IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case No: D 1050/2019

Reportable/Not Reportable

In the matter between:

AFRICAN MEAT INDUSTRY AND ALLIED TRADE UNION

(AMITU) First Applicant

DISMISSED EMPLOYEES OF THE RESPONDENT 2nd - 162nd Applicants

and

SHAVE AND GIBSON PACKAGING (PTY) LTD Respondent

Heard: **7-9 June; 25-28 October 2022; 23 January-1 February 2023**

Final closing arguments filed: **10 July and 12 October 2023**

Delivered: **17 October 2023 (Electronically)**

Summary: **Declaring a protected strike unprotected on account of violence and intimidation impermissibly denudes the constitutional right to strike of those striking employees who exercised their right peacefully**

Derivative misconduct – test developed by Constitutional Court restated

Reinstatement in the context of a violent strike

JUDGMENT

WHITCHER J

Introduction.

[1] This case is about the alleged unfair dismissal of AMITU members by the Respondent on 14 September 2018. The genesis of the dispute is the protected strike called by AMITU on behalf of its members on 18 June 2018.

[2] The referral to this Court listed AMITU as the First Applicant and 161 individual Applicants. However, AMITU informally withdrew as an Applicant and only 126 individual Applicants from the list were confirmed as Applicants at the time of trial.[1]

[3] The Respondent called three managers, namely Jason Staats (Staats), Simon Downes (S Downes) and Richard Downes (R Downes) and the chair of the disciplinary enquiry, Dr Hilda Grobler (Grobler) in support of its case.

[4] The Applicants called AMITU's general secretary, Fanoza Mkhwanazi (Mkhwanazi) and three Applicants, namely Sipho Lethlake (Lethlake) and Madoda Maphalala (Maphlala), both shopstewards at the time of the industrial action and one Zandile Ngcamu (Ngcamu).

[5] Background facts

[6] On 18 June 2018, AMITU members embarked on a protected strike over wages. Whereas AMITU had persisted with demands for a 15% wage increase, an increased shift allowance, a guaranteed bonus and the removal of the HR Manager during the wage negotiations, when the matter went to statutory conciliation, they 'dropped' their demands to a 10% across the board wage increase.[2] The Respondent had offered a wage increase of 8, 5.5 and 4.5% depending upon where the employees were on the salary structure. The offer

[1] See annexure SG1 (the list) to the closing argument. Also see Volume/Bundle 10, page 23, 30-32, 33, 34-35. 36. During the entire course of the trial there was no objection from the Applicants representatives in relation to the correspondence from the Respondent regarding the final list of Applicants. I also note that the certificate of outcome and the jurisdictional ruling by the CCMA recorded that the referral to the CCMA was on behalf of 150 employees, yet the referral to the Court cited 161 employees.

[2] It's unclear whether they dropped their other demands. The way the Respondent presented the matter, it appears they did so.

was accepted by the other employees (non-AMITU members) who constituted the majority of the workforce.

[7] On the same day, AMITU members embarked on a picket outside the main entrance[3] to the Respondent's premises. Exactly where they picketed and their behaviour in the process is in dispute.

[8] On the same day, the Respondent embarked on a lockout in response to the strike. The Respondent had advised AMITU that should its members embark on a strike their original offer would be withdrawn. The notice stated that the employees are excluded from the workplace until they accept the Respondent's "demand of a zero (0%) wage increase."

[9] On the first day of the strike, the Respondent's attorney (the attorney) wrote to AMITU. They stated that the striking employees were preventing people from entering the Respondent's premises, brandishing weapons and threatening non-strikers with same. One Ayanda Cele was specifically implicated.

[10] AMITU responded in writing. They denied the allegations and pointed out the presence of security guards stationed outside the premises, CCTV cameras trained over the entrance and a drone camera "which is fly(ing) above our members to which we believe that every incident can be viewed in those cameras".

[11] It is common cause that there were active CCTV cameras trained over the main entrance and that the conduct of the strikers was monitored by same, video recordings and photographs. As Staats testified, "we were filming everything, we were taking a lot of photos."

[12] In reply, the attorney invited AMITU to view the footage of the alleged misconduct. In response, AMITU stated they had had no reports of intimidation and violence from the security guards.

[13] On 20 and 21 June, the attorney again wrote to AMITU. They said the striking employees had stoned a client's vehicle and had attacked contract workers. Regarding the attack, they said the Respondent was in the process of identifying the perpetrators through photographs.

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[3] The one gate that remained open for employees, clients and deliveries during the strike.

[14] AMITU asked for statements from the people who had been assaulted and intimidated, detailing the time and place of the acts. The request was denied on the basis it would "aggravate" the situation.

[15] On 22 June, the Respondent applied for a court interdict. In terms of the court order the Applicants were ordered to not engage in acts of violence, intimidation and damage to property.

[16] They were also ordered to comply with certain picketing rules pending a referral to the CCMA. They were interdicted from "approaching or being within 10 meters" of the [Respondent's] workplace". In a later paragraph of the order, they were ordered to "comply with the draft Final Picketing Rules in that [they] must picket in the demarcated area as identified by the [Respondent]". And, in a later paragraph, they were ordered to "comply with the Recognition Agreement and peace obligation".

[17] The demarcated area referred to in the court order was 150 metres away from the Respondent's premises, but Clause 5.1 of the draft Final Picketing Rules stipulated that any picketing will take place at least 10m away from any Company plants.

[18] Clause 19 stipulated that the picketers must conduct themselves in a peaceful unarmed manner.

[19] As to the picketing rules in the Recognition Agreement, clause 11.10 stipulated that pickets will not "take place within ten (10) metres from the entire front façade of all premises occupied by the company."

[20] On 3 July, the CCMA declared that the rules in the draft Final Picketing Rules were to apply to the strike. As stated, Clause 5 stipulated that "(a)ny picketing will take place at least 10 metres away from any Company plant". Clause 20.1 stipulated that "(t)he picket will be held in the area defined in the attached map" (which, as indicated above, was 150 metres from the Respondent's premises) and Clause 20.1 that "(t)he picketers will conduct themselves in…a(n) unarmed…manner".

