



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JS686/23

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION o.b.o. MEMBERS**

Plaintiff

and

ECOTECH ENVIRONMENTAL SERVICES (PTY) LTD

Defendant

Heard: 4 – 8 August 2025

Oral Arguments: 25 September 2025

Delivered: 8 December 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is 8 December 2025.

JUDGMENT

MAKHURA, J

Introduction

- [1] The question before this Court is whether the individual plaintiffs or employees and members of the Association of Mineworkers and Construction Union (AMCU or union) have embarked on an unprotected strike, and if so, whether their dismissal on account of their participation in the unprotected strike was substantively and procedurally fair.
- [2] The plaintiffs claim that they did not participate in an unprotected strike but were unlawfully locked out, whilst the defendant's case is that the individual plaintiffs were on strike. If the individual plaintiffs were not on strike, it should follow that they could not be dismissed for participation in a strike. If they were on strike, the Court must determine whether their dismissal is nevertheless fair.

Material facts and evidence

- [3] The defendant is a temporary employment service which provides waste management services to BMW South Africa (BMW) in Rosslyn. These services are rendered at BMW, which has controlled access to and from the premises, including the area where the defendant conducts its business. Vinscent Thabo Moyo (Moyo), the defendant's Human Resource and Operations Manager, testified that BMW and the defendant concluded a Service Level Agreement (SLA). One of the terms and conditions of the SLA is, according to Moyo¹, that if BMW suspects an impropriety on the part of the defendant's employees, it may subject them to polygraph testing.
- [4] The defendant operates a 24-hour shift daily except on weekends and public holidays. The morning shift runs from 6h00 to 14h00, the afternoon shift from 14h00 to 22h00, and the night shift from 22h00 to 6h00. Each shift is operated by approximately 54 employees.

¹ The SLA between the defendant and BMW was not part of the trial record.

- [5] In terms of the employees' contract of employment, they were informed that the defendant has an SLA with BMW and that the SLA may be cancelled if the defendant and its employees do not abide by certain provisions of the SLA. The contract of employment provides further that:

'BMW has now informed us that they are implementing a new stipulation to our service level agreement which means that this stipulation will now have to be implemented by EcoTech. This provision has been made necessary because of the high stock losses that is being experienced by BMW and the fact that several of the EcoTech staff have been dismissed over the past years for theft.

BMW has thus indicated that with immediate effect, they will require the staff to undergo polygraph tests from time to time. While there is no specific legislation in place regulating the use of polygraph tests, an employer can ask an employee to take one, but it must be voluntary and thus, no one can be forced to undergo a lie detector test. We need to however caution you to think carefully before you refuse as this could mean that you have something to hide which would endanger the trust relationship between you and EcoTech...

Should you voluntary (sic) subject yourself to the polygraph test (which we encourage) and you fail the test and then BMW withdraws your access card, it will mean that you will have no way of entering your workplace. This will then mean that EcoTech will have no option but to commence a process of discussing your continued employment and consider your termination of contract due to operational requirements.' (Emphasis added)

- [6] The defendant deals with Michael Leibrandt (Leibrandt), the BMW Group South Africa Section Leader. Moyo testified that he reports to Leibrandt in addition to reporting to the defendant's Chief Operations Officer, Nkululengo Makhungo (Makhungo).

Pre-20 July 2023 events

- [7] On 14 October 2022, BMW sent an email to the defendant in the following terms:

'Please note that due to our zero tolerance to parts disappearing from site it is time again for the monthly random polygraph testing. Please note that we will not stop and we will carry on with random testing seeing that we as BMW has the right and the interest to protect our interests.'

- [8] Moyo testified that, during that year, 2022, the employees were subjected to two to three polygraph tests. He testified further that the polygraph tests created fear amongst all the defendant's employees, including him, and that they felt "*unfairly done*" because if they were informed that if they do not subject themselves to the tests, their access cards would be blocked and as a result, they had to attend the tests, *albeit "unwillingly"*.
- [9] Following the events of 2022, on 4 April 2023, BMW sent an email to the defendant enquiring when six of its employees would be back at work so that they could undergo polygraph tests. The six employees, all from shift B, were Oupa Motileng, Atlegang Motsepe, Jimmy Maluleka, Asia Nthongwa, Lucky Mbokazi and Lungani Buthelezi. Moyo testified that there was probably a case of theft that led to this email from BMW.
- [10] On 12 April 2023, another email regarding the polygraph test was sent by BMW to the defendant. It reads as follows:
- 'Please send names of the guys who slipped yesterday, even the ones that was (sic) absent. We also need to do the ones we discussed last week that was (sic) absent as we started with polygraph testing. Please send the names and shifts so that I can arrange with Jane.'
- [11] On 13 June 2023, meetings were held with the employees in all three shifts at 12h30, 14h00 and 22h00. Moyo testified that these meetings discussed, amongst others, issues such as theft, suspension of employees and polygraph testing every time there was an incident of theft.

- [12] On 12 July 2023, Leibrandt sent an email to Moyo requesting a list of employees on the *first* and *second* shifts. A further email was sent on 17 July 2023, where Moyo was informed that:

'Please note that it is the prerogative of BMW South Africa to protect its belongings. If we become aware of and (sic) some inconsistencies we will randomly conduct polygraph tests on our contractors as we deem fit.'

20 July 2023 events

- [13] It is common cause that a week or so before 20 July 2023, and about two hours into the shift C, which was operating 14h00 to 22h00 shift, six lithium batteries were discovered in an area where they were not supposed to be and BMW suspected that they were destined to be removed. This prompted BMW to call for polygraph testing of the defendant's employees, per emails of 12 and 17 July 2023 referred to above. There is a dispute whether it was only shift C that was required to undergo the test or whether shifts A and B were also required to undergo the test. The defendant's statement of response stated that it was both shifts B and C. However, the defendant's evidence, led through Makhunga, Moyo and Frans Lesoga (Lesoga), contradicted its pleaded case. These witnesses testified that the polygraph tests were to be conducted only on shift C employees. However, per the emails from BMW dated 12 and 17 July 2023, BMW wanted a list of employees on the first and second shifts and confirmed random testing.
- [14] Lesoga testified that he is employed as a supervisor by the defendant. He testified that on Wednesday, 19 July 2023, he was requested to take all shift C employees for polygraph testing. He did so by taking them in a group of five each to avoid disruption in operations. By the end of the shift, all employees had taken the tests and only 10 employees had refused to subject themselves to the testing. However, on Thursday, 20 July 2023, this number reduced to seven as the other employees took the tests.

