THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2643/21

In the matter between:

SIBANYE GOLD LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

N HLABA *N.O.* Second Respondent

AMCU OBO CHILIZA AND 9 OTHERS Third Respondent

Heard: 9 October 2024
Delivered: 5 December 2024

Judgment handed down electronically by circulation to the parties' representatives by email. The date and time for the handing down is deemed to be 5 December 2024

Summary: CCMA arbitration – review of proceedings, decisions, and awards of arbitrators – test on review – section 145 of LRA 1995 – determination of gross irregularities and reasonable outcome.

Dismissal – inconsistency – principles considered – commissioner properly considering the facts relating to inconsistency and applying proper legal principles – finding of inconsistency reasonable.

Review of award – conclusion of arbitrator that the dismissal of all ten members of the third respondent substantively unfair unreasonable – award reviewed and set aside –

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substituted with award that dismissal of two members substantively fair (while dismissal of remaining applicants substantively unfair).

JUDGMENT

DANIELS J

Introduction

1. The applicant brings this application to review and set aside an arbitration award issued by the second respondent in her capacity as a commissioner of the Commission for Conciliation, Mediation and Arbitration (the "CCMA"). The application is brought in terms of section 145 of the Labour Relations Act[1] (the "LRA").

2. The dispute arose from the dismissal of ten members of the Association of Mineworkers and Construction Union ("the AMCU" or "the Union") by the applicant, following disciplinary action against them for breaching the picketing rules, and possessing dangerous weapons during a protected strike, on company property. Various CCMA disputes were consolidated, resulting in a single arbitration award, issued by the second respondent (the "commissioner").

3. In her arbitration award, issued on 10 November 2021, the commissioner found that the dismissals of the Union members (hereafter "the dismissed members") were substantively unfair because the applicant had inconsistently applied discipline. The commissioner directed the applicant to reinstate the dismissed members with effect from 25 November 2021. The commissioner ordered that they be reinstated with no backpay.

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[1] No. 66 of 1995 (as amended).

Background facts

4. The applicant conducts business as a gold mining company, operating with three separate mines namely Driefontein, Beatrix and Kloof.

5. During 2018, following wage negotiations, the applicant concluded a collective agreement with the National Union of Mineworkers (the "NUM"), and two other unions namely UASA and Solidarity. However the applicant was unable to settle with the AMCU, which followed the dispute processes to engage in protected strike action.

6. The Union issued a strike notice on 19 November, with a view to commencing its strike on 21 November. The applicant and the Union engaged on picketing rules but were unable to find each other. The protected strike commenced on 21 November, and almost immediately was marred by violence. The applicant approached this court, on 22 November, to secure an interdict against the violence which was granted.

7. The Union and the applicant were unable to agree on picketing rules, a dispute was therefore referred to the CCMA. On 29 November, the commissioner handling that dispute, issued picketing rules in terms of section 69(5) of the LRA.

8. During the strike, which lasted several months, there were many incidents of violence. A number of non-strikers, particularly NUM members, contended they were subjected to intimidation. The AMCU contended that NUM members and leaders were armed, and possessed dangerous weapons, during the strike, which had intimidated AMCU members. At arbitration, reference was made to two such incidents.[2]

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[2] The AMCU contended that armed members of the NUM had blockaded the hostel on or about 23 November 2018. And then, on 9 January 2019, armed members of the NUM prevented AMCU members from entering the hostel. AMCU directed letters of complaint to the applicant regarding both incidents. On 14 January 2019, the applicant replied to one of these letters stating that the NUM members denied carrying weapons on 9 January 2019, and such conduct would not be tolerated by the NUM. However, video evidence produced by the employer at arbitration showed that this was false.

9. As previously mentioned, the applicant charged and dismissed ten members of Union:

9.1. Nine members were charged and dismissed for misconduct, allegedly committed on 3 December, at Kloof mine. It was alleged that on that date they violated picketing rules, and they possessed, displayed and/or carried dangerous weapons while participating in a gathering, demonstration, industrial action, picket, march, protest action or organised labour activity.

