Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD IN JOHANNESBURG

Case No: JS 315/12

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION ("AMCU")	**First Applicant**
BALOI, S AND 89 OTHER AMCU MEMBERS	**Second to Further Applicants**

and

AUSTRALIAN LABORATORY SERVICES (PTY) LTD	**Respondent**

Heard: 6 – 14 October 2015 and 20 September 2016
Delivered: 1 November 2017

Summary: (Unprotected strike – substantive and procedurally unfair – failure to explore ways of avoiding dismissal prior to taking decision – imposition of additional requirement before workers permitted to return – failure to invite representations prior to dismissal in circumstances where management doubted

intention to return to work – relevance of conduct of union and strikers during strike – communications with strikers during a strike)

JUDGMENT

LAGRANGE J

Introduction

[1] The dismissals giving rise to this case took place nearly 4 years before trial proceedings commenced. The matter concerns the dismissal of approximately 90 individual members of the first applicant ('Amcu') by the respondent (' ALS') on 8 November 2011. In the letter notifying Amcu of the dismissals, ALS stated:

> "Kindly take note that due to your non-compliance with the court order under case number J2489/11 issued in the Labour Court on 7 November 2011 as well is your non-compliance with the three ultimatums issued by management on 7 and 8 November 2011 requesting you to return to work, the Company has no choice but to dismiss you with immediate effect."

In his opening address, *Mr Freund SC*, counsel for the respondent, clarified that the issue of the non-compliance with the ultimatums effectively implicitly also include the workers' failure to sign a written undertaking about their willingness to return to work as pre-condition for resuming work, which became a major bone of contention between the parties.

[2] The applicants originally claimed that either they were dismissed on account of participating in a protected strike, or alternatively, they were unfairly dismissed for participating in an unprotected strike. The strike commenced on 28 October 2011. An interim order had been granted on 7 November 2011 declaring the strike to be unprotected and interdicting the applicants from various forms of strike -related misconduct. On the return date of the interim order on 1 December 2011, the rule was confirmed on an un-opposed basis. During the course of the proceedings, the applicants did not persist with their claim that the strike was a protected one and

accordingly the dismissals must be evaluated simply on the basis of whether or not they were fairly dismissed for participating in an unprotected strike. The critical events leading to the dismissal relates to the ultimatums issued by ALS on 7 and 8 November and how the parties interacted with each other during those two days.

[3] Witnesses for ALS were Mr G Condie ('Condie'), the Chief Executive Officer, Ms S Greyling, the HR Manager, ('Greyling'), Mr T van der Merwe ('van der Merwe'), the site manager of ALS operations at the Goedgevonden mine premises and Mr E van Dyk ('van Dyk'), a former laboratory manager at the Witlab site. Mr V Mkhonto ('Mkhonto'), an analyst and a former shop steward working at the Witlab premises and Mr A Mashiya ('Mashiya') an operator at GGV testified for the applicants.

Material facts

[4] After a recognition dispute in 2011, the union and the company agreed with each other at the CCMA to start wage and other negotiations in good faith by 18 August 2011 with a view to concluding them by 2 September 2011, including the conclusion of a recognition agreement. As sometimes happens in the initial stages of the rise of a new union in a workplace, despite the undertaking made at the CCMA, relations between Amcu and ALS did not develop smoothly. It is common cause that from August to October there were go slows and stoppages. Further, the negotiation timetable got side-tracked following the dismissal of a shop steward, Mr J Mdlela ('Mdlela'), for using a Morning Prayer meeting to hold a union meeting, which in turn led to a group of employees downing tools.

[5] In consequence, little progress was made on the recognition and wage talks by the time the parties met again on 26 September 2011, since the last round of negotiations on wages which took place on 1 September. The train of events was interrupted by the dismissal of Mdlela. On 19 September, Mr J Mphahlele, the general secretary of Amcu (Mphahlele) requested an urgent meeting with the company on 21 September to discuss the dismissal of Mdlela. This was the same day that a group of workers had protested about the dismissal. Greyling phoned Mphahlele and explained that she had other meetings scheduled for that date. In her

mind, the matter of Mdlela's situation was not on the table for discussion having already been referred to the CCMA, though Condie claimed the company was still willing to entertain a discussion after 19 September.

[6] On 23 September the company proposed a meeting to discuss the recognition agreement and wages on 26 September. The union only responded in writing on 26 September at about 12H00 confirming that a meeting would be held that afternoon, without mentioning the subject matter of the meeting. Greyling said she assumed that the union would have added to the agenda if they wanted to add to the subjects proposed by the company. Although the meeting had been scheduled to finalise the recognition agreement and to discuss the wage proposals, the meeting broke down when management refused to entertain discussion of the dismissed shop steward, whose case had already been referred to the CCMA. In this regard there was correspondence between Amcu and ALS.

[7] Greyling maintains that at the meeting on 26 September, Mr Mphahlele said he needed time to read the proposed recognition agreement and would revert to the company by 4 October to set a date for wage negotiations, but he never reverted to the company.

[8] By 10 October 2011, despite the absence of any discussion on wages at the meeting on 26 September owing to the union walking out of the meeting when management refused to deal with the dismissal of shop steward and despite no other meetings having been convened to discuss wage negotiations, Amcu referred a mutual interest dispute to the CCMA concerning negotiations over terms and conditions of employment. Condie did concede that the parties had not reached agreement on wages by the intended date, but was adamant that it was premature to assume negotiations had been exhausted.

[9] At the conciliation, ALS had objected that the referral had been premature because wages had not been discussed at all, let alone had any deadlock been reached before the union referred a dispute to the CCMA. ALS was of the view that consequently, there was no dispute as such over wages, which the union could refer to conciliation and asked the Commissioner to

make a jurisdictional ruling, which it claims the Commissioner agreed to do.

[10] However, no jurisdictional ruling was issued and a certificate of outcome was issued on 25 October. On the same day the union issued a notice of its intention to commence strike action on Friday 28 October. The company responded with a notice on 27 October indicating its intention to lock out workers and a separate lengthy letter in which it set out the reasons it believed a strike would be unprotected. In essence, these were that, there was no dispute over wages which the union could have referred and that the union's constitution required it to ballot members before embarking on strike action. These communications were the beginning of a battle by correspondence between the parties which continued throughout the strike. Regrettably, the parties seemed to prefer this method of communication and did not engage with each other in more direct interactive communications to the same degree.

Events at Witlab

[11] The vast majority of the individual applicants were employed at the company's main site at ('Witlab') and nine of them were employed at its Goedgevonden ('GGV') site. The central narrative concerns all the individual applicants, except insofar as it relates to the events of 8 November 2011 when individual applicants claim they reported back to work. What transpired at the GGV site will be dealt with separately.

[12] On 28 October, the day the strike commenced, the company complained in a letter to the union that individual applicants were blocking access to the premises and intimidating clients who were trying to enter the premises. The union responded with its own letter on 31 October pointing out, amongst other things, that the strike was protected and requesting a meeting with the company to resolve the dispute. Mkhonto was vague about when workers received knowledge of this communication until some stage during the following week.

[13] Management replied, again by letter, that it was not willing to meet with the union as long as the strike was in progress and notified the union that its

own offers had expired. It also said that it was “not willing to discuss wages and conditions of employment with you any more due to your unreasonable conduct”. It called on the strikers to return to work by 08h00 the following morning. The correspondence continued with a response from AMCU just after 17H00 on the same day stating that the request for an urgent meeting was a “good gesture to try and resolve the ongoing protected strike action”. The letter further stated that the invitation for a meeting still stood, despite characterising the company’s refusal to meet with Amcu, which it considered indicative of ALS’s ‘arrogant’ attitude and attempt to ‘undermine’ Amcu members. Mkhonto testified that they believe because the certificate had been issued by the CCMA that their strike was protected and they interpreted management’s response to the union’s letters as indicating that the company was not willing to engage in further discussion on the wages while the strike continued, whereas the union was willing to talk. He understood that the union and the company differed on whether the strike was protected or not.

