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(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2024-11-06
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THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

Case No: PR142/22

In the matter between:

GOODYEAR SOUTH AFRICA (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
AMON NYONDO *N.O.*	**Second Respondent**
NUMSA OBO V JACOBS AND 53 OTHERS	**Third Respondent**

Heard: 10 October 2024

Delivered: 6 November 2024

JUDGMENT

MAKHURA, J

Introduction

[1] These review proceedings are in terms of section 145 of the Labour Relations Act[1] (LRA) against the arbitration award issued in favour of the individual third respondent (employees). The applicant company seeks to review and set aside the award and to substitute it with an order that the dismissal of the 54 employees was substantively fair alternatively to remit the matter to the first respondent for arbitration *de novo*. The proceedings are opposed by the third respondent.

Material facts

[2] The company operates three shifts on Mondays to Fridays. The day shift starts from 7h00 to 15h00, the afternoon shift from 15h00 to 23h00 and the night shift from 23h00 to 7h00 the following morning. It also operates two shifts on Saturdays, 7h00 to 19h00 and 19h00 to 7h00 the following morning.

[3] The employees are members of the National Union of Metalworkers of South Africa (NUMSA). On 20 March 2020, the company and NUMSA concluded a collective agreement which was to take effect on 6 April 2020. This agreement applied to all hourly rated employees, including the employees who were all employed as machine operators in the Banbury department. The collective agreement provided, inter *alia* that:

> 'Meal and tea breaks will be staggered on such basis as may be required by Goodyear's operational requirements in conformity with maintenance of the required level of production output.'

[4] This is, per evidence, a reiteration and formalisation of the status *quo* or the long entrenched practice of continuous operation of the machines during the employees' meal and tea breaks. What the collective agreement brought about however was the termination of the payment of the legacy allowance to the employees. This legacy allowance was a payment to the employees as a form of

[1] Act 66 of 1995, as amended.

reward for relieving their colleagues during their meal or tea breaks to ensure continuous operation of the machines. The agreement essentially abolished the payment of this legacy allowance but the employees were still required to continue working staggered meal and tea breaks to ensure continuous running of the machines to improve productivity. In exchange of abolishment of the payment of legacy allowance, all employees were paid a once off gratuity of R5000.00. What the agreement did not do however was to expressly deal with what would be required of the employees when they take their breaks.

[5] In July 2020, NUMSA addressed a letter to the company in terms of which it gave 30 days' notice of termination of the collective agreement. The company rejected the purported termination, which led to NUMSA referring a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) seeking confirmation that the collective agreement between the parties had been cancelled. This dispute was referred to the CCMA in December 2020. The company successfully raised a jurisdictional point. Whether or not the collective agreement was validly cancelled is a matter that did not concern the commissioner and does not concern this Court.

[6] On 2 March 2021, one Brian van Rensburg (van Rensburg), a Roller Die machine operator (machine 5), informed his team leader that week of 1 March 2021, Dennis Jospeh (Joseph), that he was not going to operate or work on two machines and that he was going to switch off his machine during his breaks. Joseph had to stand in when van Rensburg (Van Rensburg) took his breaks. On 5 March 2021, when Joseph was not able to stand in, Van Rensburg switched off the machine during his breaks. On Saturday, 6 March 2021, the employees who worked the two shifts switched off the machines during their breaks.

[7] The employees in *casu* were scheduled to work during the week commencing Monday, 8 March 2021. At approximately 11h59 on 8 March 2021, an internal email to amongst others managers was circulated in terms of which the Employee Relations Manager, Bongani Gunyazile (Gunyazile) attached the collective

agreement and wrote, with specific reference to the provision of the collective agreement dealing with staggered breaks, that:

> 'Where applicable, with immediate effect please make sure that a staggered break system is implemented as agreed in the S189A Agreement.
>
> NB: S189 Collective Agreement constitutes new terms and conditions of employment applicable to all hourly associates – non-compliance constitutes a breach of employment contract.'

[8] At 13h40, Sakhumzi Manyisana (Manyisana), the Human Resources Business Partner: Preparation, sent an email to Elroy George (George), the Business Team Manager, recording their discussion and asking him to communicate with his team leaders to ensure that there was compliance with continuous operation. Manyisana informed George that he had communicated with the shop stewards.

[9] At 14h49, George forwarded the above email chain to the team leaders for the three shifts, Michael Diedericks (Diedericks), Dennis Joseph (Joseph) and Wickus Knoesen (Knoesen). George asked the team leaders to ensure that the employees comply with the staggered breaks arrangement.

[10] It is common cause that on 8 March 2021, there were stoppages of machines during the meal and tea breaks. It is further common cause that the issue of machine stoppages started a week prior on 2 March 2021. Van Rensburg's conduct of 2 March 2021 was reported to human resources but no disciplinary action was taken against him.

[11] On 9 March 2021, the company addressed a letter to NUMSA, notifying it of the suspension of its shop steward, Andre Goeda (Goeda), and the company's intention to discipline him. It was alleged that Goeda initiated and instigated or was a party to the initiation and instigation of an unlawful and unjustifiable refusal by the employees to effect a lawful instruction to work staggered breaks to secure continuous production and switching off machines to prevent continuous production from taking place.

