IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA62/19

In the matter between:

AMCU obo LS RANTHO AND 158 OTHERS **First Appellant**

TEBOGO MOSES MATHIBA **Second Appellant**

and

SAMANCOR WESTERN CHROME MINES **Respondent**

Held: **18 August 2020**

Delivered: **01 October 2020**

Summary: Dismissal—Strike context—Illegal strike—Employer issued ultimate employees to return to work before certain time---Striking employees complying with ultimatum to return to work but nevertheless dismissed—Employer waiving its right to discipline employees by issuing ultimatum---- Dismissal unfair as employees returned to work as instructed in the ultimatum.

Coram:

JUDGMENT

MURPHY AJA

[1] The first appellant ("AMCU") appeals against the judgment of the Labour Court (Tlhotlhalemaje J) delivered on 17 April 2019, as well as two interlocutory rulings, one a point *in limine* and the other granting absolution

from the instance in its rectification application. AMCU maintains that the Labour Court erred in finding that the dismissal of 159 AMCU members ("the individual appellants") for participating in an unprotected strike on 25 November 2013 was substantively and procedurally fair. It contends further that the Labour Court erred by not allowing the individual appellants to challenge the validity of their previous final written warnings for participating in an unprotected strike in May 2013 and to rectify a settlement agreement to permit them to dispute those warnings.

[2] The first respondent, Samancor, operates two chrome mines, the Millsell Mine and the Mooinooi Mine, ("the Western Chrome Mines") in the North West Province. AMCU and the National Union of Mineworkers ("NUM") enjoy collective bargaining rights in terms of a recognition agreement which Samancor concluded with NUM and AMCU ("the recognition agreement"). AMCU wanted to amend the recognition agreement so as to change the definition of the workplace or bargaining unit (defined to be the Western Chrome Mines and the Eastern Chrome Mines near Groblersdal in Limpopo) and thereby secure majority union status at the Western Chrome Mines.

[3] During May 2013, AMCU members participated in an unprotected strike in pursuance of a demand that Samancor change the recognition agreement so as to recognise AMCU as the sole union for collective bargaining purposes at the Western Chrome Mines. Samancor issued a final written warning (valid for 12 months) to these striking employees, including the individual appellants.

[4] On 25 November 2013, AMCU members again participated in an unprotected strike partly in pursuance of the same demand. On 13 December 2013, Samancor dismissed all the employees who participated in this unprotected strike, including the individual appellants. AMCU lodged an internal appeal against the dismissal of its members. Prior to the commencement of the internal appeal, Samancor and AMCU concluded a settlement agreement, in

terms of which Samancor agreed to reinstate all AMCU members who had not participated in the strike of 25 November 2013 or who were not on a final written warning for having participated in the earlier strike in May 2013. The individual appellants are the employees who were identified and listed in a schedule of AMCU members who were on a final written warning for their participation in the earlier strike and were not reinstated.

[5] The second appellant, Mr TM Mathiba, ("Mathiba"), also appeals against the judgment but on essentially different grounds. He maintains that he did not participate in the unprotected strike on 25 November 2013, but instead reported for duty. He also denied participating in the unprotected strike of May 2013 and thus challenged the final written warning which was issued subsequent to his alleged participation.

[6] At the commencement of the proceedings, the Labour Court consolidated the applications of the individual appellants and Mathiba. It also ruled that the appellants were precluded by the terms of the settlement agreement from challenging the validity of the final written warnings issued in relation to the strike of May 2013 and leading evidence in relation to them. In response to this ruling, the appellants brought an application to rectify the settlement agreement to permit a challenge to the warnings, such being the alleged true intention. The Labour Court granted Samancor absolution from the instance in this application on the grounds that the appellants had not made out a *prima facie* case showing a common mistake justifying rectification of the settlement agreement. While the correctness of the Labour Court's rulings on these issues took up much of the argument before us, there is no reason to canvass them as the appeal falls to be determined on another basis.

