DELETE WHICHEVER IS NOT APPLICABLE

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

07/05/2024 DATE SIGNATURE

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 1050/2018

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION obo GOODMAN MASHIANE & 41 OTHERS **Applicants**

and

SAFCOR FREIGHT (PTY) LIMITED t/a BIDVEST INTERNATIONAL LOGISTICS **First Respondent**

DHL SUPPLY CHAIN (SOUTH AFRICA) (PTY) LIMITED **Second Respondent**

Heard: **Decided on the papers**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 07 May 2024.**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] SATAWU filed a Statement of Case in which it alleged that the dismissal of its members (the individual applicants) by the first respondent (Bidvest) (previously known as Bidvest Panalpina Logistics) was unfair. The second respondent

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(DHL) was joined to the proceedings by this Court on 26 April 2021 following an application by Bidvest.

[2] The basis of the joinder application was that on 30 September 2019, Bidvest transferred to DHL, its business as a going concern in terms of section 197 of the Labour Relations Act[1] (LRA), and that the individual applicants are its former employees as they were affected by the transfer, thus making DHL to have a substantial interest in the matter. The joinder was sought for the purpose of joint and several liability should the Court find that the dismissal of the individual applicants was unfair.

[3] Bidvest and DHL have opposed the applicants' claims and any relief sought in that regard. By agreement between the parties on 16 October 2023, the matter was to be disposed of on the papers after they had submitted Stated Cases in accordance with the timelines set and agreed to. For the sake of convenience, reference to 'SATAWU', 'the applicants' or 'individual applicants', will be used interchangeably.

[4] The background to the dispute between the parties as per their signed pre-trial minutes read with the Minutes of Supplementary Pre-Trial Conference is as follows;

4.1 The parties' relationship is governed by the Main Collective Agreement (MCA) as concluded at the National Bargaining Council for Road Freight and Logistics Industry (NBCRFLI). Clause 8 of the MCA[2] makes

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[1] Act 66 of 1995, as amended.

[2] Clause **8. Compressed working week**

(1) Subject to sub-clauses (2) and (3), and after giving at least 72 hours' written notice to an employee, an employer may require the employee to work up to 15 hours a day, inclusive of meal intervals, without overtime pay.

(2) An employer may not require an employee to work a compressed working week for more than two consecutive weeks in a five week period.

(3) An employer may not require or permit an employee to work-
   (a) more than 45 ordinary hours of work in any week;
   (b) more than 30 hours of overtime in any week; or
   (c) during the rest intervals specified in clause 6.

(4) An employer who intends implementing a compressed working week scheme must-
   (a) immediately notify the National Secretary of the Council in writing of the anticipated date of implementation and approximate duration of the scheme; and
   (b) retain copies of all notices issued to employees in terms of sub-clause {1) for a period of three years.

provision for a compressed working week, and amongst other provisions are procedures to be followed where an employer required employees to worked such compressed hours, including informing the National Secretary of the Council in writing of the anticipated date of implementation and duration of the compressed working week scheme.

4.2 SATAWU disputed that Bidvest had on 23 March 2018 issued a letter to the Secretary of the Council notifying it of its intention to implement the compressed working week. What is however common cause is that from 26 March 2018 into 3 May 2018, SATAWU and Bidvest held consultation meetings at which the latter indicated its intention to introduce compressed working week in terms of clause 8(2) of the MCA and outlined reasons in that regard. Those meetings failed to result in an agreement, and SATAWU had referred a section 24 of the LRA dispute to the NBCRFLI on 4 May 2018.

4.3 On 15 May 2018, Bidvest had issued notices in terms of section 189 of the LRA and further requested facilitation by the Commission for Conciliation Mediation and Arbitration (CCMA). This was in view of the failure to reach an agreement on the implementation of the compressed working week, and possible retrenchments.

4.4 A facilitation meeting was held on 2 June 2018 and SATAWU had agreed to work new shift of the compressed working week. SATAWU disputes that an agreement was reached in order to avoid retrenchments, and contends that the agreement was reached pending the determination of a dispute it had referred to the Council. Bidvest however contends that it withdrew its dispute before the CCMA on the basis that an agreement was reached as SATAWU sought to avoid retrenchments. In the meanwhile, the NBCRFLI had issued a ruling on

(5) In order to calculate the number of working days worked in a compressed week, an employer must take the total number of ordinary hours worked in a week and must credit an employee with one working day for every nine ordinary hours worked, up to a maximum of five (5) working days per week. A part of an hour worked is deemed to be a full hour.

