IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 43/16

In the matter between -

NATIONAL TRANSPORT MOVEMENT

(NTM) **First Appellant**

M TAU and others **Second Appellant**

and

PASSENGER RAIL AGENCY OF SOUTH

AFRICA LIMITED (PRASA) **Respondent**

Heard: **16 February 2017**

Delivered: **21 November 2017**

Summary: Dismissal based on derivative misconduct – union embarking on protected strike to assert organisation rights – employer's train coaches burning down – employer suspecting that the train burnings could be connected to the striking workers as a result of the comments made by three union officials at the gatherings alleging inciting the burning of trains – employer calling employees to make representations as to why they could not be dismissed – union collective representation on behalf of its members rejected by the employer while some individual representation accepted – principle related to derivative misconduct restated. Held that employer failed

to prove that the train burnings were committed by the strikers or person's associated with the strikers. Nor has the employer been able to prove that the dismissed strikers had any actual knowledge of the train burnings or the persons responsible for them. Moreover, the termination letter makes it clear that the real reason for dismissing the employees was not their failure or refusal to disclose information about the perpetration of the train burnings. This demonstrates that the employer had invoked the principle of derivative misconduct as a means to justify the dismissals after they had taken place – and that it was not the true reason for dismissing the employees. Held further that the employer's reliance upon the principle of derivative misconduct was misplaced and unjustified. In essence, the striking employees were dismissed not for derivative misconduct but rather for "collective misconduct", a notion which is wholly repugnant to our law, not only because it runs counter to the tenets of natural justice but also because it is incompatible with the established principle of innocent until proven guilty.

Rationality and reasonableness of the evaluation process– employer's acceptance of the individual worker's representations as valid and persuasive which said far less than the union's collective worker's rendered the evaluation process so irrational that there can be no other conclusion but that the invitation to the striking workers, to make representations, was a farce designed to rubber-stamp the employer's intention to dismiss.

Consistency in the application of dismissal – principle restated - the penalty of dismissal was not applied consistently to all the employees who participated in the strike. This practice is clearly inconsistent with the requirement of consistency as contemplated in item 3(6) of the Code of Good Practice for Dismissals. Appeal upheld – Labour Court's judgment set aside – employees' dismissal procedurally and substantively unfair- employee's reinstated.

Coram: Tlaletsi DJP, Landman JA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

[1] This appeal concerns the dismissal of over 700 employees, during a protected strike, by the Passenger Rail Agency of South Africa Limited ("PRASA"), the respondent in the appeal. The dismissed employees were members of the appellant, the National Transport Movement ("NTM"). NTM challenges the dismissals on the basis that they were automatically unfair in terms of s 187 of the Labour Relations Act, 66 of 1995 ("LRA"), alternatively procedurally and substantively unfair in terms of s 186 thereof. The Labour Court (per Mokoena AJ) found that the dismissals were not automatically unfair, and that based on the principle of derivative misconduct, the dismissal of the employees were substantively and procedurally fair. The appeal lies against the judgment of the Labour Court with its leave.

[2] At the time of the dismissal of the employees, PRASA comprised three divisions: PRASA Rail (responsible for passenger transport by rail), PRASA Technical (responsible for infrastructure) and PRASA Crescent (responsible for facilities management). In addition, there were two subsidiaries – Intersite (responsible for business development) and Autopax (responsible for passenger transport by road). Metrorail is a subdivision of PRASA Rail. Sosholoza Meyl is not part of Metrorail. The dismissed workers were employed by PRASA at Metrorail,[1] PRASA Crescent and Sosholoza Meyl.[2]

Background

[2] The history of this matter begins in February 2012, when the South African Transport and Allied Workers' Union (SATAWU) embarked upon a strike in support of their demand that PRASA Group CEO, Mr Lucky Montana, and other senior PRASA officials be suspended and investigated for tender

[1] Metrorail is a subdivision of PRASA Rail.
[2] Sosholoza is not a part of Metrorail.

irregularities. The issue giving rise to the strike was not resolved and SATAWU reported its contention relating to Mr Montana's and other senior managers' alleged corruption to the office of the Public Protector. PRASA alleged that during that strike, SATAWU's members were responsible for numerous trains and coaches being burnt. This was denied by SATAWU. PRASA alleged that certain SATAWU's members, who were identified as being in the strike were dismissed. It, however, turns out that these employees were later reinstated. PRASA also alleged that certain SATAWU's leaders were arrested during the strike for allegedly inciting violence. These charges were, however, dropped for lack of evidence.

[4] In the ensuing months, there were allegations of collusion between senior officials and office bearers of SATAWU and senior management of PRASA. This resulted in many SATAWU's office-bearers and members leaving SATAWU. They formed a new union. Initially, it was called "the National Transport and Allied Workers' Union (NATAWU), but when the Registrar of Labour Relations refused to register the union with that name, the union became known as "NTM". NTM was registered in terms of the LRA on 27 September 2012.