9.2. The tenth member was charged and dismissed for being in possession of a dangerous weapon at a stadium located on company property (at Driefontein mine) on 27 November.[3]

The test for review

10. The test for review of arbitration awards of the CCMA is well established and may briefly be summarised as follows:

10.1. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[4] the Constitutional Court held that '*the reasonableness standard should now suffuse s 145 of* the *LRA*' and the test for reasonableness of an arbitration award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[5].

10.2. The award must be tested against the facts before the arbitrator to ascertain if it meets the threshold of reasonableness.[6]

10.3. Though the distinction between reviews and appeals remains applicable, it is necessary for the Court to enquire into the merits of the matter and all the evidence properly before the arbitrator.[7]

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[3] He was found not guilty of the second charge.
[4] (2007) 28 ILJ 2405 (CC).
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v CCMA and others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] See *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC) at paras 43.
[7] Id at para 41.

10.4. In *Herholdt v Nedbank Ltd* and *another*[8] the Court said:

> *'… A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'*

11. In summary, applying the review test follows a logical sequence. First, it must be determined if there is a failure or error on the part of the commissioner. Second, where there is such a failure or error, it must be shown that the outcome arrived at was unreasonable, based on all the evidence before the commissioner, even if it may be for different reasons to those referred to in the award.[9] Thus, it is only where the outcome cannot be sustained on any of the evidence properly before the arbitrator that the review application will succeed.[10]

The Arbitration

12. Prior to the arbitration, the parties concluded a pre-arbitration minute. In the minute, it was alleged that the applicant applied discipline inconsistently on two grounds. First, it was alleged that the branch leadership of the AMCU who committed the same offence (of possessing or carrying dangerous weapons on company property, during the same strike) were only given written warnings.[11] Second, it was alleged that members of the NUM who carried dangerous weapons, during the same strike, were not dismissed but given final written warnings.

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[8] (2013) 34 *ILJ* 2795 (SCA) at para 25. *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* (2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and another v CCMA and others* (2015) 36 ILJ 2038 (LAC) at para 16.
[9] *Fidelity Cash Management Service (supra)* at para 102.
[10] *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* (2015) 36 ILJ 1453 (LAC) at para 12.
[11] These individuals were identified in the minute and included Ms. Nombusika Nomtwana.

13. Before any evidence was presented, the commissioner requested the parties to make opening statements.

13.1. During the applicant's opening statement,[12] its representative informed the commissioner that the strike was particularly violent. The representative informed the commissioner of the duration of the strike, the number of employees who lost their lives during the strike, the number of employees who were injured and hospitalized during the strike, as well as the extent of the damage caused to homes and vehicles of employees. Importantly, the applicant's representative advised the commissioner that "*The company will deal with the issues of inconsistency and the message and what we want to indicate now madam commissioner is that in each and every case circumstances were considered and determined the sanction and the sanction determined out of all the entire circumstances*."[13]

13.2. Thereafter, the Union representative presented his opening statement. Among other things, he advised the commissioner that: "*we will present* evidence *that AMCU members were attacked on a regular basis by the NUM members and by the employer's security, on a regular basis AMCU members that was on a protected strike were attacked. When these incidents were reported to management, management turned the cold shoulder or turned their heads away from these incidents*."[14] The Union also alleged that the dismissal of one of its members was procedurally unfair because the disciplinary hearing was held in his absence, however little turns on this.

14. The applicant called three witnesses whose testimony is summarized below:

14.1. Mr Lungelo Mpepo ("Mpepo") a supervisor at Kloof mine, who had assisted in the investigation of the misconduct, testified first.

[12] Transcript p17 (line 13) to p19 (line 13)
[13] Transcript p19 lines 5 – 9
[14] Transcript p20 lines 3 – 9

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14.1.1. Mpepo testified that the applicant's "Dangerous Weapons in the Workplace Policy"[15] (the "Dangerous Weapons Policy") demonstrated that the company viewed the carrying, display, or possession of any dangerous weapon on company property (without prior authorization) was a dismissible offence. He also referred to the picketing rules established by the CCMA which stated that the picketers must conduct themselves in a peaceful manner and be unarmed. Mpepo testified that the applicant could not identify all the strikers who were carrying dangerous weapons, but those who were identified as carrying dangerous weapons were dismissed (and those who carried other objects, which did not qualify as a dangerous weapon, were not).

