Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

CASE: C301/2020 and
C541/2020

In the matters between:

SHOWUSA on behalf of LUPHO
MHAMBI AND 139 OTHERS **Applicants**
and

ELGIN POULTRY ABATTOIR (PTY) LTD **Respondent**

consolidated with

SACCAWU on behalf of FARO AND 29 OTHERS **Applicants**

And

ELGIN POULTRY ABATTOIR (PTY) LTD **Respondent**

Date of hearing: Dates of hearing: 16 – 20 August 2021; 9 – 12 and 23 November 2021.
Date of judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 3 August 2022

Summary: (Unprotected strike – workers transferring allegiance to community leaders but retaining membership of recognised union – recognised union refusing to

participate in meetings with community leaders giving advice contrary to its own – Alleged provocation of strike by management by uplifting suspension of HR manager – not proven – Employer taking reasonable steps to communicate ultimatums and notices of dismissal – strike leadership avoiding engagement with management – Post dismissal appeals not selectively provided – Grounds of alleged unfairness not established)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a claim for an unfair dismissal of employees who participated in an unprotected strike on 16 and 17 January 2020. Two separate referrals of the dispute were made, one by SHOWUSA ('Showusa'), a union which the majority of the dismissed employees joined after their dismissal, and the other by the recognised union at the time, SACCAWU ('Saccawu'), which were made under case numbers C301/2020 and C541/2020 respectively. For reasons which will become apparent, it is unnecessary to distinguish between the two groups of individual applicants.

[2] The applicants were employed by Elgin Poultry Abattoir (Pty) Ltd ('EPA') situated in the town of Grabouw, a processing plant. Another company, Elgin Free Range Chickens (Pty) Ltd ('EFRC'), a separate entity situated on the same premises employs monthly paid administrative staff, supervisors and members of management. Employees of EFRC were not involved in the strike action.

[3] Saccawu, not Showusa, was the recognised and representative union in EPA at the time of the strike. Showusa did not represent the employees at the time of the unprotected strike and played no role in the events preceding the dismissal of the strikers.

[4] The two cases were formally consolidated on 16 August 2021. At the start of proceedings, the unions agreed amongst themselves that Showusa would play a more active role in the presentation of evidence and cross-examination of EP's witnesses and Saccawu would mainly observe the proceedings. On this basis

Saccawu did participate in the proceedings initially. Saccawu officials informed the Court at the time that they did not want it to be seen that Saccawu failed to act responsibly as it should have in terms of the Labour Relations Act, 66 of 1995 ('the LRA').

[5] Saccawu's officials, Mr C Tyalidikazi ('Tyalidikazi') and Mr R Oostendorp ('Oostendorp'), who was directly involved before and during the strike, observed the first part of the proceedings, and were in attendance when EPA's CEO, Ms J Groenewald ('Groenewald'), Mr M Mienie ('Mienie'), Head of Production, and when EPA's HR Manager, Mr Priscient Moyo ('Moyo') gave his evidence in chief.

[6] Despite the previous understanding, after all EPA's witnesses had testified, Saccawu indicated that it wished to play a more active role and present its own evidence and cross examine witnesses. Nevertheless, shortly before the scheduled continuation of the trial on 9 November 2021, the Saccawu applicants resigned from Saccawu and joined Showusa.

[7] This turn of events led to the parties concluding a supplementary pre-trial minute, in which it was agreed that: -

7.1 Saccawu would no longer be party to the consolidated matter;

7.2 It would withdraw as representative for the aforesaid 30 Applicants accordingly;

7.3 Showusa would act for and on behalf of all the respective Applicants in this previously consolidated matter which would now proceed under case number C301 / 2020;

7.4 The previous agreement between Saccawu and the Respondent, in respect of which there was to be a further identification of issues, and the possible recall of witnesses, fell away;

7.5 Saccawu and its representatives would no longer represent any of the previous applicants who formed part of Case Number C541 / 2020, with the

case to proceed to finalization under C301 / 2020 in accordance with the pleadings filed under that case number.

7.6 The list of further issues identified by Saccawu on 27 August 2021 accordingly no longer formed part of the consolidated action.

[8] EPA's witnesses were:

8.1 Groenewald,

8.2 Mienie,

8.3 Moyo, and

8.4 Ms L Cameron ('Cameron'), EPA's Managing Director, who was called at the instance of the Respondent to be cross examined on a narrow issue of steps taken by EPA on grievances submitted on 20 December 2019.

8.5 Showusa called :

8.5.1 Mr. Lupho Mhambi ('Mhambi');

8.5.2 Mr. Andile Stokwe ('Stokwe');

8.5.3 Mr. Malibongwe ('Ntonga');

8.5.4 Mr. Themba Bonakele ('Bonakele');

8.5.5 Ms. Babalwa Ndubanduba ('Ndubanduba');

8.5.6 Ms. Thandazile Gaba ('Gaba');

8.5.7 Ms. Mathabiso Mathibede ('Mathibede');

8.5.8 Ms. Ntsamayeng Lefusa ('Lefusa'), and;

8.5.9 Mr. Nyika Babalo ('Babalo').

No Saccawu official was called to testify.

[9] Owing to the prevailing pandemic, the parties agreed that the trial would proceed by way of a virtual Zoom hearing. The union and its witnesses were situated in one of the courts and EPA and its witnesses at its counsel's chambers. Each party had an observer at the venue of the opposing side to monitor the questioning of witnesses *in situ*.

[10] Oral argument was heard on 23 November 2021.

The essence of the applicant's unfair dismissal claim

[11] It is common cause between the parties that the applicants were dismissed following an unprotected strike. The applicants claim that their dismissal for participation in the unprotected strike was unfair for one or more of the following reasons:

11.1 The strike was provoked by the company permitting Moyo to return to work, even though he had been suspended pending finalisation of various complaints about him and despite pleas by the applicants to management that he should leave the premises.

11.2 No ultimatums were served on the applicants. The only documents served on them was an interim court interdict obtained on 24 January 2020, and they only became aware of their dismissal after they approached Saccawu following receipt of the order.

11.3 EPA was inconsistent in its treatment of strikers because some of them were given an opportunity to attend a post-dismissal hearing to appeal against their dismissal and were reinstated, whereas the applicants were not given this chance.

[12] EPA rejects the applicant's claims. In short, its response to these allegations, is that:

> 12.1 Moyo had not returned to work and management had not been approached to ensure that he left.
>
> 12.2 EPA communicated two ultimatums to the applicants and shop stewards as well as Saccawu. The second one warned that if strikers did not report for work by 10h30 on 17 January 2020 they would be dismissed.
>
> 12.3 The dismissal notices advised workers of their right to complete an appeal notice if they wished to challenge their dismissals, and all those who did complete such notices were given an opportunity to appear before a hearing before a chairperson who was not an employee of the company.

Background detail and outline of events

[13] Elgin Poultry Abattoir (Pty) Ltd owns the premises in Grabouw, from which its poultry abattoir operations are conducted. The premises house a processing plant in which some 400 general workers work.

[14] The Applicants were all general workers of EPA, working in different sections of the abattoir, where they performed various functions from the slaughtering of the birds through to the evisceration, de-feathering, cutting up, filleting, trimming, packing, stacking, labelling and adding value to the products (deboning, making sausages, placing products in marinade or stuffing of birds, putting them onto kebabs, skewers). The workplace had different operational sections such as cut-ups, value adding, packing, dispatch, laundry,etc.

[15] EPA employed approximately 400 process workers and processed approximately 135,000 chickens per week operating on a five day week with a single shift. The Elgin Poultry group as a whole employed about 800 persons in permanent jobs in the Grabouw area, which made it a key employer in the district. The group was engaged in a projects in the town, such as establishing an ABET school. The

distribution of finished products takes place seven days a week. The production process is conveyor belt driven. If the line stops the quality of the product deteriorates and partly processed chickens can end up on the floor. Once production is started everything on the line must be fully processed, before it can be stopped.

[16] EPA's biggest customer is Woolworths accounting for nearly 60% of its business. Apart from being Woolworth's sole supplied in the Western Cape, it also supplies the Spar Food Group and Bidfoods, EPA also has 13 of its own stores in the Western Cape.

[17] EPA not only produces for Woolworths it also distributes to Woolworths. It delivers to their central depot, using either some of its own vehicles or their vehicles, depending on volume and amount. Each day, product has to be delivered at the Woolworths distribution centre and from the distribution centre it goes out to the stores.

3 December 2018

[18] On 3 December 2018 a three year collective agreement on substantive issues was concluded with the trade union SAUWOLIMO, which was the recognised union at the time.

17 January 2019

[19] Unprotected strike action took place on 17 January 2019, when 16 workers walked out of work in protest at the arrest of eight employees for violence and damage to property.

25 May 2019

[20] On 25 May 2019, there was another unprotected strike over demands covered by the three year collective agreement and about the role of HR in the employment relationship. All in all, Groenewald said that the plant suffered 6 work stoppages between January and November 2019.

7 June 2019

[21] On 7 June 2019 a grievance was lodged against Moyo, the HR manager. The complainants alleged that there were fraudulent irregularities in wage payments, that employees had been forced to accept the collective agreement and that the HR manager represented the employer's interests rather than serving employees. The desired outcome sought by the grievants was the dismissal of Moyo. The grievance was investigated by a representative of EPA's employer organisation who produced a detailed report and made recommendations.

7 June grievances against the HR manager

Moyo's role as HR manager

[22] Moyo had been employed by the EFRC in 2009 as a wages and salary clerk. He was promoted to the position of payroll administration and HR officer in 2011. In 2019 he was appointed as the HR manager. He holds a string of qualifications covering accountancy, payroll administration, health and safety, practical labour law and a BComm degree in industrial psychology. He testified that his functions at EPA included remuneration benefits, including pay calculations, training and development of staff, employment relations and the administration aspects of disciplinary proceedings. He is not involved in decisions to transfer staff from one department or another, which is a line management function, nor does he make decisions on employee remuneration. In his understanding, his role in employment relations is to ensure that parties are treated fairly in line with labour legislation, collective agreements, contracts and policies and procedures.

[23] Moyo testified that, prior to May 2019, he had assisted in obtaining statements for disciplinary inquiries, arranging enquiry dates and communicating the outcome of inquiries. In the enquiry itself his role was to ensure both parties got a fair opportunity to present their cases. It was always the line manager's responsibility to drive the disciplinary process and an independent chairperson would hear the enquiry.

[24] After May 2019, he no longer took statements and did not communicate the outcome of inquiries. Line managers took over these functions. He was still required to evaluate disciplinary processes to see that the various line managers were conducting the process consistently and in line with policies and legislation. If a sanction of dismissal is imposed, his function would be to ensure that the administration of the termination of employment was completed. He had no authority to make disciplinary decisions or to authorize payments to employees.

[25] Mienie confirmed that management decided Mr Moyo would have "less involvement... in his role as an HR manager, so all of the outcomes and so on, I would make sure that it is in line with the disciplinary code. So it was management's decision to not have as in, or as I say, as involved, but to clearly show the employees that we have made a decision and to have Mr Moyo distance himself from the disciplinary proceedings."

[26] Moyo also testified that his industrial relations role was to try and preserve continuity in EPA's relationship with Saccawu, which was the majority union at the time. In his own view he had a good relationship with the union officials and shop stewards and also with other employees who were influential and sometimes participated in meetings. These were persons who are not necessarily shop stewards but were individuals whom other workers respected.

[27] When Mhambi testified, he maintained that there had been no changes in Moyo's role in disciplinary proceedings after the conclusion of the investigation into the June 2019 agreements. Mhambi started working for the company in 2005 and became a shop steward in 2019, He did not specify what had not changed, but simply said that if there had been a change, things would not have turned out the way they did.

Alleged financial irregularities

[28] The first issue related to a single instance in which a reimbursement due to an employee had been erroneously paid to another employee with the same name. Moyo testified that the incorrect employee details had been submitted to the finance

department, which resulted in the mistake. The payment had been recovered from the incorrect beneficiary. As HR manager, he had not been involved in authorizing the original reimbursement, but when he realised that the correct employee had not received the reimbursement he took steps to recover the payment made in error. The person who received the incorrect payment did not come forward and it was only when the correct beneficiary complained that management became aware of the issue. Moyo testified that the employee who had been incorrectly paid agreed to the money being deducted and the correct employee was paid. His own role was simply to facilitate that process.

[29] The accusation against Moyo was that he had fraudulently engineered the payment of the incorrect employee. The investigation of this grievance was conducted by the HR director, the employer organization and the finance department. Moyo testified that the shop stewards were present in the grievance meeting where he gave his explanation about the event.

[30] Under cross-examination, Moyo explained that he did not know the reason for the reimbursement being authorised, but understood it was for an expense the employee had incurred on behalf of the company. The decision to make the payment was a decision of executive management and he was only asked to provide the employee’s bank details.

[31] In the investigation report on the grievance it was concluded that the proper financial procedures had been followed "(n)o discrepancy or suspicious activity leading to the instruction being met by management was uncovered during the investigation." It also confirmed that the HR department had no authority over the payment of any remuneration which was a function of the finance department.

