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

______________ ________________
Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS491/23

In the matter between:

THE ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION — **First Applicant**

THE PERSONS WHOSE NAMES APPEARS ON ANNEXURE 'B' — **Second Applicant**

And

NORTHERN COAL — **Respondent**

Heard: **1 – 5 December 2025**

Delivered: **30 April 2026**

Summary: Overtime omitted in employees' payslips – work stoppage – probabilities of instruction by employer to not work – no right to withhold labour as a collective – unprotected strike – considerations of substantive fairness – sanction unduly harsh in circumstances – counterclaim by employer under section 68(1)(b) LRA – liability of union not proved – holding workers liable not just and equitable.

JUDGMENT

RAMJI, AJ

Introduction

[1] This is an unusual work stoppage case in which workers allege that they were not working for a portion of their shift because they were instructed not to work.[1] Most cases concern whether workers were justified in withholding their labour following a perceived problematic instruction to work.

[2] The cessation of work was from 18h00 to approximately 22h30, i.e. four-and-a-half hours of the 12-hour shift, at most. The effect of the cessation of work stopped production for this period and approximately one additional hour. The workers on shift were dismissed.

[3] The factual question to resolve first is whether, on a balance of probabilities, the workers were (lawfully) instructed not to work for a portion of their shift. If it resolves in favour of the workers, the inquiry ends and the dismissal was unfair. If it does not, and I find that the instruction was unlawful or that workers organised collectively to withhold their labour, then there are further legal questions concerning the nature of the workers' actions and the fairness of the dismissal.

[4] I am grateful to parties' representatives for the written submissions filed on 15 December 2025.

Parties

[5] The second applicants (the individual applicants) were employed by the respondent (the company), a subsidiary of Msobo Coal. The individual

---

[1] Although there are few cases of this nature, this is not a complete anomaly. See for example: *NUMSA obo Dali and Others v Twin Structures Steel Construction (Pty) Ltd* (*Twin Structures*) (JS1051/2012) [2015] ZALCJHB 170 (28 May 2015) at para 6.

applicants are members of the first applicant (AMCU). Some of them have worked for the company since 2001.

[6] The individual applicants were employed at the coal beneficiation plant at the company's Mimosa colliery in Mpumalanga. At the plant, the workers operate a series of machines through which they 'produced' coal by washing it in magnetite and water. The coal washed by the workers at the plant would be transported to nearby ports in KwaZulu-Natal and sold for export.

[7] The byproduct of the coal washing process (the coal slurry) would then be transported to the company's plant in the KwaZulu-Natal Midlands where the last useable coal was 'recovered'. The company has an agreement with Sappi Ltd, which buys the recovered coal for its operations.

Cessation of work

[8] On Thursday 23 March 2023, 21 workers were scheduled to work a shift from 18h00 to 06h00 (the night shift). The individual applicants are AMCU members. The remaining six workers are members of the National Union of Mineworkers (NUM). They were also dismissed. However, neither the NUM members nor NUM is party to this litigation. When I refer to the 21 dismissed workers collectively, I refer to them as 'the workers.'

[9] After clocking in on time, the workers were issued their payslips by the shift supervisor, Mr Mandla Ndinisa. It is common cause that the payslips did not reflect the overtime that the workers had worked in the February/March 2023 payroll cycle. Their overtime makes up 25% of their hours per shift in terms of the agreement with the company. From the payslips provided, the lowest earning workers, such as a plant attendant (general worker), earned a nett income of R5,682.03 without overtime. With overtime, the nett income was R8,367. The higher earning workers, such as operators, earned a nett income of R10.301 without overtime and R16,083 with overtime. The prospective earnings shortfalls were in the region of 30% per worker.

[10] It is also common cause that the payslips were issued before salary transfers took place, and that at the time of receiving their payslips, the workers were

not entitled to receive their salaries. They were to receive their salaries, however, on 24 March 2023, i.e. in a few hours' time. Payroll would have processed payment according to their payslips. The ensuing days made up the Easter long weekend. Those days (24 to 26 March 2023) would also be the workers' off-period in terms of the company's shift system – the workers would not be at work for the three days after the night shift ended at 06h00 on 24 March 2023.

[11] It is not disputed that the incorrect payslips were the underlying trigger for the workers not working for a portion of their shift, whether by instruction or of their own volition.

Dismissal

[12] The payslips error was the fault of Mr Ndinisa who had failed to authorise the overtime logged on the workers' timesheets when submitting their hours worked to the company's human resources department (HR). There was no negligence on the part of the workers.

[13] It is common cause that from the start of the shift, Mr Ndinisa was on the phone with the group head of HR, Mr Mandla Mabunda, and with the plant manager, Mr Abraham 'Braam' Fouche regarding the payslips error.

[14] It is also common cause that Mr Mabunda, who would normally report at the plant at 07h00 daily, came to the plant at approximately 06h30 on the morning of 24 March 2023, and that the payslips errors were then resolved following a meeting with the workers which started at about 06h45. The workers were paid their full entitlements in two tranches, and they reported for duty on 27 March 2023, after their planned three days off according to the company's shift system.

[15] On 4 April 2023, the company issued notices to attend a disciplinary inquiry to be held on 11 April 2023. The disciplinary action concerned the four-and-a-half hours for which they did not work until receiving an undertaking to their satisfaction that their payslips would be corrected timeously and before pay-day. They were charged with:

15.1. Gross misconduct for participating in an unprotected strike on 23 March 2023.

15.2. Gross misconduct for failing to adhere to multiple direct ultimatums from management to start working on 23 March 2023.