14.1.2. In relation to the disruption of traffic on 3 December, Mpepo testified that "…*some of the trucks that were going to and from the shafts were* struggling *to get through, because the members were obstructing the flow of traffic, because they were picketing in the middle of the road. We had to assist trucks to go through, directing traffic there as the members were outside the picketing area*."[16] Ultimately his evidence demonstrated that trucks and vehicles did get through the marchers, though perhaps with difficulty.

14.1.3. The video footage viewed during his testimony showed that, on 3 December, several buses carrying employees managed to pass the strikers. Mpepo's evidence revealed that, there being no pavement / sidewalk,[17] some strikers walked on the side of the road, while others walked in the middle of the road. Mpepo did not identify which strikers walked in the middle of the road and which walked on the side of the road. Furthermore, he confirmed that some of the strikers helped to steer the buses through the marchers. He could not identify these helpful individuals. Mpepo testified that the marchers moved along the road towards the designated picketing area.[18]

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[15] Clause 3.2(a) of the dangerous weapons policy prohibited the possession or carrying of any dangerous weapon "*while participating in a gathering, demonstration, industrial action, picket, march or protest action or organised labour activity*".
[16] Transcript p28 lines 10 - 16
[17] Transcript p58 lines 19 - 20
[18] Transcript p 58 lines 5 – 6

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14.2. Mr David Moakwe ("Moakwe") a supervisor in the applicant's litigation department, testified next:

14.2.1. Moakwe testified that, on 3 December, the marchers had obstructed traffic and one individual had turned his vehicle around (it was later clarified that the vehicle belonged to one of the dismissed AMCU members).

14.2.2. Moakwe testified that he prosecuted the disciplinary hearing for the eight NUM shop stewards. He testified that the NUM shop stewards had congregated outside the hostel on 29 January 2019, following a meeting, and they were in possession of dangerous weapons such as spears, knobkerries and pangas. The chairperson found them guilty of the misconduct and dismissed them but, on appeal, senior management overturned the sanction of dismissal and imposed a final written warning. Moakwe did not participate in the appeal hearing and had no personal knowledge of why the sanction had been altered. Despite this, he testified that: "*It was a high level process where during the appeal stage considering their personal circumstances, the circumstances surrounding the breach of the specific rule, that dismissal then changed from dismissal to a final written warning*."[19] In addition, he testified that the sanction was altered because of the *allegations made by the NUM* that the AMCU was the aggressor.[20] This constituted inadmissible hearsay evidence, and could not properly have been considered by the commissioner.

14.2.3. During his cross-examination, he stated that the misconduct of the NUM shop stewards and the misconduct of the dismissed AMCU members were similar "*technically so*". Moakwe testified that the difference was that "*AMCU was marching on the road obstructing*

[19] Transcript p71 lines 18 – 23
[20] Transcript p85 line 20 – p89 line 20

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vehicles, not obeying picketing rules and on the other side NUM was not picketing, they were coming from the meeting".[21]

14.2.4. During cross examination, it was put to Moakwe that the ten dismissed AMCU members only carried dangerous weapons at the picket on 3 December and thereafter, after being advised against this, did not do so again. He could not deny this.

14.3. Mr Marthinus Van der Linde ("Van der Linde") a supervisor in the security services unit, testified next. Van der Linde testified that he was involved with the investigation of misconduct by Mr Masakani Mpengesi. He could not explain why Ms Nombusika Nomtwana ("Nombusika"), a branch leader of the AMCU, who carried a sjambok during the same strike, was not dismissed.[22]

15. The Union called two of the dismissed AMCU members, Mr Yonaba Mjajubane ("Mjajubane") and Mr Masakani Mpengesi ("Mpengesi"). In their evidence, the following was notable:

15.1. Mpengesi admitted that he appeared in the colour photograph used at arbitration. However, at his disciplinary hearing, he denied he appeared in the photograph used there. It is unclear that the same photograph was used. It appears that a black and white photograph was used at the disciplinary hearing.[23] The documents at arbitration demonstrated that Mpengesi pleaded not guilty to all the charges (including the charge that he carried a dangerous weapon on company premises on 27 November 2018) and he made and signed a written statement denying that he was on company premises on that date. However, at arbitration, he admitted that his written statement was false.

