IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT CAPE TOWN)

Reportable and of interest to other Judges
Case No: C655/2009

In the matter between

SAMWU obo M ABRAHAMS & 90 OTHERS	Applicants
and	
CITY OF CAPE TOWN	First Respondent
SA LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)	Second Respondent
ADVOCATE C DE KOCK N.O.	Third Respondent

Date of Hearing: **1/3/2011**

Date of Judgment: 17/06/2011

JUDGMENT

SHAI, AJ

Introduction

[1] This is an application whereby the applicant seeks to review and set aside

the arbitration award granted by the third respondent, the "arbitrator", issued under case number PSH447-08/09, dated 14 October 2009. The applicant seeks to have the finding of the arbitrator that the dismissal of the first to ninety first applicants is fair be substituted by the one which says that such a dismissal was unfair.

The facts

[2] On 3rd July 2007, there was an alleged unlawful collective work stoppage by members of the first respondent's Law Enforcement Department who allegedly unlawfully gathered at the Civic Centre after receiving their placement letters. Similar incidents had occurred prior to 3rd July 2007.

[3] Following the last of the alleged unlawful work stoppages, the first respondent's Executive Director: Safety and Security and the Chief of the Metropolitan Police circulated a memorandum to all the first Respondent's safety and security staff, explaining that it was a matter of serious concern that safety and security staff were not adhering to the first respondent's grievance procedures when raising grievance and that it was manifestly unacceptable for employees, and particularly essential service employees, to simply ignore such grievance procedures and embark on unlawful work stoppage, strikes or other collective actions. The memorandum however, explained that such behaviour would not be tolerated and that staff guilty of such actions would be disciplined.

[4] It appears that during 2007, first respondent was engaged in a restructuring process to ensure that employees were placed in correctly graded posts. Comprehensive consultations had occurred in relation thereto between the third respondent and employees and their trade unions. Employees were assured that the process will not affect them in so far as their terms and conditions of employment are concerned.

[5] On 14 August 2007, the first respondent received reports that a mass strike and traffic blockade was planned for the next day by the Metropolitan Police who are members of SAMWU. In the late afternoon of 14 August 2009, the respondent through Mr. Kevin Maxwel, the Director of the first respondent Metropolitan Police Force communicated to all city police members that:

- Any disruption of traffic in any form would be considered criminal and result in the arrest of any city police officer who participates in such unlawful action.
- Any strike action by city police was illegal an unprotected.
- Any employee participating either in the disruption of traffic or any other form of strike or protest would face disciplinary action. Any employee found guilty of such action would face summary dismissal.

[6] E-mails communicating the above facts were sent to officers in command of various Metropolitan Police depots and read out to employees on duty at their depots.

[7] On the morning of 15 August 2007, a great many Metro Police officers, including officers who were not from the Bonteheuwel prescint, gathered at the Bonteheuwel depot. About 06h45, Acting Director Swan Peterson addressed a group of about 100 officers in the Bonteheuwel parade room. Peterson conveyed to those present the content of the e-mail outlined about in paragraph 5 and 6. Some of those present at the parade tried to disrupt his briefing by behaving in a rudely fashion.

[8] This large group left the Bonteheuwel department in a convoy between 06h50 and 07h00. The manner in which they turned their convoy blockaded the public road running along side the Bonteheuel station, and the noise level created by them was so unacceptable that two members of the public from across the road came to complain.

[9] The convoy proceeded on to the N2. The CCTV footage was taken, the authencity of which is not disputed, was played as part of the disciplinary proceedings. The footage, taken from the point on the N2 near the Raapenberg off-ramp, shows that between 07h24 and 07h29 no traffic was coming from

Athlone, and that the traffic entering the N2 from Pinelands off-ramp was flowing freely for approximately five minutes. From the footage it was quite clear that the convoy was travelling at an inordinately slow speed. Metro Police vehicles were riding abreast one another, and obviously endeavouring to span the entire breath of the highway – such endeavour included Metro Police vehicles illegally riding on the shoulder of the road. Vehicles in the convoy also, on occasion, moved diagonally across the high way in an endeavour to prevent public vehicles from passing. One or two public vehicles succeeded in finding gaps in the convoy; but these gaps were rapidly filled, ensuring that the vast majority of public vehicles were stuck behind the convoy. The public vehicles were, to in increasing extent, hooting in order to show displeasure and in an endeavour to get the Metro Police drivers to move on, and allow public vehicles to pass them.