[12] On the same day (9 March 2021), the company issued another letter to NUMSA to the effect that its members were engaged in the unlawful refusal to work staggered breaks and a proposed final written warning to all the employees. The employees were equally issued with letters notifying them of their alleged unlawful refusal to work staggered breaks. The letter to the employees reads that:

> 'On or about 8 March 2021, the information available to the company indicates that you deliberately, and without any justification, refused to give effect to a lawful and reasonable instruction to work staggered breaks to secure continuous production, in the discharge of your duties and responsibilities in accordance with your terms and conditions of employment.
>
> You are fully aware of the fact that an unlawful refusal of this nature is unacceptable to the company...
>
> In the normal course behaviour of this nature constitutes a dismissible misconduct.
>
> The company is however prepared to take into account the fact that associates appear to have been influenced by a shop steward who instigated and/or was party to the instigation of the failure to give effect to this instruction. Whilst this does not justify associates participating in misconduct at this level the company nevertheless proposes to issue a final written warning to all associates identified as having been part to such unlawful refusal...
>
> It is also necessary to point out to you that any further participation by you in unlawful behaviour of this nature will not be tolerated and will certainly be considered as a dismissible offence.'

[13] The above proposed final written warning was immediately followed with a confirmed final written warning on the same day, 9 March 2021. Accordingly, the employees and NUMSA did not make any representations or respond to the proposal to issue the employees with the final written warning. The employees were therefore issued with final written warnings for deliberately refusing *"to give effect to a lawful and reasonable instruction to work staggered breaks"*. The final

written warnings stated that further participation in the unlawful conduct of this nature would not be tolerated and would be considered a dismissible offence.

[14] Although issued on 9 March 2021, these final written warnings were served on employees between 9 and 11 March 2021. On 11 March 2021, the company issued suspension letters to the employees, including those who were issued with final written warnings on the day, and called them to attend disciplinary hearings on 16 March 2021.

[15] The charge against the employees was formulated as:

> 'you deliberately, and by way of gross insubordination, failed and/or refused to give effect to a lawful instruction that you adhere to and apply the staggered breaks during your shift of 10 March 2021, as required of you by the Company, despite being in receipt of a final written warning for this same misconduct.'

[16] Goeda, who was on suspension from 9 March 2021, faced an additional charge of instigating or inciting the employees to commit the above misconduct.

[17] It is common cause that following the suspension of the 54 employees in this matter, all the employees embarked on an unprotected strike which lasted a week until the company obtained a court interdict. It is further common cause that the employees who embarked on this unprotected strike were not disciplined.

[18] Following disciplinary proceedings, the employees were dismissed with effect from 31 May 2021. They referred an unfair dismissal dispute to the first respondent for conciliation and later arbitration.

[19] The commissioner, after arbitration of the dispute, issued an award on 28 June 2022 in terms of which he found that although the conduct of the employees constitutes insubordination, the insubordination was not gross to warrant a sanction of dismissal. The commissioner declared the dismissal of the employees to be substantively unfair and ordered the company to retrospectively reinstate

them. It is this award which is the subject of these review proceedings instituted by the company.

The review application

[20] The company contends that the commissioner committed misconduct and gross irregularities in the conduct of the proceedings, that he committed material errors of fact and law and arrived at a decision that no reasonable decision-maker could have arrived at on the evidentiary material before him.

[21] First, the company complains that there was no fair trial or arbitration of the dispute because the commissioner expanded the issues in dispute beyond the ambit of the pre-arbitration minute and failed to highlight specific issues during the proceedings, including the inconsistency challenge vis-à-vis the striking employees, which ultimately formed the fundamental basis of his decision (the fair trial).

[22] Second, the commissioner is accused of misapplying the law to the facts by incorrectly and unreasonably characterising the dispute as one that constitutes collective misconduct dispute or placing undue weight on the "collective" dimension of the dispute (the nature of the dispute).

[23] Third, the company contends that the commissioner exceeded his powers, acted ultra vires and materially misdirected himself in determining the validity of the final written warnings issued to the employees in the absence of a referral of an unfair labour practice dispute in terms of section 186(2) of the LRA (the final written warnings).

[24] Fourth, the company contends that the commissioner failed to apply his mind to the issues and misdirected himself in finding that the insubordination was not gross. It was contended further that the commissioner failed to examine the true nature and gravity of the misconduct and thereby reached an unreasonable decision on sanction (the sanction).

[25] Finally, the company takes issue with the commissioner's finding in respect of Goeda's dismissal dispute. As already indicated above, Goeda faced an additional charge of instigation or incitement. The company contends that the commissioner disregarded material evidence in respect of Goeda's guilt and sanction. The company's case is that considering Goeda's leadership role and his role as a spokesperson, the commissioner should have found that his dismissal was fair (Goeda's dismissal).

Evaluation

[26] The review test is well settled. It was set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*, that the commissioner's award is reviewable if it is *"one that a reasonable decision maker could not reach"*.[2] The Constitutional Court explicated further on the test in *Duncanmec (Pty) Ltd v Gaylard NO and others*[3], as follows:

> 'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'[4]

[27] The Labour Appeal Court (LAC) held that this is a stringent test that will ensure that awards are not lightly interfered with.[5] This Court must ascertain whether the commissioner considered the principal issue before him, whether he evaluated the facts presented at the hearing and came to a conclusion that is reasonable. It is

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[2] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.
[3] (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.
[4] Ibid at paras 42 – 43.
[5] *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.

immaterial that the commissioner may have committed a process related irregularity.[6]

[28] Mere errors or irregularities are not sufficient to vitiate the award. To warrant interference from a review court, the award must be disconnected from the evidence resulting in an unreasonable outcome[7] and/or the failings, errors, irregularities or misconduct must have resulted in the award ultimately being unreasonable.[8] In *Makuleni v Standard Bank of SA (Pty) Ltd and others*[9] the LAC cautioned this Court not to "*yield to the seductive power of a lucid argument that the result could be different*" because that is the luxury and privilege reserved for the court of appeal. The LAC continued that it is only if the conclusion reached by the commissioner is untenable that the review court will be justified in reviewing and setting aside the award.