- [15] By 6h00, which was the start of shift C on 20 July 2023, the following employees had not undergone the polygraph test – Baron Ngubeni, Justice Setaka, Dumisani Nkosi, Charles Sithole (Sithole), Mpumelelo Baloyi, Barnett Futhane and Thabo Phiri. These employees are collectively referred to as the seven shift C employees or individual plaintiffs. Their access cards were blocked and they were unable to clock in to render their services.
- [16] Sithole was a shop steward and a branch secretary of AMCU. He testified that he attended the wage negotiations meeting on 19 July 2023, and he had noticed around 17h00 after he left the meeting that his access card was blocked. On 20 July 2023, he arrived at work at 6h00. He tried to access the premises, but his card was still blocked. He went to the reception to enquire and was informed that he needed to take the polygraph tests. He refused because of the fear of suspension similar to other employees who had been on suspension for about 15 months after they took and allegedly *failed* the polygraph tests. He testified that he called the AMCU Tshwane Regional Secretary, David Mohamose (Mohamose) and explained the situation to him.
- [17] Mohamose arrived at the premises around 6h30 and found that the seven shift C employees were outside. These employees explained the issue to Mohamose. Mohamose testified that he telephoned Moyo and later Makhunga. He also testified that Makhunga informed him that employees who do not take polygraph tests would have their access blocked. Further, the employees could not tender their services because there was an instruction to subject themselves to polygraph testing, failing which their access cards would be blocked. At 6h54, Mohamose sent an email to Makhunga, which reads as follows:
- ‘It had come to my attention that employer is forcing employees to partake on taking lie detector, and those who exercise their right not to participate their clocks card are being blocked.

Kindly be reminded that we have members who have been in suspension for almost a year due to this polygraphy test, though there's no evidence of wrongdoing.

If this is the approach the employer is embarking on, we will be taking necessary legal steps to interaction this ridiculous act by you.' (sic) (Emphasis added)

[18] Makhunga responded to the email at 15h00 that afternoon. He wrote that:

'It is not Ecotech that is conducting a polygraph test and no employee was forced to take it.

It has been communicated to all employees that it is BMW who is requiring both Ecotech and the security company employees to take the polygraph test. If they refuse to take it we are in position to force any employee to or not to however, BMW has made it clear that anyone [who] refuses to take the polygraph test, his/her access will be blocked.' (Emphasis added)

[19] In the interim before Makhunga's email above, shift A was scheduled to start at 14h00. Mohamose testified that because the shift A supervisor, Lesoga, was subjected to polygraph testing, employees on shift A were also required to undergo polygraph testing. The shift A employees started arriving from 13h00. He informed those who enquired what was happening that the defendant required all the employees to undergo polygraph testing and that the employees had a choice to go or not to go, but those who decide to go and fail the test would have their access cards blocked. The employees joined the seven shift C employees who were outside.

[20] At approximately 13h30 on 20 July 2023, Lesoga went to prepare for the incoming shift A. He waited for the employees to arrive, but only one reported. He observed another employee, Victor Phalane (Phalane), coming in and out. It is common cause that only a few shift A employees reported for duty. When Lesoga noticed that the shift A employees were not at work, he went outside to check what was happening and he found employees gathered. They told him that

they had an issue with the polygraph testing. In response, he told them that it was only shift C employees who were subjected to the polygraph testing.

- [21] Moyo testified that after realising that only a few employees reported for duty, he arranged with the supervisors to ask some of the shift C employees to continue working. At approximately 14h21, Moyo went to address the employees who were gathered outside the premises. Moyo's evidence was that:

'I went there and I asked them what is happening, why are they outside, not in, because they are supposed to be starting a shift and they should have reported for work. And their answer was that they are not happy with the polygraph test that are being done, and they want BMW management to come and address them.'

And I said to them, "But the polygraph test is not yet in this shift A, it is only done with shift A (sic) employees and instead of us fighting outside, rather let us go clock in and we can discuss the rest of the things there, because you have your shop steward and they can be able to take your, your matter forward". And they insisted that they need BMW management to come and address them, because they were not happy with the, with the polygraph issue. And I then said to them, "This gathering, it is illegal and we should be at work, we should be working", because by that time I tried to persuade them to go inside.

And I said, "It is fine, let me go ask the BMW security if she could facilitate BMW managers to come and talk to the employees". And I went to her and she refused and said to me, "That is not going to happen and Ecotech employees are not, are not BMW employees, so the company should deal with that". So I went back to them and gave them the answer, and told them that what they are doing is illegal and amounts to an unprotected strike and they should, they should go report to work. And the answer that I got was that they are not going to go inside.

And I said to them, "It is fine, but just, just know that this is an illegal strike and I am going to phone the owner who maybe will come and talk to you

guys". And their response was that, "It is fine, we will wait for the owner to come and address us". But I did indicate to them that we should go back to work as what you are doing amounts to an unprotected strike.' (Emphasis added)

- [22] Moyo was then asked by his legal representative if he had given the employees *"any time limit to go back to work"*. His response was:

'No, I said to them, "I am going to give, I am going to give the owner two, three hours to come because when I called him, he said he was in Klerksdorp, but she will, she will come back". So I sort of tried saying to them, "The owner is coming, let us go to work and maybe he can find us talking there". They said no, "We will wait for him here". So I left them sitting there outside.'

- [23] Makhunga arrived at the premises later that afternoon. He addressed the employees at approximately 17h00. Makhunga asked the employees why they were outside, and their response was that they wanted to speak to BMW management regarding the polygraph issue. Makhunga testified during examination in chief that:

'I drove from Krugersdorp straight to Rosslyn plant. I arrived at approximately 14:45 and I reported to Michael that I was on the plant and he said that I must go and speak to our employees who were gathered outside the BMW premises. And I went to them and when I arrived at them, I asked what is happening, why were they not on duty

And they said that they would love to have a meeting with BMW management, specifically to address the question of the polygraph test. And I said, "Look, you are employed by us as Ecotech; and therefore, if you have matters that you would like to raise, you must raise them with us. You cannot raise them with BMW". So this matter of the polygraph test has been addressed on numerous occasions. It was not the first time that BMW had required some of our employees to do that.