[10] The convoy reached the Civic Centre at approximately 08h30, wishing to hand their memorandum to the Mayoress personally or alternatively the Deputy Major. Neither was available as they were in important meetings. The group then gathered at the eastern entrance to the Civic Centre until about 10h00, before handing the memo to General Jones, the chief of Metro Police and dispersing.

[11] The applicant had made no arrangement with the office of the Mayoress to have her receive the memorandum nor to address them on their issues of concern

to them.

[12] The first respondent regarded the conduct of the applicant in participating in the events described above, in the serious light. The first respondent contends that the seriousness of the offence was aggravated by the following:

- The applicants are law enforcement officers whose most important function is to uphold the law and ensure that others comply there with. For persons in that position to deliberately and publicly, transgress the law is a matter of the gravest concern.
- They deliberately planned their aforesaid unlawful action to coincide with peak traffic hours, so as to cause maximum disruption to the largest number of people possible.
- The action caused the extensive disruptions and financial losses.
- The fact that it was illegal for law enforcement officers to participate in strike action, and that this would lead to disciplinary consequences, had more interest in the memorandum of 6 July 2007, than in the warnings that were issued at the various depots and thereafter at the Bonteheuwel depot, on the morning of the strike action.

[13] Initially, first respondent attempted to have the disciplinary enquiries proceed in a certain manner, in order to expedite the finalization of such enquiry. First respondent endeavoured to hold consultations with the applicants and with IMATU, the other representative trade union involved, with a view to securing agreement as to the disciplinary procedure to be followed. The applicant, SAMWU objected to the form of the proceedings which first respondent indicated that it intended following, and in due course, obtained a Court Order interdicting the first respondent from holding any disciplinary enquiries in accordance with the procedure first respondent proposed. The said Court Order is subject to an appeal to the Labour Appeal Court and not related to the proceedings herein.

[14] Thereafter, the following charges were brought against each of the said applicants:

> "The allegations against you are that you have grossly misconducted yourself, in that; you collectively, and with common purpose, alternatively by association or making common cause with the collective, on the 15 August 2007;
>
> 1. Participated in an illegal and unlawful strike, whilst being an essential service employee and in breach of the collective agreement and your contract of employment.
> 2. Deliberately and intentionally blockaded the N2 freeway into Cape Town during peak traffic hour

causing extensive disruption to thousands of commuters utilizing such freeways, causing such commuters to be late for work and other appointments, and occasioning consequential disruption of businesses employing such commuters and necessitating the City to incur additional financial expenses, through payment of additional overtime in the amount of R115 000,00.

3. Committed further unlawful acts by taking part in an illegal gathering in contravention of the gatherings Act.
4. Your and the collective's aforesaid conduct brought the City, your employer into disrepute, disrupted the lives and activities of a great many members of the public, and businesses, and undermined law enforcement in the City."

[15] The disciplinary hearing took place over an extended period between 17 March and 11 July 2008. The parties entered into a so-called common cause agreement which set out common cause facts and the manner in which the hearings were to be conducted on a practical level which included the following:

[15.1] The first respondent was also to produce various photographs from which it was able to indentify 98 of the applicant's members. The persons included the 91 employees subjected to these proceedings. The photographs were taken at the Civic Centre during the handing over of the memorandum to the Mayor.

[15.2] 17 Persons could be identified from the photographs, but were not

charged.

[15.3] 10 Persons had charges withdrawn following undisclosed submissions from their Directors or Commanders.

[16] It was agreed between parties that a single hearing be held for all those charged without admitting that the first respondent and the chair of the hearing were entitled to adopt the doctrine of "collective guilt" or common purpose.

[17] After the conclusion of the disciplinary hearing, the applicants together with the other two employees were not found guilty on charge 3, and guilty on other charges. The chairperson imposed a sanction of dismissal. An appeal to an appeal tribunal was unsuccessful as a result of which the applicant's referred an unfair dismissal dispute to the SALGBC.