The nature of the dispute and (un)fair trial

[29] The employees were charged with and dismissed for gross insubordination. Goeda was also charged with and dismissed for instigation or incitement. At the arbitration proceedings, the commissioner found that the employees were guilty of insubordination. Having found the employees guilty of insubordination, the commissioner proceeded to consider whether the insubordination was gross.[10]

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[6] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC) at paras 16 – 17 and para 20. At para 20, the LAC, per Waglay JP, explained that the questions to be asked by the review court are *"(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"*

[7] *Duncanmec (Pty) Ltd v Williams Itumeleng NO and others* [2020] 7 BLLR 668 (LAC) at para 23; *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Meditation and Arbitration and others* (2021) 42 ILJ 1071 (LAC); [2021] 5 BLLR 475 (LAC) at para 19.

[8] Ibid para 12; see also *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 33.

[9] (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4.

[10] See: *Wasteman Group v South African Municipal Workers' Union* 2010 JDR 1581 (LAC); [2012] 8 BLLR 778 (LAC); *Palluci Home Depot (Pty) Ltd v Herskowitz and others* (2015) 36 ILJ 1511 (LAC); [2015] 5 BLLR 484 (LAC) where the LAC made it clear that for an act of insubordination to warrant dismissal, it must be of

This was the correct enquiry and approach. His decision that the employees are guilty of insubordination is not challenged.

[30] In determining sanction, the commissioner considered various factors, which in the main were the final written warnings, the collective nature of the misconduct and the inconsistency challenge raised in respect of Brian van Rensburg, employees who switched off the machines on Saturday, 6 March 2021 and in other departments, and all other employees who embarked on unprotected strike following the suspension of the employees.

[31] It is the findings made in respect of the final written warnings and inconsistency which the company contends the commissioner exceeded his powers or acted ultra *vires* and/or committed material errors and irregularities. The company further complained that the commissioner mischaracterised the nature of the dispute and in the process denied it the right to a fair hearing[11] and that the commissioner committed an error by conflating the collective nature of the dispute with its right to discipline the individual employees. I deal with the issues relating to inconsistency and final written warnings later in my judgment, suffice to say at this stage that there is no merit in the company's arguments.

[32] The commissioner found that the misconduct emanated from a collective dispute relating to the continuous operation of the machines. It is common cause that the employees were unhappy with the continuous operation of machines during breaks. NUMSA issued a letter cancelling the collective agreement and later referred the dispute to the CCMA seeking confirmation of the cancellation of the agreement. The company was aware of the employees' unhappiness with the arrangement, which was also expressed by conduct a week prior to 8 March 2021. After the employees were suspended and a disciplinary process was initiated against them, all other employees in the factory downed tools. The commissioner

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a particularly gross nature. The employer therefore bears the onus to show that the insubordination is gross or serious enough to warrant a dismissal.

[11] *Nkomati Joint Venture v Commission for Conciliation, Mediation and Arbitration and others* (2019) 40 ILJ 819 (LAC); [2018] ZALAC 53 at para 18; *Masoga and another v Pick n Pay Retailers and others* (2019) 40 ILJ 2707 (LAC); [2019] 12 BLLR 1311 (LAC) at para 37.

also found that the line of cross-examination against the shop steward by Mr Le Roux, who appeared for the company during arbitration proceedings, regarding the procedures that the shop stewards should have followed in raising the employees' grievances further illustrates the company's tacit acknowledgement that the charges against the employees emanate from a collective dispute.

[33] The company's complaint was that the commissioner had a strong predisposition to ameliorate the severity of the employees' misconduct. The contention is that the employees' unhappiness in maintaining continuous production could not serve to dilute the gravity of their conduct. In my view, the continuous production or operation of machines during breaks is an issue that cannot be separated from the misconduct of the employees. The employees, without exception, were issued with final written warnings and later charged for failing to keep the machines running during their breaks. There was no specific evidence led against each employee despite the common cause fact that some employees, who were trainees at the time, could not operate the machines, at least not without supervision. These employees could not have been responsible for switching off the machines.

[34] The company's contentions are without merit. The commissioner dealt with and considered the issue before him, which was whether the employees were guilty of insubordination and if so, whether this was sufficiently serious to justify dismissal. He found the employees guilty and proceeded to deal with the second element of substantive fairness, sanction.

[35] The reason for the employees' dismissal was not because of the conduct itself, but because the employees had prior final written warnings. Therefore, if the employees had no warnings, the disciplinary action would have been short of dismissal. This is an illustration that the company did not consider the conduct itself to be sufficiently serious to warrant dismissal.

The final written warnings

[36] The final written warnings were issued on 9 March 2021. The employees were issued these final written warnings for their conduct on 8 March 2021 of switching off the machines during their breaks.

[37] On 9 March 2021, Wickus Knoesen, the shift 2 (15h00 to 23h00) team leader, served the final written warnings on about 8 employees. Knoesen's evidence was that he could not serve the final written warnings on all the employees in his afternoon shift and therefore he continued on 10 March 2021. These employees refused to sign acknowledgement of receipt of the final written warnings.

[38] On 10 March 2021, he served 11 more employees. These employees also refused to sign the warnings and wanted representation. That the employees wanted representation is evident from the cross-examination of Knoesen:

> 'MR EUIJEN: Okay, now it is also correct to say, isn't it Mr Knoesen, that when you issued the final written warnings to the workers on your shift, there was no shop steward present. Is that correct?
>
> MR KNOESEN: That is correct.
>
> MR EUIJEN: And in fact, a number of workers specifically requested a shop steward to be present and you have made note of that …
>
> MR KNOESEN: That is correct.'

[39] It is common cause that shift 2 did not run on Thursday, 11 March 2021 because by the time the employees arrived, the company had already started issuing suspension letters. These suspension letters were issued to employees who received their final written warning during their shift on 10 March 2021.