And I then said to them that I wanted them to go back to work and they have between 17:30 to 18:00 to get back to their working stations; and they did not heed to that call by that time at 18:00 and we had to ask the other employees from the other shifts to stand in, because if the line had stopped, BMW was going to lose production; and if they lose production, that was going to be put on us; and if that was put on us, then that meant that the contract was in jeopardy and that we would lose the contract and the rest of the employees will also lose their employment. It was a miracle how we worked, because with very few members of staff we were able to keep the line running.'

- [24] During cross examination, Makhunga was asked what he said to the employees when he went to address them after 17h00. His response was:

'I said that, "What you are doing is illegal and we cannot stop you from exercising your rights if you want to withdraw your work. However, we will expect you to report back for duty at 17:30 and please remember as much as you have your rights, as an employer we also have our rights".'

- [25] Moyo testified that few employees reported for duty thereafter. Sithole disputed that Moyo informed them that they were on an unprotected strike when he addressed them and testified that Makhunga told the employees to "go inside" and that if they did not, they would remain outside.

- [26] The defendant called Innocent Kgari (Kgari) as a witness. Kgari is one of the individual plaintiffs on whose behalf AMCU referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and later to this Court. His evidence was that he was never dismissed. He testified that he arrived at work by taxi at approximately 13h30. He worked shift A, which was scheduled for 14h00 to 22h00. Upon arrival, Lawrence Motsepe (Motsepe) and Pitsi (known to him as Pitsi) called him to join a group of employees who were gathered outside the premises. They told him that they were not going to work because of their grievance with the polygraph until BMW addresses them. He joined them. Victor Malaka (Malaka) went inside to call those employees who were already inside. At around 14h00, Moyo came to address them. Although his

evidence changed on the words used by Moyo when addressing them, the crux of his evidence was that Moyo told them to go to work and that they could resolve their issues whilst working.

- [27] The defendant also led the evidence of Refilwe Stephina Molele (Molele). Molele testified that on 20 July 2023, she arrived at work by taxi. She was a shift A employee and was scheduled for work from 14h00. After she got off the taxi at approximately 13h45, she was called by Beverley Nyathela (Nyathela) to the circle where some employees had gathered. Although there is a dispute whether Nyathela called Molele or the other way around, Molele testified that Nyathela told her that they were not going to work because of the issue relating to polygraph testing. She joined them. It is common cause that Molele reported for duty after the address to the employees by Moyo.
- [28] Nyathela, who testified on behalf of the plaintiffs, said that she arrived at work at approximately 13h30 and before 14h00. Upon her arrival, she parked her car on the side of the road outside BMW and approached a group of employees who were gathered outside. She enquired why they were gathered outside. It was explained to her that there was an issue regarding the forced polygraph testing and that the employees were waiting for management to address them. When Molele arrived after her, she also enquired and it was explained to her the reason they were gathered outside. Molele then went to join her friends.
- [29] Nyathela testified further that Makhunga addressed them around 17h00, where he said to them that he was giving them until 17h30 to report for duty – to “go inside”. She did not report for duty and went home around 18h00. When she and the other employees left on 20 July 2023, they agreed that they would report at 7h00 the following morning for feedback. She reported at the premises at 7h00 as agreed. She could not say whether her access card was blocked on 20 July 2023 because she did not go in or try to access the premises.
- [30] Moyo testified that, except for the seven shift C employees, no other employee’s access card was blocked, at least on 20 and 21 July 2023. He testified that some

employees clocked in but did not proceed to work. Moyo testified that Thapelo Madumo (Madumo), a shift A employee, clocked in at 13h19, clocked out at 13h31, clocked in again at 14h45, clocked out at 17h21, which Moyo said was probably going out for lunch, clocked in again at 18h03 and clocked out at 22h16. Siphso Masombuka (Masombuka) clocked in at 13h33 and clocked out at 13h44. He never returned. Innocent Kgari (Kgari) clocked in at 15h38 and out at 21h51.

- [31] Shift B, scheduled for 22h00 on 20 July to 6h00 on 21 July 2023, reported for duty, except for the seven individual plaintiffs before this Court, which included Norman Rakhuadzi (Rakhuadzi). Rakhuadzi testified that after the wage negotiations meeting around 17h00 on 19 July 2023, he requested time off for the 19 – 20 July 2023 from Moyo and Moyo agreed. This version about the request for time off was never put to Moyo during cross-examination.

21 July 2023 events

- [32] On Friday, 21 July 2023, shift C continued to report for duty, save for the seven employees whose access cards were blocked. A group of employees gathered outside the premises and chanted. These employees included Rakhuadzi, Sithole and Nyathela. Rakhuadzi went to work on 21 July 2023 and arrived at 6h00, which was the end of his shift. He did not try to access the premises.
- [33] Nyathela testified that she reported at the premises on 21 July 2023 for feedback and that nothing had changed. She testified that she tried to gain access to the premises at 9h24 to use the rest room and get warm water, but her access card was blocked. Another employee, Richard Musenga (Musenga), also tried to gain access, but his card was also blocked.
- [34] The shift C employees, excluding the seven, continued to work on Friday, 21 July 2023. Mohamose testified that he went to the premises around 7h30. On this day, the employees were joined by some of the shift B employees, who finished their shift at 6h00. Mohamose went back to the office. Whilst at the office, he was telephoned by Mr Machete of the South African Police Service (SAPS) to attend

at the premises. He arrived there around 10h30. He met the SAPS, the defendant and BMW Head of Security, Jane (Jane). He was accompanied by a shop steward. Although he said during his evidence in chief that the shop steward's access card was blocked and he could not enter the premises using his card and had to be opened by the security officers, he conceded during cross-examination that the meeting took place in an area before the turnstiles or the clocking point. At this meeting, they requested to meet BMW management. Jane promised to convey the message and revert, but she never came back to them.

Post 21 July 2023 events

[35] The employees were not required to work on Saturday, 22 and Sunday, 23 July 2023. The defendant confirmed that they were not dismissed for striking or not reporting for duty on these days.

[36] On 23 July 2023, the defendant sent the following text message to the employees:

'Kindly note that due to the unprotected strike, we are working 2 shifts this week.

Morning Shift B 6am to 6pm

Night Shift C 6 pm to 6 am.'

