THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: DA21/23

In the matter between:

SHAVE AND GIBSON PACKAGING (PTY) LTD	**Appellant**
and	
AFRICAN MEAT INDUSTRY AND ALLIED TRADE UNION (AMITU)	**First Respondent**
DISMISSED EMPLOYEES OF THE APPELLANT	**Second Respondents**

Heard: **13 November 2024**
Delivered: **28 May 2025**
Coram: **Savage ADJP, Van Niekerk JA, Govindjee AJA**

JUDGMENT

GOVINDJEE, AJA

Background

[1] This appeal concerns events that occurred almost seven years ago. On 18 June 2018, members of the first respondent (AMITU) embarked on a protected strike demanding a wage increase. The strike continued until 6 August 2018 and was marred by acts of violence and intimidation.

[2] The appellant (the company) approached both the Labour Court and the CCMA on various occasions during the strike in an attempt to protect its rights. It successfully applied for an interdict on 22 June 2018 (the order). Pending the finalisation of picketing rules by the Commission for Conciliation, Mediation and Arbitration (CCMA), the relief obtained was wide-ranging. AMITU was ordered to ensure that its striking members complied with the order and its officials and office bearers were directed to make the contents of the order known. Those on strike were interdicted and restrained from harassing, intimidating and interfering with non-striking employees, and from unlawfully obstructing access and egress at the main gate by disrupting traffic. The employees were also restrained from approaching or being within 10 metres of the workplace. In addition, the employees were ordered '*to comply with the draft Picketing Rules agreement in that the individual Respondents must picket in the demarcated area as identified by the Applicant, pending the outcome of the CCMA hearing on Picketing Rules*'.

[3] On 3 July 2018 the CCMA established picketing rules (the picketing rules), in terms of section 69(5) of the Labour Relations Act,[1] (LRA) as worded at the time, and provided that '*[t]he picket will be held strictly in the area defined in the attached map. At no time will the picketers obstruct any entrance to the Company's plants*.'[2] Barring a few minor insertions, the draft picketing rules referred to in the order were confirmed and the area referred to as the appropriate place for picketing was the same demarcated area. A number of employees nonetheless continued to picket in their preferred area, rather than within the demarcated area.

[4] The position only changed a week later. On 10 July 2018, Lagrange J heard an application to institute contempt proceedings on an urgent basis and issued a rule *nisi*, returnable on 7 August 2018, calling upon the respondents to show cause why

[1] Act 66 of 1995, as amended.
[2] S 69 of the Labour Relations Act, 1995 (Act 66 of 1995) (LRA) has been amended by the Labour Relations Amendment Act, 2018 (Act 8 of 2018) with effect from 1 January 2019.

they should not be found guilty of contempt and punished for non-compliance with the order (the rule *nisi*). Employees were now interdicted from conducting any picketing activities within one kilometre of the company's premises. As a result, the picketing employees moved away from the space they had been occupying.[3]

[5] More than 160 employees were subsequently charged, found guilty and dismissed for the following four forms of misconduct: participation in unprotected industrial action which was not functional to collective bargaining in the form of violence and intimidation, unreasonable demands and the protracted duration of the industrial action; derivative misconduct;[4] contempt of the order; intimidation, harassment and threatening fellow employees by carrying sticks, knobkerries, sjamboks and other weapons, also threatening and intimidating the appellant's customers and suppliers. The charge sheet included the following alternatives to the charge of contempt:

> 'Being … in breach of the picketing rules in that you did not remain in the designated picketing area as provided in the picketing rules and that you are within the 10m perimeter area, further you were gathered at the gate of the applicants' premises interfering and hindering access and egress to Shave & Gibson's premises.'

The Labour Court decision

[6] Only 126 employees challenged the fairness of their dismissals before the Labour Court. On the first charge, the court found that these employees were part of the strike called by AMITU. The strike was protected and never lost that status, despite being marred by various instances of violence and intimidation linked to the strike. The company never approached the court for an order to interdict or suspend

[3] The rule was discharged on 7 August 2018. Save for one employee, Mr Phumlani Mkhize, the remaining employees were not held to be in contempt of court. The Labour Court made a ruling prior to the commencement of the trial indicating that the company was nonetheless entitled to charge the employees with misconduct pertaining to non-compliance with the order.