Alleged coercion of employees to sign agreements

[32] In relation to the complaint that employees were being required to sign agreements Moyo testified that employment contracts required an employee’s assent and the collective agreement concluded with SAUWOLIMO, which had been questioned, was applied to employees just as previous agreements had been. He

said there was a perception that the collective agreement was something imposed on employees by the HR department. In his later testimony, Mhambi gave vague hearsay evidence that “another guy” reported that Moyo told him he must come and sign for “the wage increment”, but he refused to and was called again because the shop steward queried if that was fair. This vague allegation was not put to Moyo.

Recommendations

[33] On the question of the role of HR, the investigation report noted that disciplinary hearings are chaired usually by an independent chairperson. Recommendations were also made for certain initiatives HR could undertake to engage more with employees and communicate with them on day-to-day matters affecting them and the business. Moyo said that, as far as he could, he tried to ensure that company policy and procedure were followed by both parties in the relationship, but that approach was not always appreciated by the employees. He believed that this arose when there was alleged misconduct and he had to advise both parties on company policy and procedure relating to that. When he explained what the laid down procedures were, or the terms of employment, he was perceived as simply representing management’s interests. For example, if he was required to investigate an alleged transgression involving late coming, he would obtain the records then try and get the employee’s explanation and advise the employee on what was expected in terms of their conditions of employment, which was not well received.

[34] The grievance investigation report on the role of HR stated:

> “Employee representations in disciplinary hearings and inquiries are handled in line with the company’s disciplinary policy and procedure. All disciplinary inquiries that lead to dismissal should an employee be found guilty are chaired by an independent chairperson you on most occasions is not an employee of the company.
>
> In the past Management has seen HR work for all in the workplace. It must be pointed out that our HR department needs to engage more with

employees and maintain an open communication policy on day-to-day matters that affect the organization and its employees. Employees must be made aware and educated on current standing rules and regulations to ensure non-compliances related to misinterpretations are reduced. In order to build relations HR will need to develop the following roles:

6. Provide leadership and direction to employees.

7. Initiate employee development exercises.

8. Engage and encourage dialogue with employees.

9. Embark on diversity management.

10. Be involved in community and organizational sustainability awareness and initiatives."

[35] The final recommendation made for resolving the grievance and the conclusion of the grievance was set out thus:

"Recommendations

In the endeavour to resolve the grievance, the investigator proposes a meeting between the union Saccawu and its union representatives together with the alleged aggravator. The purpose of the meeting will be to share the findings of this investigation conducted as well as engage dialogue between all the parties concerned. The grievance laid against Priscient Moyo, in his role as HR manager does not warrant his dismissal from the employment of the company.

It is however a responsibility of all parties including HR to work together and rebuild peaceful and fruitful work environment for all.

Conclusion

A meeting was held with the union Saccawu representatives, EPA employee representatives, where the outcome of the investigation was presented to the committee and all parties were in agreement that the matter had been closed off."

[36] Mhambi acknowledged the recommendation and the conclusion, but denied that the shop stewards were party to either. He did not understand why it was said that the matter was closed off and did not recall even attending such a meeting.

[37] There were no further meetings about the June 2019 grievance, and Moyo claimed that through dialogue and engaging proactively with employees he encouraged them to consult with HR before doing anything that might conflict with company rules, as it was easier for HR to give advice at that stage before any transgression took place. Mhambi agreed that the grievance in June was resolved, but workers did not see the change in Moyo which was supposed to take place. In this regard, he referred to Bonakele's case, claiming that Moyo had unfairly dismissed Bonakele. He mentioned another example of an employee who was allegedly dismissed, Mapholo Ndlela. However, no further details of this claim were provided and it was not raised with Groenewald or Moyo when they testified.

[38] It was put to Groenewald that, as far as the workers were concerned the issue was not resolved because Moyo was not removed from the company. Groenewald's response was that it was only in December 2019 that the issue of Moyo not being at the premises was raised and then it was only while an investigation was conducted.

Meetings of 17 and 22 October 2019

[39] On 17 October 2019 a meeting took place between management, employee representatives and Overberg Safety Forum (OSF) regarding community concerns regarding labour matters at the abattoir. Groenewald testified that the forum had been established to mediate issues so they did not escalate into protest action. Later it was renamed the Overberg Peace Forum. The meeting was called partly to assist shop stewards to understand their roles. Follow-up meetings took place on 22 and 25 October 2019. Groenewald testified that the purpose of the meetings was to try

and introduce a system of mediation to resolve community issues without people feeling the need to resort to protest action and violence. Groenewald said that the other parties were ward counsellors, police representatives and leaders from recognised organisations. The second meeting on 22 October occurred following an incident where 16 employees walked out during emergency overtime, which they were required to work in terms of their employment contracts. Emergency overtime work is necessary to ensure that slaughtering operations are completed for hygienic reasons, following a disruption of production owing to a breakdown or some other reason.

November 2019

[40] Groenewald testified that in November 2019, as a result of six different incidents of unprotected strike action starting in January 2019, Woolworths Managing Director of Foods advised senior management of EP that unless they came up with a plan to ensure uninterrupted supply of poultry products, it would have to look for another supplier because it had incurred losses in consequence of the interrupted supply. Woolworths relied wholly on EPA for its chicken products, and had suffered losses on account of the interruptions caused by the strike action. Other retailers had more than one supplier. EPA considered confining the slaughtering process to Grabouw and performing other operations at sites elsewhere.

3 December 2019

[41] On 3 December 2019, there was a meeting held at the request of local government representatives from Wards 12 and 13 in Grabouw. The purpose of the meeting was to discuss unfair dismissals, safety at work and the relationship between employer and employees. Management representatives asked them to provide further detail and advised them that these issues should rather be raised through the union and shop stewards, who had the mandate to represent workers, rather than through community representatives. At that time, the representative union was Saccawu which had been involved on an ongoing basis in resolving workplace problems. Even so the company would still meet with members of the Overberg Safety Forum, though it advised them it would prefer to deal with labour

matters through the union and shop stewards. At the 3 December meeting the community representatives who had requested the meeting said they wanted to convene another meeting with additional community representatives, but EPA management expressed the view that the prospect of convening such a meeting was very slim because the company was already dealing with a community forum and Saccawu, a registered union, was dealing with labour matters on behalf of employees.

19 and 20 December 2019

[42] On 19 December 2019 employees embarked on unprotected industrial action at the Respondent's premises.

[43] Stokwe, who described himself as a community leader in the Overberg area, said that he became involved in December 2019 when there was a "massive protest" after he received a call from an unknown person who probably knew that he was a leader, to intervene in protest. He was concerned that there were other "opportunistic" politicians and leaders advising workers to destroy infrastructure if they wanted their grievances to be heard. Knowing how damaging and any widespread practice could be for the town and the accompanying risk of possible disruption of the traffic on the N2 he was keen to prevent matters escalating. He said he was part of the local mediation forum and the Community Police Forum [CPF]. He went to the processing plant with other leaders and managed to intervene. Initially he had gone to the police and spoken with the station commander and chairperson of the CPF to arrange a meeting with the company The police station, but he suggested that they should go and meet at the company premises because that was where the protest was taking place. A meeting then took place between the SAPS, CPF, community leaders and EPA. The chairperson of the CPF chair the meeting. Stokwe understood that the workers grievances concerned certain working conditions and alleged persecution by the HR manager. Groenewald testified that, after workers had downed tools, a meeting was convened with shop stewards, community leaders and the OSF to deal with further grievances raised against Moyo and a list of additional demands which had been submitted.

[44] Stokwe, who claimed he was the leader of “his delegation”, testified that a robust discussion lasting more than three hours took place eventually resulting in a consensus, even though the company was reluctant to discuss some of the issues. It was agreed that a follow-up meeting would be held on 13 January 2020.

[45] A significant development at the 19 December meeting was that Saccawu refused to attend the meeting because they could not deal with matters which community leaders were taking up and in circumstances where shop stewards were taking advice from the latter instead of the union. Saccawu, represented by Oostendorp distanced the union from the shop stewards, community leaders and unprotected strike action and refused to participate in meetings on work issues in which the community leaders were involved.

[46] Ms Groenewald was of the view that the union became frustrated in December 2019 when other community leaders started coming in to meetings and giving workers contrary advice to what Saccawu was giving them, to the point that union members no longer listened to the union. Before then, Saccawu had participated in meetings with EPA attended by the Overberg’s Safety Forum / Peace Panel. According to Groenewald the community leaders whom workers wanted to participate in the meeting, did hold any recognised positions, though Groenewald had the impression that they might be standing for positions in the future. The company accommodated them because it was claimed that people were not being properly heard. However, things fell apart when the community leaders were giving workers different advice to the advice given by the union. The applicants did not dispute that they were not willing to take advice from the union. Mhambi claimed it was Stokwe, who persuaded them to return to work on that occasion.

[47] Groenewald testified that, even though the company believed that the previous agreed grievance process had resolved matters concerning Mr. Moyo, it nonetheless agreed to suspend him pending an investigation, pending the complaints being reduced to writing, which was done the following day. He continued to work at home. It was suggested to Groenewald that it had been agreed that if Moyo was seen at the firm they would immediately strike. Groenewald pointed out that this was what the grievants had expressed as the desired outcome of the

grievance which the workers recorded in the group grievance they submitted on 20 December. The firm had not agreed to it. All that had been agreed to at the meeting on 19 December was that Moyo would be suspended pending the outcome of the grievance investigation.

The 20 December group grievances

[48] On 20 December 2019, a two group grievances were lodged by 10 employees all of whom were shop stewards, except Mr L Mhambi and M Mnyabiso. The first group grievance was described in these terms:

> "1..Transport.
>
> 2. Teatime.
>
> 3. The workers at laundry must be changed and stores.
>
> 4. Management OS money which supposed to?? On November 2019.
>
> 5. We want Sunlum instead of Verso.
>
> 6. We want full uniform.
>
> 7. No more working on holidays and weekends.
>
> 8. Management must ask for overtime not supposed to be must to work overtime.
>
> 9. Management must hire casuals to work on December.
>
> 10. We do not want to rate hourly we want rate day.
>
> 11. We want to go home by 15:00 on Fridays.
>
> 12. We do not want to mixed with Ubuntu in the next meetings."

(*sic*)

[49] The other grievance focused again on Moyo, *viz*:

> "1. In the last few months we grieve about Mr Moyo then after that grievance later he did not change.
>
> 2. He fires people with no reasons.
>
> 3. He also said when he goes he will not go alone. Then it happened he dismissed more people.
>
> 4. He said to Babalwa must resign the union if not he will send her in a cold place.
>
> 5. When he hire someone in that person decide to join the union he cancel the contract."
>
> (*sic*)

The 'desired outcome' of this grievance was stated as:

> "The workers says if they see Mr. Moyo in the firm again we are out of the firm."
>
> (*sic*)

[50] The specifics of these grievances are dealt with below.

20 December 2019 grievances against the HR manager

Moyo did not change after the June 2019 grievance.

[51] Although it was not articulated as part of the grievance, it was put to Mienie that Moyo was still involved in disciplinary hearings because he was 'strongly'

involved in the case of the dismissal of one of the shop stewards, Bonakele, towards the end of 2019, including initiating the case. Mienie pointed out that Moyo was present at the hearing but he was not the initiator. Moyo testified that he performed his usual function of making sure the procedure was followed and he was unaware of any complaint about his role in that hearing. He had no role in initiating or chairing the hearing.

[52] It was put to Mhambi that in the report on the result of the OSPF intervention in October 2019 it was reported that Moyo's role had been redefined in relation to disciplinary matters and he no longer perform the function of an initiator. This was also reflected in the report on the dismissal of Bonakele, which also recorded that Bonakele had ultimately been reinstated after his case went to the CCMA. Mhambi was asked how that could have been a reason for workers striking on 16 January. His response was that the employer did not resolve employees' issues and Bonakele's case was only resolved under difficult circumstances where he had to fight for his reinstatement.

[53] When Moyo was asked if he had changed the way he conducted himself since the June 2019 grievance, he explained that he had tried to be more proactive in ensuring that employees approached HR before a problem developed, rather than afterwards, so that he could offer advice timeously. He testified that they had been a number of relationship building meetings between September and December 2019 and before then, involving the employer, employees and HR. He believed relationships were improving. It was put to him that that could not be the case because otherwise the complaints would not have been raised against him, to which he retorted that if the complaints were valid he would have been dismissed.

[54] It was also put to him that he had tried to make one Mr N Lamhase sign an agreement and had even called security staff because he refused to sign it. Moyo could only say that nobody could be forced to sign an agreement they did not want to, but he could not recall the alleged incident without knowing more detail. No witness was called by the applicant's to corroborate this complaint.

Moyo fires people with no reasons.

[55] It was put to Moyo that the main complaint against him was that he was firing people without good reason and threatening to terminate their service. Moyo reiterated that he was not involved in firing anyone and if anyone's service was terminated that was not a result of his doing, nor had he threatened anyone with dismissal. No specific case was put to Moyo about either of these complaints, except for repeating the complaint relating to Bonakele.