[40] Joseph testified that he issued or handed out the final written warnings to the employees on his shift (23h00 – 7h00) in the morning of 10 March 2021. There are 11 final written warnings which Joseph served on the employees. The employees

refused to sign and Joseph noted that he gave them an opportunity to call representation. However, it is common cause that shop stewards are only available in shifts 1 and 2 and that there is or was no shop steward available for shift 3.

[41] During the day shift (7h00 to 15h00) on 10 March 2021, Diedericks, with the assistance of De Wit, served 14 employees with final written warnings. The employees refused to sign. Diedericks and De Wit did not serve all the employees on 10 March 2021. As a result, on 11 March 2021, they served 9 more employees with the final warnings. These 9 employees were on the same day issued with suspension letters and later dismissed.

[42] It is evident from the above that only 8 employees were served with the final written warnings during the afternoon shift on 9 March 2021. These employees wanted the presence of the shop steward. At least 36 employees were served with the final written warnings on 10 March 2021. The company served 9 employees with these warnings on 11 March 2021 and then suspended them. The employees issued with the final written warnings in the first and second shifts on 10 March 2021 were then informed the following day before they could even work that they continued with the misconduct and were suspended, and later dismissed.

[43] The company noted that most of these employees refused to sign because they wanted representation. This was a disciplinary sanction taken without any discussion with or representations from the employees or their trade union. The employees had the right to seek representation at least before the disciplinary sanction was issued against them. This right was violated by the company.

[44] The reason for the employees' dismissal, premised on the alleged previous final written warnings is simply not sustainable. First, the warnings were issued without the employees' and/or their trade union's representations. They were therefore arbitrarily issued. Second, for many of these employees, after being served with the final written warnings, they did not even work the next shift for the company to allege that they committed the same offence, again. The employees had no time

to reflect on the final written warnings and to consider challenging them or complying with the alleged instruction.

[45] In his award, the commissioner considered the final written warnings to be a serious disciplinary action against the employees and said that it must be issued after due and fair disciplinary process. He found that in such a disciplinary process, the employees have the right to representation. In the present matter, the employees, or most of them, asked for representation. This representation was not provided. The commissioner found that this failure by the company to allow or afford the employees representation before the issuing of the final written warning meant that the warnings were unfair procedurally. The final written warnings, so the commissioner found, were issued as part of the company's strategy to strengthen its case to ultimately dismiss the employees. They were hurriedly issued to lay a foundation for a case for dismissal. The commissioner concluded that the reliance by the company on these unfair final written warnings affected the fairness of the employees' dismissal. In other words, the dismissal of the employees, influenced directly and primarily by the unfair final written warnings, cannot therefore be fair.

[46] I am unable to find any flaw in the commissioner's reasoning and findings. However, the company contends that the commissioner should have, in essence, closed his ears and only opened his eyes to see that the employees were issued with these warnings. In other words, in the absence of a separate referral of an unfair labour practice dispute in terms of section 186 of the LRA challenging the final written warnings, it was not for the commissioner arbitrating an unfair dismissal dispute to open this enquiry, even where the company relies on the warnings to justify the dismissal. Therefore, so the company contends, the commissioner acted ultra *vires* and exceeded his powers as a commissioner, committed an error and reached an unreasonable decision.

[47] The company's contention ignores the fundamental reason for the dismissal of the employees. The employees were dismissed, not because they stopped the

machines or disrupted production or that their conduct in this regard was destructive of an employment relationship. They were dismissed because of their prior final written warnings.

[48] Mr Grogan, appearing for the employees, submitted that there was nothing unreasonable with the commissioner's finding. He argued that the commissioner was required to consider the final written warnings and the circumstances leading to the issuance thereof. For this submission, Mr Grogan referred this Court to a judgment of the LAC in *Changula v Bell Equipment*[12] *(Changula)*. In that judgment, the LAC warned against mechanically following or applying the disciplinary code as if it were an immutable set of commandments. The LAC criticised the Industrial Court for failing to take into account the circumstances that led to the issuing of the final written warning, which was used as a basis for dismissing the employee in the subsequent disciplinary proceedings. The LAC held that:

> 'In our view the appeal tribunal was wrong in concluding in these circumstances that, because the appellant had acquiesced in the final warning, no further regard need to have been given to the circumstances which gave rise to it. The industrial court also erred in holding that the respondent was within its rights to issue the final written warning following upon collective employee protest.
>
> As already indicated the original accusation and disciplinary action was unreasonable, unfair and unjustified and consequently vitiated all subsequent acts following thereon...
>
> It must be emphasized that it is not intended in this judgment to lay down a general rule that employers when disciplining employees must reopen and reconsider previous disciplinary cases against the employee. In the present case the previous disciplinary action was made an issue by the appellant at his appeal hearing in June 1988, was placed in issue on the pleadings in this case and constituted one of the findings of the industrial court.'[13] [Own emphasis]

[12] (1992) 13 ILJ 101 (LAC).
[13] Ibid at 110F - J.

[49] This Court in the *National Union of Metalworkers of SA and others v Atlantis Forge (Pty) Ltd*[14] *(Atlantis)* was confronted with a matter where the employer used the prior warnings to justify the dismissal of the employees. The employees embarked on an unprotected strike in December 2002. The employer disciplined all the employees who participated in the December 2002 unprotected strike. Amongst them were employees who in February 2002 were issued with final written warnings for similar misconduct. The warnings issued in February 2002 were valid for 12 months, despite the disciplinary code providing that warnings remained valid for 6 months. The employer dismissed these employees because at the time of the second offence in December 2022, their 12-month final written warnings had not expired and remained valid. Although they referred to the unfair labour practice challenging the warnings, the employees did not pursue arbitration of the dispute and therefore there was no outcome on the dispute. In simple terms, the employees abandoned the dispute and the challenge to the final written warnings.

