THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 652/18

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION WORKERS UNION obo E M NTULI **Applicant**

and

FERROGLOBE SILICON SMELTERS (PTY) LIMITED **Respondent**

Heard: **15 October 2024**

Delivered: **06 December 2024**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this action, the applicant (AMCU) is challenging the dismissal of Mr Elliot Ntuli, its member, on the basis that it was automatically unfair as envisaged in section 187(1)(d) and (f) of the Labour Relations Act[1] (LRA); alternatively, that the

[1] Act 66 of 1995, as amended.

LABOUR COURT

dismissal was substantively unfair. It primarily contends that Mr Ntuli was discriminated against based on his position as the AMCU branch chairperson and shop steward. The respondent (Ferroglobe) disputes that it discriminated against Mr Ntuli and contends that he was dismissed for poor performance and misconduct consequent to a disciplinary hearing that found him guilty. The main issue for determination is the reason for the dismissal of Mr Ntuli.

Background facts

[2] Mr Ntuli commenced his employment with Ferroglobe in 1991 as an Electrician. He held various positions at Ferroglobe, and when he was dismissed on 11 April 2018, he held the position of engineering superintendent and earned a gross salary of R67 641.03.

[3] In 2015, Mr Ntuli became a member of AMCU. On 27 January 2016, AMCU and Ferroglobe concluded a Recognition and Procedural Agreement (recognition agreement) in terms of which Mr Ntuli was recognised as a shop steward and branch chairperson, representing AMCU members.

[4] On 9 February 2018, Mr Ntuli was charged as follows:

4.1 Charge 1: Poor work performance in that Mr Ntuli failed to do his tasks after several poor work performance counselling sessions.

4.2 Charge 2: Conflict of interest in that Mr Ntuli disregarded and worked against management decisions and the company policies; neglected his managerial duties and preferred to attend disciplinary hearings and other meetings i.e. breaching the company code of conduct; opposing managerial decisions and viewpoints; and instructed employees not to perform managerial instructions.

4.3 Charge 3: Disorderly conduct in that Mr Ntuli led employees to an unprotected strike on 31 January 2018.

[5] Mr Ntuli was found guilty as charged and dismissed. Displeased with the outcome, AMCU referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). The conciliation at the CCMA

LABOUR COURT

was unsuccessful and the dispute was referred to arbitration. The arbitrator ruled that the CCMA lacked jurisdiction to arbitrate the matter because Mr Ntuli was alleging that he was unfairly discrimination against, hence these proceedings.

[6] In this Court, the parties stuck to their respective versions. The crux of Mr Ntuli's version is that he was charged, found guilty and dismissed because of his duties as a shop steward and AMCU branch chairperson. That is the basis for his claim that his dismissal was automatically unfair.

[7] Ferroglobe, on the other hand, contends that Mr Ntuli departed substantially from the performance standard required of him as a senior employee and an engineering superintendent. He was offered counselling, training, instructions, and ample time to improve but failed to meet the required performance standard. In addition, Mr Ntuli exceeded the limits of his role as a shop steward by misconducting himself by attending to his union responsibilities in a manner that conflicted with his duties as a senior employee and in breach of the obligations as set out in the recognition agreement.

[8] I deal with the evidence in relation to each charge.

Poor work performance

[9] Mr Roger Pereira (Mr Pereira), Mr Ntuli's line manager, testified that Mr Ntuli had a history of performance challenges. In 2013, he caused an industrial accident which nearly took his life. In July 2015, he was also charged and found guilty of refusing to subject himself to the standard alcohol test. It is common cause, however, that the previous disciplinary warnings emanating from these instances had either lapsed or been expunged.

[10] On 1 April 2017, Ferroglobe put into effect operational changes within the engineering department which applied to several employees, including Mr Ntuli. Consequently, Mr Ntuli's responsibilities were redefined as follows:

> 'ELLIOT NTULI: Engineering Supernatant responsible for and not limited to all engineering and special project requirements. Servicing mechanical maintenance requirements, (carpentry, office maintenance, sewers/drains, plumbing, canteen, building maintenance, cladding and sheeting, toilets,

LABOUR COURT

change houses, fences, gates, dump water reticulation, stormwater drains and roof gutters, drinking water reticulation) as well as acting duties for superintendents and unit manager.'

[11] Mr Ntuli was initially opposed to the changes to his responsibilities. Ignoring Mr Ntuli's protestation, on 7 April 2017, Mr Pereira sent a communication to Mr Ntuli reiterating the changes in his responsibilities, particularly that he was "*responsible for all engineering special projects requirements and mechanical service requirements throughout the plant (planning implementation and validation)*". Mr Ntuli testified that he ultimately accepted the new responsibilities under duress because Mr Pereira had threatened to discipline him. Yet, he conceded under cross-examination that he did not formally challenge the decision to impose the new responsibilities.