[14] The company made much of the conduct of the strikers in presenting its evidence. Thus, Greyling testified that:

> “... They were very violent from the onset. Blocked access to the laboratory, not only for our clients also for any staff members or members of the public or any person who wanted to deliver samples to the company. They also used abusive language, they had dangerous weapons with them, golf clubs, they had sticks, that one point had rocks that they threw, they burned tyres. I personally was there and I was really scared. It built up from early in the day and it got worse during the day. They really shouted bad remarks to me, to management.
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> They were dancing, provoking us by their dances, they came close and we stood close to some of the gates. At one point in time, some of them turned around, they pulled off their pants. They made very weird signs of things they would do to people around there. They called all white people dogs in their own language and that made terrible remarks against management, against the Australians that is part of our management team, we are an Australian company. They shouted and screamed then they would sing and dance like they normally do with the strike, but they were, it was a scary situation.”

[15] Greyling claimed to be too embarrassed to repeat what had been said by strikers despite the urging of her counsel. She also testified that barrier tape had been used to prevent access to the premises and how Lukhele was prevented from entering the premises by strikers who hit his car with sticks and steel bars. She claimed that even when she called on them to stop hitting the car they continued. Mkhonto agreed that when he arrived strikers ran in front of the gates and had surrounded the vehicle because they wanted to see whether it really was Lukhele in the vehicle but denied that anyone struck the vehicle. He claimed that he had told workers to let him through. He agreed that the workers were in front of the gates but were not there to block him from entering but merely to make him aware of the protest. No circumstantial evidence was produced of any damage to Lukhele's vehicle. Van der Merwe also testified to workers running up and down with sticks in their hands and burning tyres, but had no difficulty in entering the Witlab site on a daily basis.

[16] Greyling also claimed that strikers also gathered around the cars of clients or courier services brandishing branches. Mkhonto agreed that a number of workers were carrying sticks and 'metal bars' but denied that they were used to hit any vehicle. He admitted that a tyre had been burnt on one occasion in the early morning because of the cold. It turned out the 'metal bars' were in fact pieces of palisade fencing which had been used to erect barrier tape in front of the premises. Later, Mkhonto vacillated a little about whether or not workers were brandishing metal bars as well as sticks and golf clubs but eventually confirmed his original testimony that they were.

[17] Greyling also claimed that strikers were seen drinking outside the premises. She was too afraid to go to work on her own. Tyres were also burnt and when management tried to go outside the premises they were sworn at 'badly'. Mkhonto merely said that strikers were singing and did not use abusive or insulting language, nor did they intimidate anyone or block access to the premises. However, he readily agreed that one of the slogans charted by the strikers was "Dhubuli bhunu", which he interpreted as meaning 'kill the whites", and "amabunu izinja", meaning 'whites are dogs'. He also saw no incident on anyone exposing their buttocks. He further claimed that the workers interpreted the company's erection of

barrier tape across both gate entrances to the premises and the security building at the commencement of the strike meant that strikers could picket within the demarcated area that would be used to gain access to the premises. They found this area to be too small and then moved the barrier tape to close off the road approaches to the premises from both sides of the premises.

[18] One of the posters carried by a striker carried the bold slogan “SERENA GO TO HELL” beneath a caricature drawing of Greyling depicting her as a scarecrow figure with a deranged look on her face. Other posters carried xenophobic slogans directed at the Australian owners. When the strikers saw cars approaching they would throw stones towards the gate. Mr C Engelbrecht, an IT manager, suffered a facial injury when a striker threw a bottle at the glass window of the security office behind which Engelbrecht had been standing. The incident was reported to the SAPS and the case went to trial resulting in an employee being convicted of assault. Mkhonto agreed that when workers were marching up and down the street, there had been an incident when the window had been broken but he did not see how it happened. He also agreed that groups of workers would rush towards the company premises singing and charting and then fall back.

[19] While Greyling’s testimony must be tempered with Van der Merwe’s testimony that he was able to enter the premises, she was present for the duration of the strike and Mkhonto conceded to the threatening character of some of the chanting. Given this and the personalised attacks on management, and the aggressive action of charging towards the premises it would not be unfair to say the picketing acquired an intimidatory character.

7 November

[20] ALS gave Amcu notice on Thursday, 3 November of its intention to apply for an urgent interdict to halt the strike. Amcu chose not to oppose the application. On Monday 7 November, the company obtained the interim order and by 14H10 the same day a copy was served by Greyling on Amcu head office and received by an administrator, Ms Mabena, who received it after making a phone call and being advised to write “without

prejudice" in acknowledging the receipt of the order. Notice of the application had been delivered by hand to the union on Friday 4 November and had also been received by Ms Mabena. After delivering the notice, she saw Lukhele speaking with the president of Amcu, Mr J Mathunjwa ('Mathunjwa') in the parking area outside the union offices. Lukhele had accompanied her to the union offices but had not gone inside with her to deliver the order.

[21] On returning to ALS's premises, Lukhele and Greyling attempted to serve the court order on the assembled strikers with the assistance of the police. Neither workers nor Mkhonto, who was the *de facto* chief shop steward at the time, were prepared to accept the court order. Mkhonto's explanation for this was that the workers had agreed amongst themselves that any communications from the company should be directed through the union, though he conceded this decision of the workers had not been conveyed to ALS. Having failed to issue a copy of the court order directly to strikers or Mkhonto a copy of the court order was placed on the window of the security office where it would be visible to any strikers nearby. By mid-afternoon a copy of the order had also been faxed and emailed to the union office.

[22] Although Mkhonto agreed that he was in regular contact with Mathunjwa and Mphahlele by phone, and even though Mathunjwa spoke to workers in the afternoon of 7 November, he claimed that no mention had been made in any of these communications about the pending court application or the outcome of the application. He agreed that the company with the assistance of the police had attempted to serve the court order on him but because he refused to receive it nobody else would accept it either. He claimed that the policeman who tried to hand him a copy of the order had explained that the document he was required to give Mkhonto was "a letter from the company" and that he had not explained it was a court order. He denied having personally seen Greyling place a copy of the order in the window of the security office but agreed that if it had been placed there, he would have seen it because he was no more than 5 m away from the window and would have gone to read it because it affected him.

[23] After this failed attempt to serve the order on the employees, Mathunjwa came to the premises and met with strikers. According to Mkhonto, Mathunjwa merely wanted to find out how the strike was progressing and they had asked for a banner and union T-shirts. Whilst he was there, the company made a second attempt to serve the order. On this occasion, the company asked a security guard to hand over the court order together with first ultimatum. However, they would not take it as they were busy talking with Mathunjwa and the security guard was disturbing them. Mkhonto agreed that it was obvious that the security guard was attempting to hand the document to them and they knew that was a document which the company had asked him to give to them. He later elaborated saying that Mathunjwa had told the security guard that he told him that he was disturbing them and asked him more time to discuss the matter, but agreed that Mathunjwa never reverted back to the security guard to obtain the document. This was broadly consistent with Greyling's observation of the interaction between the security guard and the crowd gathered around Mathunjwa. What she observed was that workers and Mathunjwa made gestures waving him away. The ultimatum referred to the court order and stated that the strike was illegal and unprotected. It further stated:

> "Your (*sic*) required to return back to work at 7:00 on Tuesday 8 November 2011. If you do not return to work at the above time, the company will follow the appropriate procedure which may result in dismissal."

