

SOUTH AFRICA / JUDGMENT

NUMSA obo Maseko and 47 Others v AMT Africa Recruitment (PTY) Limited (JS 1176/2012) [2022] ZALCJHB 267; (2022) 43 ILJ 2792 (LC) (21 September 2022)

[2022] ZALCJHB 267

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS 1176/2012

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FLYNOTES:

DISMISSAL FOR GO-SLOW Labour – Dismissal –
Unprotected go-slow – No provocation or unjustified conduct
by employer – Failed
to heed ultimatums – Failed to
listen to advice from union officials – Dismissal
substantively fair.

THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
Reportable
case
no: JS 1176/2012
In

the matter between:

NUMSA
OBO DUMISANI MASEKO AND 47 OTHERS
Applicant
And
AMT
AFRICA RECRUITMENT (PTY) LIMITED
Respondent

Heard:

9, 10 and 11 May 2022 and 12 September
2022

Delivered: 21 September 2022
This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 21 September 2022.

JUDGMENT

PRINSLOO J

Introduction

- [1] The Applicant (NUMSA) on behalf of its members (the employees) approached this Court for relief after they were dismissed for participation in unprotected strike action.
- [2] Before turning to the merits of the case, it is prudent to set out the background and the common cause facts, as it will provide context to the matter.
- [3] The Respondent operates as a labour broker. The employees were employed by the Respondent as operators and assistant operators at a site in Nigel where D B Thermal (Pty) Ltd (DBT) produced machinery and parts to be used at the Kusile Power Station. There were five shops at the said site and the employees all worked in Shop 2, which consisted of the finning, galvanising and assembly departments.
- [4] The work conducted in Shop 2 was in the form of a production line. Production commenced in the finning department and should any industrial action or work stoppage occur in the finning department, the galvanising and assembly plants would also be affected and would come to a grinding halt.
- [5] The employees had to produce a minimum of 35 tubes per machine per shift. Each operator worked on a machine in a team with an assistant operator (assistant) to assist as the pipe the tubes were made from,

is 10 - 11 metres long and it is difficult for a single person to handle. The operator is responsible for the machine (e.g. to switch it on or to adjust the speed) but the role of the assistant is also very important as an operator without an assistant would not be able to meet the minimum target.
- [6] The Respondent operated with three shifts, to wit a morning shift working from 06:00 – 14:00 (shift 1), an afternoon shift working from 14:00 – 22:00 (shift 2) and a night shift working from 22:00 – 06:00 (shift 3).

- [7] On 23 May 2012, it became apparent that shifts 2 and 3 had embarked upon a go-slow as they produced only 20 tubes per operator per shift, as opposed to the minimum target of 35 tubes per shift. Prior to 23 May 2012, the production was satisfactory. The production foreman, Mr April Ncongwane (Mr Ncongwane), informed the production manager, Mr Arrie Smit (Mr Smit), who in turn got the Respondent's representatives, dedicated and based at this site, involved in this go-slow.
- [8] Upon enquiry as to what the problem was, Mr Toni Martins, the project manager who was allocated to DBT, was informed by the striking employees that they were dissatisfied with the outcome of a meeting

held with Mr Smit in relation to an increase and an incentive bonus. Mr Martins indicated to them that he would be willing to engage with them on their grievances, but that they first had to return to full production before he could do so. This was rejected and the go-slow continued. On 24 May 2012, the employees working in Shift 1 also produced only 20 tubes per shift. Shifts 2 and 3 produced only approximately 15 tubes per shift on 24 May 2012. On 25 May 2012, all shifts produced approximately 15 tubes per shift.

- [9] On 24 May 2012, Mr Martins issued the first and final ultimata to Shifts 2 and 3. On 25 May 2012, the ultimata were also issued to the employees working Shift 1. It was made clear that employees who failed to heed the final ultimatum and who continued to participate in the unprotected go-slow, may be dismissed.
- [10] The employees at the Nigel site were predominantly NUMSA members, and there were elected NUMSA shop stewards at the site and in Shop 2. The shop stewards attempted to persuade the employees to cease and desist with their unprotected strike action but were unsuccessful in these endeavours. As such, the shop stewards distanced themselves formally from such action on 24 May 2012.
- [11] A call was made to the organiser of NUMSA, Mr George Ramalatsoa, to attend at the premises on 25 May 2012 to address the employees to persuade them to abandon the unprotected go-slow. When Mr Ramalatsoa addressed the employees, he made it clear that their demands were incompetent as all of them were dealt with centrally, and in accordance with the Metal and Engineering Industries Bargaining Council (MEIBC) Main Agreement. Mr Ramalatsoa cautioned them that they could face dismissal as a result of their unprotected go-slow. The employees did not listen to the warning from Mr Ramalatsoa and they continued with their unprotected go-slow. The final ultimatum was to expire during the course of 25 May 2012.
- [12] As a last resort, Mr Ramalatsoa requested that the final ultimatum, that was to expire during the course of 25 May 2012 and early into the morning of 26 May 2012, be extended until Monday 28 May 2012. This was so that a further attempt could be made over the weekend to address the employees and to persuade them to abandon their unprotected go-slow. The Respondent acceded to this request.