[12] Mr Pereira testified that he had challenges with Mr Ntuli's work performance and compiled a list of outstanding projects and non-compliance issues at the hands of Mr Ntuli. That led to the first poor work performance counselling session against Mr Ntuli, held on 5 June 2017. According to Mr Pereira, in this session, the list of outstanding projects was discussed with Mr Ntuli, whom the AMCU official, Mr Mandoyi, represented. Moreover, Mr Ntuli was accused of not utilising the project scoping form. He was provided with the scoping form to utilise in his projects thenceforward.

[13] Mr Ntuli denied that the first poor work performance counselling session discussed the list of outstanding projects. He was adamant that the focus of this session was the project scoping form. Yet, the minutes of this counselling session support the evidence of Messrs Pereira and Sinethemba Solani (Mr Solani), the HR Manager, that Mr Ntuli's incomplete projects were discussed. Moreover, even though Mr Ntuli did not sign this session's minutes because he was disputing their accuracy, Mr Mandoyi seemingly took no issue with the their accuracy and appended his signature.

[14] A second poor work performance session was held on 3 August 2017. Still, Mr Ntuli was represented by Mr Mandoyi. It was acknowledged in this session that Mr Ntuli was at least using the project scoping form but not in all projects. One of the projects that was not scoped was the crusher grizzly project (grizzly project).

LABOUR COURT

Also, Mr Pereira took issue with Mr Ntuli's failure to structure and plan his projects. According to Mr Pereira, Mr Ntuli did not appreciate the importance of paperwork and planning as he was of the view that it was a waste of time. He preferred to complete project forms and plans once projects were finished.

[15] The outcome of this session was an agreement that Mr Pereira would conduct refresher training on project management and bar chats. It is also common cause that training on project management and bar charts did take place and Mr Ntuli duly attended. Notwithstanding being trained to use the bar chart, Mr Ntuli conceded that he did not use the bar chart because no capital projects were running after the training. This assertion was disputed by Mr Pereira who was adamant that the bar charts had to be used in all projects.

[16] A third and final poor performance counselling session was held on 23 November 2017. It is not in dispute that this session was highly charged and Mr Pereira was accused of racism. Mr Pereira raised concerns about Mr Ntuli's persisting failure to complete his projects timeously. He also raised concerns in respect of the roof, water and fence projects that had not been completed. Mr Ntuli was of the view that Pereira raised new issues which were never discussed before. The meeting concluded on the basis that HR would take over the process. Mr Ntuli was formally charged on 9 February 2018.

[17] The pertinent complaints that led to the poor work performance counselling sessions and dismissal were that Mr Ntuli failed to attend to his projects on time and there were delays in the finalisation; alternatively, he failed to attend to projects, particularly the following projects:

SOx and NOx's

[18] Mr Ntuli distances himself from the SOx and NOx's second pilot project. He testified that he was only tasked with filing emission reports, which he did. He was adamant that he was only involved in the first pilot which was unsuccessful. Mr Pereira, conversely, testified that this project was handed over to Mr Ntuli in October 2016 by Mr Neil van der Merwe (Mr Van der Merwe) who retired at the end of 2016. As a result, Mr Ntuli attended two meetings that pertained to the project and was assigned several tasks to complete, including collecting

LABOUR COURT

emission reports, calculating actual flow needed, putting together detailed cost estimates, putting together detailed component and work lists and building an estimated bar chart. Mr Ntuli conceded that he never responded to the email from Mr Pereira which listed the tasks he was required to complete in relation to this project because "*it didn't come to his mind to respond*".

[19] It is not in dispute that this project was very important because the Department of Environmental Affairs had already set the deadline for compliance as 1 May 2019. Failure to meet the deadline would have threatened Ferroglobe's atmospheric emission licence and consequently ceased operating. Thus, it makes no sense that Mr Ntuli would be given the task of merely filing reports on a project that was handed over to him and was so critical to the continued operation of Ferroglobe.

[20] In my view, Ferroglobe's version has to be accepted as Mr Ntuli defiantly refused to accept the changes to his responsibilities, which included Mr Van der Merwe's project and responsibilities.