Mkhonto denied seeing the ultimatum placed on the security office window either, but said that if workers had seen it they would have returned to work by 07H00 the following morning. It was common cause that the ultimatum was transmitted to the union offices and would have been received around 15h45, but was not conveyed to strikers at that time. In relation to the strikers who were not present at the premises, Condie's view was that in relation to strikers who were absent from the picket it was sufficient that Amcu had been served with a copy of the ultimatum, though he conceded that the purpose of issuing an ultimatum would be defeated if it did not reach the persons it was intended for and it was management's responsibility to ensure that this was done. Consequently, he accepted that if the applicants did not receive the first ultimatum they could not be

responsible for not complying with it. This essentially touches on the respective obligations parties engaged in industrial action have to communicate with each other and is discussed in the evaluation below.

[24] Condie stressed that it was the company's view that it was Amcu's responsibility to keep its members fully informed about developments and Amcu purported to represent employees so ALS accepted Amcu as the channel of communication. Further, he felt the company made every attempt to ensure that ultimatums were communicated.

[25] There was considerable disagreement about the number of strikers who were present at any time during the strike. This was an issue that only emerged gradually during the case because on the pleadings, it was common cause that all the strikers were present on 8 November, but evidently, that was not factually correct. Estimates of the size of the crowd varied considerably. Condie and Greyling recollected that the crowd on 7 and 8 November was approximately 30 in number, whereas Mkhonto said the size of the crowd varied during the day but was usually upward of 45 in number. Later when the parties produced a detailed name list of strikers, Van Dyk and Mkhonto specifically identified 22 and 57 named individuals as being present. In addition Van Dyk acknowledged there were others present whom he could not identify but that they never numbered more than 40 altogether. He based this by comparing the group of strikers with the size of the group of 60 employees he normally addressed in staff meetings. On 8 November he observed the group of strikers at various times during the morning including when workers appeared at the gate just before 09h00. Much was made in cross examination of Condie and Greyling about the fact that strikers who were not picketing at the premises would not necessarily have known about the court order, which ought to have been served on all the individual respondents.

[26] Ultimately this led the applicants to file a belated amendment to their statement of case which was not opposed by the respondents. The amendment was to the effect that ALS had not taken reasonable steps to ensure that the second ultimatum came to the attention of all of the strikers. The amendment was not opposed, but ALS then applied to

reopen its case in order to lead further evidence of Greyling that it did not have the individual cell phone numbers of the individual applicants. In applying to reopen its case, ALS did not concede that as a matter of law it was required to contact each applicant individually, but wish to lead the evidence as a precaution in the event it might be wrong on this issue and even though the applicants had not specifically pleaded that the reasonable steps ALS should have taken included service of the ultimatums by SMS or cell phone calls. The application to reopen the case was dismissed, principally on the basis that issues bearing on the strikers knowledge of the ultimatums was canvassed sufficiently for ALS to determine whether it needed to lead further evidence on the issue, even though the formal amendment of the pleadings to place afterwards. However, I made it clear that in dismissing the application, the nature of an employer's obligations to notify each and every striker an ultimatum was still a matter for argument.

8 November

[27] Mkhonto testified that Mathunjwa came early to the premises early that morning and handed out union T-shirts to the assembled strikers, who at that stage numbered approximately 45 according to him. He claimed that Mathunjwa made no mention of the court order or the first ultimatum. Although he was adamant that nothing of substance was discussed with Mathunjwa, least of all the court order and ultimatum, he did not dispute that Mathunjwa was there for over an hour before the second ultimatum was issued. Mashiya initially testified that he knew of the court order from other workers before the second ultimatum was issued but then corrected himself and simply said he could not remember if he heard of the order before or after the second ultimatum was issued.

[28] The second ultimatum was issued at 08H15, to which a copy of the court order was attached. The second ultimatum, which appeared to have been prepared the previous day, called on workers to return to work by 09H00. Mkhonto agreed that this ultimatum was handed to Mathunjwa by Greyling. Mkhonto testified that after receiving this, Mathunjwa instructed them to stop picketing, present themselves for work at the gate and return

to work. Mkhonto said workers were confused because they believed the strike was protected yet the court order said they must return to work but Mathunjwa said the court order had to be followed.

[29] According to Mkhonto, the security gates on the right-hand side was open a little bit but when they approached the gate it was closed and the security officer said that they must wait for management to come outside. Mkhonto testified further that, it was at about 08H50 that they attempted to enter the premises *en masse* through the large vehicle gate to the left of the security office and not through the turnstile gate through which they would normally enter and clock in when reporting for work. According to Greyling, workers clocked in at the turnstile using their employee numbers followed by fingerprint identification. Mkhonto conceded that before starting work workers would clock in, but claimed that on that morning the large gate was opened for them. He agreed that they were still chanting struggle songs while waiting to enter, but claimed they had left their sticks on the grass opposite the plant.

[30] There was some controversy in the evidence about what workers would normally be wearing when they reported for work. Mkhonto claimed that they would report for work in their ordinary clothes and change into their PPE work clothes once they were inside the company. On that morning they had put on the union T-shirts which Mathunjwa had issued them with earlier. In the company's answering statement, it had been said that the individual applicants were not wearing their personal protective equipment which was required of them prior to entering the premises, which ALS took to be a clear indication that they had no intention of tendering their services. However, ultimately, Greyling and Condie agreed that workers were not expected to report for work in working clothes. Greyling and Condie also agreed that there was nothing inherently untoward about wearing union T-shirts when reporting for work.

[31] When the strikers approached the gate, management received a message that a security guard wanted to speak to them. He told them that people were assembled outside and that they had told him to advise Condie they wanted to come inside. Condie told him to advise them that management

was in a meeting and would revert back to them shortly. Condie then went to observe the strikers from the first floor of the office building and saw the group assembled very close to the vehicle entry gate. He observed that they were wearing their union T-shirts which they appeared to have put on over their ordinary clothes. Seeing them dressed in their T-shirts Condie said: “I found that somewhat intimidating that they still seemed to be, purporting to be a mob, a union mob, so I was concerned about what their intentions really were.” He also said that all he knew was that they wanted to enter the premises but he had no way of knowing if they were actually going to return to work or to continue the industrial action. Given that this was the same group of people that had been waving sticks and metal bars at him, he was concerned about their intentions and felt that the company needed to consider its position. Condie conceded that there was nothing untoward about workers wearing union T-shirts when tendering their services, as such, but in the context of the events of the strike he interpreted the wearing of T-shirts by the strikers differently. The conduct of the strikers, the absence of any positive response to the first ultimatum and the donning of union T-shirts issued by Mathunjwa indicated to management that the strikers’ position was unchanged. When it was put to Condie under cross-examination that all of these issues were known in the before workers assembled at the gate and therefore ALS would have sought an undertaking from workers when it issued the second ultimatum, Condie claimed that the discussion with Lukhele about a potential undertaking had already started before workers presented themselves at the gate at 08H50, even though Lukhele only arrived after 09H00. Previously, his evidence suggested that the discussion about an undertaking arose after workers presented themselves. However, he conceded that the employees had done what the company had called upon them to do in paragraph 4 of the second ultimatum.