- [13] On 28 May 2012, the go-slow continued with approximately 15 tubes being produced per machine per shift. The final ultimatum expired per shift during the course of Monday 28 May 2012 in respect of the morning and afternoon shifts, and early on Tuesday 29 May 2012 in respect of the night shift. As a result of the employees' refusal to abandon their unprotected go-slow, the Respondent suspended them on 29 May 2012 and initiated disciplinary proceedings against them.
- [14] The disciplinary hearings were held on 4 June - 5 June 2012 and the employees all pleaded not guilty. The charge levelled against them related to their participation in an unprotected strike and their failure to produce the minimum number of tubes per shift, notwithstanding numerous requests and ultimata being issued to them.
- [15] The employees were found guilty of misconduct and they were all dismissed.

The issues to be decided

- [16] The Applicant accepts that the employees participated in the go-slow, that the go-slow was unprotected and that fair ultimata were issued. Procedural fairness is not in dispute. The Applicant challenges the fairness of the employees' dismissal on the narrow basis that the sanction of dismissal was too harsh when all the circumstances are considered. The Applicant contends specifically that the following issues must be considered when properly evaluating the sanction of dismissal:

16.1. The go-slow was instigated in response to Arrie Smit reneging on an undertaking in relation to an incentive bonus;

16.2. There was significant inconsistency in the way the machine operators were treated. A number of operators participated in the go -slow but did not receive any form of sanction at all;

16.3. The assistant operators represent a special case.

Analysis

Substantive fairness

- [17] The legal principles to be applied in a dispute concerning a dismissal for participation in an unprotected strike are well established. Item 6(1) of the Code of Good Practice contained in Schedule 8 (Code) of the Labour Relations Act[1] (LRA) provides as follows in respect of substantive fairness:

'Dismissals and industrial action.

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

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

[18] The distinction between a protected and unprotected strike is not an academic one. It is one that ought to have consequences. More so where there was no attempt to comply with the provisions of the LRA at all.

[19] Item 7 of the Code regulates dismissal for misconduct more generally and as participation in unprotected strike action is misconduct, it should logically apply. Item 7 requires the determination of whether dismissal was an appropriate sanction for contravention of the relevant rule or standard.

[20] Item 7 of the Code provides that:

‘Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal with an appropriate sanction for the contravention of the rule or standard.’

[21] In casu, it is undisputed that the employees participated in unprotected strike action, that it constituted misconduct and that they were made aware of the fact that the strike was unprotected and that they should return to full production or face the possibility of dismissal.

[22] The employees’ case in short is that the strike was provoked by Mr Smit and that their dismissal was unfair because there was significant inconsistency. I will deal with these issues in turn.

Provocation

[23] The Applicant’s pleaded case is that the employees elected three representatives, one from each shift, to present their grievances and concerns to management. The representatives were Messrs Maseko, Ngcobo and Pailane, all applicants in this matter. Around March 2012, the elected representatives scheduled a meeting with Mr Smit and the purpose of the meeting was to discuss concerns and issues relating to inter alia incentive bonuses and salary increases. A NUMSA shop steward, Mr Liso Nobezelo, also attended the meeting as an

observer.

