THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS 614/20

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION — **1st Applicant**

THE PERSONS WHOSE NAMES APPEAR ON ANNEXURE "A1" HERETO — **2nd Applicant**

and

NKOMATI ANTHRACITE (PTY) LTD — **Respondent**

Heard: **5-9 December 2022; 20-24 February 2023 and 13 March 2023**

Delivered: **11 October 2024**

Summary: **Employer failed to properly read Covid 19 regulations and that culminated in this dispute. Employer was declared essential services provider and absolved from Covid-19 restrictions. Held: (1) Dismissed employees reinstated as their dismissal was automatically unfair. (2) Employer not entitled to deduct money from employees. (3) Employer ordered to reimburse the employees whose monies were unlawfully deducted. (3) Employer ordered to pay the applicants costs consequent upon employment of two counsel.**

JUDGMENT

SETHENE AJ

Introduction

"Adv Mosam: ….If I was driving this morning to court, and low behold a bus decided to knock me down, it does not mean this matter cannot proceed…"[1]

[1] As the adage goes: the record does not lie. I have considered it apt to commence this judgment with the submissions made by Adv Afzal Mosam SC (Mosam SC) on 7 December 2022, who was for the applicants. Whether or not Mosam SC saw the premonition of his untimely exit from life, one cannot tell. All I know is that Mosam SC knew that *"…every soul shall taste death…"* as decreed in the Holy Qu'ran 3:185. Mosam SC embraced the angel of death after he attended his Friday congregational prayers at a Mosque on 13 January 2023. Mosam SC had previously acted as the Judge of this court. To Mosam SC, I can only say "…*Indeed to Allah we come and to Allah we shall return…"* as per Qu'ran 2:56. As our hearts continue to beat, we too, like Mosam SC did, live with the consciousness that we shall someday taste death. To borrow from profound poetic proses of Dr Don Omarudeen Materra (RA) when bidding farewell to the late Attorney Robert Mangaliso Sobukwe, in a poem entitled Sobukwe[2], Bro Don said:

> *"…Let no dirges be sung*
> *no shrines be raised*
> *to burden his memory*
> *sages such as he*
> *need no tombstones*
> *to speak their fame…"*

[1] Transcript of the proceedings of 7 December 2022 at page 35, line15

[2] Don Materra. Azanian Love Song 2 ed (2007) at 80.

[2] The genesis of this dispute lies in the government regulations that were issued by the Minister of Cooperative Governance and Traditional Affairs in response to a pandemic known as Covid-19. Central to the regulations was the characterisation of which services were declared essential and non-essential. In this particular dispute, mining companies such as the Nkomati Anthracite (Pty) Ltd (the respondent) were declared essential services.

[3] Premised on what appears to be a dismal failure by the respondent's senior managers to properly read and interpret the terms and conditions of the regulations in issue, the employees withheld rendering services to the benefit of the respondent. The respondent elected to deduct from the salaries of the employees who withheld their services and those who embarked on an industrial action, were disciplined and dismissed.

[4] The Association of Mineworkers Construction Union (AMCU), acting for and on behalf of its members as provided for in section 200 of the Labour Relations Act[3], (the LRA) as amended, was aggrieved by the conduct and the decisions made by the respondent and thereby instituted these proceedings.

[5] On the other side the respondent is of the considered view that there is nothing inappropriate or unlawful in its conduct and the decisions it made were premised on the regulations relating to COVID-19 which in their view compelled them not to fully operate the mine during that period of lockdown.

[6] At the commencement of the trial, I perused the bundles of the parties to this dispute and in chambers I asked counsel for the respondent if whether or not he was conflicted in representing the respondent. In response, counsel retorted that in his considered view he was not conflicted. However, in the event he finds that he is conflicted during the trial, there was an attorney who would take over and such takeover will be seamless and will not disrupt the continuation of the trial or occasion a postponement.