Failure to properly plan or comply with the procurement policy

[21] Mr Ntuli was also accused of delaying projects by refusing to properly plan, scope and prepare paperwork like project scoping forms and project management bar charts. Even though he had commenced utilising the scoping form after the first counselling session, Mr Pereira testified that he did so half-heartedly and inconsistently. He, Mr Pereira, had to correct the project scoping forms Mr Ntuli submitted. In some instances, Mr Ntuli failed to utilise the project scoping form. As a result of the delay, some projects, like the grizzly project, had to be deferred due to financial reasons.

[22] The stormwater and roof projects were still incomplete when the third poor performance counselling session was held on 23 November 2017. Mr Pereira testified that he had specifically instructed Mr Ntuli to attend to the stormwater channelling B9. As a result of Mr Ntuli's failure to attend to this project, Ferroglobe received an adverse audit finding from the Department of Water and Sanitation and was consequently fined. Mr Ntuli denied that he did not attend to this project. He was adamant that it was completed and handed over. However, he failed to

LABOUR COURT

respond to Mr Pereira's email of 30 November 2017, questioning him on the status of this project.

[23] Mr Pereira testified that the roof project was noted in May 2017 by the SHEQ meeting. Yet it was still incomplete on 23 November 2017 due to Mr Ntuli's failure to follow up on his projects. Mr Ntuli denied that he failed to deliver on his projects on time. To the extent that there was a delay, he attributed the delay to the laborious tender process. Mr Pereira denied that the tender process was the cause of the delay in completing projects. Instead, he testified that it was Mr Ntuli's failure to follow the procurement policy as he, Mr Ntuli, put all projects on tender even if the cost of a project was below R50 000.00. Had Mr Ntuli properly prepared the scoping documents, he would have easily ascertained the value of the project and followed the much shorter process to obtain three quotations if the project was below R50 000.00.

[24] Mr Ntuli claimed ignorance of the procurement policy, which is highly improbable because some of the order forms he had been using had an option of securing three quotes if the services required were less than R50 000.00. According to Mr Pereira, the fencing project was a typical example of a project that was delayed by Mr Ntuli's indiscretion in putting a most urgent project on tender. The fence near the school that is neighbouring the Ferroglobe premises was damaged at the beginning of May 2017 and posed a security threat. As a result of the delay of about two weeks, there were burglaries on the premises. Mr Ntuli denied that it was his responsibility to repair the fence and he was only expected to attend to what he was asked by Mr Pereira, which he did. The challenge with Mr Ntuli's assertion is that he never disputed the contents of Mr Pereira's email questioning his failure to procure a service provider to repair the fence. Moreover, the fence maintenance was specifically listed as part of his new responsibilities.

[25] Mr Ntuli was unbending in his assertion that he completed all his tasks and projects and Mr Pereira was mistaken in his allegations. In addition, he testified that Ferroglobe entrusted him with managerial responsibilities, offered him a position in Spain and paid him a performance bonus of R134 322.18, though after his services were terminated. Thus, his dismissal was unwarranted.

LABOUR COURT

[26] Mr Pereira conceded that he did appoint Mr Ntuli to act in his stead usually when he (Mr Pereira) went on leave, particularly over the December festive period. However, he did so because Mr Ntuli was the only senior-level employee on the rotation schedule available at the time. Mr Solani testified that Mr Ntuli was not the only engineer who was offered the opportunity to apply for engineering positions in Spain at the time. Even if Mr Ntuli was on a performance management plan, he could still apply for the opportunity if he was interested. That did not mean he was going to be accepted.

[27] The Code of Good Practice: Dismissals[2] provides the following guidelines in cases of dismissal for poor work performance:

> 'Any person determining whether a dismissal for poor work performance is unfair should consider –
>
> (a) whether or not the employee failed to meet a performance standard; and
>
> (b) if the employee did not meet a required performance standard whether or not –
>
> (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
>
> (ii) the employee was given a fair opportunity to meet the required performance standard; and
>
> (iii) dismissal was an appropriate sanction for not meeting the required performance standard.'[3]

[28] Mr Ntuli's responsibilities were well articulated and could not be misunderstood. Mr Pereira was unbending in his evidence that Mr Ntuli still had incomplete projects when the last counselling session was held (e.g. stormwater B9 piper). These projects were Mr Ntuli's responsibility even though he tried to distance himself from some of them (e.g. the Sox and Nox; school fence). Mr Ntuli was

[2] Schedule 8 of the LRA.
[3] Ibid, item 9.

LABOUR COURT

not willing to use the project management bar charts to scope his projects even after he had been trained. He continued to use the MS project document. Hence, as testified by Mr Pereira, Mr Ntuli could not properly scope and prioritise the projects and, in turn, that led to delays in finalising the projects.