Moyo said when he goes he will not go alone. He then dismissed more people.

[56] It was put to Moyo that he had made this comment when the grievances were raised against him. Moyo's response was that the allegation made no sense. If he had committed a transgression which led to his dismissal that would not result in anyone else being dismissed and, in any event, as he repeatedly testified he had no authority to dismiss anyone.

[57] Mhambi testified that he got a report that Moyo had spoken to another female employee telling her that she was "eating here" but lodging complaints against him, so he was not going to "go alone". This allegation was never put to Moyo during cross-examination, nor was any direct evidence adduced to back up Mhambi's hearsay testimony.

Moyo told Ndubanduba to resign from the union otherwise he would send her to a cold place.

[58] Apart from the specific complaint about Moyo allegedly threatening to transfer the employee to another cold section if she did not resign from the union, it was alleged that he would not let union members work in the laundry section. Groenewald agreed that she had heard about such a complaint but Moyo had no authority to transfer or dismiss anyone. That was a matter for departmental heads and supervisors.

[59] Moyo denied that he would ever tell employees to resign from the union because it was their constitutional right to associate with whomsoever they wished and he never mentioned a ‘cold place’ to Ndubanduba. In any event, it was the function of line managers and supervisors to transfer employees around. There was a good relationship with the union at the time and he saw his role as the HR management to ensure a stable relationship between the employees, employer and the representative unions. There had been a history of employees changing unions and he had to build relationships with the union that was current at the time. It made his work easier if there was a stable union that could maintain its membership because it meant he did not have to keep rebuilding relationships with new shop stewards and new trade unions.

[60] When Moyo asked for more specific details about what he allegedly conveyed to Babalwa, he was told that he had realised she was a union member but union members were not allowed to work in the laundry so he had told her she should resign if she wanted to continue working there or he would send her to a cold place. Moyo responded that employees could work in any department regardless of their union membership. EPA simply processed union subscription forms on the payroll system when they received them. He recalled that in fact there was a shop steward, ‘Lamla Forqui’ working in that section and he had never gone to him to say she must leave the union. When it was put to him that this individual had only been working temporarily in the laundry because he had been injured in another section, Moyo reiterated that employees were allocated to work in different sections based on operational needs or their employment contracts and not on the basis of union affiliation. His contention about who had authority to make transfers was not seriously disputed in the trial.

[61] Mhambi testified that Ndubanduba had been upstairs and told him that Moyo had told her to resign because no union people worked in the section where she was working and she had been given a form to resign from the union. Ndubanduba testified that when she was working in the laundry she had been summonsed to see Moyo one day before she knocked off. He asked her if she liked her laundry job and said that if she did she must resign from the union, which she refused to do. The following day she was called to his office again and he gave her a notice of transfer

to ‘cut ups’, which she signed. When she got there she realised it was a cold place and she needed to borrow clothes because she was not dressed warmly that day. She lodged a grievance with her shop steward. A few days later Mienie came to her and told her to write down what Moyo had said to her. She claims the shop stewards never came back to her about the progress of the grievance even though they said they would. She wrote the statement as requested by Mienie after Moyo had been suspended on 19 December 2019. Mienie was not asked about this interaction with Ndubanduba.

[62] Ndubanduba said that she had previously worked in a cold place when she was employed on a contract. After that contract ended she had been recalled to work at the laundry and stores. She denied she replaced someone who was on leave. She had replaced someone who had been dismissed.

[63] Under cross-examination, Moyo said he had sent an email to management while he was on suspension he had provided the same answers to the grievances as he had given in court. Until he was cross-examined, EPA’s legal representatives were unaware of the possible existence of such a document. However, after making further inquiries a copy of Cameron’s email to Moyo dated 23 December 2019 requesting his comment about the allegation that he had threatened to send Ndubanduba to a cold place if she did not resign from the union, and his written response thereto of the same date was obtained.

[64] The documents were produced the day after Moyo had testified and the union objected to their introduction arguing they should have been part of the employer’s bundle and as the documents only came to light after Moyo had testified that he had sent such an email, their authenticity was questionable. Because the alleged existence of the document came to light under cross-examination and given that the union challenged Moyo’s evidence on the basis that if there was such a document it would have been part of the bundle, as well as the significance which had been attached to the alleged threat made by Moyo, the respondent was allowed to introduce the document, subject to certain conditions. Those conditions were that Moyo was recalled for further cross-examination on the issue and it was recorded as

a matter of dispute whether Moyo's written response was genuinely written on 23 December 2019 or only after he had testified in court on 9 November 2021.

[65] In Moyo's written response to Cameron's request for his explanation about the allegation concerning Ndubanduba provided more details. He states that she was transferred from the packaging to laundry as a temporary leave replacement and was transferred back to packaging purely on account of operational requirements. When her contract was reviewed to appoint her permanently the only available permanent positions were in the filleting department. She had confirming the transfers in writing. Moyo added that, historically, unions were substantially represented in the workforce and one person's resignation would hardly make any difference to the level of unionisation of the workforce, so there was little reason for him to act as alleged even if he had bad intentions, which he did not. Moyo said he had no knowledge whether his responses to Cameron had been conveyed to Ndubanduba. He was not asked to respond to the other grievances, which he was told was similar to the ones raised in June 2019.

[66] At the union's request, Cameron was also cross-examined on the late discovery of the document. She denied that the document did not exist before Moyo gave his evidence. If necessary, it could be established that it did exist on 23 December 2019 from the firm's email servers. She claimed that their investigation revealed that Ndubanduba's complaint was false, but could not remember if Ndubanduba was interviewed. However, they had a lot of meetings with the shop stewards at the time and she was confident it was discussed with them, even if the document itself had not been disclosed to them. She agreed that the list of 14 demands that had been handed in on 20 December had not been addressed, but all the grievances against Moyo were.

[67] Contrary to what Moyo had stated in his written response to Cameron, Ndubanduba claimed that she obtained a permanent appointment in the laundry department, not the 'cut ups' department, which was presumably a reference to the filleting department. She testified that she never saw Moyo's written response before the trial.

When Moyo hired someone and that person joined the union he cancelled their contract

[68] Moyo reiterated that he had no role in initiating or deciding disciplinary matters, even before June 2019. The only contracts which could be 'cancelled' were casual contracts which ended in line with the requirements of that contract. Apart from the fact that it would be unlawful to do so, it would make no sense to terminate someone's employment on account of union affiliation because that would undermine union stability, and make his work more difficult. The only specific example advanced by the applicants was that Bonakele would come and say that he was employed as a casual employee and told he should not join the union because the union was for permanent employees and if he did join his contract will be cancelled. As far as Moyo could recollect, if Bonakele had been on a casual contract when he started, he was later permanently employed, which would not have been the case if the allegation was true. The decision whether someone was employed on a casual permanent basis was essentially made in line with operational requirements and budgets. It was contended that Bonakele only became a union member after he was employed permanently because of what he was told. Moyo could not say when Bonakele joined the union but both casual and permanent employees could belong to the union.

Additional complaint not mentioned in the 20 December grievance against Moyo

[69] Another matter raised during the trial concerned a worker who had been injured on duty and was disciplined for noncompliance with safety regulations by working on a machine he was not supposed to be working on. From the record it appears that he received a final written warning. Moyo recalled the incident and that he had taken the injured individual to hospital at the time of the accident and for follow-up appointments. The accident took place in March 2018 and was raised as one of the 'ongoing' issues concerning Moyo. The essence of the complaint was that the employee contended that he had been working on the machine previously, but it was only when he was injured that the issue of him being authorized to work on it came up. It was suggested that because Moyo was present during the hearing he played a role in only taking disciplinary measures against staff for doing work they

were not supposed to do when they were injured in the course of doing that work. As far as Moyo could recall even though the employee was represented at the enquiry the issue of him previously performing work on the same machine was not raised during the enquiry. As stated before, he played no role in the initiation determination of the sanction in the enquiry. Reference was made to another employee who suffered a severe thumb injury and it was argued that the company was not doing enough about health and safety issues. This had not been pleaded as one of the reasons for the strike, though it had been cited by Stokwe as such in a newsfeed around 20 January 2020.

[70] Moyo stated that health and safety matters were the responsibility of the health and safety officer at the plant, that employees were trained and there were regular audits both by the Department of Labour and by Woolworths. During those audits interviews were conducted and shop stewards were involved and the complaints which were being raised now were not raised then.

Group grievance containing substantive demands

[71] As mentioned above, in addition to the grievances against Moyo, a list of demands had been tabled by shop stewards , which raised a host of substantive issues concerning, amongst other things: transport; teatime; a uniform to go home in; abolition of weekend work and compulsory overtime; closing at 15 H00 on Fridays; non-forfeiture of a year-end hamper on account of embarking on unprotected strike action; being paid on a daily rate rather than an hourly one, and negotiation of one-year wage agreements instead of three year agreements.

30 December grievance

[72] A further grievance which was raised on 30 December 2019 against Mr Mabolo, the logistics manager, in which Mr Mhambi featured and in respect of which the complainants proclaimed ‘ENOUGH IS ENOUGH’. This was met by an in depth response by the company. Mienie concluded that Mr Mabolo was simply doing his job and individuals who were being required to comply with their work duties, such as Mr Mhambi were targeting him for taking them to task.

3 January 2020 stoppage

[73] EPA workers starting at 06h30 refused to work. The apparent cause of the stoppage was a number of queries about payslips and the computation of overtime work. Workers reporting at 07h30 followed suit and joined the first group which had stopped working.

Monday, 13 January 2020

[74] On 9 January 2020, EPA invited a large array of additional external role players to a meeting with the union and shop stewards at 11h00 on 13 January at EPA premises. It was called because of the ongoing disruptions, which had even attracted the attention of the provincial premier, according to Groenewald. Groenewald testified that local community leaders were also invited to the meeting. The additional government office bearers and functionaries invited were: The Western Cape MEC for Community and Safety [Mr. A Fritz]; senior officials of the Department of Labour responsible for labour inspections [Ms J Plaatjies and Mr D Esau]; Western Cape Finance MEC and Economic and Tourism MEC [Mr D Maynier and Mr I Meyer]. The company sought the assistance of these individuals as mediators to try and find a solution to the labour problems the company was dealing with. The problems were described in the following terms in Groenewald's email to the state functionaries and political office bearers:

> "We are finding ourselves in a situation where certain community leaders with some staff in our company are trying to continuously disrupt operations. They putting ultimatums on the table with the outcome that if not made they will withhold their services. In meetings whereby all parties were invited, the union leader has refrained from being part of these, and has said he is distancing himself from community lead issues. This makes mediation process is very difficult as the community does not have a mandate to negotiate on behalf of the workers, and the union leaders are not there to guide the shop stewards.

> The financial impact on our company from go slows, walkouts and protest action or becoming crippling.
>
> Our first objective is to resolve this issue amicably and to continue business as normal. Second objective will be to move the larger part of our business to another area to prevent total shutdown in future. The negative impact in the Grabouw area will be dire as more than 400 jobs will be lost, which in return will probably affect at least 2000 people. As Grabouw already has a very high unemployment rate this is just going to increase the situation.
>
> We hope and trust that through your guidance as neutral mediators we will be able to find a solution.
>
> …"
>
> (*sic*)

[75] Although Groenewald said she convened the meeting, it had been previously arranged at the meeting on 19 December, at the instance of the peace panel.

[76] According to Groenewald, the meeting on Monday 13 January was attended by representatives of the Departments of Labour, Economic Development and agriculture. The Saccawu organizer, Oostendorp, was present, as were members of the OSF, community leaders, and Saccawu shop stewards. Two of the ten signatories to the group grievance of 20 December, Mr A Mnyobiso and L Mhambi, who were not shop stewards, also attended the meeting. Before the meeting, Groenewald had obtained statements from Moyo and Babalwa, believing that the grievances could be addressed without the need for further statements.

[77] Although she said the meeting was a follow up to the 19 December meeting, Groenewald said that community leaders were invited by the workers to the meeting, not by the company. She could not say which community members attended as the attendance register had gone missing after the meeting following a caucus meeting afterwards in the same venue between the union and shop stewards. She believed it

was possibly picked up amongst other papers of people at the meeting. Although the register was circulated she could not say if shop stewards had refused to sign the register because community leaders were not admitted to the meeting.

[78] Stokwe said the community leaders were not invited by EPA to the meeting, contrary to what had been agreed and even though it was a follow up to the meeting on 19 December. As a result the community leaders did not attend, but he heard that Mhambhi and the other shop stewards left the meeting because someone inside the meeting did not want the community leaders present. Stokwe claims he had to defend himself amongst the other community leaders because they were expected to hear from him about the meeting. He believed that the protest began again because the community leaders were excluded from the meeting.

[79] Groenewald testified that the Department of Labour representative, Esau, told the shop stewards that community members had no mandate to negotiate on behalf of employees at the company. He could not participate in the meeting if community leaders were representing workers. He urged the union and shop stewards to come up with the list of issues which the department could audit.

