

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA  
(HELD AT PORT ELIZABETH)**

**In the matter between**

**CASE NO: PA3/01**

**MZEKU & OTHERS**

**APPELLANTS**

**AND**

**VOLKSWAGEN S.A. (Pty) Ltd**

**1<sup>ST</sup> RESPONDENT**

**and**

**COMMISSIONER FLOORS BRAND N.O.**

**2<sup>ND</sup> RESPONDENT**

**and**

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**3<sup>RD</sup> RESPONDENT**

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**JUDGMENT**

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**THE FULL COURT**

**Introduction**

[1] The appellants are former employees of the first respondent. Over the period from the 20<sup>th</sup> January 2000 to the 3<sup>rd</sup> February 2000 certain employees of the first respondent, including the appellants, embarked on industrial action by collectively withholding their

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(The conduct constituted a strike in its dictionary meaning, but not necessarily a strike as defined in sec 213 of the Labour Relations Act, 66 of 1995 (**[the Act]**)). In this judgment the term **[strike]** is used in its dictionary sense. Where necessary, specific reference will be made to a **[strike]** as defined in the Act.)

labour. Later on during that period some of the employees returned to work . The appellants did not. The first respondent dismissed the appellants on the 3<sup>rd</sup> February 2000. This gave rise to a dispute between the appellants and the first respondent about the fairness or otherwise of the dismissal. The dispute was referred to the Commission for Conciliation, Mediation and Arbitration, the third respondent, for conciliation. Attempts at conciliation were unsuccessful.

- [2] Ordinarily the dispute would have been required to be referred to the Labour Court for adjudication after conciliation attempts had failed. However, by agreement between the appellants and the first respondent, the dispute was referred to arbitration by the third respondent in terms of sec 141(1) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**the Act**). Sec 141 (1) of the Act gives the third respondent, if all the parties consent, the power to arbitrate a dispute that a party would otherwise be entitled to refer to the Labour Court for adjudication. The third respondent appointed the second respondent, one of its commissioners, to arbitrate the dispute, hence the arbitration proceedings which gave rise to the litigation in this matter. The commissioner found that the dismissal was substantively fair, but procedurally unfair. He held that the appellants were not entitled to any compensation but ordered their reinstatement.
- [3] The first respondent launched review proceedings in the Labour Court in terms of sec 145 of the Act. It sought the setting aside of the finding that the dismissal was procedurally unfair as well as the reinstatement order. The appellants in turn brought a counter review application to set aside the commissioner's finding that the dismissal was substantively fair and his decision not to order compensation or to make the reinstatement order retrospective to the date of their dismissal. The Labour Court, per

Landman J, granted the first respondent's application for review in part and dismissed it in part. It dismissed the appellants' counter-review application altogether. The part of the first respondent's review application that was granted by the Court a quo was its application to set aside the commissioner's order of reinstatement on the basis that he had no power to order reinstatement in a case where a dismissal was unfair only because no fair procedure was followed by the employer. The part that was dismissed was the one in terms of which the first respondent sought to set aside the commissioner's finding that the dismissal was procedurally unfair.

### **The facts**

- [4] The facts relating to this matter have been set out in detail in the award of the commissioner as well as in the judgement of the Labour Court. It is unnecessary to repeat them in any detail. A brief summary of the essential facts will suffice.
- [5] At all relevant times approximately 80% of the first respondent's hourly-paid employees were members of the National Union of Metalworkers of South Africa (**the union**). The first respondent and the union have a recognition agreement which was concluded in 1990. For some years a dispute internal within the union concerning shop stewards at the first respondent's workplace developed within the ranks of the members of the union employed by the first respondent. The first respondent tried to mediate, but to no avail. In 1999 the first respondent approached the Labour Court to obtain an interdict restraining the union's members in its employ from engaging in a strike in connection with the suspension of

shop stewards by the union. An interdict in those terms was granted by the Labour Court.

- [6] In January 2000 the union suspended thirteen shop stewards in the first respondent's workplace. On the 19<sup>th</sup> January 2000 the union sought an interdict in the Labour Court restraining the suspended shop stewards from acting as its representatives. The shop stewards were represented by Pagdens Attorneys. The matter was settled on the basis that the shop stewards submitted to their suspension pending a disciplinary hearing which was to be conducted by the union. Despite the settlement, on the 20<sup>th</sup> January 2000 employees of the first respondent who were supporters of the suspended shop stewards embarked on a strike. They intended to strike until the union lifted the suspension of the suspended shop stewards. At certain stages they also said that they wanted the first respondent to intervene in the dispute and ensure that the union lifted the suspension. The strike gained momentum and went on. The first respondent informed the employees and the union that the strike was illegal and unprocedural and called upon the employees to return to work.

**20<sup>th</sup> January 2000**

- [7] On the 20<sup>th</sup> January 2000 (i.e. the first day of the strike) the first respondent requested the union to intervene. The first respondent also tried to persuade the suspended shop stewards to attend a meeting to address the issues. The suspended shop stewards referred the first respondent to the union, and added that they would in any event only attend a meeting in the presence of their attorneys.