[32] In telephonic discussions with the company’s lawyers and Lukhele on what approach to adopt, they decided that they were concerned about whether the strikers had a genuine commitment to return to work and behave appropriately and desist from strike activities. According to Condie, it was Lukhele who advised the company to go ahead with the

undertaking after he had told him that he was concerned workers were not really stopping the strike activity, they do not seem to be taking off their Amcu gear, they were not presenting themselves at the turnstile as they would and he was concerned that it was just and "unidentified mob" who wish to gain access to the site. When Greyling was pressed under cross-examination about what more could be expected of the strikers beyond presenting themselves at the gate, she said that they needed to indicate that the intentions were serious and not that they merely wanted to gain entry to the premises. However, she found it difficult to explain how they could have demonstrated that intention other than to report at the gate, bearing in mind that they had not been asked to sign any undertaking at that stage.

[33] The wording of the undertaking, which they decided workers wishing to return to work must sign stated:

> "I, the undersigned, undertake to refrain from any violence, intimidation to any employees, damage to property, racial remarks to employees, management, members of the public or clients from the Company as well as continued participation in the illegal strike.
>
> I agreed to comply with all company policies and procedures and follow all lawful direction from supervisors and management.
>
> I agree to render service in line with required performance standards.
>
> I accept that the working hours of the company runs from 7:00-15:45 from Monday to Friday. I understand that this means that I will commence with my duties at 7:00 and finish at 15:45, apart from 15 minutes for morning tea, and 30 minutes for lunch."

[34] Condie said that the wording was informed by the conduct of strikers in the preceding week and the language of the court order. He also wanted a reassurance that the strikers acknowledged that if they were allowed onto the premises they would continue with the same activities they had been conducting whilst outside. He also sought to ensure that the "covert industrial action" which had taken place in the months preceding the strike would not resume. Condie testified that, he did not believe at the time that the strikers genuinely wanted to enter the premises to return to work. The reference to the strike as being unprotected was based on the fact that the

company had obtained an order to that effect. If the union strikers had an objection to that characterisation of the strike which reflected the position, it was never raised with him. He accepted that he did not have a definite evidence to prove they were not acting in good faith, but he had a suspicion they were not. He was not prepared to speculate on whether his suspicions would have been addressed if the company had held a disciplinary enquiry before dismissing the strikers. Condie said that the undertaking was only requested to give the company confidence that the strikers were genuinely abandoning their strike action and he could not understand why the union was opposed to workers signing the undertaking and allowed the process to roll on when the company had clearly indicated that this issue had to be addressed. .

[35] The undertaking letter was given to Mathunjwa by Greyling and van Dyk. Greyling claimed she told Mathunjwa that the company wanted workers to sign the undertaking, but Mathunjwa said they would not sign anything. She conceded that it did not occur to her to ask him what his difficulties with the document were, but equally they could have discussed it with her if they had any difficulties with document, which is why she went out to explain it to them. Once it was reported that Mathunjwa was not going to instruct strikers to sign the document, the undertaking was also posted on the security office window and transmitted to the union office by fax and email.

[36] In consequence of the requirement to sign an undertaking being presented, at 09H26, Amcu sent a letter to ALS stating that the strikers had presented themselves for work at 08H50 as per the court order served on them at 08H15, but that

> "... when our members arrived at the gates the securities (sic) reported to management that workers have presented themselves at work but management instructed the security not to open and the gate and management took to refer back to them" (sic).

The letter continued to say:

> "We confirm that Amcu and/or its members cannot be held liable to any loss the company may suffer and cannot be held liable for not honouring the court order."

Mkhonto understood this not to be a threat to the company but to be saying that it could not be held against them that the workers remained outside because it was the company which refused to allow them to get inside. Condie interpreted it very differently. He was concerned that "this was some sort of vile threat to us, that we are not going to be liable for anything that happens after this, we are not going to be responsible for any losses you incur based on any actions and we not embark on and we are not going to be responsible for honouring court order" (*sic*). However, he agreed that the letter could be read as meaning that because workers have presented themselves for work they and the union could not be blamed for not complying with the court order or ultimatum.

[37] Within less than 20 minutes, the company responded in kind to this communication from the union and the refusal of strikers to sign the undertaking by sending a replying letter to the union. Condie testified that "to ensure the union clearly understood the seriousness of the situation and what our requirement was, I had a letter drafted and sent in my name to the union, saying that we had posted this or presented this undertaking which we require them to sign, that they had refused to sign which left us with no option but to understand they were not going to comply with the court order, they were not going to desist from the court action." The letter read:

> "This is in response to your letter received at 9:26 am on 8 November 2011.
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> We put on record that on presenting to the gates at Witlab this morning your members were requested to sign a reasonable undertaking to return to work in compliance with the court order J2489/11 and standard company policies and procedures.
>
> Your members refused to sign this undertaking leaving no option but to see this as an intention by your members not to comply with the court order or company policy and procedures. Accordingly your members were considered to still be on strike so they were not admitted to our premises.
>
> All our rights are completely reserved."

[38] A little over 15 minutes after the union's last letter, Amcu sent another letter at 09:45 in which it stated that the employer's "current conduct" constituted an "unlawful lockout", and reserved its right to approach the Labour Court for appropriate relief. ALS continued the barrage of communication through correspondence, by issuing another letter in response to the union's letter of 09h45, which stated:

> "We put on record that this morning, in your presence, your members were provided a second opportunity to sign a reasonable undertaking to return to work in compliance with the court order J2489/11 and standard company policies and procedures.
>
> You advised that your members would not sign this undertaking, further indicating that your members did not intend to comply with the court order or company policy and procedures.
>
> Accordingly your members were considered to continue to be on strike so they were not admitted to our premises."

[39] About half an hour later at 10h15, the company issued a third ultimatum calling on workers to present themselves for work by 10h30 and warned that if they did not return to work at that time "the company will follow the appropriate procedure and you will be dismissed." Condie claimed that this was issued after allowing some time for the strikers and Mathunjwa to discuss the issue and absorb the implications of the requested undertaking, but when nobody came forward to sign the undertaking and no questions were asked about it, ALS believed there was no progress taking place and decided to issue this ultimatum. Condie claimed that he was concerned that issues seem to be escalating, whereas he had hoped that once the court order had been obtained and served there would be an appropriate change of behaviour. He then decided that given that Mathunjwa was standing in front of the premises and communicating and organising activities, he should personally try and communicate with him and the strikers to see if the issue could be resolved and accordingly went to present the third ultimatum to Mathunjwa with Greyling and Lukhele. The point was made in cross examination of Condie and Greyling that the third ultimatum makes no mention of workers having to sign the

undertaking but simply states that the first two ultimatums telling them to return to work were ignored.

[40] When he approached the strikers and Mathunjwa, he read the ultimatum to Mathunjwa and said that if matters continued they would have no option but to proceed with the dismissals and it was necessary to sign the undertaking so that the company could see they were desisting with the strike action. Mathunjwa responded that they did not need to sign the undertaking because the court order did not require it. At this point the discussion ended and the third ultimatum was also placed on the window of the security office. Condie claimed that he was hoping there would be some discussion that would develop so the situation could be resolved and he hoped that Mathunjwa would appreciate that by approaching him as the executive manager of ALS, Mathunjwa would appreciate that they were genuinely trying to resolve the matter. The ultimatum was emailed and faxed to the union office and he was confident that Mathunjwa was in constant communication with the office in view of the previous letters received in his name and the fact that Mathunjwa was constantly using his phone.

[41] After the third ultimatum was posted, Condie witnessed Mathunjwa calling workers to him in front of the gate saying “come, come come go to work !”. Mathunjwa then addressed the strikers and said that what the company was doing was locking them out and that the union could oppose the court order on the returned day because it was only an interim order, which said nothing about signing an undertaking. Condie interposed in the address and told strikers that the undertaking documents were in the security office and anyone who wished to return to work could return by signing the undertaking and returning one by one, but nobody responded to that. Once nobody had presented themselves at the turnstile and in the absence of any other response from the union by 10H30, the company realised that strikers would not sign the undertaking or report for work and therefore they had no other option but to proceed with the dismissal. Condie was adamant that the object of the ultimatums was to get people back to work not to dismiss them.