15.3. Gross misconduct for causing production loss to the company through the above conduct.

[16] The individual applicants pleaded not guilty. They were found guilty following disciplinary hearings. They were dismissed with effect from 18 April 2023 following a recommendation made by the chairperson of the disciplinary hearing made on the same day. The NUM members pleaded guilty and they too were dismissed. Mr Ndinisa was also dismissed in relation to the payslips error and the events arising out of it.

[17] Between resuming their duties in the ordinary course and being disciplined, there is no record, or claim, of the workers stopping work or underperforming.

[18] They were dismissed because it is the recommended sanction for participating in an unprotected strike in terms of the company's disciplinary code.

[19] The applicants challenge the substantive and procedural fairness of the dismissal.

Jurisdiction

[20] This Court's jurisdiction arises from section 191(5)(b)(i), (ii) and (iii) of the Labour Relations Act, 1995 (LRA) – that is, its exclusive jurisdiction over automatically unfair dismissals and dismissals for participating in an unprotected strike.

[21] The applicants pleaded that this is an automatically unfair dismissal because, in not working, the workers were responding to the looming short payment, for which they were entitled to withhold their labour. The disciplinary action and subsequent dismissal were therefore a case of the workers being prejudiced

for '*the failure or refusal to do something that an employer may not lawfully permit or require an employee to do*.'[2]

[22] The applicants pleaded further was that the true reason for the alleged unduly harsh sanction (dismissal) was because they had filed a grievance against the mine manager, Mr Dirk Swart, two months earlier, on 23 January 2023.At the time of the disciplinary action, Mr Swart was still the mine manager.[3]

[23] If the applicants fail to prove this case (and also on the employer's version), this is a dismissal for participating in an unprotected strike. This Court's jurisdiction therefore also arises from section 191(5)(b)(iii) of the LRA.

Overview of judgment

[24] The issues are dealt with as follows:

22.1. Issue 1: Were the workers instructed not to work did they choose to down tools?

22.2. Issue 2: If the workers were not instructed to not work, were the workers exercising their right not to work in the circumstances relating to their payslips?

22.3. Issue 3: Was the true reason for the sanction of dismissal that the workers had laid a grievance against Mr Swart in January 2023?

22.4. Issue 4: If this was not the true reason for their dismissal, was there good reason to dismiss the individual applicants?

22.5. Issue 5: Has the company proved its counterclaim under section 68(1)(b) of the LRA?

[25] Procedural fairness was addressed by the company at trial and was not questioned by the applicants. Substantive fairness was therefore the only issue before me.

---

[2] Section 5(2)(c)(iv) of the LRA.

[3] *Mackay v Absa Group & Another* (2000) 21 ILJ 2054 (LC).

[26] In respect of Issues 1 and 2 (though Issue 2 is largely a matter for legal argument), the applicants called one of the individual applicants, Mr Funukwazi Milton Nkosi and the company called the Mr Mabunda and Mr Fouche.

[27] In respect of Issue 3, the substantive fairness of the dismissal, the applicants relied on Mr Nkosi again and on Mr Percy Mashinini, a former operator at the plant and an AMCU shop steward. The company in addition called Mr Swart.

[28] In respect of Issue 4, the evidence of the applicants' two witnesses and the company's three witnesses are relevant.

[29] In respect of Issue 5, the company called the Mr Swart, who was cross-examined.

Issue 1: Instruction not to work or downing tools?

Testimony of Mr Nkosi for the applicants

[30] Mr Nkosi, testified that on 23 March 2023, all 21 workers arrived at security where they were breathalysed, and then they clocked in. They reported for the standard toolbox talk with Mr Ndinisa. After the toolbox talk, Mr Ndinisa gave the workers their payslips. In Mr Nkosi's words, translated from his testimony in isiZulu:

> 'We opened our payslips and did not find what we were expecting. We were expecting our full payslips. We spoke to foreman to say there was a problem. The foreman told us to wait there, and he would call HR to sort out matter. We did not go with him. We were waiting where he left us in the safety toolbox area.'

[31] Mr Nkosi testified that from the toolbox area, he saw Nr Ndinisa making phone calls, and that, '*We could see him on the phone. We could not hear him on the phone.*' Then, Mr Ndinisa returned and informed the workers that '*he was fighting with Mr Mabunda and that they could not reach an agreement.*' He then told the workers '*to wait*' and that he would phone Mr Fouche. Again, Mr Nkosi testified that he saw Mr Ndinisa on the phone, but that he did not hear

the call. Mr Ndinisa then reported back to the workers that he had spoken to Mr Fouche who would call him back.

[32] Finally, Mr Nkosi testified that Mr Ndinisa told the workers '*to wait where we were*', and that '*he went away*'. He testified that they were told once, at approximately 22h30, to start working, that they were instructed only by Mr Ndinisa, and that at no stage did any other person instruct or address them.

[33] The company attacked the strength of the applicants' evidence, specifically –

33.1 the applicants' failure to call Mr Ndinisa, as a key witness;

33.2 the applicants' failure to generally call corroborating witnesses;

33.3 Mr Nkosi's credibility, then argued that its witnesses were relatively more credible; and

33.4 referred pointedly to the fact that Mr Nkosi was a single witness in respect of the events of 23 March.

The failure to call Mr Ndinisa as a key witness

[34] The company requested that I draw an adverse inference from the applicants' failure to call Mr Ndinisa as a witness.

[35] A court is not mandated to draw an adverse inference from the failure to call a witness, and the company provided no exceptional circumstances for why an adverse inference should be drawn. [4]

[36] The company did not show, never mind argue, that Mr Nkosi's evidence was wholly inadequate, the applicants could not have reasonably believed a *prima facie* case had been proved, Mr Nkosi was unreliable, Mr Ndinisa was available to testify and was simply not called, there was a basis to believe that the applicants were not calling Mr Ndinisa to testify because it would undermine Mr Nkosi's version of events, or Mr Ndinisa had any duty to testify.[5]

---

[4] Schwikkard 3rd Ed at p 546.