15.2. Mjajubane testified that the video footage used at the disciplinary hearing was not as clear as that used at arbitration. Furthermore, he testified that,

[21] Transcript p86 lines 20 - 26
[22] Management recorded its decision in a letter stating that: "*Management cannot condone the conduct of the Branch leaders and has to make sure that their behaviour is corrected going forward, but there is also an acknowledgment that the offences are not gross to the extent that they warrant a dismissal*." (Record, p208)
[23] Transcript page 154 line to p157 line 21

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at his disciplinary hearing, he was advised by his representative to deny knowledge of the picketing rules, whereas at arbitration he conceded that he was aware of the picketing rules.[24] This proved that he had given false evidence at his disciplinary hearing.

Grounds of review

16. On review, there are three broad challenges to the award:

16.1. The applicant alleges that the commissioner committed a gross irregularity by refusing to allow it to present evidence relating to the violence during the strike to demonstrate the background or context to the misconduct for which the AMCU members were dismissed. The applicant alleges that such evidence was relevant *inter alia* to the inconsistency challenge and would have allowed it to demonstrate that the possession of weapons by the NUM members was distinguishable because it was an act of self-defence (the "first challenge").

16.2. The applicant alleges that the commissioner's finding that the dismissals were substantively unfair was based on inconsistency (the "second challenge") constituted a gross irregularity because:

16.2.1. The comparators were not the same or similarly placed.

16.2.2. The commissioner ignored material distinguishing factors including the following: (1) the members of the NUM were acting in self-defence, (2) the members of the AMCU were carrying dangerous weapons in breach of the picketing rules, and (3) the members of the AMCU were blocking or obstructing a public road.

16.2.3. The difference in sanction was not capricious, induced by improper motives, or rendered as a result of a management discriminatory policy. The applicant contends that the appeal chairperson (for the dispute relating to the NUM members) applied a sanction appropriate to the personal circumstances of those individuals.

[24] Transcript p141 line 14 to 142 line 2

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16.3. The commissioner failed to apply her mind to the evidence when determining an appropriate sanction because she ignored evidence that the dismissed members had behaved dishonestly at their disciplinary hearings, which precluded progressive discipline (the "third challenge").

The first challenge: curtailing the evidence

17. The LRA grants the commissioner a discretion on the most appropriate manner to conduct the arbitration, provided it is fair and quick, and subject to the minimum of legal formalities.[25]

18. The transcript reveals the full picture:

18.1. During his evidence in chief, Mpepo was asked: "*Okay sir, can you, based on what you explained to us in terms of the footage, can you tell us and give us the background, what was the impact of the strike during this period?*"[26] He responded: "*From the first day of the strike there was a shooting at Kopanang Hostel where some of the nine mine employees were shot at*."[27] The applicant objected on the basis that the dismissed members were not charged and dismissed for engaging in acts of violence or intimidation, and opening that door would lead to unnecessary evidence, and the dispute would not be finalised. The respondent's representative stated in reply: "…*I am simply trying to give you a brief overview and the impact and why the company acted in this manner in terms of (sic) for you to have a clear view. Unless it is not in dispute that the strike was experienced with violence and there were killings and there were, that is an overview that I wanted to give you in terms of what transpired*."[28] The commissioner reminds the applicant's representative of its opening statement (where the extent of the violence was detailed) and rules that evidence of the background / context can be limited.[29]

[25] Section 138(1) of the LRA
[26] Transcript p26 line 25 – p 27 line 7
[27] Transcript p27 lines 5 – 25
[28] Transcript p27 lines 20 – 25
[29] Transcript p27 line 26 – p28 line 1

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18.2. The following day, while under examination in chief, Moakwe was asked whether the applicant experienced acts of violence after 3 December. When he attempts to respond, the Union representative objects. This time he pointed out that Moakwe had no direct and personal knowledge of the violence and he should not be permitted to present hearsay evidence.[30] This was not contradicted.

