



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges/Reportable

Case no: C 376/2023

In the matter between:

**NATIONAL UNION OF MINE
WORKERS**

First Plaintiff

**MFOWEKHAYA MNQAWULI AND 22
OTHERS LISTED IN ANNEXURE A**

**Second and Further
Plaintiffs**

and

**BASELINE CIVIL CONTRACTORS
(PTY)**

Defendant

Heard: 28 October 2024 to 5 November 2024

Delivered: 5 September 2025.

Summary: (Unprotected strike caused by employer altering date of payment of annual attendance bonus – Date of due payment not governed by collective agreement – previous practice of paying bonus by mid-December – Change of date deferring payment by a week announced only a week before previously designated date – no prior consultation about date variation – Employer bearing responsibility for causing unprotected strike action – striking employees subsequently rejecting

reasonable compromise proposal and prolonging strike – Ultimatums issued – Item 6 of the Schedule 8 to the LRA considered - Dismissal procedurally fair but substantively unfair – reinstatement ordered)

JUDGMENT

LAGRANGE, J

Introduction

[1] This case concerns the fairness of the dismissal of the second and further plaintiffs¹ ('the individual plaintiffs') for allegedly participating in an unprotected strike on 9, 12, 13 and 14 December 2022 and for gross insubordination in failing to comply with lawful instructions in the form of ultimatums to return to work.

[2] Mr. J Geldenhuys ('Geldenhuys'), a director of the defendant ('Baseline' or 'the company') was the only witness for the company. Witnesses for the plaintiffs were: Mr S Luzipo ('Luzipo'), a union paralegal officer; Mr A Tyeni ('Tyeni'), a driver; Mr W Manditini ('Manditini'), also a driver, and Mr T Mapeyi ('Mapeyi') a site clerk.

[3] Parties filed written argument subsequent to the trial and agreed no oral hearing of argument was necessary.

[4] At the commencement of the proceedings, a condonation application for the plaintiffs' late referral of the statement of case was considered and granted.

[5] It is a matter of common cause that the individual plaintiffs were engaged in unprotected strike action on the dates mentioned, though they also claim that they were locked out by the company from 12 December 2022. They allege that their

¹ The citation of the parties has been amended in keeping with the current designation of parties in trials in terms of the Labour Court Rules

dismissal on 23 January 2023 was substantively and procedurally unfair. More particularly, they claim that the company did not properly consult with their union ('NUM'), the ultimatums were issued in rapid succession without giving them time to reflect on them and they also had no opportunity to plead to the second charge of insubordination. The union also claimed that Baseline had failed to consider the submissions made in mitigation, namely that the company had acted unilaterally in changing the payment arrangement and failed to communicate properly with employees on the issue. The union also contended that the employer had failed to consider factors set out in Item 6 of the Code of Good Practice: Dismissal, namely regarding the seriousness of the contravention of the LRA, whether an attempt was made to comply with it and whether the strike was in response to unjustified conduct by the employer. Lastly, the individual circumstances of certain drivers and clerks, who were performing their duties or had been locked out with the rest of the workforce, were ignored. It must be mentioned that the statement of claim did not raise any specific defence in relation to clerks.

[6] The company responded that the alteration of the bonus payment was justified and was communicated to the employees. Moreover, there was no provision in the collective agreement stating when the bonus had to be paid out. The employees had ignored four ultimatums. It claims the employees pleaded guilty to the charge of participating in an unprotected strike at the disciplinary hearing where they were represented by a union official. It denies it locked employees out and asserts this was never raised at the disciplinary inquiry. As far as the company is concerned, drivers and clerks never disassociated themselves from the strike. It maintains that the dismissals were both substantively and procedurally fair and seeks the dismissal of the referral with an order of costs against the individual plaintiffs and NUM.

The annual attendance bonus

[7] Before delving into the sequence of events, the nature of the bonus needs to be briefly explained. It was an annual attendance bonus, which provided for a

reduction in the bonus for unauthorised absenteeism. Since 2017 it had been paid in mid-December before employees commenced taking their annual leave.

[8] The company noticed that in the previous two years, following the payment of the bonus, a lot of unauthorised absenteeism had taken place in the last two weeks of the year. This resulted in an overpayment of the bonus to staff who had been absent without authority before their leave commenced. Consequently, in 2022 it decided to pay the bonus only on 23 December instead of the usual mid-December date, so it could adjust the bonus to account for any unauthorised absenteeism in the run-up to the shutdown. It claimed it obtained the consent of the bargaining council to do this, though strictly speaking this was not necessary.

[9] The year-end bonus was regulated by the bargaining council collective agreement, which was extended to the civil engineering sector. Clause 6.7 of the gazetted collective agreement² stated:

“6.7 Year-end bonus

Subject to the provisions of this sub-clause, an employer must pay an employee an annual bonus as follows:

6.7.1 20 working days’ pay

6.7.2 Where existing agreements provide for bonuses in excess of that provided for in sub-clause 6.7.1 above, such existing agreements shall prevail.

6.7.3 An employee who is employed in a year in which a bonus amount is to be paid and who has been continuously so employed for at least 3 months, but for less than one full year, shall be entitled to a pro rata bonus payment.

6.7.4 An employee whose employment is terminated through no fault of his or her own, through retrenchment, retirement, disability, or death, shall be entitled to a pro rata bonus payment.

6.7.5 No bonus payment shall be made to employees whose employment was terminated by reason of misconduct.

6.7.6 Year-end (annual) bonus will not accrue to an employee for any unauthorised absence.

² Gazette no 46423 dd 27 May 2022.

