



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

Of interest to other judges

Case no: C298/2022

In the matter between:

PREMIER FMCG (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION & ARBITRATION**

First respondent

**COMMISSIONER URSULA BULBRING
N.O.**

Second Respondent

**FOOD AND ALLIED WORKERS'
UNION**

Third Respondent

A MBETHE & 35 OTHERS

Fourth to 39th Respondents

Heard: 28 November 2024

Delivered: 12 November 2025

Summary: (Review- unfair dismissal for strike related misconduct – protected strike – lengthy strike - Common purpose principle considered - common purpose not established – Cross-review – Failure to retrospectively reinstate employees who were not dismissed but were issued with warnings and limited backpay for strikers acquitted of misconduct)

JUDGMENT

LAGRANGE, J

Nature of the application

- [1] This is an opposed application to review and set aside various findings of an arbitrator on different charges of misconduct which it is alleged took place during a prolonged protected strike. There were a number of different incidents which took place which gave rise to discrete charges relating to each incident. For the purposes of the review application, the charges in question were charges 32, 35, 40, 62 and 63.
- [2] The respondents have also applied to cross-review the arbitrator's endorsement of the employer's threshold for determining when dismissal was appropriate, the failure to make the reinstatements she awarded retrospective in effect, and awarding individuals whom she found not guilty of any misconduct an allegedly arbitrary and inadequate amount of three months back-pay each. The cross-review is also opposed.
- [3] Because of the voluminous nature of the transcribed evidence, the parties have agreed to be bound by the Commissioner's findings of fact set out in her award in these review proceedings and that this review be decided on the basis of those facts and the bundle of documents admitted as evidence during the arbitration proceeding
- [4] The arbitration took place of a prolonged period of many days commencing with an inspection *in loco* at the picketing area and gates to the Blue Ribbon bakery premises of the applicant, Premier FCMG ('Premier' or 'the company') on 31 October 2019 and ending on 4 May 2022. Its progress was also hampered by the Covid-19 restrictions. The transcript of evidence was a little over 3200 pages and the arbitrator's award comprised about 50 pages of densely typed text, which traversed

20 separate incidents which were dealt with as discrete 'cases', within the general context of the strike.

Overview of events

- [5] The union FAWU, the second respondent, initiated a protected strike on 28 November 2018, apparently over unresolved wage negotiations and alleged remuneration inconsistencies, amongst other things. It ended around 8 March 2019, which made it a significantly long strike, by current standards. In an effort to support the strike, strikers also embarked on a campaign to encourage consumers to boycott the bakery's products.
- [6] At the time the strike began Premier employed approximately 1100 and staff at the bakery, of which roughly 670 participated in the strike. After the strike ended, disciplinary inquiries were held. As a result of the inquiries 83 employees were dismissed after being found guilty of various charges including intimidation, violence, multiple breaches of picketing rules, making false and inflammatory statements and damage to property. A further 145 strikers were issued with final written warnings on account of being found guilty of a breach of picketing rules. None of the strikers who were charged with misconduct were completely acquitted.
- [7] Of the 83 strikers dismissed by Premier, the arbitrator upheld the dismissals of 19 of them and confirmed the issue of 81 final written warnings, some of which related to dismissed strikers who were reinstated by the arbitrator. The arbitrator reinstated 27 of the dismissed employees and two others who had been misidentified by the company. Some of the reinstated employees were reinstated with back pay, but others without.
- [8] The charges of misconduct arose out of different events which occurred over the duration of the strike. For the sake of briefly contextualising events, a brief chronology highlighting some of the disciplinary charges emanating from the activity of the strikers is set out below.
- [9] On 13 November 2018, FAWU and the company concluded a picketing rules agreement. In terms of the agreement certain designated picketing areas included the main gate and depot gate, with specific limits on the number of picketers.

- [10] The strike began on 28 November 2018. The company hired armed security guards from the inception of the strike allegedly on account of prior violent strikes in 2007.
- [11] On 29 November 2018, the first incident of alleged misconduct took place (Case 3) in which a company truck was twice prevented from exiting the depot gate. During the course of the incident security staff fired rubber bullets and 'flashbangs' to disperse the crowd resulting in one striker suffering an ear injury. Police arrived and the situation in Malta Road and Chatham Road apparently became chaotic, with strikers blocking traffic and picketing outside designated areas. There were allegations of disorderly conduct and alcohol consumption by some of the strikers. As a result of this incident the arbitrator imposed final written warnings on those identified in committing breaches of the picketing rules.
- [12] On 30 November 2018, the company obtained an interim interdict restraining strikers from interfering with or obstructing the access to and egress from the company premises and from committing various unlawful action from intimidation to damage to property, amongst other things.
- [13] On 5 December 2018 another incident which gave rise to Case 7 occurred. This involved a striker intimidating and assaulting a service provider. The striker's dismissal was upheld by the arbitrator.
- [14] Events giving rise to case 10 occurred on 16 December 2018, in which a striker visited a colleague at his home and threatened his wife and children. The arbitrator upheld the dismissal of the individual for intimidation.
- [15] On 18 December 2018, strikers visited various company agents and intimidated them to stop selling Blue Ribbon products. They also apparently made false statements made about bread quality and foreign workers. These facts were considered under case 10. The arbitrator found the accused employees guilty of intimidation and issued them with final written warnings.
- [16] On 3 January 2019, events giving rise to case 28 occurred. Various strikers were charged with making false statements over a loudspeaker

about the company's bread being harmful. The arbitrator upheld the dismissal of those involved.

- [17] On 11 January 2019, strikers block the weighbridge gate and chanted threatening songs and gesticulated at a delivery truck and the vehicle escorting it. The arbitrator found those identified as being involved guilty of a breach of the picketing rules and issued them with final warnings. These events were dealt with under the case 32, and the company seeks to set aside the arbitrator's findings and sanction imposed for the misconduct involved.
- [18] An incident on 16 January 2019 resulted in the charges addressed under case 35. Strikers at Khayelitsha train station make xenophobic and false statements about bakery's bread and company staff. Two of the strikers who were identified as speakers Mesuli Dywili and Sandile Deku were dismissed. However, other strikers who were present were acquitted on the basis that the employer had not proven that they made common purpose with those making the utterances complained of. Premier also seeks to set aside the arbitrator's findings relating to this case.
- [19] On 17 January 2019, an incident occurred in which water provided by the company was poured on the ground, allegedly because a striker maintained it was contaminated. The arbitrator found that this amounted to misconduct and issued a written warning relating to the incident to which was the basis for case 36.
- [20] On 22 January 2019, a bread promotion at Siyazingiza Primary School was disrupted, during the course of which a loudspeaker was used to make xenophobic and inflammatory statements. One of the strikers involved, Mr K Mqhitsana, was found guilty and dismissed. As in the case of the railway station incident, other strikers present were not found to have made common purpose with the speaker and were acquitted. This incident was captured under case 40, and is also one in which premier takes issue with the arbitrator's findings.