[5] Following upon its registration, NTM sought to obtain organisational rights from PRASA. Over the period 28 September 2012 to 25 January 2013, it handed in 3190 stop orders. When NTM received no response to a request for a meeting to discuss NTM's exercise of organisational rights, NTM declared a dispute with the Commission for Conciliation Mediation and Arbitration (CCMA). This resulted in a written settlement agreement between NTM and PRASA dated 30 October 2012. In terms of the settlement agreement, the parties undertook to meet by no later than 2 November 2012 to conduct a verification exercise at PRASA's premises. NTM sought the assistance of the CCMA in the verification process. The CCMA was not available until the new year to assist with the process. While PRASA was content with the conciliation process taking place in the new year, MTN was not. It, therefore, referred a new dispute to the CCMA relating to organisational and bargaining rights.

[6] The new dispute was conciliated on 14 December 2012. It resulted in the issue of an advisory arbitration on 14 January 2013. The award recommended, amongst other things, that PRASA should finalise the verification process within 21 days from the date of the award. In the event of a dispute relating to membership, it recommended that PRASA should not make any trade union subscription deductions, and nor should it pay over the money to any of the unions involved until the verification exercise had been finalised.

[7] On 17 January 2013, the CCMA tried to facilitate the verification terms of reference. NTM's position at the meeting was that it wanted to strike in order to ensure that the verification exercise started, as it was not confident that PRASA would start that exercise any time soon. NTM was willing to consider calling off the strike if the verification exercise started. However, PRASA's position was that the verification exercise would not start until the strike notice was withdrawn. In a letter dated 21 February 2016, PRASA informed both NTM and the CCMA that it was "*withdrawing its request … to assist with facilitation and mediation of the verification process*".

[8] Following upon the issue of the strike notice, PRASA and Metrorail, in particular, took the view that the strike was unprotected. On 17 January 2013, Metrorail issued an e-mail entitled "NATAWU PLANNED STRIKE IS UNPROTECTED". The basis for the claim was that NTM "*did not have a strike certificate and registered members*". The e-mail stated that the strike was unprotected and that any employee, who participated in it, would face harsh consequences. On 18 January 2013, employees who embarked upon the strike action received notices from PRASA indicating that the strike was unprotected. It gave the employees 48 to return to work, failing which PRASA would "*take appropriate steps*". Some days later, PRASA established that the strike was "protected", but it failed to advise the employees of this.

[9] On 27 January 2013, PRASA applied on an urgent basis to the Labour Court for an order interdicting and restraining NTM, on behalf of its members, and Mr Ephraim Mphahlele (the NTM President), from *inter alia* damaging its property and assaulting or threatening non-striking staff. The Labour Court

granted PRASA the interim relief sought. However, on 12 April 2013, the interim order was struck off the court's roll and NTM was awarded the legal costs.

[10] Mr Ronnie Khumalo ("Mr Khumalo") (Metrorail: Acting Head of Department: Protection Services), Mr Isaac Nemagovhani ("Mr Nemagovhani") (Metrorail: Area Security Commander - East Rand), Mr Justice Mukwevho ("Mr Mukwevho") (Area Security Commander), and Ms Kulu (Metrorail: Gauteng Provincial Manager) testified on behalf of PRASA in relation to the 2013 strike.

[11] Mr Khumalo testified that: Mr Vilane of NTM addressed the striking workers on their rights and the corrupt activities of Mr Montana (the Group CEO). Mr Mphahlele (the NTM President) and Mr Craig Nte (NTM's General Secretary) joined Mr Vilane at about 13h00. They demanded to meet with the Group CEO, who was not present. Before going into the building, they accused him of undermining NTM, which was a big union. Following upon an argument with Mr Mantsane (the Group's Head of Security), Mr Mphahlele and Mr Shabangu left the building. When outside, Mr Mphahlele took the microphone from Mr Vilane. He was angry with Mr Montana and PRASA and repeatedly stated that Mr Montana was corrupt. Mr Mphahlele informed the striking workers that if Metrorail did not accede to the demands for the removal of Mr Montana, and for the recognition of NTM, then they will stall the Metrorail. In addition, he encouraged the strikers to make it difficult for Metrorail to operate. He stated that they had the potential to stop the services and must ensure that there were no train movements. He said that if Mr Montana did not accede to addressing the strikers then they must not allow commuters to board the trains. In addition, he said that the only time that Metrorail would listen was when they brought the service to a standstill. He thereafter left in a RAV4 and drove to Pretoria to address the workers there. Mr Khumalo followed him to Pretoria. In Pretoria, Mr Mphahlele gave the same message – '*Ensure that the service comes to a standstill, ensure that non-striking employees join them, and that Mr Montana is removed*'.

[12] Mr Nemagovhani testified that: on 18 January 2013, Mr Vilane addressed the strikers about the corrupt conduct of Mr Montana and Mr Mantsane (PRASA's General Manager) and encouraged the strikers to bring Metrorail's services to a standstill "*by all means and by all ways, even if it means burning the trains".* In addition, Mr Mphahlele said that South African Airways had recognised NTM, but that PRASA was being stubborn by not recognising it. Therefore, in order for PRASA to recognise NTM, they would have to bring PRASA's services to a standstill by the burning of trains. Before leaving the gathering to go to Pretoria, Mr Mphahlele said that he will relay the same message to the strikers in Pretoria.