[50] The employer's case in *Atlantis* was summarised by the Court as follows:

> 'Firstly, it was submitted that because the union did not persist with the arbitration, the 12-month final written warning should stand and hence remained current at the time of the December strike. Secondly, though it was permissible for the company to have dismissed the workers who participated in the February strike, the company in a spirit of leniency had opted for a lesser sanction and it was inappropriate for this court now to second-guess that sanction. Thirdly, even if the warnings had expired, the offence committed in December 2002 remained a dismissible one and the fact that a lesser sanction was meted out to the employees with a clean record did not render the dismissal unfair on the basis of differential discipline.'

[51] The Court comprehensively dealt with the validity of the final written warnings issued against the employees in February 2002. It held that the disciplinary code provides that the final written warning would be valid for six months. The disciplinary code was incorporated into the contracts of employment of the

[14] (2005) 26 ILJ 1984 (LC); [2005] 12 BLLR 1238 (LC).

employees. Therefore, despite the company issuing warnings valid for twelve months, the Court found that the warnings were valid only for six months. The Court continued:

> 'The argument that the company was entitled to rely on both the union's failure to persist with the arbitration and the workers knowingly electing not to pursue the matter, has the ring of an estoppel or waiver argument. Estoppel normally requires a deliberate or negligent representation that a state of affairs is true and reliance upon that representation. Neither the union nor the individual applicants ever made any representation that they accepted the objectively invalid warnings as valid or as enduring for more than six months. On the contrary, they took issue straight away and represented unequivocally that they considered the warnings to be invalid. The company's chosen reliance upon its own interpretation was at its own peril, once it had been forewarned. That the union may not have acted conscientiously does not change the situation. If the warnings were objectively invalid there was no duty on the union to seek a declarator to that effect. Indeed, it could be argued, once the union had put the warnings in contention, management, rather than the union, had a duty to the company and the shareholders to seek a declarator. Likewise, the failure to pursue a specific statutory remedy within a legislative time frame does not of itself constitute a waiver of an entitlement to assert the invalidity of conduct not contractually sanctioned.
>
> Nor am I able to accept the policy argument that reconsideration of previous sanctions will lead to an unacceptable broadening of the range of admissible evidence in subsequent dismissal proceedings. Whether a sanction in any given case was in accordance with the employer's disciplinary code and the employee's disciplinary record has always been a relevant consideration when determining the substantive fairness of a dismissal. Importantly though, in the present case, the company consciously chose to premise its selective disciplinary action in response to the strike of December 2002 upon the disciplinary record of the employees, and while dismissal might very well have been justified for all the employees involved, it elected for its own reasons to spare those employees without a warning and thereby put the validity of the warnings, and its reliance upon them, directly in

issue. In view of the earlier challenge to the warnings, it did so knowingly. It is consequently a matter of reason and common sense that the validity of the warnings would assume relevance. Admittedly this extended the ambit of the issues, but evidence was in any event led on the issue and though taking up some time it did not render the trial any more unwieldy than it otherwise in fact was.

Lastly, albeit correct that the CCMA is the appropriate body to pronounce upon whether the warning of February 2002 constituted an unfair labour practice, that does not preclude this court from pronouncing upon the validity of the warnings in terms of the contract between the parties. Accepting, in accordance with the principle ommia praesumuntur rite esse acta, that the warnings may have been presumptively valid, if objectively they were in fact and in law invalid, this court and the applicants are free to disregard them. Unlawful or wrongful conduct cannot be regarded as lawful merely because it has not been challenged or pronounced upon in an appropriate forum.'[15] [Own emphasis]

[52] The significance of the above judgment is that where the employer directly relies on the previous final written warning to justify the dismissal of the employees, the commissioner or the Court determining the fairness of the dismissal must enquire into the validity of the warnings and the circumstances that led to the warnings being issued even if the employee did not initially challenge it. That the employee did not challenge the warning at the time it was issued does not automatically elevate the warning to a status of a valid and binding document and does not mean that the employee waived his right to challenge it, particularly in circumstances where the employer relies on it to justify the subsequent disciplinary action.

[53] Therefore, the commissioner was enjoined, once these final written warnings were raised and relied upon by the company to justify the fairness of the employees' dismissal, to consider the context and circumstances under which they were issued and their validity. To expect commissioners to simply accept the final written warnings on mere production by the employer because there was no challenge to

[15] Ibid at paras 143 – 145.

it, which is a suggestion by the company, would be a material misdirection on their part and a misconception of the enquiry into the fairness of the dismissal.

[54] A separate referral of an unfair labour practice dispute is not a precondition for the commissioner to consider the previous final written warning. The commissioner has therefore not committed any reviewable errors or irregularities. He conducted the enquiry within the legal prescripts and his powers and made a finding that is unassailable. The review ground raised against the commissioner's finding in this regard falls to be rejected.

[55] There may be sound and justifiable reasons why many employees issued with warnings or disciplinary sanction short of dismissal may not immediately challenge them. The main reason in my view is that the employees are not left without employment and do not suffer financial prejudice as a result of the warning. The other reason, not to be divorced from the main one, is that the warning is of a limited duration and by the time the arbitration proceedings are concluded, the warning might have lapsed. Additionally, the employee may be discouraged by the resources needed in the pursuit of overturning the warning, which will inevitably result in the employee taking leave from work to attend the hearing and the associated expenses of travelling to and from the CCMA or bargaining council.

[56] The last complaint on this aspect of the final written warnings is that because of his decision to enquire into the circumstances that led to the final written warnings and his finding that the warnings were unfair, the commissioner misdirected himself in his ultimate finding that the charge was not gross to warrant a sanction of dismissal. This argument by the company suffers a fatal blow from my finding that the commissioner was indeed required to enquire into the circumstances that led to the final written warnings and consider whether they were validly and fairly issued. This argument therefore falls flat on that basis and is equally rejected as having no merit.