[5] Ibid.

[37] The company has therefore given me no factual basis based on the authorities from which to draw an adverse inference against the applicants from the failure to call Mr Ndinisa as a witness.

The failure to call witnesses to corroborate Mr Nkosi's version

[38] It also submitted that the applicants did not call other corroborating witnesses '*placed centrally in their narrative*' and that '*the Court is entitled to draw an adverse inference that their evidence would not have supported the applicants*' *version*.'

[39] I agree with the company in that, unlike in the case of Mr Ndinisa, other individual applicants, at least one out of the 15, must have been available. A few of Mr Nkosi's co-applicants were present in Court and were instructing the applicants' attorneys.

[40] An adverse inference is drawn in exceptional circumstances. I am not prepared to effectively infer that the applicants' failure to call other individual applicants to testify was because they would harm Mr Nkosi's version of events. In reaching this decision, I have considered that a *prima facie* case was made by Mr Nkosi, he was a credible witness, and therefore the applicant could have believed it unnecessary to call further witnesses. The company's case is not that there was information missing from Mr Nkosi's testimony, but rather that it required corroboration.[6] The applicants may have made the assessment that it did not. In civil cases, judgment may be given on the evidence of a single witness.[7]

[41] The applicants must, however, accept that the failure to call other individual applicants in the circumstances and the failure to explain why it did not do so, weakens their ability to prove their version. It something the merits consideration in ultimately assessing the balance of probabilities.

Mr Nkosi's credibility

---

[6] The case law where adverse inferences have been drawn therefore do not apply. See in particular: *Elgin Fireclays Ltd v Webb* 1947 (4) SA 744 (A) at 749

[7] Schwikkard *supra* at p 552.

[42] Mr Nkosi's credibility was called into question. At first, the Company made a generalised statement during oral submissions that Mr Nkosi lacked credibility. I did not consider, on an initial assessment, that any of the witnesses lacked credibility and so questioned the company's representative on this submission.

[43] I was referred to an incident during cross-examination when the witness was allegedly receiving cues from the gallery. The company's representative was cross-examining Mr Nkosi at the time this was alleged and could not have seen it. Apparently, he was informed by his candidate attorney who was sitting next to him of this. It was further submitted in oral argument that Mr Nkosi even admitted to doing this when confronted. I stated that I had no recollection of Mr Nkosi admitting this and that I, with full view of the courtroom, did not see cues being given. The relevant portion of the recording was promised with written submissions, which the company requested time to provide.

[44] Ultimately, the company did not provide any recording or transcript with its written submissions. Further, in written submissions, it did not provide any other indicators relating to credibility such as '*the witness's demeanour, candour, bias, and the internal consistency of their evidence.*'

[45] There is therefore no basis on which I can question Mr Nkosi's credibility as an individual – or the credibility of any of the other individuals testifying for that matter.

[46] The company argued that its witnesses were more credible**.** As I stated, I did not consider any witness to lack credibility. As the applicants' representative pointed out in argument and written submissions, they were simply more eloquent. To be precise, the employers' witnesses were speaking the language of the Court, English, and were fluent in it. They were engineers and senior human resource managers. The workers were speaking primarily in isiZulu, were not comfortable speaking English, and spoke through an interpreter.

[47] There were no issues with the interpretation in any legal sense, but it is the case that a court of record will receive only the English translations of Mr Nkosi's testimony, and that it sees that his answers brief. It may seem improbable that Mr Nkosi so quickly captured a four-and-a-half-hour event so briefly.

[48] In listening to his testimony and the interpretation, and the more conversational witnesses for the company, I am mindful of the following:

48.1. It is well-recognised that the act of interpretation naturally and unavoidably loses literal meaning[8] and cultured or figurative meaning, particularly conventions such as politeness or respect, embarrassment, sadness or fear. It is also recognised that the expression of these conventions varies between cultures.[9]

48.2. It is trite that the courtroom setting,[10] its terminologies and processes (including 'the witness box', and oath-taking) and unfamiliar language (for example, 'M'Lady') are daunting.

48.3. As an example, when Mr Nkosi was clearly struggling to read the notice to attend a disciplinary hearing from the evidence bundles, he did not say that he was struggling and did not admit to struggling. This was, however, apparent, and it was AMCU's counsel who intervened having received instructions from the other workers that Mr Nkosi could not read. This is all the more reason why the court process, governed by English language, would have, in my assessment, made Mr Nkosi nervous or reserved. I view his testimony and credibility also in this context.

[8] See: Barbara Cassin *Dictionary of Untranslatables: A Philosophical Lexicon* (2014); Englund African Languages and Untranslatables: Reflections on "Decolonial Knowledge" (2024) *Reflections* at 148; De Vries, A. & Docrat, Z., 2022, 'Judges and court interpreters' experiences of multilingualism in South African courts', in M.K. Ralarala, R.H. Kaschula & G. Heydon (eds.), *Language and the law: Global perspectives in forensic linguistics from Africa and beyond*, pp. 101–128, African Sun Media, Stellenbosch.

[9] Figliulo, J.R. 1984. Breaking the Language Barrier. Litig, 10:32–63.

[10] Karpen I O & Senova M (2021) *Designing for Trust: Role and Benefits of Human-Centered Design in the Legal System* in the International Journal for Court Administration.

The single witness

[49] The company mentioned several times in written submissions that Mr Nkosi is merely a single witness.

[50] I am guided by the approach set out in *S v Sauls and Others:*

> 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy, and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told… The presiding officer when evaluating the evidence of a single witness should not allow the exercise of caution to displace the exercise of common sense.'