[80] Mhambi denied that anyone at the meeting of 13 January said community leaders should not be present. However, he testified that the shop stewards did leave the meeting, on account of the union distancing itself from them. Groenewald claimed Saccawu did not have difficulties working with the OSF, but when other community leaders became involved in December 2019, it found that whatever it advised workers, the community leaders were giving contrary advice, which workers were following.

[81] Groenewald testified that the result of the meeting was an agreement that the union and shop stewards were going to present a full list of grievances to the Department of Labour which would conduct a full audit of everything.

[82] Moyo was present at the premises that day but remained in the CEOs office, waiting to be called to the meeting that he understood was going to deal with the grievances which had been raised in December. However, he was never called to

the meeting and was told to go back home. He was adamant that, apart from 13 January, when he was summonsed to be available for meeting, he was never at the premises on 16 January when workers walked or on other occasions during his suspension as they alleged.

Thursday, 16th January 2020

The walk out

[83] At about 13h30 on Thursday, 16 January 2020, shortly after their fortnightly wages had been paid into their bank accounts in accordance with the company's usual practice, the applicants downed tools, got dressed for home, *inter alia* in the general PPE (Personal Protection Equipment) room (where the PPE clothing of some of the workers is stored) and, without notice to anyone or explanation, walked off the premises and embarked on another unprotected strike. Groenewald explained that employees receive SMS's from their banks once their salaries are paid. Groenewald and Cameron testified they were in Somerset West looking at other potential sites for the business at the time of the walk out.

[84] It was put to Groenewald that the reason everyone walked out was because Moyo was seen at the premises before the 19 December grievances against him had been resolved. It was also said that before the workers went on strike the shop stewards called Groenewald and Cameron and told them that workers had informed them that Moyo was on the premises and they will walk out but management did not want to listen to them and when shop stewards tried to discuss the issue of Moyo's presence further with her and Cameron, the pair of them walked out of the meeting.

[85] Groenewald emphasised her earlier testimony that there was absolutely no communication from shop stewards before or after workers walked out on 16 January, so EPA had no feedback whatsoever on what was going on. However, she agreed that at some stage she had received a message from shop stewards that they heard that Mienie was on the site. She advised them he was not and asked them if they heard this to provide proof of him being there because management

knew he was not present. The shop stewards did not come back with any information to that effect.

[86] Groenewald disputed that she would ever have walked out of a meeting with shop stewards and reiterated her testimony that she and Cameron got a call about the walk out while they were looking at the premises in Somerset West. Cameron confirmed that nobody came to inform her that workers were intending to walk out or that the reason they did was that they claimed that they had seen Moyo on the site. She confirmed Groenewald's testimony that they were together in Somerset West at the time of the walk out.

[87] In his testimony, Mhambi alleged that Babalo informed him that he had seen Moyo early in the morning at work. Babalo testified that early in the morning of 16 January, he was passing the gate and he saw Moyo parking his car and going inside the office building. He reported this to Mr Ntonga, a shop steward. He also claimed it was not the first time he saw Moyo during his suspension and he was upset because he knew a suspended person was not supposed to come to work.

[88] Mhambi said that after receiving this report, the shop stewards then went to Cameron and Mienie, who promised that Moyo would be taken out, but then they refused and they asked the shop stewards how long was the company going to always be in the wrong with the employees. Mienie and Cameron then left the shop stewards in the boardroom and that was when things started. Under cross-examination, he maintained that the meeting in the boardroom took place on 16 January and workers walked out when they reported back to them. Gaba testified that, on that day, shop stewards received a grievance from workers and took it upstairs to Moyo, Groenewald and Cameron, who asked them why EPA was always wrong and then these managers left the room. Under cross-examination she corrected herself and said that the meeting was with Mienie and Cameron. They reported what happened to workers, who then walked out and the police were already there when they reached the gate and started shooting at them. He said she ran "to the bush".

[89] Mienie testified that around 13h30 he heard a commotion in the factory. A line manager, Mr J de Bruyn, told him that the staff had started walking out of the factory.

PPE room incident

[90] By the time that he got to the main PPE area where workers changed out of their overalls and put on their personal clothes it was around 14:00. The people gathered in that area were busy removing their factory clothing, boots and overalls and were busy getting dressed in their “normal shoes”. They were dancing and singing at that stage. Mienie testified he saw some of the shop stewards (Sive Makeleni and Gaba) and some of the “natural leaders”. He claimed he tried to engage with them to understand what was the reason for the walk out.

[91] They ignored his request and continued singing and dancing even louder. Gaba, who was present, denied that Mienie attempted to engage the workers about why they were leaving work. He just stood there next to the door. Mienie said he moved back towards the entrance of the main PPE. There was one pedestrian access point for the staff and one emergency exit about two, three meters away from that door. He stood at the pedestrian access point. As he was calling de Bruyn to come closer to him in order to try and engage with him as to what was going on when, workers “stampeded through the doorway” where he was standing. At least eight to ten people were pushing him through the door and he tried to stay upright. He felt he was being pushed to floor and grabbed a hold of the person in front of him. He identified the person that pushed him, who was leading a group of men leaving the area, as Mr P Mbinda (‘Mbinda’). Photographs of Mienie’s bruised Arm were confirmed by him as evidence of the injury he sustained in the melee, which he claimed was sustained from being pushed by Mbinda against the aluminium side of the door. Video footage of workers in the PPE room prior to Mienie being injured was also shown. Mienie subsequently laid a criminal charge of assault against Mbinda. Mhambi said he had no knowledge of the alleged assault and only heard about it for the first time at court. In any event he disputed that Mienie was assaulted because he did not even have ‘a scratch’

[92] Under cross examination, it was put to Mienie that he was actually blocking the exit and Mbinda was pushed by other others behind him who wanted to get through. Mienie conceded that there were a few people behind Mbinda, but he was the one pushing him through the door. When Gaba testified she said that she was present and that workers did not have to push Mienie out the way when they left because he was on the side. She denied Mbinda assaulted Mienie or that Mhambi was present as Mienie alleged. Much time was spent in the trial to determine if Mhambi was visible in the video footage of the PPE room. Mienie claimed that Mhambi was part of the group who 'stampeded' him through the doorway. At the trial, he readily identified Mhambi by sight. The applicants claimed the person in the photograph was in fact Mr Z Matose, who was not a shop steward. Mhambi denied the person in the photograph was him and stated that he did not even work in "that section". Elaborating under cross-examination, Mhambi also denied that he wore PPE clothing and claimed he wore his own clothing where he worked in the dispatch section.

[93] Mienie said that when a roll call was taken after the strike only about 50 staff out of 300 were on the premises.

The first ultimatum

[94] Groenewald testified she was present when Cameron Spoke to Oostendorp at around 14h09. Cameron asked Oostendorp what was going on and why the workers were on strike. He responded that he did not know what to do with them anymore, because the workers would not listen to him. In evident frustration he said the police should: "*Sluit hulle op en gooi die sleutels weg*."'

[95] The first ultimatum was then drafted. It was addressed to all Elgin Poultry Abattoir (Pty) Ltd / Saccawu union members, Saccawu itself and to Saccawu shop stewards. It stated:

> "NOTICE TO EMPLOYEES: <u>ULTIMATUM TO CEASE WITH UNLAWFUL STRIKE</u>

We would like to refer back to the unlawful strike of Thursday, 19 December 2019 where after a consultation meeting was held on Monday, 13 January 2020 with the representative Shop Stewards, the trade union SACCAWU, the Department of Labour, the Department of Economic Development, the Department of Agriculture, Community Safety [Western Cape Government], where after it was agreed that the shop stewards and Saccawu consult on issues and grievances where after these will be handed over to the Department of Labour (Mr David Esau) and CCMA for investigation and further conciliation. All parties agreed to this outcome and next steps and we are currently awaiting instruction from the Department of Labour and CCMA.

This notification is intended to advise all those employees involved with the unlawful strike that this action is not in accordance with the Labour Relations Act 66 of 1995. You are advised that your current conduct constitutes an unlawful and unprotected strike.

Please be advised that an ultimatum is hereby given to all those employees concerned with the unlawful strike to return to the workplace at 16 H30 on 16 January 2020.

Employees must take notice that the principle of “no work no pay” will apply during this period and we urge all individuals involved comply with the instruction to return to work.

Employees must take further notice that management reserves the right to institute disciplinary action against all involved employees.

We sincerely trust that the employees will heed this ultimatum and that the company can continue with business as usual.”

[96] Mhambi insisted that he never received any communication from the company on his phone and that he never heard from the union despite the emails from Oostendorp to the company on 16 and 21 January stating what efforts the union was

making to communicate with members. He could not comment on the evidence that Bonakele was communicating with Oostendorp by WhatsApp.

[97] Groenewald and Mienie testified that a large number of copies of the ultimatum were and they both tried to hand them out to the staff standing outside the gate. Video footage showed Groenewald and Mienie approaching staff outside the premises attempting to hand them copies of the ultimatum. Workers could be seen walking away and one of the shop stewards, Ms T Mngxunyeni, whom they approached would not take a copy of the document despite Groenewald audibly assuring her that there was no need to sign for receipt of the document.

[98] Mienie and Groenewald testified they attempted to reach out to various of the groups standing opposite the company premises on the sidewalk in the road and in the field next to the premises. Video footage shown only captured their attempt at serving the ultimatum on one of the groups. They claimed the majority of the strikers were gathered outside the premises on the 16th and Mienie believed that on the 16th they "reached all or at least the majority of the staff, (who were) standing outside our premises".

[99] Eventually, a pile of ultimatums was left outside under a stone, but Mienie said later in the day they found a lot of the papers just lying around, which he believed showed "the people were not interested in it".

[100] Gaba, one of the main shop stewards, and two other shop stewards, Sive Makelini and Tandile Mngxunga, were specifically identified by Mienie as being present with the group outside the premises on that afternoon. The union put it to Groenewald and Mienie that they could only identify a handful of employees who were gathered outside the premises. Groenewald admitted that she relied on Mienie to identify shop stewards. She was not involved in operations so she was not familiar with all the staff. Mienie disagreed that he could only identify two shop stewards and one other 'natural leader'. Mienie offered to read from the list of names of employees that had left the premises (early) that day – the strikers.

[101] It was put to Mienie that all the other shop stewards would testify that they were not present so he could not have spoken to them. When Gaba testified, she claimed that she knew nothing about what happened after police shot at them on 16 January because she had gone “to the bush”.

[102] Mhambi said he never saw Mienie and Groenewald attempting to distribute ultimatums because he was not there at the time. He claimed that after the strike began workers sat outside the premises. Then the police arrived and shot at them causing them to scatter. Later, other ‘coloured’ people came with the police and told them that they had been called to come and work and the strikers were not supposed to be working at the plant. The shop stewards spoke with them and told them that workers were waiting for the owners of the company. He claimed that it was after the verbal exchange with that group that the police started firing. He claimed that workers did not have a chance to return on 17 January because police were shooting at them and closed the place. Despite the contents of a police officer’s affidavit and the evidence of Mienie and Groenewald, Mhambi was adamant that he was not mistaken in claiming that the police shot at the strikers on 16 January, rather than the next day.

[103] Groenewald also testified that they then also put copies of the notice “up on the gate at the entrance to the property in plastic bags so that they could hopefully take them from there.” It was put to Groenewald that once the police had chased strikers away they were never able to come close to the premises again and in the circumstances it was unlikely they would ever see the documents posted at the gate. Groenewald disputed this, saying she had spent nights sleeping at the processing plant during the strike and the applicants were gathered around the premises. The police presence was mainly in the morning and afternoon when temporary staff were coming to work or leaving. The police only chased strikers away when there was violence. When there was no violence, the strikers gathered outside the plant.

[104] Groenewald gave evidence that the notices were sent out via WhatsApp to the shop stewards and to Oostendorp. After the fruitless attempts to hand out ultimatums, it was also emailed to Oostendorp at his personal email address at around 16h30 together with an appeal to Saccawu to intervene, stating *inter alia*:

> "I informed you via a telephone call at 14h09 today, 16 January 2020 and this letter is intended to inform you that employees of ... let us call it EPA members of SACCAWU have embarked on an unprotected strike today and for which we seek your urgent intervention…
>
> Please regard this as extremely urgent, and note that the trade union and its members will be afforded the period leading to 16:30 on 16 January, consider the unlawful conduct and with consequences should it persist. Should you require to meet with them, such request will be granted and should therefore be regarded as a final warning and request. We wish to thank you in anticipation for your assistance and we sincerely trust that it will not be necessary to implement disciplinary action, and to possibly terminate the services of your members."

[105] Further, the letter warned that EPA was intending to impose "serious disciplinary action against all of those employees who are participating in this unlawful conduct", which could lead to their dismissal. It confirmed that attempts had been made to issue the ultimatum at 15 H 45 and called on the union to intervene and advise its members on the provisions governing strikes in the LRA.