*6.7.7 Calculation of accrual reduction upon unauthorised absenteeism —
(Example: an employee is absent without authorisation for 5 days and works 9 ordinary hours on 5 days per week:*

- a) 5 days x 9 hours = 45 hours*
- b) bonus: (235 working days x 9 hours) = 2115 total hours*
- c) bonus accrual factor: 180 hours / 2115 total hours = 0.085 (bonus accrual per hour worked)*
- d) 45 hours (see clause 6.7.7(a)) x 0.085 (accrual factor) = 3.825 hours
task grade 1: R39.81 x 3.825 hours = R152.27 (bonus reduction amount)”*

Notably, the provision did not stipulate a date by which the bonus had to be paid.

Sequence of events

[10] Geldenhuys testified that after he had consulted with the bargaining Council and confirmed that the collective agreement did not prescribe a date for payment of the increase Baseline decided it would pay the bonus on 23 December. This alteration of the date was first communicated in a memorandum which each site manager conveyed to staff on site. The memorandum was dated 7 December 2022 but was circulated in the morning of the following day. It appears it was that workers, including the individual plaintiffs, first got knowledge of the change to the normal practice of paying the bonus by mid-December.

[11] Workers were aggrieved by management’s decision to change the payment dates, which they claimed had caused uncertainty and confusion and had upset their financial plans because they expected to be paid when they stopped work on 14 December 2022. In the applicant’s statement of case, it was suggested that another memorandum had been issued on 9 December changing the date for payment from 23 to 21 December, but Geldenhuys’s testimony was that it was only on 12 December 2022 that a second memorandum was issued stating that half the bonus would be paid on 14 December and the balance on 21 December 2022. Thus, the company contends that could not have been confusion caused by two memoranda.

[12] It is undisputed that workers at the Stellenbosch site had a meeting with their site manager after receiving the news. He informed them that he was just implementing management instructions. In any event, on Friday 9 December 2022, workers at four construction sites decided not to return to work until the normal bonus payment arrangement was reinstated. They also demanded a meeting with Geldenhuys. The four work sites comprised civil or building construction sites of different clients of the firm.

[13] That day, four ultimatums were issued at 8:50, 10:10, 11:15 and 16:00, respectively. The first three ultimatums required workers to resume work within an hour of the ultimatum being issued, and the final ultimatum required them to report for work the following working day, which was Monday 12 December. It is common cause that the first three ultimatums were ignored. The ultimatums recorded that the workers were participating in an unlawful and unprotected strike and instructed them to return to work by the relevant deadline. The text of each ultimatum warned of the possibility of dismissal. The ultimatums issued after the first one also recorded that the failure to comply with the previous one amounted to an act of insubordination as well. Similarly, successive ultimatums warned of the need to comply with the ultimatum in order to avoid potential dismissal. An attendance register was also kept of the workers who were in attendance when each ultimatum was read.

[14] Just before the second ultimatum was issued, Baseline also sent an email to the union at 10:05 on 9 December. The letter advised the union that its members had embarked on an unprotected strike over the dates of remuneration payment, and an ultimatum had been issued for them to return to work. The letter asked the union to confirm whether it condoned or supported the strike action is a matter of urgency and stated that if it did not hear from the union within two hours would assume that the union did in fact support the action. It is interesting that he testified that neither shop stewards nor union members communicated at all with NUM about the unfolding events. Mr Luzipo said he never saw this email from Baseline. He testified that previously he was in regular communication with Geldenhuys about a number of issues, such as new union members or salary queries, but did not hear

from him on this occasion. This was not canvassed with Geldenhuys during his cross-examination.

[15] There is a dispute what transpired on Monday 12 December. The individual plaintiffs allege that they reported for work that morning but were prevented from doing so because management locked them out. Geldenhuys claimed that the company had engaged a security service to prevent any action against other parties at the construction site such as consulting engineers and laboratory service staff, but not to prevent workers returning to work. He also testified that at no point during the disciplinary hearing did any of the plaintiffs say that they were locked out, or refused access, on 12 December. Similarly, it was not raised when he met with shop-stewards that day, nor when the disciplinary enquiry was held. He denied that Baseline had hired replacement employees. However, at the Caledon Road construction site where they had to open a road by 15 December before the holiday season began, some salaried Baseline staff did operate machinery on the site.

[16] Before 12:00 that morning, Geldenhuys met with shop stewards from NUM and AMCU at the company's head office. AMCU was the majority union. He said the rationale for the change in payment dates was explained. He agreed that it might have been the shop stewards who proposed that at least half the bonus payment should be made earlier, namely that 50% should be paid on 14 December and the rest on 21st December, instead of making the whole payment on 23 December. The company agreed to this proposal because retaining half the payment until after workers had gone on leave, would give the company sufficient financial leeway to recalculate the bonus to avoid overpaying it to employees who were absent without leave between receiving the first portion of the bonus and when their leave began. The offer to advance payment of the balance of the payment to 21 December was made in the interest of settling the strike.

[17] At 10:17 that morning, the company had sent another email to NUM in which it confirmed that it had not received any clarification on the union's position regarding the unprotected strike action. It also advised it had given the union's members ultimatums, but they had still not returned to work by 09:00 that morning and were

continuing with their strike action. The letter concluded, in the light of the members continued action and the union's failure to respond to baseline's letter of nine December, that the union must be supporting the unprotected strike action. It reserved its right to take appropriate legal steps against the union and its members. The communication made no reference to discussions that were being held with the shop stewards, but it is not clear if those discussions had already begun by the time the email was sent. Luzipo testified that he only saw Baseline's email after 15h00, a day later, on 13 December. He could not explain why he did not receive the email of 9 December, which had been sent to the same union administrators' email addresses as the second one. Luzipo also did not offer a coherent explanation why he only saw this email a day after it was sent. Nevertheless, he promptly requested a meeting with Baseline the following morning, which was the last working day of the year and work was scheduled to end at midday. Management did not agree to the meeting because it was too late given the shutdown starting that day.

