IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA8/19–JA9/19

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION & OTHERS **Appellants**

and

NORTHAM PLATINUM MINE LIMITED **Respondent**

Heard: **11 February 2020**

Delivered: **14 September 2021**

Coram: Waglay JP, Sutherland JA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellants, the Association of Mineworkers and Construction Union and 292 of its members ("AMCU") and "the individual appellants" respectively), appeal against the judgment of the Labour Court (Lallie J) of 14 September 2018. The individual appellants were dismissed on 5 July 2016 (following a disciplinary inquiry which they failed to attend) for unauthorised and/or un-communicated absence from 17 June 2016 to 24 June 2016. AMCU challenged the dismissals on the grounds that they constituted invalid terminations of the individual appellants' contracts of employment, alternatively were automatically

or substantively and procedurally unfair, and sought retrospective reinstatement of the individual appellants.

[2] The Labour Court dismissed all of AMCU's claims, save for the claim that the dismissal was substantively unfair on the grounds that dismissal was not the appropriate sanction and in respect of which it awarded the individual appellants each 12 months' remuneration as compensation. AMCU on appeal seeks to overturn the Labour Court's rejection of its claims that the dismissals were invalid, automatically unfair dismissals and procedurally unfair. It also wants the reinstatement of the individual appellants instead of compensation. The respondent, Northam Platinum Mine Ltd ("Northam"), opposes the appeal for reinstatement and cross-appeals against the *quantum* of compensation. Northam does not cross-appeal against the Labour Court's finding that the dismissals were substantively unfair.

[3] The appeal was heard in early 2020. However, later in 2020, while this judgment was being prepared, the parties wrote to the Judge President informing him of a further attempt to settle the matter. They requested that judgment be delayed until conclusion of the settlement negotiations. In July 2021, the parties again wrote to the Judge President advising that the settlement negotiations had been unsuccessful and asked for judgment to be handed down as soon as possible.

Factual Background

[4] The issues in this appeal play out against the backdrop of trade union rivalry between AMCU and the National Union of Mineworkers ("NUM") on the platinum belt, which has been characterised by violence. In 2016, Northam employed some 5300 category 2-8 employees at its Zondereinde Mine ("the mine") of whom 4600 belonged to NUM (i.e. 87%). About 2300 of the employees (mainly members of NUM) resided in the Madiba Hostel. The other employees ("the living out employees") lived in the town of Northam and its surrounds. Although AMCU was in the minority at Northam, it has a strong presence in the region and enjoyed majority representation on other mines.

[5] Tension between the two unions began to grow in 2015. Prior to 2015, both NUM and AMCU members resided at the Madiba hostel. In January 2015,

members of NUM embarked on an unprotected strike for six days, in support of various demands. AMCU members did not participate in the strike. On 14 January 2015, Northam obtained an urgent interdict from the Labour Court declaring the strike by NUM members unprotected. The next day Northam advised 65 AMCU members occupying the hostel not to return to the hostel, because it was not safe for them to do so. These AMCU members were accommodated by Northam in its Recreational Hall. During their absence some of their rooms at the hostel were vandalised and their belongings destroyed by NUM members. Northam then placed these AMCU members on three months' paid leave, and provided them with a living-out allowance. No disciplinary action was taken against any NUM members. There is a dispute about whether Northam undertook to compensate those AMCU members who had their belongings vandalised.

[6] On 22 March 2015, AMCU's members embarked on an unprotected strike for two days in support of demands to return to the hostel and for payment of compensation. Northam obtained an interdict against AMCU and its members and issued those AMCU members who had embarked on the unprotected strike with final written warnings for their participation in the strike.

[7] In January 2016, tension was exacerbated further by a dispute about whether AMCU had reached the prescribed threshold of 15% representivity for organisational rights within the workplace. In April 2016, AMCU's members embarked on another unprotected strike for approximately six days, again in support of demands that they not be precluded from residing at the hostel and be compensated for their damaged property.

[8] Although some NUM members were murdered in the wider region during 2015, no violence was experienced at the Northam mine between February 2015 (after the strike called by NUM in January 2015) and June 2016.

[9] On Sunday 5 June 2016, a NUM shop steward and a member of the hostel committee, Mr. Somaxhama (known as Bala), was shot 100 metres away from where AMCU was holding a mass meeting. NUM members at the scene immediately formed the view that AMCU was responsible for the murder. NUM

members on the nightshift (22h00 – 06h00) at the mine responded by going on strike. The living out employees reporting for work were turned back at the boom gate (at the entrance to the mine), and the shift was cancelled. It was understood that NUM perceived that Bala had been killed by AMCU members. There is some dispute about whether any violence transpired in the vicinity of the mine that night, but the situation was undeniably tense.

[11] The next morning, Monday 6 June 2016, the boom gate remained closed and the living out employees were denied access to work. Employees remained gathered at the gate. Shortly before 08h30, a group of about 80-100 NUM members who had marched from the mine (accompanied by members of the South African Police Service – "SAPS" – in police vehicles) arrived at the boom gate. There some of the marchers cast off their blankets revealing weapons (pangas, spears and knives) and ran towards and chased after the living out employees who fled from the open area outside the boom gate. In the ensuing fray, an employee, Mr Mhlabeni (who was wearing an AMCU T-shirt) was stabbed to death at a place about 600 metres away from the boom gate. Shortly thereafter, the car of a member of the AMCU interim committee (Mr Sisane) was vandalised and torched. Members of NUM were subsequently convicted for the murder of Mr Mhlabeni and the destruction of Mr Sisane's car. AMCU members were arrested for the murder of Bala but no-one has been convicted of that offence.

[12] General Zulu, the Deputy Commissioner of SAPS in Limpopo, intervened on 6 June 2016. The intention had initially been for a tripartite meeting of AMCU, NUM and Northam, but NUM refused to meet with AMCU. General Zulu therefore met with NUM and Northam alone on 6 June 2016. Later that day Mr Joseph Mathunjwa, the President of AMCU, wrote to Mr Smith (a HR executive at Northam) calling upon management "to suspend all operations until the situation gets back to normal and our members' safety is guaranteed". He went on to allege that the "attack on our members is blamed squarely on the company". Initially Northam instructed employees to return to work. However, in the face of building tension and a call from NUM members for all

AMCU members to be removed, Northam suspended operations at the mine until 14 June 2016. It paid all its employees for that period.