- [24] During the meeting, Mr Smit indicated that incentive bonuses and salary increases are regulated by a collective agreement and he maintained that he had no mandate to discuss those issues. In respect of salary increases, Mr Smit indicated that he would ascertain whether the employees were being paid in accordance with the rates agreed to by the Steel and Engineering Industries Federation of South Africa (SEIFSA) at the MEIBC. Should the rates be below the agreed rates, Mr Smit would ensure that the employees' rates be adjusted and should it be in line with the agreed rates, it would remain the same.
- [25] At the conclusion of the meeting, it was agreed that another meeting would be held after Easter. A second meeting was held, which was attended by Mr Ncongwane, the foreman for the finning department. The representatives wanted to discuss the same issues as before and Mr Smit indicated that the employees were paid more than the agreed MEIBC rates. In this meeting, Mr Smit denied that he had previously informed the elected representatives that an incentive bonus was to be implemented and he refused to engage the representatives further on the issues they wanted to raise. Mr Smit made it clear that he had no mandate to discuss the issues relating to hourly rates, salary increases and incentive bonuses.
- [26] The Applicant's case is that the employees were aggrieved by Mr Smit's unreasonable refusal to engage with the representatives, especially as there was a previous undertaking that an incentive bonus was to be implemented. This caused the employees to embark on an unprotected strike action on 24 May 2012, which resulted in their failure to meet the production targets.
- [27] The question this Court has to consider is whether the strike action was indeed provoked by the conduct of Mr Smit.
- [28] It is common cause that on 28 March 2012 a meeting took place between Mr Smit and Messrs Maseko, Ngcobo and Pailane and a shop steward, Mr Liso Nobezelo. There is some dispute as to how the meeting came about and what was discussed at the meeting, specifically in relation to incentive bonuses.
- [29] In my view, questions relating to how the representatives were elected or how the meeting came about, are not material to the issues this Court has to decide. The relevant issue is the discussion around the incentive bonus.
- [30] Mr Smit in his testimony accepted that the question of an incentive bonus was raised but he contended that he told the employees that this could only be dealt with at the MEIBC and that it was not an issue that could be discussed at shop floor level. Mr Smit testified that he had made it clear to the employees that he had no mandate to discuss or negotiate salary increases or incentive bonuses. He disputed that any undertaking was given in respect of the payment or implementation of an incentive bonus.

- [31] Mr Smit conceded that a follow-up meeting took place on 23 May 2012 and that the same issues about a salary increase and incentive bonus were raised. He made it clear that the salary increases, as agreed to at the MEIBC, would be implemented on 1 July 2012 and that he had no mandate to discuss the issue of an incentive bonus. Mr Smit testified that the meeting did not end well as he became frustrated with the employees who insisted on an increase and an incentive bonus, notwithstanding the fact that he kept on telling them that he had no mandate on those issues. He ended the meeting by saying that he had no mandate and could no longer discuss issues he had no mandate on.
- [32] Mr Maseko testified that during the meeting with Mr Smit in March 2012, the issue of an incentive bonus was raised and Mr Smit responded by saying to them that he would approach the Respondent's management to see how they could work out an incentive bonus. The meeting ended with an understanding that Mr Smit would approach management and would give the employees feedback.
- [33] During the feedback meeting held on 23 May 2012, the employees expected feedback on the issues of a wage increase and an incentive bonus. Mr Smit informed the employees that they were remunerated above the SEIFSA rate and that they would get an increase in July
2012. Regarding the incentive bonus, Mr Smit said that it was not possible to get an incentive bonus. After the feedback about the incentive bonus was received, the employees commenced with a go-slow.
- [34] During the meeting of 28 March 2012, Mr Nobezelo took minutes and on the issue of the incentive bonus, the minutes recorded inter alia that: "[t]he issue was already being discussed on man. meetings and that the employer wanted to give incentives but not have a way. [Arie] Feedback to be given after consultation [sic]."
- [35] It is evident from the aforesaid minute of the meeting that no promise was made and no undertaking was given that an incentive bonus would be paid or implemented. Mr Smit accepted that the issue of incentive bonus was discussed, but he persisted with his version that he had no mandate to negotiate on that or to discuss that with the employees. Mr Maseko's version was that the March 2012 meeting ended with an understanding that Mr Smit would approach management and would give feedback and on 23 May 2012, the employees expected feedback on the issue of an incentive bonus.
- [36] The evidence before this Court does not show that there was a concrete promise or a firm undertaking that an incentive bonus would be paid to the employees. At best, there was an undertaking to discuss the issue with management and with that undertaking, there was the inherent possibility that management would, for whatever reason, not agree to the payment of the incentive bonus.

- [37] Mr Orr on behalf of the Applicant submitted that the conduct of Mr Smit must be considered a mitigating factor when an appropriate sanction for the employees is considered, as his conduct in raising expectations around a bonus and then dashing them out of hand was reckless and was the spark for the industrial action which followed. I cannot agree with this submission.
- [38] Mr Smit's undertaking could not have raised the expectation that an incentive bonus would be implemented and paid. At best it could have created a spes that the issue of an incentive bonus would be raised with the management of the Respondent and that the outcome could be that an incentive bonus might be paid. The spes, which existed for the employees, cannot be equated to provocation or unjustified conduct on the part of the Respondent.
- [39] It is understandable that the employees were unhappy or disappointed when, at the time they had hoped for positive feedback on the payment of an incentive bonus, they were informed that an incentive bonus would not be paid. Mere unhappiness or disappointment does not constitute provocation, more so when there was no firm undertaking or promise that the incentive bonus would be paid.
- [40] This is not a case where the course of events or the conduct of Mr Smit specifically, constituted provocation which could justify the conduct of the employees when they embarked on an unprotected strike.
- [41] The remaining issues to be decided are whether the employees were treated inconsistently and whether the assistant operators represent a special case.