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30 July 2018 and declined jurisdiction over the dispute referred by SATAWU, as it was held that it concerned matters of mutual interest.

4.5 The individual applicants worked the compressed week commencing on 4 June 2018 to 12 August 2018. On 9 August 2018, SATAWU had sent correspondence to Bidvest indicating that its members had already worked compressed working hours for more than two consecutive weeks in a five week period. It further advised that the shift ending on 12 August 2018 would be the last shift for the implementation of the compressed working week.

4.6 Bidvest's response on 10 August 2018 was to advise SATAWU that it would continue with the compressed working week based on its operational requirements until the consultation and legal processes in relation to its implementation were completed. It further indicated its willingness to continue consultations on the matter.

4.7 When the employees refused to work the compressed week starting from 13 August 2018, Bidvest dispatched an ultimatum to SATAWU and cautioned its members against engaging in any unprotected strike/work stoppages or disruptions. SATAWU was also informed that the compressed week would continue until the parties had exhausted the consultation process on the issue. In the same correspondence, Bidvest informed SATAWU that whilst engaged on an unprotected strike, some employees were intimidating, threatening and harassing others that were not on strike.

4.8 On 15 August 2018, Bidvest issued notices to employees and charged them with gross insubordination in relation to refusal to work the compressed work week, and embarking on strike action. Disciplinary enquiries were scheduled for 17 August 2018, which were then postponed to 21 August 2018 as a result of an urgent application brought by Bidvest before this Court.

4.9 Bidvest contends that disruptions to its operations as a result of the refusal to work the compressed work week continued into 16 August

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2018, and notices of suspension were then issued to the individual applicants after SATAWU was afforded an opportunity to make representations as why its members should not be suspended.

4.10 The refusal to work compressed hours continued into 20 August 2018, and Bidvest approached this Court and obtained an interim order declaring the withholding of services by the employees to be an unprotected strike, and further interdicting them from further participating in the strike. The interim Order was confirmed on 28 August 2018 unopposed.

4.11 The individual applicants were then subjected to a disciplinary enquiry, at which SATAWU entered a plea of guilty on their behalf. Subsequent thereto, the individual applicants were dismissed.

4.12 In accordance with paragraph 10.4.2.2 of the Practice Manual, the applicants further admitted that they had embarked on an unprotected strike. It was conceded that Bidvest had issued an ultimatum on 13 August 2018, and that further ultimatums were issued verbally to employees by their line managers.

4.13 The applicants however contend that Bidvest provoked the strike action in that it failed to notify the Secretary of the Council in writing of the intention to implement compressed working week and the duration thereof in accordance with clause 8(4) of the MCA.

4.14 Bidvest contends that there was no provocation on its part as the parties had entered into an agreement for employees to work the compressed work week, and that all that it did was to enforce that agreement.

4.15 The applicants further contended that the dismissals were not appropriate in circumstances where they had pleaded guilty and shown remorse.

4.16 Bidvest on the other hand contended that the individual applicants were afforded an opportunity to remedy their conduct, and that the remorse

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shown was belated as it was based on the Court order obtained interdicting their illegal strike action, and in the face of a disciplinary enquiry.

Issues in dispute for determination:

[5] The issues in dispute for determination by the Court are whether the respondents failed to comply with the provisions of the MCA, and further whether the dismissal of the individual applicants was fair.

[6] The parties' submissions will be considered within the context of the issues to be determined as below.

Was there non-compliance with the provisions of the Main Collective Agreement?

[7] Flowing from the provisions of sections 23 and 31 of the LRA, it is trite that collective agreements concluded by parties to a bargaining council are binding on them[3]. SATAWU contends that Bidvest did not notify the Secretary of the Council of the intention to implement a compressed working week in accordance with Clause 8(4) of the MCA. It further submitted that the individual applicants were not opposed to the compressed working week in its entirety, but merely opposed to the fact that Bidvest had not complied with clause 8(4) of the MCA. It denied that Bidvest had issued a notice to the Secretary on 23 March 2018. It contended that the notice discovered by Bidvest as contained in the bundle of documents was not legitimate as it was not dated nor accompanied by proof of service.