- [21] In case 44, on 24 January 2019 two of the strikers, Mqhitsana and Mr A Mbethe ('Mbethhe') were involved in intimidating a temporary worker. The former was dismissed and the latter received a final written warning.
- [22] On 29 January 2019 (case 51) three other strikers assaulted a female employee at her home. Their dismissals were upheld.
- [23] On 4 February 2019 (Case 61) another striker sent a threatening WhatsApp message to a supervisor. The arbitrator upheld the dismissal in this case.
- [24] In another case where Premier contests the arbitrator's findings (case 62), on 4 February 2019, strikers in Khayelitsha followed a gold coloured vehicle with loudspeakers, making false statements about bread being stale and harmful. The arbitrator found there was no direct evidence of the various individuals involvement and acquitted all of those charged.
- [25] On 6 February 2019, a similar activity occurred in Gugulethu with statements being made on loudspeakers about the origin and quality of bread (case 63). As in case 62, the arbitrator found no direct evidence of the involvement of those charged and acquitted all of them of the charge.
- [26] On 8 February 2019 three strikers were involved in a violent attack on a company truck in Govan Mbeki Avenue (case 65). They were all identified and their dismissals were upheld.
- [27] On 15 February 2019, the interim order issued on 30 November 2018 was made final.
- [28] What is apparent from the above is that regular instances of actual and threatened intimidation, were a feature of the strike and that the campaign to persuade the public not to buy Premier's bread was a significant component of the strikers' strategy. A cursory review of the transcripts also reveals there were at least ten instances of actual assaults on non-strikers during the strike. Thirteen strikers were also reportedly injured in the police rubber bullet shootings on 29 November 2019.

Legal principles relating to Premier's review application

- [29] A key issue in all four of the cases under consideration in this review is the application of the common purpose doctrine in determining if strikers present in an incident, were either the principal actors in the misconduct in question or demonstrated their support for the misconduct being committed. In the case of *NUMSA obo Aubrey Dhludhlu & Others and Marley Pipe Systems (SA) (Pty) Ltd*¹ the central question in the case concerned whether 148 employees of the employer had acted with common purpose when about a dozen of them assaulted the head of the Human Resources department. The employer argued that all the employees directed their disgruntlement in the form of a serious crime: those that were able to confront the head of human resources in person, physically assaulted him, and those that could not, incited the others to assault him and rejoiced at the outcome.
- [30] According to the Labour Court the employees who were identified as being on site, had acted with common purpose in associating themselves with events on the day. The Labour Court referred to the Constitutional Court decision in *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*². In *Dunlop* it was held that it was unnecessary to place each employee on the scene to prove common purpose, as this could be established by inferential reasoning having regard to the conduct of the employees before, during and after the incident of violence.
- [31] In *Marley Pipe*, the Constitutional Court reaffirmed the basic principles for establishing liability based on common purpose in situations where there was neither evidence of prior agreement nor that the accused individual was a factual cause of the misconduct. Relying on the criminal law derivation of the of the principles, the court cited with approval the

¹ (2022) 43 ILJ 2269 (CC)

² 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC)

Appellate Division judgment in *S v Mgedezi & others*³ where that court held:

“In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of [common purpose], only if certain prerequisites are satisfied. 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 assault on the inmates of room 12. 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 assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea [criminal intent]; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”⁴

(emphasis added)

- [32] In the Labour Appeal Court decision in *Marley Pipe*⁵, the court found that, of the 148 dismissed employees, twelve had been directly implicated in the assault. Another 95 were identified as being part of the group and were directly associated with the misconduct. The LAC held that the most natural inference to be drawn from the evidence that the remaining 41 unidentified employees had also left their workstations to participate in the strike and were part of the group that had proceeded to the manager's office was that they were also present when the assault took place. There was no evidence to suggest that only the 95 identified employees were present and no other alternative explanation was raised by the union on their behalf why the 41 others had not been present. The LAC noted that

³ 1989 (1) SA 687 (A)

⁴ NUMSA obo *Dhludhlu* at paragraph 17

⁵ *National Union of Metalworkers of SA on behalf of Dhludhlu & others v Marley Pipe Systems SA (Pty) Ltd* (2021) 42 ILJ 1924 (LAC)

none of the 148 employees had done anything to disassociate themselves from the assault before after or when it took place. To the contrary, the court found that the strikers celebrated the assault after the fact⁶. The court concluded that, on the evidence, the 41 employees associated themselves with the actions of the group before, during and after the misconduct, were present at the scene of the assault and associated with the other events of the day. The only alternative version of events union witnesses testified to was that the assault never took place. In the circumstances, the evidence established that the 148 employees had the requisite intention of associating themselves with the assault and the LAC confirmed the Labour Court finding that they were guilty of the misconduct and their dismissal was fair, given the seriousness of it⁷.

- [33] However, the Constitutional Court took issue with the LAC's finding that the dismissed strikers needed to actively disassociate themselves from the misconduct to escape responsibility for it. The court found that mere bystanders at such an event could not be held accountable for the assault that took place. Likewise, the fact that employees were singing while the assault took place was not sufficient to demonstrate that they associated with the assault because they had already been singing and dancing prior to that so it could not be seen as a conduct approbating the assault merely because it continued while the assault was taking place, even if it was morally reprehensible that it did continue⁸. Moreover, the fact that the singing and dancing commenced when they left the workplace to go to the manager's office also meant that it could not be interpreted as a celebration of the assault⁹. Secondly, misconduct could occur spontaneously in someone's presence without being anticipated and guilt could not be imputed to them merely because that person was present when the misconduct took place¹⁰. Further, complicity could not be attributed to an employee who was present merely because they did not come forward

⁶ At paragraph 21

⁷ At paragraph 25

⁸ At paragraph 26.

⁹ At paragraph 30.

¹⁰ At paragraph 34.

to explain what happened, because workplace dynamics were such that a fear of being the target of ostracism or animosity might cause a person to remain silent¹¹.

