IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JA37/01

In the matter between:

CEPPWAWU First Appellant

B LAWSON AND OTHERS Second and Further Appellants

and

METROFILE (PTY) LIMITED Respondent

J U D G M E N T

MLAMBO, AJA:

INTRODUCTION:

[1] This is an appeal and cross-appeal against the judgment and order of the Labour Court (Jammy AJ) in which it was held that the dismissal of the second and further appellants ("*the individual appellants*") was procedurally unfair but substantively fair and that they were not entitled to any relief. The matter comes before us with the leave of the Court a quo.

[2] The respondent, pursuant to a number of disciplinary enquiries, dismissed the individual appellants for misconduct allegedly committed during a protected strike. The

parties could not resolve the resultant dispute under the auspices of the Commission for Conciliation Mediation and Arbitration ("the *CCMA*"). The CCMA thereafter referred the dispute to the Court a quo in terms of s 191(6) of the Labour Relations Act No 66 of 1995 (as amended) ("*the Act*"), for adjudication.[1]

[3] The Court a quo concluded, after hearing extensive evidence, that, although the respondent had failed to follow fair procedures in effecting the dismissal of the individual appellants, their dismissal was substantively fair. The Court further concluded that in view of the seriousness of the misconduct leading to the dismissal and despite the finding of procedural unfairness no relief was warranted under the circumstances. The Court a quo made no order as to costs.

[4] On appeal the appellants challenge the Court a quos' finding that the dismissal was substantively fair and that no relief was warranted despite the finding of procedural unfairness. The cross-appeal is directed against the finding that the dismissal was procedurally unfair.

CHRONOLOGY OF RELEVANT EVENTS

[5] The respondent conducts business as an off-site data storage and retrieval company. Its business includes the safekeeping of confidential or sensitive documents, computer data, computer back - up tapes and disks for clients. It carries on business from two premises, situated about ten kilometers apart, being No 3 Gowie Road Cleveland, and No 30 Mineral Crescent, Crown Extension 3 in Johannesburg. For the sake of convenience and as was done throughout the trial in the Court a quo those premises will respectively be referred to hereinafter as Gowie and Crown.

[6] Following unsuccessful negotiations between the first appellant (the recognized collective bargaining agent of the respondent's employees) and the respondent about wages, the first appellant referred the resultant dispute to the CCMA for conciliation. The parties were unable to resolve the dispute through the processes of the CCMA resulting in the CCMA, on 23 March 1998, issuing a certificate of outcome in terms of s 135(5)(a) of the Act, stating that as at that date the dispute remained unresolved. On

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1 Section 191(6) provided at the relevant time: "Despite subsection (5)(a), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering -
b)
(a) the reason for dismissal;
(b)whether there are questions of law raised by the dispute;
c) (c) the complexity of the dispute;
d)(d) whether there are conflicting arbitration awards that need to be resolved;
(e) the public interest."

the same day the first appellant issued a notice to the respondent giving it forty eight hours notice of an intended strike.

[7] On 25 March 1998 the respondent issued a notice titled "*Strike Rules and Communication*" and served it on the first appellants' shop-stewards. In terms of these "*rules*" permission was granted to the first appellant's members, in support of their strike, to picket on the respondent's premises but only in certain demarcated areas. It is not in dispute that there was no prior agreement between the parties concerning any strike and picket rules that would apply during the strike.

[8] On Thursday 26 March 1998 the individual appellants and other members of the first appellant employed by the respondent embarked on a protected strike at the respondent's Crown and Gowie premises. Soon after the strike commenced the strikers moved out of the areas demarcated for that purpose by the respondent in its notice. The strikers, singing and dancing, collectively positioned themselves at the main entrances of both premises and effectively obstructed the entry to and egress from the premises.

[9] In view of the interference with its normal business operations the respondent informed the strikers that their conduct, particularly their presence at the main entrances was not acceptable and, through a number of notices, called on them to desist from their conduct. The respondent was also concerned about reports of violence and intimidation allegedly perpetrated by strikers. This was to no avail as the strikers steadfastly maintained the blockade of the premises.

