commission for Conciliation, Mediation, and Arbitration ("the CCMA"). The CCMA appointed Commissioner Hawyes ("the Arbitrator") to resolve this matter following the unsuccessful conciliation. During the pre-arbitration engagement, both disputants agreed on, among other things, issues for the Arbitrator to decide: (a) whether 40 of the Individual Employees ("the 40 Employees") were guilty of the misconduct that led to their dismissal, as 10 of the Individual Employees ("the 10 Employees") were not disputing the guilty outcome;[2] (b) the inconsistent application of discipline,[3] and (c) the appropriateness of sanctions imposed.

[2] At the end of the arbitration proceedings, the Arbitrator concluded that all the Individual Employees were guilty as he *inter alia* said: "*I am not required to determine the identity of each individual Applicant at each commission of crime or each act of misconduct or the extent of their involvement in same.By a process of inferential and probable reasoning, each of [them] committed misconduct by at least issuing unlawful instructions and/or following unlawful instructions to ignore the Labour Court Order as to where to picket should take place and/or blocking the company entrance and/or carrying weapons (even on the very first day) and/or executing the instruction to beat and hurt non-striking workers.*" Consequently, the dismissal was found to be fair.

[3] The Applicant Union is now pursuing a review of the arbitration award, requesting that it be set aside and replaced with an order for reinstatement, among other requests, which will be detailed hereafter. The central issue in these

[1] Bundle J: p 211-2. Within these 50 Employees, there are those who will be referred to as "the 10 Employees" and others as "the 40 Employees".
[2] Transcripts: p 1046, line 9-13
[3] Part A: p 138-9. The issue raised was that 15 employees of the Employer *"were not dismissed despite actively participating in the strike and picket"*

proceedings is whether the Arbitrator committed a gross irregularity, leading to a conclusion that no reasonable decision-maker could have reached, given the evidence provided. In addressing this question, this Court must recognise its role as a reviewing Court, with the grounds for review specified in section 145 of the LRA still applicable, and that the *Sidumo judgment* [4]said this Court has to decide whether an arbitrator’s decision is one that a reasonable decision maker could have reached based on the evidence presented before them.[5] In this judgment, this Court will cover the following topics hereafter, presented in no specific order: the relevant evidence; grounds for review; findings derived from the doctrine of common purpose; the treatment of hearsay evidence; the parity principle; claims of bias; procedural fairness; a summary of the arbitration award; and the conclusion.

<u>Relevant background and the arbitration</u>

[4] The Individual Employees participated in the protected strike organised by the Applicant Union. During this period, the Applicant Union arranged picketing, with the Employer involved in the process. It is undisputed that credible reports were indicating serious acts of misconduct, including property damage and torching of residences of some of the non-striking employees. Additionally, incidents of intimidation occurred, such as obstructing access to the Employer's premises and violating picketing lines. The Individual Employees do not deny these acts of violence; however, the pertinent question remains: who were the actual perpetrators, as the 40 Employees deny involvement?[6]

[5] During the arbitration, there was considerable debate regarding which Individual Employees were involved in these acts of violence. Representatives for the Individual Employees contended that while the 10 Employees were not challenging the guilty findings aspect of the dismissal, the remainder, the 40

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[4] Sidumo and Another v Rusternburg Platinum Mines Ltd and Others 2008 (2) BCLR 158 (CC) (“Sidumo”).

[5] Id, at par 110, where it was held that “…The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?... Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

[6] Transcripts: p 84-6.

Employees, maintained their respective innocence. On the latter group's behalf, their legal representatives, before the Arbitrator, in their opening statement said that: *"…[the Employer] cannot satisfy the onus of proving that [the 40 Employees] committed the acts of misconduct described to them…require[s] that misconduct be proved against each employee, not merely associated acts…"*[7]*.* Therefore, it was the Employer's responsibility to prove the guilt of the 40 Employees, as this was one of the key issues to be decided.[8]

[6] Before evidence could be presented, both the Applicants and the Employer submitted their respective formal applications for the admission of hearsay evidence, attaching affidavits supposedly from anonymous witnesses. The Arbitrator ruled that "hearsay from both sides would be provisionally admitted".