[29] It is well-accepted that the requirements applicable ordinarily in case of poor work performance may be dispensed with in a case involving a manager or senior employee. In *Somyo v Ross Poultry Breeders (Pty) Limited*[4], the Labour Appeal Court gave two instances to justify a threshold; firstly, where the manager or senior employee's knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer. Secondly, where the degree of professional skill required is so high and the likely consequences of the slightest deviation from that high standard serious enough to justify dismissal even if is a single instance. Simply put, a senior employee is expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower-skilled employees require to perform their functions.[5]

[30] Mr Ntuli, likewise, ought to have assessed and appreciated that he was not performing according to what was expected of a senior employee. Yet, Ferroglobe gave him training, counselling and the opportunity to improve but to no avail. I agree with Ferroglobe that Mr Ntuli failed to appreciate the seriousness of his deviation from the performance standards. That is so, especially in relation to the projects that involved external regulatory authorities like the Department of Environmental Affairs and the Department of Water and Sanitation where non-compliance had serious consequences. Another major challenge to Mr Ntuli's overall performance, it would seem, was the fact that he had over-committed his time to his union duties. As a result, he failed to attend his contractual duties.

Conflict of interest

[4] [1997] 7 BLLR 862 (LAC).
[5] See *Palace Engineering (Pty) Ltd v Ngcobo and Others* [2014] ZALAC 7; (2014) 35 ILJ 1971 (LAC) a para 24. See also: *JDG Trading (Pty) Limited t/a Price 'n Pride v Brunsdon* [1999] ZALAC 40; (2000) 21 ILJ 501 (LAC) at para 74.

LABOUR COURT

[31] Mr Ntuli was accused of conducting his union duties as a shop steward in a manner that was in direct conflict with his duties and responsibilities as a senior employee. Mr Pereira testifies that Mr Ntuli missed scheduled project follow-up meetings; failed to attend management meetings when he was specifically requested to stand in for Mr Pereira; and failed to attend the scheduled training that was conducted by an external service provider for a selection of Ferroglobe's employees, including Mr Ntuli. In all these instances, Mr Ntuli had no permission to be absent and could not explain his absence.

[32] Mr Ntuli conceded that he did miss some of the meetings because he was attending to official union duties such as attending disciplinary hearings and meetings between management and shop stewards. This he did with prior permission, so he testified. Yet when quizzed on some of the meetings he had attended but failed to produce proof that he had been granted permission, he accused Mr Pereira of having forgotten that he did report that he would be attending to union duties. I find Mr Ntuli's assertion curious because it is common cause that he missed the management meetings where he had to stand in for Mr Pereira. Still, he prioritised attending AMCU in total disregard of his responsibilities as a stand-in manager.

[33] Mr Ntuli was also accused of exceeding the limits of his role as a shop steward in conflict with his duties as a senior employee and acted in a manner that was against management decisions and company policies. This accusation was premised on the manner Mr Ntuli conducted himself during the disciplinary hearing of Mr Thankge Foster (Forster), a member of AMCU he was representing.

[34] Mr Foster was charged for testing positive for alcohol on 27 November 2017. Mr Solani and Mr Abner Mahlangu (Mr Mahlangu), the employee relations officer, testified that Mr Foster was not referred for counselling because he had already been counselled on 23 September 2017 and filed to mend his ways. The disciplinary hearing sat for the first time on 7 December 2017. Mr Ntuli raised a procedural objection that led to a postponement.

LABOUR COURT

[35] Ultimately the disciplinary hearing sat on 15 February 2018. What transpired in this during this sitting is somewhat controversial. It is common cause that Mr Ntuli challenged the process as irregular because, in terms of the disciplinary code, an employee whose alcohol test result was below 0.03 mg would be counselled instead of being subjected to a disciplinary hearing. Mr Foster's alcohol test result was below 0.03 mg.

[36] Mr Mahlangu testified that Mr Ntuli refused to budge in his stance even though he was presented with proof that Mr Foster was a repeat offender. The proceedings concluded with Mr Foster pleading guilty and receiving a written warning. Mr Ntuli then advised Mr Foster not to sign the written warning. The highlight of Mr Mahlangu's cross-examination was that Mr Ntuli could not be faulted for challenging the procedure as it was contrary to the disciplinary code.

[37] Mr Ntuli testified that the disciplinary hearing was adjourned before Mr Foster could enter a plea. He only saw the record of the disciplinary enquiry as he was preparing for this trial. He denied ever advising Mr Foster not to sign the written warning. He was adamant that he would have advised Mr Foster to appeal the warning had he been aware of it. Mr Ntuli accused Mr Mahlangu and the chairperson of the disciplinary hearing of forging the documents pertaining to Mr Foster's disciplinary in order to frame him.

