ARBITRATION AWARD

(Issued in terms of section 188A of the Labour Relations No 66 of 1995)

Case Number: **ECPE2551-21**
Commissioner: **Bulelani Busakwe**
Date of Award: **28 July 2021**

In the **ARBITRATION** between

Spar Eastern Cape Distribution Centre

(Employer)

And

Megan Warnie and 36 others

(Employees)

INTRODUCTION

On 19 July 2021 I made findings regarding the conduct of the Employees as set out in paragraph 1 to 76 hereunder. I have subsequently received submissions in respect of sanction, hence my award in respect of sanction from paragraph 77 to 96.

DETAILS OF HEARING AND REPRESENTATION

1. This is an arbitration award in respect of a matter referred in terms of the provisions of section 188A of the Labour Relations Act No 66 of 1995 ("the LRA"). The Employer, Spar Eastern Cape Distribution Centre, requested the CCMA to conduct an inquiry into allegations of misconduct that it had proffered against thirty-seven (37) of its employees (therein referred to as the Employees). The Employer decided to withdraw the allegations against Mteteleli Kala. The inquiry convened on 11 June 2021, 1 July 2021, 2 July 2021, 7 July 2021, 8 July 2021, and 9 July 2021. The Employer was represented by Craig Snelling, an official of AHI. The Employees were represented by Ronnie Mgubasi.

2. At the conclusion of the inquiry both parties requested to submit their closing arguments in writing. I granted their request and directed that the closing arguments had to be submitted by no later than 15 July 2021. The closing arguments were duly submitted and have been taken into cognizance in my findings hereunder.

ISSUE TO BE DECIDED

3. I am required to determine whether the Employees are guilty of misconduct as per the allegations levelled against them by the Employer and if so to determine the appropriate sanction.

PRELIMINARY ISSUES

4. It is important to mention that due to the regulations issued in terms of the Disaster Management Act No 57 of 2002, the guidelines issued by the CCMA to commissioners pursuant to the regulations, and the size of the hearing room, I determined that there may not be more than 22 people inside the hearing room. This effectively meant that not all the Employees could be permitted inside the hearing at any given time. I made all reasonable attempts to ensure that the rights of the Employees to a fair process were not compromised despite the challenges as a consequence of the regulations and COVID-19.

5. It is important to mention that this matter was not initially set down before me but before my brother Commissioner Amon Nyondo. Due to reasons that are not necessary to mention the CCMA decided to appoint me to preside over the inquiry.

6. The Employees enquired from me whether I would be in a position to conduct the process as required in terms of the LRA, specifically whether the fact that one of the family members is employed by the Employer would not influence me. I pointed out that the principles of natural justice and the LRA required of me to act impartially and without favour. I indicated that if there was a conflict of interest such as being required to determine an issue involving a family member, a family member being a witness, etc, I would be left with no option but to recuse myself. I permitted the parties to advise me of such so that I may consider it. The Employees and the Employer confirmed that they were comfortable with me proceeding to be the arbitrator.

7. I must point out that on about 1 July 2021 the parties consented to me assisting them to resolve the "dispute". This brought about a perception that I was biased by the Employees. This emanated from the fact that I informed the Employees that both parties faced the risk if the matter was not resolved because I would be required to make a finding which may be in favour of the Employees or in favour of

the Employer. I further pointed out the Employer's assertion that the Employees had committed misconduct could not be left unchallenged and such may result in a finding adverse to the Employees.

8. When the possibility of my recusal arose, I pointed out that I would be required to consider it having regard to the applicable legal principles and was not legally permitted to simply recuse myself out of convenience. I gave the Employees and their representatives the opportunity to consult. After such consultation the Employees opted not to bring any application of recusal. Neither was the issue raised thereafter.

PROCESS, RIGHTS, AND PLEA

9. At the outset of the inquiry, I assisted the parties to conclude a pre-arbitration minute which they duly signed.

10. The process to be followed was explained to the parties. The Employees and the Employer confirmed that they understood the process.

11. The Employees confirmed that they had been made aware of the allegations levelled against them and that they understood the allegations.