[4] The basis of this charge was the failure of employees to provide details as to those involved in various acts of misconduct, including: the stoning of a vehicle belonging to the appellant and the stoning of a Baker's Transport vehicle; the firebombing of a vehicle belonging to the appellant on 29 June 2018 outside the company premises in Mobeni; the shooting at a vehicle belonging to the appellant and driver of the vehicle on 24 July 2018 outside the same company premise.

the strike given the extent of violence and intimidation arising from it, and there was no ultimatum. On the second charge, dismissal due to derivative misconduct was rejected absent evidence of actual knowledge, on the part of the employees, of the identity of those responsible for the primary misconduct. The appellant had also failed to comply with its reciprocal duty to guarantee the safety of those employees who may have been able to provide the necessary information. Furthermore, the appellant had the means to obtain the information without burdening the employees, for example through the use of photographs. The Labour Court also held that there was no evidence that the employees were complicit in the various acts of misconduct referred to in the charge.

[7] In respect of the contempt charge, the Labour Court held that its own order was contradictory, so that the employees ought not to have been dismissed on this basis. Alternatively, the conduct of the employees was '*not that serious*' absent a '*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*', so that the sanction of dismissal was unjustified. In addition, the employees had '*substantially complied with the order of 10 July in that there was consensus that they moved to a field 700 metres away from the [company] premises*'.

[8] On the charge of intimidation, harassment and threatening behaviour, barring two employees, the Labour Court held that there was no evidence to link the employees to any acts of intimidation, harassment or assault of specific individuals, or to the prevention of access or egress to the premises. The dismissal of those two employees was found to be fair, as was the dismissal of 16 individuals identified as carrying weapons subsequent to the interdict, and contrary to the Code of Good Practice on Picketing which was applicable at the time.[5]

[9] It must be noted that these 18 employees formed part of a group of 90 employees who were actually identified, mainly by way of photographs, during the course of the picket.[6] The other 72 members of that group, together with 36

[5] *Code of Good Practice on Picketing* (GN 765 of 15 May 1998), repealed by GNR.279 published under *GG* 442260 of 1 March 2019.
[6] It may be that the actual number was 17, the name 'Blessing Mkhize' appearing twice in the order of the Labour Court.

employees who could not be identified as having committed any misconduct during the strike, were reinstated with effect from 14 June 2019.[7]

The appeal

[10] There is no dispute that the case of the 18 employees found by the Labour Court to have been fairly dismissed for misconduct falls outside the scope of this appeal. The appeal is directed at the Court's finding that the dismissal of the remaining 108 employees (the 72 remaining 'identified' employees on list 'SG 4' and the 36 'unidentified' employees on list 'SG 2') was substantively unfair. Two grounds of appeal were pursued and require consideration. Firstly, it is argued that the Labour Court erred in drawing an arbitrary distinction between individuals who were armed before and after the order. Secondly, the company contends that on the evidence, the dismissal of all 126 employees was substantively fair because they persistently contravened the picketing rules by picketing outside the demarcated area. This calls into question the correctness of the Labour Court's findings that the terms of the order were contradictory, that the employees had not committed an act of misconduct by continuing to picket outside of the designated area and that, even if they had, dismissal was too harsh a sanction in the circumstances.

Breach of the demarcated area

The demarcated area

[11] In terms of the recognition agreement concluded between the company and AMITU during 2017, picketing was prohibited '*within ten metres from the entire front façade of all premises occupied by the company*'.[8] The front façade of the company's premises on South Coast Road was only slightly more than ten metres from this road, and ran parallel to the road. As a result, strict adherence to the terms of the recognition agreement would effectively have precluded any picketing in the

[7] The Labour Court decision has been reported as *African Meat Industry and Allied Trade Union (AMITU) and Others v Shave and Gibson Packaging (Pty) Ltd* [2023] ZALCD 17; [2024] 1 BLLR 54 (LC); (2024) 45 ILJ 79 (LC).

[8] On the meaning of the term 'picket', see *National Union of Metal Workers of South Africa and Others v Dunlop Mixing and Technical Services (Pty) Ltd and Others* (*Dunlop*) [2020] ZASCA 161; [2021] 3 BLLR 221 (SCA); (2021) 42 ILJ 475 (SCA); 2021 (4) SA 144 (SCA) para 33.

area between South Coast Road and the company premises. This accorded with the company's original intention. When the parties were unable to reach agreement on picketing rules prior to the commencement of the strike, the company proposed a rectangular space between the front façade and South Coast Road, approximately 150 metres from a boom situated at the only entrance to be used during the strike, as its preferred location for the picket (the demarcated area).[9] The location of the demarcated area was both a deviation from the recognition agreement and a concession on the part of the company, given that it was almost entirely within ten metres from the company's front façade. Draft picketing rules made reference to this area and this information was posted on company notice boards and reiterated by senior company personnel on the morning the strike commenced. The demarcated area was known to AMITU and the employees who participated in the strike. It was marked and cordoned off with red tape prior to the commencement of the strike, before being removed by those employees who were determined to picket closer to the entrance to the company's premises.