[38] There is no reason to doubt the evidence of Ferroglobe that Mr Forster indeed pleaded guilty to the charge of testing positive for alcohol and that his disciplinary hearing concluded on 15 February 2018 with him receiving a written warning. There was no reason for Ferroglobe to fabricate evidence on how Mr Foster's disciplinary hearing concluded. Conversely, Mr Ntuli's evidence that the disciplinary hearing was adjourned and never reconvened is highly improbable. To my mind, this version was concocted to bolster Mr Ntuli's denial that he had advised Mr Forster not to sign the outcome form and the written warning.

[39] Yet, I agree with the written submission by Mr Ntuli's counsel, Mr Hollender, that nothing much turns on this allegation as Mr Ntuli's stance was based on his interpretation of the disciplinary code as it then was. The fact that the impugned clause of the disciplinary code was amended in 2020 to reflect that disciplinary

LABOUR COURT

action would be taken against an employee who tests positive for alcohol after he had been counselled supports Mr Ntuli's interpretation.

[40] The nub of the issue in this regard is whether a charge of conflict of interest is sustainable where the accused employee is a shop steward and the allegations pertain to his duties in that position. The following observation of this Court, per Brassey AJ, in *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council*[6] (*Rustenburg*), echoes more than two decades later.

> 'No one denied the adversarial nature of the relationship between unions and employers and each dealt with the other accordingly. The question became confused, however, when the role of unions became secure and their legitimacy was accepted, for efforts were then made to recast them as partners in a corporatist enterprise. It took a *Kahn-Freund* to debunk these unitarist theories and remind us that the conflict between capital and labour is eternal: "Any approach to the relations between management and labour is fruitless unless the divergency of their interests is plainly recognised and articulated…"'[7] [Own emphasis]

[41] In *Rustenburg,* the issue was about an employer who took a stance that certain levels of senior managers should not be allowed to serve in the leadership positions of a trade union, mainly because of a potential conflict of interest. Rejecting the employer's claim, the court was of the view that, consistent with the Constitution, the LRA confers organisational rights on workers without limitation in terms of seniority. Pertinently, it further observed that:

> 'The protections conferred by the organizational rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By so doing, they legitimize acts that might otherwise constitute a breach of the employee's duty of fidelity, prohibit victimization and outlaw rules of the sort that the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under the contract. The employee must still do the work for which he is engaged and observe the

[6] [1999] ZALC 145; (2000) 21 ILJ 377 (LC).
[7] Id at para 5.

LABOUR COURT

> secondary duties by which he is bound under the contract. If he does not, he can be disciplined for misconduct or laid off for incapacity.'[8]

[42] It follows that, to the extent that the LRA allows senior employees to join a trade union and participate in its activities and, in turn, have divided fidelities, a distinct charge of conflict of interest is untenable. The alleged conflict of interest must at least point to misconduct or poor work performance.[9]

[43] Mr Ntuli's conduct during Mr Foster's disciplinary hearing is a typical example of an over-zealous shop steward who vigorously represented a union member by addressing a procedural issue which he believed to be legitimate and true. Even if it turned out that the position he took was obstinate, he was still performing his legitimate union duties. In my view, Mr Ntuli's conduct must be considered in this light.

[44] However, the same cannot be said when it comes to Mr Ntuli's dereliction of duties as a senior employee. I accept Mr Pereira's evidence that Mr Ntuli failed to attend management meetings in his stead; and briefing sessions with service providers that he (Mr Ntuli) had arranged. Even though Mr Ntuli was adamant that he was attending to his union duties, it is clear that he was not clothed with the necessary permission to legitimise his conduct. Ferroglobe was not unreasonable in expecting Mr Ntuli to attend to his contractual duties like any other employee, particularly as a senior employee.[10] Mr Ntuli neglected his contractual duties and as such misconducted himself.

Disorderly conduct

[45] The third change pertains to the alleged disorderly conduct emanating from the AMCU general meeting on 31 January 2018. According to Mr Solani, this meeting was authorised to take place from 07h30 to 08h30 and subject to the condition that employees are back at their places of work by no later than 08h40 and a communication was sent to the relevant department and posted next to the main

[8] Id at para 17.
[9] Id.
[10] See *Mondi Paper Co Ltd v Paper Printing & Allied Workers Union & Another* (1994) 15 ILJ 778 (LAC) at 780F.

LABOUR COURT

gate. Mr Pereira had authorised Mr Ntuli's attendance as the AMCU Branch Chairperson from 07h00 to 09h15.