[18] After Baseline and the shop stewards agreed at their meeting on 12 December on the proposed alternative which could be recommended to the strikers, the latter had to get a mandate from their members and were supposed to revert to the company before close of business the same day. The plaintiffs alleged that NUM members were willing to accept the proposal, but AMCU members rejected it and refused to return to work. Because AMCU was the majority union, the plaintiffs also did not return to work. Geldenhuys testified that NUM shop stewards did not convey this to him. According to him, nothing would have prevented NUM members from returning to work if they had wanted to. Although he had hoped that workers would accept the proposal because the shop stewards were in favour of it, no communication was received from NUM that its members wanted to return to work. If that had been the case, he expected NUM would have advised him of this. Geldenhuys testified that the feedback he got from all four sites was that the proposal was not accepted and the strike action was going to continue. The applicants neither pleaded nor stated in their evidence that there was any intimidation by AMCU members when they had to decide if they would return to work.

[19] It was only the following day, on 13 December at 15:23, that NUM communicated with management for the first time, by sending an email in reply to the company's email of the previous day. It requested a meeting with the company on 14 December at 09:00. NUM's email made no mention of a lockout. As the company was shutting down at 12h00 that day, Geldenhuys said they could not see the purpose of a meeting with the union at that point.

[20] Notwithstanding the explanation why they did not return to work owing to AMCU members' stance, the plaintiffs also pleaded that they were denied access to the workplace both on 13 and 14 December. Geldenhuys disputed this, pointing out that the company provided transport to and from the site. He asked, rhetorically, why the company would transport workers to the site every day and then deny them access to the workplace. He further stated that any workers who wanted to attend work could have phoned their supervisors to say they were willing to work. The area of operations at each site was huge, extending several kilometres in some cases. They could have reported for duty anywhere on the site.

[21] The annual shutdown began at 12h00 on 14 December, and payment of bonuses and holiday pay was ultimately made on 23 December, because the alternative proposal canvassed by shop stewards had not been accepted by the employees.

[22] Operations resumed on 10 January 2022. On returning to work, the plaintiffs were issued with suspension letters and notification of the disciplinary enquiry which was held on 13 January.

[23] NUM members were represented in the disciplinary enquiry by Luzipo. He testified that he met with shop stewards and employees in the morning before the inquiry, but he did not see Manditini there. He did not know the reason he was absent. This version was contradicted by Manditini himself, who said he was present.

[24] Luzipo testified that he was appearing for all the members who were present at the inquiry. However, at the inquiry he never qualified who he was not representing of all the NUM members who had been charged. Tyeni said he did not attend the inquiry because he was at home with his wife, who gave birth to their child the week of the inquiry. He claimed to have advised his supervisor around 7th or 8th January that he could not come back to Cape Town that week because of the expected birth of their child. When he returned and spoke to Luzipo, he got the impression the organiser did not realise he was absent during the enquiry. He was told the dismissal dispute was being referred to the bargaining council. He agreed that he did not only get paid for transporting workers to and from site. However, once he had dropped workers off at the site he waited at his truck for other work instructions. If he did not get any new work instruction, there was nothing he could do.

[25] It is common cause that Luzipo stated that a guilty plea was entered for all the members on the first charge of participating in an unprotected strike on 9,12,13 and 14 December 2021. It was argued that the second charge of insubordination for not complying with the ultimatums was a duplication of the first charge. Neither Mapeyi nor J1, who were present, told the chairperson that they did not accept they were guilty of of the first offence. Geldenhuys, who was at the enquiry, testified that no exceptional circumstances were pleaded for Manditini, F1 or Tyeni.

The disciplinary inquiry outcome

[26] The inquiry was chaired by an external chairperson. He noted that the applicants had pleaded guilty to the charge of participating in an unprotected strike and rejected the argument that a separate charge of insubordination was competent because of their failure to comply with the ultimatums, and found them guilty on that charge as well. However, the chairperson also found that nothing much turned on whether the charges were separable and considered the misconduct in its totality. Luzipo argued that the chairperson was supposed to make a ruling on whether the charges were distinct and, if so, the union would have presented its defence to the charge of insubordination. When asked what the defence would have been, he

answered that they would have argued that the strikers were willing to return to work. However, he was unable to explain why that defence could not have been raised against the second charge.

[27] In considering the sanction he found that now if it had been made by the strikers to comply with the provisions of the LRA and that it lasted four days ending only when the business shut down for the year. The employees had been given clear ultimatums which had been read to them by an interpreter, which warned them of the possibility of dismissal if they failed to return to work. He noted the evidence of the employer that it suffered financial loss of approximately R 6 million, owing to contractual penalties imposed by clients, and had suffered reputational harm because of the failure to complete work by the year end. He accepted the decision to move the payment date of bonuses from 14 December to 23 December cause great unhappiness among workers who had planned their holiday trips home to the Eastern Cape based on the original payment date and noted the complaint that the change had been communicated at short notice, with site managers being unable to provide clarity about the change. Nevertheless, he found that Baseline was within its rights to make the change and the workers' response to the change was disproportionately serious. There were other avenues for them to address their grievances before the shutdown date. He concluded that the trust relationship had broken down beyond repair and the employer was entitled to terminate the relationship.

Circumstances of certain individual applicants

[28] The special circumstances pleaded by Tyeni, Manditini and Mr P Feni were all drivers, are set out below. Feni did not give evidence, but it was pleaded that he had also performed his duties.