12. The Employees pleaded not guilty to the allegations levelled against them.

BACKGROUND

13. On 7 December 2020 the Transport Retail and General Workers Union ("THORN"), a registered trade union, submitted wage demands to the Employer. It appears that the Employer did not accede and/or refused to engage in collective bargaining with the THORN. In response thereto the THORN referred a dispute to the CCMA regarding the Employer's alleged refusal to bargain. The dispute remained unresolved and a certificate of non-resolution was issued on 10 March 2021. On 11 March 2021 the CCMA issued default Picketing Rules.

14. The Employer was served with a notice of industrial action on 15 March 2021. In response thereto the Employer issued a notice of lockout. The industrial action commenced on 18 March 2021.

15. On 19 March 2021 the Employer wrote to the THORN wherein it stated that the Picketing Rules had been ignored and that it was "forced to approach the labour court for relief". The Employer advised that

the Labour Court had granted an order compelling the "employees to act lawfully and comply with the picketing rules with immediate effect". The Employer warned that non-compliance with the court order may result in the disciplinary action being taken against the employees who have committed misconduct.

16. The Employer and the THORN concluded a Settlement Agreement on 29 April 2021. Annexure B of the Settlement Agreement states that the Employees having been identified as having committed misconduct and that it was the Employer's view that the conduct of the Employees has irretrievably broken down the employment relationship. As a consequence, thereof the Employees would be afforded the opportunity to state their case in response thereto during a section 188A process. On 12 May 2021 the Employees were notified of the specific allegations against them.

17. The allegations levelled against the Employees are the same save for thirteen employees who have additional allegations levelled against them. The allegations against the Employees are recorded as:

"***gross misconduct in that you, on two separate occasions, violated a court order by:***

a. ***Gathering in the streets leading to the Perseverance Distribution Centre disrupting traffic, therefore violating the agreed picketing rules and/or;***

b. ***Blocked access to neighbouring companies and prevented them to continue their normal business therefore violating the agreed picketing rules and/or;***

c. ***Threating and intimidating employees belonging to our company and to the neighbouring companies from attending to normal business operations and to work therefore violating the agreed picketing rules and/or;***

d. ***Prohibited the normal day to day running of the company's business, effectively sabotaging the company, therefore violating the agreed picketing rules and/or;***

e. ***Bringing the Company's name into disrepute by disrupting the business of our neighbours, causing traffic to be disrupted for the general public and in that way embarrassing the Company, therefore violating the agreed picketing rules.***"

18. The additional charges against the other thirteen employees include throwing stones, burning of tyres, threatening the police, parking vehicles in front of the entrance of the Employer, and damaging public infrastructure.

19. The essence of the Employer's argument was that the Employees failed to comply with the Picketing Rules and court interdict issued and that their conduct amounted to gross misconduct.

20. The Employees' argument was that they had not committed gross misconduct because the Employer had no evidence to support their contention that in any event breach of Picketing Rules should not have been dealt with as misconduct but as simply a violation of Picketing Rules by either the CCMA or the Labour Court.

SURVEY OF EVIDENCE AND ARGUMENTS

21. I have considered all the evidence and arguments made, but because the LRA requires brief reasons [section 138(7) (a) of the LRA], I have only referred to the evidence and arguments that I regard as necessary to substantiate my findings.

22. The parties presented the pre-arbitration minutes, three bundles of documents at the outset of the proceedings and a memory stick. Bundle A contained documents from the date when the THORN submitted wage demands to the date when the dispute was settled by the Employer and THORN. Bundle B contained the list of the Employees, allegations against the Employees, and still photographs purporting to prove the involvement of the Employees in the alleged misconduct, Bundle C contained affidavits deposed by the Employees in response to Labour Court case No P30/21. The memory stick contained CCTV footage of the events that occurred on 29 March 2021.

23. **Julian Koutsouvelis** presented the CCTV footage. He stated that the CCTV footage was from the system of surveillance cameras which the Employer has. He indicated that the system consists of more than 130 cameras who capture images 24 hours a day. The images are then sent to the server which has capacity to store for up to 21 days. On 29 March 2021 there were incidents of gross misconduct that were committed by the Employees. The incidents were investigated by going through the CCTV footage of the day with other managers. This process led to the relevant CCTV footage being downloaded. The relevant footage is the one on the memory stick submitted by the Employer. Furthermore, still photos relevant to the Employees were captured using computer software to capture such images as per Bundle B.