[37] The defendant's evidence, led through Moyo, was that the text messages were sent to the individual plaintiffs on 23 July 2023, informing them that their strike over the polygraph test was unprotected. The text messages noted the individual plaintiffs' persistence with the strike and indicated that disciplinary action would be taken against them, which could include dismissal. The messages urged the individual plaintiffs to *"report to work as scheduled on Monday and for the rest of the week"*. The defendant stated that it was committed to continuing discussions with AMCU to find an amicable solution.

[38] The defendant testified that on 24 July 2023, BMW blocked the access card of the remainder of the employees who did not report for duty on 20 and 21 July 2023.

Monday, 24 July 2023 events

[39] On Monday, 24 July 2023, Mohamose sent a letter to the defendant. In it, he stated that it had come to his attention that the defendant had issued a communique to the employees that they were embarking on an unprotected strike. Mohamose recorded the previous correspondence exchanged between the parties. The letter also notes that:

‘there has been a communique from employer to employees declaring that there’s unprotected striking place which as AMCU aren’t aware of, but we know members who are not willing to take a polygraph test and being instructed that they will be forced and their access card will be blocked.’

[40] The letter also records that:

‘On 20 July 2023, AMCU notes that seven (7) of employees exercised their rights to refuse the polygraph test and by virtue of that they were unlawfully lock-out as their access card were blocked.’

[41] AMCU then stated that the defendant, in terms of the email from Makhunga sent at 15h00 on 20 July 2023, suggested an immediate lockout in that it said that anyone who refused to take the polygraph tests would have their access card blocked. The letter recorded the address made by Makhunga on 20 July 2023 after 17h00 as follows:

‘At around 17H08, Mr. Makhunga briefly addressed employees in unwelcoming manner, as he made these remarks –

- a. “Why aren’t you at work”?
- b. “Do you work for BMW”?

c. “Everyone has choice to be at work by 17H30 or we will reserve our rights as the company”?

With this kind of attitude one can conclude that, employer had no intentions to hear or accent to employees’ grievances and address them accordingly, but resorted to I don’t care mode.’ (sic)

[42] AMCU then proposed a meeting at 12h00 on 24 July 2023 with BMW and the defendant. The defendant did not respond to the letter, and the proposed meeting did not happen.

The dismissal: 25 July to 3 August 2023

[43] On 25 August 2023, the defendant had sent a text message to the individual plaintiffs in terms of which it recorded that they persisted with and refused to cease their unprotected strike action “*despite ultimatums both written and verbally*” issued to them and AMCU that their conduct was serious and could result in the termination of their employment. The defendant alleged in the text message that the individual plaintiffs ignored the ultimatums and the “*warning that dismissal might result*”. The individual plaintiffs were then informed that:

‘the employer has no option but to terminate your employment with effect from Tuesday 25 July 2023. Accordingly, you are advised to collect your termination notices on the 26 July 2023 between 10:00 – 12:00.

Kindly take note that the employer herewith provides you with the opportunity to make written representation directly and/or through your trade union by no later than the 27th July 2023 stating why your dismissal should not be made final.’

[44] On 25 July 2023, the plaintiffs’ attorneys, seemingly unaware of the individual plaintiffs’ dismissal, addressed a letter to the defendant. The letter records that at least 69 AMCU members had been locked out of the premises since 20 July 2023 and that:

‘We have been advised that our client’s members have tendered their services to Ecotec daily, yet our client’s members access cards have systematically been

denied access to their workplace. The AMCU members are currently gathered at the [entrance] to the premises, waiting to be allowed access to their workplace.'

[45] AMCU demanded access to the premises by 14h00 on 25 July 2023, failing which it would approach this Court on an urgent basis to interdict the unprotected and/or unlawful lockout.

[46] In response on the same day, the defendant denied that the individual plaintiffs had been locked out. It recorded that the individual plaintiffs had embarked on an unprotected strike on 20 July 2023 and had refused to report to their workplace since. The defendant said that the individual plaintiffs:

'continued with and refused to cease with the unprotected strike in the face of numerous instructions and ultimatums issued since the date of commencement of their strike advising them that:

Their conduct constituted serious misconduct that could result in their dismissal and that:

The commercial relationship between EcoTech and its client may be in danger as of their strike; which could lead to all employees (including those employees who did not partake in the strike action and those that were working during the unprotected strike) losing their job; and

Instructing them to cease with their unprotected strike and return to work unconditionally.

As delineated above your client's members persisted with their rejection of all the ultimatum issued to them and elected to continue with their unprotected strike until the employer was left with no option but to dismiss.'

[47] Despite the plaintiffs' attorneys' protest in subsequent correspondences and the demand for the withdrawal of the dismissal, the defendant maintained its stance taken in its previous letter that the individual plaintiffs had not been locked out and that they had been dismissed.

- [48] The plaintiffs submitted their written representations on 27 July 2023. On 3 August 2023, the defendant addressed a letter to the individual plaintiffs attaching the independent chairperson's disciplinary outcome and sanction and confirming their dismissal with effect from 2 August 2023.

Evaluation

- [49] The plaintiffs' case is that:

'During July 2023, the individual applicants employees were requested to undergo polygraph testing. As polygraph testing was not a term in the individual applicants' employment contract, nor was it founded in any of Ecotech's policies. The employees refused to undergo polygraph testing. This resulted in the individual applicants being refused access to the workplace and an unprotected lock-out ensued.'

- [50] In defence, the defendant sought to suggest that polygraph testing was a term and condition of the individual plaintiffs' contracts of employment and that even if it was not, the request for the individual plaintiffs to undergo the polygraph test was a reasonable one, which was necessitated by the unauthorised removal of the lithium batteries. Earlier in its statement of defence, the defendant pleaded that BMW initiated the polygraph test after the incident and as batteries were found at around 16h00 during shift B, which at the time was operating the 14h00-22h00 shift, the tests were to be conducted on all the employees working on shifts B and C. Shift C worked the morning shift, 6h00-14h00. Shift A, so the defendant pleaded, was excluded.

- [51] The defendant pleaded that on 21 July 2023, some of the shift B employees joined the strike. This was confirmed by Mohamose in his evidence before this Court that some of the shift B employees who finished their shift at 6h00 on 21 July 2023 joined the other employees outside.

- [52] The plaintiffs disputed that they participated in a strike. It is therefore necessary to determine first whether the individual plaintiffs were on strike. If they were,

their dismissal cannot be fair or sustained and that should mark the end of the enquiry into the fairness of the dismissal. If they embarked on an unprotected strike, the enquiry moves to the fairness of their dismissal.