[106] Oostendorp replied at 16:53 stating:

> "We acknowledge receipt of your e-mail and note the seriousness of the matter. We are trying our best to dissuade our members from their unprotected action."

[107] At 16h54 Groenewald communicated an 'update' to the government office bearers and functionaries who had been invited to the previous meeting on 13 January informing them that "at about 1:30 today 16 January, all the staff just downed tools and walked out, no discussion at all, waited for their wages to show in the bank and the minute they saw this, they downed tools".

[108] It should be mentioned that when Stokwe testified, he claimed that after workers walked out on 16 January he received a message from Groenewald

suggesting that he wanted to meet with the company. Despite his stated concerns about the potential effects of the escalation of strike action, he did not respond to this message because he did not like the tone, which he viewed it as informal and arrogant. Another consideration was that other leaders had received messages requesting them to meet with the company and the message to him was different, as if he had asked for the meeting. He was also advised by employees that he should not go to such a meeting because other community leaders had changed their stance after meeting with the company. He insinuated that workers might have been suggesting that the company bribed community leaders, though he had no personal knowledge of this. None of Stokwe's account of this was put to Groenewald when she gave evidence.

[109] It is common cause that no one returned to work on the 16th.

[110] Groenewald did concede that when she and Cameron returned to the plant from Somerset West, the only violence which had taken place was the incident involving Mienie, and they were able to enter the plant without obstruction even though the strikers were gathered outside the gate. However, because of the incident with Mienie she did not approach workers. She also agreed that at the time when she and Mienie approached workers with the ultimatum they were not violent at that stage, but claimed later they were. She and Cameron had arrived back at the plant between 14H00 and 14H30.

[111] According to an affidavit, from a police officer, the admissibility of which was not contested, the police were summonsed to the premises at 15h20, so Groenewald surmised it must have been at that stage that someone in the company's security department contacted the police. Groenewald admitted that police had fired tear gas at workers that afternoon but workers had run up the road and came back later, which is when an attempt was made to issue the ultimatums to them.

[112] The police were therefore present when she and Mienie attempted to hand out notices, so there was no violence at that time. It was only at 16h00 that a company vehicle was targeted. When it was suggested that the applicants had already been chased away by police at the time that Mienie and Groenewald claimed

they tried to handout the first ultimatums, Groenewald pointed out that the police officer's affidavit clearly indicated that the situation was calm before the incident with the vehicle.

[113] It was put to Groenewald that, on previous occasions, if there was a strike in the area or the community was striking for any reason, EPA would deal with the situation differently and would contact workers individually. Groenewald agreed that in instances of community protest action, where most of the staff would want to come to work, supervisors would communicate with staff about how they could get to work. However, EPA had no systematic messaging channel to all employees. Individual supervisors did have communication channels with some of their staff. As this was strike action, the company followed the normal practices of communicating through the union and shop stewards.

Friday, 17th January

[114] The strike continued on 17 January. According to the testimony of Groenewald and Mienie, the mood of the strikers had changed dramatically since the previous day when they had simply passively sought to avoid their attempts to issue the first ultimatum. Mienie said they did not feel safe to approach the strikers as they had done the previous day.

[115] Testimony was given that burning tires were placed in the road leading to the premises. Mienie said that staff who had walked out the previous day were gathered outside the facility and prevented other employees that wanted to come and work from entering the premises. They were also preventing some of the company's vehicles from entering the site by burning tyres in the road, placing rocks all over the road and by stoning vehicles and people that wanted to come in. Men were standing with knopkieries to intimidate people walking down the roads on the approach to the premises.to try and come to work, not to come to work. Mienie said at times he would go to the plant at 04h00 because it was safer. It was difficult to identify individuals because their heads were covered with their jackets.

[116] Mienie testified that early on the morning of 17 January, a few of the male employees who were on strike and were walking on the outside were calling out to him and pointing their fingers at him showing “they are going to get (him)”. He tried to ignore them, but as he walked on, they started throwing stones at him so he had to take cover, and had to protect his head and torso with a big fibreglass firehose cover. He said the stones varied in size from a quarter to half a brick size.

[117] At around 10h00 that morning video footage showed that when replacement workers are brought to the plant and police attempted to escort them into the premises, strikers again threw stones and police fired rubber bullets to disperse them. Groenewald describe the situation as “rough” and “scary”. She also stated that her son, who was driving a company vehicle, was also pelted with stones.

[118] Groenewald testified that when staff got to work that morning stones were thrown at them. Similarly company and private vehicles trying to enter the premises also had stones thrown at them. Mienie confirmed that the stone throwing only started that morning. Groenewald testified that, even when she was standing behind the perimeter fence near the security hut with security staff, stones were thrown at them. Although some stones struck her she was not injured as they hit her on the back. She could not recall if police were already there at that time. She admitted having a paintball gun in her hand, which she had for protection because she was scared.

[119] She denied ever threatening to shoot anyone or calling the police to shoot workers and disputed that the workers were demonstrating peacefully while they allegedly waited for EPA to come and discuss with them their problem with Moyo. Groenewald said that EPA did not summons the police except when there was violence because the police got irritated if they were called out needlessly.

[120] Groenewald and Mienie testified that when police arrived they were also pelted with stones. Although Groenewald and Mienie’s estimates of the size of the maximum number of people who were gathered outside the gates to the premises varied, the lowest estimate was that the crowd numbered between 100 and 150

people. In the morning a group of people also stood on a koppie or further away from our premises, according to Mienie.

[121] Mhambi denied any knowledge of violence taking place apart from the police shooting at the strikers, because he never went near the premises after running away from the police as he was waiting for the company to call them to come back to work. However when it was suggested that he abdicated his responsibility as a shop steward and had gone home, he then said he was on a piece of open veldt where the workers went after the police fired upon them. A large number of workers went there. However he denied that any stone throwing could be seen from that point. Gaba claimed that on 17 January she was at the 'kopje' meeting with workers, but never saw any incident of replacement workers being pelted with stones or the police firing rubber bullets. She insisted that that happened the day before

Final ultimatum

[122] Groenewald testified that an attempt was made to issue the second and final ultimatum to the strikers gathered at the gate at 07h10, but when management approach the gate stones were thrown at them. Subsequently, the notices were put up outside the gate in plastic folders for anyone that wanted to obtain one. A photograph in a contemporary newspaper article also depicted the folder containing the dismissal notices and the accompanying caption stated that the folder had been pinned up in front of the gates to the abattoir. A photo of the notice board showed the clearly marked folders containing the final ultimatum and the notice of dismissal were prominently and visibly displayed. Groenewald testified that approximately 200 copies of each document were printed and security officials at the gate would refill the plastic sleeves as needed.

[123] The final ultimatum read:

> "NOTICE TO EMPLOYEES:
>
> FINAL ULTIMATUM TO CEASE WITH UNLAWFUL STRIKE

This notification is intended to advise all those employees involved with the unlawful strike that this action is not in accordance with the Labour Relations act 66 of 1995.

The present conduct of the employees of Elgin Poultry Abattoir [Pty] Ltd concerned with the withholding of labour has been embarked on without any notification of their intention to do so.

Please be advised that an ultimatum is hereby issued to all of those employees concerned with the unlawful strike to return to the workplace by 10H30 on 17 January 2020, failing which the services of the employees will be terminated.

Please be advised that the principle of “no work not pay” will apply and we urge you to consider your dependents in your actions and to cease being irresponsible with your work.

Employees must take notice that no further ultimatums will be issued and ignoring the ultimatum will result in dismissal.”

[124] Groenewald testified that, as before, the final ultimatum was forwarded by Cameron to shop stewards using WhatsApp and was emailed to the union. When asked why EPA still communicated with Saccawu, as Saccawu had distanced itself the previous day from its members, Groenewald’s response was that the strikers were still employees of the firm and the firm had a recognition agreement with Saccawu in terms of which all communications and negotiations had to be conducted with it. Nevertheless, it also communicated with the shop stewards and copies were placed on the notice board. Even on 21 January, Oostendorp had stated that the union was still trying its best to persuade members of their contractual obligations, was engaging with community organizations and was hoping to make an intervention concerning the dismissals. The union also expressed its willingness to meet with the company.

[125] Mhambi denied receiving any WhatsApp message from the company, and claimed that the first time they became aware they had been dismissed when they got a letter stating they must stop the strike and they would be arrested if they went to work because there was a court interdict. This was a reference to the court interdict. Stokwe had explained to them what it meant.

[126] Stokwe testified that he continued to advise workers until February 2020 because they trusted him. He was present with workers when the interdict was issued to workers by the sheriff. At the workers request he interpreted the document for the workers, and advised them to abide by the court order, and if they did not want to accept his advice they should drop him as a leader. Because they accepted his advice there was no further protest action. However, he was reluctant to agree that there had been any violence prior to that: workers had simply been picketing. Stokwe said the protest action was affecting the entire community, including the closure of the N2, but that was not a direct result of workers' actions but was a result of the entire community supporting them. He stated he was unaware of the stone throwing which allegedly took place on 17 January.

[127] Copies of WhatsApp messages sent to Gaba, one of the shop stewards, from Cameron's phone showed that the ultimatum was received by WhatsApp and was read at 07h11. Groenewald offered to produce proof of similar transmissions to two other employees, namely Porzege Makakeni and a Ms Thaba, but the applicants did not ask for them.

[128] Gaba was one of the shop stewards to whom the company *inter alia* sent the final ultimatum. Below the WhatsApp message to Gaba's phone containing the ultimatum was a message sent from her phone over two hours later stating "Ugubani?" (Who is this?). This was followed by a voice message to Cameron's phone. It was put to Groenewald that Gaba would say that she did not know what the message containing the ultimatum was about and that is why she asked who was sending it. Groenewald's view was that it was clearly an official ultimatum from EPA, which was not ambiguous and which was communicated in the normal fashion. In her view it was not necessary to communicate further about the message.

[129] Gaba, who agreed she was a senior shop steward, said she did not have her phone with her during the strike because it was with her husband. In any event it would not have made any difference if she had it with her because she could not read English. She denied receiving any documents. She claimed that it was her husband who had typed the question 'Ugubani?', and she never listened to the much forwarded voice message which followed from Cameron explaining to workers how they could safely come to work. Gaba claimed that both her and her husband's calls were going to her phone. When asked if he would pass on messages for her, she stated that he worked as a security officer on my shift and she worked on day shift at the company. Despite the nature of the messages and that her husband had opened them, she claimed her husband never forward them to her and she could not remember when she got her phone back from her husband because she was not concentrating on her phone at the time. When it was put to her that it was unlikely that her husband would not have conveyed the messages, which obviously had implications for her as a breadwinner, she answered by querying why nobody had responded to his message asking who was sending the messages.

Notice of dismissal

[130] As none of the strikers heeded the ultimatums, the company issued notices of dismissal from around 10h50. These were also distributed via WhatsApp. The notices read:

> "NOTICE TO EMPLOYEES:
>
> <u>LETTER OF DISMISSAL</u>
>
> It is recorded that on 16 January 2020 at around 14 H00 you embarked on an unlawful strike by refusing to return to workstation.
>
> At around 15 H45 on 16 January 2020 all employees party to the strike, including yourself, were issued with an ultimatum in which it was stated that should you pursue with the unlawful strike and not report for duty is at 16 H30 on 16 January 2020 that your services would be terminated.

Regretfully you have not heeded this ultimatum, and to therefore leave the management of Elgin Poultry Abattoir (Pty) Ltd with no other alternative but to terminate your services with immediate effect, which is on date of this letter.

. Should you fail to lodge an appeal, then Management will accept that you consider the dismissal to be fair. If, however you decide to appeal the dismissal then please ensure that an appeal form [which is available from the offices of Elgin Poultry Abattoir] is completed within the prescribed period stipulated here above. Specific reasons for the appeal must be stated on the form and will not be sufficient to merely states “the dismissal was unfair”.

It is regretful that the situation has come to this, but also considering the history of such conduct and the regular refusal of union members to blatantly ignore the fact that there is a procedure which must be followed before one can embark on a strike, you should accept that you are the demise of your dismissal.

The company will await the expire of the appeal., That is 23 January 2020, and/or the finalisation of the appeal proceedings, if indeed the right to appeal is exercised, before the finalisation of earnings is performed.”

[131] Groenewald testified that in the circumstances because of the violence and the refusal of workers to communicate with the company, it could not convene disciplinary inquiries before resorting to dismissal. Mr Dladla, the union official representing the applicants in the trial, asked why EPA had not served the documents and ultimatums on each worker, using their contact details. Groenewald testified that the company did not have a database of employees cell phone numbers and it was following the established protocol of communicating with the union and shop stewards who were expected to relay messages to the workers. Under normal circumstances, if a disciplinary enquiry was contemplated then the notice will be given to the individual concerned, but when dealing with a collective situation, communication was through shop stewards and the union. In previous strikes, after the first ultimatum was given, a meeting would take place with shop stewards and

the union, and they would communicate with the strikers. On this occasion, nobody was willing to engage with the company or the union. Accordingly, Groenewald maintained that the company had sent communications to the union and the shop stewards as it had done on previous occasions and did not communicate with individual employees. In fact, it had previously been asked not to communicate directly with workers but that communication should go through the union and the shop stewards. Mienie also testified that on previous occasions when there had been work stoppages, management would communicate with the shop stewards and 'natural' leaders on site as well as the trade union. Sometimes the communication would be oral and sometimes in writing. When he went to the PPE room on 16 January that was his first attempt to engage directly with staff on that occasion. By a 'natural leader', Mienie meant order employees whom other workers respected.