Unidentified employees

[12] The company argued that even those employees who were unidentified during the picket were fairly dismissed. This was on the basis that each of the 126 employees before the Labour Court had participated in the strike. Indeed, in its judgment, the Labour Court recorded a concession to this effect, a finding not challenged on appeal. But it does not necessarily follow that participation in the strike equated to a breach of the picketing rules or amounted to contempt of the order. There is a fundamental distinction to be drawn between those employees identified as having picketed outside of the demarcated area, namely those employees listed in SG 4, and those not so identified (and listed in SG 2). Bearing in mind that the strike remained a protected strike, the argument that employees not identified by the company as having acted in breach of the picketing rules should be treated similarly to those who were specifically identified is untenable. This is tantamount to dismissing the employees listed in SG 2 purely for their participation in a protected

[9] In terms of measurements accepted by the Labour Court, the demarcated area was 10,68m x 37,81m, and was in the area between the company's front façade and South Coast Road, approximately 150 metres from a boom situated at the only entrance used by the company during the strike.

strike.[10] Absent any evidence that these employees actually picketed outside the demarcated area, or a proper basis for drawing an inference to that effect, they could not have been guilty of contravening the order by assimilation.[11] The evidence that these employees were '*part of the process*' and associated themselves with that unruliness, which spoke to their '*attitude'*, is wholly insufficient.

[13] Any misconduct on the part of those identified as having breached the picketing rules cannot simply be attributed to those employees who were not so identified. The refusal or failure to remain in the designated picketing area extended over a period of days after the granting of the order, and the company clearly had the means to record the acts of individual employees and identify them. In the absence of the identification of those employees listed in SG 2, their dismissals cannot be sustained. The Labour Court's finding that the dismissal of the employees listed in SG 2 was substantively unfair must accordingly be upheld. There is no reason to interfere with the Labour Court's reasoning in ordering the reinstatement of the unidentified employees listed in SG 2, on the terms that it was granted.

Identified employees

[14] The real issue in dispute pertains to the employees whose names appear on SG 4, those employees who, after the order was granted, were identified during picketing but not proven to have committed misconduct in the form of carrying weapons, intimidation, harassment or assault. In effect, the company seeks to justify their dismissals on the basis of their non-adherence to the order and the picketing rules, which both stipulated the demarcated area as the appropriate place for picketing. For convenience, the reference to 'the employees' in the paragraphs that follow refers to this group.

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[10] See *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC) at para 42.

[11] *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 (5) SA 354 (CC) at para 81. Also see the discussion in B Ramji, S Sibiya and H Ramji 'Tracing the historical development of employers' legal remedies against strike action: Derivative misconduct, interdicts and dismissal by common purpose' *CCR* (2024) (vol 14) 207 at 223 and following.

[15] It was AMITU's prerogative to authorise a picket by its members for purposes of peaceful demonstration in support of the protected strike.[12] The LRA provides that an authorised picket may be held, even without the permission of the employer, in any place to which the public has access but outside the premises of an employer.[13] Despite the engagement between the parties prior to the commencement of the strike, no formal agreement regarding picketing rules was reached by them. As such, the employees were free to picket in their preferred area outside the company's premises.

[16] The position changed after the company approached the Labour Court and obtained the order. As described above, in addition to regulating the conduct of the employees, the order restrained the employees from approaching or being within 10 metres of the workplace, and restricted picketing to the demarcated area until a commissioner established picketing rules.[14] In effect, the company's insistence as to the appropriate place for picketing now received the Labour Court's imprimatur.