[13] On 7 June 2016, General Zulu met again with NUM and Northam. NUM called upon Northam to put together a security plan. On 8 June 2016, General Zulu convened a meeting with AMCU and Northam. AMCU questioned NUM's absence and was informed that NUM refused to meet jointly with AMCU. At the meeting, Mr Smith presented to AMCU the security plan devised by Northam with the input of SAPS (referred to in evidence as the "16-point plan"). There is a dispute about whether Mr Smith just read out the 16 point plan, as contended by AMCU, or whether he made an in-depth 30-minute presentation with input from SAPS. In circumstances where the intention was to get AMCU's buy-in to the security plan, it is likely that the presentation addressed at least some of the detail.

[14] After a caucus during the meeting, AMCU proposed that the meeting be adjourned as the Minister of Mineral Resources ("the Minister") was expected at the mine the next day. Northam maintains that AMCU was no longer prepared to participate in the meeting or give input into the security plan, preferring instead to wait for ministerial intervention. Mr. Khoza, a member of the AMCU interim committee who participated in the caucus, testified that after discussing the matter with Mr. Mathunjwa, and being informed that the Minister would visit the mine the next day, it was decided to withdraw from the meeting. He said "we took that decision….that we are no longer going to engage in the meeting since he will be coming, the Minister will…" Mr. Mnisi, Northam's industrial relations specialist, testified that as far as he was concerned it was clear that AMCU was not willing to engage over the 16 point plan.

[15] After meeting with AMCU, General Zulu convened another meeting with NUM and Northam at which the security plan was discussed. NUM undertook to discuss it with its members at a mass meeting scheduled for later that day. NUM members accepted the security plan during the mass meeting, but indicated that they were not prepared to work with AMCU members.

[16] On 9 June 2016, the Minister held a meeting with Northam, NUM and SAPS at the mine. Although AMCU knew of an anticipated meeting, it did not receive an invitation from the Minister and accordingly did not attend it. The upshot of the Minister's intervention was that he required the parties to reach a return-to-work agreement by 14 June 2016, when he intended returning to the mine.

[17] On 13 June 2016, Mr Mathunjwa addressed a letter to the Minister recording his disappointment at not being invited to the 9 June 2016 meeting and seeking his intervention to get Northam "to desist with compelling AMCU members to report to work in the unstable and unsafe environment", before the perpetrator of the murder was arrested and before providing AMCU with the reassurance sought in its letter of 6 June 2016 requesting a guarantee of safety.

[18] Also on 13 June 2016, and in preparation for the Minister's return to the mine the following day, Mr Smith sent AMCU an email setting out the 16-point plan.

[19] On 14 June 2016, Northam addressed a letter to Mr Mathunjwa recording that it had not received any response from AMCU on the proposals made in the 16-point plan, noting that employees' safety and security are paramount and requesting a positive contribution. It emphasised that it was important for all parties to work together "to have a peaceful, orderly and safe return to work as soon as possible and call upon your encouragement for this to happen". Mr Mathunjwa immediately responded to this letter accusing the company of arrogance, union bashing and engaging in secret meetings. He offered no response to the 16-point plan, and asked for a collective agreement "that seeks to preserve lives and stability" at the workplace –referred to as a "peace pact" during argument.

[20] Later on 14 June 2016, the Minister returned to the mine and engaged again with Northam and NUM. During that meeting an agreement was reached that NUM members would return to work. For the first time since the events of 6 June 2016, NUM indicated that its members were prepared to work together with AMCU members and withdrew its demand that the AMCU workers be removed. It was agreed further that all employees would be paid for the period of 6-14 June 2016 when all operations were suspended. Thereafter an SMS

was sent to all employees informing them that an agreement had been reached that all employees would return to work starting from night shift that day.

[21] Also on 14 June 2016, AMCU held a mass meeting. It was agreed at the meeting that certain demands would be made regarding the return of AMCU members to work. Northam maintains that AMCU was remiss in not fully apprising its members of the contents of the 16-point plan aimed at securing their safe return to work.

[22] The next day, 15 June 2016, AMCU addressed a letter to Northam expressing fear about what took place on 6 June 2016 in the presence of mine security and the SAPS and requesting the fulfilment of the following conditions before the return of AMCU members to work: (i) the closure of the Madiba Hostel; (ii) the continued payment of full salaries; (iii) disciplinary action against security personnel who were "escorting" NUM members on 6 June 2016 when the attack occurred; and (iv) compensation to victims who were subjected to the attack.

[23] AMCU's letter of 15 June 2016 did not list the conclusion of the collective agreement or peace pact referred to in its letter of 14 June 2016 as a pre-condition to the return to work.

[24] Northam maintains that the demand for the closure of the Madiba Hostel was unreasonable. Close to half of the mine's category 2-8 workforce live in the hostel. Its immediate closure would have resulted in the closure of the mine, because those workers would not have been able to find alternative accommodation.

[25] On 15 June 2016, Northam sent all employees the following SMS:

> It has come to our attention that you have not returned to work since 15 June 2016. You are urged to return to work by your next shift to avoid the desertion process being applied. If you have returned to work, please ignore this message.''

[26] The SMS conveyed that the prospect of dismissal for desertion was being considered in respect of those employees who refused to return to work.

[27] On Monday, 20 June 2016, AMCU's attorneys addressed a letter to the Minister, NUM and Northam setting out "measures to deal with and prevent further violence, murder and intimidation" at the mine. Five demands were directed at Northam: (i) mine security should no longer escort workers; (ii) management should no longer exclude AMCU from meetings; (iii) the company should guarantee the safety of AMCU members; (iv) AMCU members should no longer be banned from occupying the hostel; and (v) the hostel should be closed.

[28] The demands made on NUM were that NUM must: (i) undertake to stop the organised killings of AMCU members by NUM members; (ii) refrain from participating in meetings with the government and/or management regarding the prevailing situation, to the exclusion of AMCU; and (iii) guarantee that AMCU members will not be denied their rights of movement, association, bodily integrity and life. Northam has criticised these demands for failing to appreciate that the accusations of murder were reciprocal and not recognising that there was no easy solution to the problem.

[29] On 21 June 2016, Northam addressed the following letter to AMCU.