[10] Faced with what it regarded as an untenable situation the respondent, without notice to the first appellant and the strikers, obtained an urgent interdict in the Labour Court during the afternoon of 26 March 1998. The terms of the interdict were, inter alia:

> "*2. Interdicting and restraining employees of Applicant engaged in strike action:*
>
> *2.1 from engaging in any blockage of, obstruction of or interference with the entrance and/or exits of the Applicant's business premises, or with other employees, contract employees, customers or suppliers;*
>
> *2.2 from engaging in any acts of intimidation, sabotage or damage to the Applicant's business premises or plant and equipment.*"

[11] The interdict was served on the strikers at Gowie at about 07h40 on the morning of

27 March 1998. Despite such service the strikers did not vacate the main entrance but continued dancing and singing. They, however, desisted from actively enforcing a blockade of entry to and egress from the premises. There is a dispute about the service of the interdict at Crown which is dealt with later in this judgment.

[12] Later that morning, at about 10h30, believing the strikers to be acting in disregard of the interdict, the respondent issued a notice to shop-stewards calling upon them to attend a disciplinary enquiry. This notice, referring to both premises, read:

> "*Notification to attend a disciplinary enquiry.*
>
> *This serves to confirm that striking workers prevented both access and exit of vehicles from the companies premises between 07h30 and 16h45 on 26 March 1998.*
>
> *In response thereto, the company applied for and was granted an urgent court interdict (case no. J639/98) interdicting and restraining employees of Meterofile, from, inter alia, engaging in any blockade of, obstruction of or interference with the entrance and/or exits of our business premises, or with other employees, contract employees, customers and suppliers, or any acts of intimidation. The said obstruction resulting from the worker blockade is an act of strike related misconduct. In addition thereto, and at the time of writing this memorandum, the strikers continue to be in breach of the court interdict which has been served on them.*
>
> *As a consequence of the above, a disciplinary enquiry will be held at Metrofile Gowie on Monday 30th March 1998 at 13h00.*
>
> *The object of this enquiry will be to investigate the following charges against the striking workers.*
>
> *1. Obstruction of entrance gate on 26 March 1998.*
> *2. Partial obstruction of gateway on 27 March 1998.*
> *3. Failure to comply with the urgent interdict served on strikers at approximately 08h40.*
>
> *Shop stewards are requested to attend the disciplinary enquiry on behalf of all striking workers at which time they will be given an opportunity to motivate why strikers found guilty of the above charges should not be dismissed.*
>
> *In the event that you choose not to attend this enquiry, the enquiry will continue*

in your absence."

[13] The shop-stewards refused to accept the notices and also refused to attend the disciplinary enquiry. The refusal was articulated in a letter dated 30 March 1998 from the first appellant to the respondent and reads:

"*Re : Industrial action at Metrofile/intended disciplinary hearings.*

It has been brought to our attention that your Company has applied to the Labour Court for an interdict and further that the interdict was granted by the Labour Court on 26th March 1998.

We are further informed that over and above this action, the Company intends holding disciplinary inquiries today at 13h00 in terms of your letter dated the 27th March 1998. It is our belief as the Trade Union that this action by yourselves is intimidatory and tantamount to undermining the right of employees to participate in a protected strike. We believe also that this is harassment and is aimed at interfering with a protected strike.

To this effect, we inform yourselves therefore that employees will not be attending those hearings as scheduled because of the reasons submitted above. Should the Company want to continue with the hearings, this can only be done after their strike has been resolved and not during the strike. Take further note that our letter dated the 26th March 1998 still has relevance."