[34] The last dictum reaffirmed the line drawn through previous jurisprudence¹² by *Dunlop*. Previously, employees who were present when serious misconduct took place had an obligation to disclose what they knew of the misconduct, if they were called upon to do, failing which they could be held liable for 'derivative' misconduct. Absent any express contractual obligation to that effect, employees do not have a fiduciary or implied contractual obligation to come forward with such information to distance themselves from the misconduct.

[35] In consequence, the Constitutional Court in *Marley Pipe* set aside both the judgments of the Labour Court and Labour Appeal Court and remitted the matter back to the Labour Court to consider a sanction on the charge of participation in an unprotected strike.

[36] I note in passing that the dismissals took place before the Constitutional Court decision in *Marley Pipe*, which was in August 2022, and it seems a large number had also taken place before that court's decision in *Dunlop Mixing* which was handed down on 28 June 2019.

Analysis of the arbitrator's findings contested by Premier

Case 32 The weighbridge gate incident of 11 January 2019

[37] The charge relating to this incident against each of the twelve strikers implicated was that, on that day, "*when an agent driver and escort vehicle of the company attempted to enter the companies site situated at 23 Malta Road, Salt River, at the weighbridge entrance gate, you together with others, blocked the entrance to the site and intimidated the agent driver, intimidated the driver of the escort vehicle and also caused obstruction to the escort vehicle*". It was also alleged that in doing so they had

¹¹ At paragraph 35.

¹² Originating in *Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) (FAWU v ABI) and crystallised in *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC)

contravened the picketing rules and, or alternatively the interim court order issued on 30 November 2018.

- [38] Mr R Lambert ('Lambert'), the company's Health Safety and Security Officer narrated the contents of what he observed on video footage of the incident. The accuracy of his narration was not challenged in any material way. The contentious question was the interpretation of what that evidence demonstrated. Ms K Ferreira ("Ferreira"), former Risk Investigator identified the twelve individuals who had been charged from amongst the many other strikers appearing in the video footage of the incident. This evidence was also not challenged.

- [39] The arbitrator's analysis of this case reads:

"The union did not lead any evidence on this charge. Lambert, Ferreira and Ishmael testified in respect of this charge. Lambert testified with regard to video footage taken on 11 January 2019 at around 12h18 outside the weighbridge gate. The picketers were on corner Lower Scott / Chatham Roads; Lower Scott Road leads into the Weighbridge gate; the picketers were blocking the entrance to the gate. An agent driver and support vehicle are seen in the road ahead hesitant to move down the road to enter at the gate. Strikers are seen dancing in the road, pointing towards the agent driver vehicle and the security vehicle with one of the strikers filming them (to intimidate them, said Lambert). Lambert said that the vehicle would have been in contact with the control room as to whether the vehicle should approach or not. An instruction was given to the security vehicle to escort the truck in through the weighbridge gate. As the security vehicle approaches strikers block the entrance and dance in front of the vehicle. The strikers move out of the way and clap and chant as the truck enters. The pointing may have been part of the dancing but the message was one of intimidation. Another video of the same incident (MV 07/63 with sound) records the strikers chanting / singing in Xhosa with the agreed translation being 'shoot, shoot, shoot with a gun the cowards are scared' with strikers pointing in the direction of the agent driver. The song was threatening. Some employees walk away but Lambert

observed that the video still shows a big group in front of the Weighbridge gate.

Lambert said that the bread trucks did not normally go in there but during the strike trucks were escorted and the controller would say which gate was safe and suggest which gate gets used and there has been nobody at the gate earlier but strikers had moved to that gate to 'block and intimidate'. Once the truck had gone down that road it would have to pass the Main / Weighbridge gate even if it wanted to use another gate. Roads are narrow and there are cars either side. Lambert said that there was a section to the right where 30 strikers could legally stand on the pavement at the Main gate (the Weighbridge gate is to the right as one faces it) but the strikers stood in front of the gates. The trucks would normally go in at the weighbridge gate (to get weighed and sign in) but during the strike some trucks exited there (the call would be made on the day). The weighbridge gate was not a gate at which the strikers could picket. Where they were standing on that day was in breach of the picketing rules. Security was hired for the strike; it was not a normal thing for trucks to be escorted in and out. Lambert said it was 'ordinary innocent picketing'; the truck wanted to come through and there was chanting and picketing. Lambert said that the strikers breached the picketing rules every day in terms of where they assembled. Strikers never stood in designated areas; they stood all over the place. Lambert said that the one video of this incident was 8 minutes 32 seconds which suggests a long time for a truck to make its way through a gate.

Ferreira testified that she identified the 12 charged employees. She only identified the ones known to her. Ishmael addressed the inconsistency challenges and testified that some employees were not charged because the photos were not clear, others were not identified by anybody and others were missed.

My finding is that the weighbridge gate, which was not a demarcated picketing area, was blocked by strikers. They were not as suggested by the union on either side of the road at the gate. The union's members did not testify and its efforts to persuade during argument that some were against the wall and not in the road were not persuasive. I

am persuaded that they moved around. Also, they may have been in a public road but they were still blocking that entrance and making it difficult for the truck to enter. This was in breach of the picketing rules. Whether it was stated that it was in breach of the picketing rules in the charge cannot assist the employees. The strikers were blocking the entrance, caused obstruction to the vehicles and attempted to frighten and deter the agent vehicle (with gesturing and pointing) from going into the premises, which is intimidation. I note though that the truck did enter as did the escort vehicle although it took some time with the driver and the escort vehicle being hesitant.

Yet there is no evidence of the truck driver being intimidated by any of the 12 employees specifically. Struggle songs are part of the South African landscape and can be sung during strikes; they have a place in society to unite workers and give comfort. This was confirmed in the constitutional court case of Duncanmec (Pty) Ltd v Gaylard No and others CCT248/17 although it dealt with a racist struggle song; what the workers chanted here was not racist. The finding of the chairperson at the enquiry is that employees that associated themselves with this incident only should receive a final written warning. Others that associated themselves with this incident and other incidents should be summarily dismissed. To find that the 12 made common purpose with the acts of intimidation and to find the 12 guilty of intimidation is not appropriate here. Yes, they were there; they were on strike; they were protesting but I cannot impute the acts of intimidation to any of the 12. As Lambert stated, the strikers were all over the place; they did not act as a cohesive group in effecting the intimidation. A lesser sanction of a final written warning for blocking the entrance and breaching the picketing rules is appropriate.”¹³

(sic)

[40] The arbitrator’s summary is a largely accurate account of the material evidence and neither party took issue with it.