24. In terms of such at 05h58 three of the Employees, namely Tabo Buqwana, Rusche Bottomley, and Nigel Swartz deliberated parked their vehicles in front the entrance gate of the Employer blocking access to and from the Employer. At approximately 06h00, a group of people approached from Main Road towards Kohler Road where the premises of the Employer are situated. The group started to block Kohler Road at the intersection with Main Road by burning tyres and other objects. Members of the public and other employees of the Employer were threatened and intimidated by the Employees and people who were part of the group. He stated that the conduct of the group was clear in terms of the CCTV footage, specifically at 06h05, 06h11, 06h23, 06h30; 06h34, 06h39. 06h42, 06h50 and 06h53.

25. The Employer reported the incident to the South African Police Service (SAPS). The SAPS arrived at 07h07. The SAPS extinguished the burning fires and cleared the road by removing any objects obstructing the road. The SAPS also addressed the group. The group later congregated on an adjacent embankment. The SAPS gave the group an ultimatum to disperse. The group did not disperse and the SAPS used tear gas / stun grenades to disperse the group. The group commenced throwing stones on the road and towards the direction of the SAPS.

26. In respect of Khanyisa Sodladla he stated that he joined the group at approximately 08h11. He argued that she was part of the group assembled on the adjacent embankment prior to the group being dispersed by SAPS.

27. **Armeem Alexander George Pearce** is employed by Omega Risk Solutions, a security company. Omega Risk Solutions provides security related services to the Employer. Pearce is the site supervisor. He testified that on the day three of the Employees, Tabo Buqwana, Rusche Bottomley, and Nigel Swartz, parked their cars in front of the entrance gate to the Employer's place of business. Nigel Swartz moved his vehicle to block the other access to the Employer's premises.

28. After the incident he instructed his security officers to close the gates. He indicated that after Rusche Bottomley had parked his vehicle, he took out a tyre and proceeded towards the intersection of Kohler and Main Road.

29. Pearce observed what was happening from the car park. The traffic was blocked and congested. One of his female security officers, Shenice Irries, was dropped by her transport from Uitenhage at Main Road. She proceeded to enter Kohler Road on foot. The group at the intersection of Kohler Road and Main Road prevented her from reporting for duty. She turned back and waited around the corner. She was only able to arrive on site after the SAPS had dispersed the group.

30. At some point a SAPS policeman, Warrant Officer Du Preez, addressed the crowd. One of the Employees, Lungelo Mtati (Employee 23), said this would be a second Marikana Massacre.

31. The SAPS requested Nigel Swartz (Employee 35) to remove his car from the secondary gate. He complied with the request. He wanted to park it in front of the primary gate entrance gate but was stopped by the SAPS.

32. Pearce further testified that Nomawethu Monti was dropped off between 07h15 and 08h00 further down Main Road. She proceeded to join the group gathered at the intersection of Kohler Road and Main Road.

33. **Anton Groenewald** stated that he reported for duty in the early hours of 29 March 2021. He proceeded to do patrols. On his return back to the Employer's premises the road was blocked. He had no option but to park opposite Borbet SA (Pty) Ltd, a factory nearby. He crossed Main Road on foot towards Kohler Road. At the intersection of Kohler Road and Main Road fire was burning and there was a group of people. They denied him access to Kohler Road. He was also hit with a plank. He turned back and observed what was happening from across the street. Whilst he was standing across the road, he saw Nomawethu Monti being dropped off. She proceeded to join the group.

34. Thembelani Wellem testified that there were no incidents between 19 March 2021 and 28 March 2021. They were approached by the African National Congress Youth League (ANCYL) via WhatsApp. They wanted to join their strike. A meeting with the ANCYL was held wherein there was disagreement about how the strike should proceed. They informed the ANCYL that they were bound by the Picketing Rules. On 29 March 2021 the ANCYL and the community blocked the Kohler Road. He was present when that happened. He denied that any traffic was blocked since no cars wanted to enter Kohler Road. He did not see any employees of the Employer being threatened or being chased away. When asked about Anton Groenewald he conceded that he was chased away by the community. When asked about what he observed at 06h39 he indicated that people were chased by the community. He conceded that at 06h05 a minibus taxi was stopped by members of the community. The minibus tax was from the Employer ferrying employees of the Employer who had knocked off.