[13] Mr Mukwevho testified that: Messrs Vilane, Nte and Mphahlele addressed the gathering on 18 January 2013. Although Mr Vilane stated that the workers must make sure that the Metrorail services were brought to a standstill, he did not mention how that should be done. Messrs Mphahlele and Nte arrive at about 11h00 in a white SUV (small utility vehicle). Following upon the meeting with PRASA management, Mr Nte addressed the strikers by imploring them to make sure that the PRASA services came to a standstill, even if it meant burning the trains. Mr Mphahlele also advocated the burning of the trains when he addressed the strikers. He ended his address by informing the strikers that he will relay the same message to the members in Pretoria. Mr Vilane did not advocate the burning of trains.

[14] Mr Mphahlele and Mr Nte denied being at Umjanji House on 18 January 2013, which was the first day of the strike. They said that they were there on 21 January 2013 only. They also denied that Mr Vilane made statements advocating the burning of trains or forcing employees to join the strike. They emphasised how reckless it would have been of them to force employees to join the strike or advocate the burning of trains, as this would have exposed them to criminal prosecution.

[15] Mr Mathebula (a dismissed employee) testified that: neither Mr Mphahlele nor Mr Nte addressed the strikers in Pretoria on 18 January 2013. He said that they addressed the strikers with a loudhailer, on 21 January 2013, but denied that they made statements of the nature alleged by PRASA's witnesses. He

said that PRASA officials and the police were present, and that they recorded the events. Mr Rapulungoane (a dismissed employee) also denied that Messrs Mphahlele and Nte were in Pretoria on 18 January 2013.

[16] Four incidents of training burnings took place between 22 and 31 January 2013. They were at: Braamfontein Depot on 22 January 2013; Croesus on 22 January 2013; Kliptown on 25 January 2013; Braamfontein Station on 25 January 2013, and Hercules Station on 31 January 2013. Both Mr Khumalo and Mr Nemagovhani suspected that the train burnings "*could be connected to the striking workers*" as a result of the robust comments made by the three union officials at the NTM gatherings, but they could not say for sure that that was the case. Mr Nemagovhani conceded that this was pure conjecture.

[17] PRASA commissioned Advanced Forensic Services ("AFS") to conduct the forensic fire investigation into the train burnings. In respect of the train burnings at Braamfontein, Croesus, Kliptown and Braamfontein Station, the report concluded that the fires originated as a result of commuter violence. In respect of the train burnings at the Hercules Station on 31 January 2013, the report concluded that the train was set on fire "*probably as a result of riot, strike and/or public disorder …*".

[18] On 1 February 2013, Metrorail, Gauteng, addressed an invitation to the striking employees to make written representations. The invitation read:

> '
> **INVITATION TO MAKE REPRESENTATIONS: DISMISSAL**
>
> 1. You are hereby invited to make written representations and give reasons why you should not be dismissed with effect from Monday, 4 February 2013. You may elect to have your representations submitted on your behalf by the National Transport Movement. The representations must reach PRASA Rail by no later than 08h00 on Monday, 4 February 2013. The written representations should be submitted to PRASA Rail by either Telefax 011-7745083 Email: GautengCommand1@PRASA.com, or delivered by hand to Wits Metropark and Pretoria Station, Ground Floor, Reception Area.

2. The reason for your contemplated dismissals is based on the following:

2.1 You are currently participating in a strike by members of the National Transport Movement which commenced on 18 January 2013;

2.2 Since the strike began, there have been several incidents of sabotage of company property, and more specifically, the burning of trains and train coaches. The incidents of sabotage occurred at:

2.2.1 Braamfontein depot on 23 January 2013;

2.2.2 Croesus on 23 January 2013;

2.2.3 Kliptown on 25 January 2013;

2.2.4 Braamfontein station on 25 January 2013;

2.2.4 Hercules station on 31 January 2013.

2.3 PRASA Rail recently believes that the sabotage, which only started after the commencement of the strike, has been carried out by striking workers and/or persons acting in concert or association with striking workers, yourself included, as a means of putting unlawful pressure to PRASA Rail to accede to the unreasonable demands of MTN;

2.4 PRASA Rail has taken all reasonable steps to identify the individuals who torched trains and train coaches and damaged its property but has been unable to do so and cannot do so unless the striking employees identify the culprits;

2.5 PRASA Rail holds you and all striking employees jointly and severally responsible for the torching of trains and train coaches and intends dismissing you for this reason, unless otherwise dissuaded by your representations.

3. In the event that you elect not to submit any representations, PRASA Rail will make its decision regarding your contemplated dismissal without your input.'

[19] This invitation to make representations was apparently only sent to the dismissed employees who worked for Metrorail. It was not sent to dismissed employees who worked for PRASA Crescent or Shosholoza Meyl. In addition, not all the dismissed employees who worked for Metrorail were sent the invitation to make representations.

[20] On 4 February 2013, NTM brought an urgent application in the Labour Court in which it sought an order declaring the invitation letter to be unfair and unlawful, and to interdict PRASA from implementing the contents of its invitation letter. The Labour Court dismissed NTM's application. PRASA then extended the deadline for the making of representations to 7 February 2013.