¹³ Pleadings, Arbitration Award, para 47 pp 73-4

[41] Premier argues that the arbitrator's failure to find the individual applicant's guilty of intimidation could not be justified on the evidence because all the pre-requisites for establishing intimidation were met, namely: they were all present at the scene, and were aware of the intimidation, which they associated themselves with and demonstrated by blocking access to the gates. It also claims they foresaw the probability of intimidation. Lastly, they argue that the arbitrator's finding is unsustainable because she acknowledged there was intimidation herself. To the extent that she did not appreciate that the requirements for proving intimidation were met, she misconstrued the test for intimidation.

[42] By contrast, FAWU argues that the arbitrator's findings were perfectly reasonable. The Commissioner only found, correctly, that that the twelve individuals were present and were possibly aware of intimidation, but there was no evidence any of them were directly implicated in the acts of intimidation. FAWU conceded that one of the strikers, who was not one of the twelve charged, could be seen pointing at the van, but none of the others were identified making similar gestures. Although FAWU did not dispute the arbitrator's findings, it argued that blocking the gate could not be construed as intimidatory action, but merely a breach of picketing rules, for which a final written warning was appropriate. Further, relying on a passage in the LAC judgment in *Solidarity obo Kruger v Transnet SOC Ltd t/a Transnet National Ports Authority and Others*¹⁴, it contended that the arbitrator could not have inferred that their action was intimidatory in the

¹⁴ [2021] 5 BLLR 484 (LAC); (2021) 42 ILJ 852 (LAC) at paragraph 25:

"[25] Counsel for the employee contended that the arbitrator's reliance on Adcock Ingram was misplaced since the threat in that matter was made in the context of a violent strike, which was distinguishable from the circumstances of the current matter. It is so that the facts in Adcock Ingram are not on all fours with the facts of this appeal. The evidence in the current matter was that the employee was angered by the fact that disciplinary action was being taken against him, an anger which was not without foundation given the findings above. Although his words constituted a threat and must reasonably have aimed to intimidate, it is not clear precisely what he meant by them. There was no suggestion that Mr Dlamini or Mr Shezi were fearful of the employee or considered their lives to be in danger and the arbitrator did not indicate how the words were "meant to inflict fear and subjugation". In fact, Mr Dlamini immediately took charge of the discussion and cautioned the employee not to aggravate the situation, conduct which clearly reflected that he understood the employee to be angry. Neither Mr Dlamini nor Mr Shezi called on the Security Manager, who was in the immediate vicinity, to come to their aid and both left for lunch at a restaurant after the incident." (emphasis added)

absence of corroborative evidence from the persons they allegedly intimidated.

- [43] In reviewing an award on grounds of reasonableness, the ultimate question is whether the outcome is one that no reasonable arbitrator could reach¹⁵.
- [44] Was the arbitrator's finding a tenable one on the available evidence? It is common cause that the individuals were present and aware of the intimidation. The act of intimidation was identified as the action of one or two employees gesticulating at the truck in a threatening manner. Although one might read the arbitrator's reasoning to mean that the strikers' action of blocking the entrance amounted to intimidation *per se*, that does not seem to be consistent with all of her reasoning. I am satisfied that the intimidatory action, which she identified was that of the one or two individuals making threatening gestures with their hands and, possibly, the singing of a struggle song. However, although Lambert interpreted the song to be threatening, the arbitrator discounted the intimidatory significance of the singing on the basis that it was just part of the typical backdrop to a strike, in the absence of the strikers acting in a focussed, cohesive way rather than milling around all over the place.
- [45] The evidence was that the only individual who was identified as making the threatening gesture was not one of the persons facing this charge, but they were no longer employed by the company. To the extent the company maintains that the action of the strikers in blocking access was plainly intimidatory, I accept that their obvious aim of trying to bar the truck's entry or at least make it difficult that might have been a common objective they shared with the individuals making threatening gestures in an effort to scare the personnel on the vehicle to abandon their attempt to enter the premises. However, I am not persuaded that because they probably shared a common goal of preventing the truck from entering by one means or another, that they must have also endorsed the intimidatory methods undertaken by a few individuals amongst them. From what one

¹⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC)

can discern from the evidence, the movement of the strikers in the path of the truck shows they were not acting in unison. The arbitrator's finding that they were 'all over the place' and not acting as a cohesive group, is not an unreasonable inference to have drawn. On this basis, I am satisfied the finding of the arbitrator is within the band of reasonable outcomes she could have arrived at in this case.

Case 35 - The xenophobic statements and product disparagement over loudspeakers at Khayelitsha station

- [46] The charge against each of the 19 employees implicated in this case in this case was that on 16 January 2019, together with others, they had entered Khayelitsha station where they were complicit with intimidatory and xenophobic remarks made about a fellow employee namely, "Rodney is from Zimbabwe", "Rodney is the biggest dog", and making false statements relating to the company products.
- [47] There was evidence that the company had received reports of striking employees approaching shop owners and intimidating them not to buy bread from the company. There was no dispute that the 19 employees who were charged were part of the group present at the station when the shop steward Mr A Mbethe was using a megaphone to warn people that the flower being used in the bakery's bread was not fresh. Another individual, Mr M Dywili then took the microphone and made more inflammatory statements such as claiming that the bread the company was supplying was supposed to be pig feed and referring to Lambert as 'the biggest dog'. His performance on the megaphone was followed by that of Mr S Deku who made false statements about Lambert being a foreign national from Zimbabwe. Video footage was played confirming the conduct of the speakers. Apart from the evidence of the conduct of these three individuals there was precious little evidence of anything the other strikers were doing there apart from being with the speakers at the station.
- [48] The only other evidence was offered by Mbethe himself to the effect that, seemingly on the same day, the group was going from shop to shop and

were told by some of the shop owners that the bread was stale and maize meal and flour (presumably from Premier) was stringy.

- [49] The arbitrator concluded her examination of the evidence on this charge thus:

“They were present but I cannot find that the associated themselves with or demonstrated an association with the statements made by the three, particularly the xenophobic statements. To make this finding would require more than just them being there at the station.

...

Mbethe's false statement about the bread and flour not being fresh on own does not warrant dismissal. As to whether he made common purpose with Deku and Dywili, Mbethe gave no comment on the statements made by them, neither at the time nor at arbitration. To call them out in the moment would have been exceedingly difficult. Even if legally his silence and presence close to the microphone indicates his common purpose, I find that a lesser sanction would have been appropriate for Mbethe. He should not have to face an equivalent sanction as who made comments. The comments made were in reaction to the company security being present, and would not have been planned in advance (which would have gone to intention and made him complicit). A warning here is an appropriate sanction for Mbethe.”