- [8] An employee delegation of five persons representing the striking employees held a meeting with the first respondent's management. The

explanation that they gave for the strike was that the striking employees were dissatisfied with the suspension of the shop stewards by the union and wanted the union to lift the suspension. They also said that the striking employees wanted the first respondent to get the union to lift the suspension or to address their complaint. The first respondent told the employee delegation that the suspension of the shop stewards was an internal issue within the union in which it could not intervene. It advised that the striking employees as union members should resolve that issue with the union internally. The first respondent's representatives at the meeting also told the employee delegation that the strike was illegal and that those who continued to take part in it faced disciplinary action including dismissal. A memorandum to this effect was handed to each member of the employee delegation. The employee delegation was asked to convey the contents of the memorandum to the striking employees. The first respondent issued notices to employees entering the plant stating that the strike was illegal and calling upon the employees to resume their work. The first respondent's attorneys wrote a letter to Pagdens Attorneys seeking to establish communication with the suspended shop stewards. The first respondent also wrote a letter to the Minister of Labour and appealed for his intervention. Copies of the letter were sent to COSATU, the president of the union, the relevant MEC of the Eastern Province and to the Deputy Director - General of the Department of Labour.

### **21-24 January 2000**

- [9] The strike continued on the 21<sup>st</sup> January. On that day the first respondent closed the plant and issued a notice to all employees leaving the plant. In the notice the employees were again informed that the strike was illegal and they were called upon to resume work on the 24<sup>th</sup> January failing

which they would face serious consequences which might include dismissal. The union advised the first respondent that it had informed the employees through the electronic and print media as well as through the distribution of pamphlets that they should discontinue the strike. Pagdens Attorneys wrote to the first respondent's attorneys to the effect that their clients held the view that it was for the union officials to call on the employees to end the strike. According to the letter the suspended shop stewards said that they would deal directly with the union. The first respondent wrote to the union requesting the union to call on workers to resume their work on 24 January failing which they would face serious consequences including dismissal. The first respondent issued a press release to the same effect to all major newspapers and to primary broadcasting stations. The 22<sup>nd</sup> and 23<sup>rd</sup> January were a Saturday and Sunday respectively.

#### **24 January 2000**

- [10] On Monday the 24<sup>th</sup> January the first respondent handed to all employees entering the plant notices requiring them to report to their workstations or face possible dismissal. The union issued a statement to the electronic and print media calling on the workers to return to work and warning them of possible dismissal should they fail to do so. On both the 23<sup>rd</sup> and the 24<sup>th</sup> January a document prepared by the ANC/COSATU/SACP alliance was distributed in the area calling on employees to resume work. However, the first respondent still continued to experience substantial absenteeism. It then addressed a letter to COSATU and the national leadership of the union again seeking their assistance. In the light of the failure of the employees up to that stage to return to work, the first respondent decided to close down the plant in its entirety until further notice and required an undertaking from the employees to resume work in accordance with their contracts of employment.

**25-28 January 2000**

- [11] On the 25<sup>th</sup> January the local media carried reports of the call to resume work. Executives of the first respondent's parent company in Germany arrived in South Africa and a meeting with the union's regional structure was arranged. The union undertook to meet with its members the following day in an effort to end the strike. On the 26<sup>th</sup> January the German executives met with a number of influential people. They also met with the union. The union officials informed the first respondent that a meeting of the union members, which was not well attended, had been held, and that those present had resolved to return to work on the 28<sup>th</sup> January. The first respondent also requested the suspended shop stewards to meet with the German executives. The request was not heeded. On the same day a body called the Uitenhage Crisis Committee met. The committee was formed in support of the strike. It resolved to repeat the demands relating to the reinstatement of the suspended shop stewards.
- [12] On the 27<sup>th</sup> and 28<sup>th</sup> January the first respondent's management and the German executives met with the union. The meetings culminated in the conclusion of an agreement between the first respondent and the union. The parties agreed that the first respondent would re-open the plant on the 31<sup>st</sup> January and that, if employees persisted in the strike, the first respondent would take disciplinary action which **will include dismissal**. The first respondent informed the union that, if employees did not comply with the agreement, it would issue an ultimatum. The agreement was widely published in notices, the electronic media, radio and the print media. The 29<sup>th</sup> and the 30<sup>th</sup> January were a Saturday and a Sunday respectively.

### **31 January - 3 February**

- [13] On the 31<sup>st</sup> January the first respondent still experienced a substantial level of absenteeism. Notices giving the effect of the agreement of the 28<sup>th</sup> January were again distributed in various languages through the media and by dropping 50 000 copies in the area. In the notices the first respondent called on the employees to resume work on the 3<sup>rd</sup> February or face dismissal. At a meeting the union was informed of the ultimatum. On the 3<sup>rd</sup> February a substantial number of the striking employees returned to work but the appellants did not. They were then dismissed by the first respondent. As already stated above a dispute then arose between the appellants and the first respondent on whether the dismissal was fair. This dispute was arbitrated by the second respondent who gave the arbitration award which is now the subject of these proceedings.