[7] The relevant viva voce evidence can be summarised as follows: Mr Saif,[9] for the Employer, testified that, before the strike concluded, the Employer successfully applied to this Court for an interdict against 61 Employees (this list includes the Individual Employees and 15 others, "the 15 Employees").[10] In preparation for this application, the Employer's management aimed to identify employees suspected of misconduct that warranted the Court's urgent intervention. During cross-examination, Mr Saif, among other points, presented the following noted evidence:

7.1. Some names on the list of these Employees should not have been included, as there was no concrete evidence of their presence during the alleged acts of misconduct, despite being part of the strike.

7.2. He also conceded that the list of all those employees was compiled with a broad brush, indicating that the Employer had not conducted a

[7] Id, p 84, lines 21-4, p 85

[8] See par 1 of this judgment. In Sidumo supra, at par 78 that Court said "**In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances**. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, ***as he or she must take into account the basis of the employee's challenge to the dismissal.*** There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list." (Own emphasis)

[9] One of the 10 witnesses called by the Employer.

[10] These 15 Employees are the comparators referred to in the parity principle mentioned in footnote 2 above.

thorough investigation, since the main goal was to hasten the interdict application—an approach he acknowledged was improper.

7.3. The charges against the Individual Employees related to either direct participation or acting in common purpose to commit misconduct, and that is what resulted in the dismissal.[11]

7.4. One of the Individual Employees, Phenyo Selemane, was seen by him on the tree shouting at the people, saying, "We are coming to get you".[12]

7.5. That no specific material allegations were made against some of the Individual Employees, namely: (a) Nkosoxolo Jaxa, (b) Grace Kgonare, (c) Itumeleng Kgotlabeng, (d) John Mathetsa, (e) Refilwe Mogale, (f) Mita Mokobane, (g) Samuel Manama, (h) Johannes Motheletsi, (i) Lawrence Seelo, (j) Ben Sibigi, and (k) Thamsanqa Xhama (collectively referred to as "the 11 Employees").[13]

[8] The pertinent documentary evidence, which formed part of the hearsay evidence provisionally admitted by the Arbitrator, was submitted for consideration and referenced during the testimonies of the witnesses. Among these documents, Amos Mohale is identified as one of the individuals observed around 22:00 on 1 October 2018 and remained there "with intention to burn the truck…". Since there are two Mohales, it appears that Andries Mohale was not mentioned. A statement from "Security Guard 2" indicates that they witnessed a group of individuals assaulting others and preventing them from reporting to work, one of the victims was identified as 'Sandile,' who subsequently fled to the Security Guard 2, then the latter "and Sandile then ran to get away from them." It remains unclear whether this "Sandile" refers to Sandile Xekwa, one of the Individual Employees.

[9] Furthermore, the hearsay evidence suggests that Elias Mere followed a car driven by Louis when it left the Employer's premises. The OB report also states that "We identified (Mere) with another guy. Mere with another guy," but the significance of this was not clearly explained. Additionally, Xolelwa Sigaba is recognised as one of the individuals who "come to stand in front of Plusnet/Geotex" around 7:29 on 19

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[11] Transcripts: Part A, p 660.

[12] Id, p 732.

[13] Id, Part A, p 730-9

October 2018; however, it was not clarified what the implications of her actions were. Moreover, it was noted that on 18 October 2018 at approximately 13:05, Grace Kgonare was seen with others “screaming.” Once again, the reasons for their actions and the content of their “screaming” were not clarified, as the relevant witnesses did not provide testimony.

[10] The evidence further revealed that, at the conclusion of the strike, the Employer summoned the Individual Employees to a disciplinary hearing, where they were accused of various types of misconduct, with specific charges outlined. The introductory paragraph of the charge sheet reads: "*Be advised that the below charges are of a collective nature and directed against any and all employees who were not at work since since commencement of the legal strike, either participating in the strike action directly, or by way of association, being a member of the representative union or not.* And despite the charge that indicates direct involvement, it was also indicated in the charge that “…*associated yourself as part of striking employees collectively and with a common purpose to commit intentional misconduct…”*[14] Accompanying this charge sheet was a covering letter *that* invited employees to make representations to Management regarding *“why they should not be* ***charged***[15] *based on any common purpose or collective intent to commit misconduct.*[16] It was common cause during the arbitration that no instructions were given to the strikers to identify possible perpetrators.