- [50] The company contends that the arbitrator reached a conclusion which no reasonable decision maker could have reached on the evidence before her at the arbitration proceedings and thereby committed a gross irregularity in the conduct of the arbitration proceedings by finding that the individual respondents in Case 35 had not associated themselves with the false remarks made at the Khayelitsha Train Station.

- [51] FAWU argues that there is nothing to undermine the reasonableness of the arbitrator's award and retorts that there is simply no evidence of the other strikers at the station showing active support for the utterances of the speakers. The photos of the group at the station do not portray a crowd that is animated in any way.

[52] It is not in dispute that the group was going around together to try and persuade consumers and retail outlets not to buy or sell the bakery's bread. But, if the persons with access to the megaphone made statements that were false or defamatory, does the mere fact that the individuals charged were part of a group traipsing from shop to shop in the company of the individuals in control of the microphone make them complicit in the speakers' conduct of broadcasting any of those unacceptable statements? Just because the individual respondents were part of a group of strikers engaging with consumers and retailers to support the consumer boycott, and that they remained with the group when the offensive statements were made by those controlling the megaphone, that does not automatically give rise to the inference that their presence made them complicit in the expression of those utterances. It is not unreasonable to infer that their conduct of remaining part of the group was insufficient proof that they positively associated themselves with the actions of the few individuals making the offensive statements. To suggest they needed to actively demonstrate that they disapproved of that conduct and disassociated themselves from it, to escape being found to be complicit with the perpetrators, seems to imply a resurrection of derivative misconduct principles.

Case 40 - Disruption of product promotion at Siyazingiza Primary School and xenophobic and inflammatory statements over loudspeakers on 22 January 2019

[53] The charge relating to this case was formulated as an accusation that each of the 24 individuals charged had participated in blocking the entrance to Siyanzinga Primary School, where the bakery was holding a promotion and that they were present when various false statements were made through a loudspeaker claiming there was poison in the bread and that customers should not eat it. It was also alleged that it was broadcast that children were getting ill from eating the bread and that it was inferior to bread distributed in 'white' areas. Further, it was broadcast that Lambert was from Zimbabwe and was '*here to kill the black nation*'.

[54] Apart from Mbethe, Dywili and Deku, the following six individuals were identified on the video footage as being present at the school: Lucy Ntamo; Yolisa; Samla Ntane; Mr Madlabu and Samla Musi Dam.

[55] Lambert testified that he received a call from the promotion team reporting that FAWU strikers were blocking the school entrance. When he arrived he saw Mr K Mqhitsana's vehicle parked in the entrance with loudspeakers on the roof. A masked individual inside the vehicle was speaking over the loudspeaker. He testified that the promotion was cancelled due to safety concerns. The videos he played showed the car blocking the gate and corroborated his allegations about the statements broadcast on the loudspeaker alleging racial discrimination, xenophobia, and health risks relating to the bread. The video footage also showed SAPS involvement and the promotion truck leaving the school premises to the clapping and cheers of the strikers.

[56] Mqhitsana testified and confirmed the vehicle was his, but denied he had blocked the vehicle gate, claiming he had parked near a pedestrian gate. He testified that the purpose of being at the school was to solicit support from teachers and categorically denied making or hearing any statement broadcast over the loudspeakers mounted on his car. He also testified that the school principal had no issue with their presence and that there was no intimidation or disruption. When police asked him he moved his vehicle, he obliged.

[57] The arbitrator's analysis reads:

"I note that the company promotion team felt intimidated but there were no direct acts of violence or intimidation. Employees working when their colleagues are on strike naturally feel unsettled by it when there is a strike. I understand the company concern that a truck had been vandalised (case 65) and that there was a reported incident of a promotional stabbed at Samora Machel (in dispute and charge not pursued) and that it felt that Security was necessary to protect the trucks, driver and promotional employees but insofar as strikers were there to boycott and protest, it did not fall to the company to discipline them without any direct act of intimidation."

Nobody was prevented from going in and out and when Mqhitsana was requested to move his vehicle, he complied. The truck left the school under the watch of the police and the company's security were all present at the scene. The strikers were there to disrupt the promotion. They would not have been there if there was no promotion but I cannot find this is wrongful or unlawful conduct or that there was any intimidation.

I take issue though with the words uttered over the loudspeaker. There is a difference between statements made to cause economic harm and ones that constitute economic sabotage. Not all bets are off during a consumer boycott and protest. The company could not prove that the word 'poison' was used; this would have been going too far given that it would have implied that the company was trying to kill the consumers but it was not said. The voices on the loudspeaker tried to discourage customers from consuming a product of a company faced with a strike. This is not unlawful conduct if in furtherance of a strike. The reference to Lambert being a Zimbabwean and being in South Africa to "kill the black nation" are xenophobic and inflammatory and would certainly justify dismissal. Mqhitsana was a particularly poor witness and untruthful when testifying under this case number. He was evasive and misleading. At first we were told during cross examination that it was not his vehicle but that of the community, SANCO. Then he conceded in his evidence that it was his vehicle, but says that he did not know who was sitting in it speaking on the loudspeaker ("there was a mix of us there, male and female). This is inexplicable and highly unlikely. He is seen on the video right next to the vehicle. His attempts to evade an association with the person on the loudspeaker leads me to conclude that he made common purpose with those statements. If he did not, then as a shop steward and marshal it fell to him to call them out and dissuade them from making the inflammatory and racist statements. He would certainly have known better. Mqhitsana is guilty of this charge and dismissal is appropriate.

In general, that false statements were made is wrongful, as is the making of other statements that are racist and inflammatory. However, again I cannot jump from there to find that all the named employees are guilty

of the charge. They were in the area when the statements were made because they were on a consumer boycott. They cannot be held to be account for everything everybody said in the area. There are different levels of liability. There is no evidence that they acted as a cohesive group. Cheering and clapping after achieving their consumer boycott purpose is not unlawful. The statements complained of were made by two people that the company failed to identify. I find the employees are not guilty of this charge.