> Zondereinde mine has been calm with stability restored on 7 June 2016. This was communicated to all employees via a request to report for duty. The request was eventually complied with on 15 June 2016. The Ministry of Mineral Resources, National and Provincial SAPS leadership, employee representatives, mine security and management all contributed to restoring calm.
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> The SAPS and Northam Platinum have increased both SAPS personnel and mine security on the Zondereinde operation and Northam town. A number of preventative security measures have also been proposed by SAPS and mine management. For example, a satellite police station in Northam town, CCTV cameras in and around Northam town, providing accommodation to the SAPS POP unit on the mine property to guarantee improved response times and increased random searches at strategic locations on the mine, to name a few.
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> Under the leadership of Major General Zulu, Deputy Provincial Commissioner Limpopo, who has personally overseen SAPS operations, a number of arrests

relating to 5 and 6 June 2016, the murder in Northam town, the murder at the railway crossing and damage to property, have been made.

The arrests followed the in-depth safety and security briefing given to AMCU regional officials on 8 June 2016. During the briefing, the AMCU officials requested the meeting be adjourned as they wanted to further the discussion with the Minister of Mineral Resources when he was scheduled to visit the mine operations on 9 June 2016. A follow-up meeting is being scheduled by the SAPS to continue and conclude the discussion.

The company residence is not solely occupied by NUM members as stated in your letter of 15 June 2016. Our records reflect employees (who choose to live at the residence) affiliated to multiple unions, including AMCU affiliated employees. Our residence accommodation process has been discussed and explained to AMCU affiliated employees and employees who comply with the procedure, being placed in residence.

The principle of 'no work no pay' will apply from 15 June 2016. This return to work date was communicated to all employees, the majority of whom have returned to work. There have been no reports of any employee being prevented from reporting to work, including AMCU affiliated employees who have complied with mine management's return to work request.''

[30] During cross-examination, it was put to AMCU's regional deputy chairperson, Mr Ludidi, that the letter offered some assurance of safety. His response was that AMCU wanted "a common agreement" not a letter from "this side or that side". This response, Northam maintained, was an indication that AMCU was not open to persuasion about the facts on the ground and the true security situation but was pursuing its own demands and interests heedlessly.

[31] The reference in the letter of 21 June 2016 to the implementation of increased security measures was to the 16-point plan, which involved a significant increase in security (both on and off the mine). The new measures, amongst other things, included: i) 128 members of SAPS being stationed on the mine for 45 days commencing on 6 June 2016; ii) SAPS deploying a dedicated helicopter and a number of "nyala" and "soft skin" vehicles on the mine; iii) the number of on-site reaction units was increased from one to nine; iv) the setting

up of an intimidation hotline (no reports of intimidation were received for the balance of 2016); v) the introduction of increased random searching; vi) the increase of monthly security expenditure from R1-million to R2.5-million and the acquisition of new sophisticated security equipment; and vii) the establishment of a satellite police station for Northam town financed by Northam.

[32] These measures appear to have had some success. It is common cause that between 60 and 210 AMCU members returned safely to work after 15 June 2016. Moreover, Mr Mathunjwa conceded during his testimony that there had been no incidents of violence after the return to work by most of the workforce on 15 June 2016.

[33] On 21 and 22 June 2016, Northam re-sent the SMS to employees on 15 June 2016. On 23 June 2016, AMCU's attorneys addressed a further letter to Northam claiming that Northam's letter of 21 June 2016 was not a satisfactory reply to their letter of 20 June 2016, and requesting that no action be taken against AMCU members until all of the issues in our letter have been addressed. On 24 June 2016, Northam sent another SMS to all workers reading:

> You have not returned to work since 15 June 2016, this is the final reminder to return to work on your next shift. The desertion process is now applicable. If you have returned to work, please ignore this message.''

[34] On 28 June 2016, Northam sent out another SMS requiring employees to visit the nearest TEBA office to receive an "urgent letter" which was a notification of a disciplinary inquiry scheduled to be held at the mine on 4 July 2016 on the charge of being absent without permission and/or failing to communicate the reason for absence from 15 June 2016 to 24 June 2016. The SMS did not explain that the letter related to a disciplinary enquiry.

[35] The disciplinary inquiry was held in the absence of the individual appellants on 4 July 2016 at Northam's premises. AMCU maintains that the individual appellants did not attend the hearing because they were either not aware of it or feared for their safety.

[36] On 8 July 2016, Northam sent an SMS requesting the employees to visit the nearest TEBA to receive a termination letter from Northam. The termination letter records that: i) a disciplinary inquiry was held in the employee's absence on 4 July 2016; ii) he/she was found guilty; iii) a recommendation of dismissal was made, which was ratified; and iv) consequently the employee was dismissed with effect from 5 July 2016.

[37] In addition to the correspondence between Northam and AMCU, Mr Mnisi interacted with Mr Ludidi at regional level telephonically and claims to have met him some five times during the month of June 2016. Mr Ludidi denied meeting Mr Mnisi during this time. Mr Mnisi also interacted with Mr Khoza at branch level during the month of June 2016. The nature and extent of these interactions are in dispute, but for reasons that follow there is no need to resolve the matter.

[38] On 8 July 2016, AMCU's attorneys sent another letter to Northam tendering the individual appellants' services immediately "subject to the employer guaranteeing their safety at the workplace", with the company being called upon to provide its "commitment and guarantee" by the close of business that day. On 11 July 2016, Northam's attorneys responded to the letters of AMCU's attorneys dated 20 June 2016 and 8 July 2016 raising various issues, but not giving the undertakings sought.

[39] On 14 July 2016, NUM responded to AMCU's attorney's letter of 20 June 2016 stating *inter alia* that NUM was not engaged in any organised killings, such allegations were spurious and unsubstantiated and should be withdrawn, and that AMCU's rights are constitutionally guaranteed and no further guarantee was accordingly required from NUM.

[40] On 18 July 2016, AMCU's regional office addressed a letter to Northam, recording that its members were ready to return to work "if the safety measures are in place following the killing or Mr Thembinkosi Mhlabeni". Asked about these "safety measures" during cross-examination, Mr Ludidi testified that "we have put forward our proposals as per the request of 15 June, we wanted management and NUM to come and engage us, to engage us and guarantee that they will not chase or kill our members further."