[11] Mr Saif also testified that, although the 15 Employees were involved in the strike and were members of the Applicant Union alongside the Individual Employees, they were later removed from the list of those facing charges because management established that they had not committed any acts of misconduct.[17] Before this Court, the Applicant's legal representatives argued that this alone indicates a clear sign of inconsistency, given the circumstances of this matter.

[14] Bundle A, p 1. This excludes two Individual Employees who were Shopstewards, namely Abram Gadibolawe and Hlengiwe Mkhonza (“the Shopstewards”), as they were charged differently.
[15] Own emphasis.
[16] This excludes the Shopstewars..
[17] Transcripts: p 699.

[12] The procedure followed, which resulted in the dismissal, consisted of two separate hearings. The first, involving 48 employees, was chaired by Advocate Ebersohn, while a second forum, comprising only the shopstewards, was headed by Advocate Chokwe. Mr Saif confirmed that all 48 Employees wanted to attend the disciplinary hearing, and although the Applicant Union offered a larger venue, the Employer insisted that only a representative group could. Both forums ultimately found the Individual Employees guilty, leading to their dismissal. Advocate Ebersohn, who was the first witness for the Employer, during the arbitration *inter alia*, who found the 48 employees guilty of misconduct that resulted to this dismissal, indicated that in a collective inquiry there is no requirement for identifying who exactly committed misconduct and said he followed the doctrine of common purpose, as those 48 Employees failed to distance themselves from the acts of misconduct. He noted that these employees only offered a bare denial of the incidents and failed to "dissociate" themselves from the misconduct.

[13] Despite their denials, he believed they bore responsibility to come forward; by not doing so, they were linked to the violent actions, and he said they were associated with misconduct by virtue of their participation in the strike.[18] Advocate Chokwe concluded that the shop stewards were guilty of some of the counts. The findings of the latter are not significant considering Order 2 below.

[14] At the end of the arbitration, the Arbitrator clearly identified the key issues to be addressed, focusing on the substantive fairness of the dismissals, the inconsistency, and the procedural aspects involved.[19] He discussed the common ground regarding how the violence occurred, confirming that it was the Employer's responsibility to substantiate the allegations against the Individual Employees. Under the rubric of common purpose, the Arbitrator looked at the case law presented by the disputants' respective legal representatives. He recognised the Individual Employees' concerns—that the evidence provided by the Employer did not demonstrate that the violence was planned collectively or that all Individual Employees were aware of the culprits' identity, which simply being present at the

event does not necessarily imply that each participant was aware of or supported the acts of violence committed.

[15] The Arbitrator, after closely repeating part of the evidence presented by the parties and where the Individual Employees were dealing with the legal principle of common purpose,on this point, said the Individual Employees were not before a criminal court, reasoned it was likely that all the strikers attended a briefing organized by the shop stewards at the start of the strike, where they were advised to take aggressive action. Additionally, regarding the picketing, he said his finding was that *"the strikers"* participated in the initial pickets, knew what was happening, and concluded that it was each Individual Employee's responsibility to disassociate themselves from any violent acts.. Moreover, the Arbitrator found that he was not required to identify each individual applicant for every act of misconduct or the precise extent of their involvement. This is the same approach taken by Advocate Ebersohn, which resulted in the dismissal.

[16] By stating that what he said was inferential reasoning, the Arbitrator concluded that, through reasonable deduction, each of the Individual Employees engaged in misconduct by either failing to comply with instructions or ignoring the Court's order regarding picketing lines, blocking the Employer's entrance, carrying weapons, and assaulting non-striking workers.[20]

<u>Grounds for review application and analysis</u>

[17] The Applicant Union disputes the Arbitrator's decision, arguing that he committed several major errors in law and fact that significantly impacted the arbitration outcome. The Employer contends that the Individual Employees were dismissed due to common purpose, without mentioning derivative misconduct, as none of the strikers were questioned about their fellow strikers' actions and/or afforded necessary protection.