[8] Clause 8(4) of the MCA required an employer who intends implementing a compressed working week scheme to immediately notify the National Secretary of the Council in writing of the anticipated date of implementation and approximate duration of the scheme, and to retain copies of all notices issued to employees in terms of sub-clause (1) for a period of three years. The last requirement does not appear to be in dispute in that following various

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[3] See also *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC) at para 5.

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consultation meetings as indicated elsewhere in this judgment, the employees were notified as early as March 2018 of the intention to implement a compressed work week.

[9] Bidvest's submitted that the Secretary of the Council was indeed notified on 23 March 2018 of the intention to implement the compressed working week from 7 May 2018, and for an infinite period. It had further issued section 189 notices to SATAWU informing it of its intention to change the shift structure through the implementation of the compressed work week and its reasons for the proposed restructuring.

[10] It is further common cause that the compressed work week was implemented after no less than eight consultation meetings with SATAWU and employees between 26 March to 3 May 2018. During that period, separate meetings were also held with the employees in that regard. Those consultation meetings were even attended by an Agent of the Council who had made a presentation to SATAWU and employees regarding the legality of clause 8 and the implementation of the shift structure.

[11] I fail to appreciate SATAWU's contentions that there was non-compliance with clause 8(4) of the MCA in circumstances where the only basis for this contention was that the notice is undated and there was no proof of its service. Furthermore, the sole basis of the referral to the Council in terms of section 24 of the LRA in May 2018 was that the compressed work week was to be implemented for a period of twelve months subject to review based on Bidvest's operational requirements. SATAWU only complained about the duration of the implementation which it viewed as being in breach of clause 8(2) of the MCA, and nothing was said about the failure to notify the Secretary of the Council.

[12] It is apparent that SATAWU's contentions that there was non-compliance with the provisions of clause 8(4) of the MCA is not only an afterthought but a mere red herring. This is further so in that if indeed the issue of the notice to the Secretary was the main complaint, it would not have made sense for the Council Agents to have been party to the consultations on the matter, nor would it have

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made sense for the employees to commence the compressed work week without that notice.

[13] In summary in regards to the alleged non-compliance with the provisions of the clause 8 of the MCA, it is concluded that Bidvest had complied with the provisions of clause 8(4) of the MCA. Furthermore, to the extent that the issues of the notice to the Secretary and duration of the implementation of the compressed work week were indeed in dispute, SATAWU as shall further illustrated below, had options after the Council had issued a ruling on 30 July 2018 in which it was held that the dispute referred under section 24 of the LRA pertained to a mutual interest.

Was the dismissal of the individual applicants substantively fair?

[14] The individual applicants were charged with gross insubordination and embarking on unprotected strike. In my view, the two charges are interlinked in that at their core is effectively the refusal to work the compressed work week despite instructions to do so.

[15] Item 3(4) of Schedule 8 in the Code of Good Practice 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[4]. It is further trite flowing from *Sidumo*[5] that the fairness or appropriateness of a sanction of dismissal involves a consideration of a variety of factors taking into account the totality of the circumstances. These include the importance of the rule that was breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the

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[4] See also *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others* [2016] ZALAC 55 (2017) 38 ILJ 881 (LAC) at paras 25 – 26, where it was held that;

> 'In determining the fairness of a dismissal, each case is to be judged on its own merits. Item 3(4) of the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable, with instances of such misconduct stated to include gross dishonesty. When deciding whether dismissal is appropriate, the Code requires consideration, in addition to the gravity of the misconduct, of personal circumstances, including length of service and the employee's previous disciplinary record, the nature of the job and the circumstances of the infringement itself. Other relevant considerations include the presence or absence of dishonesty and/or loss and whether remorse is shown.'

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 78.

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dismissal; the harm caused by the employee's conduct; the effect of dismissal on the employee, and his or her long-service record.

[16] The starting point in determining whether the dismissal of the individual applicants in the light of the unprotected strike action was substantively fair is Item 6(1) of Schedule 8 as contained in the LRA. It provides that participation in a strike that does not comply with the provisions of Chapter IV of the LRA is misconduct. The Code makes it clear that like any other act of misconduct, it does not always deserve dismissal, and that the substantive fairness of such a dismissal in these circumstances must be determined in the light of the facts of the case, including; the seriousness of the contravention of this Act; attempts made to comply with the Act; and whether or not the strike was in response to an unjustified conduct by the employer.