Events after the dismissals

18 January 2020

[132] Groenewald testified that Moyo returned to the premises on Saturday 18 January. Prior to his return, there was no discussion with the shop stewards or others who had been involved in the meeting on 19 December because by that stage the strike was underway and he was needed to assist with the employment of temporary staff to replace people on strike

21 January 2020

[133] On Tuesday, the 21st of January, at 12:24, Oostendorp sent an email to Cameron as follows:

> "Good afternoon, Linka. We are still trying to engage with workers and to persuade them of their contractual obligations. We believe …. has escalated seriously and is getting out of hand. We are also engaging with the community organisations to contain the situation

… We believe that we can still make intervention in the dismissal of the workers. To this end, we are willing to meet as soon as possible.

Regards, Robert".

[134] EPA issued a press release the same day, *viz*:

We at Elgin Poultry Abattoir Grabouw are committed to the development and upliftment of our employees. The Company is a significant economic role player within the Grabouw Community, not only providing employment to over 500 people, but also supporting local initiatives such as the ThembaCare Patient Palliative Care Unit, as well as the Agape Centre for the care of children with special needs. Other Community support includes Animal Welfare and local Sport sponsorships.

In addition to occupational training and our internal Multi-Skilling Program, the Company has established a Learning Centre with a full- time educator, who together with the Elgin Learning Foundation, provides tuition and support to our employees in obtaining their ABET Level 4 and Matric qualifications at the Company's expense. A qualified Information Technology teacher and a fully equipped Computer Centre have been provided to enable all interested employees to attain computer literacy and proficiency.

We have worked closely with our employees and together have built a Company all can be proud of.

Therefore, as a Company we regret the action taken by our employees last Thursday, 16 January 2020, in engaging on an illegal strike.

Background:

On 19 December 2019, the Employees of EPA embarked on an unlawful strike, where after a consultation meeting was held on 13 January 2020, with the following Parties present:

Shop stewards

Trade Union SACCAWU

Department of Labour

Department of Economic Development

Department of Agriculture

Department of Community Safety

Elgin Poultry Abattoir management representatives

As an outcome of this meeting it was agreed that the shop stewards, SACCAWU and Community members would consult on issues and grievances. Thereafter these would be handed over to the Department of Labour and the CCMA for investigation and further conciliation.

All parties agreed to this outcome.

Current situation:

However, on Thursday afternoon, 16 January 2020, the employees embarked on an unannounced, unlawful strike by downing tools and refusing to return to the workplace.

Repeated efforts on behalf of the Company to engage with them were disregarded, and letters giving them an opportunity to return to work were ignored.

As the demands of the strikers are focused on the desired removal of certain key staff members, rather than on valid grievances against Company policy or work practices, we have not been able to reach consensus with this group.

> For the survival of the Company and the protection of its role within the Community, we have recruited currently unemployed people, who are in need of employment, to assist with production and operations.
>
> We are striving towards and are committed to a peaceful and positive outcome and conclusion to this strike."

The appeals

[135] As mentioned above, the dismissal notice set out in some detail the appeal process workers should follow if they wanted to challenge their dismissals. All in all, 58 appeal forms were received.

The application process

[136] Groenewald testified that the appeal forms were issued by security officers manning the gate to the premises. The security officers kept a register of everybody that took an appeal form, and when these were handed back, the first part thereof (including a contact number) having been completed by the appellant, that was registered as well. Each employee who submitted an appeal application, was subsequently sent a notification of the date, time and venue of the hearing. The notice further advised the employee that they could be represented, call their own witnesses and cross-examine management witnesses. It also notified them that they had a right to refer any "appeal" against the chairperson's finding to the CCMA within 30 days. They were also warned that the enquiry would proceed in their absence if they did not attend without a valid reason.

[137] Groenewald also claimed under cross-examination that she was called by members of the OSF about the appeal forms and she had handed 200 forms to them for distribution, but they reported back to her that workers were refusing to fill in the forms. She said she could not divulge the names of the community members involved, without their permission, because one of them had been assassinated though she would not speculate further on the reason for this action. Though she could not say it was linked to the distribution of the forms, the group that met her

asked to meet with her privately because they did not want to be seen attending such a meeting.

[138] Groenewald referred to a table of 58 names of employees who had submitted appeal forms. Of these, five were recorded as not attending the hearing. A further 19 were recorded as having been reinstated. In some cases, the reinstatement appeared to be on account of the individual being on leave. The remaining 34 employees on the list were reinstated with final written warnings.

[139] It was put to Groenewald that two of the applicants, Lefusa and Mathibede, would testify that they were unaware of the appeal forms and that it was only by chance, when they were visiting the clinic, that they saw a group of people at the gate to the premises. They got the impression that people were been rehired so they went to the gate received and completed appeal forms but never received a call to attend the hearing.

[140] Moyo claimed that he had phoned Lefusa using the number which appeared on her appeal form and informed her of the date of the hearing scheduled for 29 January 2020. Before the hearing she should have collected the notice of the appeal from reception. She did not attend the scheduled hearing and a second hearing was scheduled for 14 February 2020, which he claimed she acknowledged on the hearing notice form by initialling changes in the date and time. Despite the change in date, she did not attend on the second occasion either. It was put to him that Lefusa was never called to attend the appeal hearing on 29 January and the purported signature next to the handwritten date for the respondent hearing was a forgery. Moyo disputed this, observing that the alleged forged signature on the appeal notice was very similar to the signature on her appeal application form. He also argued that because she did not attend the first hearing, the company was not required to reconvene a second hearing. If it had wanted to dismiss her for not attending the hearing it could have done so on the first occasion, without fabricating a second hearing.

[141] Lefusa confirmed that she also learned of the appeal forms, on her way to the clinic one morning, when she saw people gathered at the gate to the premises. She

completed the form as advised by the security officer. After she completed the form nothing was said to her. She also denied that she was even phoned to collect the notice of the appeal hearing, so she never signed the notice nor any amendment of the date of the hearing. She agreed that the phone number which appeared on the appeal application form was her number, but she was never phoned by the company. She also denied seeing the dismissal notices on the notice board on 20 January.

[142] According to Moyo, Mathibede also failed to attend on the first occasion and was also rescheduled for 14 February, but like Lefusa she also did not appear the second time. It was contended that she too never received any notification of the appeal hearing date. Moyo's explanation was that the appeal application form itself made it clear that a failure to attend the hearing without a reasonable explanation for would entitle the chairperson to proceed with the enquiry but if an explanation was provided then a second opportunity would be given. He could not say when they had been given a second opportunity to attend, but they had both confirmed the date for the second hearing with their signatures. Details of the employee's phone number were included on the appeal application form and they were contacted telephonically to come and collect the notice of the appeal hearing. The same method of communication was used to contact all the employees who had completed appeal applications.

[143] Mathibede confirmed signing the appeal application form and that she came to know of the process by chance when she went to the clinic. She claimed that the phone number written on the form was her old number. On the day she filled in the form she was asked for her phone number that she told them she did not have a phone. She claimed she was never phoned by the company. Mathibede insisted that even though the number '2' in the written phone number looked very similar to the '2' in the handwritten date she had entered on the form and on the register of persons applying for leave to appeal, she had not written any phone number down.

The appeal hearings

[144] Mienie testified he sat in all the appeal hearings of about 40 personnel who were directly linked to his production department, representing the company in presenting the company's case to an independent chairperson who would "gauge the merit of each person's statement or reason why they could not attend work".

[145] On the day of the appeal hearings the company would call in the individuals. Security had a list, so they would allow those specific individuals at specific times for the appeal hearings.

[146] The chairperson would open the appeal hearing, explain the purpose of the appeal hearing, clarify the dates in question and the period that they workers had been away from work and allow the employee to give their reasons and any additional evidence for those reasons. The chairperson would go through the evidence that was submitted, and the reasoning of each employee with each individual case.

[147] At the end of each of the appeal hearings, they would tell the employees they would receive feedback. In cases which were more "clear-cut" they would give the worker "an indication" that they could come back to work. In very clear cases (where someone had been on annual leave or sick leave) the company would give them a date on which they can start working again. It would be explained to others that there had been misconduct, and in their cases a final written warning could be issued in terms of the company's disciplinary code and filed on their personal files.

[148] All workers who attended the appeal hearing were given an individual hearing and their personal circumstances would have been taken into account in deciding on an appropriate sanction. He confirmed Moyo's testimony that those who did not arrive for the appeal hearings on the first date for which it had been set down, were given a second opportunity. On that occasion they could provide reasons why they missed the first opportunity for the appeal hearing, and in many cases their appeals would also have been successful.

[149] The process line manager issued sanctions up to a final written warning. As soon as the sanction is determined, the process line manager completes what is known as the pink book, “but there is also a green duplicate book which is an HR document, and that is why, with all the dismissal cases, HR would not be involved in the disciplinary hearing necessarily, but when it gets to the outcome stage, they need to then be present, because that is an HR document, exit documentation that they need to assist in completing and advising the employee on the next steps or the provident funds et cetera.”

[150] Mr Moyo and his department would take the matter further, but they were not involved in any way in the decision to dismiss.

[151] None of the evidence about the conduct of the hearings was disputed.

24 January

[152] On Friday 24 January, EPA obtained an interim interdict in the labour court declaring the strike action unprotected and prohibiting and restraining the individual applicants from participating in the strike and committing various acts of violence and interference with the operations of the business.

[153] Groenewald testified that after the interdict was issued, the level of violence diminished. There was no more stone throwing but there was still a certain amount of intimidation of staff coming to work.

Aftermath

[154] A spreadsheet showing the cost of the strike was produced. Groenewald confirmed that a claim for losses amounting to R3,75 million had been lodged with Sasria.

[155] Groenewald testified that EPA now has a good (healthy and productive) relationship with its staff. The new union has invested quite heavily with the company on shop steward training and upliftment. The company now has a good working relationship with the current shop stewards and staff. It took the company “a good six

months" to get back on track to skill "all the people" (new workers), but the people are now skilled and the Respondent has not had any further grievances raised against Mr Moyo, who is still the HR manager and he (still) works quite closely with the shop stewards (of the new union – SDTU (the Sustainable Development Trade Union).

[156] Groenewald testified that the names of persons whom the applicants claim had participated in the strike but were not dismissed, were not in fact employees of EPA but were monthly paid employees of EFRC and were not on strike, though they might not have been at work because they were prevented from coming to work by the strike.

Primary common cause and disputed issues

[157] In the pre-trial minute of 3 May 2021 the parties agreed that:

> "2.2 The fact that the individual applicants participated in a strike is common cause.
>
> 2.3 The fact that the strike was unprotected is also common cause.

[158] It is a matter of dispute whether or not:

> 158.1 two ultimatums and notices of dismissal was served on the individual applicants on 16 and 17 January 2020;
>
> 158.2 the applicants were provoked to strike by the conduct of the employer;
>
> 158.3 the employer acted selectively by not dismissing some employees who participated in the strike, or whether employees who were not dismissed were simply those who had successfully appealed against their dismissals;

158.4 the individual applicants were given an opportunity to appeal against their dismissals, and

158.5 the individual applicants were given a fair an opportunity to defend themselves against the allegations before they were dismissed.

Analysis

General legal principles governing the fairness of dismissals for participating in unprotected strikes

[159] Section 68(5) of the Labour Relations Act, 66 of 1995, establishes that:

> Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.

Item 6(1) of the Code of Good Practice for Dismissal[1] (the code) provides as follows:

> "(1) Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissals in these circumstances must be determined in the light of the facts of the case, including –
>
> a) the seriousness of the contravention of this Act;
>
> b) attempts made to comply with this Act; and
>
> c) whether or not the strike was in response to unjustified conduct by the employer."

[1] Schedule 8 to the LRA.