[14] The respondent sent a further letter to the shop-stewards urging them, to reconsider their attitude and attend the disciplinary enquiry. When they failed to do so the respondent postponed the enquiry to 14h30 on 31 March 1998 and advised the appellants accordingly. On that day the enquiry continued under the chairmanship of a certain Healy in the absence of all the strikers and their shop-stewards. That enquiry was concluded on 1 April 1998. Healy handed down his verdict on 2 April 1998. Fifty six Gowie and seven Crown employees were found guilty on the three charges set out in the notice. The seven Crown employees were found to have been present at Gowie on the 27th and to have participated in "*the refusal to immediately comply with the interdict once served, and also to have been party to subsequent interference and obstruction*" at Gowie. The rest of the Crown employees were only found guilty on the charge regarding the obstruction of entrances on 26 March 1998. Healy must have

based this finding on evidence given by Graham Wackrill, the respondent's deputy managing director, that after he served the interdict at Crown on his return from Gowie, the strikers obeyed it and ceased the blockade.

[15] In relation to sanction Healy was of the view that the misconduct of the Crown strikers, on the one charge they were found guilty of, was less serious than that of the Gowie strikers. He therefore recommended that they receive final written warnings. He was of the view that the conduct of the Gowie strikers was ongoing and purposeful, and given that they had been found guilty on three charges, he recommended that they, and the seven Crown employees who were with them, be summarily dismissed.

[16] On 1 April 1998 the respondent issued further notices to attend disciplinary enquiries on 7, 8 and 9 April respectively to B Lawson, D Lewis and M Tlabiyane all from Crown. They were charged with the obstruction and partial obstruction charges set out in the initial notice as well as further charges relating to individual misconduct. The additional charges against Lawson and Tlabiyane respectively were:

> "*3. Intimidation in that at approximately 16h00 on the 27th March 1998 you threw a stone at Elizabeth Ngwenya which narrowly missed her. You also shouted to Moses Tlabiyane, who had a firearm to 'Shoot the bitches, Shoot the scabs'. He then fired shots into the air*. "

and

> "*3. Intimidation in that at approximately 16h00 on the 27th March 1998 you fired shots into the air after B Lawson had shouted at you to 'Shoot the bitches, Shoot the scabs'*." *The people being referred to were Elizabeth Ngwenya and Patience Nyakane*."

The additional charge against Lewis was:

> "*3. Intimidation in that at approximately 14h00 on the 26th March 1998 you threw a rock at Carl Bergover which hit him on the left thigh*."

[17] On 6 April 1998 the respondent gave notice to four other Crown employees

charging them with participating in an assault on a non-striking employee. Their resultant dismissal was conceded to be fair, in the Court a quo, and nothing more will be said about their dismissal.

[18] Healy chaired the enquiries held against Lawson, Tlabiyane and Lewis who also failed to attend the enquiries. Lawson and Lewis were found guilty of all three charges. Tlabiyane was found guilty of charges 1 and 3. Healy recommended that all of them be summarily dismissed. All of Healy's recommendations of dismissal were given effect to by the respondent.

[19] It is not in dispute that four Crown employees, Mokhethi, Ncube, Malepa and Lebakeng were present at the Gowie main entrance after the interdict was served on the strikers on the 27th. It is also not in dispute that they were not dismissed.

[20] The Court a quo found that on the probabilities the respondent had established that the collective activity of the striking Crown employees could legitimately be differentiated to that of the Gowie striking employees. In this regard the court said:

> "*In the result, and save for the actions of certain of the Crown employees who travelled to Gowie after the order had been served there, I accept as having been established on the probabilities, that the collective activity of the striking Crown employees may legitimately be differentiated, in the context of the degree and extent of their misconduct, from that of those at Gowie.*"

[21] The Court a quo further concluded that the appellants' allegation of unfair selective dismissal had not been established by them. In this regard the Court stated:

> "*I am also prepared to accept as entirely credible the Respondent's submission regarding the fact that certain Crown employees who joined the Gowie strikers were not subjected to disciplinary action whilst others were, that this was because those not charged could not be positively identified in the video recording. For those reasons, I conclude that the allegation of unfair selective dismissal has not been established by the Applicants.*"

[22] The Court a quo also found that the dismissals of Lawson and Tlabiyane were substantively justified. With regard to Lewis the Court a quo found that whilst the

incident of individual misconduct proffered against her, might not on its own, have justified the extreme sanction of dismissal, her dismissal was also substantively justified because she had also been found guilty of association with and participation in the unlawful blockade of the respondent's Gowie premises on the 27th.