[21] On 29 June, the attorney again wrote to AMITU. They stated that vehicles of the Respondent had been stoned and firebombed and the house of a non-striker (Alfred Ngidi) had been set alight. They also enclosed a screenshot of a

WhatsApp message to employees of the Respondent. The English translation reads as follows:

> *"It will be good for you to stay at home and leave us to show this white man of yours, you rats, exactly who we are. We are tired of you all working, while we are not working- what is next is the death of yourself and your family.*

[22] AMITU was called upon to identify the perpetrators, failing which their members would be charged with derivative misconduct.

[23] On 10 July, the court granted a further perimeter order, of one (1) kilometre, pending another referral to the CCMA. Following this, the strikers moved to a sports field about 700 metres away.

[24] On the same day, the Respondent filed an application to hold AMITU and its members in contempt of the court order of 22 June.

[25] On 11 July, the attorney again wrote to AMITU, again alleging that non-strikers had been assaulted and calling on AMITU to identify the perpetrators.

[26] On 24 July, a further letter was sent, this time to report that at 04:15am, a vehicle of the Respondent had been shot at while being driven by an employee on Leicester Rd. AMITU was called upon to identify the perpetrators.

[27] The letter went on to state that due to the high levels of violence and the fact that the dispute between the parties remained unresolved for some time, the strike was no longer functional to collective bargaining.

[28] The following day (25 July), AMITU informed the attorney that they will be attending their offices on 26 July to view the video footage of the alleged misconduct.

[29] On 30 July, AMITU wrote to the Respondent:

> *"Our mandate is that our members want to return to work on Monday, 6 August…on the terms of employment that prevail(ed) prior to the commencement of the strike on 18 June."*

[30] On 2 August, the Respondent advised AMITU that its letter "is ambiguous." In any event, the Respondent intended to file misconduct charges against the strikers and convene a disciplinary enquiry so they must not report for work on 6 August but present themselves at the disciplinary enquiry.

[31] AMITU responded on 2 August. They denied their letter was ambiguous and that the strike had lost its protection. They further stated:

> *We also want to place on record that in terms of your letter when you have addressed numerous letters requesting information relating to certain acts of misconduct to which you have had no response from us. Please note that we have made it clear to you that we are not at all times with our members employed by your client, at which we have no idea as to what you are talking about because your client is the one to provide you with that information you want from the union."*

[32] It is convenient to state here that, in addition to the letters sent to AMITU, the Respondent had sent bulk SMSes and had affixed to the fence where the picketers congregated copies of a "whistle blower" notice. It read as follows:

> *We have set up a whistle blower cellphone number and would encourage anyone who has been threatened in any way to sms this number and advise what has been said and by whom. We will never divulge the identity of the whistle blower, but we will ensure that the criminal action is dealt with in the harshest possible manner.*
>
> *I also wish to warn all AMITU members that we intend to look after our people to the fullest of our ability using every resource at our disposal…I urge you to take this as a warning that any violence or threat thereof will be dealt with very severely.*
>
> *I also wish to assure the good people of Shave & Gibson that we shall protect them and look after them, as they are part of our family.*

[33] On 02 August, the Respondent served the Applicants with charges of misconduct and notices to attend a disciplinary enquiry on 10 and 11 August.

[34] On 7 August, before the first sitting of the disciplinary hearing, the contempt of court case (see above) was heard and judgment delivered. Save for Applicant Phumlani Mkhize, the remaining Applicants were acquitted. The presiding judge found:

> *"…regrettably I am unable to pin this directly to the respondents that are before me…unfortunately I am unable ti confirm that the respondents have acted contrary to the order of this Court…Some of the employees are depicted as being outside of the perimeter area".*

[35] The disciplinary hearing sat on 10, 24 and 25 August, but the Applicants did not attend on 25 August. On that day, the Respondent led its case. Why the

Applicants did not attend on 25 August is relevant to their claim of procedural unfairness and will be discussed later.

[36] On 10 September, the Chairperson of the disciplinary hearing filed her report. She found the Applicants guilty as charged and recommended the sanction of dismissal. Upon this, on 14 September, the Respondent terminated the contracts of employment of the Applicants.

[37] The Respondent had levelled four charges of misconduct against the employees who it listed as "identified employees":[4]

Count 1: participation in unprotected industrial action in that the industrial action that commenced on 18 June 2018 was not functional to collective bargaining due to (1) high levels of violence and intimidation; (ii) unreasonable demands of AMITU and its members; and (iii) protracted duration of the industrial action.

Count 2: derivative misconduct in that in terms of the relationship of employment, you are required to act in the best interest of your employer. Despite being called upon on numerous occasions to provide details as to precisely who is involved in the following, but not limited to, acts of misconduct: (i) the stoning of a shave & Gibson vehicle and stoning of a baker's transport vehicle; (ii) the firebombing of a shave & Gibson vehicle on 29 June 2018 outside the company premises at 260 Leicester road, Mobeni; (iii) the shooting at a Shave & Gibson vehicle and driver on 24 July 2018 outside the company premises at 260 Leicester Road, Mobeni.

Count 3: being in contempt of the court order granted on 22 June 2018 by the Labour Court, ***alternatively*** breaching of the picketing rules in that you did not remain in the designated picketing area as provided in the picketing rules and that you were within 10 perimeter area, further you were gathered at the gate of the Applicant's premises and hindering access and egress to Shave & Gibson's premises.

Count 4: you harassed and or intimidated or assaulted specific individuals employed or contracted by Shave & Gibson.

[4] Volume 4, Trial Bundle page 1 to 441.

[38] The Respondent had preferred the charges in counts 1 and 2 above against the employees who it listed as "unidentified employees".[5] According to this list, Gabriel Mbhele and Sifiso Mthembu were moved to the list of "identified'' employees.

[39] On 25 August, that is before the outcome of the disciplinary hearing, the Respondent sent out bulk SMSs. The message stated:

> *"The disciplinary enquiry concluded on Saturday, 25 August 2018. Employees are invited to make written submissions as to why they should not be found guilty of the alleged misconduct and their contracts of employment terminated by 16h00 on Wednesday 29 August 2018."*

[40] Staats said the Respondent made this offer because the Applicants did not attend the disciplinary hearing and to limit the loss of skilled employees.