35. Lungelo Mtati corroborated Thembelani Wellem's version that the minibus taxi was from the premises of the Employer and was occupied by employees of the Employer who had knocked off.

36. Tabo Buqwana testified that they did not block the entrance as alleged by the Employer. They parked the cars simply for safety reasons because they were aware that there is a CCTV camera in front of the gate.

ADMISSIBILITY OF CCTV FOOTAGE

37. The first issue I need to dispose of concerns the admissibility of certain evidence tendered by the Employer. The Employees' representative argued that the CCTV footage presented by the Employer was inadmissible. This is because it did not comply with the provisions of section 15 of the Electronic Communications and Transactions Act No. 25 of 2002 ("the ECTA").

38. The Employer contended that the evidence was admissible because the CCTV footage was introduced by a person who had supervised its production for purposes of presentation before me and that the photographs were essentially the documentary form of such evidence. The Employer further argued that the nature of the proceedings required that the footage should be admitted and that the same evidence was accepted by the Labour Court when the Employer sought an order of contempt against the Employees.

39. It is trite that "any evidence which is relevant is admissible unless there is some other rule which excludes it" (see **R v Schaube-Kuffler 1969 (2) SA 40 (R., AD.)**).

40. There is no question that the evidence is relevant. The Employees attack its admissibility on the basis that it may have been tempered with and/or questioned its authenticity. This was clear from the arguments advanced by Mr Mgubasi and the questions he posed on the witnesses of the Employer, specifically Mr Koutsouvelis.

41. The Employees' argument is flawed because the Employees also relied on the very same evidence to challenge the testimony of the witnesses.

42. The witnesses that testified on behalf of the Employees accepted the evidence as being authentic and to not having been tempered.

43. It must also be mentioned that contrary to the argument by Mr Mgubasi, what the ECTA did was to create a legal mechanism for the admissibility of electronic evidence so as to ensure certainty that such evidence is admissible and that such evidence cannot be excluded because it is in electronic form. In

fact, in **S v Ndiki and Others 2008 (2) SACR252 (CK)** the Court stated that ECTA is inclusionary as opposed to exclusionary.

44. The argument regarding the reasons for the time difference between the time indicated by the server versus the time on the CCTV footage was explained by witnesses and such witnesses were subjected to cross-examination. The point I am making is that this was not a case where I was simply expected to admit evidence (CCTV footage) without oral evidence or some other evidence in support thereof.

45. It must also be borne in mind that admissibility of evidence and the weight to be attached to such evidence are not the same concepts. The weight to be attached to such evidence is something I would consider depending on the issues in dispute.

46. For the reasons stated above, I find that the evidence is admissible.

ANALYSIS OF EVIDENCE AND ARGUMENT

47. The Employer has proffered allegations of misconduct against the Employees. I am required to inquire whether the Employees are guilty of the allegations levelled against them.

Does the Employer have a right to discipline the Employees?

48. It was argued on behalf of the Employees that the Employer was not permitted to discipline the Employees for violating the Picketing Rules and the order of the Labour Court. It seems to me that before I can determine whether the Employees are guilty of the allegations, I must first dispose of this contention. This is so because if such is correct the Employees could not be guilty of misconduct as alleged by the Employer.

49. It is trite that the relationship between an employer and an employee at common law is premised on the basis that the employee avails her labour at the disposal of an employer and in return an employee is entitled to remuneration. In such a relationship it is an employer that engages an employee, that pays the remuneration, that has the power to regulate the conduct of an employee, that sets standards of performance, etc. The power of an employer is constrained or limited through various legislative provisions such as the LRA which requires for example that the dismissal of an employee must be fair (see section 185 of the LRA). There is no doubt therefore that where an employer believes that the conduct of the employee has affected the employment relationship it is permitted to discipline an employee. This may even involve conduct that has occurred outside the workplace if there is a nexus

between such conduct and the workplace. On this basis alone, I am of the view that the contention by the Employees stands to be dismissed.

50. This view appears to be indirectly confirmed by the Good of Good Practice: Dismissal ("the Code"). Item 6(1) of the Code states that the "Participation in a strike that does not comply with the provisions of Chapter IV is misconduct". Chapter IV deals with strikes and lockouts. It does appear that the social partners were aware that when there is a strike there may be instances that affect the employment relationship and in such event an employer would be entitled to discipline an employee.