[7] The facts and circumstances of the strike of 25 November 2013 are for the most part not disputed. In the early morning on that day, most workers on the mine did not work. A memorandum was handed to management demanding

resolution of the bargaining unit issue and other issues. One of the primary demands was that one of Samancor's human resources officers be immediately removed from the Mooinooi mine on the grounds of her being biased against AMCU. The office of NUM at the mine was trashed and some workers willing to work were intimidated. Management, believing there was a safety problem, ordered the evacuation of the underground areas of the mine.

[8] Various meetings were held during the day in an attempt to persuade the workers to return to work. Mr Mphahlele, the AMCU General Secretary, came from Johannesburg to assist in the negotiations. The last meeting ended at 15h00, but neither the afternoon shift nor the night shift reported for work. AMCU members did not return to work until the day shift of the next day 26 November 2013, meaning that the day shift, the afternoon shift and the night shift of 25 November 2013 were not worked.

[9] At 18h53, on 25 November 2013, Samancor sent an SMS to all Western Chrome Mines employees which read:

> 'All WCM employees to report for duty tomorrow, 26 Nov 2013, as per normal.'

[10] A second SMS was sent at 19h58 which read:

> 'All night shift employees need to report for duty tonight as normal.'

[11] At 23h00 on 25 November 2013, after the night shift had failed to report, a written ultimatum on Samancor's letterhead was addressed to "All striking Mooinooi and Millsell Night Shift Workers" in the following terms:

- You commenced on an unlawful/unprotected strike today Monday 25 November 2013 at approximately 22h00.

- Despite management attempt to engage with striking workers and their representatives, you have embarked on an unlawful/unprotected strike.

- You are hereby instructed to return to work at the commencement of the next shift tomorrow, 26 November 2013, at 22h00.

- The Company will be taking every precaution at its disposal to ensure your safety, should you wish to return to work.

- If you do not intend to return to work, you and/or your representative are required to provide reasons as to why the Company should not issue a final ultimatum requiring you to return to work, failing which, why the Company should not dismiss you. These reasons must be received by the Company on or before 10h00 tomorrow, Tuesday 26 November 2013.

- You are not permitted to intimidate employees wanting to return to work.

- You are encouraged to communicate through your union representatives to the extent possible.

- Should you wish to provide written reasons why the Company should not issue a final ultimatum, these may be emailed to [the relevant HR Officer] or delivered by facsimile to [telephone number provided] or by hand to the security offices at Mooinooi and Millsell. You may through your representatives also make arrangements to meet with management at the mine premises. Management are available to meet with your representatives at any time.

- The Company reserves the right to take disciplinary action against you for participating in unprotected/unlawful strike action and for your conduct during the strike.

- The Company also reminds you that you can also be held liable for any losses suffered as a consequence of this unlawful/unprotected strike.

- The principle of “No Work No Pay” will apply.

- UASA, the NUM and AMCU have been provided with a copy of this ultimatum.

[12] The next day, 26 November 2013, at 05h30, another ultimatum was issued to “All striking Mooinooi and Millsell day and afternoon shift employees”. The ultimatum was in exactly the same terms except for the first three paragraphs which set a different pertinent timeline for the day and afternoon shifts. These paragraphs read:

- You commenced on an unlawful/unprotected strike today Monday 25 November 2013 at approximately 06h00 for day shift and 14h00 for afternoon shift.

- Despite management attempt to engage with striking workers and their representatives you have embarked on an unlawful/unprotected strike.

- You are hereby instructed to return to work at the commencement of the next shift today, 26 November 2013, at 06h30 for day shift and 14h00 for afternoon shift.

[13] Thus, in terms of these ultimata, the night shift was given 23 hours to return to work, the day shift one hour, and the afternoon shift eight and a half hours. The ultimata gave the workers a choice. They had to return to work at the stipulated times or, alternatively, if they intended not to return to work at those times, they could provide reasons as to why Samancor should not issue another final ultimatum requiring them to return to work. They were warned that if they did not heed the final ultimatum, they would then be dismissed. One may reasonably deduce from the terms in which they were framed that the two ultimata were preliminary in nature; with the threat of dismissal likely to be realised only after non-compliance with an intended further (and final)

ultimatum.