The assistant operators

- [42] The Applicant's case is that although it is accepted that the assistants participated in the unprotected go-slow, their conduct is less culpable than that of the operators. This is so because the assistant operators were not permitted to run the machines, as they were not trained to do so and once the operators had decided to go on a go-slow, there was nothing whatsoever the assistants could do to speed up production.
- [43] The evidence showed that if an operator attempted to work without an assistant, he would not be able to fulfil the minimum target of 35 tubes per shift. The pipes used are more than 10 metres long and it would be difficult to be handled by only one person, which would slow the production down. Mr Ngondwana, the foreman in the finning department, testified that the assistants would not be able to do the joining of the finning strips and to switch the machines on and off, but other than that, an assistant could do everything that an operator could do. Furthermore, at the beginning of May 2012, a decision was taken to upskill the assistants to train them to qualify as operators.
- [44] The uncontested evidence presented by Mr Martins, and corroborated by the evidence of Mr Maseko, was that the first ultimatum was issued to the operators only. This was because an assistant operator would be unable to produce a tube if the operator was not present. If an operator was not present, the assistants would fulfil other functions. In the first

ultimatum issued, the operators were instructed to cease the go-slow and to return to full production, failing which disciplinary action, which could result in dismissal, would be taken. Mr Martins testified that when he issued the first ultimatum to the operators, the assistants made it clear that they were part of the go-slow. He explained that the operator and assistant worked as a team and during the strike, they also worked as a team, they made the decision together to slow down the production

and the assistants made common cause with the strike. As a result of this, by the time when the second ultimatum was issued, it was clear that the assistants participated equally in the go-slow and the final ultimatum was also issued to the assistants, calling on them to stop the go-slow and to return to full production or face the possibility of dismissal.

- [45] Mr Ngondwana also testified that the assistants made it clear that they were part of the strike. He testified that when an assistant did not want to be part of the go-slow, they had to report to him, as the foreman, that there was a go-slow and that they did not want to be part of it. No assistant reported to him that they were not part of the go-slow, on the contrary, they made it clear that they were also part of it.
- [46] In my view, the assistants' participation goes further than only making common cause with the unprotected industrial action embarked upon by the operators. Not a single assistant approached Mr Ngondwana to indicate that they are distancing themselves from the strike action or that they had no part in it. On the contrary, they made sure that the Respondent knew and understood that they were also part of the go-slow.
- [47] It is further evident from the transcribed record of the disciplinary hearing that after the feedback was received from Mr Smit on 23 May 2012, the operators and the assistants decided to minimize the production to draw the Respondent's attention. The decision to embark on a go-slow was taken by the group of operators and assistants together.
- [48] During the trial, no assistant testified to provide this Court with a different version, and I have no reason not to accept the version presented by the Respondent. Absent any evidence adduced by an assistant, this Court accepts that the assistants participated equally in the go-slow.
- [49] Any notion that the assistants were not equal partners in the go-slow embarked upon, is dispelled by the evidence before this Court and it is clear that they participated fully in the go-slow. As such, their conduct is not less blameworthy than that of the operators. The fact that the functions, responsibilities and hourly rates of the operators and assistants differed, is not relevant, in fact, it is separate from the question of blame and the degree of participation in the unprotected go-slow.
- [50] The operators and assistants ought to be treated equally for purposes of an assessment of the sanction imposed upon them and there is no merit in the Applicant's submission that the assistants represent a special case.

Inconsistency

[51] The next issue to be decided is the issue of consistency. As I alluded to supra, the operators and assistants ought to be treated equally for purposes of an assessment of the sanction imposed upon them and they will be dealt with together in respect of inconsistency.

[52] The Applicant's case is that a number of operators and assistants who took part in the go-slow received no disciplinary sanction at all and were not even called to a disciplinary hearing. The operators who were not disciplined fell into two categories:

52.1 Operators who abandoned the go-slow on Monday and returned to normal production;

52.2 Operators who were absent from work on Monday 28 May 2012. In this instance, the assistants to those operators were not disciplined at all solely on the basis that the operators they worked with were absent on the Monday.

[53] In short: the employees challenged the fairness of their dismissal on the ground that discipline was applied inconsistently in that there were other employees who participated in the strike who were not dismissed or disciplined at all.

[54] The Respondent's case is that there was a valid reason for differentiating between groups of employees guilty of the same offence.

[55] In *SA Commercial Catering and Allied Worker's Union and others v Irvin and Johnson Ltd*[2] (I&J), the Labour Appeal Court (LAC) held that:

'In my view too great an emphasis is quite frequently sought to be placed on the 'principle' of disciplinary consistency, also called the 'parity principle' (as to which see eg Grogan Workplace Law (4 ed) at 145 and Le Roux & Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious.'