[17] The evidence supports the conclusion that the employees were fully aware of the location of the demarcated area. This much is evident from the interactions between the company and AMITU prior to the commencement of the strike, including the manner in which the space was cordoned off with tape prior to this being removed by the employees. According to Mr Downes, the company's chairman, fresh tape used to cordon off the area again was also removed, and the employees continued to occupy the space they preferred. The employees neither misinterpreted the order nor mistook the location of the demarcated area and the decision not to remain in that space was considered and deliberate. This is evident from the interaction between Messrs Mkhwanazi, AMITU's general secretary, and Staats, the company's group financial director, at the time the order was served.[15] When Staats

[12] Section 69(1)(*a*) of the LRA.
[13] Section 69(2) of the LRA.
[14] See para 2, above. Absent agreement on picketing rules following the intervention of the CCMA, the CCMA '*must establish picketing rules*': s 69(4) and s 69(5) prior to amendment by the Labour Relations Amendment Act, No. 8 of 2018 (Government Gazette 42061 dated 27 November 2018), with effect from 1 January 2019.
[15] Various attempts were made to communicate the contents of the order to the employees. The employees were individually advised, by bulk short message service (SMS), that '*the judge ruled that AMITU can only stand in the demarcated area*'. Mkhwanazi also read the contents of the order to the employees, and the order was served by the sheriff on 25 June 2018. The return of service reflects that AMITU's shop stewards refused to listen to the sheriff and carried on singing.

made the point that the order had referenced the demarcated area, and that employees would be in contempt, Mkhwanazi's response was as follows:

> 'I'm not agreeing with that. That is why I'm saying that you can proceed with the contempt, we will defend. We reserve our rights … Proceed with your legality, but I'm going to, as I say to you, we reserve our right to defend.'

[18] Video footage captured their interaction. Mkhwanazi repeated his willingness to stand in contempt of the order more than once. He maintained that the employees were '*in dispute*' about the demarcation area, so that he had effectively advised the employees to ignore the demarcated area on the understanding that they would nevertheless be in compliance with the order. As another witness called on behalf of AMITU testified, the outcome was that the employees simply continued to occupy the space that they were in, without moving to the demarcated area, despite the proper service of the order and the clear implications of its content.

[19] Interpretation is the process of attributing meaning to the words used in the order having regard to the context provided by reading the contested provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Consideration must be given to the language used in the order in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed objectively in the light of all these factors. A sensible meaning, as opposed to one that is unbusinesslike or undermines the apparent purpose of the document, is to be preferred.

[20] Properly construed, the order was unequivocal and peremptory. The Labour Court restricted its focus to the language used, erroneously ignoring the evidence regarding the circumstances that resulted in the granting of the order and the importance of the demarcated area to the company. It also ignored the manner in which AMITU had contrived to feign confusion regarding the location of the demarcated area, when in fact this had always been readily apparent. Considering the purpose of the provision in context, the order clearly required picketing to be

restricted to the demarcated area pending the CCMA's determination of picketing rules. That the order also restricted the employees from approaching or being within 10 metres of the workplace could not negate the location of the demarcated area. There was no contradiction between these provisions and the Labour Court's approach resulted in the negation of its own earlier order pertaining to the appropriate place for picketing. This was unjustified. In addition, after the picketing rules were established by the CCMA on 3 July 2018, there could be no basis whatsoever for the employees to continue to ignore the existence and location of the demarcated area. The Labour Court erred in its failure to appreciate the importance of this development.

[21] The consequence is that the company succeeded in proving the existence of a workplace rule pertaining to the place for picketing,[16] one that the company had consistently sought to enforce through its approaches to the Labour Court and CCMA. From the time the order was served, the employees contravened that rule by picketing at the entrance boom and in the space between the boom and the demarcated area, instead of restricting the picket to the demarcated area as ordered. The rule was reasonable and, considering the evidence, particularly the various ways in which the contents of the order was communicated, the employees were aware, or could reasonably be expected to have been aware of the rule. There is no suggestion to the contrary, or that the rule was applied inconsistently. In any event, the importance of complying with a court order, also in a workplace context, is so well established and widely known that it would be superfluous to require further forms of communication. In effect, the employees acted insubordinately in continuing to picket where they did and the company succeeded in proving its alternative charge to contempt of court. There is no merit to the suggestions that the rule was 'in dispute', that the court had been misled in granting the order, or that there had been due compliance with the order. The demarcated area was contravened without justification. The remaining question is whether dismissal was an appropriate sanction.