[21] By letter dated 7 February 2013, NTM's attorneys provided a collective response to the invitation. NTM denied that their members had been involved in the acts of sabotage, including the burning of the trains, and it challenged PRASA's belief that the strikers were responsible for the train burnings. It also distanced itself from acts of ill-discipline and unlawfulness and offered both its assistance, and that of its members, to identify who was responsible. It finally declared that it was open to explore the need for oral representations. In addition to the collective response of NTM on behalf of the members, 23 workers at Metrorail made individual representations.

[22] A committee, chaired by Ms Kulu (Gauteng Provincial Manager for Metrorail), considered these representations. According to Ms Kulu, Metrorail rejected NTM's collective response on the basis that:

'50. We were surprised that the representations, when they finally arrived, consisted of an email from their attorneys, which on the one hand, denied the arson attacks, and at the same time, stated that the applicants were not involved. The problems with the email, and representations were the following:

50.1 The email does not say why the individual applicants are not submitting individual representations, given that each would have a different explanation of where they were on the dates on which the trains were burnt as listed in the invitation letter;

50.2 The email does not state that NTM held meetings with all employees given invitation letters and that each one has provided an explanation to NTM of where they were on the days and at the times in question; and

50.3 the email does not say that the attorneys consulted with the individual applicants either;

50.4I was aware that the strikers were meeting regularly, including the park across Jan Smuts Avenue and Pretoria Station and it would therefore have been fairly easy for them to prepare and submit individual representations.'

[23] On 8 February 2013, and a day after the NTM collective response was sent to Metrorail,[3] Metrorail dismissed the striking employees who did not provide individual responses, as well as those who provided responses that were not reasonably acceptable. The termination letter of the same date reads:

'1. You were invited to submit representations to PRASA Rail by no later than 08h00 on 4 February 2013 why you should not be dismissed due to the sabotage of trains and train coaches by striking members of the National Transport Movement;

2. PRASA Rail has considered the representations submitted on your behalf but these have been found to be unpersuasive;

3. Your employment is hereby summarily terminated with effect from 11 February 2013.'

[24] NTM referred an unfair dismissal dispute to the Labour Court on behalf of its dismissed employees. The Labour Court found that their dismissals were procedurally and substantively fair.

[3] There are no termination letters for dismissed workers from PRASA Cres or Shosholoza Meyl on record

The Labour Court judgment

[25] The Labour Court found that the dismissals were substantively fair because the members of NTM, who participated, in the strike breached their duty of good faith owed to PRASA by –

(i) remaining silent about their actual knowledge of the burning of coaches or about their actual knowledge of relevant information about the burning of the coaches or actual knowledge of the identity of individuals who torched the coaches;

(ii) failing to disassociate themselves from the arson when called upon to do so;

(iii) failing to take reasonable steps to help PRASA to identify the individuals who torched the coaches.

[26] The Labour Court found that the dismissals were justified on the following grounds:

(i) Derivative misconduct as the employees had failed, without justification, to disclose their knowledge of the individuals who torched the coaches;

(ii) The employees failed to provide an innocent explanation or to disassociate themselves from the burning of the coaches;

(iii) The employees preferred to make general collective representations through their union rather than providing individual explanations as invited to do by PRASA. This prevented PRASA from properly deciding whom to dismiss for the burning of its property.

[27] The Labour Court found that the dismissals were procedurally fair because they involved a large group of employees, who were given an

opportunity to be heard by being invited to make representations, and that PRASA decided to dismiss them only after applying its mind to the representations submitted by individual employees.

Derivative misconduct

[28] PRASA's contentions are broadly that the dismissals were fair because at the workers' gatherings, during the strike, NTM leaders advocated the burning of trains and that, subsequent to this, trains were burnt. This, so it contends, meant that the workers were associated with the strike. PRASA argues, in this regard, that although it was unable to identify the culprits, it justifiably adopted the view that the train burnings were carried out by striking workers or persons acting in concert or association with the striking workers or both. It, therefore, called upon the strikers to identify the culprits and to make written representations on why they should not be dismissed, as all the striking employees were held to be jointly and severally responsible for the train burnings. The strikers were warned that they would be dismissed if they failed to provide persuasive reasons in relation to why they should not be dismissed.

[29] PRASA accordingly relied upon the concept of derivative misconduct as justification for the dismissals of the striking employees. The principle of derivative misconduct may be relied upon by an employer where there is no direct evidence that the dismissed employees committed the primary misconduct that led to them being charged and dismissed. In the case of derivative misconduct, the employee is liable for a separate and quite distinct offence from the primary misconduct. The derivative misconduct is the employee's failure to offer reasonable assistance to an employer to disclose information about individuals who are responsible for the primary misconduct. The employee who is accused of derivative misconduct needs not associated with the primary misconduct.[4]

Onus of proof

[4] *TAWUSA obo TAU and others v Barplats Mine Limited (Crocodile River Mine)* [2009] 30 *ILJ* 2791 (LC) at para [29].