[56] In *Absa Bank Ltd v Naidu and others*,[3] the LAC held that:

'However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:

"[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty".'

[57] In *Sasol Mine Limited v Nhlapo and Others*[4] (Sasol), the LAC held that:

‘The obligation upon an employer to act consistently in the application of discipline arises in two contexts in our law. The first is in relation to the application of the rule and the second is in relation to the imposition of sanction. In both respects there can exist either contemporaneous inconsistency or historical consistency. In relation to the consistent imposition of sanction it was stated in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*[5] that:

“The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires

that the employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same

misconduct”’

[58] The LAC in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[6] held that:

‘This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly.’

[59] Consistency is but an element of fairness and not decisive of the outcome on the determination of the fairness of a dismissal.

[60] In *National Union of Mineworkers obo Botsane v Anglo Platinum Mine (Rustenburg Section)* [7], the LAC addressed the issue of consistency and held as follows:

‘Moreover, as a matter of practice, a party, usually the aggrieved employee, who believes that a case for inconsistency can be argued, ought, at the outset of proceedings, to aver such an issue openly and unequivocally so that the employer is put on proper and fair terms to address it. A generalized allegation is never good enough. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. Introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process. (See *SACCAWU & others v Irvin & Johnson Ltd* 2002

(3) SA 250 (LAC); (1999) 20 ILJ 2302 (LAC) at para 29; also see *Masubelele v Public Health & Social Development Bargaining Council & others* [2013] ZALCJHB JR2008/1151 which contains an extensive survey of the case law about the idea of inconsistency in employee discipline.)’

[61] In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*,^[8] the Court held that:

‘It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.’

[62] In the statement of case, the Applicants took issue with the fact that not all the operators (and the assistants) who embarked on the go-slow were disciplined and dismissed and issue was specifically taken with six operators (and their assistants) who were not dismissed. It was subsequently conceded that Mr Maleo was not employed by the Respondent and the Applicant did not persist with its challenge in respect of Mr Maleo.

[63] Five operators were not dismissed. The Respondent’s case was that Mr Ramashala was on sick leave on Monday 28 May 2012 and as he was sick, he was not dismissed because he did not have the opportunity to heed the final ultimatum. Mr Buzi reached the minimum production requirement of 35 tubes on 28 May 2012 and as such, he returned to full production and was not dismissed. Mr Mokoena worked on the McElroy machine on 28 May 2012, which does not require an assistant and does not have a minimum production target. Mr Ngwenya was absent on Monday 28 May 2012 and on the basis of him being absent, he could not be dismissed as he did not have the opportunity to heed the ultimatum. Mr Sibanyoni was absent on 28 May 2012 due to

unrest in Kwa-Thema, where he resided, and on the basis of him being absent, he could not be dismissed as he did not have the opportunity

to heed the ultimatum.

[64] The Respondent’s case is that some of the aforesaid operators were absent on the day upon which they had to comply with the ultimatum, but upon their return on the next day (Tuesday 29 May 2012), their production was satisfactory and it was apparent that they were no longer participating in the industrial action and effectively they complied with the instruction to stop the go-slow and to return to full production.

[65] During argument, Mr Orr submitted that the Applicant no longer took issue with the operators who resumed full production or worked on the McElroy machine on 28 May 2012. The only issue relating to consistency was in respect of the operators who were absent on 28 May 2012 and as such, also did not heed the ultimatum. The Applicant’s case is that the employees who did not heed the ultimatum on 28 May 2012, were dismissed and that the three other operators, who were not at work, and thus also did not heed the final ultimatum, were not dismissed or disciplined at all and therein lies the inconsistency.

[66] In my view, there is no merit in the Applicant's inconsistency challenge.

[67] The Respondent issued a final ultimatum to the striking employees, operators and assistants wherein they were instructed to stop the go-slow and to return to full production during their shift on 28 May 2012 or face the termination of their employment. Mr Martins testified that they were all afforded an equal opportunity to return to full production and on 28 May 2012, the employees were once again warned that the go-slow was unprotected and that they were putting their jobs at risk. He testified that the go-slow continued on 29 May 2012, whereafter the employees who did not return to full production

were suspended, notified of a disciplinary hearing and subsequently dismissed.

[68] Mr Martins explained that the employees who were subjected to a disciplinary hearing and dismissed, were those who continued with the go-slow on 29 May 2012 and who did not heed the final ultimatum. The employees who were not disciplined, were either not at work on 28 May 2012 or proceeded with full production in compliance with the final ultimatum. The employees who were not at work on 28 May 2012, proceeded with full production upon their return to work.