[41] On 2 August 2016, AMCU referred a dismissal dispute to the CCMA for conciliation. The required result was stated as being retrospective reinstatement. On 3 August 2016, AMCU launched an urgent application in which it sought the reinstatement of the individual appellants, as well as an order that the company "ensure, as far as reasonably practicable, a workplace that is safe and without risk to the health" of the individual appellants. The application was subsequently withdrawn.

[42] On or about 22 September 2016, and following an investigation, the company issued 12 NUM members with a final written warning for having participated in an illegal protest march on 6 June 2016. According to Mr Mnisi, Northam disciplined everyone that it could identify, and decided to leave an investigation of criminal activity committed outside its premises on 6 June 2016 to SAPS. Certain employees were convicted in the criminal courts for the murder of Mr Mhlabeni, for public violence and damage to property. These employees were then dismissed by Northam.

The judgment of the Labour Court

[43] After conciliation failed, AMCU referred a dismissal dispute to the Labour Court alleging that the dismissals were invalid, automatically unfair and, alternatively, substantively and procedurally unfair. The Labour Court dismissed the claim that the termination of the individual appellants' contracts of employment was in violation of section 82 of the Mine Health and Safety Act[1] ("the MHSA"). AMCU maintains in this regard that the individual appellants were dismissed for exercising their rights in terms of section 23 of the MHSA to leave the Mine and/or not report for duty at a working place which, with reasonable justification, appeared to them to pose a serious danger to their health or safety. The Labour Court also dismissed the alternative claim that Northam breached the individual appellants' contracts of employment by dismissing them for exercising their common law right to refuse to work in an unsafe working environment. It, in addition, dismissed the appellants' second claim that the dismissals were automatically unfair on the grounds of unfairly discriminating against them on

[1] Act 29 of 1996

the basis of their AMCU membership, as envisaged in section 187(1)*(f)* of the Labour Relations Act[2] ("the LRA"); their claim for reinstatement; and the claim that their dismissals were procedurally unfair. The appellants appeal against all these findings.

[44] The Labour Court found the dismissals to be substantively unfair in two respects. Firstly, it held that dismissal was not the appropriate sanction. It stated:

> Disciplinary action was taken against the applicants when the events of 5 and 6 June 2016 were fresh in their memories. The respondent did not have the benefit of hind sight of the absence of violence on the mine for an extended period after 15 June 2016. While the respondent took significant steps after 6 June 2016 to ensure the safety of its employees, the reason for the applicants' refusal to return to work on 15 June 2017 was not fear of violence by management. They feared NUM members and NUM had refused to give an undertaking not to attack them again, management could not compel NUM to give the undertaking and the applicants knew from experience that management did not protect AMCU members against NUM members. Their conduct of taking care of their safety by not returning to work required compassion and understanding from the respondent. It did not warrant dismissal……The applicants' dismissal was substantively unfair. It resulted from the respondent's failure to treat them with compassion after they had been traumatised by a violent and fatal attack by members of a rival trade union. Dismissal was not the appropriate penalty for the applicants' absence from work. They were also victims of the respondent's inconsistency in exercising discipline.''

[45] Regarding Northam's inconsistency in the application of discipline, the Labour Court held:

> The applicants submitted that the respondent's inconsistency in applying discipline also rendered their dismissal unfair. It is common cause that a number of NUM members who attacked AMCU members at the boom gate and burnt their cars on 6 June 2016 could be identified from CCTV recordings. Had the respondent wished to apply discipline consistently, it would have

[2] Act 66 of 1995

investigated the incident with the view to taking disciplinary action against the perpetrators. The police and the respondent's mine security who escorted NUM members who marched from the hostel to the boom gate were in a position to identify at least some perpetrators – so were the security guards at the boom gate. Even Mnisi was not far from the boom gate shortly before the attack started. He was in a position to identify some perpetrators. No assistance to identify perpetrators was sought from AMCU members who survived the attack. The respondent could not justify its decision not to take disciplinary action against more NUM members for at least the incident of 6 June 2016. The respondent also took no disciplinary action against more NUM members for their absence from work during their unprotected strikes. The parity principle precludes an employer from taking disciplinary action against some and no other employees who commit similar misconduct. I am satisfied that it finds application in this case. Both NUM and AMCU members were employees of the respondent. Armed NUM members committed serious misconduct which involved a brutal attack of unarmed AMCU members. They exposed AMCU members to danger, traumatised them and killed one of them. No disciplinary action was taken against them. The applicants absented themselves in circumstances where they were justifiably scared to return to work. Not only did the respondent take disciplinary action against them, it punished them with dismissal. The respondent's conduct offended the parity principle in that it treated AMCU and NUM members unequally. The inequality constituted inconsistency which rendered the applicants' dismissal unfair.''

[46] As mentioned at the outset, neither the appellants nor Northam seek to appeal against the Labour Court's finding that the dismissals were substantively unfair. However, the parties are in dispute about the relief granted. The appellants want reinstatement and Northam a reduction in the amount of compensation awarded. I will discuss the findings of the Labour Court when considering these matters later in the judgment.

The first and second grounds of appeal – invalid dismissal and breach of contract

[47] The appellants contend that the individual appellants were entitled to absent themselves and refuse to work after 15 June 2016 on account of Northam breaching its statutory and contractual duty to provide and maintain a safe working environment.

[48] Section 1 of the MHSA includes among its objects the protection of the health and safety of persons at mines; the control and minimising of risks relating to health and safety at mines; and the promotion of a culture of health and safety in the mining industry. The obligation of employers to provide a healthy and safe working environment is set out in section 5(1) of the MHSA which requires every employer, as far as reasonably practicable, to provide and maintain a working environment that is safe and without risk to the health of employees

[49] Section 102 of the MHSA defines "reasonably practicable" to mean "practicable" having regard to: (a) the severity and scope of the hazard or risk concerned; (b) the state of knowledge reasonably available concerning that hazard or risk and any means of removing or mitigating that hazard or risk; (c) the availability and suitability of means to remove or mitigate that hazard or risk; and (d) the costs and benefits of removing or mitigating that hazard or risk.

[50] Section 23(1) of the MHSA deals with an employee's right to leave a dangerous working place. It provides in relevant part that an employee has the right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee.