[18] In terms of the agreement concluded at the Bargaining Council on 18 March 2009, the parties agreed that *viva voce* evidence which was led at the disciplinary hearing, together with the documentary, photographs and CCTV material, would be placed before the arbitrator and serve as evidence for purposes of the unfair dismissal dispute to be determined by him. Further that it was agreed that except if the arbitrator gave a directive to the contrarily, no further witnesses would be called by them.

[19] On 31 July 2009, the third respondent delivered his award, which award confirmed the dismissal of all the employees (applicants) save Messrs Ludick and Lyons who were reinstated with no back pay.

Applicants' grounds of review

[20] The applicants raise the following grounds of review against the award of the arbitrator:

> *Collective misconduct*
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> [20.1] The third respondent committed gross error of law in finding that the employees could be dismissed on the basis of having been part of a collective and without any individual proof of their misconduct. The third respondent therefore failed to distinguish adequately between the holding of a single collective hearing and the need to establish guilt in respect of each individual employee, so it is argued. Further that the third respondent committed a gross error of law in finding contrary to Section 192(2) of the LRA, that the employees were obliged to demonstrate their non-involvement in the blockade.
>
> *Collective agreement*

[20.2] The third respondent committed a gross error of law in finding that the disciplinary procedure collective agreement did not require the first respondent to demonstrate the individual misconduct of each and every employee.

Employees not properly identified

[20.3] The third respondent made a award which no arbitrator, acting reasonably, could make in finding the following employees guilty of charge 2, (a) R Jeptha, (b) M Matthys, (c) Van Rynevled, (d) B Koopman, (e) J Snyman, (f) M Marbe. In respect of Mr. Jeptha, no photograph was produced no evidence led at the hearing placing him at the Civic Centre. In so far as others are concerned evidence was led at the hearing that they either did not travel on the N2 to the Civic Centre, or else did so after the blockade had ended. Therefore there was no rational basis to find them guilty on charge 2.

Inconsistency

[20.4] The third respondent acted unreasonably in failing to find that the first respondent had acted inconsistently and unfairly in either not charging or withdrawing charges, for no good reasons. No evidence was led to explain this inconsistency.

Preliminary Applications

[21] Two applications for condonation were made:

[22] The factors that need to be taken into account when determining whether there is sufficient cause to grant condonation were set out in *Melane v Santam Insurance Co Ltd*[1] and involves weighing together the following factors; which are

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[1] 1962 (4) SA at 532

interrelated : degree of lateness, explanation thereof, the prospects of success and the importance of the case. The court went on and said that although these factors are interrelated, they are not individually decisive, if there are no prospects of success there would be no point in granting condonation.

[23] In the case of *Kritzinger v CCMA and Others*[2], *Molahlehi J* said the following in relation to the test as inunciated in *Melane* case:

> "These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance, a good explanation for the delay in lateness may assist the applicant in compensation for weak prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delays"

[24] The first respondent filed it's answering affidavit late by 8 days hence this application for condonation of the said late filing. There is no opposition to the application. The reasons for lateness is stated as that the process of compiling the

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[2] JR2254/05 (2007) ZALC 85 November 2007

brief, voluminous documentation and instruction to Senior Counsel to draft first respondent's answering affidavit was a lengthily one and time consuming and that the Senior Counsel was indisposed for a 3 week period in May. As a result indulgence was sought from the applicant's representative and was granted. Owing to the fact that the delay is short and that the other party was engaged throughout the process, I see no reason why I should not grant condonation. Condonation is therefore granted.

[25] The second application for condonation relate to the first respondent's heads of arguments which are late by one week. The reason for lateness is states as unavailability of the briefed Counsel who was on leave. Another one could not be appointed due to the fact that the first counsel was already familiar with the record which is extensive and to brief another one would have resulted in further delay due to the extend of the record. Secondly the first respondent realising the

delay asked for extension from the applicant's attorneys which was granted. I'm of the view that a proper case for condonation has been made and hence I grant condonation for the late filing of the heads of argument.

[26] The third preliminary application concerns application for joiner in respect of the second to the nineth applicants. The application is unopposed. Having read documents and heard Counsel herein I grant the application.