[20] Para 106-110

[18] The Applicant Union further argues that the Arbitrator misconceived the inquiry. In support of this argument, the Applicant Union asserts that the Arbitrator's understanding of the principle of common purpose was flawed, as he *inter alia* irregularly relied on an *obiter dictum* of a judgment that the Employer invited him to follow, while the principle clearly stated that an individual must have been associated with the conduct; furthermore asserts that the mere participation in the strike and/or picketing cannot sufficiently prove that the 40 Employees were involved in acts of misconduct, as certain elements have to be proved (these are as covered hereafter).[21]

[19] The Applicant Union also contends that the Arbitrator's guilty finding regarding one Individual Employee, Mr Sibigi, who had a sick note with him from a medical practitioner, represents a reviewable irregularity; this finding lacked a solid basis, particularly because there was uncontradicted evidence that Sigibi was on leave and did not return to work, and the Employer's evidence confirmed that Sigidi attempted to submit a sick note during the strike.

[20] It is further argued that the Arbitrator's acceptance of hearsay evidence was inappropriate, as he failed to adhere to the relevant principles. His analysis did not adequately address the hearsay evidence provided by the Individual Employees. On the issue of the admission of hearsay evidence, the Applicants contend that the Arbitrator "was not aware of what the relevant legal principles underlying the admission of hearsay evidence were".

[21] In *Tau Ying*,[22] the Constitutional Court held that an arbitrator, in order to perform their duties effectively, is given a measure of latitude in deciding a matter before them in a manner that they deem fit. However, what needs to guide him is that he must promptly address the real dispute between the parties and act fairly towards all parties in accordance with the LRA. In doing so, he should disregard claims and counterclaims that would not assist in reaching a reasonable decision. Moreover, the arbitrator is required to reach the desired outcome based on the

[21] Id, para 84.13.
[22] *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC), at para 65.

evidence that was properly presented before him, taking into account that he deals *"with the substantial merits of the dispute"*.

[22] In this matter, the Arbitrator indicated that he was provisionally accepting hearsay evidence for both parties, the evidence that had been admitted on behalf of the Applicants consisted of three statements from anonymous, which covered the issue of picketings, as they said no one told them exactly where the picketting would be held, and the denial of the charges. Whereas in respect of the Employer, statements were submitted indicating what happened, and some informants were deployed by Liebenberg, who testified that he had planted them among the strikers and was regularly in communication with them.[23]

[23] This Court acknowledges that the Labour Appeal Court in the matter of *CTP Gravure* [24]recently recognised that an arbitrator may admit hearsay evidence in arbitration if, upon considering relevant factors,[25] the arbitrator is of the opinion that it would be in the interests of justice to do so. Considering the affidavits that were submitted and considered as hearsay evidence, it is clear that the admission of hearsay evidence *in casu* the Arbitrator, according to him, was premised on the discretion following a section 3(1)(c)[26] assessment of the circumstances of the disputes as it was clear from the beginning that these witnesses were not going to testify as they were concerned with their safety, witnesses on both sides.

[24] This Court agrees with the Applicants' Counsel that it seems the Arbitrator misconceived the provisions of LEAA as it is unclear what the Arbitrator meant by

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[23] Transcripts: p 889.
[24] CTP Gravure (Pty) a division of CTP Limited v Statutory Council for Printing Newspaper and Packaging Industry and Others (DA 04/2024) [2025] ZALAC 16 (20 March 2025)
[25] "(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,
is of the opinion that such evidence should be admitted in the interests of justice.'"

[26] Of the Law of Evidence Amendment Act 45 of 1988 ("the LEAA").

stating at the start of the arbitration that he was provisionally admitting hearsay evidence, which he repeats in paragraph 9 of the arbitration award, considering that the Labour Appeal Court[27] clearly stated thus:

> *"'Those safeguards and precautions, duly adapted, also apply to the application of s 3 of the LEAA in civil proceedings. …(6) the commissioner must timeously rule on the admission of the hearsay evidence, and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount."*

[25] As the Arbitrator stated in the arbitration award that "I decided that all relevant hearsay from both sides would be provisionally admitted as part of the record, subject to its proper evaluation at the end of the arbitration and in preparation of this award." This led to confusion during the arbitration, as even Attorney Daniels, representing the Individual Employees, continued to mention this confusion and expressed his concern that the Arbitrator had not indicated his final decision on this evidence. The Court also considers what the Arbitrator describes as "primary these three factors" when deciding on the admission of hearsay evidence and overlooks the other factors that the LEAA requires him to consider.