[29] Tyeni and Feni alleged that they were drivers and on all days of the strike performed their duties of collecting and delivering workers to site. Likewise, Manditini, who was also a driver, performed his duties, but he was on sick leave from 12 to 14 December. Geldenhuys's response to these defences was that a driver's

duties of ferrying workers to and from the site, did not distinguish their conduct from that of the strikers, because they did not make themselves available for other duties, from the time they brought workers to the site to the time they took them back. Once they brought workers to the site, they were supposed to continue with their other driving duties on the site, like transporting materials and the like. In his view this demonstrated they were part of the strike. Drivers were not remunerated merely for transporting the workers to and from the site, but also for performing other driving duties he performed during the rest of the day. Geldenhuys said they ought to have reported to their supervisors that they were ready and able to work so they could be assigned work. As mentioned above, Geldenhuys testified that this special defence for the drivers was not pleaded at the disciplinary inquiry. Although this was not put to any of Baseline's witnesses, when Tyeni testified, he said that he never heard of an instruction that he had to contact his supervisor to say that he was now ready to perform other duties. Once he had dropped workers offered the site he waited for any further instructions. Manditini gave similar evidence.

[30] Geldenhuys alleged that the first time he saw the medical certificate provided for Manditini's sick leave, was sometime in July 2023, when he saw the copy of it attached as an annexure to the statement of claim. The certificate booked Manditini off from work, from 12 December 2022 until 14 January 2023. The stated diagnosis was that he was suffering from influenza. According to the certificate he consulted the doctor on 12 December 2022. The original certificate had never been received by the company, which was contrary to company policy which required it to be handed in. Geldenhuys was sceptical about the validity of the certificate because it stated that Manditini was suffering from influenza but would only be able to return to work after a month. Nonetheless, he conceded he could not pass any medical opinion on this.

[31] When Manditini testified, he agreed he was present amongst the strikers when all the ultimatums were issued on 9 December 2022, but claimed he was not part of the group which was on strike. When asked if he told his manager that he was part of the strike, his response was that his manager never came to him about it.

[32] The attendance register of 12 December 2022 showed that Manditini was marked as being present, but a manuscript entry next to his name stated: “*WENT TO DOCTOR*”. He said he told his supervisor after dropping the employees off at site that he needed to go to the doctor. He claims he gave the certificate to Tyeni who handed it in at Baseline the next day. Despite being booked off ill, it was common cause that Manditini came to collect his payslip on 14 December 2022.

[33] Geldenhuys said he did not accept that Manditini had gone to the doctor because the original certificate was not submitted to the company. He was not confronted with Manditini’s version under cross examination. Significantly, Tyeni, who testified before Manditini never mention that he had handed in Manditini’s certificate. Manditini could not offer any explanation why the copy of the medical certificate attached to the statement of claim was not signed by the doctor nor why it showed Manditini’s identity number to be “1972”.

[34] Mapeyi’s circumstances were different from the drivers. He was a site clerk. He claimed that when he arrived at the site, his foreman came to tell him that the site agent would tell him where he should work because he could not go work where he normally did. When he was asked why this version had not been put to Geldenhuys, his explanation was that he was not in court when Geldenhuys testified, but he conceded he had consulted with NUM’s attorneys in preparation for the trial. He testified that it was on 9 December that the site agent came a together with security staff and read papers to workers saying that they had to leave the site. It was pointed out that this version of security staff being deployed on 9 December was also not part of the applicant’s pleaded version, namely that workers were locked out from 12 December, not 9 December. He agreed that he was transported to the site so that he could work but commented that it made no sense if the employer wanted him to work that the gates were closed and security was on site. When he was asked why management agreed to a split payment of the attendance bonus if it did not want employees to return to work, his answer was that the office staff did agree with the proposal and took their response to the other workers.

Evaluation

[35] In previous years, the statutory attendance bonus had been paid out by the time sites closed for the year end shutdown. In keeping with this practice, the initial year end close procedure memorandum published by the company provided for the payment of leave pay bonuses and public holidays on 14 December 2022. However, Baseline had experienced problems in the past because a number of employees simply did not return to work until the following year after these payments were made. As a result, the bonus payment could not be reduced in accordance with the formula for forfeiting part of the bonus because payment of the full bonus had already been made. To address this problem Baseline decided that it would only pay the bonus after the shutdown date. It took this decision after taking advice from the bargaining Council that there was no stipulated date when payment of the bonus had to be made. As far as the collective agreement goes, the Council opinion was correct. Thus, in a revised shutdown procedure issued memorandum of 7 December 2022, the payment of the attendance bonus for hourly paid employees was rescheduled to be paid on 23 December 2022, together with salaries for the last week of work and the public holidays of 16 and 25 December 2022 and 2 January 2023. The affected workers at the four Baseline sites in the Western Cape were only advised of the change during the course of 8 December 2022.

[36] Needless to say, that news was well not well received. The workers had justifiably assumed that the bonus would be paid out before the shutdown, as was the case in the previous years. Moreover, this had already been confirmed in the first memorandum issued on the shutdown procedure for 2022. It was apparent that a number of them travel home to their families after the shutdown and use the bonus money to make purchases before they set out on their journeys home. Delaying the payment until after they had already reached their home destinations upset such plans. They were evidently not satisfied with the explanation they received from their site managers, and the next day they decided not to work until the normal bonus payment date was reinstated and they demanded a meeting with Geldenhuys.

[37] During Friday, 9 December 2022, four ultimatums were issued. Successive ultimatums increasingly emphasized the prospect of dismissal if the strikers did not return to work, and the final ultimatum issued at the end of the day provided them with one more opportunity to return to work on Monday. Although it had been pleaded that strikers did not have enough time to consider the ultimatums, no evidence was led to show that the On Monday they still did not return to work, but a meeting took place during the course of the morning between management and shop stewards of both unions representing strikers, which led to the formulation of a compromise proposal in terms of which workers would receive half the bonus on the normal date and the balance on 21 December 2022, two days earlier than the intended payment date of 23 December.