[30] Where the employer relies on derivative misconduct, the employer must prove on a balance of probabilities that the employee committed the misconduct. This would require the employer to prove the following main elements of derivative misconduct namely, the employee knew or must have known about the primary misconduct, but elected, without justification, not to disclose what he or she knew. The requirements of derivative misconduct were dealt with in *Western Platinum Refinery Limited v Hlebela,*[5] *(Hlebela)* where this Court held that the following considerations are relevant to derivative misconduct:

(i) The employee must have had actual knowledge of the wrongdoing, otherwise the blameworthiness cannot be attributed to him or her;

(ii) Non-disclosure must be deliberate;

(iii) The gravity of the non-disclosure must be proportionate to the gravity of the primary misconduct;

(iv) The rank of the employee may affect the gravity of the non-disclosure;

(v) While there is a general duty to disclose wrongdoing, the non-disclosure may also be affected by whether the employee was specifically asked for that information;

(vi) The employee needs not have made common purpose with the perpetrator;

(vii) An employee cannot be guilty of derivative misconduct on the basis of negligently failing to take steps to acquire knowledge of the primary wrongdoing.

[31] As was held in *Western Platinum Refinery v Hlebela*, it is not sufficient that the employees may possibly know about the primary misconduct. The employer must prove on a balance of probabilities that each and every employee was in possession of information or ought reasonably to have possessed information that could have assisted the employer in its

[5] [2015] 36 *ILJ* 2280 (LAC).

investigations.[6] The test implies that the employees must have been called upon to provide this information. And that "[w]ithout *prima facie* evidence that any of the employees did have information [about the principal misconduct]…one cannot conclude that the employee's failure to cooperate necessarily meant that they either did have or must have had something to hide".[7]

[32] It was contended on behalf of PRASA that the primary evidence points to the commission of arson on train coaches belonging to PRASA and that it is probable that striking employees, rather than non-striking employees or commuters, committed the arson. It argued that despite the absence of direct evidence, the dismissals are fair because the particular circumstances imposed on the dismissed employees a duty to speak – to say what they did or did not know – in order to assist in an investigation to protect PRASA's interests and assets. The failure of the dismissed employees to speak, so it contended, amounts to a breach of the duty to speak imposed on them by the implied contractual term of trust and confidence. In addition, PRASA contended that the failure of the striking employees to speak amounted to association with the arson and the arsonists.

Advocating the burning of trains

[33] The facts which PRASA contends gave rise to the duty to speak are broadly these: When Mr Vilane and Mr Nte addressed the union members at Umjanji House on 18 and 21 January 2013, they said that PRASA's services should be halted even if it meant burning trains. Two witnesses, namely Mr Nemagovhani and Mr Mukwevho testified that they heard union leaders call on striking workers to burn trains, and that the striking members demonstrated their approval by clapping in response.

[34] The testimony of these two witnesses in relation to what occurred on 18 and 21 January 2013 is, in my view, wholly unreliable and contradictory. Mr Khumalo, who was at the same workers' gatherings in Johannesburg and

[6] *NUM and Others v Grogin NO and Another* [2010] ILL 25713 (LAC).
[7] *NUM and Others v Grogin NO* (*supra*) at para [62].

Pretoria as Messrs Nemagovhani and Mukwevho, testified that Messrs Mphahlele, Nte and Vilane never advocated the burning of trains. To the contrary, Mr Nemaghovhani testified that all three of them advocated the burning of trains, while Mr Mukwevho testified that Messrs Mphahlele and Nte advocated the burning of trains, but he did not hear Mr Vilane do. Needless to say, there were material contradictions in the testimony of these three witnesses, even though each of them was supposedly in the immediate vicinity of the workers' gatherings at which Messrs Mphahlele, Nte and Vilane purportedly addressed the workers on either the 18th or 21st January 2013.

[35] By comparison, the evidence of Mr Mphahlele and Mr Nte was consistent and credible, and it was corroborated by two striking workers who were present at the workers' gatherings. It is unlikely, on the probabilities, that Messrs Mphahlele and Nte would have advocated the burning of PRASA's coaches in the full view of the police and members of PRASA management present at the gatherings, as this would have exposed them to criminal prosecution. Moreover, although the addresses of the union officials were video-taped by PRASA, it failed to produce this evidence at the trial. The video-footage would have seamlessly cleared up exactly what was said by each of the three union officials at the workers' gatherings on 18 and 21 January 2013, but it was not produced by PRASA at the trial. PRASA's explanation for not doing so was that the videotapes were in the possession of the South African Police Services (SAPS), and that although it had made an oral request for them, the SAPS had not returned them. This explanation remained unsubstantiated.

The train burnings were not strike-related

[36] Four incidents of training burnings took place between 22 and 31 January 2013. They were at: Braamfontein Depot on 22 January 2013; Croesus on 22 January 2013; Kliptown on 25 January 2013; Braamfontein Station on 25 January 2013, and Hercules Station on 31 January 2013. Both Mr Kumalo and Mr Nemagovhani suspected that the train burnings "*could be connected to the striking workers*" as a result of the robust comments made by the three union officials at the NTM gatherings, but they could not say for sure that that was the case. Mr Nemagovhani conceded that this was pure conjecture.