18.3. Later, during the cross examination of Moakwe,[31] the commissioner intervened to prevent the Union's representative from asking Moakwe questions directly related to the violence. The representative then states: "*Can we agree that you will ignore that he has talked about violence and it is AMCU that was involved in that madam commissioner, then I am fine with that, we can step away, because I did not want to go there. Thank you madam commissioner. You know my concern is Mr Moakwe I get the feeling, I get the feeling Sibanye was very happy with the violence coming from the NUM, because what I see is, they used the NUM to get to the AMCU members*."[32]

19. It is important to note that the applicant did not advise the commissioner that it sought to lead evidence of the background and context, to show that AMCU was the aggressor, and the NUM was acting in self-defence, because this would be relevant to inconsistency. The commissioner could hardly be blamed for concluding that she was already in possession of all the necessary background information.

20. In any event, if the applicant intended to show through such evidence that the NUM was acting in self-defence when they carried weapons, this would have required evidence from the NUM members or, at the very least, evidence from the appeal chairperson. Nothing said by the commissioner can be construed as a ruling that the applicant could not call such witnesses.

21. Furthermore, any evidence from Mpepo and Moakwe relating to the background or context would have been hearsay evidence. Nothing on the record suggests

[30] Transcript p66 line 25 to p69 line 21
[31] Transcript p92 lines 10 – 25
[32] Transcript p92 lines 19 – 26

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that they held personal knowledge of the violence. In fact, the record suggests the opposite. As regards hearsay evidence, the appropriate point of departure is the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 ("LEAA"). Hearsay evidence must be excluded from civil[33] and criminal proceedings unless admitted in the interests of justice after considering the factors set out in section 3(1). The applicant brought no application, formal or otherwise, to admit hearsay evidence. Our courts have stated that hearsay evidence not admitted in accordance with section 3(1) of LEAA is not evidence at all.[34]

The second challenge: inconsistency

22. It is necessary to first set out the applicable legal principles, as explained through the authorities. The overarching principle is captured in *National Union of Metalworkers of SA & others v Henred Fruehauf Trailers (Pty) Ltd*[35] where the court stated:

> "*Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word 'equity' as used in the United Kingdom statute dealing with the fairness of dismissals, 'comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment' (Post Office v Fennell (1981) IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice*." (own emphasis)

[33] Though CCMA arbitrations are not court proceedings this does not mean that commissioners may ignore the legal principles set out in LEAA.
[34] *Exxaro Coal (Pty) Ltd & another v Chipana & others* (2019) 40 ILJ 2485 (LAC) at para 19
[35] (1994) 15 *ILJ* 1257 (A) at 1264A – D; *Cape Town City Council v Mashitho* (2000) 21 *ILJ* 1957 (LAC) at paras 11 and 12

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23. In *SA Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd*[36] the court clarified that "*Discipline should not be capricious. It is really the perception of bias inherent in selective discipline that makes it unfair. Where, however one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy*" (own emphasis)

24. Objective differences in circumstances is a critical consideration. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others*[37] it was held:

> *'… An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors …*'

25. In *Bidserv Industrial Products (Pty) Ltd v CCMA and others*[38] the Court had the following to say:

> *'This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. …'* (own emphasis)

[36] (1999) 20 ILJ 2302 (LAC) at para 29.
[37] (2010) 31 ILJ 452 (LC) at para 10.
[38] (2017) 38 ILJ 860 (LAC) at para 31.

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26. The LRA Code of Good Practice also provides that consistency is a necessary consideration in deciding the fairness of the sanction of dismissal.[39] Where instances of inconsistency are raised as a defence to dismissal as an appropriate sanction, this would form part of the value judgment that must be exercised in deciding whether dismissal is fair.[40]

27. The applicable legal principles may be summarized as follows: (1) in general employees must be measured against the same standards, (2) the court must consider whether the chairperson (of the disciplinary enquiry) conscientiously and honestly determined the sanction; (3) the decision by the employer not to dismiss other employees for the same or similar misconduct must not be arbitrary, capricious or induced by improper motives; (4) inconsistency is not dispositive of the issue of an appropriate sanction and all relevant factors must be considered, (5) a value judgment must be exercised. The onus lies with the employer to prove that there was no inconsistent application of discipline.[41]

28. The Union argued that discipline was applied inconsistently for two reasons:

    28.1. First, two individuals from AMCU branch leadership were given only a warning for similar offences. When proposing this sanction to the branch leadership, which was accepted, management acknowledged in a letter that stated that misconduct was not "*not gross to the extent that they warrant a dismissal*."[42]

    28.2. Second, members of the NUM who had committed similar offences were given only final written warnings (which had been altered on appeal).