[16] Cf *Panorama Park Retirement Village v Commission for Conciliation, Mediation and Arbitration and Others* (2020) 41 ILJ 1200 (LC) at para 32, holding that it is only the court that could pronounce on whether there was contempt of its orders or not, and that an order cannot '*automatically morph into a workplace rule for the purposes of a charge of insubordination*'. Also see, in general, *Lencoane and Others v Vector Logistics (Pty) Ltd* (JS 958/09) [2010] ZALC 149 (20 October 2010).

Was dismissal an appropriate sanction for breach of the designated area?

[22] In the circumstances, it is open to this court to draw its own conclusion as to whether dismissal was appropriate for the proven misconduct.[17] Determining a fair sanction entails a value judgment following consideration of all relevant factors.[18] The importance of the rule and flagrancy of the breach are indicators of the gravity of the misconduct. In addition, the employees' circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself are relevant.[19] The factors are open-ended and may, for example, include remorse shown by employees for non-compliance with the rules.[20] The totality of the circumstances must be taken into account.[21]

[23] The point of departure is that the designated area in which picketing was to be conducted was a serious matter for the company, so much so that it approached the Labour Court, which duly restricted picketing to the demarcated area in peremptory terms. Mkhwanazi read the order to the employees on the afternoon of 22 June 2018 and the order was duly communicated and served. Thereafter, as explained above, there could have been no confusion as to the obligation to picket only in the designated area. After 3 July 2018, when picketing rules were agreed at the CCMA, there could equally have been no doubt that picketing was to take place only within the designated area. In picketing as they did, the employees' conduct amounted to

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[17] *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28; 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 at para 195.

[18] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*) at para 79: relevant factors to be considered include the importance of the rule that had been breached; the reason the employer imposed the sanction of dismissal; the basis of the employees' challenge to the dismissal; the harm caused by the employees' conduct; whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employees and their long-service record. Such considerations have been labelled as 'objective extras': see R Le Roux and A Adam 'The many shades of intolerability in the workplace' (2024) 141 *SALJ* 323 at 336. Also see J Grogan *Dismissal* (4th Ed) (2022) 181: the choice of sanction is not a matter of logic or law and there are situations in which adjudicators may reasonably disagree that dismissal was appropriate.

[19] Item 3(5) of the Code.

[20] See Grogan above n 18 at 241.

[21] *Sidumo* above n 18 at para 78.

both a breach of the order and, after 3 July 2018, the breach of picketing rules determined by the CCMA.

[24] The rule of law, a founding value of the Constitution, requires that the dignity and authority of the courts (and in the case of labour disputes, the CCMA and bargaining councils clothed with the jurisdiction to arbitrate disputes) be maintained, as must their capacity to carry out their functions. Any act of misconduct that constitutes a breach of a court order or a determination made by the CCMA must necessarily be viewed in that context.

[25] This is not to suggest that every breach of a picketing rule established or confirmed by court order or the CCMA will necessarily warrant dismissal. Various circumstances may render dismissal inappropriate. For example, employees may picket marginally outside the prescribed area, even for an extended period of time, or picket well outside the place prescribed but only for a short period of time. Each case must be determined on its own facts.

[26] The employees have all been treated as first offenders for purposes of determining the appropriate sanction and it has been assumed in their favour that there is little risk of a repeat occurrence should they be reinstated. It is also to the employees' advantage, when considering the context, that the misconduct occurred during the course of picketing in furtherance of a protected strike.[22] Trade union members enjoy the right to participate in the lawful activities of the trade union, subject to the union's constitution and, as the judgment of my colleague Savage ADJP rightly emphasises, everyone has the right, peacefully and unarmed, to assemble, to demonstrate and to picket.[23] As the Supreme Court of Appeal has explained, a picket, by its nature, serves to broaden the impact that the withdrawal of labour of striking workers has upon the employer by seeking to disrupt operations which would otherwise continue despite the strike.[24]

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[22] See DM Davis and NM Arendse 'Picketing' (1988) 9 *ILJ* 26. Also see Ramji *et al* above n 11 at 235 on the 'reconstruction of the striking worker'.
[23] Section 17 of the Constitution.
[24] *Dunlop* above n 8 para 33. Also see *Pepsi-Cola Canada Beverages (West) Ltd v Retail, Wholesale and Department Store Union, Local 558, Burkart and Reiber personally and as representatives of all members of Retail, Wholesale and Department Store Union Local* 558 (2002) 90 CRR (2d) 189 at paras 26 and 27, indexed as *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* as cited