[37] PRASA commissioned Advanced Forensic Services ("AFS")[8] to conduct the forensic fire investigation into the train burnings. In respect of those at Braamfontein and Croesus Stations on 22 January 2013, and Kliptown and Braamfontein Stations on 25 January 2013, the report concluded that the fires originated as a result of commuter violence. It is only in respect of the train burnings at Hercules Station on 31 January 2013, that the report concluded that the train was set on fire "*probably as a result of riot, strike and/or public disorder …*". There was, however, no mention that PRASA's striking employees were responsible for setting the train on fire.[9]

[38] The burning of trains is not an uncommon occurrence in South Africa. As is evident from PRASA's own documentation which was provided to it by Protocol Forensic Fire Investigations, there were approximately 73 incidents of deliberate train burnings from March 2010 to December 2014. Of these 73 burnings, 15 took place in the train yards. There are various reasons why commuters burn trains. As Dr Popo Molefe, the Chairperson of the PRASA Board at the time is reported to have said:

> 'We are trying to keep alive a system that is terminally ill in the intensive care ward. You fix it today, tomorrow it breaks. That's why commuters get frustrated and burn these assets.'[10]

[39] In the circumstances, I reject the evidence of both Mr Khumalo and Mr Nemagovhani that the train burnings were strike-related and not commuter violence related, because they happened during or immediately after the strike, and the union leaders advocated their burning. Although the strike and the train burnings were contemporaneous, PRASA has failed to prove that the train burnings were committed by the strikers or person's associated with the

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[8] It turns out that neither Mr Khumalo nor Mr Nemagovhani read this report before testifying on the question of who was responsible for the burning of the trains.

[9] Mr Khumalo and Nemagovhani attempted to provide evidence of other trains that were burnt after the dismissals. These incidents were described in Mr Khumalo's NTM Strike Presentation and a report from the Gauteng Investigative Team, dated 13 June 2013. Although Mr Khumalo ascribed these incidents to the strikers, their evidence constituted hearsay as neither he nor Mr Nemagovhani had personal knowledge of these incidents. In most cases, the Gauteng Investigative Team Report contradicted the version of Mr Khumalo and Mr Nemagovhani that the train burnings were attributed to the strikers.

[10] PRASA unveils new modern locomotive IOL News, 2 December 2014.

strikers. Nor for that matter has PRASA been able to prove that the dismissed strikers had any actual knowledge of the train burnings or the persons responsible for them.

No steps taken to identify culprits

[40] It was submitted on behalf of PRASA that it had taken all reasonable steps to identify the persons who torched the trains and damaged its property, but it has been unable to do so and could not do so unless the striking employees identified the culprits. Ms Kulu was, however, unable to elucidate the Labour Court on the steps taken, other than to say that the matter was reported to the SAPS. PRASA had simply failed to provide the Labour Court with any credible or convincing evidence that it had taken reasonable steps to identify the culprits who were responsible for burning the trains. Had it taken such steps, I have no doubt that it could have identified the persons involved in the train burnings.

Essential elements of derivative misconduct not proved

[41] As correctly submitted by NTM, the Labour Court's reliance upon derivative misconduct was misplaced because its' essential elements were not proved by PRASA. Crucially, PRASA failed to show that the burning of the trains was carried out by the striking workers and/or persons acting in concert or association with them, and that the striking workers had actual knowledge about the train burnings and the persons responsible for setting them alight.

[42] Even if the train burnings were related to the strike, it did not follow that each of the striking employees knew or must have had actual knowledge of this. The letter, inviting representations from the dismissed employees, called upon each of them to provide representations on why PRASA should not hold him or her "*and all striking employees jointly and severally liable for the torching of trains and train coaches*", and why he or she should not be dismissed. It did not call upon the employee to disclose evidence about the actual perpetrators of the train burnings.

[43] The termination letter stated that the dismissed workers were dismissed "*due to the sabotage of trains and train coaches by striking members of the National Transport Movement*". This letter makes it clear that PRASA's real reason for dismissing the employees was not their failure or refusal to disclose information about the perpetration of the train burnings. This demonstrates that PRASA had invoked the principle of derivative misconduct as a means to justify the dismissals after they had taken place – and that it was not the true reason for dismissing the employees.

[44] The facts, in the decisions of this Court in *Hlebela*[11] and *FAWU* v *Amalgamated Beverage Industries*,[12] where the principle of derivative misconduct was applied, are materially distinguishable from the facts in the current case. In both those cases, the employer succeeded in showing that all of the dismissed employees had knowledge or ought to have had knowledge of the primary misconduct, owing to their physical presence at or near the place, and time, of the occurrence of the primary misconduct. In this case, there is no evidence that any of the dismissed employees were at the places where, and during the times when, the train burnings occurred. Consequently, the proposition that the employee must have known about the primary misconduct, as a result of his or her presence at the place where, and time when, the primary misconduct took place, has no application in this case.

[45] As pointed out by counsel for NTM, PRASA's contention that the dismissed workers must have had knowledge of the train burnings is based on the assertion that the train burnings were related to the strike – "*The train burnings are related to the strike, therefore the strikers must have had knowledge of the train burnings.*" Even if the first proposition is true (which on the evidence it is not), it does not necessarily follow that the second proposition is true.

[46] I accordingly consider PRASA's reliance upon the principle of derivative misconduct to be misplaced and unjustified. In essence, the striking employees were dismissed not for derivative misconduct but rather for

[11] *Hlebela* (above).
[12] *FAWU v Amalgamated Beverage Industries* (1994) 15 ILJ 1057 (LAC).