[51] This will guide my assessment of Mr Nkosi's testimony against that of the company's witnesses.

[52] In any case, it was also not only the applicants who kept their evidence brief. The company did not use evidence that would be easily accessible to it, most notably CCTV footage which could have demonstrated workers' interactions with Mr Ndinisa and telephone conversations involving the shop stewards or broader group of workers if any. In fact, none of the company's witnesses were present at the plant, never mind in or around the toolbox area at any time during the night shift and the documentary evidence contains no evidence of workers refusing to work or being given an ultimatum to start work. This too is a factor to consider in assessing the reliability of witnesses.

The more probable version

[53] Mr Nkosi in his evidence-in-chief did not state that Mr Ndinisa told them not to work until he had resolved the issue. Instead, Mr Nkosi repeatedly testified that Mr Ndinisa told the workers to '<u>wait</u>' while he made some calls to resolve their payroll issue. He used the words translating to 'wait' even when answering questions under cross-examination.

[54] It is not improbable that Mr Ndinisa, faced with a serious payroll error of his making, panicked and rushed to resolve the matter, and that he instructed the workers to wait for him to resolve the issue. Even Mr Mabunda testified that he and Mr Ndinisa were going '*back and forth*' on the phone.

[55] That said, I find it improbable that any shift manager would have actually told workers to down tools, or that workers would have understood to mean that they should down tools. This is possibly even an unlawful instruction – an instruction to embark on an unprotected strike. Mr Ndinisa was not a fellow machine operator or a shop steward. He was part of and accountable to management. There is also no apparent reason why he would tell the workers to down tools.

[56] There is no direct evidence that Mr Ndinisa instructed the workers to start working. There is also no evidence that the workers were instructed to start working. The WhatsApp conversations relied on by the company did not involve the workers, stop stewards or other union officials. The company's evidence is of Mr Mabunda and Mr Fouche speaking to Mr Ndinisa, and to an AMCU member and a NUM shop steward, Mr Peter Ngwenya and Mr Mdlalose respectively.

56.1 Mr Mabunda stated in cross examination that approximately 18h05 (in his first call with Mr Ndinisa), he gave the workers an ultimatum through Mr Ndinisa, testifying as follows:

> 'I would not say the first ultimatum was at 7pm, because we spoke at 6pm, and I was very clear that I would resolve this and workers must go back to work.'

56.2 Mr Fouche testified that at approximately 18h30, he phoned Mr Ndinisa, was put on speaker and spoke to Mr Ngwenya and Mr Mdlalose. Mr Fouche testified as follows on the alleged conversation:

> 'I spoke to them and I said please, we've never done this before, why would you stop us now. First, they said they were not happy. I gave them an ultimatum and said go back to work. I told them that Mandla confirmed this would be resolved, and I said that I would make sure

they got their money. I said you are playing with fire, think about your children, your family at home. I meant that they could lose their jobs, because they were on an illegal strike.'

56.3 Mr Mabunda testified that later that evening, he too had a group call with Mr Ngwenya and Mr Mdlalose. Mr Nkosi had no comment on their movements during this period.

[57] Mr Nkosi could not dispute this, as he stated during cross-examination. It is therefore in its failure to call Mr Ngwenya as a witness that the applicants' case is weakened. I do not doubt Mr Nkosi's testimony that Mr Ndinisa told the workers to wait. I cannot, however, accept on his version alone that there was no discussion, over a four-and-a-half-hour period, for the workers to start working. This is especially given the fact that the machines generally remain in operation during shift changeovers because they require time to start working again after being stopped.

[58] I therefore find it more probable, on the evidence available, that during this period, the workers chose, and were not instructed, to physically wait in the toolbox area for a satisfactory resolution of the payslips issue, instead of starting work.

[59] The following facts will be relevant to whether a dismissal was justified:

59.1. It is not in dispute that none of the managers addressed the workers directly, even over the phone.

59.2. The relevant AMCU shop steward, Mr Mashinini, was not notified even when there was a WhatsApp group that included him and made it easy to contact him and other elected AMCU representatives.

59.3. Although Mr Ngwenya and Mr Mdlalose may have been party to two of the phone calls in which ultimatums, they do not have the managerial power to give other workers ultimatums and Mr Ngwenya was not an elected representative for bargaining purposes.

<u>Issue 2: In deciding not to work, were the workers exercising a protectable right?</u>

[60] It was pleaded and argued that the workers were not unlawfully withholding their labour given the employer's breach of contract: the applicants' position is that the workers were entitled to not work until they were paid in full (i.e. for the overtime that they had worked in the February/March 2023 payroll cycle) by the company.

[61] The workers are essentially relying on the common law remedy of the *exceptio non adempliti contractus*.

[62] I do not believe that this claim or defence is available to the workers:

62.1. Under the common law, the workers' act of remaining in the toolbox area might have constituted legitimate use of the *exceptio non adimpleti contractus* remedy.[11] However, in *National Union of Mineworkers on behalf of Employees v Commission for Conciliation, Mediation & Arbitration (NUM v CCMA)*,[12] the LAC held once conduct meets the definition of a strike in terms of section 213 of the LRA, that conduct is governed by the LRA.

62.2. The effect of *NUM v CCMA* is that the exceptio is not available as a remedy to a group of workers acting collectively in not working or not working fully, when employers fail to perform in terms of a contract because it is not legislated.

62.3. On the other hand, the *exceptio* has been codified as a remedy available to employers during a protected strike. Section 67(3) of the LRA states: '…*an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike.'*

[11] A consideration under the exceptio is whether at the time that the workers withheld their labour, the employer had breached its obligation to pay them for their services, or whether that date had not yet come. However, this question does not have to be answered as the exceptio is currently unavailable to the workers.