[17] It was not in dispute that the strike was unprotected. The contravention of the provisions of section 64(1) of the LRA was clearly serious, particularly since no attempt was made whatsoever to comply with the statutory requirements. I did not understand it to be in dispute that the applicants were not aware of Bidvest's disciplinary code and that the offence of participation in unprotected strike action was viewed as very serious which, and which may warrant summary dismissal. In fact, it was common cause that from 9 August 2018, the applicants were informed of the consequences of refusing to work the compressed work week, and further after the ultimatum was issued on 13 August 2018.

[18] Insofar as SATAWU alleged that the unprotected strike was provoked, in *Mlondo and Others v Electrowave (Pty) Ltd*[6], it was held that;

> 'An appeal to provocation is one of the not uncommon means whereby exculpation is sought against the consequences of flouting the carefully crafted procedures that seek to maintain industrial peace. While it is correct that a court ought properly to take into account conduct by an employer which may serve to excuse any failure by employees to refer their dispute to the statutory dispute resolution mechanisms, the threshold is set high. For employees to escape the ordinary consequences of participation in an unprotected strike by way of

[6] [2023] ZALCD 8; [2023] 8 BLLR 813 (LC); (2023) 44 ILJ 1751 (LC).

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provocation, the conduct by the employer must be egregious, and there must be some substantial justification proffered to excuse a failure to comply with the applicable procedures.'

[19] The basis of the alleged provocation was that the notice to the Secretary was not issued, and further that the duration of the implementation of the compressed work week was in contravention of the provisions of the MCA. I have already dealt with the issue of service of the notice to the Secretary and no more needs to be added in that regard.

[20] To however understand the context of why the issue of provocation is equally a red herring, it was common cause that an internal memorandum issued by Bidvest to the employees on 2 May 2018 also gave notice of the compressed week and outlined how it would be implemented. From the last consultations held on 3 May 2018, Bidvest was to implement the scheme with effect from 7 May for a period of 12 months, subject to review based on operational requirements. SATAWU had objected to the duration of the period as it was in breach of clause 8(2) of the MCA which required that the scheme be implemented only for two weeks in a five week period, and thus declared a dispute.

[21] When Bidvest issued letters to employees titled 'Amendments to 'Conditions of Employment' to change hours in accordance with the compressed work week, they refused to accept them. SATAWU declared a section 24 of the LRA . dispute on 4 May 2018 with the Council. Bidvest in turn then issued notices to consult in terms of section 189 of the LRA in the light of the refusal to implement the compressed work week. It then referred a dispute for facilitation by the CCMA.

[22] As already indicated, the CCMA Commissioner issued an outcome report on 2 June 2018 (The 'Comprehensive Outcome Report')[7]. In that report. it is recorded that none of the 51 employees affected would be retrenched, and that the measures to be implemented in order to avoid or minimise dismissal included reduction and/ elimination of overtime. It was recorded that '*The*

[7] Pages 150 – 151 of the respondents bundle of documents.

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agreed to work a compressed work week in order to reduce costs'. Arising from this agreement, the employees worked the compressed work week from 4 June to 12 August 2018.

[23] If indeed the issues of the notice to the Secretary and the duration of the implementation of the compressed work week were the basis of the employees' discontent, SATAWU had various options, particularly after the Commissioner's ruling of 30 July 2018 that the issue referred pertained to a mutual interest dispute since the MCA was silent on the duration that the scheme could be implemented. Between 30 July 2018 and 12 August 2018 when the employees stopped working the compressed work week, SATAWU had sufficient time within which the provisions of section 64(1) of the LRA could have been complied with. SATAWU and the individual applicants instead elected not to do so, and unilaterally decided not to comply with the agreement reached at the facilitation under the CCMA. Significant with that agreement was that it was concluded on the understanding that jobs would be saved and that no employees would be retrenched. There is therefore no substance to SATAWU's contention that there was an agreement to work the compressed work week pending the determination of the dispute in terms of section 24 of the LRA. When that determination was made on 30 July 2018, the employees had continued to work the compressed work week without raising any issues until 08 August 2018.

[24] Flowing from *Mlondo and Others v Electrowave (Pty) Ltd* as referred to above, there is nothing on the part of Bidvest's conduct, that can be said to have been egregious to compel the individual applicants to have embarked on unprotected strike. Bidvest's conduct on the other end demonstrated that it was concerned not only with its operational sustainability but also with preserving the employees' jobs. It had already initiated the section 189 process through notices and request for a facilitation by the CCMA when the employees were not consenting to compressed work week. When the individual applicants realised that a retrenchment was a possibility, they had then agreed to work the compressed work week, and yet reneged on that agreement.