[3] No. 66 of 1995.

[7] The reason I enquired from the counsel for the respondent about his conflict of interest in this dispute is that he had directly addressed letters on behalf of the respondent directly to AMCU and not the legal representatives. For instance, counsel for the respondent had gone to the extent of arranging meetings to deal with the dispute and he had duly participated in the meetings he so arranged on behalf of the respondent.

[8] During the cross-examination of Mr Frans Vikizitha Mkhabela (Mr Mkhabela), AMCU's sole witness in these proceedings, the respondent counsel, referred Mr Mkhabela to a letter sent by him (counsel) relating to the meeting arranged by counsel in question. In response, Mr Mkhabela directed his answer to the respondent's counsel asking him to explain to court the purpose of the meeting he arranged as he was the one who penned the letter directly to AMCU. It is on that basis that for the first time counsel for the respondent realised that in fact he is conflicted and he is a potential witness for the respondent. Counsel for the respondent went further to place it on record that he had nothing further to ask Mr Mkhabela and duly ended the cross-examination. The applicants closed their case.

[9] I am mindful that the counsel for the respondent is not a member of the Bar and he is a so-called trust account advocate, meaning he can take instructions directly from a client in terms of the provisions of the Legal Practice Act[4].

[10] Following this episode during cross examination, the counsel withdrew as counsel for the respondent and was duly replaced. That meant that the matter had to be postponed for a new counsel to dive into bundles and be prepared to continue leading witnesses for the respondents at the previous counsel had finalised the cross-examination of Mr Mkhabela.

[11] The claims sought by the applicants are in the following terms:

[4] No. 28 of 2014.

11.1 That the court shall find that the employer made unlawful deductions from the salaries of the second or further applicants; and

11.2 That their dismissals were automatically unfair or alternatively unfair.

11.3 An order for costs;

11.4 Further and/or alternative relief.

[12] The respondent's contention is that there is no reason for the court to grant the applicants the relief sought. The matter must be dismissed with costs.

[13] In terms of the pre-trial agreement concluded between the parties it was agreed that the applicants will bear the onus to commence leading their witness.

[14] To avoid prolixity, I shall summarise the evidence tendered in support of the parties.

AMCU's case

[15] AMCU called its sole witness, Mr Mkhabela. Mr Mkhabela is AMCU's Regional Chairperson with twenty years' experience as a trade unionist. He testified that AMCU is recognised as the majority union by the respondent and in this regard, there is a recognition agreement between the parties concluded on 17 May 2019. In terms of the said agreement, AMCU was represented in meetings with the respondent in which substantive and non-substantive issues affecting its members were discussed. One of the substantive issues that would be discussed would be the conclusion of the collective agreement between AMCU and the respondent. Other issues such as special leaves would either be part of the collective agreements or shall be regulated by the respondent's policy.

[16] He testified that following an announcement by the President of the Republic of South Africa that there would be restrictions imposed in response to dealing with the Covid-19 pandemic, the respondent took a decision to place employees on special leave. This unilateral decision meant that the respondent would have to adjust its remuneration scheme given the uncertainties of the restrictions imposed. Further, there was no consultation with AMCU or directly with the employees.

[17] He further testified that like everybody he was aware of the restrictions imposed by government in its attempt to curb Covid-19. He was also aware that the respondent had ventured into creating a timetable that was to operate in terms of shifts in an effort to ensure that the spread of the pandemic is minimised, and the mine is not completely shut.

[18] Mr Mkhabela testified that on 7 May 2020, he received a call from the Chief Executive Officer (CEO) of the respondent, Mr Hepburn who presented a roster regarding shifts for the employees in the wake of Covid-19 restrictions. According to the testimony of Mr Mkhabela, he informed Mr Hepburn that he had no mandate or authority to bind the members of the union and as such the respondent was at liberty to enter into discussions with the employees in respect of the shifts that were proposed by the respondent. In sum, Mr Mkhabela testified that there was no agreement concluded between himself in his capacity as the Regional Chairperson of AMCU and with Mr Hepburn as CEO of the respondent in respect of the roster or the shifts system that was proposed.