The Test for Review

[27] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo & Another v Rustenburg Platinum Mines LTD & Others*[3]:

> "is the decision reached by the commissioner one that a reasonable decision maker could not reach?".

[28] In Sidumo Ncgobo J was of the opinion that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard, that of a reasonable decision maker, when a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review and at 186 he said the following:

> "The general powers of review of the Labour Court

> under Section 158(1)(g) are therefore subject to the provisions of Section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the

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[3] 2008 (2) SA 24 CC

> Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioners may be reviewed by the Labour Court under Section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under Section 145(2) must found his or her cause of action on one or more of these grounds of review"

[29] In *Southern Sun Hotel Internationals (PTY) LTD v Commission for Conciliation, Mediation and Arbitration & Others*[4], the Court acknowledged the test for review of Commissioner's award as enunciated in the Sidumo decision (reasonable decision maker test) but said:

> "Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner's process related to conduct is found wanting. Of course, reasonableness is not irrelevant to

this inquiry – the reasonableness requirement is relevant to both process and outcome"

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[4] [2010] 31 ILJ 452 (LC)

[30] To succeed in its application the applicant must therefore show that the decision reached by the commissioner is not the one that a reasonable decision maker could reach.

[31] The first attack on the award of the arbitrator is that the arbitrator committed an error of law in finding that the employees could be dismissed on the basis of a collective and without any individual proof of their misconduct.

[32] Item 7(a) of the code of Good Practice requires the employer to prove on a balance of probabilities, that the employee was actually guilty of misconduct. This may be easy in some cases and prove difficult in others. Proof is particularly difficult in cases where a number of employees are involved in the same misconduct, collective misconduct. In such circumstances, it is required that it be shown on a balance of probabilities that each employee was actually involved before a disciplinary action can be taken against them. This therefore means that there needs to be proved that the employee was actually involved and that no one should be found guilty in circumstances where no proof can be presented showing

that the employee was involved in the identified acts, merely because he or she was part of a collective.

[33] In the case of *NSCAWU & Others v Coin Security Group (Pty) Ltd*[5] there was a strike, and workers engaged in acts of misconduct. The employer dismissed all of them on the basis that the misconduct was committed in furtherance of a collective aim (common purpose). The Industrial Court found that while the workers engaged in a collective action, there was no indication that any of the employees were directly involved in the relevant misconducts. The Court found further that the employer relied on collective guilty than on the doctrine of common purpose.

[34] With regard to the above situation *Grogan*[6]**,** had this to say:

> "However, there are exceptions to the principle that employees cannot be held collectively liable for misconduct in circumstances where a particular culprit cannot be identified".

[35] In the case of *Chauke and Other v Lee Service Centre t/a Leeson Motors*[7]

5 [1997] 1 BLLR 85 (LC).
6 Gogan *Workplace Law,* 8th *ed (Juta & Co Ltd 2005)* ***at 160***
7 (1998) 19 ILJ 1441 (LAC) at para 27.

the Labour Appeal Court commented on the dilemma caused by the above situation as follows:

> "The case presents a difficult problem of fair employment practice. Where misconduct is necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?
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> Two different kinds of justification may be advanced for such a dismissal. In Brassey & Others, The New Labour Law (1987) at 93 – 5, the situation is posed where one of only two workers is known to be planning a major and irreversible destructive action, but management is unable to pin point which. Brassey suggests that; if all avenues of investigation have been exhausted, the employer may be entitled to dismiss both. Such a case involves, the dismissal of an indisputably innocent worker. It posits a justification on operational grounds, namely that action is necessary to save the life of the enterprise. That must be distinguished from the second category, where the justification advanced is not operational and no innocent workers are involved. Management's rational is that it has sufficient grounds for inferring that the whole group is responsible for or involved in the misconduct."

[36] In *casu*, the appellants who worked in certain sections of the respondent had committed acts of sabotage pursuant to the dismissal of a fellow-employee. After several incidents of damages to the motor cars, the unsuccessful intervention of the police, the respondent issued an ultimatum to the employees to the effect

that any further sabotage where the culprit could not be identified would result in their instants dismissal. After a further damage of the motor cars, and after a meeting with the union, the respondent dismissed 20 employees.