[26] On this point, the Court agrees with the Applicant Union that the Arbitrator committed an irregularity, but the remaining question is whether it amounts to a gross irregularity, which requires the intervention of this Court, considering the totality of the evidence. This Court concludes that it does not, based on the evidence before it, as per the records of the arbitration, which states, among other things, that: (a) Witness Liebenberg infiltrated the strikers with informers who provided information whenever something occurred, and he confirmed with Mr Saif the accuracy thereof; (b) Witness Liebenberg did not seek to implicate employees not directly mentioned by his informers, and he testified during the arbitration; (c) the Individual Employees did not suffer prejudice from the hearsay evidence involving

[27] Fn 23 above.

them, as they could have testified if they wished; (d) it was confirmed that the informants were not going to testify, and the reason was known in advance—that it was about their safety as acts of violence were committed, which is similar to the witnesses the Applicants; (e) The Security guard's Occurrence Book corroborated some of the incidents indicated by the Employer's witnesses, and the person who was coordinating security testified about some of the issues.

[27] In addition, the hearsay evidence exonerates some of the Individual Employees, as it only states that they were present but does not state what acts of misconduct, either directly or by common purpose, they committed, as part thereof are summarised in paragraphs 8 and 9 above, and what is stated in paragraphs 29 to 34 below. Therefore, the admission of hearsay evidence cannot be set aside, despite the shortfalls highlighted regarding the manner in which the Arbitrator handled it.

[28] Regarding the issue of a guilty finding for those who claimed they were not involved at all, this Court first looks at the established legal principle on common purpose, as per *Mgedezi*[28], as followed by the Labour Appeal Court in *AMCU and others v KPMM Roads and Earthworks,*[29] which is that:

> *"…In **the first place**, he must have been present at the scene where the violence was being committed. **Secondly**, he must have been aware of [the crime to be committed]….**Thirdly**, he must have intended to make common cause with those who were actually perpetrating the assault. **Fourthly**, he must have manifested his sharing of a common purpose with the perpetrators of [the crime] by himself performing some act of association with the conduct of the others. **Fifthly**, he must have had the requisite mens rea [criminal intent]…"*

[28] [1989] 2 All SA 13 (A). See also NUMSA obo Aubrey Dhludhlu and 147 Others 2023 (1) SA 338 (CC).
[29] [2019] 4 BLLR 340 (LAC).

[29] Later, the apex Court in *Nganezi*[30] said the following, in addition to what is stated in the preceding paragraph**:**

> *[46] Inferential reasoning in establishing actual participation or association in the primary misconduct was sufficient in Fawu, Chauke and RSA Geological Services (Review). The difficulty seems to be with the A emphasis placed on the necessity of direct presence at the scene of the misconduct, as is also evidenced by the arbitrator and Labour Court's approach here. Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish B complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required. And as Grogan aptly remarked in RSA Geological Services (Arbitration), '(i)n any event, a refusal to disclose information relating to an offence can in certain circumstances make a person an accessory'. He could have added C 'after the fact'. (footnote omitted)*

[30] Furthermore, in *R v Blom,*[31] recently followed by the Labour Appeal Court[32] in respect of what has been said regarding inference and circumstantial evidence, it was held that:

> *"'…two cardinal rules of logic …"*
>
> *(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

[31] At this juncture, this Court must affirm its agreement with the Applicant Union's assertion that the central issue at the core of the dispute was the

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[30] Numsa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others - 2019 (5) SA 354 (CC) at par 46.

[31] 1939 AD 288.

[32] NUMSA obo Mokase v Nissan South Africa Ltd and Others (JA46/23) [2024] ZALAC 16

identification, considering the reason for dismissal as elaborated in paragraph 7.3 above and what the Arbitrator was invited to decide. Accordingly, the Arbitrator indeed committed a reviewable irregularity by misconstruing the substantial merits of the dispute with regard to the law and facts of this matter.

31.1 Furthermore, it is acknowledged as fact that (a) the strike was protected; (b) the Individual Employees participated in the strike; (c) acts of violence occurred during the strike and picketing; and (d) some of the employees who participated in the strike were not charged ("the 15 Employees"), despite the determination by Advocate Ebersohn and the assertions in paragraph 7.3 of this judgment, that those found guilty were based on common purpose, thus only capable of "disassociation" if implicated in a case.