Inconsistency

[57] Consistency is an element of disciplinary fairness which requires the employer to apply the same measure of discipline to every employee who committed the same or similar offence.[16] The case of inconsistency must be raised upfront and with sufficient particularity.[17]

[58] Inconsistency may either manifest itself in the form of issuing different or inconsistent sanctions to employees who committed the same or similar offence, or where the employer fails to take disciplinary action against one employee but disciplines another employee for the same or similar offence committed by the former employee.

[59] Once the employee raises the challenge, the onus is on the employer to show that it applied discipline consistently by either demonstrating that the offences committed by the respective employees are not the same or similar or that the employee is a repeat offender which makes the repeated offence more serious and the employer having previously adopted progressive discipline, was now justified to impose a harsher sanction.

[60] The commissioner made the following findings on the issue of inconsistency:

> 'The Respondent did not apply the discipline consistently. No disciplinary action was taken against Mr Van Rensburg who started the actions of stopping the machines during the break on 2 March 2021. No disciplinary action was taken against the employees who stopped the machines in the two shifts on Saturday 06 March 2021. The actions of those employees were identical to the actions of the Applicants. No disciplinary action was taken against the employees who went on an unprotected strike as a result of this dispute. The applicants were also listed as part of the plus minus 800 strikers who were listed in Schedule "1" of the Labour Court case P27/21. The same cause of action gave rise to actions of the Applicants of switching off the machines during breaks and going on an unprotected strike by

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[16] See: *SA Commercial Catering & Allied Workers Union and others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC); *Cape Town City Council v Masitho and others* (2000) 21 ILJ 1957 (LAC); [2000] ZALAC 15.
[17] *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2017) 38 ILJ 860 (LAC) at para 31; *Mthembu v Commission for Conciliation, Mediation and Arbitration and Others* [2022] ZALCJHB 159.

the employees. Both the strikers and the Applicants "took the law into their own hands" in so far as they reacted to the collective dispute of their demand pertaining to conditions of employment. The 54 Applicants were dismissed while all other employees who committed the same offence were left intact. The machines were being stopped in other departments which were covered by the same working arrangement that was introduced as part of the March 2020 agreement. No disciplinary action was taken against the employees in those departments. What the employer did in dismissing the Applicants was unfair in the circumstances.'

[61] The company does not, wisely so, take issue with the inconsistency finding in respect of Van Rensburg. This is a material admission on the company that the finding of the commissioner is reasonable. Further, it was established that the employees who worked on Saturday, 6 March 2021 switched off their machines during breaks and were not disciplined. The company's attempt to upset the award based on inconsistency falls flat on this basis alone.

[62] The company takes issue with the commissioner's finding of inconsistency insofar as it relates to the striking employees and the employees who work in other departments where the machines are switched off. The case advanced was that the inconsistency challenge did not extend to the striking employees and therefore the company was denied a fair trial of the issue.

[63] Mr Fourie correctly conceded that even if the Court finds in the company's favour on these issues, these alleged irregularities are not sufficient to vitiate the award, considering that the company accepts that it applied discipline inconsistently when compared to Van Rensburg. Therefore, even if I agree with the company that the commissioner committed an error or irregularity, which I do not, the error or irregularity will not result in the setting aside of the award.

[64] The issue of inconsistency against the striking employees was properly placed before the commissioner and the company was aware of it. It is common cause that after the suspension of employees on 11 March 2021 and the notices issued against them to attend disciplinary proceedings, all employees stopped work and

participated in an unprotected strike which continued for a week until interdicted by this Court. In his opening statement, Mr Euijen acting for the employees stated that:

> 'But, the dispute about the agreement was not just a dispute between these workers and the Company. It was really the entire... factory, to the extent that on the day that the individuals were... suspended, the entire Goodyear factory came out on strike and stayed out on strike for another week over this issue and no disciplinary action was taken against any of those strikers. The only people who have been disciplined in this case, for the three and bit days of the expressed unhappiness, are the people sitting here before you and it is for that reason that we say that the Company is really using this issue to make an example of these dismissed workers to maintain production the way they want to at the factory and that enabled them to really not take any disciplinary action against the rest of the factory for going on a strike for longer duration than any misconduct that these workers have been accused of.'

[65] Mr Euijen stated that all other employees who participated in the unprotected strike were not disciplined. Significantly, he emphasised that the employees in *casu* were disciplined despite expressing their unhappiness for three days, whereas all other employees who expressed their unhappiness for a week were not disciplined. In my view, there can be no doubt that the above statements raised squarely an issue of inconsistency against the striking employees who were not disciplined and a comparison of the nature of misconduct committed and how long the misconduct continued for.

[66] The company relies on an alleged objection raised by Mr Le Roux during the cross-examination of De Wit that this aspect of inconsistency was not before the commissioner. Mr Euijen put to De Wit, the company's first witness, that no disciplinary action was taken against the striking employees and that they remained employed, to which De Wit confirmed. It was at this stage, after De Wit had already responded to the question that Mr Le Roux interjected and raised what he called a "concern". This concern was captured as follows:

'MR LE ROUX: Sorry Mr Commissioner, I am just concerned about one thing and I do not want to say too much in front of the witness, but if this is going – if that distinction is going to be pursued, it may make it necessary for me to call Mr Gunyazile about what was or was not done in relation to the strikers and then he must rather step outside, because I may need to call him as to what was done in that regard...

MR LE ROUX: At least until I have taken instructions and spoken to my learned friend about it.

MR LE ROUX: I do not want to compromise him as a potential witness.