[38] On each day of the strike, strikers were transported to work and were transported back at the end of each day. They alleged that on Monday 12 December they were prevented from returning to work and that the company had engaged additional security staff for that purpose. The company agreed that it had augmented the existing security staff for the purposes of ensuring that other non-striking staff were not hampered from attending work, though there was no evidence led of any threats, or actual violence been committed by the strikers.

[39] Despite the shop stewards believing that the strikers would accept the compromise proposal, they did not. The applicant's claim that NUM members were willing to return to work but because most of the strikers who were members of AMCU, the majority union, were not willing to accept the proposal and return to work, they did not do so either. There was no evidence that the nuanced stance of NUM members was conveyed either to management or to union officials. Geldenhuys's evidence was that, if management had been advised they wished to return to work NUM members could have done so. It was alleged that Baseline prevented strikers from returning to work that Monday. Management disputed this, arguing that it also made no sense to transport the strikers to the workplace if it did not want them to work. Apart from this, the suggestion that strikers were willing to return to work that morning is plainly belied by the fact that even after a compromise proposal was put to them, which they claim they accepted, they did not return to work. It simply makes

no sense that they claim they were willing to work, even before management met with the shop stewards, yet were unwilling to do so afterwards when an improved bonus payment arrangement was proposed, because AMCU members did not accept it. Moreover, if shop stewards simply told management that the strikers wanted to return to work but the company was preventing from doing so, there was no reason why management would have felt compelled to negotiate a compromise proposal. Everything points to the strikers own unbending will being the real reason they did not return to work that day. The improbability of them being locked out by management is supported by the fact that there was no evidence, either by the shop stewards, the strikers, or the union, that the issue of a lockout had been raised at any stage up to and including the disciplinary inquiry on 13 January 2023.

Procedural fairness

[40] On the question of whether they were denied an opportunity at the disciplinary hearing of addressing the separate charges of insubordination because they expected the chairperson to make a ruling whether it was a duplication of the charges, it was not disputed that the chairperson did not deal with this until delivering his decision. As mentioned previously, the chairperson decided that the charges were distinct but did not think that the charges should really be dealt with separately and that the misconduct should be considered in totality rather than being analysed separately. Baseline argued that the union's own contention that the charge of insubordination was merely a duplication of the charge of being on an unprotected strike and failing to return to work after ultimatums were issued. If the plaintiffs admitted guilt on the first charge, they would effectively have to admit guilt on the second as well. In any event, the only defence which Luzipo would have proffered to this charge was that the workers wanted to return to work, which would also have been a defence to the first charge, but this would have been incompatible with pleading guilty to the first charge. It seems that the only thing he could have been referring to was the contention that the workers were locked out, which only came up for the first time when the statement of claim was filed. From the chairperson's findings, nothing suggests that he considered insubordination as something which

should be entertained as a separate consideration in deciding whether to impose the sanction of dismissal.

[41] It was contended that there was no opportunity to present argument in mitigation, but the evidence on what transpired in the inquiry and the chairperson's own findings do not support that.

[42] It was argued that the chairperson was not entitled to make findings in respect of individual plaintiffs who did not attend the enquiry. However, Luzipo claimed to be representing all the plaintiffs and the chairperson was not advised that distinct representations needed to be made in respect of any of those absent because their defence was different from all the other plaintiffs.

[43] Considering the above, I am not persuaded the dismissals were procedurally unfair.

Individual circumstances advanced as defences or factors in mitigation

[44] Regarding the matter of distinct circumstances being raised on behalf of the individual applicants who testified, none of them denied being present when the ultimatums were announced, though Mapeyi tried to suggest that he might not have fully understood the ultimatums because he did not read them himself.

[45] As far as the three drivers were concerned, it was common cause that every day during the strike they transported the strikers to and from the workplaces but did not perform any other duties during the day. They claim they were not on strike with the other workers who did not report for work. They agreed that their normal duties did not begin and end with transporting workers to and from the workplace. However, they all claimed to be waiting for instructions to perform other duties. There was no evidence that any of them attempted to contact the supervisors to find out if there were any other duties they should perform, and they remained in the presence of the strikers and heard the ultimatums together with them. It seems inherently implausible, that over the course of four days, that they could have believed their

supervisors must have known that the reason they were not at work was because they were waiting to be summonsed by them to perform duties and not because they were not doing other duties because they were acting in concert with the general body of the strikers. What is indisputable is that none of them attempted to contact their supervisors to advise them they were not on strike, but awaiting instructions.

[46] It is significant that this defence was not raised on their behalf at the disciplinary inquiry, even though they were at the very least aware the inquiry was taking place, and one of them was present at the inquiry, who could have advised Luzipo of their non-participation in the strike. In any event, they offered no explanation why they did not enter the workplace but remained with the strikers. On the basis that there was no obstacle to the other strikers returning to work because they were not locked out, the same consideration would apply to the drivers.

[47] Quite apart from whether he participated in the strike on 9 December 2022, Manditini raised a separate defence that he had been booked off on sick leave from sometime during 12 December 2022 until the day after the disciplinary hearing on 13 January 2023. It is common cause that at the disciplinary hearing, Luzipo did not attempt to argue that some individuals had defences to the charge of participating in the strike.

[48] During his evidence he tried to suggest that his representation was qualified by whomever was present at the enquiry, but there was no evidence that he advised the chairperson or management of this, nor did he argue that certain members should be dealt with in a separate inquiry either because they were not present or because their cases were distinct from all the rest of NUM members on whose behalf he had pleaded guilty. Moreover, Manditini admitted he was not present at the inquiry.