"collective misconduct", a notion which is wholly repugnant to our law, not only because it runs counter to the tenets of natural justice but also because it is incompatible with the established principle of innocent until proven guilty. This, in my view, renders the employees' dismissals both substantively and procedurally unfair.

Evaluation process irrational

[47] A committee chaired by Ms Kulu considered both the collective response of the striking employees as well as the 23 individual responses. From the reasons provided by Ms Kulu for rejecting NTM's representations on behalf of its members, other PRASA correspondence and Ms Kulu's evidence, it is possible to extract the criteria used for assessing the various representations. These criteria were:

(a) The reasons had to be valid and persuasive;

(b) The representation could not be a bare denial;

(c) each individual had to explain whether he or she associated himself or herself with the events;

(d) The employee had to provide his or her whereabouts on the dates and times of the events.

It is, however, apparent that PRASA did not apply the criteria listed above, in its assessment of the responses received from the individual workers, but applied them strictly in its assessment of the collective response which NTM submitted on behalf of the workers. This much is clear from the examples listed below:

(i) Gugugeletu Blows:

She only provides an explanation for where she was from 1 February 2013. She does not state where she was on 23, 25 or 31 January 2013. However,

she does state that she "*did not participate in the strike*". The explanation was considered valid and persuasive and not a bare denial.

(ii) MJ Matlhare:

His representation does not state where he was on 23, 25 or 31 January 2013. He does not mention the train burnings at all. He expresses the desire to return to work. This was considered valid and persuasive. He was given a 12-month warning.

(iii) Joyce Ramasehla:

Ms Ramasehla stated that she did not participate in the strike but, realising that she would not be granted leave "*on those days*" went to her grandmother in Lichtenberg. She came back to work even though the strike was not over because she needed her "*job desperately*". She stated that she knew nothing about the burning of the trains. Precisely what is meant by "*those days*" is not clear. As Ms Kulu conceded, it is not clear when she went to Lichtenberg. Her representations were nonetheless considered to be valid and persuasive and not a "*bare denial*".

(iv) Elizabeth Hlongwane:

Ms Hlongwane expresses her willingness to return to work. She refers to some story that took place on 24 February at 10h30, which is unclear, and even Ms Kulu did not know what she was talking about. Ms Kulu denied that the reason her representations were considered valid and persuasive was because she indicated her willingness to return to work. She also said that there was a clear indication that she was pregnant. She never indicated where she was on the day that the trains were burnt. She never mentioned the train burnings.

(v) J Ntamo:

This employee makes a bald assertion that he knows nothing about the incidents. The worker does not deal with his or her whereabouts on the days

in question. Ms Kulu conceded that the main message is that the worker is willing to return to work.

(vi) Doctor Mnguni:

He states that he was a participant in the strike after a threatening phone-call, that as a Christian he did not want to be involved and that he stayed at home from 24 January 2013. He apologised for any inconvenience caused. He did not stipulate where he was on 23 January 2013 when two of the train burnings took place.

[48] What is clear from these examples of the individual worker's responses is that many of them:

(a) do not refer to the train burnings at all;

(b) do not state where the employee was on the date of the train burnings;

(c) constituted a bare denial of their involvement with the train burnings; and

(d) referred to train burnings that are not referred to in the invitation letter.

Despite these deficiencies and Ms Kulu's numerous concessions that the representations were deficient, the individual worker's representations were accepted as valid and persuasive. These representations that said far less than NTM's collective worker's representations were accepted – yet the latter were found to be invalid and unpersuasive. This, in my view, rendered the evaluation process and the decision of the Committee (headed by Ms Kulu) that considered the collective and the individual worker responses, so irrational that there can be no other conclusion but that the invitation to the striking workers, to make representations, was a farce designed to rubber-stamp PRASA's intention to dismiss.

[49] Moreover, PRASA's insistence, in its response to the collective worker response, that each individual member of NTM should have submitted a representation was unreasonable as it contradicted the express offer made in the invitation letter - "*You may elect to have your representation submitted on your behalf by the National Transport Movement*". It was unreasonable for PRASA to have expected NTM, a fledgling union, to co-ordinate the drafting and gathering of individual representations within a few days, when PRASA Rail, despite its substantial resources, was unsuccessful in distributing the invitation letters to all the employees.

[50] Notably, in this regard, the letter inviting the workers to make representations was from Metrorail, Gauteng and not from PRASA Cres, or Shosholoza Meyl. PRASA provided no evidence justifying the dismissals of the employees who worked at PRASA Crescent and Shosholoza Meyl, and provided no evidence regarding the procedures undertaken at these two divisions. Ms Kulu stated that she could not testify about these divisions. It is clear from Ms Kulu's evidence that the collective representations of the workers, who were employed at PRASA Crescent and Shosholoza Meyl, were not considered prior to their dismissal. In the circumstances, I am of the view that PRASA has failed to prove that the dismissals of the employees took place in accordance with a fair procedure. Accordingly, the employees' dismissals were procedurally unfair.