[41] The Respondent received submissions from four (identified) employees and all four were reinstated.

The Applicants' case

[42] The Applicants contend that no witness identified or gave evidence directly or circumstantially linking any of them to the alleged acts of assault, intimidation, violence and damage to property.

[43] The evidence showed they did not prevent any person (employee or clients) from entering the premises of the Respondent and did not intimidate or threaten any person trying to enter the premises.

[44] The charge of derivative misconduct was flawed in law. In any event, when they were called upon to identify the perpetrators of the alleged acts of violence and intimidation they did not because they did not have such knowledge.

[45] After the court order of 22 June, the Applicants were told in employee meetings that they should not carry sticks or weapons and S Downes testified that after the order there was less brandishing of weapons, it was one or two sticks. Video evidence also showed no one carrying weapons on 23 June.

[46] They picketed behind a boom gate 10 metres away from the main gate and there was consensus during the trial that the space between the perimeter

[5] Volume 5, Trial Bundle page 6 to 105

fence and South Coast Road is less than ten (10) meters. As such, to the extent that the picketing rules directed that they must be ten (10) meters away from the fence, such term could not be complied with.

[47] They essentially complied with the court order of 10 July in that there was consensus that they moved 700 meters away to a sports field.

[48] On 7 August, Cele J acquitted them of contempt of court in relation to the court order of June 22. It was therefore not open for the Respondent to charge them with misconduct relating to disobeying the court order. I note here that a ruling on this issue was made before the trial commenced. I held that the Respondent was entitled to charge the employees with misconduct relating to the court order.

[49] The strike remained protected and it was not at the competence of the Respondent to clothe itself with powers of a court and declare that the strike was not protected.

[50] The Respondent dismissed even those AMITU members not identified as having participated in the strike. The Respondent divided the members into two categories. The first category of 109 employees as those who were positively identified as having participated in the strike and the second category of 52 employees as those who were not identified as having participated in the strike.

[51] Finally, they were denied a fair hearing on the charges.

<u>The issues to be determined</u>

[52] The issues to be decided are who participated in the strike and whether each charge was flawed in law, *alternatively* whether the Respondent proved the charges of misconduct against the Applicants and, in that event, that dismissal was a fair sanction, and whether or not the Respondent afforded the Applicants a fair hearing.

[53] In relation to whether each charge was flawed in law, obviously associated factual inquiries only become relevant if the questions of law are answered in favour of the Applicants' submissions. However, for the sake of completeness, I did first make factual findings.

<u>Who participated in the strike?</u>

[54] There are a number of aspects in the evidence which support Staat's testimony that no AMITU member reported for duty on 18 June and while the strike persisted. It is common cause that AMITU conducted a strike ballot and the result was that the majority of its members voted to go on strike. Further, the strike notice from AMITU informed the Respondent that "our members have mandated us to notify the Company that on Monday, 18 June 2018 they will go on (strike)…" It is also common cause that the lockout notice was in response to the strike notice. It did not prevent any AMITU member from tendering their services. The notice stated that they will be excluded from the workplace until they accept the employer's demand. This is in response to the Applicants' counsel suggestion that the Applicants were unable to report for work because they had been locked out.

[55] It was further evident that the lists of 'identified' and 'unidentified' employees put up by the Respondent at trial in reality referred to the striking employees who were positively identified as having attended the picket actions, and those who were not; and not employees who participated in the strike and those who did not. It was put to Staats under cross-examination that the list of "identified" employees referred to those observed "walking up and down South Coast Road" and he confirmed this.

[56] Staats further testified that the Respondent had set up a WhatsApp message system for employees to call if they wanted to come to work and had a problem. In this regard, the Respondent ran three taxis and set up a hostel type arrangement at the workplace. According to him, no AMITU member called to say they needed assistance to report for work, while other employees did.

[57] Only one dismissed employee/AMITU member, Ms Zandile Ngcamu took the stand to claim that she reported for work, but her version was not put to any Respondent witness. In any event, she testified that on 21 June, she received a call from an unidentified male instructing her not to report for work because she was a member of AMITU so she did not report for work. While counsel for the Applicants tried to suggest otherwise, her actual evidence did not implicate the Respondent in the call. She further confirmed that she was not paid for the days she allegedly worked despite payment being linked to the clock-in system and that she never queried the non-payment.

[58] The Applicants also conceded in closing that they participated in the strike.[6]

[59] It is thus my finding that all the Applicants in this case were part of the strike called by their union, AMITU.

Did the strike lose its protected status?

Unreasonable demands

[60] The Respondent's case in this regard is devoid of any basis in law. The Respondent was not obliged in law to give into the demands. Moreover, this Court has repeatedly affirmed the point that the reasonableness of demands made in the collective bargaining process is not justiciable. As long at the demand relates to matters of mutual interest between the employer and employee, does not fall foul of sections 64(1)(a) and/or 65 of the Labour Relations Act, 1995 and does not require the employer to act unlawfully, the demand is lawful.[7]

[61] The Court's dictum in *Vanachem*[8] answers the issue head on. There, the applicant employer sought an interdict to prevent its employees from embarking on a strike. It alleged that the union's demands were 'unfair, unreasonable and not conducive to functional collective bargaining'. Thus the claim was not that the demands were not legally compliant in terms of sections 64(1)(a) and/or 65 and the definition of a strike. The court held:

> But there is a more fundamental reason why the interpretation of the term 'matters of mutual interest' proffered by the applicant cannot be sustained. What the applicant seeks to do, by extrapolating the reference to the common good in the *Rand Tyres* decision into the term 'matters of mutual interest,' is to subject every demand made in the collective bargaining process by trade union (and indeed, by any employer or employers' organisation) to utilitarian analysis. It would require the court to apply a form of Bentham's *felicific calculus*, to determine what might constitute the greatest good for the greatest number. What this approach overlooks, at a basic level, is that the LRA acknowledges that the interests of parties to an employment relationship more often than not stand in conflict, and that the preferred mechanism to reconcile competing interests is the process of collective bargaining. In a

[6] Their closing arguments state: "The Applicants embarked on a protected strike which commenced on 18 June 2018 and terminated by the Applicants on 30 July 2018."