[23] Mr Van der Riet, appellants' counsel, submitted that the differentiation between Gowie and Crown cannot be justified on the evidence. He submitted that, had all the strikers at both premises been dismissed for their conduct on the 26th and 27th, the appellants would not have pursued the matter. In this regard counsel conceded that it was not acceptable to obstruct and interfere with an employer's normal business activities. He submitted that on the facts of this case employees at both premises were guilty of totally blockading the respondent's entrances on the 26th but not on the 27th. Counsel submitted that on this factual basis the respondent had to justify the dismissal of the Gowie and not the Crown strikers for the events of the 27th. He further submitted that the respondent had perpetrated an unfair selective dismissal when one considered the situation of the four Crown employees who, he submitted, clearly associated themselves with the conduct of the Gowie strikers and some Crown employees after the service of the interdict, but were not dismissed whilst others were.

[24] Regarding Lawson, Lewis and Thlabiyane, Mr Van der Riet submitted that their dismissals could also not be justified. He submitted that the Court a quo provided no basis for its finding that these dismissals were justified and that no reliance could be placed on the respondent's witnesses in this regard. Regarding Lawson he submitted that the alleged victim of the stone throwing incident, Elizabeth Ngwenya, did not testify and that Patience Nyakane, the person who testified about it, never mentioned the incident in her evidence in chief.

[25] Mr Pretorius, counsel for the respondent, submitted that the Court a quo was correct in upholding the dismissals. He submitted that it was inappropriate to simply ignore the events of the 26th as the individual appellants were charged with the events of that day as well. He submitted that the simple fact of the matter regarding the events of the 27th after the service of the interdict, is that the Gowie strikers did not comply whilst the Crown strikers did. Counsel submitted that the question before the Court a quo was whether there was a fair reason to dismiss the Gowie strikers i.e. looking at all the evidence of the events of the 26th and 27th. He submitted that no basis had been laid by the appellants for the proposition that the respondent deliberately and consciously embarked on a process aimed at dismissing the Gowie and not the Crown strikers.

[26] Mr Pretorius relied largely on an unreported judgment in *Imperial Car Rental (Pty)*

Ltd (Jet Park) v Transport and General Workers Union and Others (LAC) Transvaal Division case no: NH11/2/22436. In that case employees who had embarked on a strike, barricaded the gates to the employer's premises and remained inside the premises singing and toyi-toying. The employer dismissed them after three hours when they failed to remove the barricades. The Court in that case held that, while the strike was in progress, the employer was also entitled to continue conducting its business. The Court held that by barricading the employer's premises, the strikers had committed misconduct of a serious nature.

[27] It is correct that the mass dismissal of Gowie and some Crown strikers was on the basis that, in addition to other misconduct, they defied the interdict served on them in the morning of 27 March 1998. The Court a quo specifically found that the collective activities of the Crown strikers could be legitimately differentiated, when one considered the degree and extent of their misconduct, from that of those at Gowie. The Crown strikers, save those who were at Gowie, were not dismissed since the respondent contended that they complied with the interdict after it was served on them.

[28] Wackrill gave contradictory evidence as to when he served the interdict on the Crown strikers. He testified at the disciplinary enquiry that the Crown strikers continued with the blockade on the 27th until after he had returned to Crown from Gowie later that morning and served the interdict on them whereafter they ceased the blockade completely. (I interpose to say that that must have been well after 10h30 that morning) In the Court a quo however, he initially testified, in chief, that Eedes, the respondent's operations manager had come to Crown to serve the interdict, in his absence.

[29] In cross-examination, however, Wackrill was extensively questioned about the service of the interdict at Crown. He adopted the position that he, and not Eedes, served the interdict at Crown early in the morning before he left for Gowie. He was, however, unable to explain how he had come into possession of a copy of the interdict. At some stage he thought that he had received it by telefax. In re-examination Wackrill testified that his final version on the service of the interdict at Crown was that he served the interdict before he left for Gowie that morning.