[19] The documentary evidence tendered on behalf of AMCU by Mr Mkhabela clearly demonstrated that none of the employees agreed to the terms and conditions of the shifts or the roster that was proposed. In this regard, it follows that individual members of AMCU did not agree to the terms and conditions proposed by the respondent. However, they were astonished to establish that at the end of the month their salaries were not paid in full as there were certain deductions effected by the respondent without the consent of the affected employees.

[20] Mr Mkhabela further testified that there was also a scheme devised and unilaterally implemented by the respondent which commenced from the periods between 27 March to 16 April 2020; from 17 April 2020 to 22 April 2020 and from the 23 to 30 April 2020. These time periods were decided and implemented by the respondent without the input of the employees or AMCU.

[21] According to the testimony of Mr Mkhabela, the respondent issued AMCU's members with forms purporting to be special leave forms to be signed. All the forms

where according to the testimony written only in English. According to Mr Mkhabela, the majority of AMCU's members did not properly understand English and there was no attempt by the management of the respondent to translate explaining clearly the contents of the forms and why they ought to be signed.

[22] As the majority of the workforce did not appended their signatures to the special leave forms, when the deductions were effected, the employees were startled to be informed to have consented to taking special leave. The emphasis by Mr Mkhabela was that the employees whose educational backgrounds were inadequate for them to comprehend the terms and conditions set out in the special leave forms did not understand what they were signing. Hence, AMCU members did not sign the special leave forms.

[23] At the end of the month all the employees were startled to establish that they were not paid their full salaries during the periods of their special leave they were meant to sign for. In this regard, according to the testimony of Mr Mkhabela, the employees embarked on the process of rendering their services at a very slow pace as a form of protest.

[24] On 5 June 2020, according to Mr Mkhabela's testimony, he again telephonically engaged the CEO of the respondent who raised a concern that there was a go-slow strike that the employees have elected to embark upon without following a due process. According to Mr Mkhabela, the form of protest the employees embarked upon was peaceful and did not pose any threat or danger to other persons or employees within the mining environment.

[25] Some of the employees who participated in this go-slow strike were ultimately put through the disciplinary process and were found guilty of embarking on an illegal strike and were consequently dismissed. According to the testimony of Mr Mkhabela, the employees were entitled to withhold rendering their services due to the respondent repudiating the terms and conditions of their employment contracts.

[26] Under cross-examination, the evidence tendered by Mr Mkhabela specifically in respect to contentious issues which were material and substantive to the dispute

before this court was not challenged at all by the counsel for the respondent. The primary focus under cross examination of Mr Mkhabela involved issues that were not pleaded by the respondent in its statement of defence.

Nkomati's case

[27] The respondent called about six witnesses in support of its case. These six witnesses testified on various aspects that Mr Mkhabela testified about.

[28] Mr Allan Hepburn (Mr Hepburn) was the first witness to testify in support of the respondent's case. Mr Hepburn was the CEO of the respondent until he left the employ of the respondent at the end of February 2021. He testified that the respondent was in business of mining anthracites in various operations in the country.

[29] He further testified that he was in constant communication with AMCU's officials, notably, Mr Mkhabela and they enjoyed a good working relationship. At all material times during his engagement with Mr Mkhabela, Mr Hepburn testified that verbal communication would be followed by written correspondence and this manner of communication was acceptable to AMCU.

[30] Mr Hepburn testified that at the time this dispute arose the respondent was in financial stress and there was a company that was keen or had expressed interest in purchasing shares in the respondent. Therefore, at the time the Covid-19 announcement was made, he had been grappling with this possible purchase.