[37] The Court in *Chauke*[8] went further and laid the applicable principles as follows:

> "In the second category, two lines of justification for a fair dismissal may be postulated. The first is that a worker in the group which includes the perpetrators may be under a duty to assist management in bringing the guilty to book. Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationships between employer and employee is in its essentials one of trust and confidence, and even at common law, conduct clearly inconsistent with that 'essenlia' warranted termination of employment (*Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) at 26 D – E.) Failure to assist an employer in bring the guilty to book violates that duty and may itself justify dismissal".

[8] n 7 at paragraph 35

[38] The Court cited with approval the case of *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[9] where the above principles were laid down as follow:

> "In the field of industrial relation, it may be that policy considerations require more of an employee that he merely remained passive in circumstances' like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."

[39] This the Court termed derivative justification as it stemmed from an employees failure to offer reasonable assistance in the detection of actual culprits.

[40] In both the above cases, although the Court laid down the principles of derivative justification did not rely thereon. Instead, both cases relied on the principle of common purpose.

[41] In *Chauke*[10], the application of principle of common purpose was formulated as follows:

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[9] [1994] 15 ILJ 1057 (LAC) at 1063 A-B

[10] n 8 at paragraph 37

> "There was no suggestion that any individual worker

> had an isolated motive for attempting to sabotage production. The evidence points straight the other way. The workers had a collective motive, stemming from grievance at the refusal of their pay demand, the dismissal of Hlogwane and other complaints …… This suggests that the misconduct was perpetrated by the workers collectively, or on behalf of, and with the approval of, the collective.
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> On one of the repeated occasions on which the workers were confronted with sabotage was any effort made to provide assistance or to volunteer any suggestion as to how to solve the problem. The workers silence here is significant. As already indicated, it is not necessary to decide whether a derivative interference of misconduct by non-cooperation would have justified their dismissal. The physical circumstance of the workplace and in particular the workers' proximity to each other and to the damage that occurred in my view warrant the primary factual interference that they all remained silent because they were all themselves complicit in the sabotage."

[42] In the case of *FAWU*[11], the Court held that the employee's silence justified the inference that they had either participated in the assault or supported it. This was therefore justification based on common purpose.

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[11] [1994] 15 ILJ 1057 LAC

[43] In *NUM and Other and RSA Geological Services, a Division of De Beers*

Consolidated Mines LTD,[12] the arbitrator relying on residual misconduct (derivative justification), stated the two requirements thereof as follows:

> "First, that the employees knew or could have acquired knowledge of the wrongdoing; second, that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge."

[44] From the above, it is clear that the exception to rule herein is to be found in the principle of derivative justification and the principle of common purpose.

[45] In our given case, the applicant, SAMWU, mobilized its members, planned to move in a convoy from Bonteheuwel through the N2 to the Civic Centre. The plan was executed as planned. However, the identification could only be made at the Civic Centre and indeed all the applicants were identified there. No identification was made from Bonteheuwel through the N2 to the Civic Centre. The question that needs to be answered is whether their guilty in respect of the blockade and can be imported from the fact that they were present at the Civic Centre and had given no explanation of how they got there.

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[12] (2004) 25 ILJ 410 (ARB) at paragraph 30...

[46] The arbitrator found as follows at p15 of the award:

> "There is therefore a sufficient close link between the applicants before me and the events that had occurred on the N2 freeway on route to the Civic Centre to find that the respondent was entitled to charge applicants as a collective. Once charged as a collective, it was for the applicants to present evidence, as some of them did, as to why they should not be found to have been part of the group of offenders on the N2 freeway……."

[47] The applicants seem to be of the view that the circumstances of the case are such that they cannot give rise to a derivative justification mainly because the applicants had not given explanation as to how they got there and therefore their participation in this misconduct cannot be established on a balance of probabilities.

[48] In line with the comments made by Labour Appeal Court as I outlined in paragraph 37, the applicant had a duty to assist the management to bring the guilty to book and a failure to assist in this respect amounts to misconduct. A disciplinary hearing is a process by which the employer used in an endeavour to establish the truth. The applicants were given the opportunity to tell the employer the truth at the disciplinary hearing, they chose not to do so. For the fact that the whole scenario was planned and executed as planned by the applicants and its members, had the desired effect and applicants were warned that participation would lead to disciplinary action, it is reasonable to find that on a balance of

probabilities the applicants were involved with the events along N2 freeway.