MR EUIJEN: Ja, I do not have any more questions on that issue.

MR LE ROUX: Okay. Alright, that is fine. If he is stepping off anyway, then I do not need to throw him out.'

[67] This concern, as I understand it, was the presence of Gunyazile in the room as a potential witness. The distinction between the dismissed employees and the striking employees was already made and De Wit responded. Mr Euijen did not withdraw the question put to De Wit. He simply indicated that he had concluded his cross-examination on the issue and had no further questions. As a result, Mr Le Roux did not see the need to ask Gunyazile to excuse himself from the proceedings.

[68] Accordingly, the opening statement, the questions put to De Wit and the above interaction between Mr Euijen and Mr Le Roux illustrate that the employees have pursued this aspect of inconsistency and that the company was well aware of the point. Mr Le Roux did not raise any objection and the questions put to De Wit were not withdrawn.

[69] In my view, I cannot but find that the company's conduct of not pursuing disciplinary action against Van Rensburg, the employees on duty on Saturday, 6 March 2021 and the striking employees smacks of capriciousness and arbitrariness and has a

direct impact on the substantive fairness of the employees' dismissal. The commissioner therefore did not commit any irregularities nor did he commit any errors. His decision falls within the bounds of reasonableness.

[70] Lastly, the complaint against the finding that other departments continued to switch off machines during breaks takes the matter no further. I do not believe that this issue should detain me any further.

Goeda's dismissal

[71] Goeda was charged with instigation and/or participating in the instigation of an unlawful and unjustifiable refusal by employees to give effect to the lawful instruction that they work staggered breaks to secure continuous production and switching off machines to prevent continuous production. The alternative charge against Goeda is the same charge faced by all other 53 employees. For this alternative charge, Goeda did not have a previous warning and dismissal for this reason was, insofar as the company relied on previous warnings, indisputably unfair.

[72] The evidence against Goeda was led by Knoesen on behalf of the company. Knoesen testified:

> 'As I was reading through the email, Mr Goeda said to the associates that they must continue with stopping the machines. They must take their breaks. So, that is exactly what transpired that day and the day going forward.'

[73] During cross-examination, Knoesen testified that there was no discussion after he read out the email to the employees. It was put to him that Goeda would deny having said that the employees must stop the machines or anything to that effect and that he would testify that there was no response from the employees. Knoesen was re-examined on this issue and he said that Goeda said to the employees in the meeting that "*they will continue to stop and that is what happened*". In his evidence, Goeda testified that he was one of the employees who worked on Saturday, 6 March 2021 where machines were switched off and that no one was

disciplined. He denied that he instructed employees to switch off the machines during breaks on 8 March 2021. During cross-examination, Goeda confirmed his testimony led at disciplinary hearing that they, the afternoon shift on 8 March 2021, made Knoesen understand that they were not going to continuously operate the machines and that this was a unanimous view of the employees on the shift.

[74] The commissioner found that the company failed to show that Goeda instigated the employees to commit the misconduct. He found that as a shop steward, Goeda was voicing the collective decision of the shift and that he was not guilty of instigation. Goeda was however found guilty of insubordination.

[75] The company's challenge against the commissioner's finding is that the commissioner failed to draw the only reasonable conclusion from the evidence presented which is that Goeda incited the employees. This complaint is explicated in the company's heads of argument that the commissioner failed to undertake an assessment of conflicting versions in accordance with the principle in *Stellenbosch Farmers' Winery Group Ltd and another v Martell & Cie SA and others*[18]. The company contends that Goeda's conduct went beyond the role of being the voice of the employees to that of taking a leading role in turning their intentions into action.

[76] In response, Mr Grogan submitted that the commissioner might have erred in not expressly dealing with Knoesen's evidence but that Knoesen's evidence, in any event, was scanty and did not sustain the charge of instigation.

[77] The commissioner's finding is that the company's evidence failed to establish that Goeda instigated the employees to switch off the machines. Knoesen's evidence was nothing more than Goeda saying that the employees must "*continue*" to stop the machines. Goeda denied having said these words to the employees but conceded that the unanimous view of the employees in his shift was that they would switch off the machines during breaks. The cross-examination of Goeda did

[18] (2003) 1 SA 11 (SCA) at para 5.

nothing more than confirm that the employees collectively made it known to Knoesen that they would not operate the machines continuously.

[78] Knoesen's evidence is far from establishing a *prima facie* case against Goeda that he instigated the switching off of the machines. The overwhelming evidence was that this conduct started a week earlier and continued during the day shift on 8 March 2021. The afternoon shift continued with the conduct and when Knoesen informed them of the provision in the collective agreement, they stood their ground that they would not revert to the continuous operation of the machines. No doubt these are employees who already knew of colleagues who have switched off the machines and were informing Knoesen that they would not revert to continuous operation. It cannot therefore be seriously argued that Goeda instigated the action on 8 March 2021. I am not persuaded that there were material conflicting versions which warranted a credibility assessment nor am I persuaded that the commissioner erred in not conducting the credibility assessment test to the versions proffered by Knoesen and Goeda.

[79] There is nothing unreasonable with the commissioner's finding that the company failed to establish that Goeda instigated the conduct of the employees and this ground of review is rejected. There is no cross review against the finding that Goeda is guilty of insubordination despite the fact that Goeda was suspended on 9 March 2021. This finding therefore stands.