[31] As a consequence of the government's announcement in respect of the Covid-19 restrictions, in his capacity as the CEO he deemed it fit to ensure that the mining operations were properly closed and its assets and employees were safeguarded. In consideration of challenges presented by restrictions as management they made a decision that a principle of "no work no pay" should be applied. He also considered that all their employees are from a poor community at Kwa Ngwane, and had to survive despite the restrictions imposed.

[32] He also testified that as management they devised a plan to place employees on special leave. In this regard, Mr Hepburn testified that he had discussions with the shop-steward from AMCU representing the employees. He also stated that they communicated their plans to the employees through the issuance of a memorandum. He testified that the issue of the special leave was explained to the employees and they were informed that overtime will be set off against special leave and if this could not happen it will be set off against annual leave. He further testified that employees were invited to sign special leave forms.

[33] In his testimony Mr Hepburn emphatically stated that AMCU is a very strong trade union and no management decisions could be forced down the throat of the union and as a result, neither AMCU nor its members raised any objection in respect of the plans the respondent had such as the signing of special leave forms by the employees.

[34] In order to increase the mining operations, Mr Hepburn testified that at the end of the first lockdown period they made an application to have the main mining operations operated at least on a 50% basis as an essential service. However, there was no response from the powers that be. The application in issue was made following an announcement by the government that certain businesses should operate on a limited scale and in his view, the respondent fell in that category.

[35] In sum, Mr Hepburn stated that granted the difficult conditions presented by Covid-19 restrictions the respondent did what it could to ensure that the pandemic was minimised consistent with the regulations which were imposed. Therefore, the respondent acted lawfully in implementing measures such as placing its employees on special leave.

[36] Under cross examination, Mr Hepburn emphasised the good working relationship the management had with AMCU. He conceded it was the management's prerogative to decide on the options for Covid-19 in an effort to minimise the spread of the pandemic. He further conceded that by placing employees on special leave such leave was not paid leave. He further conceded that no correspondence was sent to employees informing them of the measures or plans

put in place such as a system of special leave during the period of restrictions or lockdown.

[37] It was put to Mr Hepburn that during the various meetings and discussions he had with Mr Mkhabela, he was informed by Mr Mkhabela that he (Mr Mkhabela) was not in a position to take any decision in respect of the employees without consultation with the affected employees. Mr Hepburn further conceded that in fairness to the affected employees, Mr Mkhabela could not go on a frolic of his own without the requisite mandate from the affected employees who were all members of AMCU.

[38] Mr Hepburn further conceded that the respondent did not pay its employees their full salaries at the end of May 2020. In respect of the plan to introduce shifts or a roster, Mr Hepburn considered that the employees had a different understanding of what the plan involved. The same goes with the issue of special leave.

[39] Ms Ada Susan Stroh (Ms Stroh), is the payroll administrator employed by the respondent who testified about payroll related processes. Amongst her duties, Ms Stroh ensures that leave submitted is accordingly captured on the system as it needs to be processed for the benefit of the employees of the respondent.

[40] She testified that during the time the dispute arose Mr Hepburn was the CEO of the respondent. She was familiar with Mr Mkhabela of AMCU and further confirmed that indeed on 19 May 2020, there was a meeting between Mr Hepburn and Mr Mkhabela at the request of the respondent to discuss the issues of special leave and such meeting was held at the respondent's administrative office at Riverside Park in Nelspruit.

[41] She testified that in the main, the discussions between Mr Herpburn and Mr Mkhabela, dealt with different periods of lockdown and how special leaves should be taken and how payment of salaries should be processed. In her testimony, Ms Stroh denied that Mr Mkhabela disagreed with the views expressed on behalf of the respondent by Mr Hepburn.