[46] Mr Ntuli denied that the meeting was authorised to take place between 07h30 to 08h30. He was adamant that Mr Solani gave oral permission to hold the meeting from 07h30 to 09h00. Mr Solani refuted this assertion and testified that it was a standard procedure that when arranging AMCU general meetings, a brief would be issued setting out the conditions for the authorisation. In this instance, the brief that was issued supports the version of Ferroglobe that the meeting had to conclude at 08h30 and employees were expected to be at their work station by 08h40. A copy of the brief was placed next to the clocking station.

[47] On 31 January 2018, the same morning the AMCU general meeting was held, Messrs Fakude and Mokoena, AMCU shop stewards, appeared before a disciplinary hearing on allegations that in November 2017 they stopped employees from working at the furnace area. Mr Solani testified that the disciplinary hearing was held in the administration building and commenced at 09h00. Mr Mandoyi, the AMCU official, represented Messrs Fakude and Mr Mokoena.

[48] The AMCU general meeting ran over. At about 09h30, a band of AMCU members (day-shift and night-shift workers), including Mr Ntuli, marched to the administration building. The whole event was captured in the video footage that was presented as evidence during the trial. The group gathered by the administration building where they chanted and danced. Mr Ntuli was constrained to concede that he was also chanting and dancing.

[49] According to Ferroglobe, this action was seen as an attempt to disrupt the disciplinary hearing, intimidate management and disrupt the orderly operation of the company. Mr Solani testified that the disciplinary hearing was temporarily disrupted, and so was the rest of the administration building. Mr Mandoyi addressed the protesting band of AMCU members and urged them to disperse.

[50] Mr Ntuli denied that the purpose of the protest was to cause any disruptions; particularly to disrupt the disciplinary hearing because he was unaware that it was in progress. He testified that the purpose of the gathering was to present a

LABOUR COURT

memorandum of grievances to management. The angry AMCU members forced him and other shop stewards to join the gathering. He joined the gathering and presented the memorandum to management because he feared for his life. Yet, he was adamant during his cross-examination that the protest was peaceful.

[51] Mr Solani denied that the scribbled piece of paper that Mr Ntuli referred to as the memorandum was ever handed over to management on 31 January 2018. According to Mr Solani, the alleged memorandum only emerged during the preparation for trial. In any event, he was surprised by the event as Mr Ntuli was aware of the procedure to attend to workers' grievances in terms of the recognition agreement. As such, it could not have been a coincidence that the grievance raised in the memorandum pertained to the same issue for which Messrs Fakude and Mokoena were charged.

[52] In my view, Mr Ntuli seemed to match the beat of his drum when it suited him and often took a pedantic stance when compliance with policies affecting AMCU members was at stake. Yet, he failed to honour the conditions attached to the granting of permission to attend the AMCU general meeting and the grievance procedure in terms of the collective agreement. As a branch chairperson, he inconsiderately allowed the meeting to run beyond the authorised time when he ought to have known that such conduct would disrupt the operations. Not perturbed by the delay in dispersing the meeting, Mr Ntuli, a senior employee, led the band of AMCU members to engage in disorderly conduct and blissfully participated.

[53] Therefore, Mr Olivier, Ferroglobe's counsel, is correct in his submission that Mr Ntuli led the band of AMCU members to the administration building with no other purpose but to disrupt the disciplinary proceedings, intimidate the management and disrupt the overall company operations. That conduct fell outside the protected scope of normal duties and obligations of a shop steward in terms of the recognition agreement and prescripts.

Was Mr Ntuli dismissed because of his position as a shop steward?

[54] As alluded to above, Mr Ntuli claims that his dismissal was automatically unfair because the real reason for his dismissal was his role as a shop steward in

LABOUR COURT

contravention of section 187(1)(d) and (f) of the LRA. Ferroglobe contends that Mr Ntuli was dismissed for poor performance, conflict of interest and disorderly conduct. In light of the findings I have arrived at above, I do not have to be arrested by this issue.

[55] The test is trite and aptly summarised by the Labour Appeal Court in *Baxter v Minister of Justice & Correctional Services & others*[11] as follows:

> 'The test for determining the true reason is that laid down in *SA Chemical Workers Union & others v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not made the protected disclosure. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such disclosure was the main, dominant, proximate or most likely cause of the dismissal. Thus, the court must enquire into the main, dominant, proximate or most likely reason for the dismissal. The employee bears the onus to establish at least a 'credible possibility' that the dismissal was for a proscribed reason. If the employee fails to discharge that onus, the Labour Court at its discretion may proceed to determine the substantive and procedural fairness of the dismissal in terms of s 158(2) of the LRA, as happened in this case.' [Own emphasis]

[56] Mr Ntuli failed to discharge the onus to establish a credible possibility he was dismissed for participation in union activities and performing in his role as a shop steward. Even if he did, based on the findings I have arrived at above, the main, dominant and proximate cause of his dismissal was poor work performance and misconduct. Stated otherwise, it cannot be said that Mr Ntuli would not have been dismissed, but for his position as a shop steward and participation in the union activities. Accordingly, the automatically unfair claim must meet its demise.