Inconsistency

[51] Item 3(6) of the Code of Good Practice: Dismissal ("the Code") provides:[13]

> 'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

In terms of item 3(6) of the Code, an employer is required to apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more

[13] Schedule 7 of the LRA.

employees who participate in the conduct under consideration. Consistency in applying the sanction of dismissal has two elements. The first is historical which requires the decision to be consistent with past practice, and the second is contemporaneous which requires that all employees who participate in the same misconduct be treated similarly.[14]

[52] As indicated, the Committee chaired by Ms Kulu considered both the collective response of the striking employees as well the 23 individual representations. According to Ms Kulu, except for Mr Rapulungoane, all 23 employees who made individual representations were not dismissed. It later transpired, and this was common cause, that Mr Dangale and Mr Mosekwa, who had made individual representations that were considered persuasive by Ms Kulu and her committee, were, nonetheless, dismissed. Ms Kulu could not explain why they were dismissed.

[53] The Committee rejected the collective representation of NTM, and all those employees who failed to submit individual responses were dismissed. The parties prepared a joint list of the names of the dismissed employees. A number of the employees who were originally dismissed were re-hired or reinstated. They are: M Kgobe; ND Ndaba; P Phire; K Sekwati; MB Zwane; E Mdhuli; A Dibakwane, and A Mathebula. Mr Kgobe, Mr Phire, Mr Mdhuli and Mr Dibakwane. All of these employees had participated in the strike and were dismissed but later returned to work. None of them submitted individual representations. No explanation was provided for why these workers were re-hired or reinstated and, in the case of one worker, Mr Phire, promoted to Autopax in August 2013.

[54] It is clear from this that the penalty of dismissal was not applied consistently to all the employees who participated in the strike. This practice is clearly inconsistent with the requirement of consistency as contemplated in item 3(6) of the Code of Good Practice for Dismissals. This is a further reason why the employees' dismissals were substantively unfair.

Remedy

[14] *Southern Sun Hotel Interests (Pty) Ltd v CCMA* [2009] 11 BLLR 1128 (LC) at para 10.

[55] Ms Kulu testified that in the event that the employees' dismissals were found to be unfair, then reinstatement was not appropriate because:

(a) the dismissed workers have been replaced;

(b) they have not distanced themselves from the acts of burning the trains; and

(c) the costs of back-pay for a public entity, such as PRASA, would be so enormous that it would affect the improvement of PRASA's service offering.

[56] In *Dunwell Property Services CC v Sibande*,[15] the Labour Appeal Court held that in determining whether to reinstate an unfairly dismissed employee, "*[t]he overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus*". In *Equity Aviation Services (Pty) Limited v CCMA and Others,*[16] (*Equity Aviation*) the Constitutional Court held that fairness "*ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA security of employment*". Therefore, a decision whether to reinstate "*is therefore, in part, a value judgment and, in part, the factual finding made upon the evidence adduced about the unworkability of a resumption*".[17]

[57] Section 193(2) of the LRA requires the adjudicator to engage with these factors and the evidence about the nature of the relationship between the parties in order to determine an appropriate remedy. The primary assessment of intolerability, therefore, rests with the employer. To prevent reinstatement, the employer should lead evidence to prove that the circumstances surrounding the dismissals are of such a nature that the reinstatement of the dismissed employee would be intolerable.[18] In *Equity Aviation*,[19] the Constitutional Court held that in determining the extent of retrospectivity of the reinstatement, a court or arbitrator should take into account all relevant

[15] [2012] 2 BLLR 131 (LAC).
[16] [2008] 12 BLLR 1129 (CC) at para 36.
[17] *Equity Aviation* at para 39.
[18] *NUM v CCMA* [2007] 28 *ILJ* 402 (LC). See, also, *Baba v GPFFSBC* (2011) 32 *ILJ* 2669 (LC).
[19] above at para [43].

factors, including that the dismissed employee might have been without income and the financial burden upon the employer if retrospective, reinstatement was ordered.

[58] PRASA has failed to show that the employment relationship between the employees and PRASA would be intolerable if the employees are reinstated. Although Ms Kulu alluded in her testimony to the financial burden that reinstatement and back-pay will have on the improvement of PRASA's service delivery, PRASA led no evidence to substantiate Ms Kulu's say so. Accordingly, I am of the view that there is no basis to deviate from the primary remedy envisaged by s 193 of the LRA, being reinstatement from the date of dismissal.

Costs

[59] I consider it fair and just that costs follow the result.

Conclusion

[60] For these reasons, I consider the dismissal of the employees by PRASA to be both procedurally and substantively unfair. PRASA has advanced no convincing reasons for why this Court should not grant the employees the primary relief of reinstatement with back pay retrospective to the date of their dismissal. In the circumstances, I see no reason not to grant the employees that relief. The appeal accordingly succeeds.

Order

[61] In the result, I order that:

1 The appeal is upheld with costs.

2 The order of the Labour Court dismissing the action is set aside and replaced with the following order:

'1. The dismissal of the employees is procedurally and substantively unfair.

2 The respondent is ordered to reinstate the employees retrospectively to the date of dismissal.

3 The respondent is ordered to pay the employees back pay retrospective to the date of dismissal.

4 The respondent is ordered to pay the costs of the action.'

F Kathree-Setiloane AJA

LABOUR APPEAL COURT

Tlaletsi DJP and Landman AJA concur in the judgment of Kathree-Setiloane AJA

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