[42] Under cross-examination Ms Stroh confirmed that no agreement or any form was signed by Mr Mkhabela in respect of the issues that were discussed during the meeting of 19 May 2020. She conceded that the company had already made the decision in respect of the plans that were brought about by the lockdown and the regulations imposed by government. She further conceded that she was never part of any consultations held with individual employees and in that regard, she was unable to testify on something she was not involved in. Ms Stroh testified in respect of the leave forms that no employee signed the form during the period between 27 March to 16 April 2020, between 17 April to April 22, 2020 and to a period of 23 to 30 April 2020.

[43] Ms Stroh conceded upon being referred to the transcript of the evidence of Mr Hepburn that that he too, conceded that Mr Mkhabela had informed him that he needed to discuss the respondent's proposals with the branch leadership of AMCU and the affected employees who would have to approve the proposals of the respondent. In clear terms, Ms Stroh testified that there was indeed no agreement that was ever reached between the leadership of the respondent, AMCU and employees.

[44] In sum, the evidence tendered by Ms Stroh was demonstrated to be at odds with that of Mr Hepburn

[45] Mr Van Reenen Jewaskiewitz (Mr Jewaskiewitz), was the General Manager of the respondent when the dispute arose. He testified that during one of the meetings of April 2020, held with the employees to explain the repercussions of the lockdown AMCU was not invited and the minutes of the said meetings were not circulated to AMCU and the employees.

[46] He also testified about the response by the employees who downed tools following their dissatisfaction in not receiving their full salaries. He testified that it was unacceptable for employees to down tools because they had issues and concerns. In his view any concerns raised by the affected employees could have been resolved whilst the plant was operational. He further testified that the strike was an unprotected strike.

[47] In an effort to stop the unprotected strike, the respondent, as a measure of last resort approached this Court on an urgent basis to interdict the continuation of the said strike. This Court granted the prayers that were sought by the respondent on 29 May 2020 and accordingly, the strike came to an end. The employees then resumed to render their services.

[48] In ensuring that the interdict obtained by the respondent was widely communicated to its workforce, Mr Jewaskiewitz issued an ultimatum to employees warning them that should they not resume their normal duties by 6:00am following the issuance of the court order, they will be charged for participating in an unprotected strike and will also be suspended and disciplined.

[49] He further testified that notwithstanding the ultimatum he issued to the employees who continued participating in an unprotected strike, some of the employees did not report for duty as outlined in the ultimatum issued to them. He was therefore left with no option other than to institute disciplinary proceedings against those who did not heed the contents of the ultimatum.

[50] He conceded under cross examination that during the period of lockdown the payroll continued to operate and payments were advanced to employees or persons who were doing maintenance work.

[51] He further conceded that the document that sought to explain the company's plan to set off overtime in respect of special leave, the document did not specifically state that the company will be applying the set off in respect of overtime. He further conceded that the employees did not receive payment in May 2020, for overtime and for working during weekends and public holidays. He further conceded that there was no document signed by the employees authorising the company to deduct payment for overtime for working on weekends and public holidays. He conceded that there is no document from AMCU that demonstrates that the respondent was entitled to deduct monies from the employees.

[52] In respect to the ultimatum issued calling upon employees participating in an unprotected strike, Mr Jewaskiewitz conceded that as much as he signed the said ultimatum on 25 May 2020, he could not prove on which company notice boards was it placed. Mr Jewaskiewitz was asked to comment on the evidence of Mr Hepburn who testified that Mr Mkhabela informed him that he cannot make a decision without consulting the branch leadership. He could not comment.

[53] Ms Funeka Makwea (Ms Makwea) also testified for the respondent and stated that she was former Human Resources Manager of the respondent. In the main Ms Makwea testified about the options that were discussed by the management of the respondent in respect of the recovery of the special leave. In addition to that Ms Makwea also testified that during the period of the unprotected strike, the striking employees close down the mine and locked the gates with chains and padlocks and no one was allowed entry into or exit out of the mine. In essence Ms Makwea stated that the unprotected strike was comprised of elements of intimidation and violence resulting in her and others closing down their offices as they could not afford to be exposed to violence.