[30] The Court a quo found that the dispute about the service of the interdict at Crown did not merit detailed analysis as the respondent's evidence was emphatic that it was served at Crown and that, on becoming aware of the interdict, the strikers complied with it by ceasing the blockade completely. On a reading of the Court a quo's judgment on this aspect it is not clear on what basis the Court a quo found that the respondent's evidence was emphatic that the interdict was served at Crown. The Court a quo did not deal with the contradictions between Wackrill's version before the disciplinary enquiry that he served the interdict after he returned from Gowie, and that in court that he served it early in the morning before he left for Gowie as well as his general uncertainty about what actually transpired.

[31] I can find no basis on which Wackrill's testimony can be relied upon about the service of the interdict at Crown. Eedes, placed Wackrill at Gowie from early in the morning until after 10h30 on the 27th. Wackrill's testimony about compliance with the interdict is based on his observation of a "*couple of minutes*", before he left for Gowie. He testified that, when he left Gowie "shortly after lunch" he went to the airport where he took a flight to Durban. (This, incidentally, renders his version in the disciplinary enquiry incredible.) He conceded that he was not aware of what transpired at Crown after he left for Gowie. No one else testified for the respondent about that situation. It is also not correct, as found by the Court a quo, that Wackrill's version was not seriously challenged. He was challenged in cross-examination about the incredible nature of his versions and the version of Lawson, in particular, was put to him. Wackrill's version is, in any event, displaced by Lawson's testimony dealt with hereinafter, that no service took place.

[32] If anything Lawson's testimony about the situation at Crown is, to my mind definitive. She testified that before she left Crown for Gowie that morning there had been no service of the interdict. She specifically denied that Wackrill had served it. She also testified that on her return to Crown later that morning she addressed the Crown strikers and informed them about the interdict, and that the information did not have any effect on their conduct. She testified that they continued singing and dancing and she actually saw them, at about lunch time prevent a certain Cornell Thompson from leaving the premises. No rebuttal evidence, on this aspect in particular, was adduced by the respondent.

[33] Lawson's testimony points to no service of the interdict at Crown having taken place. It further points to the Crown strikers reacting in similar fashion to the interdict, after they were informed of it, as did the Gowie strikers. In fact if she is to be believed

on this aspect, and I can see no reason why not, the Crown strikers at least, in one instance, prevented a non-striker from leaving the premises well after they became aware of the interdict. Lawson's testimony contradicts Wackrill's version given in the Court a quo that he served the interdict on the Crown strikers before he left for Gowie on the morning of the 27th. Incidentally, this version also contradicts Wackrill's version given at the disciplinary enquiry that he served the interdict on the Crown strikers after he returned from Gowie that morning. There is further the issue of a sheriff's return in the record suggesting that the sheriff served the interdict at Crown at 08h30. No reliance appears to have been placed on such return in the Court a quo. Even, however, if such service occurred, Lawson's evidence is clear that the strikers at Crown thereafter acted in defiance of the interdict.

[34] Clearly, in my view, the finding by the Court a quo that "*the collective activity of the striking Crown employees may legitimately be differentiated, in the context of the degree and extent of their misconduct, from that of those at Gowie*", is not supported by the evidence in this case. There is simply no factual foundation on which any differentiation can be based. The absence of a basis on which to differentiate therefore placed the strikers at both premises on the same footing and similar treatment was required under the circumstances.

[35] Our law requires that employees who have committed similar misconduct should not be treated differentially. In *National Union of Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) Goldstein J had occasion to consider the fairness of an offer of re-employment with loss of allowances linked to length of service. The learned judge reasoned, in that case, at 1029G-H that the offer of re-employment was unfair because its acceptance would have resulted in employees losing allowances that depended on length of service. This, the learned judge found, would mean that employees were being unequally punished.

[36] This principle, also referred to as the "*parity principle*", was aptly enunciated in *National Union of Metalworkers of SA & Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) where the Court stated at 1264A - D:

> "*Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey 'The Dismissal of Strikers' (1990) 12 ILJ 213 at 229-230). So it has been held by the English Court of Appeal that the word 'equity' as used in the United Kingdom statute dealing with the fairness of dismissals, 'comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment'* ***(Post Office v Fennell (1981) IRLR 221 at 223****). The parity principle has been applied in numerous judgments in the Industrial Court and the*

L A C in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice."