[69] In *National Union of Metalworkers of SA & others v CBI Electric African Cables*[9] the LAC accepted that compliance with an ultimatum was a material difference in the distinction drawn between employees who were

dismissed and those who were given 12 month final written warnings. Mr Orr submitted that it provides no authority for the current matter where employees' compliance with an ultimatum was the difference between dismissal and no disciplinary process at all. The situation is even more unfair if the operators who were absent on the Monday are taken into account, so it was submitted. These operators were given permission to stay at home due to unrest in Kwa-Thema. When they came back to work, on Tuesday 29 May 2012, the dismissed employees had already been suspended and the go-slow was over. The only distinction between these employees and the dismissed employees is that these employees were given permission to stay at home on Monday 28 May 2012. This cannot possibly be a material difference justifying the inherent unfairness of the disparity of treatment between being dismissed and facing no disciplinary action whatsoever.

[70] There are a number of difficulties with the Applicant's case and I cannot agree with the Applicant's submissions, for a number of reasons.

[71] Firstly, the operators who were not dismissed, either heeded the ultimatum or were not at work on 28 May 2012 and when they returned, they resumed full production in compliance with the ultimatum. These constitute valid grounds to distinguish the conduct of the employees from the conduct of those who were not dismissed.

[72] The Respondent did not dismiss the assistants of the operators who were absent on 28 May 2012, for reasons that the assistants could not meet the minimum required production of 35 tubes per shift without an operator.

[73] In County Fair Foods (Epping), a division of Astral Operations Ltd v Food and Allied Workers' Union and Others,[10] some 200 employees embarked on an unprotected strike, the employer issued three ultimata and some employees heeded the ultimata while approximately 100 employees did not return to work until after the deadline to return to work had passed. Those employees were subsequently dismissed. The LAC found that the conduct of the employees who failed to adhere to the terms of the final ultimatum

distinguished them from the other employees who had returned to work and as a consequence, their conduct could, on the facts, be

differentiated. The LAC held that:

'[25] Our courts have repeatedly stated that fairness generally requires that like cases should be treated alike and that disciplinary consistency is the hallmark of progressive labour relations. While discipline should be neither capricious nor selective, this

applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with fairness

remaining a value judgment. There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, albeit that they have engaged in the similar conduct, having regard to the material facts applicable.

[26] The appellant was neither capricious nor selective in its approach to the misconduct committed by the respondent employees. The collective activity of the respondents could, unlike in CEPPWAWU v Metrofile, be legitimately differentiated from the employees who complied with the final and earlier ultimata. The striking workers were, therefore, not all on the same footing given the respondent employees' failure to comply with the final ultimatum given to them. As much was not in dispute. This constituted a material distinguishing feature between the different

groups of strikers which provided a legitimate factual basis which permitted the appellant to differentiate between the conduct of the respondent employees and that of those striking workers who had complied with the ultimata issued.'

[74] An employee who is not at work, due to being on sick leave or because he had obtained permission from the employer not to report

for duty due to unrest in the area where he resides, is not at the workplace and is unable to heed an ultimatum or resume full

production. This is not the same as an employee who is at work, who is able to heed the final ultimatum and who deliberately refused to comply with the ultimatum and persisted with the unprotected go-slow. As the LAC held "that like cases should be treated alike", it is evident that an employee who is absent from work, is not the like of an employee who is at work and refuses to heed an ultimatum, whilst in a position to do so, and they cannot expect to be treated alike.

- [75] Furthermore, in a number of authorities, the courts have accepted in instances where employees participated in industrial action and some heeded an ultimatum and others not, that the failure to heed an ultimatum, which results in dismissal, was a legitimate basis for differentiation.
- [76] In NUMSA and others v Delta Motor Corporation[11] seven out of 70 employees were suspended and subsequently dismissed for their failure to heed an ultimatum to resume work. The appellants challenged their dismissals on the grounds of inconsistency in that other employees, who had also participated in the work stoppage, had not been disciplined. The facts were that all the employees, but the seven who were dismissed, had complied with the ultimatum and returned to work.
- [77] The Labour Court held that there was no inconsistency on the part of the employer in disciplining only the seven employees and not the other employees who had earlier participated in the work stoppage, as the ultimatum had intervened, the refusal of the appellants to return to their posts was a studied and wilful refusal which was not supported by the remainder of the workforce and that there was a legitimate basis for differentiation. On appeal, the LAC found inter alia that the purpose of the ultimatum was to put the employees on terms and that the employees were made aware of the fact that a refusal to abide by the ultimatum and to return to duty would result in disciplinary action and accordingly, held that the employer did not act inconsistently in disciplining only the seven employees.
- [78] In National Union of Metalworkers of South Africa (NUMSA) and others v Mandlakazi Electrical Technologies Holdings[12], the employer dismissed its employees for participating in an unprotected strike. The employees argued that the employer had not applied discipline consistently as two employees who had participated in the strike were not dismissed. The Court considered the evidence related to the two employees and noted that the one employee initially participated in the strike, but had returned to work when the administrative staff of the employer was informed that they could not participate in the strike. Thereafter the employee was given permission to leave the workplace for a personal matter and leave was granted. The other was in fact not an employee but a student who received a stipend. The Court referred to I&J where it was inter alia stated that:
- 'Consistency is simply an element of disciplinary fairness... Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency.'[13]
- [79] The Court concluded that that the decision not to dismiss the two individuals was not capricious or induced by improper motives but justifiable given their specific personal circumstances.