Did the individual plaintiffs embark in a strike?

[53] Section 213 of the Labour Relations Act² (LRA) defines a strike to mean:

‘the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to “work” in this definition includes overtime work, whether it is voluntary or compulsory.’

[54] From the above definition, four elements emerge for conduct to constitute a strike. There are (a) a partial or complete concerted refusal to work or retardation or obstruction of work, (b) by employees of the same employer or by different employers, (c) for the purpose of remedying a grievance or resolving a dispute, (d) in respect of a matter of mutual interest between employer and employee.³ The Constitutional Court clarified that:

‘One should not talk about a strike in support of a certain demand because, in terms of the definition of the word ‘strike’, a strike already includes a demand. One should speak of a collective refusal to work in support of a certain demand or in pursuit of a certain demand.’⁴

[55] The question is whether the conduct of the individual plaintiffs satisfied all four elements above to constitute a strike. If so, whether the dismissal was substantively fair. To answer this question, the conduct of the employees from shift C is considered separately from the shifts A and B employees.

² Act 66 of 1995, as amended.

³ See also *Transport and Allied Workers Union of South Africa obo Ngedle and others v Unitrans Fuel and Chemical (Pty) Ltd Ltd* [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC) (*Unitrans*) at para 106.

⁴ *Ibid.*

The seven shift C employees

- [56] There were only seven employees from shift C who were dismissed for participation in an unprotected strike. It is common cause that these seven individual plaintiffs' access cards were blocked as at 6h00 on 20 July 2023. The defendant had knowledge of this fact. These plaintiffs arrived before 6h00 to report for duty, they tried to access the premises, but they could not because their access cards were blocked. They did not refuse to work. Their conduct does not satisfy the very first element of the definition of strike because they were ready to work but could not. They were not on strike.
- [57] The employees' contracts of employment state that where their access cards had been blocked by BMW, the defendant would consider termination of employment for operational reasons. However, the defendant elected to dismiss these seven plaintiffs for participation in an unprotected strike. Moyo was asked by the Court why the defendant dismissed them for alleged participation in an unprotected strike and his response was that he was not sure why the defendant took the decision it did.

The shifts A and B employees

- [58] Shifts A and B employees were scheduled respectively to work from 14h00 to 22h00 and 22h00 to 6h00 the following morning on 21 July 2023. Their case that they were not on strike but were locked out on 20 and 21 July 2023 is not borne out of the evidence. It is, in fact, contradicted by their own evidence, which is that they did not attempt to access the premises. There was no evidence presented on behalf of any of these plaintiffs that their cards were blocked. On the contrary, Nyathela testified that she did not attempt to access the premises on 20 July 2023. The defendant's witnesses, Molele and Kgari, testified that after the address by Moyo and Makhunga, they reported for duty, and their cards were not blocked.

- [59] The defendant's statement of response states that employees from shifts B and C were to be subjected to polygraph tests. Of the more than 50 shift B employees, only seven joined the strike, and the rest continued to work. Shift A is not mentioned in any correspondence or the statement of response yet 43 employees joined the strike. In fact, they started the strike at 14h00 on 20 July 2023. Mr Cook, for the plaintiffs, submitted that their strike lasted for one hour, from 14h00 to 15h00 when Makhunga addressed an email to Mohamose. Makhunga's email stated that the defendant communicated to "all employees" that BMW required them to undergo polygraph tests and any employee who refused take the test would have his or her access card blocked. Whilst there may be force in Mr Cook's argument, this is undermined by the fact at his 17h00 address to the employees, Makhunga asked or told or "*instructed*" the employees to report for duty. Whilst Makhunga's address will be discussed in detail later insofar as whether this constituted an ultimatum as contemplated by the law, the fact that he mentioned to the individual plaintiffs present at this meeting that they should report for duty is not in dispute. I am unable to agree that the shift A employees were on strike only for one hour. The seven shift B employees also withdrew their services on 20 and 21 July 2023.
- [60] Those individual plaintiffs who accessed the premises on 21 July 2023 did not do so for the purpose of rendering services. There is no evidence that they tendered services on 21 July 2023 but were unable to do so because their access cards were blocked. The evidence established that these individual plaintiffs' access cards were only blocked on Monday, 24 July 2023. These individual plaintiffs engaged in a concerted refusal to work until the issue relating to the polygraph test is resolved, alternatively until their demand to meet BMW management to address the issue was met. Their conduct constitutes a strike. This strike was unprotected. Accordingly, the shifts A and B plaintiffs participated in an unprotected strike on 20 and 21 July 2023. They were not on strike on Monday, 24 July 2023 until the date of dismissal because their access cards were blocked.

Was the dismissal substantively fair?

[61] The reason for the dismissal of the seven shift C employees for alleged participation in an unprotected strike is unsustainable. The defendant, per the contract of employment, should have considered dismissing them for operational requirements. Their dismissal was therefore substantively unfair.

[62] The shifts A and B plaintiffs had embarked on an unprotected strike. A sudden withdrawal of labour by employees without notice to the employer is *prima facie* serious. It is disruptive to the operations of the employer and could result in serious loss of production. In *Mzeku & others v Volkswagen SA (Pty) Ltd & others*⁵, the LAC stated that:

‘Once there is no acceptable explanation for the appellants’ conduct, then it has to be accepted that the appellants were guilty of unacceptable conduct which was a serious breach of their contracts of employment with the first respondent. In such a case the only way in which the appellants’ dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction. In this case it must be borne in mind that the appellants refused to work or failed to perform work for over two weeks and, in the process, caused the first respondent huge financial losses. In our view there can be no doubt that dismissal would be an appropriate sanction if it is properly established that they were guilty of such misconduct.’⁶

[63] It is trite that whilst participation in an unprotected strike may constitute a fair reason for the employer to dismiss its employees,⁷ it does not follow axiomatically that dismissal for participation in an unprotected strike is fair. The onus to prove the fairness of the dismissal remains with the employer. This much

⁵ 2001 (4) SA 1009 (LAC); (2001) 22 ILJ 1575 (LAC).

⁶ Ibid at para 17; see also the minority judgment in *Unitrans* (fn 3 above), where the Constitutional Court stated that “[a]n illegal strike has been recognised by our courts to constitute serious and unacceptable misconduct by workers”; *Sasol Mine Ltd v Nhlapo an others* [2021] 12 BLLR 1209; (LAC) (2021) 42 ILJ 2589 (LAC) at para 39.