29. The applicant was aware, from the outset, that inconsistency was in issue, from the pre-arbitration minute, as well as the Union's opening statement. In its own

[39] Schedule 8 Item 3(6) reads: '*The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration*.'
[40] See *SRV Mill Services (Pty) Ltd v CCMA and others* (2004) 25 ILJ 135 (LC) at para 23
[41] *SA Police Service v Safety & Security Sectoral Bargaining Council & others* (2011) 32 ILJ 715 (LC) at para 10
[42] See fn. 22

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opening statement, the applicant acknowledged that it was required to prove that it applied discipline consistently.

30. None of the applicant's witnesses participated in the appeal hearing (for the NUM members) and had no personal knowledge of why the sanction had been altered. Despite the absence of personal knowledge, Moakwe attempted to explain it as follows: "*It was a high level process where during the appeal stage considering their personal circumstances, the circumstances surrounding the breach of the specific rule, that dismissal then changed from dismissal to a final written warning*."[43] Moakwe conjectured that the sanction was altered because of the allegations made by NUM that AMCU was the aggressor.

31. Despite being aware of the inconsistency challenge, the applicant failed to present any admissible evidence that the conduct of the NUM members and the dismissed AMCU members were sufficiently distinguishable. For this reason alone, the finding of the commissioner that the applicant applied discipline inconsistently was reasonable. Nevertheless, it is important to note that:

    31.1. The Dangerous Weapons Policy was not applicable only to employees engaged in a strike or picket. The Policy was applicable to all employees of the applicant while on company premises, and was expressly applicable to any organised union activity (see fn. 15) which would have included the activities of the NUM.

    31.2. At arbitration, the AMCU discovered a letter[44] from the applicant advising the AMCU branch leadership that their conduct (in carrying dangerous weapons on company property) was not so gross as to merit dismissal. The applicant provided no explanation for its failure to call the Employee Relations Manager, Mr Tommy Molamu, the author of the letter.

    31.3. Any full evaluation of whether there were sufficient distinguishing factors between the actions of the NUM members and those of the dismissed AMCU members would require consideration that: (i) the carrying of dangerous weapons by the NUM occurred during the same strike, (ii) the AMCU members were marching to a designated picketing area which is why

[43] Transcript p71 lines 18 – 23
[44] Record p208

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they were outside the designated picketing area, (iii) the third respondent's argument that it was necessary to march there together for safety reasons, (iv) it was common cause that the applicant provided no transport for the strikers to proceed to the designated picketing area, (v) it was common cause that there was no pavement or sidewalk making it necessary to walk on the road, (vi) it was common cause that no vehicles or trucks were prevented from passing the marchers, and (vii) there was no evidence of intimidation or violence during the march. In the circumstances, it cannot fairly be said that there were sufficient distinguishing features between the misconduct of the NUM and that of the dismissed AMCU members.

32. Inconsistency remains a key tenet of fairness. Although it is the commissioner's sense of fairness that must prevail and not that of the employer[45] the inconsistent application of discipline is an indication of the kind of misconduct that the employer is prepared to tolerate. When deciding whether dismissal is a fair sanction, the commissioner must consider the totality of circumstances. The commissioner must consider the importance of the rule that had been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the misconduct, whether additional training and instruction may result in the employee not repeating the misconduct, and the effect of dismissal on the employee and his or her long-service record.[46] Here, no harm was caused by the misconduct, and the reasons why the employer imposed the ultimate sanction of dismissal was not adequately explained, given its inconsistent application of discipline.

The third challenge: sanction

33. On review, the applicant contends that the commissioner acted irregularly by reinstating Mpengesi and Mjajubane, given their concessions that they had been dishonest at their disciplinary hearings.