[49] In *Chauke*[13] , the Court said the following:

> "*FAWU v ABI* involved a group of more than 100 workers. On an abstract appreciation of the evidence, the inference that any individual present that morning at the workplace was actually involved in the assault, by approval or direct participation, was not the most probable. It became the most probable only because none of the individuals concerned came forward, either at the individual disciplinary hearings, or in the Industrial Court, to absolve themselves".

[50] The applicant is of the view that the requirement that employees have a duty to assist the management in bringing the culprit to book, which involves them stating their non- involvement, is contrary to Section 192 (2) of the Labour Relations Act[14]. Section 192 (2) puts the *onus* to proof the fairness of the dismissal on the employer. It appears that the applicants are of the view that by

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[13] n 10 at paragraph 41
[14] 66 of 1996 (LRA)

expecting the employee to assist the employer in the circumstances outlined above is to shift such *onus* to the employee. I do not think so. This situation is, in my

view, akin to the question of inconsistency where an employee alleges inconsistency. The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. This is necessary for the employer to respond properly to the allegation. Failure to do so, may lead to a finding that no consistency exists or was committed by the employer. This situation never shifts the *onus* from the employer to the employee to prove that there is no consistency. Of course, it should be understood that one's involvement or failure to do so may have adverse consequences both ways. If one keeps quite an inference that he supported or was actually involved may be made. While on other hand revealing ones involvement may lead to a finding of guilty. I do not think that this is in conflict with Section 192 (2) of the LRA at all as it is the consequence of the nature of employer -employee relation.

[51] In the premise, I am of the view that the arbitrator correctly found that the circumstances of this case are such that the misconduct committed at along N2 can be imported on those who were identified at the Civic Centre for reasons stated above.

[52] The second attack on the arbitrator's award is that he committed an error of law in finding that the Disciplinary Procedure Collective Agreement (DPCA) did not require the first respondent to demonstrate the individual guilt of each and

every employee.

[53] Clause 7.1 of 'DPCA' provides that the hearing shall be conducted by the presiding officer who may determine the procedure to be followed subject to the following:

> "7.1.1 the rules of Natural justice must be observed in the conduct of the proceedings"

[54] Clause 7.2 provides that the prosecutor shall bear the duty to commence and, the burden to prove each and every allegation(s) on a balance of probabilities.

[55] The applicants are of the view that by approaching the matter from collective misconduct approach, the arbitrator has failed to apply the above agreement in so far as individual proof of involvement is concerned. I am unable to understand why the applicants would say that because all the applicants were given an opportunity to inform the respondent of their non involvement if any, they were present or properly represented at the hearing. It also appears that those who gave account of themselves were not dismissed by the first respondent.

[56] In so far as collective misconduct (derivative misconduct) is concerned, I have indicated above that in principle it is required that individual guilt be proved before one is found guilty. However, as illustrated above there are exceptions in the circumstances of derivative misconduct or common purpose. The

circumstances of this case fall squarely within the principles as I said above. I cannot see how the DPCA was violated because every applicant was given opportunity to defend himself or herself. It will serve no purpose to repeat it here. Consequently I find no irregularity on the part of the arbitrator.

[57] The third attack on the award of the arbitrator is twofold. First is that during the disciplinary hearing, no photograph was produced in respect of Mr. R Jeptha, nor did any witness give oral evidence placing him at the Civic Centre and therefore there was no basis to find him guilty, or to confirm his guilt.

[58] The first respondent through the answering affidavit of Marion Jacobs as follows at paragraph 9 thereof:

> "Jeptha was one of the employees who, in terms of clause 1.3 of the Common Cause Agreement admitted to being present at the Civic Centre. No evidence was given by him and no questions were posed to any of the applicant's witnesses, to the effect that he had not travelled to the Civic Centre as part of the aforesaid convoy and procession but had arrived there by other means, the contentions set out in paragraph 8.4 and 8.5 above apply to Jeptha as well."