⁷ Section 68(5) of the LRA.

was aptly articulated as follows by the LAC in *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*⁸:

‘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 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 Metalworkers 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.’⁹

- [64] Item 6 of the now repealed and substituted Schedule 8 of the Code of Good Practice: Dismissal (old Code) regulated dismissal for participation in an unprotected strike. It emphasised that the like any other misconduct, the enquiry into the substantive fairness of this dismissal must consider factors such as the seriousness of the contravention, attempts made to comply with the LRA and whether the strike was in response to the employer’s unjustified conduct.¹⁰ Item 6(1) was retained as item 12(1) of the new Code of Practical: Dismissal¹¹ (new Code), with “unjustified” now replaced by “unlawful, unfair or unreasonable”.
- [65] The assessment of the seriousness of the participation in the unprotected strike must include the conduct of the parties, the legitimacy of the demands, the duration and timing of the strike and the harm caused by the strike.¹²
- [66] Item 6(2) of the old Code dealt with what the employer should do before dismissing the employees. It provided that:

⁸ [2014] 1 BLLR 31 (LAC); (2014) 35 ILJ 642 (LAC).

⁹ Ibid at para 29.

¹⁰ See item 6(1) of the old Code.

¹¹ GG No 53294 dated 22 August 2025, wef 4 September 2025.

¹² Item 12(2) of the Code of Practice.

'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.' (Emphasis added)

[67] The above provision is now retained under item 12(3) of the new Code, *albeit* more detailed. Item 12(3) provides:

'The process before dismissal should include the following –

- (a) The employer should, at the earliest opportunity, contact a trade union official to inform the trade union about the strike so as to afford the trade union an opportunity to consult with the striking employees.
- (b) The employer should consider representations by the official, and discuss the course of action it intends to adopt with the trade union.
- (c) If there is no trade union involved, the employer should seek to engage with leaders or representatives of the striking employees.
- (d) 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.
- (e) The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.
- (f) If an employer issues an ultimatum to employees engaged in an unprotected strike, it may not be fair to dismiss employees for participation in that strike who obey the ultimatum and return to work within the stipulated period.

- (g) If participating employees reject an ultimatum, the employer may dismiss the employees after considering the conduct and any representations of the employees in accordance with the provisions of this Code.
- (h) In cases of collective misconduct, the employer may, depending on the circumstances, satisfy the requirements of procedural fairness by calling for collective representations.
- (i) In the employer cannot reasonably be expected to extend any of these steps to the employees in question, the employer may dispense with them.’
(Emphasis added)

[68] There is no material difference between the old and the new Code. Ultimately, the enquiry involves that the employer must, before dismissing the employees, (1) contact the trade union for intervention and engage on the course of action to be taken, (2) issue an ultimatum in clear and unambiguous terms, (3) the ultimatum must warn the employees of the sanction that would be imposed if they do not comply with it, (4) give the employees sufficient time to reflect on and respond to the ultimatum and (5) ensure that a fair procedure is followed before dismissing the employees. Employees who comply with the ultimatum cannot be fairly dismissed.¹³

[69] I have already articulated what these employees’ demands were above. The demand was communicated to both Moyo and Makhunga during their address to the employees at 14h21 and 17h00, respectively. Moyo and Makhunga were aware of the demand from these employees, yet they did not inform the employees that shift A was not required to undergo polygraph testing. Lesoga and Moyo testified that they informed the employees that only shift C employees were expected to undergo the tests. Although the evidence of Makhunga, Moyo and Lesoga was consistent that only shift C employees were required to undergo polygraph tests, this evidence was undermined by BMW’s email dated 12 July 2023 which stated that employees on the first and second shifts were to undergo

¹³ Item 12(3)(f) of the new Code; see also *Mveltrans (Pty) Ltd t/a Bojananla Bus Services v Pule and others* [2014] ZALAC 63.

the polygraph tests, the defendant's pleaded case that shifts B and C were required to undergo the polygraph tests, supported by the findings of the chairperson of the alleged disciplinary hearing and the defendant's failure to inform these employees that they were not required to undergo the tests. Further, Makhunga's email at 15h00 stated that "*all employees*" who do not undergo the polygraph tests would have their access cards blocked and that it was not the defendant but BMW that required the tests. The defendant's oral evidence is inconsistent with its pleaded case and the documentary evidence. I am therefore not able to accept that the employees were informed, and informed unequivocally, that they were not expected to undergo the polygraph tests and that only shift C employees were expected to undergo the tests.

[70] The strike started at 14h00 on 20 July 2023, when shift A employees refused to report for duty after being informed by Mohamose that they were required to undergo the tests. The defendant did not contact AMCU, nor did it seek its intervention at any stage from the commencement of the strike. Even after Friday, 21 July 2023, the defendant continued to engage the employees directly to the exclusion of AMCU. Had the defendant contacted AMCU or informed AMCU in its email at 15h00 that only shift C employees were expected to take the tests and not shifts A and B, the matter might have taken a different turn.

[71] The defendant claimed that it issued written and verbal ultimatums. In *Mveltrans (Pty) Ltd t/a Bojananla Bus Services v Pule and Others*¹⁴, the LAC said the following about the ultimatum:

'It is beyond cavil that the purpose of an ultimatum is to get workers who are participating in unlawful industrial action back to work. Although the participation in an unprotected strike remains a serious misconduct, workers can avoid the ultimate sentence, which is dismissal, by complying with an ultimatum. Those who comply with the ultimatum may not be dismissed, because compliance is an act of atonement. Those who do not comply may be dismissed, after being heard, because non-compliance is an unacceptable act of defiance... It has been

¹⁴ [2014] ZALAC 63.

said that an ultimatum is as much a means of avoiding a dismissal as a prerequisite to affecting one...

The ultimatum must be fair and geared at achieving its primary purpose of getting the workers back to work. Whether an ultimatum was fair will depend on the facts of the particular case.¹⁵

[72] In *Association of Mineworkers & Construction Union on behalf of Members & another v Samancor Western Chrome Mines*¹⁶, the LAC held that:

'The object of an ultimatum is to give striking employees the opportunity to reconsider their action. It must, therefore, be clear and unambiguous and give the employees sufficient time to reflect. The ultimata issued by Samancor were not entirely clear but indicated that dismissal would only follow after non-compliance with a final ultimatum to be issued after unjustified non-compliance with the preliminary ultimatum. Samancor also reserved its right to take disciplinary action against the employees for participating in unprotected strike action and for their conduct during the strike.'