[27] Such sentiments cannot undermine the importance of employees' compliance with reasonable workplace rules or the dictates of courts and tribunals such as the CCMA. While trade unions are at liberty to select their own tactics, including the adoption of a confrontational stance, unions and their members are not permitted to act unlawfully when striving towards the desired end.[25] When dismissal is the result, courts are obliged to scrutinise the circumstances surrounding the exercise of these rights, particularly when it is alleged that there has been significant harm to the employer, fellow employees or to the public.[26]

[28] In the present circumstances, it is accepted that the employees were guilty of serious misconduct due to their wilful failure to obey the order and, later, the picketing rules in respect of the place for picketing.[27] Obedience to court orders are a foundational feature of a state based on the rule of law so that failure to comply with the order is accepted as having constituted an aggravating feature of the misconduct.[28] The breach was not of a technical nature or one that could be described as minimal or inconsequential. The evidence reveals that this was neither a case of employees standing marginally outside the prescribed area for an extensive period of time, nor was it a gross violation of the prescribed place for picketing for only a short period. Instead, considering the duration of the violation together with its spatial extent, the misconduct must be assessed as being both flagrant and protracted.

[29] The order, in so far as the place for picketing was concerned, was disregarded without justification and this violation continued day after day for more than a week in a manner that was tantamount to gross insubordination. The misconduct was made more egregious by the fact that the employees failed to alter

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in *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union and others* (2010) 31 ILJ 2539 (KZD) at para 48.

[25] *National Union of Public Service and Allied Workers on behalf of Mani and Others v National Lotteries Board* 2014 (35) ILJ 1885 (CC) (*Mani*) at para 194. Also see *SATAWU v Garvas and Others* 2012 (33) ILJ 1593 (CC) (*Garvas*) at para 26: the right to protest, picket and assemble is directly linked to it being exercised peacefully.

[26] *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC) at para 17.

[27] See the minority judgment of Dambuza AJ in *Mani* above n 25 at paras 213, 214.

[28] *Modise and others v Steve's Spar Blackheath* [2000] ZALAC 1; 2001 (2) SA 406 (LAC) at paras 119, 120. Also see *Pheko and others v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) at paras 28 and 30.

their stance for a further week after the establishment of picketing rules by the CCMA on 3 July 2018. As indicated, the picketing rules imposed by the CCMA reflected that the picket must be held '*strictly* in the area defined in the attached map'.[29] The CCMA ruling included the picketing rules as an annexure. Attached thereto was a single, separate, page clearly depicting and highlighting the demarcated area in relation to the company's premises and South Coast Road.

[30] Borrowing from cases involving gross insubordination, the gravity of the offence is apparent when considering factors such as the prior steps taken by the company to ensure that picketing occurred within the demarcated area, the reasonableness of the company's attempts to ensure strict adherence thereto, and the wilfulness of the employees' sustained defiance.[30] Considered in context, the employees' conduct led to a breakdown in the trust relationship, as confirmed by the company's witnesses. As Staats put it:

> 'Well, these are not people that we can, that we can trust again, that we can have in the factory, that we can afford to have around our machinery and so the breakdown of our relationship, the breakdown of the process, the elongated nature of the process, the fact that they were so far off side - off site, just made this whole process facile towards the end.'

[31] It may be added that the employees showed no remorse for their misconduct. Even when called to place a version before the chair of the disciplinary enquiry, a respected senior CCMA commissioner, AMITU elected to disrupt the proceedings and maintained a confrontational attitude. None of the employees sought to explain their circumstances to the company or to explain why they had persistently stood well outside the demarcated area, often near the company's only entrance, alongside colleagues who carried weapons and created an intimidating and hostile environment. One of the results of the breach of the designated area was that the employees, including those carrying weapons, placed themselves day after day in close proximity to the only entrance to the company that remained open. The evidence of Mr Downes confirmed what followed:

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[29] Own emphasis.
[30] *Mani* above n 25 at para 214.

> '…I witnessed that they continued to rush up to every vehicle [that approached the entrance], up to the boom, which was then broken, and they would rush up and charge up and they would try and intimidate them, and then march back and then rush up again and then re-gather. That's what happened during the day … despite the court order.'