[42] Mkhonto testified that one worker did attempt to enter through the turn style some 20 to 40 minutes after strikers presented themselves en masse at 08h50, but he reported that he could not clock in and gain access.

[43] ALS did not specifically invite Amcu to make any representations why the strikers should not be dismissed before it issued the dismissal notice. Condie agreed this was not done but in view of the correspondence between ALS and Amcu, it was clear that if the situation was not resolved, dismissals would take place. The channel of communication was open with the union and the union was free to have raised any issues with the company. Greyling was of the view that there was ample opportunity for Amcu to make representations and the union had an opportunity to engage company when Condie had approached Mathunjwa personally in the course of issuing the third ultimatum. Greyling would not concede that if ALS had held a disciplinary enquiry before dismissing employees, management's suspicions could have been tested at the time rather than four years later at the trial.

[44] At around 11h00 the company posted a notice of dismissal on the security of this window, stating:

> "Kindly take note that due to your non-compliance with the court order under case number J2489/11 issued in the Labour Court on 7 November 2011 as well is your non-compliance with three ultimatums issued by management on 7 and 8 November 2011 requesting you to return to work, the company has no choice but to dismiss you with immediate effect."

Condie claimed that he saw workers reading the letter and having a discussion after which they started to leave.

[45] Amcu also sent ALS a letter at 11h33, which made no reference to the dismissal letter but responded to the issuing of the third ultimatum. Amcu claimed that strikers had presented themselves for work at 08H50 following the second ultimatum issued at that time and that the employer's refusal to allow them to work constituted an unlawful lockout because they had complied with both the second and third ultimatums. ALS did not respond to this letter until the following day, by which stage it had already affected the dismissals the previous day. The letter merely reiterates the

company's stance that their failure to sign the undertaking indicated that they did not intend to comply with the court order or company policies and procedures and therefore were considered to be still on strike when they failed to heed the third ultimatum.

Events at GGV

[46] Nine of the individual applicants were employed at the ALS site at the GGV mine, where ALS provided its laboratory services as a contractor to the mine. In terms of the work schedules of these applicants, six of them (Messrs P Nyaka, P Thabang, V Khoza, J Moleleki, P Seerane and C Sello) were not scheduled to work on 8 November and none of them reported for work before the expiry of the ultimatums on that day. A dispute exists between the parties about the three remaining individual applicants (Messrs A Mashiya, L Xulu and S Baloyi), who would ordinarily have worked on 8 November in terms of their schedule. In essence, Amcu claims that after the second ultimatum was issued the three individuals, who were at the picket at Witlab premises, went to report for work at GGV. They arrived at around 11H00 and commenced work but later were called to the office of the site manager by the superviser, Mr Mncube. Van der Merwe told them they were dismissed and must leave the work area after which they were escorted off the premises by mine security personnel.

[47] Van der Merwe denied that the three individuals had presented themselves for work on 8 November. He testified that access to GGV premises for ALS employees is through a turnstile controlled by the mine's security department. ALS employees were issued with an access card, which had to be checked to see if the holder still had a valid medical rating and to verify the identity of the cardholder against the photograph on the card. The card was not swiped by the holder but by the security officer. Once the strike commenced the security department was advised to deny access to the individuals on strike. As far as he was concerned, the three individuals could not have gained access to the premises. Van der Merwe agreed that Baloyi did report at the mine at about 14H30 on 8 November. Van der Merwe was advised by the security office that Baloyi had come to the site because he wanted to empty his locker, but he did not have

access and had a dismissal letter with him. He and a security officer then escorted Baloyi to his locker which he proceeded to empty and thereafter he was escorted off the premises. Mashiya disputed this version because he claimed that he was with Xulu and Baloyi the whole day as related in his own account of events.

[48] Van der Merwe said he never received any report that Mashiya or Xulu had come to the premises. van der Merwe was sceptical that these two individuals would have gained access to the premises at GGV even if the access system was not working because the security office had been issued with a list of all the names and the photographs of those on strike who were not allowed to come on site, but agreed that it was possible that a security officer who did not know them well and was on duty could have let them in.

[49] Mashiya said the access system was not always working and the security staff would let them even if they forgot their access cards because they knew they were working there and there was a good relationship with the security staff. On 8 November, when they arrived around 11H30 they did not have their access cards and told the security staff the strike was over and they were returning to work. They were admitted to the premises and put on their PPE and started to work. They saw van der Merwe in his office which overlooked the working area and presumed that he saw them because they walk past his office on the way to their workstations. He admitted that there were other people he did not know at their workstations but he did not see them doing any work and they were able to resume their duties. When he was confronted with the evidence that the company had engaged Labour broker staff to fill in for those on strike, he changed his version and said that he only found three ALS staff in the lab area. Nobody questioned their return to work. He claimed they told Mncube that a court interdict had overturned the strike and so they were back at work. After working for some time, at around 14H00, they were summonsed to van der Merwe's office and he told them he got a call from Witlab to say that whoever was involved in the strike was dismissed. He told them they should leave the premises and they were escorted out by a security staff member. He then phoned Mkhonto who advised him that all

the AMCU members had been dismissed and there was a dismissal letter in the window at Witlab.

[50] Mkhonto claimed to have received a call from Mashiya to say that they had been called out by van der Merwe and told to leave the mine because they were dismissed. Mashiya claimed to have been present at Witlab in the morning of 8 November and had spoken to Mathunjwa about the fact that he and his colleagues worked at GGV after the second ultimatum had been issued. Mathunjwa had encouraged them to get to GGV as soon as possible. Arrangements were then made with a friend of Baloyi's to take them to GGV by car and the three of them went. Initially Mashiya said it would take about an hour and half to get to GGV from Witlab, and when it was pointed out to him that the distance involved was only about 30 km he explained that the delay was caused by waiting for the lift from Baloyi's friend.

Post-dismissal events

[51] Fourteen of the persons appearing in the list of individual applicants were in not in fact dismissed or were immediately reinstated even though their names had appeared on the list of persons dismissed which was posted on the security office window. Condie explained that these individuals had either been on leave or did not participate in the strike. Some had reported for work. Others did not but had advised the company that they wanted to continue working but were worried about reporting for work during the strike. By the time proceedings commenced, the parties had agreed that these individuals were no longer part of the second to further applicants and accordingly the case concerns the remaining 76 second to further applicants.

[52] ALS gradually started to replace the dismissed workers. However, because of economic conditions in the coal industry by the beginning of 2015, it only employed 44 employees compared with 138 at the time of the strike in November 2011. During the same period the price of coal declined by approximately 40%. In addition, one of ALS's clients, New Clydesdale Colliery closed and no longer had use for ALS's on-site laboratory and the GGV mine terminated its contract with ALS. Condie

testified that ALS had estimated it would cost the firm approximately R 16 million in the event the individual applicants were reinstated. In 2014 the company had made a profit of R 1.7 million but in 2015 but had suffered a R 2.6 million loss, which he attributed to the decline in the coal mining industry. To pay an amount of R 16 million would effectively require the company to liquidate the business and sell off fixed assets.

Evaluation

[53] The main disputed facts concern: the extent to which the strikers had knowledge of the court order and the ultimatums; the degree of violent behaviour displayed by the strikers; the number of strikers present at the premises at the lab on the last few days of the strike, and whether or not certain individuals working at the GGV site did report for work on 8 November after the strike ended. In relation to the events at about 08H50 on 8 November when strikers gathered at the vehicle gate of the Witlab premises, there is less dispute about the actual chain of events, but it is the parties different perceptions of what the other party's intentions were that were at odds with each other. I will only focus on those areas which require the court's attention to determine the fairness of the dismissal.