[49] Manditini was at the workplace, but not working, on 9 and 12 December, even though it was recorded that he had left to see the doctor on 12 December. Geldenhuys testified that company procedures required an employee to at least notify the company by the next day or as soon as possible that they are ill and to

hand in the original medical certificate within a day or two. This evidence was not disputed. It was also never put to him that the certificate was handed in by another employee on 13 December 2022. Only when Manditini testified himself was it first claimed that the original had been given to Tyeni to hand in. However, Tyeni who testified before Manditini was not asked anything about delivery of the certificate, whereas his evidence on that question would have been crucial as he was the only witness who could give direct evidence of that.

[50] On the evidence, the copy of the medical certificate, which was first produced as an annexure to the statement of claim, raises serious problems about its provenance. Firstly, the probabilities do not favour Manditini's version that it was handed in the day after it was issued. Secondly, the certificate bears no signature of the doctor and the four digit ID number raises serious concern that a doctor would have issued a certificate. Thirdly, without more explanation, a prognosis made on the first consultation that Manditini would need 34 days to recover from influenza is notably unusual. The period of sick leave, which extended to 14 January 2023, coincidentally also happens to have covered the date of the disciplinary enquiry on 13 January 2023. Lastly, it was not alleged in the statement of case that the certificate had been handed in previously. It was simply alleged he was on 'sick leave' and the copy of the certificate was attached. All of these factors point to a certificate the authenticity of which is too questionable to accept that it was issued by a doctor. This is not an instance where the authenticity of the certificate is questioned based on a suspected practice of a doctor selling certificates³.

[51] The dubious authenticity of the copy of the sick note in this instance arises *ex facie* the certificate itself and the most probable timing of its first appearance. That said, it cannot be ruled out that Manditini did consult a doctor on 12 December 2022 after leaving the workplace, but the document produced by him cannot be accepted as corroboratory evidence of leave the doctor purportedly prescribed. Even if he did consult a doctor on 12 December 2022, there is no reliable evidence to support what period of time, if any, he was booked off for. The contention that the original

³ See e.g, *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2024) 45 ILJ 2270 (LAC) which dealt with such a factual scenario.

certificate was handed in on or about 13 December also seems improbable based on the discussion above. As such his absence on account of illness on 13 and 14 December has not been substantiated. It is noteworthy that he did attend the workplace on 14 December 2022 to collect his. At best, it is doubtful that he was in attendance during the strike on 12 December, but even so he did not return to work when he arrived that day.

[52] The defence of the two site clerks, M Mapeyi and Mr H Jors, are similar in many respects to the drivers, except that their defences were not even pleaded in the statement of case. Further, Mapeyi's testimony, in effect, was that he had been barred from entering his workplace, which falls to be considered under the claim that strikers were locked out by management. To some extent this has been foreshadowed in the exposition of evidence above. The main difficulty with the contention that strikers were locked out on 12 December and by implication were prevented from working, is that it is at odds with other considerations and evidence. Firstly, I agree with the submissions made by Baseline's counsel that, if a lockout had occurred, it is highly improbable that such an important issue would not have been a primary point of discussion between management and the shop stewards on 12 December, and that it would not have been raised as a major pillar of the defense to the charges at the inquiry on 13 January 2023. Secondly, it is at odds with the fact that management felt it was necessary to reach a compromise to end the strike by modifying its plan to defer the bonus payment. If workers were in fact intent on returning to work on 12 December but were being prevented from entering the workplace by management, there is no reason why Baseline would have felt it was necessary to negotiate with them. It could simply have ended any lockout and allowed them to return without any alteration of its plans. In a similar vein, if management did not want workers to return to work, it makes no sense why they were transported to the workplace as usual.

[53] In conclusion, I am not persuaded, even if the belated defense of a lockout and Manditini's illness, together with the unpleaded defence advanced on the behalf of the clerks is considered, that the plaintiffs were not participating in the strike

throughout, bar perhaps part of 12 December in the case of Manditini. Accordingly, there was nothing to distinguish their conduct from the bulk of the strikers.

The substantive fairness of the dismissals

Relevant principles

[54] Item 6 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal, reads:

“6 Dismissals and industrial action

(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-

- (a) the seriousness of the contravention of this Act;*
- (b) attempts made to comply with this Act; and*
- (c) whether or not the strike was in response to unjustified conduct by the employer.*

(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.”

[55] The Labour Appeal Court has held that a two-stage enquiry must be conducted. In *NUMSA v CBI Electric African Cables*⁴ it held:

“[29] In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike

⁴ [2014] 1 BLLR 31 (LC)

related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not “a magic wand which when raised renders the dismissal of strikers fair” (National Union of Mineworkers of SA v Tek Corporation Ltd and others (1991) 12 ILJ 577 (LAC). The employer still bears the onus to prove that the dismissal is fair.

[30] In his work Grogan expresses the view that item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He, therefore, opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers’ demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the Code.”

(emphasis added)

In analysing these factors, it is important not to make a static snapshot evaluation. The situation is a dynamic one and the conduct of the various parties may change from obstructive to constructive and vice-versa over the course of the events culminating in the dismissal.

[56] In relation to evaluating whether a strike is in response to unjustified action by an employer, it is important to emphasise that it includes not only illegal action, but also unfair or unreasonable conduct by an employer⁵. In this case it is the fairness and reasonableness of Basline’s conduct in altering the timing of the bonus payment which is at issue.

⁵ *Trellicor (Pty) Ltd t/a Trelidor v National Union of Metalworkers of SA on behalf of Ndwalane & others* (2022) 43 ILJ 1331 (LAC) at paragraph 53.

[57] Unprotected strike action is a serious form of misconduct because it is intended to harm the business of the employer, and the impact of concerted collective action typically has a much greater prejudicial impact on an employer than individual acts of misconduct. Further, it undermines the principle of not resorting to economic force without first trying to settle a dispute by means of consultation or negotiation and without using the conciliation machinery of the LRA. Nonetheless, the mere fact that employees embark on unprotected industrial action, does not automatically mean that a dismissal for such misconduct is invariably fair.