[51] Section 102 defines "safety" to mean "safety at mines". A "mine" is defined to include a "place where a mineral deposit is being exploited, including the mining area and all buildings, structures, machinery, mine dumps, access roads or objects situated on or in that area that are used or intended to be used in connection with searching, winning, exploiting or processing of a mineral, or for health and safety purposes". A "working place" is defined to mean "any place at a mine where employees travel or work."

[52] Section 83 of the MHSA provides *inter alia* that no person may discriminate against any employee for exercising a right in terms of the MHSA, for doing anything that the employee is entitled to do in terms of the MHSA, or refusing to do anything that the employee is entitled to refuse to do in terms of the MHSA. For the purpose of section 83 of the MHSA "discriminate" is defined to mean "to dismiss an employee or to engage in any other conduct which has the effect of

prejudicing or disadvantaging the employee, or which prejudices or disadvantages the employee relative to other employees".

[53] Section 23(1) of the MHSA thus gives an employee a right to leave any working place whenever circumstances arise at that working place which, with reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee.

[54] In 2016, the Chief Inspector of Mines published the "Guideline for the compilation of a mandatory code of practice on the right to refuse dangerous work and leave a dangerous working place" ("the Guideline"), in terms of section 49(6) of the MHSA.[3] The Guideline deals among other things with the right to leave any dangerous working place ("the RLDWP") and the right of refusal to do dangerous work ("the RRDW"). Sections 1.2 to 1.4 of the Guideline read:

> '1.2 Under common law employers are required to provide and maintain a work environment that is safe and without risk to the health or safety of employees. This is reflected in section 2 of the MHSA which requires the employer to ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety of themselves or of any other person.
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> 1.3 Arising from this entitlement to a safe working environment, employees have the RRDW… This right entails not only that the employee is entitled to leave a working place where he/she has reason to believe that the working place is unsafe (the RLDWP), but also that an employee is entitled to refuse to do work in a working place that is safe, but in which there is any equipment, machine, device or thing the employee is required to use or operate which is likely to endanger himself/herself or any other employee (the RRDW). Put differently, the RRDW can be exercised either by refusing to do the required work but remaining in the working place, or by refusing to do the required work and leaving the working place.
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> 1.4 Section 23(1)(a) of the MHSA partly reflects the common law mentioned above. It gives employees the RLDWP if circumstances arise which, with

[3] Government Gazette No R1465 of February 2016.

> reasonable justification, appear to that employee to pose a serious danger to the health or safety of that employee or if the health and safety representative responsible for that working place directs that employee to leave that working place. The fact that section 23 does not mention the RRDW does not mean that employees do not have that right…'

[55] Section 4 of the Guideline offers an interpretation of the concept of "reasonable justification" as required in section 23(1) of the MHSA. It provides:

> 'Reasonable justification means that the employee has some objective information that makes him or her believe that there are unsafe conditions at the working place or the work to be done is unsafe to the extent that there is an imminent and serious danger to the health or safety of person at that working place. The employee does not have to be correct in his or her knowledge or belief, but such belief should be reasonable given the information of the employee. These principles apply to both RRDW and RLDWP.'

[56] Annexure 2 to the Guideline contains a table of examples of major health and safety hazards, which may give rise to the right to leave any dangerous working place which includes "unacceptable and dangerous behaviour of colleagues" and "aggressive or violent behaviour" as instances of such.

[57] Northam submits that section 23(1)*(a)* of the MHSA does not apply as matter of law to threats to safety arising from criminal conduct perpetrated in the course of inter-union rivalry. The preamble to and the objects of the MHSA, it argues, reflect that the MHSA regulates occupational/operational health and safety at the employees' working place. Section 2(1)*(a)* and *(b)* provide that the employer must provide conditions for the safe operation of the mine, and ensure (insofar as reasonably practicable) that the mine is "commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering safety of themselves or any other person". Safety, Northam maintains, thus relates fundamentally to the operation of the mine and the requirement in section 5 of the MHSA to provide and maintain "a working environment that is safe" does not extend beyond the direct working environment on the mine.

[58] We do not accept that the MHSA is limited to occupational health and safety hazards arising in the work process at the coalface. Section 102 defines "hazard" widely as "a source of or exposure to danger", and "risk" as "the likelihood that occupational injury or harm to persons will occur". There is no justification to restrict the duty of the employer to mitigate hazards and risks to narrow occupational safety in the work process. A "working place" which an employee may leave in the face of danger is defined as "any place at a mine where employees travel or work". And a "mine" is defined to include the access roads to the mine. The intention is to allow employees to absent themselves from the broader working environment when a hazard or risk of harm to their personal safety arises.

[59] The reference in the table annexed to the Guideline to "unacceptable and dangerous behaviour of colleagues" and "aggressive or violent behaviour" is a contemporaneous exposition and interpretive aid of what risks and hazards were in the contemplation of the legislature. Violence arising from factionalism of one kind or another is a regrettable feature of life on the mines in our country. Parliament has prudently ordained through the mechanisms of the MHSA that employers should have policies and procedures in place to deploy suitable means to mitigate the risk of factionalism in as far as that is reasonably practicable.

[60] Section 23(1) of MHSA thus bestows a right upon employees to leave their workplace where dangerous, aggressive or violent behaviour by colleagues reasonably appears to pose a serious danger to their safety. However, an employee may only exercise the right if there is reasonable justification to do so. In terms of section 4 of the Guideline there must be an objective basis or reasonable grounds to believe that there are conditions posing "an imminent and serious danger" to safety.

[61] In relation to this issue, the Labour Court noted that the individual appellants did not raise the exercise of their rights in terms of section 23 of the MHSA as the reason for their absence. However, it appeared to accept that employees were entitled to exercise that right in response to a threat of factional violence. It held:

> ‘A party relying on the section 23 has to prove that the section applies to that party’s circumstances. Section 23 may not be used as an afterthought by employees who have absented themselves from work for reasons which fall outside its realm. The applicants testified that they did not return to work because NUM refused to give them the undertaking that they would not attack them again. They also sought the respondent to guarantee their safety at the mine. Their refusal to return to work leading to their dismissal therefore went beyond the aggressive and violent behaviour referred to in the guideline. They wanted NUM and the respondent to meet their demands. They led no evidence to the effect that they refused to return to work after 15 June 2016 only because they were in danger. For these reasons, the provisions of section 23 of the MHSA do not apply.’