[37] In *Post Office v Fennel* [1981] IRLR 221 223 (referred to in *Henred Fruehauf*) the following was said:

"*It seems to me the expression 'equity' as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an Industrial Tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal.*"

[38] *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC)this Court was confronted with a case where an employer had dismissed some employees but issued a warning to another employee who was involved in the same disciplinary infraction. The Court (per Nugent AJA) stated at 1961 A

"...*in the absence of material distinguishing features equity would generally demand parity treatment*" *and further at D - F* "*Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but were two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way …. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.*"

[39] The principle as enunciated in the cases above applies with equal force to the unfair selective dismissal claim advanced by the appellants. Furthermore at the

disciplinary enquiry Wackrill himself stated that Mokhethi was one of those "who disobeyed the interdict of the 27th ". Yet Mokhethi was not dismissed.

[40] Whilst no bias can be imputed to the respondent for failing to dismiss the four Crown employees and in particular Mokhethi, the fact of the matter is that they were in no different position to that of the other Crown employees present in the blockade at Gowie who were dismissed. The respondent's contention that they were not selected because they did not form part of the so-called second circle from which employees were identified for discipline and the Court a quo's conclusion based thereon, is not supported by the evidence. The four employees are clearly visible on video, actively associating themselves with the conduct of everyone else there. Wackrill, in fact confirmed this fact at least in regard of Mokhethi, to Healy during the disciplinary enquiry.

[41] It appears justified therefore to conclude that without a factual basis, or any other basis for that matter, by differentiating between the Gowie strikers on the one hand and the Crown strikers on the other, the respondent acted unfairly in dismissing the Gowie strikers. The same goes for the respondents' dismissal of some Crown employees and not others who were engaged in similar conduct at Gowie. It must be mentioned that reliance on the Imperial Car Rental case does not advance the respondents' cause in view of the absence of a basis on which to legitimately differentiate between the Gowie and the Crown employees present at Gowie on the 27th . This is clearly a situation where the respondent was enjoined to have acted consistently. Furthermore the respondent's conduct, of selecting some Crown employees for dismissal can be viewed as having been arbitrary to say the least. The unfairness in the disparity in treatment lies in the inconsistency thereof. In *Saccawu and Others v Irvin and Johnson* [1999] 8 BLLR 741 (LAC) (referred to by Nugent AJA in *Cape Town City v Masitho & Others*) this Court reiterated that consistency is an element of disciplinary fairness.

[42] I must also mention that on a conspectus of all evidence regarding the events of the 26th and 27th it is clear that differential treatment between the conduct of the strikers at Gowie and Crown was misguided. The evidence from the respondent's witnesses demonstrates quite clearly that the conduct of the Crown strikers, on the 26th in particular, was of a more violent nature. In this regard it is so that almost all the reports of intimidation, eviction of non-strikers, violence and assaults on non-strikers emanated from Crown. It is due to this fact that all employees charged with individual acts of misconduct including the four employees dismissed for a violent assault on a non - striker, came from Crown and not from Gowie. In the circumstances the conclusion

must be that the dismissal of the Gawie and seven Crown strikers was substantively unfair.

[43] It remains to consider the substantive fairness of the dismissal of the three Crown employees for specific acts of misconduct. Lewis was found guilty on three charges. The first two charges were the same charges on which the Gowie strikers were also found guilty. The third charge on which she was found guilty related to an alleged stone-throwing incident involving a certain Carl Bergover. Regarding this charge the Court a quo found that the stone-throwing incident, on its own, did not justify the extreme sanction of dismissal. The Court a quo was correct in this regard as the conduct complained of was not serious enough to warrant dismissal. It is clear that Bergover suffered no more than a measure of discomfort. Clearly therefore, because of the view I take of the dismissals, the dismissal of Lewis cannot be sustained.