[80] Lastly, in *AMCU obo Rantho and others v Samancor Western Chrome Mines*,^[14] the LAC has set out the purpose of an ultimatum as:

'[26] It is well-established in our law that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them. To hold otherwise would render the purpose of an ultimatum nugatory. Strikes are functional to the social good of collective bargaining. Thus, the right to strike is constitutionally enshrined as a legitimate means of advancing orderly collective bargaining. A precipitate strike subverts the process by undermining the opportunity for resolution of the collective dispute by negotiation. The misconduct present in participation in an unprocedural strike is the subversion of the process. The purpose of an ultimatum is to put the negotiation process back on track and to end the precipitous action. If it achieves that purpose, dismissal normally should not follow because that too would be precipitate action undermining legitimate and orderly collective bargaining.'

[27] For those reasons, our law regards an ultimatum by the employer as a waiver of the right to dismiss for the period of its duration. A party who has once approbated (waived a right arising under the contract, including the right to terminate it) cannot thereafter reprobate (seek to enforce that right). If the employees refuse to return to work, the waiver implicit in the ultimatum will lapse. But if they comply with the ultimatum, the employer is ordinarily precluded from dismissing the employees for the act of striking, but not necessarily for other misconduct committed during the strike. Where an employer after issuing an ultimatum wishes to reverse or amend the terms of the waiver prior to it expiring, it may do so in appropriate circumstances provided it has a good reason and gives the striking workers timeous notice of the change to prevent them from being unfairly prejudiced thereby.'

[81] The LAC made it clear that the purpose of an ultimatum is to end the precipitous action and if it achieves that purpose, dismissal should not follow. In *casu*, the Respondent did not dismiss the employees who heeded the ultimatum and who resumed full production. The purpose of the ultimatum was achieved.

[82] It appears that the Applicant's main gripe is that the employees were dismissed for failing to heed the final ultimatum, yet others who also participated in the go-slow and did not heed the final ultimatum on 28 May 2012 because they were not at work on the said date, came off scot-free.

[83] The employees were well aware of the fact that they would face dismissal, should they fail to comply with the ultimatum. They persisted with their go-slow, in the face of a threat of dismissal, and when dismissal followed, as they knew it would, they claimed unfairness and inconsistency because others were not disciplined. In my view, this is opportunistic and far-fetched.

- [84] The Respondent as employer has the prerogative to take disciplinary action against its employees, as long as it is done fairly. Where a final ultimatum is issued and employees were warned that failure to comply with it, would result in dismissal, employees who persist with unprotected strike action should not be surprised when they are dismissed for failing to stop the go-slow and to resume full production.
- [85] However, where employees comply with the ultimatum, the purpose is achieved and there is no obligation on the employer to discipline the employees who participated in the unprotected strike, but who subsequently heeded the ultimatum. It is within the prerogative of the employer to decide whether disciplinary action is to be instituted and whether any sanction (short of dismissal) is to be imposed. Where an employer decides not to take any disciplinary action against employees who heeded the ultimatum, it is within its prerogative to do so and a failure to institute disciplinary action does not automatically render the dismissal of employees who did not heed the ultimatum unfair or inconsistent.
- [86] It is not for this Court to prescribe or dictate to the Respondent as to how it should discipline its employees and where the Respondent decided not to discipline employees who heeded the ultimatum, this Court cannot find that decision unfair, even where the ones who persisted with the unprotected go-slow in defiance of a final ultimatum, were dismissed.
- [87] It has not been suggested that the Respondent acted capriciously or with bias in dismissing the employees but rather that it acted inconsistently in not disciplining others. Ultimately, consistency is but an element of fairness.
- [88] In casu, the Respondent was able to show that there was a valid reason for differentiating between the employees who were dismissed and those who were not, that there was a fair and objective basis for treating the employees differently and the Respondent's application of discipline was not inconsistent.