Legal framework

[54] Before proceeding with the analysis of the events, the general legal framework for evaluating the conduct of the parties preceding an unprotected strike dismissal needs to be outlined.

[55] Item 6 of schedule 8 of the Labour Relations Act, 66 of 1995 ('the LRA'), which must be taken into account of in deciding the substantive fairness of unprotected strike dismissals in terms of s 188(2), states:

> "Dismissals and Industrial Action
>
> (1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in

these circumstances must be determined in the light of the facts of the case, including—

(a) the seriousness of the contravention of this Act;

(b) attempts made to comply with this Act; and

(c) whether or not the strike was in response to unjustified conduct by the employer.

(2) Prior to 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. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

(emphasis added)

Item 6, attempts to encapsulate important aspects of the respective conduct of the employer and employee parties in the course of the strike which must be considered in deciding whether any ensuing dismissals were substantively fair or not. Item 6 (1) is concerned with the extent to which strikers, and by implication any union they belong to, have departed from the legal requirements for protected strike action and how they conducted themselves during the strike itself. Item 6 (2) is concerned with the extent to which the employer party gave strikers a reasonable opportunity to abandon their unprotected action. Unfortunately, the object of the guidelines has often been lost sight of by parties engaged in unprotected strike conflicts and there is a tendency for both parties to focus on whether the employer formally complied with item 6 (2) since this is often the easiest factual question to evaluate and is one of the important requisites for a fair dismissal of unprotected strikers. Similarly, there is a tendency to ignore the extent to which workers or the union party makes any meaningful efforts to end the unprotected strike, because item 6 (1) tends to emphasise the non-compliance with the statutory requirements for commencing strike action. In focusing in a checklist fashion on these

factors, an underlying concern of item 6, which is to evaluate how both parties dealt in good faith with resolving the unprotected strike action is sometimes lost sight of.

[56] In the extract below from LAC decision in ***National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*** [1] the LAC made it clear that the factors determining the fairness of a dismissal of unprotected strikers are not confined to those listed in item 6 and that there are other considerations that also should be taken into account as the court alluded to in the reference to the work of Grogan. The LAC expressed the principles as follows:

> "[28] It is clear from the provisions of section 68(5) that participation in a strike that does not comply with the provisions of Chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the Code but also item 7 which provides as follows:
>
> "7. Guidelines in cases of dismissal for misconduct. –
>
> Any person who is determining whether dismissal for misconduct is unfair should consider –
>
> Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> If a rule or standard was contravened, whether or not –
>
> the rule was a valid or reasonable rule or standard;
>
> the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and
>
> dismissal was an appropriate sanction for the contravention of the rule or standard.
>
> [29] In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the

[1] [2014] 1 BLLR 31 (LAC) at 36, par [26].

> strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not "a magic wand which when raised renders the dismissal of strikers fair" (National Union of Mineworkers of SA v Tek Corporation Ltd and others (1991) 12 ILJ 577 (LAC)). The employer still bears the onus to prove that the dismissal is fair.
>
> [30] In his work Grogan expresses the view that item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He, therefore, opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in s not confined to the consideration of factors set out in item 6 of the Code." [2]

[57] In considering those aspects of the parties' conduct in the course of an unprotected strike which are relevant to the fairness of the dismissal, it is also important that the court should be careful not to adopt an armchair approach in its evaluation of that conduct, and to bear in mind the context in which decisions were taken by parties. That context can, in some instances, mitigate deviations from best industrial relations practices to a greater or lesser extent. The more measured, reflective and detached environment of trial proceedings is a different context from that when they confronted each other through the employer's perimeter fence. The reasonableness of how they conducted themselves in relation to each other must be assessed in the context of that more fraught environment.

[2] At pages 38-39, paras [29] – [30].

The court order and first ultimatum

[58] Unusually, the court order was delivered directly to the union offices early in the afternoon of 7 November. There is no dispute that it was received by an administrator who evidently spoke to someone who had advised her to receive it ‘’without prejudice”. It is improbable that she did this without speaking to someone in authority in the union. Moreover Mathunjwa was aware of the company’s visit to the premises as he was in conversation with Lukhele outside the building when Greyling left the building after delivering the notice. In all probability, the union at least knew of the interdict by mid-afternoon. It is common cause that strikers gathered at the premises refused to accept the service of the interdict on them and were aware that management was attempting to issue a document to them. Mkhonto also conceded that if they had been interested in the order that was placed in the window of the security office, they could have read it.

[59] It is also common cause that Mathunjwa met the strikers outside the company premises that afternoon, after the order had been served on the union and that a further attempt to serve the order together with the 1st ultimatum was resisted by ignoring the efforts of the security guard on the pretext that Mathunjwa was preoccupied with discussions with the workers. Astonishingly, in these discussions, the news of the court order was not conveyed to the strikers according to Mkhonto. I find it hard to believe that the only issue of substance discussed was the provision of T-shirts and a union banner. The ultimatum was also placed on the window of the security office and it is not disputed it was sent to the union office before close of business.

[60] Despite Mkhonto testifying that the union was the strikers chosen channel of communication, it seems the union chose not to convey the order to them and when the president of the union was outside the premises, he declined to accept communications from the company. Under no circumstances if workers truly remained ignorant of the court order and the ultimatum on Monday afternoon, they only had themselves and the union to blame as management did all that reasonably could to bring the order and the ultimatum to their attention. As a matter of probability, I believe it

was unlikely they did not at least learn of the court order on Monday afternoon because it is highly improbable that Mathunjwa would not have enquired at the office about Greyling's visit. Secondly, Mashiya evidently knew of the court order before the second ultimatum was issued on Tuesday morning. It is more probable in my view that the union was engaged in a conscious tactic of trying to delay the moment when the strikers could no longer credibly deny their knowledge of the court order. It is also perhaps not coincidental that although the strike had been in progress for some days, it was only when the court order was obtained that workers asked Mathunjwa to provide them with T-shirts and a banner. Knowing that they could not prolong the return to work much longer, it is quite plausible that workers wished to demonstrate to management that they were unbowed and remained loyal to the union and their cause despite having to end the strike.

Second ultimatum

[61] The first ultimatum had given strikers until 07H00 on 8 November to return to work. When they did not, the second was issued around 08h15 calling upon them to return to work by 09H00, they were now clad in their union regalia. There was also some evidence that they were carrying a banner too. Given the length of the meeting proceeding the issuing of the second ultimatum, it is unlikely that it could have been solely taken up with the distribution of union paraphernalia. It is more likely that the meeting discussed the imminent prospect of the return to work and the way forward, such as whether they would oppose the interim interdict or how their demands might be pursued thereafter. It is only reasonable to surmise that this was discussed because it was barely 30 minutes after the second ultimatum was issued that workers presented themselves at the vehicle gate. Mkhonto had said workers were confused about the court order and their own view that the strike was protected. It is more likely that much of this was discussed in the first meeting that morning and that Mathunjwa did not simply break the news of interdict when the second ultimatum was issued because the response to the second ultimatum was

relatively rapid if one considers that according to Mkhonto, workers had no prior knowledge of the court order or the first ultimatum at that point.