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[25] Furthermore, after the Council had issued its ruling that it lacked jurisdiction to determine the dispute as it was a matter of mutual interest, SATAWU had on 8 August 2018 discussed that ruling with the employees. On 9 August 2018, the applicants resolved not to continue working the compressed work week after 12 August 2018. Bidvest had responded to SATAWU and warned it that the failure to work the compressed work week amounted to a refusal to obey instructions which would amount to participation in an unlawful strike, and which in turn constituted a fair reason for a dismissal. Bidvest further stressed the importance of the scheme in the light of its operational requirements.

[26] Rather than continuing with the compressed work week whilst SATAWU negotiated or consulted with Bidvest, the individual applicants from 13 August 2018 stopped working the compressed work week. An ultimatum, both written and verbal by Bidvest and its line managers failed to persuade the individual applicants to work according to the scheme.

[27] Inasmuch as the procedural fairness of the dismissal is not in dispute, it has been said that the purpose of an ultimatum is not to elicit any information or explanations from the employees, but to give them an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The ultimatum is issued with the sole purpose of enticing the employees to return to work, and serves as a final warning[8].

[28] It was common cause that from 13 August 2018 when the individual applicants stopped working the compressed work week, they were warned of the folly of their actions and issued with an ultimatum. The same warning had been issued on 10 August 2018. Other than the ultimatum, the line managers also spoke to them and warned them of the consequences of their actions. The individual applicants remained recalcitrant in their unreasonable and clearly unlawful posture. The individual applicants' conduct in the circumstances was not only unreasonable but also in bad faith in view of the agreement reached at the

[8] *Mndebele and others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (2016) 37 ILJ 2610 (LAC) at para 27.

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CCMA facilitation meeting, and their willingness to work the compressed work week between 4 June to 12 August 2018.

[29] To the extent that there is no substance to the contention that the strike was provoked, it is my view that the applicant's posture in refusing to work the compressed work week despite an agreement, and their failure to heed warnings and the ultimatum issued to them, clearly damaged any trust relationship between them and Bidvest. Effectively, they demonstrated that they could not be trusted to keep to their end of the bargain where agreements were concluded in good faith, and with the aim of preserving jobs. They further could not be trusted to pursue whatever disputes or interests they had within the four corners of either the provisions of the LRA or collective bargaining. As also correctly pointed out on behalf of DHL, in the absence of facts showing that the trust relationship was not detrimentally affected by the conduct of employees, it would be unreasonable to compel either party to continue with that relationship.

[30] The applicants' contention that they were not given sufficient time after the interim order of 20 August 2018 to comply with that order as it was communicated late to them does not in any manner assist their case. This is so in that the order was obtained in circumstances where they had refused to heed the ultimatum issued to them from 13 August 2018, and where they had ignored warnings that their conduct could lead to their dismissal. It did not need a court order for them to resume their duties in terms of the compressed work week scheme. Furthermore, the facts of this case are distinguishable from *AMCU obo Rantho and Others v SAMANCOR Western Chrome Mines*[9], where it was held that it would not be fair to dismiss employees who had embarked on an illegal strike where they had obeyed an ultimatum and returned to work within the stipulated time[10]. In this case, an ultimatum was issued on 13 August 2018 and the applicants failed to heed it. They only tendered their services on 21 August 2018, and even then, only after the interim order was obtained.

[9] [2020] ZALAC 46; (2020) 41 ILJ 2771 (LAC); [2021] 3 BLLR 236 (LAC).
[10] At para 26.

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[31] It was further submitted on behalf of the applicants that because they had shown remorse and pleaded guilty with the undertaking by Bidvest that they would not be dismissed, the subsequent dismissals were therefore unfair, harsh and inappropriate. The applicants further submitted that the compressed working week was in any event not part of the individual applicants' contracts of employment, and there was no structure put in place by Bidvest as to how the scheme was to operate. It was further contended that the fact that the individual applicants had worked the compressed week from 4 June to 12 August 2018 was indicative of their willingness to work in accordance with the scheme on the proviso that Bidvest had complied with the provisions of the MCA.

[32] The contention that the no structures were put in place as to how the compressed work week would work is fallacious in the light of extended consultations held with the employees, including the presentations made by the Agent from Council on how it would work. The further contention that the scheme was not part of the individual applicants' contracts of employment is equally misplaced. Collective Agreements concluded at the Council supersede any individual contracts of employment. The issue of compressed work week was a matter regulated by the MCA. Once there was compliance with the requirements in implementing it, employees cannot complain about unilateral changes to their terms and conditions of contracts of employment.