[54] Out of fear Ms Makwea stated that they had to enlist the services of the security personnel backed up by members of the South African Police Services (SAPS) in order to deal with the consequences of the illegal and unprotected strike. She testified that they were even scared of driving their cars and it is for that reason that they had to call on the members of the SAPS to diffuse the situation.

[55] She also testified that the respondent was duty-bound to interdict employees engaged in unprotected strike. She further testified about the meeting that was held with Mr Mkhabela who represented AMCU.

[56] In respect of how the respondent communicated with the striking employees Ms Makwea testified that they sent text messages to all employees regarding the final ultimatum following an email sent to Mr Mkhabela.

[57] Under cross examination Ms Makwea was referred to the government gazette dated 25 March 2020, which detailed the implementation of the lockdown or Covid-

19 restrictions as its were. Ms Makwea was referred specifically to the government gazette showing that coal was exempted and mining companies were declared to be essential services. Ms Makwea further conceded that there was no collective agreement in place which detailed that the respondent was at liberty to deduct overtime pay for public holidays and weekends at its own volition. She conceded that she has not seen any document signed by AMCU agreeing to the proposals made by management in respect of dealing with the management of Covid-19 restrictions.

[58] It was put to Ms Makwea that the respondent was not relying on the collective agreement as a basis to act on its plans for purposes of the management of lockdown restrictions. Ms Makwea conceded that indeed the company was not relying on any clause in the collective agreement. In respect of the deductions of monies from the salaries of the employees, Ms Makwea was referred to section 34 (1) of the Basic Conditions of Employment Act[5] which stated the following:

> "(1) An employer may not make any deduction from any employees' remuneration, unless –
>
> (a) subject to subsection two. The employee in writing agrees to the deduction in respect of a debt specified in the agreement."

[59] In essence, Ms Makwea conceded that there was no agreement in respect of which the employees have consented in writing to the deduction of monies due to them for overtime, public holiday, and weekend work. However, Ms Makwea was also persistent that a document exists but that document was never signed by AMCU and employees.

[60] Mr Jacques Louw (Mr Louw) also testified that he was in the employ of the respondent and was responsible for the day-to-day running of the mining operations. He also testified about the issue of special leave, deductions of salaries and the options that were discussed with AMCU and employees. Mr Louw testified that it was

[5] No. 75 of 1997.

crucial for the respondent to put in place measures it had in dealing with the management of the lockdown period.

[61] In his testimony Mr Louw stated that anthracite was not a product which was an essential need and that is why the respondent had to comply with Covid-19 restrictions as published in the Government Gazette. However, under cross-examination Mr Louw made the same concessions that other witnesses for the respondent made.

[62] Mr Willem Fredrick Hattingh (Mr Hattingh) also testified for the respondent and without repeating the evidence that he tendered which is similar to the evidence of other witnesses, he made material concessions that other witnesses made.

Evaluation, analysis and law

[63] Mr Mkhabela as the sole witness on behalf of the applicants, testified premised on the constructive knowledge he had in respect of the labour developments that are the subject of this dispute. He went through all the aspects pleaded in the statement of case and he spoke eloquently in respect of each.

[64] In the main, Mr Mkhabela's evidence was supported by documentary evidence to underscore the applicants' case. His evidence was left unchallenged during cross-examination. It is trite law that a party that fails to challenge under cross-examination, *prima facie* allegations adverse to it, cannot claim victory but such amounts to conceding defeat[6].

[65] In this regard, the evidence tendered on behalf of the applicants cannot be disregarded by this court. In fact, this court has to accord credence to the said evidence as it was not challenged under cross-examination. The apex court in dealing with this principle in *President of the Republic of South Africa v South African Rugby Football Union*[7] said:

[6] *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* (2005) 26 ILJ 1652 (LAC) at para 39.

[7] 2000 (1) SA 1 (CC) at para 61.

> "If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts."