33.1. Mpengesi denied that he could be identified in the photograph used at his disciplinary hearing. Different photographs were used at the disciplinary

[45] *Sidumo* cited in fn. 4 at para 75
[46] *Sidumo* (supra) at para 78

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hearing and at arbitration; and the photograph used at the hearing was not produced at arbitration. At his disciplinary hearing, Mpengesi signed a statement denying that he was on company premises on 27 November, which he later conceded was false. This clearly established dishonesty.

33.2. Mjajubane conceded that, at his disciplinary hearing, he had falsely denied knowledge of the picket rules on the advice of his representative. He too accepted that he had been dishonest at his disciplinary hearing.

Consolidated analysis of the grounds of review

34. The allegations of dishonesty relate only to Messrs. Mpengesi and Mjajubane. The commissioner did not consider how their dishonesty impacted on the employment relationship. It is trite that while all dishonesty does not merit dismissal, dishonesty has the effect of eroding the trust relationship.[47] Despite her obligation to do so, the commissioner failed to consider the totality of the circumstances. On this basis alone, the arbitration award falls outside of the range of reasonable outcomes. I see no reason to remit the dispute back to the first respondent. The dispute has been fully ventilated, and the record (including documents and transcript) is complete. Exercising my powers under section 145(4) of the LRA,[48] I consider it appropriate to finally determine the issue. Considering the totality of the circumstances, including the fact that their dishonesty was egregious - given that it sought to subvert the disciplinary process, the commissioner's award of reinstatement (in respect of Messrs. Mpengesi and Mjajubane) falls to be reviewed, set aside, and substituted with a finding that their dismissal was substantively fair.

35. I now consider the case for the remaining eight dismissed members.[49] In my view, the commissioner committed no irregularly by finding that the applicant had applied discipline inconsistently. This finding, given the evidence before her, as discussed fully in paragraphs 28 to 31 above, was reasonable. While consistency of discipline is not determinative of the appropriate sanction, it remains a basic element of fairness, and must be taken into consideration. Had the commissioner

[47] *Absa Bank Ltd v Naidu and others* (2015) 36 ILJ 602 (LAC) at paras 52 and 53.
[48] Section 145(4)(a) reads: '*If the award is set aside, the Labour Court may – (a) determine the dispute in the manner it considers appropriate …*'
[49] The remaining eight employees are: (1) Mr. J Chiliza, (2) Mr. Nqwamakhwe, (3) Mr. B. Myeni, (4) Mr. Tomose, (5) Mr. Cele, (6) Mr. M Ntongwana, (7) Mr. T Ngqwemeza, and (8) Mr. N. Nqendukana

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considered the totality of the circumstances, she would have taken into consideration that - no vehicles were actually prevented from entering or leaving the company's premises, there was no violence or intimidation by the dismissed employees, the employer could not sufficiently distinguish the dismissed AMCU members misconduct from that of the NUM or the branch leadership of AMCU, the object of the march was not to breach the picketing rules but to proceed to the designated picketing area, the public road did not have a pavement or sidewalk, and the marchers had no means to reach the designated area but to walk on the road. In the circumstances, considering all the evidence before the commissioner, the outcome in respect of these individuals was reasonable. I see no reason to tamper with the commissioner's order that they be reinstated.

Costs

36. In terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was partially successful, I do not intend to burden the third respondent with a costs order. I am mindful of the *dictum* in *Zungu v Premier of the Province of Kwa-Zulu Natal and others*[50] that costs awards in employment disputes are not the norm and there must be sufficient reason to depart from this. There is no reason to depart from the norm and I therefore make no order as to costs.

Conclusion

37. In the premises, I make the following order:

1. The arbitration award dated 10 November 2021, and issued under CCMA case reference GAJB13413-19, is hereby reviewed and set aside.

2. The arbitration award is substituted with a finding that the dismissal of Messrs. Mpengesi and Mjajubane is substantively fair, but dismissal of the other eight is substantively unfair and they are reinstated with effect from 10 November 2021.

3. There is no order as to costs.

[50] (2018) 39 ILJ 523 (CC) at para 25.

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R Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate A Myburgh SC
Instructed by:	Solomon Holmes Inc
For the Third Respondent:	Adv A Cook
Instructed by:	Larry Dave Inc

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