[59] The applicant in its replying affidavit failed to deal with this matter further. I have also noted that Jeftha's name does not appear in clause 1.3 of the

common cause lists but A5 of the record and classified under names of officers involved in protest A4 – A13 of volume 6 and under a list of accused persons contained at page 5-10 of the index.

[60] The applicant in its Heads of Argument at page 9 paragraph 28 describes volume 5 and 6 of the record as follows:

> "Volumes 5 and 6 of the Record constitute the two bundles of documents used at the disciplinary hearing and thus were part of the evidential material that the third respondent (arbitrator) was obliged to consider ..."

[61] There is no where in the record indicating that he was not part of the protest and hence was correctly included therein. I therefore find no irregularity in this respect.

[62] Secondly, it is contested that evidence was presented in respect of Messrs Matthys, Van Ryneveld, Koopman, Snyman and Marbe to the effect that they either did not travel on N2 to the Civic Centre or else did so after the blockade. Thus, there was no rational basis for them to have been found guilty of charge 2.

[63] On the day in question, Neville Matthys travelled with Van Ryneveld and Beula Saal. They went to the Civic Centre through N2. This is not disputed. However, what is disputed is the time they left Bonteheuwel.

According to them, they left at 07h40. However, the time reading equipment recorded that they left at 07h16. This is the time the convoy left Bonteheuwel to the Civic Centre through N2. The record further indicates that Beula Saal was the one who was in possession of the memorandum to be handed to the Mayoress. Further that the record shows that Beula Saal remonstrated with the police to give way to the convoy on route to the Civic Centre and was in front. Neveille Matthys confirms that Beula and Van Reyneveld got out of the car to be in front of the convoy which means that Matthys could not pass through the convoy to be in front. Beula had to be in front because of the memorandum. On balance of probabilities, they were part of the convoy at N2 and were correctly found guilty of charge 2 (see record pages 1103, 1105, 1120, 1122, 1202, 1356, 1357, 1358, 1359, 1367, 1369, 1370, and 1384)

[64] Koopman and Beula Saal testified that commander Tuck encouraged them to deliver the memorandum to the Mayoress as he was also not happy. The plan was to drive in a convoy through N2 to the Civic Centre. Mr. Kooopman was at Bonteheuwel when the convoy left for N2 but he had to wait for one Ludik who arrived allegedly at 07h30. It was testified that they and Ludik used another road other than N2 because they were informed that N2 was congested ('vol'). This is more or less the time the convoy left for N2. The reason to move in a convoy was to cause congestion or blockade. The fact that they used another road is

inconsistent with the intention to cause a blockade of N2. All these factors make it more probable that they used N2 and I therefore find that he was correctly found guilty of charge 2.

[65] As for Mr. Marbe it was testified that he had permission to be in Cape Town and also around the vicinity of the Civic Centre to do other lawful assignments. However, it is clear from evidence that he took part in the proceedings of the day. On the record I could not find any credible evidence indicating that he may have used another road other then the N2 freeway. Hence I find no irregularity in this respect.

[66] It is the principle of our law that discipline should be applied consistently. ***Grogan,***[15] had this to say:

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[15] n 6 at paragraph 33, at page 163

> "The Labour Courts have for many years stressed the principle of equality of treatment of employees – the so called parity principle. Other things being equal it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past (historical inconsistency), or to dismiss only some of a number of employees guilty of the same infraction (contemporaneous inconsistency). As the Labour Appeal Court held in one case: [36]
>
> "The respondent and Maziya were guilty of the same offence, the theft of chicken pieces. *Prima facie,* they should have

> received the same penalty. I say *prima facie,* because an employer may justified in differentiating between employees, guilty of the same offence, on the basis of differences in the personal circumstances of the employees (such as their length of service and disciplinary record) or the merit (such as the roles played in the commission of the misconduct)."

[67] In the case of *SACCAWU v Irwin and Johnson Ltd*[16] the Court said the following:

> "Discipline must not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the

[16] (1999) 20 ILJ 2303 (LAC)

> exercise of discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motivating or, worse, by a discriminatory management policy.... Even then I dare say that it might not be so fair as to undo the outcome of other

disciplinary inquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offender. The point is that consistency is not a rule unto itself."