[160] Thus, section 68 [5] of the LRA and item 6 [1] of the code set the parameters for the considerations affecting the substantive fairness of dismissals for participation in unprotected strike action. The Constitutional Court reaffirmed that participation in an unprotected strike is unacceptable conduct and a serious breach of the employees' employment contracts. Once participation in an unprotected strike is established it falls to the employees to provide an acceptable explanation for it, viz:

> "[44] Item 6(1) of the code provides that while participation in an unprotected strike amounts to misconduct, this does not automatically render dismissals substantively fair. The substantive fairness of the dismissals must be measured against inter alia: (i) the seriousness of the contravention of the LRA; (ii) the attempts made to comply with the LRA; and (iii) whether or not the strike was in response to unjustified conduct by the employer.
>
> [45] The LAC held in *Mzeku* that:
>
> > 'Once there is no acceptable explanation for the [workers'] conduct, then it has to be accepted that the [workers] were guilty of unacceptable conduct which was a serious breach of their contracts of employment. … The only way in which the [workers'] dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction.'
>
> [46] Therefore, where striking workers engage in unprotected strike action, the onus rests on the workers to tender an explanation for their unlawful conduct, failing which their dismissal will be regarded as substantively fair, provided dismissal was an appropriate sanction. In this matter, no reasons were provided to the employer by the striking workers that explained their failure to return to work following the strike becoming unprotected.[2]
>
> (emphasis added)

[2] *Transport & Allied Workers Union of SA on behalf of Ngedle & others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 *ILJ* 2485 (CC) at 2501

[161] In the LAC judgment in *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables*[3] , which predated the Constitutional Court decision in *Unitrans* Fueld, the LAC elaborated further on the other factors that might come into play in evaluating the substantive fairness of a dismissal for participation in an unprotected strike:

> "[28] It is clear from the provisions of s 68(5) that participation in a strike that does not comply with the provisions of chapter IV (strikes and lock-outs) constitutes misconduct and that a judge who is called upon to determine the fairness of the dismissal effected on the ground of employees' participation in an illegal strike should consider not only item 6 of the code but also item 7 which provides as follows:
>
> '7 Guidelines in cases of dismissal for misconduct
>
> Any person who is determining whether dismissal for misconduct is unfair should consider —
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not —
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

[3] (2014) 35 *ILJ* 642 (LAC).

[29] In my view the determination of substantive fairness of the strike related dismissal must take place in two stages, first under item 6 when the strike related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not 'a magic wand which when raised renders the dismissal of strikers fair' (*National Union of Metalworkers of SA v VRN Steel (Pty) Ltd* (1995) 16 ILJ 128 (IC)). The employer still bears the onus to prove that the dismissal is fair.

[30] In his work Grogan expresses the view that item 6 of the code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the fairness of the strike related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the code."[4]

[162] In any event, in *CBI* the LAC did not find it necessary to consider factors in item 7 of the code in arriving at its conclusion that the dismissal of unprotected strikers in that case was substantively fair, so the two stage test propounded does not appear to have been necessary for the court's decision, and might well be an *obiter* statement. Nevertheless, it is clear that item 6 of the code clearly states that the substantive fairness of unprotected strike dismissals must be determined "in the light of the facts of the case", which include the ones specifically stated, but clearly do not exclude others. The ones mentioned by Grogan, and cited with approval by the LAC in *CBI* are ones that are all directly relevant to weighing up the gravity of the

[4] At 651-2.

misconduct and determination of whether dismissal is an appropriate sanction, which is an intrinsic part of any enquiry into the fairness of a dismissal for misconduct or incapacity, as mentioned in Item 7 of the Code.

[163] Strike action is not simply a collective form of insubordination: it is conduct which not only suborns the employer's normal authority to direct the conduct of employees in the performance of their work, but entails a partial or complete abandonment of duties by the strikers, which is intended to cause economic harm to an employer's business for the purpose of pressurising the employer to meet the strikers' demands. It entails a unilateral suspension of the employees' obligation to tender their services as required, in order to achieve a collective goal. The fact that it is intended to harm the employer's business, even if only for a while, and not merely to challenge the employer's authority, makes it a serious form of misconduct, except when exercised lawfully.

[164] Notwithstanding this, because strike action is also accepted as a legitimate economic pressure employees can bring to bear as a counterweight to the employer's power to determine conditions of employment on its own terms in the context of collective bargaining, it has been given specific protection both in the Constitution and in the LRA.[5]

[165] It is important to emphasise that, by providing a simple procedure under s 64(1) which employees or a union need to follow, the LRA has made it relatively easy for employees or a union wishing to resort to the economic weapon of a strike in that context to do so. Apart from a few special exceptions like essential services, the broad limitations the LRA places on exercising the right are where the strike would undermine an existing binding agreement (and thereby undermine the outcome of collective bargaining) or where the dispute is one that should not be the

[5] For a discussion of the respective economic weapons at the disposal of both collective bargaining parties see, e.g, *Putco (Pty) Ltd v Transport & Allied Workers Union of SA on behalf of Members & another* (2015) 36 *ILJ* 2048 (LAC) at 2058-9, at [32] – [34] and following. See also the discussion in *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC) on how the principles of collective bargaining and the right to strike are intimately linked to the promotion of bargaining between unionised labour and employers at paras [13], [22],[26],[61] and [64], which is the context in which collective bargaining is promoted by the LRA.

subject matter of collective bargaining but must be resolved by an adjudicative process.

[166] By complying with a limited number of essential steps, employees can obtain protection against dismissal for participating in peaceful strike action in pursuit of legitimate collective bargaining goals. A failure to comply with the statutory procedures cannot simply be fobbed off as merely an omission to comply with formal administrative steps. The procedural requirement that the dispute should be conciliated is intended to provide an opportunity of resolving it without industrial action by providing the parties with breathing space and the assistance of independent mediation expertise. Similarly, subsequently notifying the employer that the strike will begin, provides *inter alia* a further opportunity to try and settle the matter and avert the strike. Incidentally, subjecting the dispute to the conciliation process ordinarily ought to clarify if the dispute is one that may be the subject of strike action, or must be resolved by other means, thereby acting as a safety mechanism which might prevent employees unwittingly embarking on an unprotected strike.

[167] Accordingly, if employees do not use the appropriate dispute resolution mechanisms provided by the LRA, which are easy to invoke, and instead embark on strike action in respect of a dispute which must be resolved by an adjudicative process, or if they simply embark on a strike without invoking the prior dispute resolution mechanism, they run the risk of dismissal for what amounts to serious misconduct because it occurs without following the potentially valuable procedural mechanisms that might make a strike unnecessary.[6] Where the dispute is one that

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[6] See also in this regard *SA Clothing & Textile Workers Union & others v Berg River Textiles - A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) at 979-980:

> [27] As with any dismissal for misconduct, the court ultimately needs to determine whether the relationship has irretrievably broken down and whether a less severe form of discipline ought to have been utilized by the employer, dismissal being the ultimate and most severe sanction available. At the same time, the court will take into account that the LRA prescribes a relatively simple procedure to render strike action protected; the failure of a trade union and its members to make use of this procedure removes the protection with which they could have clothed themselves and opens them up to the sanction of

could not have been resolved by a deliberative process of adjudication, and a settlement is reached in the period before the strike could take place, the conclusion of an agreement represents the desired outcome of collective bargaining and will have been achieved without inflicting unnecessary economic damage on the employer and without employees having to sacrifice remuneration.

[168] Notwithstanding this, the provisions of s 68(5) of the LRA read with Item 6(1) of the Code provide a framework within which the fairness of such dismissals might still be challenged. It is important when evaluating the facts bearing on substantive fairness not to see the factors specified in item 6(1) just as random examples of relevant facts to be considered, but as essential considerations which the legislature chose to identify, whatever other facts might be relevant. Thus, items 6(1)(b) and (c) point on the one hand to the importance of considering whether there was good justification for the statutory machinery of dispute resolution not being invoked. Item 6(1)(a) focusses on the extent of the departure from the provisions of the Act itself. By highlighting these factors as essential considerations, the legislature emphasised that employees embarking on unprotected strike action must provide a good justification for not following the statutory dispute resolution.

[169] Considering all these factors together with the applicable provisions of Item 6 of the Code will assist the court in determining whether a dismissal for participating in an unprotected strike was "proportional to the misconduct"[7] and therefore appropriate or fair. As the LAC more recently stated:

> dismissal, especially if the employer had issued an ultimatum making the consequences of their actions clear.

[7] See *Hendor Steel Supplies (A Division of Argent Steel Group (Pty) Ltd formerly named Marschalk Beleggings (Pty) Ltd) v National Union of Metalworkers of SA & others* (2009) 30 *ILJ* 2376 (LAC) :

> "[8] Mr Redding correctly conceded that an unprotected strike did not automatically justify dismissal as the only appropriate sanction. Dismissal is manifestly the sanction of the last resort. W G Davey (Pty) Ltd v National Union of Metalworkers of SA 1999 (3) SA 697 (SCA); (1999) 20 ILJ 2017 (SCA) para 18. Hence there is a need to examine the arguments of both parties as to the manner and conduct of the strike to test whether dismissal was proportional to the misconduct."

> [35] The principle that was established in *Hendor* is not that the dismissal of employees because they were on a short duration strike will inevitably be found to be disproportionate and thus substantively unfair. Rather, the principle established there is that when determining whether the dismissal of striking employees is proportional to the misconduct, a court must examine the conduct of both the employer and employees 'as to the manner and conduct of the strike'. [8]

Accordingly, the conduct of the parties *during* the unprotected strike is also an important consideration in determining the fairness of the dismissal. Additional issues of principle which this case raises will be dealt with in the course of the analysis below.

Evaluation of the applicants' case

[170] In evaluating the fairness of the applicants' dismissals, the court must do so on the basis of the pleaded grounds of unfairness. Each of these will be considered in turn, but it is useful to abstract from the morass of evidence a few prominent features of the dispute and milestones leading up to the dismissals.

[171] The first point to make is that EPA has always engaged with the majority union in the workplace at the time. It was not disputed that over a couple of years workers had shifted their allegiance and membership from one union to another. An illustration of this was the apparently rapid rise of Saccawu in 2019 to the status of majority union, even though its predecessor SAUOLIMO had just concluded a three year substantive agreement in December 2018 after a protected strike.

[172] Saccawu did not enjoy the workers' allegiance for long. Increasingly, EPA found itself dealing with a variety of organizations and forums which were in the community. Saccawu was not opposed to the participation of individuals from certain organizations such as the OSF. However, the work stoppage on 19 December 2019 represented a turning point. It is clear that Saccawu was not happy with the

[8] *SA Commercial Catering & Allied Workers Union on behalf of Mokebe & others v Pick 'n Pay Retailers* (2018) 39 *ILJ* 201 (LAC) at 213.

involvement of new community leadership elements because they were giving advice to workers contrary to the advice of the union. There was virtually no detail of what the points of difference were, but the applicants never disputed this. It is also clear from the account of Stokwe, if it is taken at face value, and other evidence that his intervention with others in meeting with management and shop stewards that day without the involvement of Saccawu officials was something the shop stewards and workers welcomed. It was not disputed that he had persuaded workers to return to work on that occasion.

[173] At the very least, it is obvious that by 19 December a schism had developed between the workers, including the shop stewards, and the union. However, instead of switching their allegiance to another union, the workers decided that they preferred to take the advice of, and wanted to be represented principally by Stokwe. There was no evidence led, nor was it suggested, that there were any resignations from Saccawu until after the dismissals took place.

[174] The company nonetheless was bound by its obligations to deal with such Saccawu and the shop stewards, as the recognised union and the shop floor representatives of Saccawu members. Although EPA had been open to engage with formalised community organizations and even ward counsellors, that was in the context of an established relationship with Saccawu as the representative of the workforce and in circumstances where the union was willing to be party to such an arrangement.

[175] It is clear that the rift between Saccawu and its members over the involvement of additional community leadership figures in the workplace, created a problem for EPA too. EPA's attempt to keep its employment relations within a recognizable stable framework was evident in its invitation to formal political representatives and government officials to attend what was supposed to be a follow-up meeting on 13 January 2020.

[176] It is fair to say that the participation of these additional state representatives as part of the follow-up meeting that would occur on 13 January, was not something that been envisaged by the participants in the meeting on 19 December. Regrettably,

a clear chronology of events at the meeting on 13 January is difficult to discern from the somewhat sketchy accounts given by witnesses for both parties.

[177] On the question of who attended the 13 January meeting, it was not disputed that Oostendorp did attend, despite what happened on 19 December. What is murkier is whether any community leaders came to attend the meeting on 13 January. Stokwe claimed they never received an invitation to the meeting. Although this was not put to Groenewald, she never claimed to have done so, and in fact stated that the community leaders were invited by the workers.

[178] Despite Mhambi's evidence that nobody had objected to the presence of community leaders at the meeting, Groenewald was never challenged on her account that the Department of Labour official was not willing to participate in the meeting if community leaders were also participating. Stokwe's claim that he heard shop stewards had left the meeting because someone in the meeting did not want community leaders present, albeit hearsay, is more consistent with Groenewald's account than Mhambi's explanation of why they walked out. Interestingly, Stokwe's impression was that it was the refusal to admit his delegation as community leaders, which was the real cause of the walk out on 16 January.[9]

[179] In any event, the applicants' own case is that they were provoked to strike because Moyo was seen on the premises on several occasions and EPA was confronted about this but did nothing about it. Workers became furious when they learned about this and decided to down tools until their demands were met. On the applicant's version, the firm had agreed that they could do this if they saw Moyo at the premises for any reason.

[180] Once the strike was underway, there was no communication from the shop stewards or from Stokwe. The only evidence of parties who were communicating was the evidence of communications between EPA and Saccawu, and EPA's attempts to communicate with strikers and shop stewards.