[12] (2011) 32 ILJ 2104 (LAC) at paras 14; 16 – 18.

62.4. The company in written submissions provided more recent case law which confirms this position.[13]

[63] Put simply, whether rightly or wrongly, the law currently prevents workers from exercising common law remedies that were once available to them, and the workers cannot justify collective withholding of labour based on the employer's breach of contract.

[64] The applicants' claim of an automatically unfair dismissal is therefore dismissed

Issue 3: Was the true reason for the sanction of dismissal that the workers laid a grievance against the mine manager?

[65] There is no convincing evidence that the dominant reason for imposing the sanction of dismissal was based on pressure by Mr Swart because these workers had laid a grievance against him. The only evidence was the say-so of Mr Mashinini and the say-so of Mr Swart. The disciplinary chairperson who made the recommendation did not testify.

[66] I find it unconvincing that the grievance was even a factor in the decision to dismiss the workers. From the testimony of both Mr Mashinini and Mr Swart, they engaged with each other openly and robustly. Mr Mashinini was clearly a very assertive shop steward, and Mr Swart was approachable, but forthright. Their engagements evidenced good-natured goading typical between union officials and managers, and not aggressive antagonism.

[67] This therefore becomes a case of an ordinary unfair dismissal, centred on the question of whether the sanction was unduly harsh. If the sanction was unduly harsh, the dismissal is unfair. The company bears the onus of proving fairness.

Issue 4: Was the dismissal for good reason?

[13] *Mndebele and Others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant) (Xstrata)* JA57/12 [2016] ZALAC 28; *National Union of Metalworkers of SA and Others v CBI Electric African Cables JA51/11 [2013] ZALAC 25; [2014] 1 BLLR 31 (LAC)*

[68] If the workers chose to stop working until the payslips error was resolved to their satisfaction, as I have found is the case, this also meant that they were on an unprotected strike. Given the extended and complicated statutory process for embarking on a strike, the immediate and brief downing of tools could never have met the requirements for protected industrial action.

[69] The workers therefore did commit the misconduct in charge 1.[14] This does not, however, mean that the company acted fairly in dismissing the workers. This is regardless of the company's disciplinary code and the fact that dismissal is the recommended sanction for an unprotected strike, particularly when the internal code does not take into account the different ways in which an unprotected strike can be conducted.

Law on dismissal for embarking on an unprotected strike

[70] The LAC in *NUM v CCMA* stated:

> '[T]he unprotected nature of this strike is not a license to dismiss without a careful consideration of the surrounding circumstances. In determining whether those workers who participated in an unprotected strike should be dismissed, a number of considerations must be part of the decision.'[15]

[71] The LAC turned to the Code of Good Practice: Dismissal, in Schedule 8 to the LRA, as mandated under section 68(5) of the LRA, and considered the seriousness of the contravention, the attempts made to comply, and 'unjustified conduct' by the employer.[16]

[72] In *Twin Steel,* Prinsloo AJ (as she then was), described the assessment as '*multifactoral':*

> 'At one level it might be so that participation in an unprotected strike is never justifiable, since the Act provides avenues for the resolution of disputes, whatever their nature. However, justifiability in relation to an assessment of

[14] On the above evidence, there is also no evidence of the workers having been issued ultimatums. Therefore, there is no good reason to have found that they were found insubordinate in terms of charge 2. Charge 3 concerning loss is dealt with when assessing the company's counterclaim.

[15] *NUM v CCMA supra* at para 21.

[16] The amended Code (2025) circumscribes the conduct this to 'unlawful, unfair or unreasonable conduct by the employer.'

> substantive fairness is a rather different concept. The Code specifically acknowledges that the participation in an unprotected strike is not an act that *per se* justifies dismissal. The relevant enquiry is a multi-factoral one, in which the cause of the strike and the conduct of the employer must be considered.'[17]

[73] In reviewing and setting aside the CCMA award in *NUM v CCMA* (which was against the workers) the LAC held that the following factors rendered the dismissal substantively unfair:

73.1. It was common cause that the employer had wrongfully deducted money due to the workers.

73.2. The workers were justifiably distressed by this decision.

73.3. The strike could be described as fairly peaceful.

73.4. The objective of the strike was to recover the unlawful deductions made unilaterally by the employer.

73.5. The impact was minimal in that '*only 3 x 12-hour shifts had been affected*' and the estimated loss was between R120,000 and 180,000.[18]

[74] It was not unreasonable to find that these considerations outweighed that the facts that the workers had alternative remedies, and that the company had acknowledged its error and offered to rectify it in the next pay cycle.[19]

[75] As in the present case, the workers in *NUM v CCMA* wanted to be addressed. The company insisted on only engaged with selected representatives. Unlike in the present case, in *NUM v CCMA* there was clear evidence of an

---

[17] *Twin Steel supra* at para 116.

[18] *NUM v CCMA supra* at para 24.

[19] *NUM v CCMA supra* at para 25.

ultimatum having been given.[20] Unlike in the present case, the workers missed three shifts, and not one-third of a single shift.

[76] In *Twin Steel,* the workers were being dishonestly underpaid – as opposed to it being a case of negligence by the employer, as it is here. Even though the Court found that the employer had issued an ultimatum in compliance with the Code, and that the workers had sufficient opportunity to reflect on it,[21] the Court was swayed not only by the employer underpaying the workers, but also by their manager's refusal to engage with the employees at all, and instead instructing them to go back to work without addressing their legitimate complaints. In the Court's view, it made it '*worse… that he used the receptionist <u>and foreman</u> to convey his instructions*' (own emphasis).[22] This is not the only parallel with the present case.