[67] The above judgment was tempered as follows in the case of *Cape Town City Council v Masitho and Others*[17]

"In *SACCAWU & Others v Irvin & Johnson* [1999] 8 BLLR 741 (LAC) at 751B this Court reiterated that

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[17] (2000) 21 ILJ 1957 (LAC) at paragraph 14

consistency is an element of disciplinary fairness, and that it is really the perception of bias inherent in selective discipline that makes it unfair, but went on to observe that the flexibility which in inherent is the exercise of discretion will inevitably create the potential for some inconsistency. I am not all sure that disciplinary decisions involve the exercise of discretion, but even if that is so, fairness would seem to me to generally require any such discretion to be exercised consistently. While if it is true that an employer cannot

> be expected to continue repeating a wrong decision in obeisance to a principle of consistency (751D), in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment to be determined in the circumstances of a particular case, and for that reason there is necessarily room for flexibility, but where 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, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias."

[69] In this instance, the applicants base their argument on withdrawal of charges against certain employees. The arbitrator dealt with this extensively and the award alluded to the fact that first respondent offered all employees plea bargain arrangement and in particular invited the applicants to take part in such arrangement. The applicants vehemently rejected the arrangement (so-called Steenkamp ruling). In terms of these arrangement, the respondent categorised the

misconducts as (1) those employees who blocked out or drove the City's vehicles and blocked the N2 and or drove to the City Centre to participate in an unlawful strike or protest action and or drove to the City Centre to participate in unlawful strike or protest action or for removed number plates and or instigated and or facilitate and / or played a leadership role in the unlawful strike or protest action and or unlawful conduct associated with it and (2) those employees who attended the unlawful strike or protest action in the City Centre but did not partake in any serious misconduct related to (1) above which, on the basis of the previous sanction, present dismissal. The disciplinary hearing would proceed in respect of category 1, and those who fall in category 2 would get final written warnings valid for 12 months and complied with two months suspension with no right to appeal.

[70] The arbitrator dealt with the matter as follows:

> "I must find, based on this plea bargain arrangement that was offered to the applicant at such an early stage, that the respondent's actions were very fair towards the applicants and that the applicants, in deciding not to accept the plea bargain arrangement did so at their own peril. It is clear, looking back to this offer today that the majority of the applicants before me would not have been dismissed. In terms of the categorization, only some 42 employees were identified as falling under the first category. The respondent further offered, in respect of this first category of employees that a formal disciplinary hearing be held in order for the employees

> so identified to be able to defend themselves. The rejection of what I belief was a very fair offer can only be blamed on those members who mandated SAMWU to reject the offer. I can further not understand why the applicants argued that it was sought from SAMWU to agree to dismissal for some and no dismissal for others, as this was not what was stated in the "without prejudice" letter sent to SAMWU. "

[71] It is clear to me that the commissioner applied his mind properly to the facts when he reached the conclusion he reached. I agree with him that the fact that all employees were offered the arrangement and the applicants having rejected it cannot now be heard to say it was unfair to them because those who embraced it had some advantages of withdrawals of charges or charges not being pursued against them. The advantages were open to all and were not hidden in any way. The arbitrator lamented also the fact that when he looked at the whole scenario some of the people appearing before him would not be appearing had they took the advantage.

[72] I may also add that from the record and the papers, it is clear that some of the employees who were party to proceedings of the day in question were identified at the disciplinary hearing. It cannot be said therefore that because there were not disciplined together with the others that amounts to inconsistency. Indeed it appears from the papers that the respondent disciplined the other

employees who were identified at the disciplinary hearing and also those that were identified at the arbitration hearing as fellow wrongdoers but not disciplined. On this basis, I agree with the arbitrator that discipline was not administered capriciously.

[73] Can it be said that the arbitrator arrived at a decision a reasonable decision maker could not reach? I do not think so; in the premises, my order is as follows:

(1) The application for review and setting aside of the arbitration award issued under case no PSH447-08/09 is dismissed.

(2) The applicants to pay costs of the application.

SHAI AJ

For the Applicants**:** **J. Whyte**

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For the Respondent: **A Oosthuizen S.C.**

Instructed by: **Herold HE Attorneys**