[32] In the circumstances, the company cannot be criticised for attempting to deter misconduct of the kind that was proved, as part of a sensible operational response to risk management.[31] Having regard to all of the relevant factors, including the examples cited in the Code of Good Practice: Dismissal as warranting dismissal for a first offence, the misconduct perpetrated was sufficiently serious to warrant the penalty of dismissal. The Labour Court's finding that their dismissal was substantively unfair stands to be set aside.[32] Given this outcome, it is unnecessary for present purposes to determine whether the company had also succeeded in proving a fair dismissal based on contempt of court.

Reinstatement of the unidentified employees

[33] Finally, it cannot escape notice that the strike leading to the present proceedings commenced on 18 June 2018. The Labour Court's judgment was delivered on 17 October 2023, the trial having commenced more than a year previously. More than a year has elapsed since leave to appeal was granted so that it is difficult not to experience a sense of unease as to the ramifications of reinstating the unidentified employees for the company. In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*, Froneman J expressed the views of the Constitutional Court in respect of the effect of systemic delay on remedies, as follows:[33]

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[31] See Le Roux and Adam above n 18 at 334–335; A van Niekerk 'Dismissal for misconduct – Ghosts of justice past, present and future' in R le Roux and A Rycroft (eds) *Reinventing Labour Law* (2012) 102 at 117.

[32] It may be added that 18 of these individuals were reinstated by the Labour Court despite admittedly carrying weapons prior to the date of the order. Considering the Code of Good Practice on Picketing applicable at the time, there was no basis for differentiating between employees who carried weapons after the order, and those who had done so before. This is a further basis for upholding the appeal in respect of these 18 employees.

[33] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC) at para 51.

'Any appeal process carries its own risk. In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others*,[34] Goldstein JA stated, in relation to the previous Labour Relations Act,[35] that:

"Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."

[34] This court is constitutionally empowered to make any order that is just and equitable in the circumstances, including the power to confirm, amend or set aside the judgment or order that is the subject of the appeal.[36] The Labour Court reduced the effect of its order of reinstatement by a period of nine months, given the delay in prosecuting the matter, and also did not award costs in favour of AMITU or the employees. There is no basis for interfering with those decisions in respect of the employees to be reinstated. Fairness demands that there be no order of costs in respect of this appeal.

[35] Consequently, the following order is made:

Order

1. The appeal is upheld to the extent set out below.
2. The order of the court *a quo* is set aside and replaced with the following order:

'(a) The dismissal of each of the 90 applicants whose names appear on annexure SG 4 was substantively and procedurally fair.

[34] 1994 (2) SA 204 (A) at 219H–I.
[35] 28 of 1956.
[36] Section 174 of the LRA read with s 172 of the Constitution.

b) The dismissal of each of the 36 applicants who are listed in annexure SG 2 was substantively unfair.

c) The respondent is ordered to reinstate each of the 36 applicants listed in annexure SG 2 in its employ on terms and conditions of employment not less favourable than the terms and conditions that governed their employment at the date of dismissal.

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

e) There is no order as to costs.'

3. No order is made as to costs of the appeal.

Govindjee AJA

Van Niekerk JA concurs.

SAVAGE ADJP

[36] I have had the benefit of reading the judgment of my colleague, Govindjee AJA, with which I agree in part, save for the order made in respect of the 90 employees whose names appear on annexure SG 4 (the SG4 employees). In relation to the SG 4 employees, I would dismiss the appeal but vary the order of the Labour Court to order their reinstatement retrospective to 14 June 2019 with a final written warning valid for 12 months for the breach of the picketing rules.

[37] The SG4 employees were dismissed for contempt of the order of the Labour Court on 22 June 2018 and the breach of picketing rules. There is no dispute that the SG4 employees moved outside of the picket area demarcated in the court order and picketing rules.

[38] Although the SG4 employees were dismissed for contempt of court as well as a breach of the picketing rules, it bears noting that no application was made to the Labour Court to have the employees found to have been in contempt of that Court order. While framing the misconduct as "contempt" is unfortunate, this Court has repeatedly emphasised that it is the substance of the alleged misconduct which must

be determined and not the name given to it. There is no dispute on the facts that the SG4 employees did not remain within the confines of the demarcated picketing area. I am satisfied that by so doing they committed misconduct. Importantly, however, no acts of violence or intimidation in the course of the picket was attributed to them.

[39] The right to picket is given constitutional protection. Section 17 of the Bill of Rights provides that "(e)*veryone has the right the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions*". This is echoed in section 69 of the Labour Relations Act,[37] which allows employees to picket in support of a strike.