[77] The Court in *Twin Steel* held that the extent of production loss could have been mitigated by the employer taking a practical ('common sense') approach:

> '[T]he employees were concerned about the non-payment of wage increases and overtime and their interest was to discuss those issues with the [employer]. The [employer] on the other hand had no interest in discussing the issues with the employees and its main concern was to secure a return to work and full production.
>
> In my view and with the application of a modicum of common sense, a solution might have been found, but the gap between the interests of the employees and the interests of the [employer] was never bridged with the consequence that the employees lost their jobs and the [employer] lost production.'[23]

[78] Considering the law as set out above, I find that the dismissal of the workers for participating in an unprotected strike was substantively unfair.

78.1 The payslips error would have been socially and financially devastating to the workers had their overtime not been added. As mentioned, they

[20] *NUM v CCMA supra* at para 11.

[21] *Twin Steel supra* at paras 95 – 97.

[22] *Twin Steel supra* at para 120.

[23] *Twin Steel supra* at paras 127 – 128.

would have taken home at least 30% less money that what they had in fact rendered services for. General workers such as Mr Nkosi only took home R8,000.

78.2 These are not individuals with reserves, and many are breadwinners for families. Mr Nkosi explained the seriousness of the impact. One can presume that all the individual applicants are similarly placed. Mr Mabunda, as Group HR manager conceded that a short payment '*hurts*' and that '*even 10% [short payment] hurts*' and answered in the affirmative when asked if it would have been hard for him to suffer a similar short payment.

78.3 This is also more understandable because only a few months earlier, in December 2022, another significant time of year for all wage-earners, there was a shortfall in salaries actually paid. The workers followed the prescribed processes, and they were only reimbursed in January 2023. The significance of this, and the wait period, for workers who live from one month's salary to the next, cannot be overstated. Mr Mabunda's own testimony is proof of this:

> 'Question: Mr Mashinini said that [the workers] were suffering over December.
>
> Mr Mabunda: I don't know.
>
> Question: You wouldn't want the suffering to continue?
>
> Mr Mabunda: Yes. So, I fixed the problem on the 24th.'

78.4 The strike was peaceful and not disruptive, except to operations to a limited extent set out below. In Mr Nkosi words, the workers were not '*fighting*'. I do not accept the evidence of Mr Mabunda, who was not present at the plant, and attempted to cast the AMCU workers as being '*aggressive*', testifying, '*Well, if you look at the hearing, they said AMCU was aggressive.*' No evidence from the hearing was led.

78.5 Related to this, the stoppage was only for part of the shift, and the workers did not wait until their payslips were corrected but instead commenced work as soon as they were satisfied that someone would be addressing their issue. The workers therefore started the shift even before their payslips were corrected.

78.6 The company contributed to the length of the work stoppage by not having its managers go to the plant to address the workers, alternatively, by not speaking to all of them on speak over the phone. Mr Mabunda explained during cross-examination that he did not want to have a call with all the workers '*because [he] was not there and [he] did not want an out-of-control situation.*' The logic is hard to follow, and he did not expand on it. There was no re-examination, and I can only assess his decision as poor judgement. Mr Fouche never explained why he did not have a group call with all workers. There is also no evidence of strategising a response from the WhatsApp messages on the company WhatsApp group.

78.7 There is no evidence that between returning to work on 27 March 2023 and receiving notices to attend a disciplinary hearing on 4 April 2023, that the workers performed their duties poorly or were insubordinate. There is also no evidence of a break in the trust relationship. Mr Fouche's evidence in this regard is dealt with under remedy.

78.8 There is no pattern of misconduct of this nature that would justify the exercise of the harshest form of workplace discipline against the individual applicants – if not also the entire night shift. This is not a case of '*naughty*' or '*criminal*' workers as the company described them in closing arguments. By all accounts, these are remarkably restrained and obedient workers.

[79] All that the company has to justify the dismissal is the loss that it allegedly suffered. Even accepting that the quantum is correct, it is not sufficient to outweigh all the above factors that point to the dismissal being substantively unfair and disproportionate to the misconduct.

[80] Finally, for all the dispute resolution mechanisms under the LRA and internal grievance processes, the purpose of the LRA is to promote orderly collective bargaining and speedy dispute resolution. Although the workers did not follow the prescribed processes, their actions, together with the company's swift

response, upheld these values. Essentially, a group of workers, regardless of union affiliations, trusted in their own organisation and discipline and engaged with their employer to have their dispute resolved before it escalated not only in terms of industrial action, but also in terms of the impact that it would have on their own lives. The company responded by keeping its promise to address their concerns. It is therefore surprising that the company then dismissed all 21 workers and their shift supervisor, effectively escalating a dispute that could have been closed amicably.

[81] The LRA cannot uphold its own values if workers (or employers)[24] are punished for peacefully speaking to, listening to and trusting in each other, however frustrating it may be for the affected hours. This is not licence to down tools, as fair labour practices operate in both directions. The facts of this case, considering previous judgments discussed above, however, render this dismissal substantively unfair.

[82] This leaves the company's counterclaim for damages.

<u>Issue 5: The company's counterclaim for damages arising from an unprotected strike</u>

[83] The company filed a counterclaim in terms of section 68(1)(b) of the LRA. It is dated 18 July 2025. The pre-trial minute was filed more than one year earlier, in April 2024. A subsequent minute was signed on 1 December 2025 because of the timing of the company's counterclaim. In any case, I turn to the merits of the counterclaim.

[84] There is no need to deal with the company's evidence on quantum in this matter, because I find that it has failed to demonstrate liability of AMCU and its members for purposes of section 68(1)(b) of the LRA.

[85] The company restricted its claim to positive interesse, or restitution, seeking to quantify the losses actually suffered. Section 68(1)(b) is still, however, underpinned by considerations of what is just and equitable in respect of any loss suffered by an employer because of an unprotected strike.