[7] See: *Greater Johannesburg Transitional Metropolitan Council v IMATU and another* [2001] 9 BLLR 1063 (LC); *TSI Holdings (Pty) Ltd and others v NUMSA and others* [2006] 7 BLLR 631 (LAC); *SA Federation of Civil Engineering Contractors obo Members & others v NUM & another* (2010) 31 ILJ 426 (LC); *Vanachem Vanadium Products (Pty) Ltd v NUMSA & others* (2014) 35 ILJ 3241 (LC).

[8] *Vanachem Vanadium Products (Pty) Ltd v NUMSA & others* (2014) 35 ILJ 3241 (LC).

voluntarist system such as that established by the LRA, the courts have no role in determining the merits of any demand made during the bargaining process, nor are they empowered to make any value judgment as to whether a demand promotes or secures the common good of the enterprise. The court is empowered to intervene if and only if a demand made in support of a strike or lock-out if any industrial action does not comply with the substantive and procedural limitations established by the Act. In other words, the court is concerned only with the lawfulness of demands in a strict sense, and can make no judgment as to their merits or consequences.[9]

[62] And, finally, the Labour Appeal Court noted: [10]

> A strike uses collective action and the withdrawal of labour as an exercise of power in an attempt to press an employer to meet certain employee demands. An employer's claim that it will not accede to such demands or that it has not budgeted for or obtained the required approvals to accede to such demands does not necessarily make either the demands or the strike itself unlawful… What these submissions indicate is an approach to collective bargaining in the public service which appears to fail to understand the inherent nature of the power play between the parties and the right of unions and employees to exercise collective power in support of workplace demands.

[63] It thus follows that the Respondent had no right to treat the strike as unprotected on the basis of its view that the wage demands were unreasonable.

[64] To the extent that the evidence shows that AMITU continued to demand the dismissal of the Respondent's HR manager, the Respondent ought to have applied for an order prohibiting that demand. The Labour Appeal Court in *Imperial Cargo (Pty) Ltd v Democratised Transport Logistics and Allied Workers Union and others* held:

> 'The respondents are correct in their contention that the right to strike in pursuit of a permissible demand did not evaporate upon the addition of the three impermissible demands. If the second demand is a permissible demand, the respondents may embark on a protected strike over it. But it does not follow that the appellant was not

[9] Vanachem para 19.

[10] *Nehawu v Minister for the Public Service and Administration and Others* (2023) 44 ILJ 1207 (LAC) (13 March 2023)

entitled to orders prohibiting a strike over the impermissible demands. The Labour Court erred in not making such orders.'

[65] The approach of the LAC was endorsed by the Constitutional Court in *Unitrans.*[11]

The duration of the strike

[66] Here again, I was pointed to no legal authority which holds that an otherwise protected strike loses its protection after a "protracted" duration.

Was the strike marred by high levels of violence and intimidation?

[67] It was the testimony of Staats and S Downes that when the strike commenced at about 6am, the picketing employees prevented non-strikers and vehicles from entering the gate, would "rush up" to them "to try and intimidate" them. This continued throughout the strike.

[68] However, the most reliable objective evidence in this trial showed nothing of the sort. This was the extensive, clear and audible footage from the CCTV cameras that were trained over the main entrance to the Respondent and the picket near the entrance and the video recordings made by the Respondent from the boardroom that overlooked the two.

[69] In sum, this Court was not provided with any reliable evidence of violence and intimidation on the picket line outside the main entrance to the Respondent's premises.

[70] Notwithstanding this finding, in my view the strike was marred by violence and intimidation.

[71] It was the testimony of Staats that he observed that one Musa Jama, a non-employee union official, was armed with a side weapon (handgun) while on the picket line. This claim was not meaningfully challenged; the only challenge rested on a submission that Staats provided no photographic evidence of his claim. Clearly a visible firearm on a picket line is potentially intimidating. Even the law applicable to the general public is that one can carry a registered firearm in public but it must not be visible.

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[11] *TAWUSA/obo MW Ngedle and others v Unitrans Fuel and Chemical (Pty) Limited* (CCT 131/15)

[72] Video and photographic evidence revealed that prior to and after the court order of the 22th June, several of the picketing strikers openly held sjamboks, knobkerries, golf clubs, planks and sticks.

[73] The Code of Good Practice on Picketing (which was applicable at the time[12]) stipulated that picketers "must be unarmed".

[74] The Labour Appeal Court in *Palprint*[13] held that:

> The constitutionally protected right to strike does not encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate.

[75] And that:

> *The decision to have a sjambok, PVC pipe and sticks at a protest, at which others were in possession of a golf club and axe, was not only a clear breach but, viewed objectively, was aimed at sending a message which, at the very least, was threatening to others".*

[76] The potential danger of such weapons in a strike situation was illustrated by Staats' testimony that on the first day of the strike he "ran down the road after two guys who were running after one of our female employees with a sjambok to call them off".

[77] Video evidence also showed that on the first day of the strike, some of the picketers moved onto the public road in front of the Respondent's premises and stood in the way of an oncoming bus, which forced it to stop. Such a show of force is potentially intimidating.

[78] More crucially, it is undisputed that on 20 and 28 June, rocks were thrown respectively at a truck of a client and the Respondent.

[79] It is also undisputed that on 28 June at about 22h00 and on 24 July at about 04h00, a truck of the Respondent was attacked. The first was petrol bombed and in the case of the second truck, two shots of live ammunition were fired into the door on the driver's side. Crucially, the acts were committed while the

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[12] Picketing Regulations replaced the Code, but with effect from 1 January 2019. In terms of clause 6, picketers are prohibited from having any dangerous weapons in their possession, which includes sticks, knobkerries and sjamboks.

[13] *Pailprint (Pty) Ltd v Lyster N.O. & others* (2019) 40 ILJ 2047 (LAC).

vehicles were being driven and objects were placed on the road to force the drivers to slow down. As one would expect, the drivers had to be sent for trauma counselling. It goes without saying that such acts would have a chilling effect on non-strikers and replacement labour.