[44] Lawson and Tlabiyane were also dismissed because of the events of the 26th and 27th. Lawson was furthermore charged with intimidation in that she threw a stone at Elizabeth Ngwenya, a non-striker. It was also alleged that she shouted at Tlabiyane, who had a firearm, to "*shoot the bitches* shoot the *scabs".* Tlabiyane is alleged to have responded by firing shots in the air. The third charge against Tlabiyane related to this shooting incident.

[45] I am of the view that the Court a quo properly gave consideration to all the evidence relating to Lawson and Tlabiyane in concluding that on the probabilities they had behaved in an unbecoming manner, particularly Lawson as a shop-steward. Significantly, both Lawson and Tlabiyane admitted that during the blockade at Crown a shot was fired in the air. On a conspectus of all the evidence and also considering that the appellants' challenge to the respondent's witnesses was based on a quest to establish contradictions and improbabilities, their dismissals were substantively fair. After all, violence even during a strike is abhorrent and completely unacceptable and should not be countenanced.

[46] In view of the aforegoing I would uphold the appeal regarding the dismissal of the Gowie employees, the seven Crown employees and Lewis. I would dismiss the appeals by Lawson and Tlabiyane.

[47] Inow deal with the issues of two employees, Mchunu and Xulu, in respect of which very little argument was advanced to us during the hearing of the appeal. Immediately prior to the termination of the trial the Court a quo was referred to exhibit "D", which was handed in by agreement between the parties, and asked to rule "whether or not (Mchunu and Xulu) are properly applicants ... whether or not they are included". I understand this request to mean that the Court a quo was required to determine whether Mchunu and Xulu ought to be granted the relief sought by the other employees

who were properly before it.

[48] It is common cause that both these employees were advised on 3 September 2000 (when the adjudication in the Court a quo started) that their names did not appear on the list of individual applicants. No mention of Mchunu or Xulu is made in the Court a quo's judgment, and the learned judge appears to have overlooked them.

[49] Xulu's case can be disposed of briefly. It appears from annexure "D" that his dispute with the respondent had nothing or little to do with the issues before the Court a quo and now before us. Furthermore, there are disputes of fact regarding his case which cannot be resolved on the limited information before us. Accordingly this Court cannot assist him.

[50] However, Mchunu's situation appears to involve an issue we can consider. He worked at Gowie and was on strike on 27th March 1998. He was away from work from the 28th until 7 April 1998. Upon his return he learnt of the dismissals of the strikers and regarded himself as having been similarly dismissed. Though his name was never before Healy, the respondent also treated him as having been dismissed by demanding that he return all company property in his possession and also by handing him his UIF card and a cheque for R600.

[51] Mchunu, with fifteen others appealed against their dismissals. The appeals were considered and dismissed. I can only surmise that Mchunu was treated like all other Gowie strikers; hence the consideration of his appeal. When he left on 28 March and returned on 7 April 1998 the strike had not been called off. It appears justified therefore to conclude that the omission of Mchunu's name from the list of individual applicants was inadvertent and that for all intents and purposes his situation is similar to the Gowie

strikers who were dismissed. He should therefore be treated as one of the individual appellants before us.

THE CROSS-APPEAL

[52] The Court a quo held that the dismissal of the individual appellants was procedurally unfair. This conclusion was based on the Court's reasoning that the action by the respondent to institute disciplinary action during the strike was not based on any valid reason. The Court opined that there was no valid reason why the respondent could not wait until after the strike.

[53] The purpose of a protected strike is to enable employees to engage in a form of power play with the employer with a view to influencing the employer into offering better conditions of employment. What this entails in practice is that employees are entitled to withdraw their labour and are also entitled to engage in pickets in furtherance of their strike action. What is also clear however is that the right to engage in a protected strike is not a licence to engage in misconduct.

[54] An employer has the right to institute disciplinary action at any time against employees engaging in misconduct particularly of a criminal nature as was the situation in this case. At the end of the day employees engaging in protected strike action need to know that they may only engage in legitimate activities intended to advance the course of their protected strike. Fairness also demands that an employer should not wait for a strike to end to institute disciplinary action for strike-related misconduct. By its nature illegitimate strike-related misconduct if unchecked, affords strikers an unwarranted advantage. Due to the illegitimacy of the misconduct it cannot be expected of an employer to tolerate it indefinitely.