[24] For example, in the form of a lengthy grievance process, or even a claim at the CCMA in terms of section 73A of the BCEA.

[86] The company's claim against AMCU is dismissed for the following reasons:

86.1 First, there are indications that despite this being framed as restitution, the action is retributive. The entire night shift withheld their labour. This included AMCU and NUM members. Despite this, when filing the counterclaim, the company did not join NUM to proceedings. Under cross-examination and in legal argument, there was no explanation as to why NUM was omitted when the clear effect of granting the counterclaim in such circumstances would be that one union would be footing a joint bill.

86.2 This is unfair, legally problematic, and would not promote workplace peace when both unions have a presence at the company and on the mine.

86.3 During oral argument, when I put this to the company, the response was that AMCU could have brought an application to join NUM. As AMCU pointed out, given that the counterclaim was filed after a trial date was issued, and a mere five-and-a-half months before the trial, an interlocutory application could have lost the applicants their trial date. I accept this, particularly given that the workers are asking for their jobs back.

86.4 Second, the employer provided no evidence of irreparable harm, including, for example, evidence of having lost clients, that its current financial position is suffering as a result of the 6 hours of production lost in 2023. Ordering one union to pay a R2,2 million claim, or portion of it, does not rectify an injustice and it undermines what would be equitable. In *PTAWU v New Kleinfontein Gold Mine (PTAWU)*,[25] Le Grange J held:

> "While unions cannot escape liability simply because it would be onerous financially, it is important that compensation claims are not used as a device to cripple a union's ability to operate or to deal it a terminal blow. While I am reluctant to allow a union to escape the consequences of pursuing the unprotected strike, I am also concerned that the issue of liability for

[25] (2016) 37 ILJ 1728 (LC) at para 79.

compensation under s68(1)(b) was only raised with it after the event, at a stage when PTAWU could not have done anything to minimise its exposure to such liability. Had it been made aware of the potential liability faced at an earlier stage that might well have concentrated the minds of the union leadership to consider more seriously the wisdom of persisting with the strike action."

86.5 *PTAWU* was a two-hour strike. This was a four-and-a-half-hour strike with an approximate additional one-and-a-half-hour production loss. There was no damage to the machines as a result of them not running during this period and needing to be restarted.

86.6 Also, in *PTAWU* and in *Algoa Bus Co (Pty) Ltd v Transport Action Retail & General Workers Union & Others (Algoa Bus),*[26] to which the company referred, there was an interdict in place. The union had knowledge of the strike. I was specifically referred to the approach of the Labour Court in *Algoa Bus to the effect that* a union may be liable if did little if anything to discourage its members from participating in the strike or to distance itself from the strike.

86.7 In this case, there is no indication that AMCU officials knew of the strike. There was a WhatsApp group for the company and AMCU representatives, and the company adduced no evidence of chats from the WhatsApp group and Mr Mashinini testified that he was not made aware of the work stoppage.

86.8 A union cannot discourage members from participating in an unprotected strike when it is not made aware of it. It is also difficult to imagine how a union could take steps to distance itself from a strike that lasted between 18h00 and 22h30 on the night before the Easter long weekend. Even Mr Mabunda said that as HR, he could do nothing for the workers at this time. In the interests of equity, the same considerations should apply to the union.

[26] (2015) 36 *ILJ* 2292 (LC).

[87] I therefore find that 't*hat the party sought to be fixed with liability'* did not participate in the strike or commit other acts in furtherance thereof.[27]

[88] Last, I must consider the workers' conduct, since the employer seeks to hold AMCU and the individual applicants jointly and severally liable for the R2.2 million claim. Ultimately, even if their unprotected strike caused the company these financial losses, it is not just and equitable to impute to the individual applicants a legal obligation to pay the company whatever it may have lost during the stoppage:

88.1 The AMCU and NUM workers' action was undisputedly spontaneous, an immediate response to receiving payslips that suggested that they would be paid substantially less than they were entitled to. This was not a plan to catch the employer off-guard.[28]

88.2 Instead, it was a spontaneous response to incorrect payslips,[29] that would by the company witness's own admission *'hurt'*, and which had occurred previously and had approximately on month to resolve. The company cannot erase its contribution to the situation that ensued.[30]

88.3 The workers withheld labour for less than half of the shift, and at most, the effect of their stoppage was that potential production for half the shift was affected. There conduct was peaceful and docile as already detailed.

88.4 Given the obvious fact that, even when they worked, they were poor, holding them jointly and severally liable with AMCU undermines principles of equitability.[31]

<u>Appropriate remedy</u>

---

[27] *Rustenburg Platinum Mines v Mouthpiece Workers Union* (2001) 22 ILJ 2035 (LC) at 2041D.

[28] Section 68(1)(b)(i)(bb) of the LRA.

[29] This distinguishes this case from the *Xstrata supra* at para 34*,* where the workers conduct was found to have been '*'planned to occur at the time that would create maximum pressure on the company*'.

[30] Section 68(1)(b)(i)(cc) of the LRA. This is another factor distinguishing this case from *Xstrata supra* at para 34.

[31] See: *CSAAWU obo Dube and Others v Robertson Abattoir* (2015) 36 ILJ 2080 (LC) at para 34.5.

[89] Reinstatement is the primary statutory remedy in unfair dismissal disputes.[32]

[90] The company put to Mr Mashinini that because of the large amount of money lost during the stop in production, the company could not accept the workers back. That is not a basis not to reinstate or re-employ the workers – or to keep them unemployed. The arguments against these remedies are not based on retribution.