31.2 Consequently, the ongoing inquiry pertains to the role of the 40 Employees and whether their participation in the lawful strike constitutes acts of misconduct, especially in light of the charge sheet as noted in paragraph 10 above[33] and the reasons provided for their dismissal. More on this is demonstrated below.

[32] This Court confirms that the Arbitrator committed a reviewable irregularity relating to the Individual Employees mentioned in Order 1.1 below relating to the law and fact in respect of the guilty findings of those Individual Employees as the reasoning by inference by the Arbitrator was not consistent with all the proved facts as it is not the more plausible or natural one from the evidence instead is a sharp contrast of what was before him based on what is set out above and hereinafter.

[33] The Applicant Union correctly contends that the Employer:

33.1 Conceded during cross-examination that no material allegations were made against the following Individual Employees: (a) Nkosoxolo Jaxa, (b) Grace Kgonare, (c) Itumeleng Kgotlabeng, (d) John Mathetsa, (e) Refilwe Mogole, (f) Mita Mokobane, (g) Samuel Manama, (h) Johannes Motheletsi, (i) Lawrence Seelo, (j) Ben Sibigi, (k) Thamsanqa Xhama, and (l) Solomon Sekao (collectively referred to hereafter as "the 12 Employees"). According to

[33] This again excludes the Shopstewards.

the principles outlined in paragraphs 28 to 30 above, none of these Employees was involved. Even the hearsay evidence that the Arbitrator admitted does not implicate these Employees. Instead, the Employer's witnesses, specifically witness Greef, testified that not all those involved in the strike were necessarily involved in the acts of violence, and indicated that only a few might have been involved.

33.2 In addition, has not presented evidence that supports the guilty findings on employees such as (m) Adries Mohale, (n) Steven Kambula, (o)Samuel Lephafa, (p) David Maleke, (q) Xolela Sigaba, (r) Abel Tshukulume, and (s) Sandile Xekwa. In applying the same principle mentioned in paragraphs 28 to 30 above, no evidence implicates these ones.

[34] Additionally, Mr Saif and Advocate Ebersohn confirmed that the Employer's case was based on a common purpose, and the former also stated that he could not confirm whether "the strikers" were aware of all plans and who was responsible for what actions during the strike and picket except those identified. This admission by Mr Saif, which was presented before the Arbitrator, indicates that even the 11 Employees should not have been found guilty, as was the case with those who were part of the list of employees referenced as the 15 Employees above, who, together with the Individual Employees, were part of the Court Order in the interdict application. This Court concludes in this way, except those who were positively identified as culprits, as per the evidence in the records and are not mentioned in Order 1.1 below.

[35] Furthermore, Advocate Ebersohn stated that "the evidence of the employer before me stated that they were not 100% sure who was involved." Considering the entire transcripts, it is clear that the Employer's expectation that these Employees mentioned in paragraphs 33.1 and 33.2 above would disassociate themselves was illogical, because how can one disassociate themselves when they were never associated or invited to do so in the first place? Regarding the charge sheet mentioned in paragraph 10 above, what occurred was that they were asked to state "why they should not be *charged* based on any common purpose or collective intent to commit misconduct," not to disclose their whereabouts during the acts of violence in question.

[36] Furthermore Ben Sibigi presented uncontested testimony that prior to the strike and picketing he injured his finger and was on sick leave between 19 and 30 September 2018 and he was treating his finger at home, when sick his leave expired, he did not return to work but only went there with an intention to submit a medical certificate but found security and could not enter the premises of the Employer then handed over it to the security at the gate and he never returned to work until after the strike.[34] Liebenbenerg, also representing the Employer, clarified when questioned by Attorney Daniels for the Applicants that the report on the strike did not indicate that “all the strikers were aware of the planned attacks." He added that some union members did not participate in the physical strike actions.[35] Furthermore, Greef, a witness for the Employer, acknowledged during cross-examination by Attorney Ramji for the Applicant that not everyone on strike committed violence. He suggested only a few might have been violent, while others were not. Therefore, the conclusion by the Arbitrator that Ben Sibigi and all those mentioned in paragraphs 33.1 and 33.2 were guilty of misconduct, whilst the Employer failed to show the elements of common purpose as indicated above, indicates a misapprehension of the law and fact, as this indicates that the Arbitrator misconceived “the substantial merits of the dispute”.