51. There is even a more compelling authority to the right of the Employer to discipline the Employees. In an unreported case, **FAWU v Rainbow Farms (Pty) Ltd (C65/12) [2014] ZALCCT 7 (29 January 2014),** before the Labour Court, Van Niekerk J, was faced with the same issue as the present in review proceedings. The learned judge remarked that "***Picketing rules exist for a purpose, and are integral to the peaceful exercise of the right to strike. An integral element of picketing rules is the respect that striking employees are required to show towards those who elect not to participate in the strike. When striking employees breach picketing rules, they disrespect others, especially when that disrespect is directed against those who wish to work. When striking employees breach picketing rules, and especially when they engage in conduct that is designed to threaten those who not to participate in the strike, they can expect to be disciplined.***"

52. It is thus clear that the contention by the Employees is without basis and as such is dismissed.

Are the Employees guilty of misconduct as alleged by the Employer?

53. The Employees denied the allegations levelled against them. This means that the Employer was required to adduce evidence to prove the allegations against the Employees.

54. It is important to bear in mind that in this inquiry by the arbitrator the Employer bears the onus to prove the allegations against Employees.

55. Onus is at times confused with a similar but different concept, namely evidentiary burden. The key distinguishing feature between the two is that the burden of proof (or onus) remains fixed (with the employer in labour disputes) whilst on the other hand the evidentiary burden may shift during the course of the proceedings [see **SAMWU obo Lungile Felicia v CCMA and others (JR2195/14)**].

56. Having understood this does not wholly answer as how one version over another is preferred. This is where the standard of proof comes to the 'rescue'. It concerns the degree to which a party must prove its case to succeed. In labour disputes the standard of proof is on balance of probabilities (which version is most probably true).

57. A trier of fact (such as a disciplinary hearing chairperson) is required to determine where the truth lies. Naturally the question that must be answered is whether the probabilities favour the party that bears the burden of proof. This requires an analysis and evaluation of the probability or improbability of each party's version on each of the disputed relevant and material issues [see **Stellenbosch Farmers' Winery Group and Another v Martell & Kie SA and Others (2003) (1) SA 11 (SCA)**]. In other words, one is required to determine whether it is probable that a particular state of affairs took place.

58. It is common cause that on 29 March 2021 a group of people gathered at the intersection of Kohler Road and Main Road. The group gathered at approximately 06h04. To the extent that the group included the Employees such was contrary to the Picketing Rules since the Picketing Rules permit picketing from 08h30 (see clause 5.2 of the Picketing Rules). The group blocked traffic, threatened members of the public, intimidated members of the public, made fires, was carrying sticks, threw stones, etc. Such conduct was in violation of clause 6 of the Picketing Rules. The conduct was also in violation of the Labour Court order dated 19 March 2021 in that the blocking or otherwise impeding access to Kohler and Main Road was not permitted.

59. There is therefore no question that the conduct of the group was not permitted. In fact, Thembelani Wellem, conceded that the group violated the Picketing Rules and the Labour Court order.

60. The question is whether the Employees was part of the group and/or associated themselves with the group.

61. I have carefully considered the evidence at my disposal and have come to the conclusion that the evidence as per CCTV footage, the oral testimony of Mr Koutsouvelis, and the documentary evidence (specifically the affidavits) before me proved on a balance of probabilities that the Employees listed hereunder committed misconduct by violating the Picketing Rules and the court order. The evidence proved on a balance of probabilities that the Employees listed hereunder gathered at Kohler Road before 08h30, blocked access to Kohler Road, directly or indirectly threatened members of the public and fellow employees, and brought the name of the Employer into disrepute:

1. Megan Warnie (Employee No 1),
2. Dillon Classen (Employee No 2,
3. Charlton Daniels (Employee No 3),
4. Sibusiso Diamond (Employee No 4,
5. Busisiwe Tonono (Employee No 5),
6. Qhamisa Jack (Employee No 6),
7. Aphelele Somdaka (Employee No 8),
8. Daniel Fredericks (Employee No 9),
9. Geofrey Synman (Employee No 10),
10. Tabo Buqwana (Employee No 11),
11. Mzwandile Marks (Employee No 12,
12. Masixole Mehlala (Employee No 13),
13. Siyanda Makana (Employee No 14,
14. Rusche Bottomley (Employee No 15),
15. Ashton van Rooyen (Employee No 16),
16. Enrico Williams (Employee No 17),
17. Henry Gaseba (Employee No 18),
18. Siposetu Boltina (Employee No 19),
19. Sherwyn Saaiman (Employee No 20),
20. Thembelani Wellem (Employee No 21),
21. Xabiso Mpati (Employee No 22),
22. Lungelo Mtati (Employee No 23),
23. Tiziyano Arnolds (Employee No 24),
24. Ayanda Ntoyanto (Employee No 25),
25. Athenkosi Godlo (Employee No 27),
26. Mwezi Dingiswayo (Employee No 28),
27. Masixole Tshabalele (Employee No 29),
28. Xolile Betela (Employee No 30),
29. Lubabalo Jacobs (Employee No 31),
30. Siphesande Msesiwe (Employee No 32),
31. Sinethemba Ponono (Employee No 33),
32. Lubabalo Kanana (Employee No 34), and
33. Nigel Swartz (Employee No 35).

62. I have no doubt that the Employees were part of the group that violated the Picketing Rules and the court order. The group was burning fires, blocking the road, and intimidating people. The group carried

sticks and was not doing so in the demarcated areas in terms of the Picketing Rules. The group was aggressive and even threw stones. The conduct of the Employees listed in paragraph 61 above amounts to misconduct.

63. I agree with the sentiments expressed by Judge van Niekerk in **FAWU v Rainbow Farms (Pty) Ltd (C65/12) [2014] ZALCCT 7 (29 January 2014)** that just because such conduct "*may have become so common so as to characterise South African industrial relations life, but that does not mean that they are acceptable. Picketing rules exist for a purpose, and are integral to the peaceful exercise of the right to strike. An integral element of picketing rules is the respect that striking employees are required to show towards those who elect not to participate in the strike. When striking employees breach picketing rules, they disrespect others, especially when that disrespect is directed against those who wish to work. When striking employees breach picketing rules, and especially when they engage in conduct that is designed to threaten those who not to participate in the strike, they can expect to be disciplined.*"

Additional allegations levelled against Tabo Buqwana, Rusche Bottomley, and Nigel Swartz

64. It is common cause that Tabo Buqwana (Employee No 11), Rusche Bottomley (Employee No 15), and Nigel Swartz (Employee No 35), parked their cars in front of the entrance gates of the Employer. Tabo Buqwana testified that this was for security reasons. Such evidence is not only illogically but is inconsistent with the proven facts. For instance, he provided no explanation why the vehicles were not parked just alongside the embarkment near the gate but were instead parked in a manner that blocked access. He provided no explanation why they arrived at the same time and more than 2 hours before the start of the picket as per the Picketing Rules. He provided no explanation why one of his colleagues took out a tyre from his vehicle that later used to make fires at the intersection of Kohler and Main Road. The most probable inference to draw from these facts was to obstruct entry and exit to and from the Employer's premises. Therefore, I am satisfied that Tabo Buqwana, Rusche Bottomley, and Nigel Swartz, are guilty of the of having parked their cars in front of the entrances of the Employer obstructing entry and exit from the premises of the Employer.

65. I am satisfied that the Employer has proven on a balance of probabilities that Rusche Bottomley, and Nigel Swartz violated the Picketing Rules by burning tyres. Their conduct resulted in the damage to the public infrastructure, specifically Kohler Road.

Allegations levelled against Nomawethu Monti, Mhlanganisi Nam, and Khanyisa Sodladla

66. Pearce and Groenewald testified that Nomawethu Monti (Employee 26) was dropped off at Main Road and that she proceeded to join the group gathered at the intersection of Kohler Road and Main Road. On the other hand, in her affidavit, she stated that she arrived between 08h00 and 09h00 and that she was not involved in any illegal activities. She conceded that she joined a few of her colleagues near Kohler Road.