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[9] In passing, if indeed it was the real cause, it is unlikely that it would have been deemed the kind of provocation that would justify the strike (see *Mxalisa & others v Dominium Uranium & another* (2013) 34 *ILJ* 2052 (LC))

[181] With this backdrop, the specifically pleaded issues in dispute can be addressed.

Service of the ultimatums and notice of dismissal

[182] The applicants argue that they simply did not receive any of the ultimatums or notices of dismissal issued by EPA. In respect of the attempts by Groenewald and Mienie to handout the first ultimatum, it is evident from the video footage that they were persons gathered outside the company but they moved away from Mienie and Groenewald when they approached them with the documents. It is not disputed that one of the persons identified in the video was a shop steward who declined to accept a copy of the ultimatum. None of the witnesses called by the applicants could say that they were present at the time that Mienie and Groenewald were attempting to hand out the documents. Although it was contended that all the strikers had been chased away that afternoon by the police, Mienie and Groenewald were not challenged about the evidence that the video was taken that afternoon, which supports the evidence that between 15h00 and 16h00, the situation was sufficiently calm for management to approach workers outside the premises. The evidence that ultimatums were left under a stone but were later found scattered about was not disputed.

[183] Although it was suggested that when there had been community protest actions on previous occasions there had been some direct communication to workers, no direct evidence was led to support the contention that all workers were individually notified on such occasions, and Groenewald's testimony that the communications which did occur on those occasions were initiated by individual supervisors who had contact details of some workers was not contested, nor was her claim that the company did not have a database of all employees' phone numbers. Groenewald's and Mienie's evidence that when there were strikes at the plant previously communications to the workforce had been addressed to the union and the shop stewards, who had responded.

[184] Evidence was presented of notices been sent to Gaba's phone and further evidence was tendered, if required, of the same communications with two other shop

stewards. These individuals did not come and testify that they had not received the notices as alleged by Groenewald. Gaba could not dispute that the messages were received on her phone, but came up with the most extraordinary explanation for not responding to the messages.

[185] Even if I accept that she gave her phone to her husband during the strike, it is highly improbable that he would not have alerted her to the messages and, once alerted, that she would not have made inquiries about what they meant if she truly did not understand them. It must have been obvious from the letterheads that the messages came from the company. Effectively, what the applicants are asking the court believe is that someone who is a leader of workers participating in a strike in order to compel an employer to comply with some demand, would have no interest in any communication received from the employer during the strike. A strike is necessarily intended to evoke a response from an employer, otherwise there would be no point in striking. Under the circumstances, the only reasonable conclusion about Gaba's unwillingness to make any further inquiries about the documents received was that she did not want to engage with the contents of the documents.

[186] If shop stewards were not receiving communications from the union as a result of preferring to be represented by community leaders, that was a result of their own decision. The company was still obliged to communicate with Saccawu as it was still the majority union in the workplace. On the evidence tendered it is improbable that the company would only have sent documents to a few selected shop stewards and not to others. *In Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 *ILJ* 924 (LAC), the LAC stated:

> "[23] Communication of the ultimatum to the chosen collective bargaining representative of strikers during a strike would generally constitute sufficient notice thereof. Employees cannot belong to the collective when it suits them and insist on individual communication when it does not."

[187] In the context of this case, it was reasonable of the company to expect that, even if shop stewards were no longer communicating with the union, as the representatives of the striking workers, they would continue to act as representatives

and relay important issues relating to the strike to them and, in particular, management's reaction to the strike.

[188] Based on the evidence of the incidence of violence which took place in the vicinity of the premises, it is also unlikely that none of the strikers would have seen the clearly marked sleeves containing the final ultimatum and the dismissal notice. While Lefusa and Mathibede both claim to have discovered the existence of the appeal applications accidentally, their own evidence confirmed that people were gathered at the gate. In addition, approximately 1 in 4 employees lodged appeals against their dismissals with the security staff. This evidence also demonstrates that it was possible to approach the premises and obtain the documents on the notice board.

[189] Consequently, I am satisfied that EPA took reasonable steps to convey the ultimatums and notice of dismissal to the strikers and was entitled to rely on the shop stewards to convey the contents of the documents to them. There was also uncontested evidence that Groenewald even tried to distribute documents via the OSF.

Provocation of the strike

[190] What was put to Groenewald was that workers saw Moyo at the workplace, contrary to the agreement he would be suspended and that she and Cameron were called to a meeting and they were told what workers were saying. They alleged that she and Cameron then just walked out on the shop stewards. Groenewald acknowledged she got a message from shop stewards that they had heard that Moyo was on site. Management shocked to hear that allegation and she told them he was not, because she knew it was not true. That is why she asked them to provide proof of the allegation, but they never reverted to her after that.

[191] Groenewald's testimony that she and Cameron were in Somerset West when they first heard of the strike, was not challenged. It was only when Mhambi gave evidence that he claimed that Groenewald was at the company premises at the time.

[192] When pressed further on whether shop stewards said that Moyo was there and workers wanted to walk out, Groenewald agreed shop stewards had asked to see her and Cameron. The shop stewards related what they had 'heard', but they could not say more than that. They also wanted to know why he was back when they had no feedback into the grievance inquiry. They were told that the company was working on the grievance, but Moyo was not back at the premises. She confirmed that what was conveyed to her was that if Moyo was there workers would walk out, but when she asked them to give details of where and when he was seen and by whom, they could only say they heard that.

[193] Gaba's evidence of the meeting with management was vague. She even claimed that the meeting was with Cameron and Mienie, which was contrary to Mhambi's version. She simply said that the workers came to them with a grievance which they took to management, who walked out after asking why they were always in the wrong. She did not explain what the shop stewards reported back to workers, which prompted them to walk out. Mhambi, for his part, did not give any account of a report back to workers after the meeting, but simply said that "things started" after Cameron and Groenewald walked out on them.

[194] Mhambi's account of the interaction with management was significantly different from what was put to Groenewald and also from Gaba's version. He testified that when the shop stewards told management of Moyo's presence management agreed to remove him but then reneged on that undertaking and walked out of the meeting. His version implies that management agreed that Moyo was present, rather than disputing that. In short, the version that was put to Groenewald under cross-examination was not supported by the applicants' own evidence.

[195] If Mhambi's version cannot be relied on because it was never tested with Groenewald, what of the version that was put to Groenewald and the concessions she made in that regard? Groenewald agreed that a meeting did take place. It is not clear she agreed when it happened, but it is safe to infer that it occurred after 13 January. On this version, shop stewards reported to her and Cameron that they had been told Moyo was on the premises. Management denied this and asked for

information to corroborate the allegation. This raises an important issue. If the shop stewards were truly relying on the details of Babalo's account, why was this not conveyed to management to support their claim? That would have been the most natural thing to do if they had such information when they met with management.

[196] At best for the applicants, even if the court ignores the conflicting evidence of Mhambi and Gaba, which they led about what transpired at the meeting, the shop stewards were probably not able to provide management with any detail about when, where or by whom Moyo was seen and that is why they did not try substantiate what they had 'heard', when management disputed it. It is inconceivable they would not have been more specific and confident about the sighting of Moyo at the premises if in fact they had received the information Babalo allegedly provided. If they had received information of Moyo being at the plant, it was more likely to have been non-specific rumour.

[197] It also casts doubt on Babalo's version he had conveyed what he saw to Mhambi the very morning of the strike. Babalo claimed to have been well aware of what a suspension entails and that he was consequently surprised when he saw Moyo on the premises on a number of occasions. If he was so disturbed by seeing Moyo at the premises previously, the question arises why he only reported to Mhambi his latest sighting of Moyo on 16 January. Similarly, Stokwe's hearsay evidence that he heard of sightings of Moyo at the workplace during the period 23 December 2019 to about 3 January, begs the question why shop stewards would have waited till after 13 January to raise the issue, if indeed such sightings had been reported.

[198] It must also be mentioned that is clear that there was a relentless campaign against Moyo. It is apparent from Mhambi's evidence that the shop stewards did not accept the outcome of the first investigation, and what was put to company witnesses, that from the time the June 2019 grievances were laid, the workers wanted Moyo out of the company. What was supposedly the central complaint against him, namely that he vindictively dismissed employees, was without any foundation and workers persisted with this complaint even after he his role in disciplinary enquiries was reduced to an administrative and monitoring one. Mhambi

could not articulate how his role had reverted to what it previously was, except to allude to Bonakele's case, which did not bear out that he was responsible for his dismissal. The complaints about terminating contracts or forcing someone to sign an agreement were supported with very slender evidence. The complaint about an unlawful payment and deduction was also groundless. There was a tendency just to attribute anything which workers were suspicious about or did not like to the machinations of Moyo. Even the complaint about Ndubanduba was far from a cut and dried matter, given Moyo's undisputed evidence that it was not his decision to transfer employees and the lack of a clear chronology of her work history in different departments as a contract and permanent worker. Given the high turnover in the union allegiances of the workforce, Moyo's claim that he preferred to have a stable union rather than having to re-establish relations afresh makes sense. This raises the question whether the workers were really *bona fide* in repeatedly raising a litany of complaints against him. The fact that workers might have found Mhambi aggravating and were hostile to him does not mean that if management did not remove him they were entitled to feel 'provoked' to the extent that they could justifiably strike.

[199] Another aspect of the claim of provocation must be examined. There was no agreement that workers were entitled to walk out if Moyo was seen at the premises while the grievances were still under consideration. That was simply a threat made by the workers of how they would retaliate. In other words, it was advance notice that they would consider themselves to be 'provoked' to act in this way.

[200] Taking all this into consideration, I am not satisfied that the applicants have established that the cause of the strike was that management had actually reneged on Moyo's suspension. On the most favourable interpretation of the evidence to the applicants, if the strike was connected to Moyo, it was based on a belief or suspicion that Moyo's suspension had been uplifted by EPA, not that management had actually uplifted it. Accordingly, the applicants have not established that management had allowed him to return to work and it was this action had provoked them to strike.

Alleged selective dismissals of strikers

[201] Initially, the applicants had claimed that 16 employees who were on strike were never dismissed. Groenewald testified that the persons identified were not employed by EPA but by EFRC and were never dismissed because workers at that firm were not on strike. This was not disputed in the trial and the applicants abandoned a claim of selective treatment based on this by the time the matter was argued.

[202] It was nonetheless alleged that it was unfair to only reinstate workers who had successfully appealed their dismissals, because this opportunity was only made available to a few individuals. EPA argued that all the strikers had the same opportunity to appeal against their dismissals. Some were reinstated without any disciplinary sanction because they were found not to have participated in the strike, while others who did but could present mitigating factors were issued with final written warnings.

[203] Approximately a quarter of the strikers did complete appeal application forms. All the strikers were equally able to obtain them. If one in four strikers filled in such applications, it is unlikely other strikers would not have been aware of the forms which were available from the company. In any event, there was never any request made to the company that the period for applying to appeal against the dismissals should be extended, which the shop stewards or individual employees could have done, if they wanted to appeal but only learned of the process later.

[204] Lefusa's and Mathibede's evidence that they were never told of their hearings is hard to believe. Firstly, only five out of 58 persons who filled in appeal applications did not attend their hearings. Secondly, the evidence of handwritten alterations of the hearing date on their appeal notice forms is consistent with the evidence of the procedure that was followed for rescheduling a hearing if the employee had a reason for failing to appear on the first occasion. If they had not requested a second opportunity, there was no reason for EPA to schedule a second hearing. Further, if the appeal procedure was a sham and the company was not notifying applicants of their hearing dates, this is irreconcilable with the fact that 90 % of those who applied

did attend hearings. In addition, the handwritten script on Mathibede's forms was most probably hers given the other examples of her handwriting. Lefusa agreed the phone number appearing on the appeal application form was hers. She advanced no explanation for the rescheduled dates of hearing appearing on the appeal hearing notice, or why the company would have deliberately not phoned her.

[205] In conclusion, there is no evidence that appeal hearings were selectively granted by the company and that all strikers did not have the same opportunity to apply for a hearing. On the evidence, the hearings which took place afforded each applicant a comprehensive individual disciplinary enquiry.

Conclusion

[206] In light of the above, I am satisfied that the dismissal of the individual applicants in the consolidated case was not unfair for any of the pleaded grounds of unfairness.

[207] The strike was accompanied by considerable violence and damage to property. It resulted in significant economic loss to the business. The leadership of the strike made no effort to communicate with the employer once the strike was in progress and were unresponsive to any of the employer's communications attempting to persuade strikers to return to work and the risk of dismissal. It was necessary for an interdict to be launched for the levels of violence to be dampened. No compelling arguments were advanced of other factors which this court should take account that would result in a finding that the dismissals were unfair.

Order

[1] In light of the reasons above, the dismissal of the individual Applicants in the consolidated cases was substantively and procedurally fair.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicants **J Dladla of SHOWUSA**

For the Respondent **R G Stelzner SC instructed by Rufus Dercksen Inc.**