[14] As it turned out, the afternoon and night shift workers fully complied with the preliminary ultimatum when all of them returned to work on 26 November 2013 at the stipulated times applicable to them. The day shift workers, who were given only one hour to comply, substantially complied with the ultimatum by returning to work between 06h45 and 07h00 on 26 November 2013. The unions offered to work the day lost, but this proposal was not accepted by Samancor.

[15] A decision was taken at a management meeting held on 6 December 2013 that all the employees who had failed to clock-in on 25 November 2013 were to be disciplined on the charge of "gross misconduct" for participating in an unprotected/unlawful strike. Three separate disciplinary hearings were held in respect of members of the three different trade unions.

[16] AMCU did not attend the disciplinary hearing scheduled in respect of its members on 10 December 2013. It sent an email to Samancor advising that it was not available to attend the hearings and that it would only be available on 16 or 21 January 2014. Samancor decided that the hearings would proceed as planned and in AMCU's absence. The chairperson of the hearings wrote to Mphahlele on 11 December 2013 advising him that the hearings had proceeded in AMCU's absence; that the decision on the guilt of the employees was reserved, and would be handed down on 13 December 2013; and that AMCU should attend on that date as the employees would be given an opportunity to plead in mitigation. AMCU did not attend the hearing on 13 December 2013 and the chairperson dismissed the individual appellants for participating in the unprotected strike.

[17] The disciplinary hearings in respect of the members of other trade unions were held on 11 December 2013. The members of these unions were not found guilty on 13 December 2103.

[18] Despite it lodging an internal appeal, AMCU did not pursue the appeals process in the light of the conclusion of the settlement agreement. As explained, in terms of that agreement, only the employees with valid final written warning were not reinstated. Their dismissals were confirmed at the conclusion of the settlement negotiations on 26 January 2014.

[19] Clause 2.1.4.3 of the settlement agreement records that AMCU "reserves its rights to refer a dispute as provided for in terms of the Labour Relations Act". Clause 5 provides that the settlement agreement is entered into in full and final settlement of all claims arising from the dismissals on 13 December 2014 except as provided for in the agreement. Clause 5.2, in turn, provides that notwithstanding the generality of Clause 5, "nothing shall preclude the dismissed employees from exercising their rights as set out in 2.1.4.3 above". Relying on these provisions, the individual appellants referred a dispute to the Labour Court challenging their dismissals.

[20] In their statement of claim, the individual appellants contested the substantive and procedural fairness of their dismissals on various grounds. The challenge to substantive fairness was based broadly on the following bases: i) the work stoppage was for a short duration and lasted less than a day; ii) the individual appellants heeded the ultimatum and returned to work in accordance with it; iii) the misconduct was not of a nature to warrant the sanction of dismissal; iv) the final written warnings were not valid or fair; and v) all the employees were involved in the same misconduct but not all were consistently disciplined. The dismissals were alleged to be procedurally unfair because: i) the chairperson was misinformed of the reason for the appellant's absence from the disciplinary hearing; ii) the request for a postponement of the disciplinary enquiry was unreasonably refused; and iii) proceeding with the hearing in the absence of the individual appellants was unfair for various reasons.

[21] As mentioned earlier, the Labour Court did not permit AMCU and the individual appellants to lead evidence regarding the final written warnings or to challenge their validity and fairness. It held the warnings were valid and concluded that in the face of them participation in the unprotected strike was serious misconduct justifying dismissal. It reasoned as follows:

> 'The question that remains is whether the dismissal on account of participation in the unprotected strike and the fact that the employees were on final written warnings was appropriate. It is my view that questions surrounding the inter-union rivalry between AMCU and NUM, or the fact that Samancor's approach to the recognition agreement and its amendment was slow or biased cannot serve as mitigating factors.…Where a union in a workplace is of the view that it is entitled to more rights of engagement with management, legal processes are in place for those ends to be achieved. ….
>
> A whole range of factors needs to be looked at in assessing fairness. In this case it is significant to point out the following: i) the strike was unprotected and unprovoked; ii) in terms of the provisions of Samancor's disciplinary code, participation in an unprotected strike was to be met with a dismissal even if it was a first offence; iii) the strike was essentially in respect of the same issues that led to final written warnings in July 2013, coupled with other impermissible or unlawful demands; iv) the final written warnings remained valid as at the time of the unprotected strike; v) the employees following a meeting between AMCU and management, ought to have immediately (at least the afternoon shift) returned to work and had not done so…; vi) aligned to the issues of the gross nature of the misconduct in question is the conduct of the employees during the strike; it was not contested that damage was done to the offices of NUM during the strike. …; vii) [t]he financial harm caused by the unprotected industrial action…. included a loss of R2.3m for the 25 November 2013, and a loss of R1.3 per day per mine on 26 November 2013…….
>
> In this case, I fail to appreciate what other alternatives were available to Samancor, in circumstances where the dismissed employees had failed to

> heed the final written warnings issued to them two months earlier, which ordinarily in terms of Samancor's disciplinary code, would have led to a dismissal.….The conduct of the individual applicants and the nature of the strike itself rendered an employment relationship intolerable, and accordingly, the sanction of dismissal was appropriate'.

[22] With regard to the contention that the dismissals were unfair because the appellants had complied with the ultimata, the learned judge stated:

> 'To the extent that the employees returned to work on 26 November 2013, it can be accepted that they had heeded the ultimatums, but this does not imply that Samancor was not within its rights to institute disciplinary proceedings against them. After-all, they had participated in an unprotected strike.
>
> To this end, [the] contentions that management had not in the meetings indicated an intention that disciplinary action would be taken against the employees did not however imply that management could not do (sic). The fact that the employees had resumed their normal duties on 26 November 2013 did not imply that it was the end of the matter.
>
> A decision to discipline employees, who had embarked on an unprotected strike ….even if they had agreed to return to work, remains a management prerogative. Furthermore, the reliance by AMCU on 'ambiguous/confusing' messages in the ultimatum, as to whether management would take disciplinary action…, does not assist its case in the light of the prerogative enjoyed by management. To this end, there is further no merit in the contention…that Samancor was estopped from disciplining the employees by virtue of any impression it had created through the ultimatums.'

[23] In our view, the Labour Court misconstrued the legal consequences of the individual appellants' compliance with the ultimata.

[24] Item 6 of Schedule 8 of the Labour Relations Act[1] ("the LRA") offers clear

[1] Act 66 of 1995.

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

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

[25] The object of an ultimatum is to give striking employees the opportunity to reconsider their action. It must, therefore, be clear and unambiguous and give the employees sufficient time to reflect. The ultimata issued by Samancor were not entirely clear but indicated that dismissal would only follow after non-compliance with a final ultimatum to be issued after unjustified non-compliance with the preliminary ultimatum. Samancor also reserved its right to take disciplinary action against the employees for participating in unprotected strike action and for their conduct during the strike.

[26] It is well-established in our law that where illegally striking employees obey an ultimatum and return to work within the stipulated time, the employer will not be entitled to dismiss them. To hold otherwise would render the purpose of an ultimatum nugatory. Strikes are functional to the social good of collective

bargaining. Thus, the right to strike is constitutionally enshrined as a legitimate means of advancing orderly collective bargaining. A precipitate strike subverts the process by undermining the opportunity for resolution of the collective dispute by negotiation. The misconduct present in participation in an un-procedural strike is the subversion of the process. The purpose of an ultimatum is to put the negotiation process back on track and to end the precipitous action. If it achieves that purpose, dismissal normally should not follow because that too would be precipitate action undermining legitimate and orderly collective bargaining.