LABOUR COURT

[11] [2020] ZALAC 27; (2020) 41 ILJ 2553 (LAC) at para 60. See also *SA Chemical Workers Union & others v Afrox Ltd* [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC) para 32; *Kroukam v SA Airlink (Pty) Ltd* [2005] ZALAC 5; (2005) 26 ILJ 2153 (LAC) para 28.

Unfair dismissal

[57] Notwithstanding the above finding and the fact that the alternative dispute of unfair dismissal ought to have been referred to arbitration, I deem it expedient to invoke the provision of section 158(2)(b) of the LRA[12] given the history of this litigation. The finalisation of this matter was extensively delayed by the interlocutory applications.

[58] Mr Ntuli sought to bring an application to amend his statement of claim which was objected to by Ferroglobe. That occasioned the postponement of the trial on 10 May 2022. The application for amendment of the statement of claim was eventually agreed to by Ferroglobe and an order by agreement was issued on 28 April 2023. However, the parties could not agree on the amendment of the pre-trial minutes. A separate opposed application served before this Court when the trial recommenced on 8 April 2024. Ferroglobe agreed to the amendment to the pre-trial minutes. The hearing of evidence concluded on 19 June 2024 for the parties to file the written submissions which were duly filed on 1 and 2 September 2024, respectively. The hearing of the oral submissions took place on 14 October 2024 and the judgment was reserved.

[59] Therefore, the remittal of the matter to the CCMA would be highly prejudicial to the parties. In any event, I am in the position to deal with the unfair dismissal claim and there is no objection to me doing so.

[60] In light of the findings, I have arrived at above, Ferroglobe successfully proved, on the balance of probabilities, that Mr Ntuli failed to perform his duties per the required work standard and was thus guilty of poor work performance. In the same way, Mr Ntuli was guilty of dereliction of his duties by failing to attend scheduled meetings, including management meetings and prioritising the union duties when he had no permission. Finally, Mr Ntuli was guilty of disorderly

LABOUR COURT

[12] Section 158(2)(b) provides:
'If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may –
…
(b) if it is expedient to do so, continue with the proceedings, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162(2)(a) are applicable.'

conduct by leading a band of AMCU members to engage in unprovoked meritless and disruptive conduct; and by blissfully participating as a senior employee.

[61] Notably, Mr Ntuli abandoned the claim that his dismissal was procedurally unfair.

Was dismissal an appropriate sanction?

[62] It is contended, on behalf of Mr Ntuli, that his conduct, viewed on its own concerning each charge or collectively concerning other charges, did not warrant a dismissal. Instead, what should have happened concerning the charge of disorderly conduct is that the salary of Mr Ntuli should have been deducted on the same basis as the salaries of the employees who participated in the alleged unprotected strike or disorderly conduct.

[63] In my view, these submissions are untenable. That is so because Mr Ntuli was a senior employee whose conduct exceeded the bounds of legitimate union duties. Mr Ntuli was not only a senior employee; he was often tasked with acting responsibly in Mr Pereira's stead. Still, he would miss management meetings and prioritise his shop steward duties. Mr Pereira testified that Mr Ntuli would miss some of the tender briefing meetings he had scheduled because of his shop steward duties. While it is true that in some instances he has sought permission, it is clear from the unrefuted evidence that he failed to ensure that his duties as a senior employee were not compromised.

[64] As mentioned elsewhere in this judgment, it is trite that shop stewards indeed enjoy some indemnity from discipline for the conduct ancillary to the exercise of their duties.[13] Yet, parallel to that is a stern warning that such a privilege must not be allowed to operate as a canopy or an excuse for conduct which ordinarily would justify dismissal.[14] The protection ends when the legitimate union activities cease and the contractual obligations resume with full force, restoring the

LABOUR COURT

[13] *Adcock Ingram Critical Care v CCMA and Others* [2001] ZALAC 10; [2001] 9 BLLR 979 (LAC) (*Adcock Ingram)*; *BIFAWU and another v Mutual and Federal Insurance Company Ltd* [2005] ZALAC 10; [2006] 2 BLLR 118 (LAC); *CEPPWAWU and others v Metrofile (Pty)* Ltd [2003] ZALAC 22; [2004] 2 BLLR 103 (LAC); *NUM & others v Black Mountain Mining (Pty) Ltd* [2009] ZALC 162; [2010] 3 BLLR 281 (LC*) (Black Mountain); Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and Another* (1994) 15 ILJ 778 (LAC).
[14] See *Adcock Ingram* at para 15.