67. The allegations against her were that she gathered at Kohler Road and that she disrupted traffic. This cannot be since by the time she arrived the SAPS had already cleared Kohler Road and/or were in the process of doing so. At no point was any evidence adduced that anyone was intimidated in her presence. I could find no evidence that she prohibited the normal to day running of business or that she associated herself with such. I could find no evidence that she brought the name of the Employer into disrepute. Having considered the evidence against her, I am of the view that the Employer has failed to discharged the onus to prove that she committed misconduct.

68. Mhlanganisi Nam (Employee No 36) deposed an affidavit that he arrived on site around 09h00. It is a fact that around that time the SAPS had dispersed the group. The Employer sought to show that he is guilty of misconduct by adducing evidence showing that he was there. In terms of the evidence tendered by the Employer he is shown in a hill adjacent to Kohler Road at around 08h12 and nothing more. The allegations against him were that he gathered at Kohler Road, he disrupted traffic, intimidated people, prohibited the normal to day running of business, and brought the name of the Employer into disrepute. Having considered the evidence against him, I am of the view that the Employer has failed to discharged the onus to prove that he committed misconduct.

69. The evidence at my disposal indicates that Khanyisa Sodladla (Employee No 37) arrived near Kohler Road at around 07h20. The affidavit deposed by her confirms this at paragraph 3. In terms of her affidavit, she denied to have associated herself with the conduct of the group but that the reason for her early arrival was to make the ANCYL aware of the Picketing Rules.

70. The Employer sought to show that she is guilty of misconduct by adducing evidence showing that she was there. In terms of the evidence tendered by the Employer she is shown in a hill adjacent to Kohler Road at round 08h11. Just before the group is dispersed by the SAPS she is out of picture. As the group is dispersed and people are running away, she appears near an Eskom pole. She turns around appearing disinterested to participate in what the group is doing (throwing stones).

71. The allegations against her were that she gathered at Kohler Road and that she disrupted traffic. This cannot be since she was not even near Kohler Road at the time. At no point was any evidence adduced that anyone was intimidated in her presence. I could find no evidence that she prohibited the normal to day running of business or that she associated herself with such. I could find no evidence that she brought the name of the Employer into disrepute. Having considered the evidence against her, I am of the view that the Employer has failed to discharged the onus to prove that she committed misconduct.

CONCLUSION

72. The allegations levelled against Mteteleli Kala (Employee 7) are withdrawn.

73. I find that the Employees listed in paragraph 61, are guilty of the allegations levelled against them.

74. The Employer and the Employees listed in paragraph 61 are invited to make written submissions on the appropriate sanction (factors in aggravation and mitigation) by no later than 21 July 2021.

75. I find that the Employer has failed to establish that Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), are guilty of the allegations levelled against them.

76. It follows that the precautionary suspension imposed by the Employer on Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), is set aside and that Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), are entitled to report for duty.

SANCTION

77. Having found the Employees in paragraph 61 guilty, I am now required to determine the appropriate sanction. In determining the appropriate sanction, I invited the Employer and the Employees to make written submissions by no later than 21 July 2021. The Employer and Employees have duly made the submissions albeit the submissions from the Employees were only received on 22 July 2021.

78. The Employer submitted that the conduct in question had commenced since the first day of the industrial action on 18 March 2021. The conduct caused operational disruptions to the Employer and other businesses. This resulted in the Employer being forced to approach the Labour Court for an urgent

interdict. Despite the interdict having been granted the Employee engaged in misconduct. The Employer argued that such indicates that the conduct was intentional and premeditated.

79. The Employer indicated that other employees who had committed misconduct the same or similar misconduct had been dismissed. What made matters even worse was that the Employees did not show any remorse.

80. The Employer prayed that the Employees should be summarily dismissed because their conduct had rendered the trust relationship intolerable.

81. The Employees stated that I should consider their personal circumstances and the fact that South Africa is a country where the rate of unemployment is high.

82. The Employees indicated that they have been loyal to the Employer and had no disciplinary record. They argued that they conducted themselves in a legal admissible manner which was for the purpose of sound labor relations and keeping an intact mutually positive beneficial working relationship.

83. Some of the Employees argued that I should reconsider the decision of finding them guilty of misconduct as they have not committed any misconduct.

84. The Employees prayed for a sanction short of dismissal.

85. Determining the appropriate sanction is often a complex process because it involves weighing up a variety of factors. What compounds it even more are the realities in South Africa. Those realities are that the unemployment rate is extremely high. The other reality is the unequal nature of our society.