[66] Further, the same principle enunciated by the apex decision cited in the preceding paragraph is also aptly captured in ***Small v Smith***[8]***,*** the court said the following when dealing with unchallenged evidence:

> "It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever."

[67] All the witnesses who testified for the respondent were astonished to belatedly find that in fact there was no provision set out in the Covid 19 restrictions imposed by government that declared mining operations to be non-essential services. The mining operations were declared essential services.

[68] From the CEO, General Manager, Human Resources Manager, Payroll Manager of the respondent; all of them seemed not to have properly understood, let alone reading the regulations published on the 25 March 2020. It is apparent that none of the senior officials of the respondent gave themselves an opportunity to read the government Gazette so that they had a better understanding of the appropriate responses they needed to put in place.

[8] 1954 (3) SA 434 (SWA) at 438 E-H.

[69] By devising shifts or roaster in an effort to deal with the management of the pandemic was in essence misplaced or premised on ignorance on the part of the senior managers of the respondent. The mining operations were declared essential services and there is nothing that was contradictory in the regulations themselves.

[70] Due to the clear ignorance of failure to read the contents of the regulations, the respondent employed measures that resulted in unnecessary labour dispute which this Court had to be burdened with to adjudicate.

[71] It is also startling that the evidence of the senior managers of the respondent were contradictory in material terms. All of them held an apprehension that there was an agreement between AMCU and employees despite the fact that neither AMCU officials or employees themselves agreed to the proposals or terms and conditions suggested by the respondent. Granted the contradictory evidence tendered by the respondent's senior managers, this court cannot accept the conduct of the respondent in causing the unnecessary hardships to its employees. Further, it was perplexing to observe that the most senior managers of the respondent testified about the existence of the agreements they have never had sight of and yet brazenly testified that there was an agreement on special leave and the likes.

[72] The conduct of the respondent in triggering this dispute demonstrates the lack of appreciation in respect of the essence of collective agreements in the workplace and its impact to labour peace. Section 23 of the LRA states the following:

> ***"23. Legal effect of collective agreement***
> *(1) A collective agreement binds-*
> *(a) the parties to the collective agreement;*
> *(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;*
> *(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-*

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement.

(3) Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.

[73] Section 31 of the LRA provides:

"31. Binding nature of collective agreement concluded in bargaining council subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds—

(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employer's organisation that is such a party, if the collective agreement regulates—

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."

[74] The exposition of sections 23 and 31 of the LRA clearly connote that employers and employees are bound by collective agreements. By their very nature, collective agreements become conditions of services of the employees.

[75] In ***Collins v Volkskas Bank***[9]*,* the Industrial Court (predecessor to Labour Court) made reference to the fact that the conditions of employment negotiated through collective bargaining were binding and enforceable against individual employees through the common-law principles of agency or *stipulatio alteri.*

[76] It should be borne in mind that collective agreements are signed by trade unions representing its members and the employer organisations representing its members.

[77] In the circumstances, courts are enjoined to respect the contractual autonomy of the parties to contracts. In ***Brisley v Drotsky***[10], the SCA held that courts are required to respect the freedom to contract as "contractual autonomy informs also the constitutional value of dignity". The unfortunate emergence of Covid-19 pandemic was not a licence for the respondent to trample upon collective agreements and worker's rights. The same is the case with recognition agreements.

[78] Was the respondent entitled to unilaterally deduct monies from the salaries of the employees? The respondent engaged in a process of self-help by unilaterally deducting monies from the salaries of the employees without their consent. Arbitrary or capricious deductions of employees' salaries by the employer assails the

[9] (1994) ILJ 1398 (IC)

[10] [2002] (12) BLCR 1229 (SCA)

principles of the rule of law and no court must rubberstamp or authorise such brazen illegality.[11]