[62] I have little doubt that management was taken aback by the rapidity of the apparent turnaround by the strikers. Having believed that the union and the strikers were unlikely to heed the ultimatums given that the strike continued even after the court order had been served on the union and that there had been no communication from the union itself after the order and first ultimatum had been served, and having seen workers putting on union T-shirts as a demonstration of reinforcing their solidarity, it must have caused some confusion when they appeared *en masse*, still singing and charting, at the gate. It is also not implausible that management may have had some doubts about whether they genuinely intended to return to work or whether it was just a ruse to gain entry to the premises. The strikers also did not attempt to enter the workplace where they would clock in at the turnstile which also suggested that they might have been pursuing a different agenda than signalling the end of the strike. Lastly, although the strike had not been unusually violent, there was some overt violence and the picketing was aggressive and had an undertone of personal animosity towards Greyling and Condie. Under these circumstances, I accept that management might reasonably have wanted some assurance that the workers were not intending to continue the strike action if they were admitted to the premises. The device management hit upon was the signature of the written undertaking. Although Condie claimed that the company had been considering an undertaking before workers presented themselves, it seems more likely that it was the events at 08H50 that triggered this response.

[63] Regrettably, the underlying purpose of the undertaking got somewhat lost in the formalistic tit for tat between the union and the company which followed, which resulted in the parties entrenching positions rather than finding common ground. We do not know what informed Mathunjwa's thinking except from the correspondence and what he said to management. The union's first response was to dash off a letter disclaiming any liability for further continuation of the strike on the basis that management had refused the tender of services. It must be

remembered that, previously the company had said that it would hold the union liable for losses incurred as a result of the strike action and it is understandable that Mathunjwa would have taken the earliest opportunity to protect the union from any subsequent claim by placing on record the company's refusal to admit workers back to work. Condie instead took it to be a threat that the union no longer took any responsibility for subsequent events. Perhaps, if this letter had been discussed with the company's lawyers, he might have obtained an alternative perspective of it. Be that as it may, his perceptions reinforced his view that obtaining the undertaking was critical and responded in this vein to the union, adding the rider that in the absence of the undertaking being signed the company regarded the workers as still being on strike, thereby shifting the emphasis away from the return to work as the primary thrust of the ultimatum to a requirement of making a written personal undertaking to do so. For its part, the union sought to strengthen its legal position by pointing out that since workers had ended their strike action, their exclusion from the workplace now constituted an unprotected lockout, since it could not be construed as a defensive lockout to an unprotected strike. The absurdity of the situation ought to have become clear: the parties were now in dispute about whether a strike was over, a matter which ought to have been relatively simple to resolve. While their formal communications flew back and forth, Mathunjwa and Condie were within sight of each other at the company premises. It was only after the third ultimatum was issued that Condi took the initiative of directly approaching Mathunjwa. He claimed that he hoped some discussion would develop. Unfortunately, the way he approached Mathunjwa was not very conducive to that. Essentially, he did no more than directly present the third ultimatum to Mathunjwa and insist that the undertaking was necessary to ensure workers were ending the strike. Mathunjwa responded in kind by pointing out that compliance with the court order did not require workers to do so. At that juncture, if cooler heads had prevailed, there might have been a proper engagement in finding a solution. Thus, union leadership was insisting that the strike was over but management was unconvinced and was insisting on a particular mode of acceptance by strikers that this was indeed so. Essentially, there

was common ground that the strike should come to an end but they simply disagreed about how workers would return to work. It was suggested that the requirement in the undertaking that workers acknowledge the unprotected nature of the strike had been one of the reasons they had been reluctant to do so, but this was never articulated by Mathunjwa at the time. It seems more probable that it was simply the fact that the employer appeared to be adding the written undertaking as an additional requirement before they could return to work, which was not foreshadowed in the interdict, nor indeed even in the third ultimatum. Regrettably, there were no attempts to explore other alternatives to an individual written undertaking, such as the union confirming that the strike would not continue once they returned to the premises, or agreeing that the workers would enter the premises as usual through the turnstile gate where they would clock in.

[64] Both parties can be blamed for failing to engage properly with the underlying issue, but before the company moved to the next step of dismissing the workforce management should have paused to consider whether it was really entitled to assume that dismissal was the only alternative at that point. It took the decision to dismiss the workers at a point where it knew that they were claiming they wanted to return to work but would not sign the ultimatum and where there was a dispute whether its requirement to sign the undertaking went beyond the court order, and what had been stated expressly in the undertakings. The fact that there was an evident disagreement about whether workers had in fact shown their willingness to end the strike ought to have alerted the company to the need to give workers or the union an opportunity to address the company on this issue. This was not the type of case where there had been no positive response from strikers or their union to steps taken by management to end the strike. The union was clearly expressing the view that its members wanted to return to work but should not be required to do anything more than comply with the court order in order to do so. What should have been evident to management, even if they had reasonable misgivings about the workers real intentions, was that they were not dealing with a workforce that adamantly continued to ignore the court

order and the company's ultimatums. If that had been the case, management might justifiably have concluded that nothing was going to alter their stance and that there was no alternative to dismissal.

[65] In this case, the company was aware of an unmistakable change in the strikers' behaviour before it issued the final ultimatum because they had ceased picketing and appeared at the gate. It was also aware that the union claimed it was the company that was preventing workers from returning to work and management heard Mathunjwa exhorting workers to return to work after the third ultimatum was issued. The company also knew that the court order and the ultimatums had not stipulated any formal pre-requisite for returning to work but never sought to explore this sticking point with Amcu. An enquiry or opportunity to make representations might have revealed that it was workers' genuine intention to end the strike and return to work and that it was just a natural suspicion about why the additional requirement of signing the undertaking had been imposed which prevented the parties from realising a common objective.

[66] At the very least, management could have done more to allay any genuine concerns it had about workers intentions by giving the union an opportunity to make representations why it should not dismiss the workers because they refused to sign the undertaking before entering the premises. That opportunity might have opened up the channel for more meaningful dialogue of the kind which Condie claimed he had been seeking with Mathunjwa when he gave him the third ultimatum and insisted on the importance of the undertaking being signed. Alternatively, if the company had held an enquiry before finalising any dismissals, it might have realised that there was a genuine intention on the part of the workers to end the strike, instead of relying almost entirely on its own perceptions and interpretation of their actions. It is for this reason that this was a case where simply issuing the ultimatums and waiting for them to expire was not procedurally sufficient either.

[67] Other factors making the dismissal substantively unfair was that the union and its members had some reason to believe that the strike was a protected one. The parties clearly had not been able to conclude a wage

agreement and on the face of it, there was an unresolved dispute of interest arising from that, even if the company felt more time should have been given to negotiation beforehand. Further, the strike was preceded by a referral to conciliation and more than two days formal notice of the commencement of the strike. Even though the union engaged in some unacceptable brinkmanship between the issuing of the order and the second ultimatum, within less than a day after the court order was issued the cessation of the strike had occurred, subject only to its possible revival later if the court order was not discharged.