[58] In *National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration & others*⁶, the Labour Appeal Court held that Item 6(1) of the Code of Good Practice “affirms earlier law where the illegality of the strike did not automatically result in the dismissal or unprotected strikers”⁷, and “even in the case of an unprotected strike, dismissal is not the automatic default position”⁸.

Was the strike a response to unlawful, unreasonable or unfair conduct of the employer?

[59] It is obvious no strike would have taken place, had Baseline not decided to alter the timing of the bonus payment. It is true that the bargaining council collective agreement did not prescribe that the bonus payment had to be made when the annual shutdown began, so it was not a breach of the agreement not to pay it by that date. However, it was a well-established practice to pay it when the sites shut down. In addition, the company had already confirmed in its earlier memorandum on the shutdown procedures that the same approach would be followed in 2022. Its decision to alter the payment date to coincide with the other remuneration payments made on 23 December 2022, was taken only a week before the shutdown and was only conveyed to the employees a day later. Baseline failed to consult with the union or shop stewards beforehand about its intentions, but presented it as a *fait accompli* to workers.

⁶ (2011) 32 ILJ 2104 (LAC)

⁷ At paragraph 22.

⁸ At paragraph 27.

[60] The effect of the new payment date was to defer payment of what amounted to nearly a month's income for a week at a critical time for the employees. Baseline did not dispute that its decision would disrupt the employee's spending plans and could inconvenience those who wanted to make purchases with the bonus money before they returned home. In the circumstances, I am satisfied the strike was an understandable response to the company's unreasonable and unfair conduct in altering the payment arrangement on such short notice without any prior consultation. I note in passing that there was no explanation why the reason for making the alteration only came to Baseline's attention so late before the payments were due to be made.

The seriousness of the contravention and efforts to end the strike

[61] The fact that the strike which started on 9 December was a reaction to Baseline's unreasonable and unfair conduct, significantly diminishes the seriousness of the workers embarking on strike action without following the LRA procedures for embarking on protected industrial action. The company ought to have realised that such a dramatic departure from the usual payment schedule, without any prior consultation and on relatively late notice, was likely to provoke a serious backlash from employees. The responsibility for the inception of the unprotected strike lies squarely with the company. Even though the plaintiffs bear greater responsibility for the continuation of the strike, it remains a weighty consideration, that the strike only happened because of Baseline's conduct.

[62] However, the strike continued right up to 14 December when the annual shutdown began at midday, which effectively brought an end to it. On the resumption of operations in the new year, the strikers were told to report to the 'Stella' site where they were issued with suspension letters. No evidence was led about whether they had tried to report for work or remained off site. In any event, the act of suspension made it immaterial whether they intended to continue with the strike.

[63] It is not in dispute there was no attempt was made to comply with the ultimatums. The plaintiffs contention that they wanted to return to work on 12 December cannot be sustained on the evidence. It must also be mentioned that no evidence was led to suggest they did not understand them or needed more time to discuss them. No complaint was made that workers did not have enough time to consider them.

[64] Another factor to consider is whether the union or the members took any constructive action after strike began to try to end it. The union played no role whatsoever until latish in the afternoon of 13 December when it requested a meeting with the company the following day. There was no evidence it made any effort to call on members to end the strike. There was also no evidence the shop stewards or members sought the union's assistance or advice, despite the succession of ultimatums issued on 9 December warning of serious consequences if the strike continued. The apparent communication gap between the union and the strikers was not explained, but the upshot is that the union played a largely passive role in affairs until a very belated attempt to intervene. It is hard to accept that Luzipo was so out of touch that he never saw the first email on 9 December at all, and only learnt of the strike on reading the email of 12 December the following afternoon.

[65] Whether he was normally in telephonic contact with Geldenhuys was never raised with Geldenhuys, but it is obvious that beyond the two emails the company made no other attempt to contact Luzipo. Similarly, despite the supposed direct line of communication between them, when Luzipo allegedly first learnt of the strike, his response was not to phone Geldenhuys immediately but to send an email instead. On balance, the union made no positive contribution by intervening early on, and workers and shop stewards could and should have sought the union's help. The company also might have been expected to have at least tried to phone the union and not content itself with two emails over two days, in the absence of a response, but in fairness to Baseline its limited communications with the union were not something that was canvassed with Geldenhuys under cross-examination.

[66] Nonetheless, by Monday at least one constructive step was undertaken, when the company met with shopstewards in an effort to resolve the impasse. The result of that meeting was also constructive, because it resulted in a reasonable compromise between the positions of the company and the strikers. It seems shopstewards believed it would be accepted, but unfortunately the workers were unwilling to budge. The court was told the plaintiffs were willing to return to work, but decided not to because AMCU members rejected the idea. However, if that was indeed the attitude of NUM members, it is odd that it did never occurred to the members or shop stewards, to apprise the company of that. The failure to communicate to management such a significant shift in attitude by NUM members towards continuing the strike, in my view, makes it more probable that it did not happen. It seems more probable they actually positively aligned themselves with the stance taken by the majority union. Consequently, the opportunity to end the strike with a result that was significantly more beneficial to workers than what management intended to implement originally, was squandered by the plaintiffs.

[67] The strike effectively lasted three and a half days, and did cause Baseline significant financial loss in the region of R 6,5 million according to Geldenhuys's evidence, which the union could not really dispute. It ought to have ended by Tuesday, the third day, by settling the matter on the recommended compromise proposal. While the plaintiffs cannot be judged harshly for their initial reaction to the change in payment dates, they were unwilling to budge despite management being willing to halve the negative impact of a one week delay in the full payment. In assessing the reasonableness of their rejection, it must be remembered that the collective agreement did not prescribe a payment date, so Baseline was not obliged by it to retain the past practice. Nevertheless, that does not absolve the company from responsibility for the poor way it handled the sudden departure from past practice, which was clearly uninformed by sound industrial relations practices. The nett result is that it is fair to say that it was not a disproportionate response of the plaintiffs to embark on strike action, but beyond 12 December when the compromise was tabled, their rationale for continuing with the unprotected strike is much less justifiable and aggravated the seriousness of their misconduct.