(sic – emphasis added)

- [58] The arbitrator found that the picketing rules did not apply to off-site locations like schools, so discipline for off-site picketing was not within the company's purview unless unlawful conduct occurred. While she was not willing to find the persons facing this charge guilty of being complicit in the offensive statements made on the vehicle loudspeakers, she did find Mqhitsana had made common cause with the person making the announcements because of his ownership of the vehicle and his ability to exert some influence over the speaker in his role as shop steward.
- [59] It is noteworthy that Mqhitsana's inactivity in curbing the conduct of the speaker, despite being the owner of the vehicle from which the offense broadcasts were being made and his position as a shop steward, were interpreted by the arbitrator as factors evidencing his complicity with the author of the offensive statements. In the circumstances, his omissions were tantamount to acts of association with the conduct of the speaker.
- [60] In conclusion, the arbitrator found Mqhitsana guilty and upheld his dismissal, but she acquitted the other 23 employees on the charge.
- [61] Premier contends her conclusion was one which no reasonable decision maker could have reached on the evidence before her because they had associated themselves with the undermining of the Blue Ribbon bread promotion at the Siyazing Primary School. It referred to the review pleadings about Mqhitsana making offensive statements but no reference was made to the transcript itself, which bears out the arbitrator's account.

- [62] As in the other cases, it cannot be said that the arbitrator was remiss because she did not find evidence of active association with the offensive broadcasts. In the circumstances, it was not unreasonable of her to find that the requirements of common purpose had not been satisfied for the rest of those charged under case 40.

Cases 62 and 63 : Strikers in Khayelitsha and Gugulethu following a gold coloured vehicle with loudspeakers, broadcasting false statements about bread being stale and harmful on 4 and 6 February 2019, respectively

- [63] The specific charge against each of the 17 strikers implicated in respect of the Khayelitsha incident was that on 4 February 2019, together with others, each of them had attempted to sabotage the company's business and tarnish its good name and reputation by maliciously making various disparaging, defamatory or false statements to stockists of Premier products and to the general public, including school learners, such as saying: *"Do not stock Blue Ribbon bread as it is old, stale and will make you sick."*
- [64] The charge relating to the Gugulethu incident on 6 February 2019 (case 63) was identical except that a different disparaging statement about the bread taking eight days to come from Lesotho to Cape Town was referenced. The Gugulethu incident involved 14 individuals, four of whom were also charged in case 62.
- [65] Lambert and Mr N Armien ('Armien'), a risk investigator at Premier, gave evidence on the events supporting the charges. Lambert did so by commenting on video evidence which was played during the course of which the offensive statements which were broadcast from the vehicle were confirmed. In neither case did they specifically identify the persons charged, but neither were they challenged on the question whether those charged were part of the group of strikers accompanying the vehicle.
- [66] On 4 February, The provocative statements broadcast over the loudspeakers on the vehicle were that:

66.1 *"The workers are on strike since 28 November up until today. The workers don't make the bread. The bread you are getting is from other provinces."*

66.2 *"The bread that you are buying is not the bread being made by the workers. The people making the bread are on strike that's why they are giving you old bread that is crumbling/sticky. The bread is from other provinces and can make your children ill."*

[67] On 6 February, the offensive statements emanating from the vehicle were that:

67.1 *"They won't have mercy when our children get sick."*

67.2 *"They will give old bread that will make our children ill."*

67.3 *"They are selling old bread in our community to us black people."*

[68] The arbitrator assessed both cases together. This was apparently owing to the fact that the evidence was presented in the form of a single narrative attested to by Lambert and Armien, and that the factual matrix in both instances was very similar.

[69] The arbitrator found that statements made over the loudspeaker were false, disparaging and intended to damage the company's reputation. On the evidence, she found that the disparaging statements were untrue.

[70] However, the company failed to identify which of the 17 strikers were responsible for making the statement or to establish if any of them directly supported the statements. She accepted that the charged employees were present in the vicinity of the vehicle and the loudspeakers but there was no evidence demonstrating that they acted as a cohesive group or made common purpose with the statements. In relation to hearsay evidence that they had been involved in intimidating shop owners, they had not even been charged with intimidation.

[71] Although the statements were false and damaging, the company failed to prove individual culpability of the charged employees, as there was no evidence presented which showed that the employees made or endorsed

the statements. Accordingly, the arbitrator acquitted all of the strikers charged under case 62.

Arbitrator's Assessment In Case 63:

[72] Fourteen strikers were charged with the misconduct of attempting to sabotage the company's business and tarnish its reputation, by maliciously making or associating themselves with false and disparaging statements broadcast via loudspeaker to the public. The offensive statements have been identified above.

[73] She noted that the vehicle was driven by a since dismissed shop steward, who was not part of the case. The crux of her reason for dismissing the charge against the 14 individuals in this case was expressed thus:

"They were in the area when the statements were made because they were on a consumer boycott. They cannot be held to be accountable for everything everybody said in the area. There are different levels of liability. There is no evidence that they acted as a cohesive group... I find that the employees are not guilty of this charge."

[74] As in the other cases, the company argues that the fact that the identified strikers were accompanying the vehicle from which the unacceptable statements were broadcast made them complicit with the unidentified person who made the announcements. However, if one evaluates this contention against the Constitutional Court's analysis of the conduct of the strikers in the *Marley Pipe* scenario, it is hard to believe that the facts in this situation present a more compelling case for imputing complicity when measured against the standard set in that case. Accordingly, the court is bound to apply that approach here. Consequently, the arbitrator's acquittal of the fourteen individuals cannot be held to be one that no reasonable arbitrator could have reached.

The Cross Review

FAWU's locus standi

[75] Premier claimed FAWU had no *locus standi* to launch the cross-review without joining the individual members affected by this application. I agree with the union that it is well established that a trade union has legal standing and may litigate on behalf of and represent its members in proceedings in the Labour Courts under s 200(1) of the LRA.¹⁶

First Ground – The arbitrator's adoption of Premier's threshold for dismissal

[76] FAWU claims that the arbitrator's endorsement, without more, of Premier's view that two or more breaches of the picketing rules were sufficient to render the dismissal of the guilty employee, fair was arbitrary. More particularly, it argues that she upheld the dismissal of the employees listed in paragraph 52 of her award, only because they had been found guilty of more than one offence of breaching the picketing rules even though, on their own, neither warranted dismissal and each offence only merited a final written warning.

[77] Paragraph 52 of the award reads:

"52. I find that the dismissals of those employees found guilty of more than one offence are also substantively fair. The company set the benchmark at the commencement of its disciplinary proceedings that those employees found guilty of more than one offence would face dismissal. It is reasonable and fair that I follow through on this save if there are strongly mitigating circumstances. Those employees found guilty of two charges and attracting two final written warnings each are Kamvelihle Mambudlu, Deon Otto, Athini Mrawuzeli, Malibongwe Ralayo and Lucy Samla Ntamo. There are no extraordinary mitigating factors to warrant a lesser sanction. Their dismissals are substantively fair."