[80] I accept that no witness gave evidence directly linking any of the strikers to the above acts. However, circumstantially, by reason of the targets (the Respondent's vehicles, drivers and client) and the timing and signs of premeditation, it is more likely than not that the incidents were linked to the strike. A group of strikers or other persons[14] linked to them in all likelihood committed the acts. To believe otherwise would mean that some random group of persons with no ties to the Respondent coincidentally decided when the strike was underway to stone and firebomb vehicles connected to the Respondent and shoot at its employees on different days for no apparent reason.

[81] The fact that the strikers demonstrated no overt acts of intimidation while under the scrutiny of the CCTV and video cameras trained on the entrance to the Respondent's premises does not dispel this inference. AMITU's letter of 18 June indicates they were well aware of the cameras.

[82] It is noteworthy that one of the strikers, Phumalani Blessing Mkhize (aka Poomlani), was found guilty by this court in the contempt of court case (*supra*) of praising and thus essentially encouraging the attack on the trucks in a social media post.

[83] It is also undisputed that Mkhize also posted the following on Facebook:

> *Day 9 today*
>
> *Nothing from the white man. No answers. We are going to continue standing, striking, no more working, until he gives us the percentage that we all need. Other than that, soon we will make him feel the pain that will scare him.*

[84] It is also undisputed that on 19 July, Phumalani (Blessing) Mkhize (aka Poomlani) cell phone number 0784870690, sent the following WhatsApp message. The translation paraphrased read as follows:

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[14] As indicated the video footage shows that a number of people were involved.

This message is for all members of the Corrugated Department. Even if the strike were to end, Alfred Mahalaba will get everyone in the department who worked during the strike. The message went on to say that when they burnt down Albert Ngidi's house, they did not kill him only because he was not there at home.

[85] It is also undisputed that on 28 June, a message in Zulu was sent to the Respondent's employees on a group WhatsApp. The translation reads as follows:

"It will be good for you to stay at home and leave us show this white man of yours, you rats, exactly who we are. We are tired of you working, while we are not working – what is next is the death of yourself and your family."

[86] The Respondent saw the messages and sent a screen shot to the union on 29 June.

[87] It is also undisputed that on 29 June, the house of a non-striker was set alight while he was at work. Here again, it is possible that it was unrelated to the strike, but in terms of the timing and the fact that he was a non-striker, it more likely than not the act was connected to the strike.

[88] It is also undisputed that a non-striker secured a protection order against one of the strikers (Applicant Emmanuel Mabuza) for alleged threatened assault during the strike. The only challenge to this evidence was to the effect that it happened away from the workplace.

[89] It is also undisputed that one Ngubane, a union official, gave a radio interview accusing the Respondent of hiring "foreigners", a provocative subject.

[90] In my view, these incidents, bearing in mind the nature of some of them, collectively amounted to a high level of violence and intimidation.

Did the violence and intimidation render the strike unprotected?

[91] The first judgment directly in point is *Tsogo Sun*[15] in which Van Niekerk J made this obiter comment:

'…When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of a labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy protected status.'

[15] *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC).

[92] In a later judgment (*UPN*[16]), with reference to *Tsogo Sun*, Van Niekerk stated:

> 'While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in [Moloto] this court ought not to easily adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike…'

[93] In *UPN*, Van Niekerk J stressed that strike violence is a denial of the right of those at whom violence is directed, typically those who elected to continue working and replacement labourers.

[94] There's also a plethora of journal articles by respected academics and practitioners and other obiter dictums from this Court that strike violence constitutes an implied limitation on the right to strike. In summary, the reasoning is that where violence is employed in the power play to accelerate the effectiveness of the strike (is a constitutive element of the power play) and a court order interdicting the violence has proven ineffective, the strike loses its protection and may be interdicted. Put differently, once violence replaces the refusal to work as the focal point of the strike, then it no longer qualifies as a 'strike' as defined. The cross-over occurs when the violence takes its toll, resulting in non-strikers and replacement labourers refusing to work – it being at this point that the strikers secure an illegitimate advantage that serves to skew collective bargaining power, and places the employer under [illegitimate] economic duress. The view that the act of striking and the conduct of strikers are different phenomena, and should be treated as such fails to appreciate the dynamic involved in strike violence. Strike violence is not about violence *per se* – instead it is about the effect it has on the collective bargaining power of the parties. Typically, strike violence serves to scare away non-strikers and replacement labourers, which results in the strike being more effective and the employer is placed under undue economic duress.[17]

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[16] *National Union of Food and Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re: Universal Product Network (Pty) Ltd v National Union of Food and Beverage Wine Spirits & Allied Workers & others* (2016) 37 ILJ 476 (LC).

[95] Given the definition of a strike and the rationale behind the right to strike, these views are compelling.

[96] The oft-quoted words of Davies & Freedland Khan-Freud[18] and the Constitutional Court judgment in the *First Certification* case explain that the right to strike is to bring *credibility* and *equilibrium* in the power play.

[97] Davies & Freedland Khan-Freud articulated it as follows:

> '[I]f workers could not, in the last resort, collectively refuse to work, they could not bargain collectively. The power of management to shut down the plant (which is inherent in the right of property) would not be matched by corresponding power on the side of labour. These are the ultimate sanctions without which the bargaining power of the two sides would lack "credibility". There can be no equilibrium in industrial relations without a freedom to strike'.

