



(1) Reportable: NO  
(2) Of interest to other Judges: Yes/No  
(3) Revised

Signature

Date

## THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS878/2017

In the matter between:

**NUMSA OBO AUBREY DHLUDHLU & OTHERS**

**Plaintiffs**

and

**MARLEY PIPE SYSTEMS (PTY) LTD**

**Defendant**

**Heard: 11 & 12 August 2025 (closing arguments delivered on 26 August 2025)**

**Delivered: 21 January 2026**

### JUDGMENT

**ITZKIN, AJ**

#### Introduction

[1] On 22 August 2022, the Constitutional Court delivered a seminal judgment on the principles on common purpose in the context of employee misconduct.

[2] In it, the Constitutional Court effectively exonerated a group of 41 employees of misconduct entailing assault. It did so on the basis that the principles on the doctrine of common purpose did not establish their guilt in relation to the assault.

[3] Those employees had also been dismissed for misconduct entailing participating in an unprotected strike. With the assault conviction falling away, the Constitutional Court took the view that the issue of sanction for their participation in the unprotected strike ought to be considered afresh by this Court.

[4] The Constitutional Court held as follows:

[38] A complicating factor is that the employees were convicted of assault and participating in an unprotected strike. Despite the fact that the latter conviction stands, that does not necessarily mean that dismissal is the sanction that would have been imposed for it. The reality is that the unprotected strike entailed violence. It is not inconceivable that this fact had an influence on sanction. It seems to me that an appropriate order is remittal to the Labour Court for a consideration of what ought to be done with regard to sanction now that the aggravating fact of a severe assault is out of the way.<sup>1</sup>

[5] The Constitutional Court's orders included the following:

- '5. The matter is remitted to the Labour Court to consider a sanction afresh on the charge of participation in an unprotected strike.
- 6. For purposes of paragraph 5, the Labour Court must be constituted differently.'

[6] The Constitutional Court was not prescriptive regarding the manner of adjudicating the remitted matter, and it made no directive regarding whether the remitted matter should be determined based exclusively on the record of evidence that was presented at the Labour Court trial, by way of a hearing *de novo*, or otherwise.

[7] At the commencement of the remitted proceedings, the parties' representatives confirmed their agreement that the matter be determined by having regard to the record of evidence that was presented at the Labour

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<sup>1</sup> NUMSA obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA)(Pty) Ltd [2022] ZACC 30; (2022) 43 ILJ 2269 (CC).

Court trial held in 2019, supplemented by any additional evidence that they may present during the remitted hearing. They also confirmed that any such additional evidence would pertain to the issue of sanction for participating in the unprotected strike (with such participation being common cause in the remitted proceedings), and to the issue of relief in the event of a finding of substantive unfairness at the level of sanction being made.

- [8] I saw no basis to depart from the parties' agreed approach.
- [9] Although the remittal order pertained to 41 dismissed employees, this was pared down to seven in the remitted proceedings, as a settlement agreement had been concluded with the balance in the context of the remitted proceedings having been previously set down. The remaining persons to whom the remitted proceedings pertain, are Thabo Mphuthi, Vusi Mthimkulu, Moses Dhludhlu, Potia Mosekedi, Thabang Pitsi, Hopolang Khumalo and Sarah Mokoena.
- [10] References in this judgment to:
- 10.1 'the plaintiffs', are references to these seven persons;
  - 10.2 the 'main trial', are references to the trial proceedings that took place in this Court in 2019; and
  - 10.3 the 'remitted trial', are references to the proceedings held pursuant to the Constitutional Court's remittal order.

#### The factual matrix

- [11] Key features of the factual matrix are usefully captured in the Constitutional Court's judgment.<sup>2</sup>
- [12] The material facts may be briefly stated:

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<sup>2</sup> See paragraphs 3 to 9, 24 to 26 and 29 to 31. Whilst some of these paragraphs include details regarding the assault incident (which is not germane to the issue under consideration, given the Constitutional Court's findings), they also include details regarding the broader factual matrix.