[37] As a result, the issues to be decided and all the evidence presented before the Arbitrator pointed in a direction that is contrary to the Arbitrator’s inference when he concluded that he was not required to determine who was involved and who committed the misconduct; consequently, this Court, in this manner, concludes that the Arbitrator indeed misconstrued the inquiry before him, specifically whether the 19 Employees mentioned in Order 1.1 below were charged and dismissed based on common purpose or derivative misconduct. The principle regarding the latter required more from the Employer, such as that the Individual Employees became aware of the wrongdoers and were invited to come forward with information, but they failed to do so, and the Employer offered them protection, which did not occur in this

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[35] P 945 and 946 at line 10-17.

matter. Therefore, the conduct of the Arbitrator resulted in an outcome that a reasonable decision-maker could not have reached.

[38] Furthermore, being part of a protected strike and/or picketing does not make you part of the violence that took place on different dates during that protected strike and/or picketing. Even if one was part of a briefing by shop stewards that violence was to be committed does not equate to breach of a rule, considering that no evidence was presented during the arbitration that it was a common understanding that all those who were present were in agreement that they were condoning the violence to be committed, and that they associated themselves with such. Additionally, if the Arbitrator's reasoning that "all the strikers" were part of the briefing by the shopstewards, so are guilty, were to be followed, it would imply that even those whom the Employer removed from the list committed the acts of misconduct, and this raised the issue of inconsistency, one of the issues to be decided by the Arbitrator. However, considering the facts of this case, one clear thing is that, despite the Arbitrator identifying the issue of whether they committed the offences for which they were dismissed, he misconceived the applicable principle thereof.

[39] Regarding procedural aspects of the dismissal side. This Court finds that the dismissal of the Shopstewards was procedurally fair, as they were given an opportunity to state their respective case. However, the evidence presented by the Employer witnesses indicates that the remaining Individual Employees, through their trade union, offered a larger venue in which they wanted to explain what transpired for each of them. However, they were not given such an opportunity. Instead, the Employer indicated that they can only be represented by a limited number of people, who were classified as observers, so not given time to state their respective versions. This indicates that these Individual Employees were prevented from presenting side which is unfair. Considering the charge sheet relating to them,as stated in paragraph 10 above, which repeatedly states that the Individual Employees associated themselves and all participated with their fellow striking employees in committing the offence, they needed to be allowed to present their cases, not only to

allow few individuals to be permitted as observers.[36] The Employer, however, refused to provide them with this opportunity.

[40] Considering what the Arbitrator says in the arbitration award, as he states what he refers to as the realities of COVID-19, which he says have proven that it is impossible to conduct large-scale events, goes against the evidence presented because this was not an excuse given by the Employer. Therefore, the dismissal was procedurally unfair. This clearly indicates that the Arbitrator relied on something that was not before him.

[41] This Court has considered the issue of bias as raised against the Arbitrator by the Applicant Union, but finds none; instead, it concludes that this Arbitrator erred, as all commissioners are prone to do.

[42] As this Court has ruled that the dismissal of the 19 Employees was substantively unfair, the enquiry now concerns whether to order reinstatement, re-employment, or compensation, as section 193(2) of the LRA provides that:

> *"The Labour Court …must require the employer to reinstate or re-employ the employee unless—*
>
> *(a) The employee does not wish to be reinstated or re-employed;*
>
> *(b) The circumstances surrounding the dismissal are such that a continued employment would be intolerable;*
>
> *(c) It is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
>
> *(d) The dismissal is unfair only because the employer did not follow a fair procedure."*

[43] This Court should carefully consider the options of remedies in section 193(1) as well as the effect thereof, as per section 193(2) before deciding on an appropriate remedy.[37] This Court has also to determine if there are any circumstances that could prevent reinstatement, taking into account that those who have been found not guilty

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[36] Transcripts: p 143-144.