[98] In the *First Certification case*, the Constitutional Court articulated it as follows:

> "…Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action… "

[99] However, the Labour Appeal Court in *NEHAWU v Minister for the Public Service and Administration and Others*[19] has essentially taken the view that an otherwise protected strike does not lose its protected status on account of violence. In the case of the NEHAWU strike, which was also characterised by extreme violence, the Court stated:

> The shocking reports of widespread strike misconduct and intimidation, which appear to characterise the current strike and which have resulted in unopposed interdictory relief being granted against NEHAWU and its members in most provinces, are not

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[17] *Verulam Sawmills (Pty) Ltd v AMCU & others* (2016) 37 ILJ 246 (LC); *KPMM Road and Earthworks (Pty) Ltd v AMCU & others* LC September 2017 case no J1520/2016 unreported; A Myburgh 'Interdicting Protected Strikes on account of violence' (2018) 39 *ILJ* 703 at 724; A Myburgh 'The Failure to Obey Interdicts Prohibiting Strikes and Violence – The Implications for the Rule of Law' (2013) 23 (1) *Contemporary Labour Law* 1 at 5; PAK le Roux 'Strike Interdicts: Dealing with Violence and Unlawful Demands' (2015) 25 (5) *Contemporary Labour Law* 52; A Rycroft 'Can a Protected Strike lose its Status'?' (2012) 33 ILJ 821; A Rycroft 'What can be done about Strike-related Violence? (2014) 30 (2) *International Journal of Comparative Labour Law and Industrial Relations* 199.

[18] Labour and the Law 3 ed (1983) 292.

[19] (2023) 44 ILJ 1207 (LAC) (13 March 2023).

disputed by NEHAWU. Such conduct is not only illegal but wholly unjustified and unwarranted. By doing so, NEHAWU and its members display a total disrespect for the law. Yet, even in spite of this, as was stated by the Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)*–

> `[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'[20]

[100] The LAC also referred to *Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and another* in which the Constitutional Court held that:

> 'Where a person lawfully exercises their right to protest, strike or assemble, but is nonetheless placed under interdict, that person's constitutionally protected rights are impermissibly denuded…'[21]

[101] In other words, rendering the strike unprotected would impermissibly denude the constitutional right to strike of those striking employees who exercised their right peacefully.

[102] In the circumstances, I am not convinced that the Respondent had the right to treat the strike as unprotected on account of the violence and intimidation perpetrated by some, maybe even many of the strikers.

[103] In any event, the case law relied on by the Respondent indicates that the Respondent had to approach the Court for such an order and a consequent interdict or order that the strike to be suspended, which it did not do.

[104] Moreover, in terms of Schedule 8 of the Labour Relations Act, 1995 employees who are engaged in an unprotected strike have to be warned *via* an ultimatum that they were participating in an unprotected strike.

[105] In *AMCU obo Rantho and 188 others & another v Samancor Western Chrome Mines,*[22] the LAC held that:

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[20] 2012 (8) BCLR 840 (CC) at para 53.
[21] [2022] 6 BLLR 487 (CC) at para 41.

24] Item 6 of Schedule 8 of the Labour Relations Act ("the LRA") offers clear guidance regarding the purpose and implications of an employer issuing an ultimatum during an unprotected strike. While making it clear that participation in a strike that does not comply with the provisions of the LRA is misconduct, Item 6 recognises that such conduct does not always deserve dismissal. The substantive fairness of a dismissal for participation in an unprotected strike must be determined in light of the facts, including the seriousness of the contravention, attempts made to comply with the LRA, and whether or not the strike was in response to unjustified conduct by the employer. Item 6(2) aims at avoiding precipitate dismissals by means of cooling-off measures. It provides in relevant part:

> 'Prior to a dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.'

[25] The object of an ultimatum is to give striking employees the opportunity to reconsider their action… The purpose of an ultimatum is to put the negotiation process back on track and to end the precipitous action. If it achieves that purpose, dismissal normally should not follow because that too would be precipitate action undermining legitimate and orderly collective bargaining.

[27] For those reasons, our law regards an ultimatum by the employer as a waiver of the right to dismiss for the period of its duration. A party who has once approbated (waived a right arising under the contract, including the right to terminate it) cannot thereafter reprobate (seek to enforce that right).[23] If the employees refuse to return to work, the waiver implicit in the ultimatum will lapse.[24] But if they comply with the ultimatum, the employer is ordinarily

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[22] AMCU obo Rantho and others v SAMANCOR Western Chrome Mines (2020) 41 ILJ 2771 (LAC).

[23] *Administrator, Orange Free State & others v Mokopanele & others* 1990 (3) SA 780 (A); *MM & G Engineering (Pty) Ltd v NUMSA & others* (2005) 26 ILJ 1326 (LAC); and J Grogan *Workplace Law* (10 ed) 405-406.

[24] *SA Workers Union (in liquidation) v De Klerk NO* (1992) 13 ILJ 1123 (A).

precluded from dismissing the employees for the act of striking, but not necessarily for other misconduct committed during the strike. Where an employer after issuing an ultimatum wishes to reverse or amend the terms of the waiver prior to it expiring, it may do so in appropriate circumstances provided it has a good reason and gives the striking workers timeous notice of the change to prevent them from being unfairly prejudiced thereby.

[106] It follows that the charges in count 1 found no justification for the dismissal of the Applicants.

Harassment, intimidation and assault of specific individuals (Count 4)

[107] This brings one logically to the charges in count 4. Other than Phumalani Blessing Mkhize (aka Poomlani) and Immanuel Mabuza, no witness identified or gave evidence directly or circumstantially linking any Applicant to acts of intimidation, harassment or assault of specific individuals. In one of the letters to AMITU, it was claimed that one Ayanda Cele was brandishing a knobkerrie and had threatened a number of employees "with their lives", but no Respondent witness confirmed the claim.[25] The affidavit of Raj Dewaran (a deceased non-striker) which I admitted into evidence disclosed no intimidation by Lethlake.

[108] Given the serious nature of their offences, it follows that the dismissal of Phumalani Blessing Mkhize (aka Poomlani) and Immanuel Mabuza was justified.

Derivative misconduct

[109] 'Derivative misconduct' developed in our case law as a type of misconduct distinct from the primary misconduct in question, generally relied on by employers in circumstances in which the actual perpetrators of the primary misconduct cannot be identified.[26] The concept of 'derivative misconduct' was articulated in *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) at para 33:

'This approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the

[25] Just the presentation of the letter by a witness does not constitute proof of its contents.
[26] Kelsey Allen, 'The death of derivative misconduct', De Rebus, September 2019.

misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'

[110] As to proof of knowledge of wrongdoing, the Labour Appeal Court in *Western Platinum Refinery Ltd v Hlebela*[27] held that:

> The undisclosed knowledge must be actual and not imputed or constructive knowledge of wrongdoing. Proof of actual knowledge is likely to be established by references from evidence adduced but it remains necessary to prove actual knowledge.