[62] The appellants challenge the findings of the Labour Court. Firstly, they deny that the refusal to return to work was their holding out for the meeting of their demands. All of AMCU’s witnesses testified that the employees feared for their lives. The appellants contend that circumstances had arisen on 6 June 2016 which gave rise to reasonable grounds to believe that there was a serious danger to their safety. This situation persisted regardless of whether or not demands were made and the employees thus retained the right to exercise their right to leave the working place in terms of section 23(1) of the MHSA. The Labour Court recognised that the fears of the individual appellants were reasonable. In addition, the failure to specify the specific legislation in terms of which a right is being exercised, it was submitted, can never deprive the employee of such right, or preclude reliance thereon. However, it did not accept that there was reasonable justification for the individual appellants to entirely withdraw their labour for a sustained period.

[63] Northam correctly contends that during the period 6-14 June 2016, there was no question of the individual appellants having exercised their rights in terms of section 23(1)*(a)* of the MHSA, because operations were suspended for that time. The issue is whether there was reasonable justification to refuse to return to work in response to the call to return to work on 15 June 2016 and thereafter. The evidence suggests that the mine was safe (as far as reasonably practicable) at that time. Additional security measures were implemented, and,

as Mr. Mathunjwa admitted, there were no incidents or violence after 6 June 2016. A significant number of AMCU members returned to work without incident.

[64] The witnesses who testified on behalf of the appellants were not able to point convincingly to any objective information leading them to reasonably believe that things were so unsafe at the mine after 15 June 2016 that there was an imminent and serious danger to their safety if they returned to the mine, such as to justify a complete withdrawal of their labour. Rather the evidence strongly supports the conclusion that the individual appellants placed their fate in the hands of AMCU after attending the mass meeting on 14 June 2016 and simply waited on AMCU to tell them if, and when, they should go back to work. They had little knowledge of the conditions at the mine after 15 June 2016 and some returned to their homes outside of Northam. From their experience on the mine, the individual appellants ought reasonably to have known that there had been no violence on the mine for a year-and-a-half before the events of 6 June 2016 and that there were security measures (including surveillance cameras) in place to protect employees at the mine. They also took no steps to communicate with Northam about the prevailing conditions before opting to refuse to work.

[65] Although AMCU may not have properly communicated the 16-point plan to its members, the enhanced security measures were in fact implemented and it was incumbent on AMCU and the individual appellants to assess the true situation before absenting themselves on the grounds of safety concerns. There is no evidence that they did so. Without apprising themselves of the nature and extent of the newly implemented security measures, the individual appellants could not claim reasonable justification for their absence. Their subjective fears were not objectively sustainable. There was in fact no imminent and serious danger.

[66] The attempt by AMCU to construct reasonable justification on the basis of its demands and the failure to accede to them, must fail. Not only because there was in fact no demand for a peace pact at the time of the dismissals but also because the other demands, such as the closure of the hostel, were unreasonable. Insofar as the individual appellants contend that they were

holding out for a peace pact, AMCU's demands of 15 June 2016 did not contain a demand for a peace pact but instead sought unilateral guarantees from NUM.

[67] Hence, the individual appellants have failed to bring themselves within the scope of the section 23(1) of the MHSA. The defence conferred by the section was not available in the circumstances of this matter. Accordingly, there is no merit that the dismissal was in conflict with section 82 of the MHSA and invalid for that reason and requiring reinstatement on that basis. In the result, the first ground of appeal must be dismissed.

[68] The Labour Court rejected the appellants' contractual claim as follows:

> 'The respondent's evidence of absence of mine violence from 15 June 2016 which was conceded by Mathunjwa supports the respondent's version that form the date the applicants refused to return to work, (15 June 2016), to the date of their dismissal (5 July 2016), the workplace was safe. The respondent did not owe the applicants guaranteed safety. There is nothing it could do about the guarantee the applicants sought from NUM which NUM had no legal objection to give (sic). The applicants' testimony is inconsistent with the argument forwarded on their behalf in that the standard of safety which the applicants demanded exceeds the legal one by far. Neither their contracts of employment nor common law requires the respondent to guarantee their safety at the workplace. In argument the applicants conceded that the respondent owed them no safety guarantee. The applicants' claim that their dismissal was unlawful because their absence from work was justified by the respondent's breach of its common law and contractual duty to provide a safe workplace cannot succeed.'

[69] At common law, if the employer fails to provide a reasonably safe working environment, employees have the right to refuse to work. Section 23(1)*(a)* of the MHSA gives effect to this principle. At common law, if the workplace is objectively safe, then employees are obliged to work. It follows from our finding that the mine was reasonably safe after 15 June 2016 (in view of the enhanced security measures, no evidence of violence or intimidation and the safe return of some AMCU members to work) that Northam did not breach its duty to

provide the individual appellants with a reasonably safe workplace. The Labour Court accordingly did not err in rejecting the appellants' common-law claim.

The third ground of appeal – automatically unfair dismissal

[70] The individual appellants allege that the reason for their dismissal was discrimination on the ground of their trade union membership, and thus that their dismissal was automatically unfair in terms of section 187(1)(f) of the LRA. The applicable test requires determination of the dominant or most likely cause of the dismissal.[4] The Labour Court held that the appellants did not prove a connection between their dismissal and union membership, with the dominant reason for the dismissal being the misconduct of being absent.

[71] The appellants contend that the "anomalous disparity of treatment" (i.e. inconsistent treatment) between NUM and AMCU members demonstrates that the individual appellants would not have been dismissed had they not been AMCU members and the disciplinary action was motivated by the company's "illegitimate anti-AMCU *animus*".

[72] AMCU did not put forward evidence establishing a credible possibility that the actual reason for the individual appellants' dismissal was their trade union membership (and thus failed to acquit itself of its evidentiary burden).