[40] In *South African Transport and Allied Workers Union and others v Garvas and others*[38] it was recognised that:

> 'The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. The right to picket must be exercised peacefully.'[39]

[41] The court noted that:

> 'Freedom of assembly is no doubt a very important right in any democratic society. Its exercise may not, therefore, be limited without good reason. The purpose sought to be achieved through the limitation must be sufficiently important to warrant the limitation.'[40]

[37] Act 66 of 1995.
[38] 2013 (1) SA 83 (CC) at para 61.
[39] *Garvas* above n 25 at para 53.
[40] *Garvas* above n 25 at para 66.

[42] The collective bargaining process reflects, often starkly, the different interests of the employer and employees, with the exercise of the constitutionally protected right to strike used by employees to exert pressure on the employer, usually in relation to collective workplace demands. A strike picket aims to encourage non-striking employees, and even members of the public, to support strikers and to put pressure on the employer to meet strike demands. The demarcation of the picket line is therefore often not simply a mechanical task but can reflect the deeply different needs and interests of the parties. The facts of this appeal indicate as much in that despite the demarcation of the picketing area by order of the court and the picketing rules, the trade union continued to make it clear that it was dissatisfied with the ambit of the picketing area, although it did not seek a variation of the court order.

[43] In *Garvas* the European Court of Human Rights decision of *Ziliberberg v Moldova*[41] was cited with approval, in which it was made clear that:

> '[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.'[42]

[44] Determining whether a dismissal was fair or not involves a value judgment reached following a consideration of all relevant factors.[43] The mere breach of a picket line cannot in my mind warrant dismissal without more, for if this were to be so a one-metre breach of the line would justify termination of employment. I accept that the strike was marred by incidents of violence and intimidation but this did not have the effect that the striking SG4 employees were not permitted peacefully in the exercise of their constitutionally-protected right either to strike or to picket.

[45] The unlawful conduct of other strikers is not to colour a determination as to the fairness of the dismissal of SG 4 employees. The breach of the picket line by

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[41] ECHR (Application No 61821/00) (4 May 2004) at para 2.
[42] *Garvas* above n 25 at para 53. *Ziliberberg v Moldova* ECHR (Application No 61821/00) (4 May 2004) at para 2. See also *Cisse v France* ECHR (Application No 51346/99) (9 April 2002) at para 50 and *Christians Against Racism and Fascism v United Kingdom* (1980) 21 DR 138 (Application No 8440/78) at para 4.
[43] *Sidumo* above n 18 para 79.

SG 4 employees occurred within the context of an extended and difficult strike, and in circumstances in which there had been a clear dispute about the location of the picket line, with no violence or intimidation proved on the part of SG 4 employees.

[46] I am unable to agree that the breach of the picket line by SG4 employees was conduct of such gravity, magnitude and seriousness that it justified the imposition of dismissal as the ultimate and most severe of workplace penalties on the first occasion. I am also not satisfied that the conduct of the SG4 employees was shown to have led to a breakdown in the trust relationship with the appellant. The evidence of Staats to the contrary fails, in my mind, to reflect an appreciation of the inevitable strain that a protracted strike places on workplace relationships or the capacity for such relationships to improve over time following the conclusion of a strike. The fact that the SG4 employees showed no remorse for their misconduct for standing outside of the demarcated area near to the only entrance to the company that remained open, also does not lead me to a conclusion that this warranted their dismissal.

[47] The principle of progressive discipline seeks to ensure a structured and graduated approach to employee misconduct, granting an employee the opportunity to improve their conduct or performance through imposing less severe corrective actions, escalating these as necessary. The Code of Good Practice[44] recognises that dismissal for a first offence is reserved for cases in which the misconduct committed is serious and of such gravity that it makes continued employment intolerable. Having regard to all relevant considerations, I agree with the Labour Court that the dismissal of SG 4 employees was not fair. I find no reason not to reinstate such employees with retrospective effect subject to the imposition of a final written warning when their continued employment is neither intolerable nor am I satisfied that their dismissal was "*a sensible operational response to risk management*".[45]

[48] For these reasons, in relation to the SG 4 employees, I would dismiss the appeal but vary the order of the Labour Court to reinstatement of the employees

[44] Item 3(4).
[45] *De Beers Consolidated Mines Ltd v CCMA and Others* [2000] 9 BLLR 995 (LAC) at para 22.

retrospectively to 14 June 2019, but with a final written warning valid for 12 months for the breach of the picketing rules.

Savage ADJP

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