[68] It was argued that the company ought to have held an enquiry because not all of the strikers would have received the communications regarding the ultimatums as they were not all present at the picket on Monday or Tuesday. It was also conceded by the employer that it might have been possible to notify strikers by SMS of the ultimatums. While that may be a measure that would be prudent to take, and in some situations might be seen as a necessary step, in the context of a strike where workers outside the company premises refused to accept direct communications from the company and insist that there should only be a single channel of communication with them through their union, they could hardly insist afterwards that the employer ought to have communicated with them as individuals. Moreover, workers who engage in strike action ought reasonably to be expecting some response from the employer. After all, if they were not expecting to provoke a response, they would not go on strike. It is reasonable to expect that workers on strike will maintain a degree of contact with each other and their union to keep abreast of recent developments in the progress of the strike including management's response to it. Unions also ought to be aware that in the dynamics of strike situations, circumstances can change rapidly and the need for constant communication between the union and its members is important to maintain. While management needs to communicate its responses to the strikers clearly and unequivocally, if it attempts to do so by communicating with the union and the strikers were present at its premises, that will generally be sufficient. I did not think that management has an obligation to try and keep constant track of the identity of particular strikers who were

not present when ultimatums were communicated to the strikers who are present. Obviously, there may be situations where strikers tend to attend the strike picket during their shift and this would require an employer to ensure that there was a reasonable opportunity for workers on different shifts to adhere to any ultimatums to return to work, but unions and shop stewards also have a responsibility to communicate developments to those who are absent from the picket line. In this case, the channels of communication were clear and the strikers would not allow any direct communications to themselves. ALS took more than reasonable steps to communicate the court order and ultimatums to the union and to the strikers at the premises. Any striker who was not present but had been interested enough to be informed about the progress of the strike on a daily basis, ought to have been aware that important developments were afoot at the time and kept themselves updated on those developments. The time period over which the court order and ultimatums were communicated was not so short that absent strikers could reasonably claim to have been caught unawares.

The GGV workers

[69] In respect of the GGV strikers who would not have been required to report for duty by the time workers were dismissed on 8 November, there is no real dispute that their dismissals were unfair. There remains the question of the three employees who contended they had returned to work.

[70] The respective company and union versions of what transpired with the three GGV strikers who were dismissed are mutually exclusive. Was within the company's grasp. According to Van der Merwe, the only one of the three who came to the premises on 8 November was Baloyi and he only did so in the afternoon after the dismissals had taken place. His reporting at that time simply in order to collect his belongings was consistent with arriving at GGV following the dismissals. Van der Merwe's testimony that the security office contacted him before Baloyi was admitted to the premises accompanied by a security official is also consistent with Van der Merwe's testimony that the security office had been instructed not to admit strikers to the premises of the mine during the strike. There was no direct

evidence to contradict Van der Merwe's account of Baloyi's appearance that afternoon, save that by indirect implication it was a fabrication because on Mashiya's version all three of them had returned to work by about 11H00.

[71] Mashiya could not dispute that the security office had been given instructions not to admit them, but explained that they merely informed the security that the strike was over and proceeded to their workstations having been presumably seen by Van der Merwe, who let them work for at least two hours they were advised of their dismissal. On their version, their supervisor simply accepted their return to work even though temporary workers were filling in for them and seemingly did not think it was necessary to mention their return to his superior, Van der Merwe. Two difficulties arise with the inherent probabilities of Mashiya's account. Firstly, given that he said they did not speak to Van der Merwe but that he must have seen them on the premises, it is highly improbable he would have simply turned a blind eye to their sudden appearance in the workplace when they were supposed to be prevented from entering by the security staff. He did concede the possibility that, despite the arrangements with the security office, it was possible that they might have been admitted to the premises, but that does not mean it is likely that he would have been indifferent to their presence if he must have seen them on their way to their workstations as Mashiya claimed he would have. Secondly, it seems less probable that they would have not created some confusion at their workstations when replacement workers had been engaged to do their duties. Even if those replacement workers were not at the workstations at the time they arrived, it seems somewhat unlikely they would have avoided contact with them over a period of more than two hours. Moreover, on Mashiya's version, Mncube did not have any difficulties with their reintegration in the workplace despite the presence of the temporary replacement workers, which also seems improbable.

[72] I am satisfied on the relative probabilities of the two versions that it is less likely that Mashiya and his two colleagues did report for duty as he claimed and accordingly they did not resume their duties as normal only to

be ejected a couple of hours later. However, there was no evidence what they were expected to do if they wanted to return to work.

[73] Van der Merwe did not testify that he had been instructed to ask them to sign an undertaking if they reported for work and it is more probable that the company did not differentiate between them and the rest of the Witlab employees and that the impasse which led to the dismissal of the Witlab employees also led to their dismissal. In fact he did not even know about the undertaking and Condie had testified it was never sent to him. Van der Merwe testified that even if they had presented themselves for work they would not have been admitted to the GGV premises, so it seems the opportunity for being admitted to the premises before the ultimatum expired on signature of the undertaking was not even available to them as the undertaking was never sent to Van der Merwe.

[74] In conclusion, the GGV employees on strike were dismissed without any consideration of whether or not they were prepared to tender their services and they were treated as if they were simply part of the group of workers gathered at Witlab. Clearly, had even more reason to be heard before they were dismissed to evaluate whether their circumstances warranted different treatment from the rest of the strikers, given that they would not have been admitted to the GGV premises and the improbability they could have complied with the third ultimatum before it expired even if transport to GGV had been immediately available when it was issued. I am not satisfied that they had the same opportunity as other strikers to comply with the ultimatum and ought at least to have been given an opportunity to make representations on why they should not have been treated the same as the other strikes. Consequently, I am satisfied their dismissals were also substantively and procedurally unfair.

Relief

[75] As the dismissal of the applicants was substantively and procedurally unfair the issue arises whether there is any reason why they should not be reinstated. By the time the matter came to trial, the business of the respondent was a hollowed out version of what it had previously been. Owing largely to the declining fortunes of the cold industry, in particular a

substantial drop in the coal price of 40 %, and loss of contracts involving laboratories run by ALS at other mines, the workforce had shrunk by even more than the number of those who had been dismissed, a drop of close to 70%.

[76] It stands to reason that if the workers had not been dismissed during the course of the strike, they stood a very high chance of being retrenched in the ensuing years. This is not a situation where it is simply a question of reinstating those dismissed and then embarking on a retrenchment process to align the employment figures with the firm's current operational status. Even if every one of the current employees were retrenched to make way for reinstated strikers, ALS could only accommodate half of those dismissed, assuming for the sake of argument that the 44 of the hypothetically retrenched workers could easily be replaced by any of the dismissed strikers from a skill matching point of view. Clearly, in this context it is not reasonably practicable to reinstate the dismissed individual applicants.

[77] The remaining question then is the extent of compensation as an alternative to reinstatement. Given the analysis above of the substantive and procedural unfairness of the dismissals, I am satisfied that if it was practicable to reinstate the dismissed workers that would have been the appropriate remedy, with some reduction in the degree of retrospectivity owing to the some of the unduly aggressive conduct of the strikers, personalised attacks on management, racist and threatening chants, and their initial failure to comply with the court order as well as wilfully ignoring communications from the company. The union also collaborated in the last mentioned tactic.

[78] Given that compensation is the only alternative remedy, but that twelve months' compensation would be unduly generous in view of the factors mentioned. I am also mindful that given the reasons why reinstatement is not practicable, the economic value of reinstatement would not have been very meaningful as it seems unavoidable that approximately 50 % of the strikers would have been retrenched after being reinstated given the

current size of the workforce. Consequently, I believe eight months' remuneration is an appropriate amount of compensation.

Costs

[79] The applicants have been substantially successful and there is no ongoing relationship between the parties. In this case, it is appropriate that costs should follow the result, with a reduction as a mark of the court's disapproval owing to the initial conduct of the union after receiving the court order.

Order

[1] The dismissal of the second and further applicants, excluding the fourteen applicants identified in paragraph 4.2.3 of the respondent's statement of response of 18 September 2015, was substantively and procedurally unfair.

[2] The respondent must pay each of the second and further applicant's, identified in paragraph [1] of this order, compensation equivalent to eight (8) months' remuneration calculated at their rates of remuneration at the time of their dismissal in November 2011, which must be paid within 30 days of the date of this judgment.

[3] The respondent must pay 75 % of the applicants' costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	R Itkin instructed by Larry Dave Inc.
RESPONDENT:	A Freund, SC instructed by Anton Bakker Attorneys