[73] The individual appellants were undeniably in breach of the rule against unauthorised absence which rule was consistently invoked by Northam in its SMS communications in the run up to the dismissal. Moreover, the many AMCU workers who reported to work were not dismissed or disciplined in any way. Northam had a legitimate reason for bringing disciplinary charges against the employees on account of their undisputed absenteeism, and considering that it gave repeated notice of its intention to do so on that basis there is no sufficient evidentiary basis from which to infer that it had an ulterior motive for the dismissal. The dominant or most likely cause of the individual appellants' dismissal, therefore, was their unauthorised absenteeism and not their trade

[4] *SACWU & Others v Afrox Ltd* [1999] 10 BLLR 1005 (LAC).

union membership. In the result, the third ground of appeal also stands to be dismissed.

The fourth ground of appeal – refusal of reinstatement

[74] Having come to the conclusion that the dismissal was substantively unfair, the Labour Court turned to the question of remedy. Section 193(2) of the LRA obliges the Labour Court on finding unfairness to order an employer to re-instate or re-employ the employee unless: (a) the employee does not wish to be re-instated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.

[75] The Labour Court declined to order re-instatement for the following reasons:

> 'The respondent denied that reinstatement is either due to the applicants or is the appropriate relief. It submitted that the demands made by AMCU…which should precede their return to work had not been met. They are unreasonable and without legal basis … An overwhelming majority of the applicants' witnesses expressed their unwillingness to work should an unconditional reinstatement order be issued. The conditions most witnesses sought were undertakings from NUM that its members would not attack them and a guarantee from the respondent that they would be safe at the workplace….
>
> Although it was argued on behalf of the applicants that they sought to be reinstated, the argument is not consistent with the evidence. Section 193(2)(c) provides that reinstatement must be ordered unless it is not reasonably practicable for the employer to reinstate an employee. Although reinstatement is the primary relief for a substantively unfair dismissal, if circumstances of a case fall within the exceptions provided in section 193(2), it may not be granted. The applicants sought to be reinstated on condition that the respondent and NUM guarantee their safety at the workplace. The condition is incompetent, as neither the respondent nor NUM has a legal obligation to provide the guarantee. Reinstatement can in the circumstances not be granted.'

[76] Hence, the Labour Court concluded that reinstatement was not reasonably practicable because the appellants were insisting on the fulfilment of unreasonable conditions before they would return to work.

[77] The appellants contend that the Labour Court erred in refusing reinstatement, and that it ought to have reinstated the individual appellants with back-pay. The individual appellants, they argued, need not do more than tender their services. Given that the duty to maintain and provide a safe workplace rests on the employer, reinstated employees (as with existing employees) would be within their rights to tender on condition that the workplace is safe. The appellants in any event denied that the evidence revealed that they sought reinstatement conditional on NUM and Northam guaranteeing their safety. But even if it did reveal as much, this would not render reinstatement impracticable.

[78] Northam maintains that the evidence reveals that AMCU and its members did indeed pose conditions to reinstatement.

[79] While section 193(2) makes it clear that reinstatement or re-employment is the primary statutory remedy in unfair dismissal disputes, the Labour Court must decide whether it is reasonably practicable to reinstate in the circumstances of the case. That determination involves the exercise of a discretion which is in part a value judgment, and in part a factual finding.[5] The Labour Court must make a factual finding about whether there are reasons, as envisaged in s 193(2) of the LRA, which would render an order for reinstatement inappropriate. It is trite that an appeal court may not lightly interfere with a trial court's discretion on a factual finding unless the appeal court is satisfied that such finding is based on misdirection or is clearly wrong.[6]

[80] AMCU's witnesses generally vacillated in cross-examination when questioned about whether the demands set for their return to work had been abandoned as at the time of them giving evidence. The witnesses who testified on behalf of the appellants although at times equivocating left little doubt that the employees would not tender their services unconditionally. They were only

[5] *SAMWU v Ethekwini Municipality* [2019] 1 BLLR 46 (LAC) at para 17.
[6] *Elliot International (Pty) Ltd v Veloo & another* (2015) 36 *ILJ* 422 (LAC) at para 53

willing to accept reinstatement subject to a peace pact being agreed to by Northam, NUM and AMCU. One may legitimately infer that in addition to their concerns about safety, the appellants were in part motivated to strengthen AMCU's bargaining position at the mine. This, Northam intimated, made reinstatement impracticable in the face of unpredictable outcomes in the envisaged bargaining process.

[81] All the AMCU witnesses when addressing the issue of the demands gave some indication that they would abandon the demands but only if there was an ongoing negotiation involving AMCU, NUM, SAPS and Northam, which yielded an outcome to the satisfaction of AMCU, prior to the individual appellants returning to work.

[82] Mr Mathunjwa during his testimony equivocated on the issue. He opined firstly that reinstatement "is a process on its own"; but he quite evidently envisaged that if reinstatement was ordered, there would need to be a bargaining process to secure a peace pact prior to the individual appellants returning to work. When asked about the proposed engagement, he replied: "I said the company, NUM, AMCU and SAPS should meet and discuss the issue and restore peace, then it will be possible for us to go back to work".

[83] This strategic positioning, premised on the questionable assumption that the workplace remained unsafe, was reiterated by the individual appellants who testified, indicating that the position was probably shared by the AMCU members aimed at gaining some tactical advantage. Thus Ms. Nombale expressed ambivalence about going back to work because it was unsafe, but agreed on balance that she would probably go back "because I believe that there will be negotiations and engagement regarding our safety". When asked what would happen if NUM did not agree to a collective agreement or peace pact, she replied: "then I do not know what must happen". Likewise, Mr. Fana stated: "Even if the court gives an order that I must go to work now, I will not go M'Lady, until I have seen safety." In response to a question whether he meant he would not go back until there was an agreement between Northam, NUM and AMCU, he said that was correct. When asked what he would do if no agreement was possible, he answered that he would wait to hear from AMCU

about what he should do. All the other witnesses gave similar testimony, some stating unequivocally that they would not return to work pursuant to an order of reinstatement until a peace pact was concluded with NUM and Northam.

[84] The evidence hence shows that the appellants were holding out for guarantees beyond the employer's duty to provide a reasonably safe workplace. They sought reinstatement conditional upon the conclusion of a multilateral collective agreement that was not within the gift of the employer; or the Labour Court for that matter. The Labour Court has no power to set a condition to reinstatement that a peace pact must first be reached with non-parties to the litigation before the employees can be expected to return to work. In such circumstances, the Labour Court did not misdirect itself by finding that it was not reasonably practicable for the employer to reinstate the individual appellants who were obstinately holding out for a peace pact, which, in all probability, could not be achieved. It was not feasible to order reinstatement, because it was not reasonably possible, in the sense that it was potentially futile.[7] Reinstatement would not have guaranteed that the individual appellants would perform their duties effectively, and hence such an order would have constituted an excessive operational burden for Northam.[8]

[85] In the premises, the Labour Court did not err in refusing to order reinstatement.