[73] Despite the defendant's assertion that ultimatums were issued, there was, in my view, no single ultimatum issued by either Moyo or Makhunga. Alternatively, their ultimatums were not issued in "*clear and unambiguous terms*" and did not inform the individual plaintiffs that they would take disciplinary action and the sanction that would be imposed if they did not adhere to the ultimatums. This finding is based on the fact that Moyo's address to the employees at 14h21 ended with him saying that he would call Makhunga or wait for two to three hours for Makhunga to arrive.

[74] Makhunga's message to the employees, whilst going a bit further than Moyo's in that he gave the shift A employees a choice to report for duty by 17h30 or 18h00 or the defendant reserved the right, cannot be said to constitute a clear and unambiguous message to the striking employees that if they do not report for duty, they would be disciplined and a sanction of dismissal could be imposed.

¹⁵ Ibid at paras 55 – 56.

¹⁶ (2020) 41 ILJ 2771 (LAC); [2021] 3 BLLR 236 (LAC).

Makhunga conceded that he did not warn the employees of the consequences. This was his evidence during cross-examination:

MR COOK: And did you advise them of what the consequence was of – because you have not given that evidence. I am telling you now.

MR MAKHUNGA: Not, not here.

MR COOK: In your evidence-in-chief... (intervenes)

MR MAKHUNGA: Not in this meeting.

MR COOK: So you never said, "If you do not come back to work, you could face dismissal?"

MR MAKHUNGA: No, not in this meeting.

MR COOK: So therefore there was no consequence on your version which is disputed and your changed version is, you said, "What you are doing is illegal".

MR MAKHUNGA: Yes, it... (intervenes)

MR COOK: "You have a right to withdraw your labour".

MR MAKHUNGA: At this stage I still believed that they will fit their call and go back to their workstation.

MR COOK: But you did not... (intervenes)

MR MAKHUNGA: And therefore that at that time, because I believed that they will, that is why I did not say to them these are the consequences, that is why I said as much as they have the right to strike, we have the right, we also have our rights as an employer.

MR COOK: Yes, but an ultimatum must tell an employee in clear language that they understand what is expected of them and the consequences of not heeding the ultimatum. That is the requirement for an ultimatum.

MR MAKHUNGA: We subsequently did that when they did not do...
(intervenes)

MR COOK: No, I, do not go ahead of me. I am dealing with this meeting. On your own version you never told them what the consequences were?

MR MAKHUNGA: No, at this meeting I did not. I have said that.'

[75] There was no evidence of an ultimatum issued to the employees who were on shift B. The absence of ultimatums or clear and unambiguous ultimatums setting out the consequences of non-compliance means that these plaintiffs had no opportunity to consider and reflect on their conduct.

[76] The duration of the strike was two days or two shifts. Moyo's evidence was that they worked extra hours with the assistance of temporary employees and shift C employees. There was no penalty imposed on the defendant and therefore, BMW did not suffer any loss. He conceded that there was no economic loss. The loss attributed to the strike was overtime and payment of temporary employees, and nothing more.

[77] Makhunga's evidence did not take the issue any further, despite suggesting that the defendant suffered economic loss. His evidence was that:

'MR COOK: And you would agree with me that now that BMW nor Ecotech suffered any economic loss as a result of the strike?

MR MAKHUNGA: We did.

MR COOK: What did, what loss did you suffer?

MR MAKHUNGA: Because we had to had people to work on the weekend when they were not supposed to work and we had to find people to work in the positions that the other employees were on the illegal strike.

MR COOK: In the same breath you said, no work no pay, so you were not paying for those people, so the money that you were going to pay those people to perform those functions, you paid other people?

MR MAKHUNGA: I paid... (intervenes)

MR COOK: So there is no loss?

MR MAKHUNGA: There is because you also have to consider the PEE, it is not just the salaries, it is also the total cost of employment, the cost that we would have not incurred and the overtime that we would have not worked.

MR COOK: And more importantly, you never pleaded that you suffered any loss. Why not?

MR MAKHUNGA: I cannot answer with why... (intervenes)

- [78] For the above reasons above, there is no harm suffered by the defendant. Accordingly, considering the duration of the strike which lasted two days or shifts, which is not significantly long and the defendant's failure to contact AMCU and to issue ultimatums at all or issue clear and unambiguous ultimatums with clear and unambiguous consequences for non-compliance and that the defendant suffered no harm, I find that dismissal was not an appropriate sanction and that the dismissal of the shift A and B employees was substantively unfair.

Procedurally fairness

- [79] Although the trial record did not include a disciplinary code, both Moyo and Makhunga admitted that the defendant has a disciplinary code that requires a disciplinary hearing to be followed for allegations of misconduct. The defendant admitted that it deviated from the disciplinary code as it failed to conduct a disciplinary hearing. The individual plaintiffs were not issued with a charge sheet, were not called to a disciplinary hearing, were not afforded an opportunity to submit mitigating factors.
- [80] Makhunga conceded that the disciplinary code provides certain procedural rights or steps before the dismissal. He was asked why the defendant did not follow those steps:

MR COOK: We know in this matter that they were dismissed and asked to make written submissions. Why were they not afforded, why did you deviate from your Disciplinary Code, what justified the deviation?

MR MAKHUNGA: It is because we were dealing with an unprotected strike.'

- [81] Asked why the individual plaintiffs could not be issued the charge sheet and called to a hearing to present their evidence and arguments in mitigation, Makhunga's response was that *"because we were dealing with that situation and I cannot comment and say why not"*.
- [82] The dismissal of all the individual plaintiffs was procedurally unfair. Mr Ntaka conceded during closing arguments that the defendant made a *"mistake"*. The procedural mistake was egregious. They were provisionally dismissed, asked to make representations and later the defendant purported to constitute a disciplinary hearing without the individual plaintiffs. There was no evidence of any exceptional circumstances justifying the procedure followed by the defendant of a provisional dismissal without a charge sheet and a hearing. Further, there was no evidence that it was not reasonably practicable to charge the individual plaintiffs and call them to a disciplinary hearing before a decision to dismiss was taken. Accordingly, the dismissal of the individual plaintiffs was procedurally unfair.