[33] To the extent that the applicants contended that they had shown remorse by pleading guilty, it has been held that acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken[11]. Bidvest's contention was that no undertaking was made by it that elicited the guilty plea from the individual applicants, and further that the plea was in any event characterised by falsehood and bad faith, and did not in any manner demonstrate genuine remorse. Bidvest in justifying the dismissal submitted that the individual applicants and SATAWU had no

[11] *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) 21 ILJ 1051 (LAC) at para 25.

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regard or respect for authority, and that the charges against them were serious and had made a continued employment relationship intolerable. In this regard, it was submitted further that the strike action was unprotected, and that a dismissal was appropriate in respect of all those that had entered a 'guilty' plea.

[34] There is no doubt that a dismissal ordinarily raises constitutional issues under section 23 of the Constitution. The focus of these provisions was said to be broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on the terms that are fair to both. It was further held that in giving content the rights, it was important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations, and that these must be so as to arrive at the balance required by the concept of fair labour practices[12].

[35] The facts of this case demonstrated that the applicants refused to continue the compressed work week from 13 August 2018 until their dismissal despite warnings. The primary reasons why it was important for Bidvest to implement the scheme was to *inter alia* avoid retrenchments in the light of the inefficiencies and unsustainability of the previous working arrangements to its operational requirements; to reduce operational costs to its clients. It intended to increase the number of productive hours per day; ensure proper handing over between shifts; share the workload proportionally between the two shifts; reduce overtime worked per person to be within the statutory limits, and allow employees adequate days off.

[36] Notwithstanding the rationale behind the compressed work week, extensive consultations and an agreement, the applicants participated in a disruptive unprotected strike with no regard to the above factors and the authority of the Bidvest as the employer. Not once during their unprotected strike did they reflect on the consequences of their conduct including the adverse impact of their actions on Bidvest's operations, the security of their own employment and the effect on the employment relationship. Their conduct was deliberate, calculated and clearly intended to undermine the process of collective

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[12] *National Education Health & Allied Workers Union v University of Cape Town and others* [2002] ZACC 27; (2003) 24 ILJ 95 (CC) at para 40.

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bargaining and the provisions of the LRA in resolving disputes. Clearly one cannot speak of genuine contrition in these circumstances. Any remorse was indeed belated, and only came about when the penny dropped on 21 August 2012 at the disciplinary enquiry, that their misconduct was indeed serious. Bidvest pointed out that during the disciplinary enquiry, none of the individual applicants testified in regards to how contrite they were. Furthermore, although after their dismissal they were afforded an opportunity to appeal, none of them had taken that opportunity to show that they were truly remorseful.

[37] In the light of the above circumstances, the individual applicants' personal circumstances including their length of service or disciplinary records, could not absolve them from their gross misconduct and the effects thereof. These could not override the interests of Bidvest in the light of the destroyed working trust relationship. The individual applicants' personal circumstances are factors that they ought to have considered prior to embarking on a confrontational and self-destructive path of embarking on unprotected strike, and persistently refusing to obey instructions to work in accordance with agreements reached related to compressed work week. Consequently, there is no basis for any conclusion to be reached that their dismissal was unfair. It follows that their claim must be dismissed.

[38] I have further had regards to the requirements of law and fairness in regards to an award of costs. None of the respondents pursued a costs order against the applicants, and in any event, SATAWU and Bidvest continue to have a relationship. Accordingly, any award of costs is not warranted in this case.

[39] Accordingly, the following order is made;

Order:

1. The dismissal of the individual applicants as identified on pages 8 – 9 of the Applicants' Statement of Case was substantively fair.

2. The Applicants' claim is dismissed.

3. There is no order as to costs.

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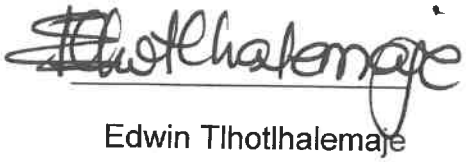

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa.

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Representations:

For the Applicants:	South African Transport and Allied Workers Union.
For the First Respondent:	CN Phukubje Attorneys INC.
For the Second Respondent:	Eversheds Sutherland (SA) INC. (Heads of argument drafted by RJ Moultrie SC)

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