[37] *SARS v CCMA and Others* 2017 SA 549 (CC), at para 38.

have asked for the primary remedy which is reinstatement, as "*intolerability should not be easily be reached, and that the employer must provide weight reasons, accompanied by tangible evidence, to show intolerability."*[38]

[44] In *Booi*[39] the Court said:

> " It follows that this Court is at liberty to order that Mr Booi is entitled to retrospective reinstatement, and in so doing, is constrained only by section 193(1)(a) of the LRA, which states that the reinstatement may be "from any date not earlier than the date of dismissal". It is also noteworthy that, in exercising its discretion regarding the date of reinstatement—
> *"a court or an arbitrator may address, among other things, the period between the dismissal and the trial as well as the fact that the dismissed employee was without income during the period of dismissal, ensuring, however, that an employer is not unjustly financially burdened if retrospective reinstatement is ordered or awarded."*

[45] Given that the dismissal of the employees referenced in paragraphs 33.1 and 33.2 of this judgment has been determined to be both procedurally and substantively unfair, this Court, among other considerations, acknowledges that they were dismissed on 26 August 2019. The referral was made immediately thereafter, and the matter remained at the CCMA for nearly three years, with the arbitration award issued on 8 June 2022. The Applicants' legal representatives did not delay in referring this matter to this Court, and there was no delay in prosecuting it.

[46] A significant period has elapsed since the dismissal. This Court recognises that, although these 19 Employees were dismissed following acts of violent misconduct, no evidence has been presented to suggest their involvement. Colleague employees who participated in the same strike were not dismissed, as noted in this judgment. There is no evidence to suggest that the Employer is unable to reinstate these Employees, apart from concerns regarding the passage of time and acts of violence that happened, which are unrelated to these Employees

[38] *Booi v Amathole District Municipality and others* 2022 (3) BCLR 265 (CC) *("Booi")*
[39] Id.

themselves. The Court opines that, based on the evidence presented, reinstatement with limited compensation, as specified in the order below, would be appropriate.

[47] Furthermore, individuals who challenged *only* the procedural aspect of the dismissal, including employees not referenced in paragraphs 33.1 and 33.2 but part of 40 Employees except the Shopstewards, shall be entitled to only one month's compensation each for the following reasons: they were involved in violent conduct during a lawful strike, which resulted in the destruction of homes of individuals not participating in the strike. This conduct also included stabbing incidents, discussions of hiring hitmen to eliminate certain individuals, and the degree of non-compliance with the procedural requirements of the dismissal, as this Court rejects the remaining arguments advanced by them relating to the procedural aspects of this dismissal.

[48] Based on the above, the following order is made:

<u>Order</u>

1. The Third Respondent's arbitration award is reviewed and set aside, and replaced with the following order:

"1.1 The dismissal of the following Employees by the Plusnet Geotex, A division of Master Plastic Ltd ("the Employer") was substantively and procedurally unfair: (a) Nkosoxolo Jaxa, (b) Grace Kgonare, (c) Itumeleng Kgotlabeng, (d) John Mathetsa, (e) Refilwe Mogole, (f) Mita Mokobane, (g) Samuel Manama, (h) Johannes Motheletsi, (i) Lawrence Seelo, (j) Ben Sibigi, (k) Thamsanqa Xhama, and (l) Solomon Sekao, (m) Adries Mohale, (n) Steven Kambula, (o)Samuel Lephafa, (p) David Maleke, (q) Xolela Sigaba, (r) Abel Tshukulume, and (s) Sandile Xekwa.

1.2 As a result of the above, the Employer is ordered to reinstate all these 19 Employees, mentioned in 1.1 above, on the terms and conditions not less favourable than those applied before their dismissal, and ordered to pay each of these Employees back-pay for their retrospective reinstatement equal to 36 months' remuneration each.

1.3 The dismissal of those Employees not mentioned above is confirmed to be substantively fair.

1.4 The dismissal of both Abram Gadibolawe and Hlengiwe Mkhonza is found to be procedurally fair.

1.5 The dismissal of the remaining Individual Employees not mentioned above is found to be procedurally unfair; therefore, the Employer must pay each of these Individual Employees compensation equivalent to one month's salary.

2. There is no order as to costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Mr K Barkhuizen.

From: Cheadle Thompson & Haysom Inc.

For the First Respondent: Adv M Meyerowitz

Instructed by:Griffiths & Associates Attorneys