[79] Under oath, senior manager of the respondent stated that there was unrest caused by the employees and members of AMCU resulting in the SAPS and the mining security personnel called to defuse the situation. However, the respondent placed no documentary evidence on record sourced from the SAPS, let alone calling any SAPS official or its security personnel to come testify about the alleged acts of intimidation that allegedly ensued during the go-slow strike. In clear terms, such evidence was merely a fabrication meant to deceive the Court. In ***East Rand Gold and Uranium Co Ltd v National Union of Mineworkers***[12], the LAC held as follows with respect to the failure to call witnesses who are available:

> *'Failure to call witnesses who are available and able to elucidate the facts leads to the inference that the litigant in question fears that such evidence will expose facts unfavourable to him. See Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A). There can be no doubt that members of the union's negotiating team were available to the union as witnesses. They have personal first-hand knowledge of the state of their minds as representatives of the union and this evidence would have elucidated the facts on this point. They were not called. Ergo obviously could not call them.'*

[80] In the absence of the SAPS incident reports or cases of intimidation instituted by the senior managers of the respondents, the allegations of employees causing violence is simply a fabrication and stands to be rejected.

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[11] See Public Servant Association of South Africa obo Ubogu v Head of the Department of Health, Gauteng and Others 2018 (2) BCLR 184 (CC); Gqithekhaya and Others v Amathole District Municipality [2022] ZAECELLC 20; [2022] 4 All SA 106 (ECLD); [2022] 11 BLLR 1066 (ELC); 2023 (2) SA 227 (ECEL); (2023) 44 ILJ 627 (ECL)

[12] (1989) 10 ILJ 683 (LAC) at 694H-695A. See ABSA Investment Management Services (Pty) Ltd v Crowhurst (2006) 27 ILJ 107 (LAC) at para 14, the court held "…it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support-and may even damage-that party's case. Compare Zeffert et al SA Law of Evidence (5 ed) at 128-130."

[81] In clear terms had the senior management of the respondent, starting with its CEO taken time or sought assistance in the interpretation of the regulations, this dispute would not have arose. It goes without saying that this court would not have been burdened with a request for a special allocation in an attempt to expedite this dispute.

[82] In the conspectus of what is adverted above, the applicants are entitled to the prayers sought.

Costs and Conclusion

[83] Contrary to the erroneous misinterpretation of *Long v South African Breweries (Pty) Ltd and Others; Long v South African Breweries (Pty) Ltd and Others*[13] , *Booi v Amathole District Municipality and Others*[14] and *Zungu v Premier of the Province of KwaZulu-Natal and Others*[15], which are all decisions of the apex court, those decisions have not stripped this court from ordering costs where appropriate as contemplated by section 162 of the LRA.

[84] I find it difficult to comprehend that highly paid senior managers of a mining company such as the respondent would fail to properly read the contents of the regulations imposing restrictions and want to rely on a document they do not seem to have read to make adverse decisions against the employees.

[85] In this regard, and in the interest of fairness, it is appropriate to order that the respondent must pay the costs consequent upon the employment of two counsel.

[86] In the result the following order is made:

Order

[13] [2019] 6 BLLR 515 (CC).

[14] [2022] 1 BLLR 1 (CC).

[15] [2018] 4 BLLR 323 (CC).

1. The dismissal of the employees is declared unfair and they are hereby reinstated;
2. The deductions effected by the respondent on the salaries of the employees is unlawful;
3. The respondent is ordered to compensate all the employees whose salaries were unlawfully deducted;
4. The respondent is ordered to pay the costs of applicants' consequent upon employment of two counsel.

S. Sethene
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants:	Adv F Boda SC Adv A Mosam SC (*Rahmatullah Alay*) Adv R Itzkin (drafting of Heads of Argument) Adv A Omar Adv MH Moolla (pupil-drafting of Heads of Argument)
Instructed by:	LDA Attorneys Inc, Johannesburg
For the Respondent:	Adv H Molotsi SC
Instructed by:	Selomo Attorneys Inc, Pretoria