managerial prerogative to take disciplinary action against shop stewards like any other employee.[15]

[65] Mr Ntuli also takes issue with the fact that he was the only employee who was dismissed consequent to the incident of 31 January 2018. He testified that he was not supposed to be charged and dismissed as AMCU and Ferroglobe had agreed that no one would be charged in relation to that instance. Ferroglobe disputed that the agreement between the parties included Mr Ntuli's case as he had already been charged when the agreement was concluded. Converse to Mr Ntuli's assertion, the agreement between the parties is silent on Ntuli's disciplinary hearing, thus giving credence to Mr Solani's evidence that Mr Ntuli was deliberately excluded.

[66] It is well accepted that the question of inconsistency in the application of discipline must be approached with a degree of caution. That is so because "*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*"[16]. In any event, fairness is a value judgment and inconsistency could be a price to be paid for flexibility, which requires the exercise of discretion in each case, only to the extent that discipline is not undertaken capriciously or selectively.[17] Hence the generalised allegation of inconsistency is insufficient because there may be compelling grounds, based on material facts, to differentiate the conduct of employees who engaged in similar conduct.[18]

[67] Absent the evidence by AMCU officials who negotiated the collective agreement, I accept Ferroglobe's unrefuted evidence that, by signing the collective agreement when it was clear that Mr Ntuli was excluded, AMCU sanctioned his exclusion from the negotiated deal. Besides, I have seriously considered the fact that Mr Ntuli was a senior employee who participated and/or led other employees

[15] See *Black Mountain* at paras 42 and 43
[16] See *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALAC 4; (2017) 38 ILJ 860 (LAC) at para 31.
[17] See *SA Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC), at para 29; *County Fair Foods (Epping), a division of Astral Operations Ltd v Food & Allied Workers Union and others* [2018] ZALAC 9; (2018) 39 ILJ 1953 (LAC) at para 25.
[18] Id.

LABOUR COURT

to conduct themselves in a disorderly manner. Mr Ntuli ought to have known that, while he was free, as a senior employee, to join AMCU and assume a leadership role, he was walking a tightrope.

[68] Lastly, it is apparent from the evidence of Ferroglobe that the trust relationship between the parties had broken down. Mr Ntuli baselessly accused Ferroglobe of dishonesty in relation to the minutes of the poor work performance sessions and the record of Mr Forster's disciplinary hearing. Moreover, Mr Ntuli refused to take responsibility for any of his actions. Instead, he sought to blame everyone else but himself. Worse still, Mr Ntuli showed no hint of remorse for his conduct. I also find it curious that Mr Ntuli contends that he ought to have been demoted instead of being dismissed for poor work performance. However, there is no evidence that he would have consented to a demotion, a precondition for demotion in terms of the disciplinary code.

[69] Mr Ntuli's long service with Ferroglobe is not mitigatory as he ought to have known the typical behaviour and performance that was expected of him as a senior employee. That there was no previous disciplinary offences that were still current at the time is not weighty enough to tilt the scale in favour of Mr Ntuli and spare him the sanction of dismissal.

[70] Viewed holistically and cumulatively, Mr Ntuli's conduct in relation to each charge was serious enough to warrant a sanction of dismissal.[19]

Conclusion

[71] In all the circumstances, Mr Ntuli failed to make out a case for automatically unfair as envisaged in section 187(1)(d) and (f) of the LRA as he failed to objectively establish that a main, dominant or even proximate reason for his dismissal was as a result of him holding the position of shop steward of AMCU.

[72] By the same token, the dismissal of Mr Ntuli for poor work performance and misconduct was substantively fair.

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[19] See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) para 78.
Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate [2014] ZALAC 136; (2015) 36 ILJ 968 (LAC) at para 18.

LABOUR COURT

Costs

[73] It is well accepted that costs do not follow the result in this Court. In the present matter, I am disinclined to award costs against AMCU as it would offend the principles of law and fairness.

[74] In the circumstances, I make the following order:

Order

1. The applicant's automatically unfair dismissal claim is dismissed.
2. The dismissal of Mr Ntuli is substantively fair.
3. There is no order as to costs.

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P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant:	Advocate L Hollander
Instructed by:	LDA Incorporated Attorneys
For the Respondents:	Johan Olivier of Webber Wentzel Attorneys

LABOUR COURT