[27] For those reasons, our law regards an ultimatum by the employer as a waiver of the right to dismiss for the period of its duration. A party who has once approbated (waived a right arising under the contract, including the right to terminate it) cannot thereafter reprobate (seek to enforce that right).[2] If the employees refuse to return to work, the waiver implicit in the ultimatum will lapse.[3] But if they comply with the ultimatum, the employer is ordinarily precluded from dismissing the employees for the act of striking, but not necessarily for other misconduct committed during the strike. Where an employer after issuing an ultimatum wishes to reverse or amend the terms of the waiver prior to it expiring, it may do so in appropriate circumstances provided it has a good reason and gives the striking workers timeous notice of the change to prevent them from being unfairly prejudiced thereby.[4]

[28] Samancor did not reverse or amend its waiver in this case. The ultimatum specified that dismissal would only follow if after the preliminary deadline the employees did not justify their refusal to return to work or did not heed a final ultimatum, which seemingly would only have been issued after the deadline to submit reasons for not returning to work – set in the ultimatum at 10h00 on 26

[2] *Administrator, Orange Free State & others v Mokopanele & others* 1990 (3) SA 780 (A); *MM & G Engineering (Pty) Ltd v NUMSA & others* (2005) 26 ILJ 1326 (LAC); and J Grogan *Workplace Law* (10 ed) 405-406.
[3] *SA Workers Union (in liquidation) v De Klerk NO* (1992) 13 ILJ 1123 (A).
[4] *Maluti Transport Corporation Ltd v MRTAWU & others* (1999) 20 ILJ 2531 (LAC).

November 2013. The employees did not submit reasons for not returning to work and no final ultimatum was issued because they all complied with the preliminary ultimatum.

[29] However, in the ultimatum the employer expressly reserved the right to take "disciplinary action" both for participation in the strike and for other misconduct committed during the strike. This provision introduced a measure of ambiguity which should be interpreted restrictively so as to advance the constitutional rights of the employees. Had the employer wanted to reserve to itself the right to dismiss the workers, even if they returned to work, it would have done better to have worded the ultimatum differently. But, in any event, a reservation of the right to dismiss would impermissibly undercut the purpose of an ultimatum. There would be little incentive for employees to obey an ultimatum and end an illegitimate power play if its terms permitted dismissal despite compliance. The aim of an ultimatum is to afford a last chance before resorting to the ultimate sanction. Hence, at best for Samancor, the reservation in the ultimatum of the right to pursue disciplinary action for participation in the strike must be construed as permitting disciplinary action short of dismissal.

[30] In the result, the dismissals of the individual appellants and the second appellant were substantively unfair because Samancor had waived its right to dismiss them if they complied with the ultimatum. They did comply and dismissal was accordingly an inappropriate sanction in the circumstances.

[31] There is insufficient evidence to conclude that reinstatement would be intolerable or impracticable, therefore in terms of section 193(2) of the LRA the individual appellants are entitled to reinstatement. However, this is a case where reinstatement to the date of dismissal would be inappropriate.

[32] The primary demand of the striking workers related to a dispute about the bargaining unit. Demands of this kind must be dealt with in sensitive manner,

especially in the context of the trade union rivalry bedevilling the mining industry in our country. The legislature has devised a particular process to ensure that disputes about bargaining units are managed and resolved on the basis of comprehensive information and in accordance with legitimate principles. To that end, section 64(2) of the LRA, in addition to requiring prior conciliation before industrial action, obliges the employees or employer, as the case may be, to refer a dispute about bargaining units to advisory arbitration as contemplated in section 135(3)(c) of the LRA.

[33] The determination of bargaining units is often a difficult matter requiring meticulous consideration of interlocking factors such as methods of pay, seniority, convenience etc. The pre-condition of advisory arbitration aims at affording the parties an opportunity to ventilate the issues in front of an independent party, culminating in a recommendation hopefully narrowing the dispute (and possibly settling it) prior to industrial action. In embarking on and participating in two wildcat strikes circumventing these processes, the individual appellants resorted to precipitate and illegitimate power plays that led to violence and most likely added needlessly to inter-union rivalry, tension and disharmony at the workplace. As the Labour Court pointed out, this unnecessary and harmful friction could have been avoided, or at least minimised, by procedural conduct. The message must be brought home to employees that destabilising conduct of this kind will not be tolerated. Therefore, reinstatement in this case should be of limited retrospective effect.