¹⁶ See *NUM v Heric Exploration (Pty) Ltd* (2001) 22 ILJ 203 (LC) at paragraph 32 and *Afgri Animal Feeds v NUMSA and Others* (2024) 45 ILJ 1937 (CC) at paragraph 39.

[78] Ms L Ntamo ('Ntamo') was found guilty in cases 3 and 11. The other four employees were found guilty in cases 3 and 32.

[79] Case 3 concerned an event early in the strike on 29 November 2018. Employees were accused of blocking access and egress at the milling gate premises of the company, conducting themselves in a violent aggressive and disorderly manner having the potential to endanger the safety of employees or the general public the driver of one of the vehicles attempting to exit the gate. Twenty-eight strikers were implicated by this charge. Although the arbitrator found that the driver had not been intimidated, she concluded that on that occasion the strike is in question had acted in breach of the picketing rules:

"... this conduct is misconduct and in breach of the picketing rules (rule 5). Having surveyed the footage I find that on 29 November 2018 a company truck attempting to exit the site at the depot gate was blocked from doing so twice. The argument that the strikers were provoked because the milling / depot gate is not normally used for trucks to exit is opportunistic. It was not business as usual; the entire site was compromised and Lambert's evidence that different gates were used on different days to mitigate harm is accepted. The strikers only moved out of the way after Security fired rubber bullets into the air. I do believe though that it was unseemly, ill-timed and with undue haste that the company engaged armed Security on day 2 of the strike knowing that a previous strike in 2007 had been violent. The company did not show what other alternatives were considered other than the previous day emailing the union to advise of a breach of the picketing rules. That said, the fact of the matter is that picketing rules have been agreed and designated picketing areas agreed, the main gates [30 people on the paving] and the depot gate [25 people on either side of the gate]. These rules were not followed. To what end does one negotiate picketing rules if these are going to be ignored? Those employees identified at the Applegate are guilty of this charge. Employees should not have picketed outside gate 4... By picketing in front of gate 4 was in breach of the picketing rules. Their conduct blockaded and obstructed egress to and access from gate 4... Regarding the third allegation of those in Malta Road,

MVI-0116 shows strikers singing and dancing in Malta Road followed by police with cars attempting to pass... Picketing in the public road blocking one lane and half into the other was also in breach of the picketing rules... Those employees identified are guilty of this charge."

- [80] Case 11 was a charge of intimidation based either on direct involvement or being complicit in the misconduct of telling third parties not to buy Blue Ribbon products and that if they did they would suffer the consequences because company trucks would be attacked. More particularly one of the long-standing customers import bread from the company was told that the strikers knew the routes that the customer's trucks took and their trucks would be attacked. The arbitrator accepted that the customer had been intimidated and dismissed Ntamo's claim that she had not been outside the house of the customer. The arbitrator found that she and the other employee had identified with the statements made to the customer. Because the chairperson had handed down a sanction of a final written warning for this offense alone, the arbitrator followed suit and also issued them with final written warnings.
- [81] Case 32 has already been dealt with in detail above. In that matter the arbitrator imposed a final written warning on those involved. Accordingly, in the case of all five of the individuals mentioned by the respondents, each of them had been awarded two final written warnings. Ntamo was issued with a warning for a breach of the picketing rules and intimidation, whereas the other four were involved in two instances of breaching picketing rules entailing the obstruction of vehicles entering or exiting the premises of the company.
- [82] The union argues that it was completely arbitrary for the arbitrator to apply the principle, which the employer had used, namely of dismissing strikers who had been found guilty of two forms of misconduct during the strike. It is apparent that the employer had adopted this approach to dealing with all misconduct that had arisen during the strike. The general application of this approach was not challenged by the union in the course of the arbitration, which ought to have occurred if the union objected to it in principle. I find it difficult to accept that the application of the principle is

only challenged on review and then only in respect of certain of the employees. It was also argued that accumulative approach of treating two warnings for separate acts of misconduct flouted the principle of progressive discipline because none of the individuals had a sanction of dismissal imposed for either of the two charges on which they were found guilty. That may be so, but that should have been raised in the arbitration proceedings. The arbitrator can hardly be criticised for following a general rule adopted by Premier in the determination of sanctions for misconduct committed during the strike, if it was never raised directly as an issue in contention at the arbitration. It was not even canvassed in the union's extensive closing written submissions in the arbitration proceedings.

- [83] Another point raised in this regard was that the arbitrator was inconsistent because she did not apply the 'two infractions' principle in the case of Mr A Mbethe, a shop steward. In his case, he had been found guilty of three acts of misconduct, and she imposed a final written warning and two written warnings for his misconduct under cases 44, 35 and 36 respectively.
- [84] The arbitrator did explain why she did not apply the principle to him in some detail. There is no clear reason why similar exceptional circumstances warranted a departure from the principle in the case of the five strikers identified by the union.

Failure to award retrospective reinstatement and awarding three months' remuneration as compensation to those acquitted of misconduct.

- [85] The arbitrator did not make any retrospective award of reinstatement of the strikers who were issued with warnings. The strikers who were completely acquitted were awarded retrospective reinstatement of three months.
- [86] Her reasoning for not awarding backpay to those who were issued with warnings was multifaceted, as follows:

"56. REMEDY

Albert Mbethe, Tembelani Apile, Thandiswa Dubha, Phakamani Mhlongo, Mongezi Dumisani, Nkosinathi Galadini, Vuyani Kenkebe, Siphелеle Luzipho, Siyabonga Mimi, Mawetu Mazwi, Patrick Mbalo, Mzwarafana Monakali, Fezile Njengele, Luyanda Ntetye, Jeffrey Ntezo, Andile Qashani, Akhona Sidloyi, Zitha Sphambo, Nkosana Tapleni, Zoyisile Calu, Bethwell Khumla, Yandiswa Lukashe, Lutando Magazi, Kamvelihle Mambudlu, Andile Mlandeli and Vuyisani Tyelo are reinstated. Reinstatement is the primary remedy and there was no evidence that such an order shall be impracticable. However the reinstatement is without back-pay.

The applicants have been the perpetrators of acts of misconduct, which cannot be diminished; the witnesses who testified on their behalf were not forthcoming and were unreliable. Not one employee took me into their confidence and openly stated the truth. It was only after a painstaking process of identification the applicants admitted being where they were said to be.