Was dismissal an appropriate sanction

- [89] The substantive fairness of the employees' dismissal must be determined in the light of the facts of the case, as well as other factors, such as the seriousness of the contravention of the LRA, attempts made to comply with the LRA and whether or not the strike was in response to unjustified conduct by the employer.
- [90] It is common cause that the employees participated in a go-slow during which they slowed the production down significantly, whilst they continued to receive their full remuneration. Mr Maseko's evidence was clear that the employees had no intention to stop the go-slow until their demands were met. This was obviously beneficial for the employees, as they would continue to receive their full remuneration, at half the production and a significant loss for the Respondent.
- [91] In *National Union of Metalworkers of SA v Henred Fruehauf Trailers (Pty) Ltd*[15] it was held that:

‘It is manifest too that a go-slow strike is a most insidious form of industrial action. It causes continuing financial loss to the

employer while the employees continue to draw their wages.’

[92] There was no attempt whatsoever to comply with the provisions of the LRA. It is evident from the facts placed before this Court that the NUMSA shop stewards and the organiser, Mr Ramalatsoa, were alive to the fact that the employees’ conduct was unprotected.

[93] The shop stewards attempted to persuade the employees to cease their unprotected strike action, but they were unsuccessful in these endeavours and the shop stewards distanced themselves formally from the strike action.

[94] A call was made to the NUMSA organiser, Mr Ramalatsoa to attend at the premises on 25 May 2012 and to address the employees to persuade them to abandon the unprotected go-slow. Mr Ramalatsoa indicated to the employees that their demands were incompetent and he cautioned them that they could face dismissal as a result of their unprotected go-slow. As a last resort, Mr Ramalatsoa requested that the final ultimata that were to expire during the course of 25 May 2012 and early into the morning of 26 May 2012, be extended until Monday 28 May 2012, in order that a further attempt could be made over the weekend to address the employees to persuade them to abandon their

unprotected go-slow.

[95] On 28 May 2012, the go-slow continued unabated with approximately 15 tubes being produced per machine per shift. There was complete recalcitrance on the part of the employees to abandon their unprotected go-slow.

[96] The NUMSA officials distanced themselves from the strike action, they pleaded with the employees to stop what they were doing and that they warned the employees that they were putting their jobs at risk. None of this had any effect and the employees were stubbornly persisting with conduct they knew would cost them their jobs. Their own union warned them of this grave consequence.

[97] In his testimony, Mr Maseko stated that when the employees decided to embark on a go-slow, it was their understanding that they could not be dismissed, however Mr Martins addressed them and told them that they could face dismissal, the NUMSA shop stewards and Mr Ramalatsoa told them that they could be dismissed because of the go-slow, they received the ultimata which warned about dismissal, Mr Ramalatsoa pleaded with them over the weekend to stop the go-slow, but they persisted with the go-slow, notwithstanding the advice and warnings they received. Mr Maseko was adamant that the employees had conditions which the Respondent had to meet before they would resume full production and abandon the go-slow. The attitude adopted by the employees is certainly aggravating.

[98] I already found that the strike action was not provoked or in response to unjustified conduct by the employer.

[99] An illegal strike has been recognised by our courts to constitute serious and unacceptable misconduct by workers.[16]

[100] Given the fact that the employees' misconduct is serious and unacceptable, the extent of the contravention and the lack of any attempt on the part of the employees to comply with the provisions of the LRA, the persistent failure to listen to the advice from the NUMSA officials or to heed the final ultimatum and the fact that the strike was not in response to any unjustified conduct by the employer, this Court is satisfied that dismissal was the appropriate sanction in the circumstances of this matter.

[101] It follows that the employees' dismissal was substantively fair.

Costs

[102] None of the parties seek a cost order and as a result, no cost order is made.

[103] In the premises, I make the following order:

Order

1. The Applicant's case is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate C Orr SC

Instructed by Haffegge Roskam Savage Attorneys

For the Respondent:

Mr D Pretorius from Fluxmans Attorneys

- [1] Act 66 of 1995, as amended.
- [2] (1999) 20 ILJ 2302 (LAC) at para 29.
- [3] (2015) 36 ILJ 602 (LAC) at para 36.
- [4] (2021) 42 ILJ 2589 (LAC) at para 40.
- [5] (2010) 31 ILJ 452 (LC) at para 10.
- [6] (2017) 38 ILJ 860 (LAC) at para 31.
- [7] (2014) 35 ILJ 2406 (LAC) at para 39.

- [8] (2012) 33 ILJ 623 (LC) at para 10.
- [9] (2014) 35 ILJ 642 (LAC).
- [10] (2018) 39 ILJ 1953 (LAC).
- [11] [2002] 9 BLLR 817 (LAC).
- [12] Unreported judgment under case no JS599/17, delivered on 11 October 2019.
- [13] I&J supra at para 29.
- [14] (2020) 41 ILJ 2771 (LAC).
- [15]
- (1994) 15 ILJ 1257 (A) at 1263G - H.
- [16] See: Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994
- (2) SA 204 (A) at 216E.
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Prepared on 12 October 2026 · Esheria