[55] The right to be afforded a fair hearing before one's dismissal is indeed an integral part of our law. This right is explicitly recognised by the Act and has been restated in numerous decisions of this Court. However once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to

attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee must be prepared to accept the consequences thereof, one of which is that the enquiry will proceed in his absence and adverse findings may be made. Of course, if employees choose to do so, they are free to send representatives to the inquiry who may do what is necessary to advance the case of the employees including the cross- examination of witnesses. Furthermore, employees may also make written representations to the person presiding at the inquiry. Employees may in practice choose to absent themselves from an enquiry when it would be disruptive to the strike for them to attend it in person. We were not referred to any provision of the Act which either expressly or by necessary implication is to the effect that an employer may not convene a disciplinary inquiry against an employee taking part in a protected strike while such strike is in progress. In fact there is, as far as I am aware, no such provision in the Act. On the contrary, there are provisions in sec 67 which were clearly designed to confer protection on a strike that complies with the Act as well as on non – criminal conduct that is resorted to in contemplation of or in furtherance of a protected strike. If the Act sought to grant employees taking part in a protected strike temporary immunity from disciplinary action or disciplinary inquiries while during the progress of a protected strike, it would in my view have said so.

[56] Clearly therefore the respondent, in view of its allegations that the strikers were engaged in misconduct, was entitled to institute disciplinary enquiries against the perpetrators during this strike. It appears justifiable therefore to conclude that the Court a quo misdirected itself when it found that it was procedurally unfair for the respondent to institute the disciplinary enquiry during the strike.

RELIEF

[57] It remains to consider the relief, if any, to be awarded to the individual appellants in view of the substantive unfairness of their dismissal. Section 193(1) of the Act provides that where a dismissal is found to be unfair reinstatement or re-employment may be ordered from any date, not earlier than the date of dismissal, or compensation. This section in my view provides that where reinstatement or re-employment is to be ordered a discretion must be exercised regarding the extent thereof. Section 193(2) provides that where a dismissal is found to be unfair substantively, reinstatement or re-employment must be ordered unless this is not desired or is not feasible and where the dismissal is unfair procedurally.

[58] The dismissal of the individual appellants in casu has been found to have been unfair substantively and they desire reinstatement. No facts have been placed before us, nor before the Court a quo, regarding the inappropriateness of a reinstatement or re-employment order. The substantive unfairness of the dismissal of the individual appellants lies in the inconsistent conduct of the respondent in differentiating between the misconduct of the Gowie and Crown strikers. It appears justified in the circumstances of this case, to grant reinstatement. Mr Van der Riet submitted that should this Court decide to grant reinstatement such reinstatement should be with effect from the date of the order of the Court a quo. There is no reason not to accede to this request. As to costs it appears to me that in all the circumstances of this case it would not be appropriate to award the appellants any costs on appeal.

[59] I would therefore, under the circumstances, make the following order:

1. The appeal succeeds;

2. The cross appeal succeeds.

3. The order of the Labour Court is set aside and is replaced with the following:

> "*1. The dismissal of the second to further applicants including Mchunu and save for B Lawson and M Tlabiyane, is found to be substantively unfair but procedurally fair.*

2. *The second to further applicants including Mchunu, save for B Lawson and M Tlabiyane, are reinstated from the date of this order.*

3. *There is no order as to costs.*"

4. There is no order as to the costs of the appeal, or the cross-appeal.

_____
D MLAMBO
ACTING JUDGE OF APPEAL

I agree.

_____
RMM Zondo
Judge President

I agree.

_____
EL GOLDSTEIN
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	Adv J.G. Van der Riet SC
Instructed by:	Cheadle Thompson & Hayson
For the Respondent:	Adv P.J. Pretorius SC
Instructed by:	Petersen Hertog & Associates
Date of Judgment:	19 December 2003