Remedy

- [83] Section 193 of the LRA sets out the relief which this Court may award following a finding that a dismissal was substantively and/or procedurally unfair. Section 193(2) requires this Court to reinstate the employees unless they do not wish to be reinstated or the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employees.
- [84] The individual plaintiffs seek reinstatement. Where a dismissal is found to be substantively unfair and the employees seek to be reinstated, the primary

remedy of reinstatement must be awarded.¹⁷ The defendant has failed to issue ultimatums in clear and unambiguous terms against the shift B employees and the one verbal ultimatum issued by Makhunga against the shift A employees was not clear and unambiguous and did not inform the employee of the consequences of their persistence with the strike. There was no harm suffered by the defendant because of the misconduct committed by the shifts A and B employees.

[85] The breakdown of the trust relationship must be assessed based on the misconduct committed by the employee. The evidence led by the defendant suggests that there was no breakdown of the trust relationship. Moyo testified that:

MR COOK: You do not have anything personally against these people.

MR MOYO: No.

MR COOK: In fact, you know lot of them by face. You worked with them. You have been there for what, four years.

MR MOYO: Yes, it is just unfortunate that my position is critical in the company and allows for one to take disciplinary actions there and there; and for that you will not be popular with employees, but I personally, I do not think I have any issues with anyone.

MR COOK: And they also do not have any issues. They are obviously not happy that they were dismissed, but they are hoping that the Court will remedy it and they say that the trust relationship has not broken down. – Your comment?

MR MOYO: Ja, trust relationship is something else, because I believe, M'Lord, as the advocate has put my version, I would have thought as their manager, they would have listened to me on that day and came back to work; and whatever issues that were there, their regional official was still going to assist in that. So I

¹⁷ See: *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) at paras 39 – 40; *Notisi v South African Police Service and Others* [2023] ZALAC 33; [2024] 4 BLLR 380 (LAC) at paras 58 – 60.

am not sure in terms of the relationship being completely broken down, because it was just a once-off incident that had happened, which would not necessarily mean the relationship had broken completely.' (Emphasis added)

- [86] Makhunga was also given an opportunity to provide evidence whether the trust relationship had broken down between the defendant and the individual plaintiffs. He was non-committal and instead chose to wait for the judgment of this Court. There was no evidence of any alleged misconduct suspected to have been committed by these employees during their two-day unprotected strike. The strike was caused by poor communication between the defendant and AMCU and the defendant's lack of clarity as to who was expected to undergo the polygraph tests when the strike commenced at 14h00.
- [87] The dismissal of the seven shift C employees for participation in an unprotected strike was unnecessary. The defendant conceded that these employees were not on strike. The defendant should have followed the operational requirements procedure per the contract of employment. Instead, it opted to dismiss them for alleged participation in an unprotected strike despite knowledge of the fact that they had elected to exercise their rights not to undergo the polygraph testing, that BMW had blocked their access cards and that they attempted to access the premises to render their services but were unable to do so on account of its client. There can be no issue with the trust relationship because these employees did not commit the alleged misconduct and there was no evidence to suggest that their conduct pre and/or post the dismissal had broken down the trust relationship. For these employees, there are no factors militating against reinstatement, with a full retrospective backpay.
- [88] The remainder of the plaintiffs denied participating in the unprotected strike. Their strike lasted for two days before they were locked out. The evidence shows that Mohamose understood that all the employees were required to undergo the polygraph tests. When the employees conveyed their grievance to Moyo and Makhunga and demanded a meeting with BMW to resolve the issue, Moyo and Makhunga did not clarify to them that they were not required to undergo the

tests. Instead, Makhunga was dismissive of their demand, questioning whether they worked for BMW. Had the defendant contacted AMCU to seek intervention at the commencement of strike at 14h00 and to discuss the issue raised by the employees with AMCU and clarified that only shift C employees were expected to undergo the tests, and had the defendant issued clear and unambiguous ultimatums, the strike could have been averted or resolved shortly after its commencement on 20 July 2023. This does not mean that the shifts A and B employees should not be held accountable for participation in an unprotected strike. Had they, through AMCU or during the two meetings with Moyo and Makhunga respectively, sought clarity on who was expected to undergo the polygraph tests, the strike could have been averted or resolved during Moyo's address at 14h21.

[89] The defendant did not suffer any economic harm and there is insufficient evidence to suggest that the trust relationship had irretrievably broken down. Moyo, who worked closely to the plaintiffs, went as far as labelling the strike a once off incident which could not have led to a breakdown of a trust relationship. For these reasons, the shift A and B employees should also be reinstated. However, their reinstatement should not be with full back pay. Their denial of participating in the unprotected strike on 20 and 21 July 2023 was a waste of the Court's time. In my view, for procedural and substantive unfairness, eight months back pay and a final written warning for 12 months applicable from the date of their reinstatement would be an appropriate remedy.¹⁸

[90] The plaintiffs sought costs. I am not persuaded that this is a matter that warrants a costs order to be made.

[91] In the premises, the following order is made:

Order

¹⁸ See: *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC); [2008] 12 BLLR 1129 (CC) at para 43.

1. In respect of the seven shift C plaintiffs, namely, Barron Ngobeni, Justice Setaka, Samuel Sithole, Charles Sithole, Mpumelelo Baloyi, Barnett Hemp Futhane and Thabo Phiri:

- 1.1. Their dismissal was substantively and procedurally unfair.

- 1.2. The defendant is ordered to reinstate them retrospectively from the date of their dismissal, without loss of earnings on the same terms and conditions as they applied before their dismissal.

2. In respect of the remainder of the plaintiffs (shifts A and B plaintiffs excluding Innocent Kgari):

- 2.1. Their dismissal was substantively and procedurally unfair.

- 2.2. They are issued with a final written warning for their participation in the unprotected strike on 20 and 21 July 2023, which will apply for 12 months from the date of their reinstatement.

- 2.3. The defendant is ordered to reinstate them from the date of their dismissal, on the same terms and conditions of employment applicable at the time of their dismissal, and to pay them backpay limited to eight (8) months remuneration at the rate applicable at the time of their dismissal.

3. The individual plaintiffs must report for duty on Monday, 5 January 2026 at 6h00.

4. Payment of backpay to all the individual plaintiffs must be made on or before 16 January 2026.

5. There is no order as to costs.
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M. Makhura

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Plaintiffs: Mr A. Cook

Instructed by: Larry Dave Incorporated

For the Defendant: Mr T. Ntaka

c/o T Ntaka Attorneys Inc.

LABOUR COURT