[111] The Constitutional Court in *NUMSA obo Nganezi v Dunlop Mixing Technical Services (Pty) Ltd*[28] considered whether there was in fact a duty on the part of employees to disclose information pertaining to the misconduct of other employees to their employer. The court distinguished between fiduciary duties, which entail a unilateral obligation to act in the beneficiaries' interest, and the contractual duty of good faith, which is reciprocal in nature and requires no more than that the contracting parties have regard to the interests of the other. The court concluded that our law does not imply fiduciary duties into all employment relationships. The duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee to disclose information of misconduct of their fellow employees to their employer, in the absence of any reciprocal obligation on the part of an employer itself to give something to the employees in return (such as guarantees for their safety).[29]

[112] In sum then, in instances where an employer sought to impose a duty on employees to disclose information about their fellow striking employees, the employer had to prove (using the balance of probability standard) actual knowledge of the perpetrators of the wrongdoing on the part of the employees and the reciprocal nature of the trust relationship between the employer and employees would have required the employer to guarantee the safety of the disclosing employees.

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[27] 2015 ZALAC 20.
[28] [2019] 9 BLLR 865 (CC).
[29] FN 26 above.

[113] It also logically follows that where the employer had the means to obtain the information, there would have been no ground to burden the employees with a duty to provide the information.

[114] Turning to the facts of the matter before me, they do not sustain the conviction and dismissal of the Applicants on this charge.

[115] Firstly, it has not been shown that it is more likely than not the accused employees had actual knowledge of the perpetrators of the unlawful acts referred to in the charge. As pointed out by counsel for the Applicants, the violence which involved the stoning, firebombing and shooting at the drivers of the trucks happened in the dead of the night, and not during or near an active picket. None of the Applicants were placed at the scenes of the crimes, so to speak or in circumstances from which it can be inferred that they had knowledge of the perpetrators. The same with the arson attack on a non-striker's house and the attacks on non-strikers and contract workers.

[116] The Respondent was also in a position to ascertain certain information without the assistance of the strikers. Here I have in mind the WhatsApp messages, social media posts and the protection order. The Respondent's attorney further informed the union that the Respondent was in the process of identifying the attack on the contract workers through photographs.

[117] Finally, even if any of the Applicants had been in a position to identify the perpetrators, a careful reading of the "whistle blower" notice does not disclose a guarantee of the whistle blowers' safety. The Respondent accordingly did not discharge its reciprocal duty of good faith.

[118] Staats suggested that the strikers had a duty to dissociate themselves from the unlawful acts.

[119] There is nothing in the *Dunlop* judgment which holds that employees are required to actively and positively dissociate themselves from the unlawful acts in question.

[120] As to complicity in the misconduct, to the extent that this may be relevant under this charge, the Constitutional Court held:

> Evidence, direct or circumstantial that individual employees in some form associated themselves with the violence before it commenced or even after it ended, may be sufficient to establish complicity in the misconduct.

[121] There was no evidence that the Applicants were complicit to the acts referred to in the charge.

Contempt of the court order of 22 June and breach of picketing rules (Count 3)

[122] This issue concerns three aspects. Firstly, where the employees picketed, secondly whether they hindered access and egress to the Respondent's premises and thirdly whether they remained armed with weapons after the court order of 22 June.

[123] It is common cause that the picketing Applicants picketed behind a boom gate ten (10) metres to the right from the main entrance. They did not picket 150 metres away from the Respondent's premises and did not picket ten (10) metres from the entire front façade of the premises.

[124] However, given the framing of the court order sought and granted, their conviction on this charge, *alternatively* the sanction of dismissal was not justified. The order was contradictory.

[125] In terms of the order, the picketers were interdicted from "approaching or being within 10 meters" of the [Respondent's] workplace". In a later paragraph of the order, they were ordered to "comply with the draft Final Picketing Rules in that [they] must picket in the demarcated area as identified by the [Respondent]", which was 150 metres away from the company premises. And, in a later paragraph, they were ordered to "comply with the Recognition Agreement and peace obligation".

[126] Clause 5.1 of the Final Picketing Rules stipulated that any picketing will take place at least 10m away from any Company plants and clause 11.10 of the Recognition Agreement stipulated that pickets will not "take place within ten (10) metres from the entire front façade of all premises occupied by the company."

[127] Lethlake testified that their understanding of the Rules was that they must be ten (10) metres away from the gate or entrance, which was not disingenuous given the Recognition Agreement and contradictions in the court order.

[128] Further, there was consensus during the trial that the space between the perimeter fence and South Coast Road is less than ten (10) meters. As such, to the extent that the picketing rules directed that they must be ten (10) meters away from the fence, such term could not be complied with.

[129] Essentially, the conduct of the picketing Applicants was not that serious given the fact that there is no Code or Regulation that pickets must be out of sight of non-strikers or in a place where the picketers are not in a position to see who enters the workplace.

[130] Finally, the picketers substantially complied with the order of 10 July in that there was consensus that they moved to a field 700 meters away from the Respondent's premises.

[131] As to the claim that the picketers prevented employees and clients from entering the premises and harassed and intimidated persons trying to enter the gate, as already found above, the most reliable evidence did not corroborate this.

[132] Turning to the final aspect of the charge, the evidence demonstrates that Alfred Mahlaba, Dumisani Duze, Zwelibanzi Ngcobo, Mtokozisi Mtolo, Lungani Zulu, Aaron Mkhize, Sabelo Shabala, Mongezi Mahlaba, Philani Mntungwa, Mbongeni Khuzwayo, Khanyisani Ngubane, Bhekani Mzimela, Zukile Nomfula, Nhlakanipho Makhoba, Blessing Mkhize and Nonkululeko Shabalala continued to carry weapons even after the court order of 22 June and the CCMA ruling of 3 July which directed that the picketers must be unarmed. The Code of Good Practice on Picketing (which was applicable at the time[30]) also prohibited the carrying of weapons. It stipulated that picketers "must be unarmed".