[91] The only relevant consideration, based on the evidence, is intolerability evidence.[33] The evidence was not convincing and on balance, it cannot be said that a continued employment relationship between the company and the individual applicants would be intolerable. When asked if he could work with the individual applicants again, Mr Fouche stated:

> 'We go back a long time. But the AMCU union has changed things so much. They became so distracted by the union. You cannot have people just stopping work. I have a good relationship, but the company needs to do what it needs to do.'

[92] Read with Mr Nkosi and Mr Mashinini's testimony about Mr Fouche, and the serious approach taken by Mr Mabunda to the payslip issues, there are all indications that there a good and generally respectful relations between individuals in the workplace. The testimony against AMCU is irrelevant: workers have a right to join a trade union of their choice, they cannot be refused reinstatement because of union affiliation, and finally, it is not AMCU that is being reinstated.

[93] Even if the financial loss suffered were an argument, it would be weakened by the show of good faith by the workers, whose uncontested evidence was that, before they were dismissed, the workers offered to work back the time that the company lost when they ceased work on 23 March 2023. It would be further weakened by Mr Mashinini's undisputed evidence under cross-examination that '*we used to have shutdowns and losses happened, but during those*

---

[32] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2009 (1) SA 390 (CC) (*Equity Aviation*) at para 36.

[33] Section 193(2) of the LRA.

shutdowns, the employees were never dismissed'. Mr Swart also confirmed that there were periods of shutdown for maintenance.

[94] The company sought in written submissions to draw comparisons with other judgments. This cannot be compared to the shutdown of high-capacity furnaces, as was the case in *Xstrata*, where the impact of totally shutting down the furnaces (as opposed to merely idling, for example), could cause damage to the plant as a whole. The same logic applied in *Xstrata* therefore does not apply. Also, in *Xstrata,* other factors that persuaded the LAC to find against the workers was that the unprotected strike action was premeditated, calculated to cause maximum harm, and was unprovoked by any action by the employer.

[95] The same applies in respect of the other judgment relied on by the company in written submissions: in *Motor Transport Workers Union on behalf of Sehularo & others v G4S Cash Services (Pty) Ltd*, the court considered that time was of the essence to operations in the context of '*sporadic disruptions that occurred far too often and had significant financial and operational consequences*.'[34] In the present case, Mr Mabunda testified that that '*not to his knowledge*' had there been strikes at the company. This was not contradicted by other company witnesses. This is significant considering Mr Mabunda has worked in HR at the company since 2018.

[96] In testifying that the workers' offer to work over Easter or on Sunday was meaningless because work was not done on these days because of the company did not have the required exemption from the prohibition to work on those days in terms of section 9 of the Mine and Works Act 27 of 1956. His testimony is self-defeating: where stopping mining or works would jeopardise safety or cause damage, a company applies for permission to continue operation. The fact that colliery and plant were not exempted points to the seriousness of the temporary stop to production on 23 March 2023 being overstated.

[34] (2013) 34 ILJ 1221 (LC) at para 41.

[97] I have a discretion regarding the date from which the reinstatement will run, provided it is not earlier than the date of dismissal. Three factors are decisive:

97.1. The evidence is that the individual applicants have generally been without an income, or at least stable income, since their dismissal. This is unsurprisingly given not only the difficulty finding permanent work, but because they would have had to explain to prospective employers that they were dismissed and why. It is therefore not incredulous that Mr Nkosi testified that he only ever found casual work from time to time. That he could not remember the exact days on which he worked, and that in approaching other mines in the region (which he names), he was unsuccessful. The company's implied contention that this could not be regarded as reliable evidence is inappropriate in this context: these are machine operators at a coal plant, and Mr Nkosi does not have or use e-mail.

97.2. Second, the retrospective period is relatively short in the context of labour litigation because this case came to court without unnecessary delay, and therefore not resulting in a claim for backpay that would excessive and resultantly unfair towards the company.[35] Only three years have passed since the individual applicants were dismissed, and the pre-trial minute was filed within 14 months of their dismissal. In any case, no evidence was led or argument advanced against the date of reinstatement sought by the applicants. The trial could in fact have proceeded in July 2025, but for the company's application for a postponement and the associated counterclaim filed.

97.3. Finally, the workers pleaded with the company not to dismiss them, sought to mitigate its losses by working an extra shift without receiving payment, and they were willing to even accept a final written warning, notwithstanding the predicament that the company placed them in on 23 March 2023, for the second time in a four-month period.

[35] See: *Toyota SA Motors (Pty) Ltd v CCMA* (2016) 37 ILJ 313 (CC) at para 1.

[98] The date of dismissal is therefore an appropriate date from which the order of reinstatement should run, and an entitlement to backpay.

Costs

[99] The applicants have been successful. Were the appropriate relief not reinstatement, I would have been inclined to award costs in the counterclaim. It was entirely meritless and took up significant time during the trial and time in preparation for the applicants' representatives.

[100] I have, however, considered that AMCU is a recognised union at the company. A costs order, even limited to costs for the counterclaim, would not be constructive to the ongoing relationship between AMCU and the company, or between the mine and the workers, especially where all evidence points to the prospects of the workers rejoining the company with a clean slate and good relationships with their overall superior, Mr Fouche.

[101] Accordingly, the following order is made:

Order

1. The dismissal of the individuals comprising the second applicants is declared substantively unfair.

2. The respondent is ordered to ordered to reinstate the individuals comprising the second applicants in the same or not less favourable positions that they held at the time of their dismissals on 18 April 2023.

3. The reinstatement is effective from the date of dismissal, 18 April 2023.

4. The individuals comprising the second applicants are entitled to retrospective payment from the date of dismissal, 18 April 2023, until the date of reinstatement.

5. There is no order as to costs.

B. Ramji

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant	:	Adv S Saunders
Instructed by	:	Larry Dave Attorneys Inc.
For the Respondents	:	Mr C Crafford, Crafford Attorneys