- 12.1 On 13 July 2017, a wage agreement applicable to the plastics industry was concluded pursuant to sectoral bargaining.
- 12.2 The agreement bound the defendant and its employees and was communicated to NUMSA shop stewards on the same day.
- 12.3 On the morning of 14 July 2017, NUMSA's members nonetheless embarked on a work stoppage. They initially gathered at the canteen awaiting an address by Mr Steffens, the defendant's head of human resources (who did not arrive at the canteen), and thereafter moved towards the administrative offices.
- 12.4 An incident ensued involving the assault of Mr Steffens. The plaintiffs have been exonerated of the allegation of assault (by common purpose) by the Constitutional Court.
- 12.5 An ultimatum was prepared. It was issued by hand to two employees only. Mr Chinner testified at the main trial that as he was issuing that ultimatum, a shop steward told him that the ultimatum should not be distributed further, whereupon he returned to the office block. He also testified about certain threats having been uttered in that context.
- 12.6 The defendant obtained an order interdicting the unprotected strike and the unlawful conduct associated with it.
- 12.7 The unprotected strike endured for approximately six hours.

The appropriate sanction for participation in an unprotected strike

- [13] An issue requiring determination at the outset is whether any regard may be had to violence associated with the strike, despite the fact that the plaintiffs were exonerated of the assault by the Constitutional Court.
- [14] In my view, the answer is "no". The Constitutional Court's judgment makes it clear that the plaintiffs bear no responsibility for the assault on Mr Steffens, and the assault incident was the main manifestation of violence.

- [15] It follows that no reliance may be placed, directly or indirectly, on the assault itself, or on any associated acts of violence, when assessing the seriousness of the misconduct in determining the fairness of dismissal.
- [16] This includes any reliance on the atmosphere in which the assault occurred, the defendant's reaction to violence, or the broader characterisation of the strike as violent. All such considerations are excluded from the enquiry.
- [17] I therefore proceed with the assessment of sanction on the basis that the misconduct under consideration is participation in an unprotected strike only, shorn of any violent dimension.
- [18] Section 192(2) of the Labour Relations Act<sup>3</sup> (the LRA) places the onus on the employer to establish the fairness of a dismissal. For present purposes, the fairness inquiry is confined to the issue of sanction.
- [19] In strike-related dismissals, section 68(5) of the LRA expressly recognises that participation in an unprotected strike may constitute a fair reason for dismissal, and requires the Code of Good Practice: Dismissal contained in Schedule 8 (the Code) to be taken into account in undertaking that assessment.
- [20] Although the Code has since been repealed, it was extant at the time of the misconduct and throughout the litigation which preceded the remitted trial.
- [21] The Code requires a two-stage enquiry. The first involves a consideration under item 6 (strike-related factors), and the second a consideration of item 7 (general misconduct principles).<sup>4</sup>
- [22] Item 6(1) identifies three non-exhaustive factors relevant to substantive fairness.
- [23] With reference to the first factor in item 6(1), being the seriousness of the contravention of the LRA, the strike occurred the day after a sectoral wage

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<sup>3</sup> Act 66 of 1995, as amended.

<sup>4</sup> *NUMSA v CBI Electric African Cables* [2014] 1 BLLR 31 (LAC).

agreement had been concluded and communicated. The employees, therefore, acted with full knowledge that the bargaining process had run its course.