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[30] Picketing Regulations replaced the Code, but with effect from 1 January 2019. In terms of clause 6, picketers are prohibited from having any dangerous weapons in their possession, which includes sticks, knobkerries and sjamboks.

[133] To my mind, the conduct of these picketers constituted a dismissible offence. On the Applicant's own version (Lethlake's testimony), following the court order of 22 June, the Applicants were told that the carrying of weapons was prohibited.

[134] The danger posed by the carrying of weapons in a strike situation was confirmed by Staats' testimony that on the first day of the strike he "ran down the road after two guys who were running after one of our female employees with a sjambok to call them off".

[135] And, as already mentioned, the Labour Appeal Court in *Palprint*[31] held that:

> The constitutionally protected right to strike does not encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate.

[136] And that:

> *The decision to have a sjambok, PVC pipe and sticks at a protest, at which others were in possession of a golf club and axe, was not only a clear breach but, viewed objectively, was aimed at sending a message which, at the very least, was threatening to others".*

The dismissals that were substantively unfair

[137] It follows from all of the above findings that save for Phumalani Blessing Mkhize, Immanuel Mabauza, Alfred Mahlaba, Dumisani Duze, Zwelibanzi Ngcobo, Mtokozisi Mtolo, Lungani Zulu, Aaron Mkhize, Sabelo Shabala, Mongezi Mahlaba, Phila ni Mntungwa, Mbongeni Khuzwayo, Khanyisani Ngubane, Bhekani Mzimela, Zukile Nomfula, Nhlakanipho Makhoba, Blessing Mkhize and Nonkululeko Shabalala, the dismissal of the Applicants was substantively unfair.

Is the primary remedy of reinstatement appropriate?

[138] The Respondent contends that the circumstances surrounding the dismissal of the Applicants are such that a continued employment relationship would be intolerable given the violence and intimidation that plagued the strike, the fact that in most of the instances the Respondent does not know who the actual perpetrators are, the fact that no Applicant disassociated themselves from

[31] *Pailprint (Pty) Ltd v Lyster N.O. & others* (2019) 40 ILJ 2047 (LAC).

same and given the inflammatory statements the union made during the strike on behalf of the Applicants against the Respondent, wildly accusing it of racism, slavery, using foreigners and of using the most derogatory terms against the Applicants.

[139] The Constitutional Court in *Booi v Amathole District Municipality and Others (Booi)*[32]considered section 193(2)(b) of the LRA and held that the term "intolerable" implicates a level of unbearability, and must require more than the suggestion that the relationship is difficult, fraught or even sour. The court held that the language, context and purpose of section 193(2)(b) dictate that the bar of intolerability is a high one and that a conclusion of intolerability should not easily be reached. The employer must provide weighty reasons, accompanied by tangible evidence, to show intolerability, with such evidentiary burden heighted where the dismissed employee is exonerated from all charges.

[140] To my mind, the case put forward by the Respondent is compelling. I particularly note that not one witness for the Applicants testified that they or any other Applicant or the Union condemned or dissociated themselves from the violence. On Mkhwanazi's evidence, the tender of services was not because of the violence but because the long strike had not heeded any results in respect of their demands.

[141] However, I am constrained by the fact that there was no direct or circumstantial evidence linking any of the Applicants to the violence and intimidation and by the Constitutional Court's reasoning in *Marely*[33] which essentially amounts to this: there is no duty on employees to dissociate themselves from the violence and intimidation committed by other employees during a strike or even condemn it.

[142] It follows that the Applicants are entitled to an order of reinstatement. However, given the nine (9) months delay by the Applicants in the prosecution of the matter, reinstatement to the date of dismissal would be inappropriate.

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[32] [2021] ZACC 36.

[33] *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* **[2022] ZACC 30**

Procedural unfairness

[143] This issue relates to only those Applicants whose dismissals I have found to be substantively fair. It is my finding that their dismissals were not procedurally unfair.

[144] The failure of the Applicants to attend the disciplinary hearing essentially rested on their complaint about the venue and that they had no taxi fare to attend.

[145] The issue of taxi fare does not assist the Applicants' case because the Respondent offered taxi fare money. If the fare was not sufficient it was open to them to discuss this matter further. They did not.

[146] While I accept that they may have had genuine concerns about the venue and that this may have impacted on their ability to attend the disciplinary hearing, there is, however, a crucial feature of the evidence which is fatal to their claim of procedural unfairness. They were invited twice to make written representations as to why they should not be disciplined and dismissed. Probably a more practical process for an employer given the number of employees charged with misconduct. None of the affected Applicants pleaded or testified that they did not receive or had been unaware of the invitation to make written submissions.

[147] It is clear that the Respondent was open to fairly consider the representations. As Staats testified, the Respondent extended the invitation to avoid the loss of skilled labour and its consequent damage to the company. It was also the undisputed evidence of Staats that all four employees who submitted representations were reinstated.

Costs

[148] The lack of an ongoing relationship between AMITU and the Respondent and the reprehensible behaviour during the strike against which the Union made no statements of condemnation justifies no award of costs in favour of the Applicants.

Order

In the result, the following orders are made:

(a) The dismissal of Phumalani Blessing Mkhize, Immanuel Mabauza, Alfred Mahlaba, Dumisani Duze, Zwelibanzi Ngcobo, Mtokozisi Mtolo, Lungani Zulu, Aaron Mkhize, Sabelo Shabala, Mongezi Mahlaba, Philani Mntungwa, Mbongeni Khuzwayo, Khanyisani Ngubane, Bhekani Mzimela, Zukile Nomfula, Nhlakanipho Makhoba, Blessing Mkhize and Nonkululeko Shabalala was substantively and procedurally fair.

(b) The dismissal of the remaining Applicants was substantively unfair. These are the Applicants listed in annexure SG1, minus the above Applicants.

(c) The Respondent is ordered to reinstate each of the Applicants (referred to in (b) above) in its employ on terms and conditions of employment not less favourable to him or her than the terms and conditions that governed his or her employment when the Applicants were dismissed on 14 September 2018.

(d) The order of reinstatement will operate with retrospective effect to 14 June 2019.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: M N Xulu, instructed by M Dlamini Attorneys

For the Respondent: Farrell Incorporated