The sanction

[80] The commissioner found that the insubordination was not gross. He considered the circumstances under which the misconduct occurred, which included that the employees made attempts to raise the issue with George who was not of assistance to them, and that when Van Rensburg took his breaks the previous week, the team leader would stand in for him, that Van Rensburg switched off the machine on 2 March 2021 and was not disciplined, that the employees who worked on Saturday were not disciplined for switching off their machines during breaks

and that Diedericks permitted the day shift employees to switch off the machines in a particular order during breaks. The commissioner concluded:

> 'While it was unchallenged evidence that the refusal of the Applicants to keep the machines functional during their meal/tea breaks resulted in lower tonnage; it is worth noting that the strike by the entire workforce which ensued as a result of this dispute, caused a lot more damage to the plant. No action was taken against the employees who engaged in an unprotected strike. Seeing that the Respondent lived with a more serious situation of losses during the strike and not take disciplinary action against the strikers, the dismissal of these Applicants was unfair in the circumstances.'

[81] The company, despite the above reasons for the commissioner's decision, persists with its contention that the employees were guilty of gross insubordination. It contends that the employees' conduct was a deliberate and calculated failure to uphold a reasonable and crucial workplace standard and that the commissioner failed to apply his mind to the issue and materially misdirected himself by failing to examine the true nature and gravity of the employees' conduct.

[82] Diedericks, who was the shift one leader on the week of 8 March 2021, testified that after the safety talk at the commencement of the shift, the shop steward, Langa Nguqu (Nguqu), called the employees and said that the exploitation must stop and that they should find out from Diedericks which machines should be stopped at what times. Diedericks and the employees were aware of the incidents of the previous week where Van Rensburg stopped the machine during his shift on Friday, 5 March 2021 and the Saturday employees stopped machines during breaks. Diedericks then gave the order in which the machines should be stopped. In his evidence in chief, Diedericks testified as follows:

> 'MR LE ROUX: Alright, so let us deal with this now because I think you would even remember from the previous process, the suggestion may be that you know, the fact that on this day the machines stopped, it was your initiative, it was your idea, it was your way in which you wanted things to happen on

that day, and employees were just carrying out your instruction. What is your comment on what occurred that morning, as you have started to describe it?

M DIEDERICKS: Ja, the risk was the Covid. As I said, the risk was the Covid situation, where we need to avoid the – I mean we need to manage the social distance. I was unaware of how the machines is (sic) going stop. So, I just managed. I just did damage control, you can say.'

[83] During cross-examination, Diedericks conceded that Nguqu approached him to find a solution on the way forward considering the events of the previous week relating to stopping machines during breaks. He however said that the employees had already taken a decision (to stop the machines) and that he was only doing damage control. He continued:

'M DIEDERICKS: Because I was not aware, I mean I was not sure on that morning will they stop all the machines or not. So, I did damage control for the Covid situation that we had. Our procedure was to apply the social distancing. So, that is what I did.'

[84] When it was put to him further that when Nguqu approached him to find a way of managing the situation which arose as a result of the previous week's events, Diedericks said that he was managing the Covid situation. In answer to what was put to him that the rotation system suggested by him was a joint solution to address the situation, Diedericks simply said that he suggested the rotation or the order of switching the machines *"to control the Covid situation"*. Whatever happened, it appears that the day shift employees after a discussion with Diedericks, had all the blessings and approval from him. Diedericks' evidence was in essence that the employees were informed by him to switch off the machines for operational requirements, being Covid-19.

[85] With regard to shift 2, this is dealt with above under Goeda's dismissal. There is no dispute that the shift 3 employees switched off their machines.

[86] In *Sidumo*, the Constitutional Court set out the approach to be adopted by a commissioner when dealing with a dismissal dispute. The Court said:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'[19]

[87] The commissioner has considered the importance of the rule breached, in this case, the continuous operation of the machines during breaks. He then considered the reason the company imposed the sanction of dismissal, which was that the employees were issued final written warnings which were valid at the time of commission of the offence, which I have addressed earlier in this judgment. The commissioner found that the employees had in general long service and considered harm caused by the employees' conduct on the company's operations and compared this with the harm caused by other employees.

[88] The employees' conduct resulted in halting the operations for not more than 1 hour per shift whereas the conduct of the striking employees brought the company's operations to a complete halt for a continuous period of a week. No evidence was led on how the conduct of the employees destroyed the trust relationship and how and why the conduct of the striking employees was not destructive of a trust relationship. It is without any doubt as the commissioner found that the impact the

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[19] *Sidumo* at para 78.

conduct of the striking employees had on the operations of the company was significant compared to that of the dismissed employees.

[89] The commissioner demonstrated that he understood the nature of the enquiry before him and addressed the relevant and substantial merits of the dispute. His decision is supported by reasons based on the evidence led and is not untenable. There is no basis for this Court to interfere with the findings and the award.

Conclusion

[90] Mr Grogan referred the Court to four individual employees who were trainees and another employee who arrived late for work on Wednesday and was off-sick on Thursday. These employees should not have been charged or found guilty of the charge. The commissioner has however made a finding that these employees, as with all other employees, are equally guilty of insubordination. These employees have not brought a cross review against the finding of guilt. I cannot therefore entertain the argument any further.

[91] Mr Fourie complained that the commissioner did not issue a disciplinary sanction, despite his finding that the employees were guilty of insubordination. The company did not however plead this ground. In any event, there is nothing wrong or unfair or unreasonable on the part of the commissioner to not issue a sanction. All the other employees were not disciplined. In any event, any disciplinary action issued by the commissioner which would have been valid for a limited period would make no difference as such warnings would have in all probabilities expired. The employees were dismissed on 31 May 2021. The award was issued on 28 June 2022, more than a year after the employees' dismissal.

[92] With regard to the issue of costs, both parties were in agreement that no costs order should be issued.

[93] In the premises, the following order is made:

Order

1. The application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr G. Fourie SC with Ms M. Jacobs
Instructed by:	Chris Baker & Associates
For the 3rd Respondent:	Mr J.G. Grogan
Instructed by:	Gray Moodliar Inc.