Also, I do believe that there were acts of intimidation on shop owners and customers but that the company was not able to provide direct evidence. However, the entire context of the strike through the overall evidence presented at the arbitration made it clear that blame cannot be apportioned in only one direction.

Also, the company was willing to engage in a conciliation exercise and offer certain employees reinstatement during the course of the arbitration (this was off the record but placed on the record during the argument). The union did not want to know the names of those being offered reinstatement and rejected the proposal and it may have been that many of the above could have gone back to work significantly earlier.

Also, the company should not have to carry the weight of the administrative delays as well as the delay caused by the Covid-19 pandemic.

No back-pay is awarded to these employees.

In this regard, the matter commenced in late 2019 with the Covid-19 pandemic which directly impacted this matter, being heard throughout 2020 and 2021 and further CCMA

practice effectively precluded the matter being heard for more than a few days in any month.

- [87] The arbitrator expressly referred to these reason as informing her decision of limiting the backpay she awarded to those acquitted of all misconduct to three months' remuneration, save that she made some allowance in their case:

"Bulelani Chewu, Shanki Ketso, Nosiphiwo Lawana, Celile Makapela, Bonga Mayimayi, Lunga Mdudi, Thobela Memeza, Mandla Mfundisi, Buyiswa Thiwani and Ziyagida Sonyabashe are reinstated with three months back-pay each. The comments above apply (again, they could have been reinstated earlier) but my sense is that to award no back-pay here would mean that they were punished for simply being on strike. They were there, they were identified as part of the group and so they get punished. This cannot be fair. Employees have the right to strike."

- [88] The union accepts that a commissioner has a discretion, to be judicially exercised, whether to make reinstatement retrospective to the date of dismissal or some lesser period. It argues that none of the considerations relied on by the arbitrator were fair and relevant factors for determining backpay of those reinstated with warnings. The union argues that these were not a rational foundation for refusing backpay and the arbitrator should at least have awarded 12 months' salary, which was the period that they had been unemployed even if the impact of Covid is discounted.
- [89] Premier argues that the arbitrator was entitled to exercise her discretion and consider the factors she did in deciding not to award backpay.

Legal principles applicable to reviewing a decision not to award retrospective reinstatement or to limit its extent

- [90] It is trite that the extent to which an award of reinstatement is made retrospective under s 193(1)(a) of the LRA involves an exercise of a true discretion on the part of the adjudicator which a court will only interfere with if the discretion was exercised capriciously or upon a wrong principle,

or it has not brought an unbiased judgment to bear on the question or has not acted for a substantial reason¹⁷. In the *Fibre Flair* decision that LAC cited with approval an extract from an article on the exercise of discretion, viz:

“(A) truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power” (Rubinstein Jurisdiction and Illegality (1956) at 16).’

The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and the exercise of power could not be set aside merely because a court would have preferred him to have followed a different course among those available to him.”¹⁸

(emphasis added)

- [91] To illustrate the extent to which the court will defer to the exercise of an arbitrator’s discretion on the retrospectivity of reinstatement two examples from the cases cited illustrate the point. In *Fibre Flair* employees were found to have committed misconduct in the form of unprotected industrial action, but it did not warrant their dismissal. Nonetheless, despite the fact that two years had elapsed between their dismissal and the Labour Court judgment the court reinstated them with no retrospective effect. The LAC found that on the facts of the case, a number of reasonable persons could have decided on different effective dates of reinstatement but that did not warrant interference in the absence of the appellants being able *“to show that the court a quo acted capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its*

¹⁷ *NUMSA & others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR 631 (LAC) at page 633, citing *Ex parte Neethling and others* 1951 (4) SA 331 (A). See also *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (3) SA 493 (SCA) at paragraph 32.

¹⁸ At page 631

*discretion improperly or unfairly.*¹⁹ In the *Shoprite* case, an unfair dismissal case, originating in December 2000, had been arbitrated and reviewed twice. In the second arbitration award handed down in 2003, the arbitrator had found the employee had been unfairly dismissed and reinstated him with a severe written warning, but the reinstatement was not retrospective. The Labour Court ordered the matter to be remitted for a third arbitration but on appeal, the LAC upheld the unfairness of the dismissal and the imposition of the warning. However, in 2007, it found the arbitrator's failure to award retrospective reinstatement was not justifiable, reasonable or rational and therefore ordered reinstatement with full retrospective effect to the date of dismissal. The SCA found the LAC had substituted its own discretion for that of the commissioner in circumstances where it had not been shown the commissioner had exercised his discretion capriciously or upon a wrong principle or any other ground warranting interference²⁰.

- [92] The SCA also held that both employee and employer parties suffered from the systemic delays of the dispute resolution process and while it was unfair on employees to bear the consequences of that, it was equally unfair to expect employers to bear the brunt of those failures.
- [93] Even though I am of the view that the arbitrator, ought not to have speculated about the prospect of some of the cases being resolved, nor was it correct in principle to rely on intimidation, which was suspected but not proven, I cannot say that it was improper to have considered the fact that the proceedings were lengthy, in part because concessions which should have been made were not, and in part because of the restrictions adopted during the Covid pandemic.
- [94] Similarly, in keeping with the approach of the SCA in *Shoprite*, the distribution of the burden of the dispute resolution process delays was not a matter to be resolved by balancing the burdens of the parties. For the reasons discussed, in the circumstances I do not believe the court is entitled to step into the arbitrator's shoes and modify her orders of

¹⁹ At page 634

²⁰ At paragraphs 33 and 34.

reinstatement. The same considerations apply to the limited orders of reinstatement she awarded for those who were ultimately dismissed.

[95] In passing, it is worth mentioning that parties in labour disputes concerning multiple incidents of misconduct occurring over an extended period of industrial action, need to bear in mind that a failure to resolve the resulting disputes early on through conciliation and negotiation can result in very protracted litigation requiring voluminous evidence to be led and the resulting delays will inevitably raise the risks for both parties.

[96] Considering the discussion above, the cross review cannot succeed.

Conclusion

[97] The outcome of the review and cross-review is that neither application succeeds. As the parties have an ongoing relationship and neither pressed the issue of costs. I am satisfied that both should bear their own.

Order

1. The Applicant's review application and the Third and Further Respondents' cross review application are both dismissed.
2. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa

Appearances

For the Applicant: M Van As instructed by Fluxmans Inc

For the Respondents: M Eiujen, SC instructed by Cheadle Thompson & Haysom Attorneys