- [24] The strike did not occur in a context of confusion. It was a deliberate and collective decision to withhold labour in defiance of a binding agreement and the LRA.
- [25] Although the strike endured for only six hours, duration is not determinative. A short but calculated stoppage, as occurred here, is a serious matter.
- [26] With reference to the second factor in item 6(1), being the attempts made to comply with the LRA, there were none. No dispute was referred to conciliation and no strike notice was issued. This was not a technical or borderline failure to comply with statutory requirements, but a wholesale disregard of them.
- [27] With reference to the third factor in item 6(1), being whether or not the strike was in response to unjustified conduct by the employer, the strike was not a response to unjustified or unlawful conduct by the defendant. It arose from dissatisfaction with the outcome of collective bargaining.
- [28] Item 6(2) of the Code requires the issuing of an ultimatum, but provides that where the employer cannot reasonably be expected to issue one, it may dispense with this. An ultimatum was prepared and the process of issuing it commenced. The evidence establishes that further distribution was actively thwarted by a shop steward.
- [29] In the circumstances, and given that the plaintiffs could not reasonably have believed the strike to be protected, the defendant cannot be faulted for failing to do more. The position relating to the ultimatum is therefore, at best for the plaintiffs, neutral.
- [30] A further factor of relevance is the harm to the defendant.
- [31] At the remitted trial, the defendant adduced evidence of substantial financial losses and operational disruption following the strike. While not all losses can necessarily be attributed to the unprotected strike itself (given that some may

well have flowed from the assault and associated conduct), it is clear that the strike caused real harm and contributed to a breakdown in operational continuity. This constitutes a meaningful aggravating factor.

- [32] The absence of remorse on the part of the plaintiffs is also an aggravating factor.<sup>5</sup>
- [33] In the proceedings at the main trial, the plaintiffs' pleaded case was that all employees were instructed to leave the premises based on concerns about their safety, and while waiting outside the defendant's premises, security officers locked the gate. Their pleaded case was thus that they had not participated in an unprotected strike.
- [34] During the remitted trial, Ms Hopolang Khumalo (who testified for the plaintiffs) sought to suggest that the reason she did not perform work on the day of the strike was that her department was closed. She later conceded (when pressed on the issue) that she had joined the strike. Ms Mosekedi (who also testified for the plaintiffs) acknowledged that she had participated in the unprotected strike.
- [35] Despite these belated concessions, the plaintiffs did not explain what motivated their course of action in embarking on the unprotected strike, or seek to justify it.
- [36] The absence of candour and remorse undermines prospects of progressive discipline being a viable means of rehabilitation, and weighs in favour of dismissal.
- [37] The plaintiffs' clean disciplinary records are mitigating factors. They are not, however, decisive, particularly where the misconduct strikes at the heart of workplace discipline and operational stability.

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<sup>5</sup> *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC) at para 25; *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] 8 BLLR 830 (LAC) at 835; *Department of Labour v General Public Service Sectoral Bargaining Council & others* (2010) 31 ILJ 1313 (LAC) at para 33.

- [38] On an overall basis, the task of the Court is to weigh all relevant considerations and make a value judgment.
- [39] On the one hand, the strike was of limited duration, and the plaintiffs had clean disciplinary records.
- [40] On the other hand, the misconduct was deliberate and committed in defiance of a binding wage agreement. It caused tangible harm, and it was followed by a lack of remorse and accountability.
- [41] In these circumstances, the misconduct went beyond warranting progressive discipline. It fundamentally undermined the trust and discipline necessary for the continuation of the employment relationship.
- [42] I am therefore satisfied that the defendant has discharged its onus of proving that dismissal was a proportionate and substantively fair sanction.
- [43] Lastly, having regard to the requirements of law and fairness, and taking into account the fact that the remitted trial was the result of the Constitutional Court's order, no order as to costs is warranted.

#### Order

1. It is declared that the dismissals of Thabo Mphuthi, Vusi Mthimkulu, Moses Dhludhlu, Potia Mosekedi, Thabang Pitsi, Hopolang Khumalo and Sarah Mokoena were substantively fair (at the level of sanction), and their unfair dismissal claims are therefore dismissed.
2. There is no order as to costs.

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R. Itzkin

Acting Judge of the Labour Court of South Africa



Appearances:

For the Applicants: MW Marweshe

Of: Marweshe Attorneys

For the Respondent: I De Vos

S Abdool Kareem

Instructed by: Cliffe Dekker Hofmeyr Inc.

LABOUR COURT