[68] Another factor that should be considered is that the strike remained orderly throughout its duration. It did not escalate. There were no allegations that the strikers were not peaceful nor that there were any threats of violence, or damage to property, committed during the strike. Everything suggests the conduct of the strikers cannot be criticised in this respect.

[69] Geldenhuys testified that he believed the strike broke a very well established trust relationship with the plaintiffs, which he could not see being restored because he could not be confident they would not commit such conduct again in the future. However, there was no evidence of a history of the plaintiffs embarking on unprovoked unprotected strike action which might demonstrate they had a propensity to try and resolve disputes by way of economic force and were uninhibited by previous disciplinary action.

[70] I have already mentioned the financial impact of the strike on the company, though it must accept that a significant part of this loss was a consequence of its own precipitous action. From the plaintiff's perspective, this was not a case where management was refusing to pay what was due, it was a delay in making the payment.

[71] Ordinarily, a delay of about a week under ordinary circumstances might not be considered an unacceptable inconvenience, bearing in mind there was no mandatory payment date. However, this occurred at a critical time of the year, when the payment of such a sum was made would have had a material impact on the employees' year-end financial arrangements especially in the case of those who had to travel to homes a distance from the urban environs of the greater Cape Town area. The initial alteration of the payment date, effectively would have denied them of as much as approximately one month's additional income, which they had previously been told and anticipated they would get on 14 December. In this context being denied access to that money at a critical time, was a significant disadvantage imposed unilaterally at a very late stage, even if they would eventually be paid all of it.

Conclusion on substantive fairness

[72] By way of conclusion the outcome of the discussion above can be summarised as follows. The strike was a response to unjustified conduct by the employer, and it bears the main responsibility for it occurring. However, the responsibility for its prolongation after 12 December lay with the plaintiffs. The seriousness of the failure to follow the LRA procedures to embark on a protected strike, is materially diminished on account of what led to the strike, but the continuation of the unprotected action after management had engaged and compromised on its initial stance, which would have significantly reduce the negative impact on employees of its unilateral alteration of normal payment schedule, is attributable to the plaintiffs. The ultimatums were clear and the plaintiffs had sufficient time to consider them and decide how to respond. While employees were prejudiced arising from the timing of the payment and would still have been in a less favourable position than they normally would have been in mid-December, the amount of the bonus remained unchanged. Though at least responsible for approximately half the loss it incurred as a result of the strike, the company did suffer an actual and not insignificant loss in consequence of the strike and its inability to make good on its contractual commitments before the shutdown would have reflected negatively on its reliability.

[73] In light of all the factors above, I do not think that the dismissal was a fair sanction, even though it warranted a serious disciplinary sanction.

[74] In view of this conclusion, it makes no sense to also consider whether the dismissal would be justified in terms of the normal test for dismissal for misconduct. Nevertheless, it is appropriate to emphasise that it is obvious that the absence of prior instances of unprotected strike action and the fact that it would not have happened but for the unjustified conduct of Baseline are material considerations in deciding if dismissal for the misconduct was an appropriate sanction, in the specific circumstances of this case. I am not persuaded on the facts that Geldenhuys could reasonably believe he could have no confidence that it would not happen again. As

such, I am not persuaded that it is reasonable to conclude the trust relationship was destroyed. A lesser sanction of a final written warning will suffice.

Relief

[75] The primary remedy for a substantively unfair dismissal is reinstatement. I have already dealt with the question whether it would be intolerable to reinstate the plaintiffs. The company also did not advance any reasons why it would be impracticable to reinstate them.

[76] As mentioned, a final written warning is sufficient sanction for the misconduct. In view of the financial impact of the strike on the employer and because the dismissals were procedurally fair, and making allowance for the fact the substantive unfairness of the dismissal was not grossly unfair, in the exercise of my discretion under s 191(3)(a) of the LRA, I believe it is appropriate to limit the extent of retrospective reinstatement to a period of sixteen (16) months.

[77] As it is possible that some sites the plaintiffs were working on might no longer be under construction, the order provides for a place where they must tender their services.

[78] This is not a matter which justifies a cost award being made, given the ongoing relationship between the parties.

Order

1. The dismissal of the Second and Further Applicants by the Defendant on 23 January 2023 was procedurally fair and substantively unfair.
2. The Defendant must reinstate the Second and Further Plaintiffs with retrospective effect to a date 16 (sixteen) months prior to the date each of them tender their services to the Defendant in terms of this order, subject to the imposition of a final written warning for participating in unprotected strike action, which shall be valid for twelve (12) months from the date of recommencing work with the Defendant.

3. Within ten (10) days of the date of this judgment the Defendant must issue a written notice to the Plaintiffs' attorneys of record and the First Plaintiff of an address where the Second and Further Applicants must tender their services and identify a person or persons who will accept their tender of services at that address.
4. The Second and Further Plaintiffs must tender their services at the address mentioned in paragraph 2 above, within 20 (twenty) days of the issue of the notice in paragraph 3 of this order.
5. The Defendant must pay each of the Second and Further Plaintiffs, 16 (sixteen) months' backpay, arising from their retrospective reinstatement, within 30 (thirty) calendar days of the date they tender their services under paragraph 4 of this order.
6. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances

For the Plaintiffs: M C Malematja instructed by Mashabala Attorneys Inc.

For the Defendant: C de Kock instructed by Carelse Khan Attorneys.