[34] The situation of Mathiba, the second appellant, is different. Mathiba denied participating in either of the strikes of May 2013 and November 2013. He testified that on the day of the November strike, he reported for duty and went underground, but was recalled to the surface by his supervisor. He was with several of his colleagues, who he identified. The supervisor informed them that they would not work due to the strike. He left the mine's premises at around noon. He received his full remuneration for November 2013 with no

deduction being made in respect of the day of the strike.

[35] Mathiba's clock card for 25 November 2013 reflects that he clocked in at the main gate at 05h53 and clocked out at the main gate at 11h59. He clocked in at the mining change house at 07h27 and out at 7h30. He then clocked in again at the mining change house at 10h43 and out at 11h27 before exiting the mine at 11h59.

[36] On the days of the first strike in May 2013, Mathiba worked a double shift on 28 May 2013 and had a rest day on 29 May 2013. This is confirmed by his clock-card for that day. He nonetheless received a warning for participating in the first strike when he, in fact, had not. He raised this with human resources at the time and assumed it had been rectified.

[37] Mathiba hence argues that he should not have been dismissed; firstly because he did not have a valid final warning and secondly he had not participated in either strike.

[38] None of Samancor's witnesses gave any direct evidence establishing that Mathiba had participated in the strike. Samancor failed to present any evidence about his participation, save for challenging his version about his whereabouts premised on his clock-card. Samancor's General Manager, Mr. Smart, during his evidence in chief did not testify as to the whereabouts of Mathiba on 25 November 2013. During re-examination, he was referred to the clock-card and maintained that it appeared that Mathiba did not go underground as other entries would have been reflected on the card. However, he had earlier conceded that the clocking card was difficult to interpret.

[39] Samancor's second witness, Rakoma, also struggled to interpret the clock card, but he too suggested that it did not indicate that Mathiba had gone underground. He confirmed though that Mathiba received payment for

services rendered on 25 November 2013. During cross-examination, he was presented with clock cards of various employees and acknowledged that they had discrepancies and seemed unreliable. Rakoma ultimately conceded that there are occasions when the clocking system does not operate properly, that 25 November 2013 might have been one of those occasions and that Mathiba's clocking card contained entries which seemed strange under the circumstances. He then went on to concede further that on the basis of the clocking cards, he had no "idea as to who left; whether they participated in the strike or not." It is accordingly not beyond the bounds of belief that Mathiba was underground between 07h30 and 10h43, being the period between his clocking in and out of the mining change house.

[40] In the premises, Samancor failed to discharge its onus that the dismissal of Mathiba was for a valid and fair reason. It adduced insufficient evidence showing on a balance of probabilities that Mathiba participated in the strike of 25 November 2013. He is accordingly entitled to be reinstated retrospectively to the date of dismissal.

[41] Given our findings on substantive fairness and the appropriate remedies, it is not necessary to determine whether the dismissals were procedurally unfair.

[42] The ongoing relationship between AMCU and Samancor, and the reprehensible behaviour of the individual appellants, justify no award of costs. However, considering the paucity of evidence against him, equity demands that Mathiba be awarded his costs before the Labour Court and on appeal.

[43] In the result, the following orders are made:

43.1 Orders 4, 5 and 6 of the orders of the Labour Court are set aside and substituted as follows:

43.1.1 The dismissals of the individual appellants represented by AMCU and the second appellant were substantively unfair.

43.1.2. The respondent is ordered to reinstate the individual appellants represented by AMCU with effect from 1 June 2020.

43.1.3 The respondent is ordered to reinstate the second appellant with effect from 13 December 2013.

43.1.4 The respondent is ordered to pay the second appellant's costs in the application.

43.2 The respondent is ordered to pay the second appellant's costs in the appeal.

_____

JR Murphy

Acting Judge of Appeal

I agree

_____

P Coppin

Judge of Appeal

I agree

_____

F Kathree-Setlioane

Acting Judge of Appeal

APPEARANCES:

FOR THE FIRST APPELLANT:	Adv A Redding SC
	Instructed by LDA Attorneys
FOR THE SECOND APPELLANT:	Attorney C Scholtz
FOR THE RESPONDENT:	Adv MJ van As
	Instructed by Solomon Holmes Attorneys