<u>The quantum of compensation – the cross appeal</u>

[86] The Labour Court awarded each individual appellant the maximum amount of compensation permitted in terms of section 194 of the LRA, being the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration at the date of dismissal. Its reasoning for awarding the maximum amount was brief. It held:

[7] *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha & others* (2016) 37 *ILJ* 2313 (LAC) at para 11
[8] *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 *ILJ* 87 (CC) at para 49

> 'The applicants' dismissal was substantively unfair. It resulted from the respondent's failure to treat them with compassion after they had been traumatised by a violent and fatal attack by members of a rival trade union. Dismissal was not the appropriate penalty for the applicants' absence from work. They were also victims of the respondent's inconsistency in exercising discipline. A number of them had long service. Their feelings were hurt by the dismissal. The circumstances of their dismissal justify the maximum compensation prescribed in section 194 of the LRA.'

[87] The determination of the *quantum* of compensation in terms of section 194(1) of the LRA involves the exercise of a discretion in the strict sense. Such determinations will be set aside on appeal only if it is shown that the Labour Court acted capriciously, or upon a wrong principle or adopted an incorrect approach.[9]

[88] In its cross-appeal, Northam submits that the Labour Court misdirected itself by failing to consider and give sufficient weight to the material facts, and thus acted on wrong principle, by not having regard to the extent to which the individual appellants (and their union) were to blame for their dismissal and predicament, with a reduction being warranted where they are materially at fault.

[89] Northam points to a number of facts that in its view justified a lesser amount: i) the disciplinary action against the individual appellants was legitimate; ii) AMCU did not properly communicate the safety plan to its members which might have allayed their fears; iii) many AMCU members returned to work on 15 June 2016; iv) the individual appellants set conditions for their return to work that were unreasonable and thus were to blame for their dismissal; and v) the individual appellants spurned the opportunity of putting forward their case at a disciplinary inquiry, and again at an appeal inquiry thereby contributing to their dismissal.

[90] Northam contends that the Labour Court erred further in taking into account the irrelevant considerations of some of the individual appellants having long service and the fact that their feelings were hurt by the dismissal.

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[9] *Kemp t/a Centralmed v Rawlins* (2009) 30 *ILJ* 2677 (LAC) at para 55.

[91] Northam accordingly asked this court to intervene and to reduce the compensation to an award of three months' compensation.

[92] The appellants submit that a wide range of relevant factors may be taken into account by the Labour Court or an arbitrator determining just and equitable compensation. They include length of service and the impact of the employer's conduct on the employees. They contend that various findings at different parts of the judgment indicate that the Labour Court took a number of relevant factors into account when determining the appropriate compensation. Thus the Labour Court took particular cognisance of the facts that: i) the individual appellant's refusal to return to work on 15 June 2016 arose from a legitimate fear of the conduct of NUM members and their experience that management and the SAPS had failed to protect AMCU members against NUM members; ii) armed NUM members had openly murdered an unarmed AMCU member and no disciplinary action was taken against them until they were convicted in the criminal courts, leading to an understandable breakdown in trust; and iii) the individual appellants absented themselves in a context that was fraught and volatile.

[93] Compensatory relief is not strictly speaking a payment for the loss of a job but in fact monetary relief for the injured feeling and humiliation that an employee may suffer at the hands of the employer. It is a payment for the impairment of the employee's dignity. Because compensation constitutes a *solatium* for the humiliation that the employee has suffered at the hands of the employer and not strictly a payment for a wrongful dismissal, compensation is comparable to a delictual award for non-patrimonial loss. The relevant factors in determining the *quantum* of just and equitable compensation include: the nature and seriousness of the *iniuria*, the circumstances in which the infringement took place, the behaviour of the defendant, the extent of the plaintiff's humiliation or distress, abusive conduct and the attitude of the defendant after the *iniuria* occurred.[10]

[94] Since compensation or damages is a matter of estimation and discretion, the

[10] *Arb Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] 11 BLLR 1081 (LAC)

appeal court is generally slow to interfere with the award. It will do so if there has been an irregularity or misdirection such as ignoring relevant facts, considering irrelevant facts, basing the decision on totally inadequate facts or where there is a substantial variation or a striking disparity between the award of the Labour Court and that which the appeal court considers ought to have been made.[11]

[95] The various findings of the Labour Court at different parts of the judgment reveal that it was mindful of the factors that were relevant to its award of compensation. It did not ignore the blameworthy conduct of the appellants. Their behaviour was central in its decision not to award reinstatement. It attached less weight to that factor in its setting the *quantum* of compensation because it evidently believed that the employer had acted too quickly in dismissing the appellants. Although the Labour Court did not say as much, the problem of factionalism in the volatile circumstances in which it expressed itself in this instance might have been better resolved by suspending the absent employees on the grounds of the temporary supervening difficulties of performance. The AMCU members had grounds to be afraid. A colleague had been murdered, their property had been vandalised in the past, and many had been put on leave on previous occasions because their safety could not be guaranteed. More time should have been taken in meaningful engagement around the 16-point plan.

[96] Moreover had the appellants not obdurately held firm to their badly thought out positional bargaining, they would have been reinstated. In such circumstances, there is no basis to conclude that the Labour Court misdirected itself with regard to compensation; nor did it make an award substantially at odds with an award which this court might make.

[97] In the result, the cross-appeal stands to be dismissed.

[11] *RAF v Guedes* 2006 (5) SA 583 (SCA) at 586-587

Conclusion

[98] In view of the award of maximum compensation being upheld, there is no need to consider the appeal in relation to procedural fairness as it would have no practical effect on the relief granted.

[99] Both parties have had success. Therefore, it will be just to make no order as to costs.

[100] In the premises, the appeal and the cross-appeal are dismissed.

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JR Murphy

Acting Judge of Appeal

I agree

_____

B Waglay

Judge President

I agree

_____

R Sutherland

Judge of Appeal

APPEARANCES:

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