86. Item 3(4) of the Code of Good Practice (Schedule 8 to the Labour Relations Act No 66 of 1995) provides that:

"Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to property of the employer, wilful endangering of the safety of others, physical assault on the employer, fellow employee, client or customer and gross insubordination."

87. From the above, it is clear that the Employer is required to establish that the misconduct is serious and of such gravity to the extent that it makes the employment relationship intolerable. In addition to this the Employer must show that it had considered all relevant factors and that dismissal was still considered to be the appropriate sanction. In **Sidumo v Rustenburg Platinum Mines Ltd (2007) 12 BLLR 1097 (CC)**, the Constitutional Court stated that some of the factors to consider include amongst others:

a) The importance of the rule that was breached.

b) The reason the employer imposed the sanction of dismissal.

c) The basis of the employee's challenge to the dismissal.

d) The harm caused by the employee's conduct.

e) Whether additional training and instruction may result in the employee not repeating the misconduct.

f) The effect of dismissal on the employee.

g) The long-service record of the employee.

88. There is no question that the employment relationship is premised on trust, good faith and confidence. If any of these elements is disturbed, the relationship is at risk of being terminated. There is no question that the conduct of the Employees created such risk. The question is the degree to which the Employees' conduct disturbed it. In other words, is their conduct of such gravity that continued employment is no longer possible.

89. In paragraph 51 of my findings regarding the conduct of the Employees I quoted the dictum of van Niekerk J in **FAWU v Rainbow Farms (Pty) Ltd (C65/12) [2014] ZALCCT 7 (29 January 2014)**, wherein the learned judge stated that "***Picketing rules exist for a purpose, and are integral to the peaceful exercise of the right to strike. An integral element of picketing rules is the respect that striking employees are required to show towards those who elect not to participate in the strike. When striking employees breach picketing rules, they disrespect others, especially when that disrespect is directed against those who wish to work. When striking employees breach picketing rules, and especially when they engage in conduct that is designed to threaten those who not to participate in the strike, they can expect to be disciplined.***"

90. The conduct of the Employees is worsened by the fact that they were warned as far back as 19 March 2021 not only by the Employer but the Labour Court as well. This is so because the Labour Court

granted an interdict against the Employees. This did not change the conduct of the Employees. I am unsure what else the Employer was expected to do in the circumstances.

91. During the course of the arbitration the Employees demonstrated a lack of appreciation that what they had done did not only amount to gross misconduct but was a criminal offence as well. They failed to appreciate that their conduct infringed on the constitutional rights of the Employer and other members of the public. Such conduct is inconsistent with remorse. This has made matters even worse because rehabilitation starts with remorse. In the absence of remorse rehabilitation is impossible.

92. No amount of additional training or instruction would result in the Employees not repeating the misconduct.

93. I appreciate that most of the Employees have a long service with the Employer and have clean disciplinary records. One would have expected them to know better considering their long service.

94. The harm caused on the Employer was clearly significant because employees of the Employer were intimidated. Some were even assaulted. There was clear actual and potential harm to the Employer in that the Employer was prevented from operating and suffered reputational damage.

95. It must also be mentioned that the conduct of the Employees was intentional and premeditated. This can be gleaned for the fact that some arrived with tyres and blocked access using various objects and their cars.

96. For these reasons, I am left with no option but to conclude that the Employer is entitled to terminate the employment relationship. Therefore, I find that the Employees should be summarily dismissed.

AWARD

97. The allegations levelled against Mteteleli Kala (Employee 7) are withdrawn.

98. I find that the Employees listed in paragraph 61 of my findings regarding the conduct of the Employees, are guilty of the allegations levelled against them.

99. I find that the Employees listed in paragraph 61 of my findings regarding the conduct of the Employees, should be summarily dismissed.

100. I find that the Employer has failed to establish that Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), are guilty of the allegations levelled against them.

101. It follows that the precautionary suspension imposed by the Employer on Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), is set aside and that Nomawethu Monti (Employee 26), Mhlanganisi Nam (Employee No 36), and Khanyisa Sodladla (Employee No 37), are entitled to report for duty.

Signature: _____

Commissioner: ***Bulelani Busakwe***

Sector: ***Business/Professional services***