### **The Appeal**

#### **SUBSTANTIVE FAIRNESS**

- [14] The appellants appeal against the finding of the Court a quo that the commissioner's finding that the dismissal was substantively fair could not be interfered with on review. It is necessary to explain what is meant by the phrase **substantive fairness** in the context of a dismissal. Reasons to dismiss generally fall under three categories, namely, conduct, operational requirements and capacity. Conduct refers to situations where the employee is alleged to be guilty of unacceptable conduct. The phrase **operational requirements** refers to the operational requirements of the employer and is defined in sec 213 of the Act. Dismissal for incapacity refers to dismissal on the basis that the employee is not able to perform his duties either at all or properly.

- [15] In a case such as this one where employees are dismissed because they refuse to work, the substantive fairness of the dismissal means that the conduct for which the employees are dismissed is unacceptable (or is conduct which constitutes a material breach of the employment contract) and for which dismissal is a fair sanction. Where the conduct for which the employees are dismissed is unacceptable but the sanction of dismissal is, in all the circumstances, not a fair sanction, the dismissal cannot be said to be substantively fair. Obviously, where it is found that the conduct for which the employee has been dismissed is unacceptable conduct or where it is found that the employee is not guilty of the unacceptable conduct for which he was dismissed, the dismissal cannot be said to be substantively fair.
- [16] It is within the context of that meaning of "substantive fairness" that this part of the appellants' appeal must be examined. It is common cause that the appellants refused or failed to perform their duties for a period of over two weeks. Once this is common cause, the appellants must provide an explanation for their conduct. Their explanation can only be that they wanted the union to lift the suspension of the shop stewards or that they wanted the first respondent to intervene in what was clearly an internal dispute between the striking employees and their union and to put pressure on the union to lift the suspension or in one way or another to get the union to deal with their grievances. None of these explanations provides an excuse for the appellants' conduct against the first respondent.
- [17] Once there is no acceptable explanation for the appellants' conduct, then it has to be accepted that the appellants were guilty of unacceptable conduct which was a serious breach of their contracts of employment with

the first respondent. In such a case the only way in which the appellants' dismissal can justifiably be said to be substantively unfair is if it can be said that dismissal was not an appropriate sanction. In this case it must be borne in mind that the appellants refused to work or failed to perform work for over two weeks and, in the process, caused the first respondent huge financial losses. In our view there can be no doubt that dismissal would be an appropriate sanction if it is properly established that they were guilty of such misconduct.

- [18] The appellants' attack on the finding by the commissioner that the dismissal was substantively fair was in effect that in this matter the commissioner failed to apply the correct principles of our law. Although Mr Surju, who appeared for the appellants, presented the appellants' argument, argument on this part of the appeal was presented by Mr Rubin on behalf of the appellants.
- [19] In the answering affidavit - which is where the appellants set out the basis for their counter review application - the appellants' complaint is set out as being that the commissioner **failed to take into account the provisions of s5(1) of the Act in that we were exercising a right (the right to strike) conferred by the Act.** The provisions of sec (5)(1) of the Act read thus: **No person may discriminate against an employee for exercising any right conferred by this Act.** It is necessary to immediately dispose of this complaint. Assuming that, when the appellants refused to work as they did from the 20<sup>th</sup> January to the 3<sup>rd</sup> February, they were exercising a right conferred on them by the Act, the appellants' complaint of discrimination would still stand to be rejected because there is simply no factual foundation for it in the papers. The question must then be whether or not the appellants were exercising a right conferred by the Act when they refused to work.

- [20] Mr Rubin's submission was that what the appellants did was an exercise of their legal right to strike. He made this submission despite the fact - which is common cause - that there was no compliance by the appellants with the provisions of sec 64 of the Act. Sec 64 provides that **“(e)very employee has the right to strike ---if”** the conditions which are there prescribed are met. In situations which are specified in sec 64(3) a strike may be resorted to even if the conditions set out in sec 64(1) have not been met. None of the situations envisaged in sec 64(3) is present in this matter.
- [21] In support of his submission that the appellants had a right to strike, Mr Rubin referred to various provisions of the Constitution of the Republic of South Africa, 1996 (**“the Constitution”**) with which we deal shortly, as well as to certain ILO Conventions and other writings. It is not necessary to refer to each one of those.
- [22] Sec 231(1) of the Constitution provides that the negotiating and signing of all international agreements is the responsibility of the national executive. The provisions of sec 231(2) and (3) are to the effect that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive. An agreement falling within the exception binds the Republic without the approval of the National Assembly and the National Council of Provinces but such an agreement must be tabled before both Houses of Parliament within a reasonable time.

[23] Sec 231(4) provides that **“(a)ny international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the constitution or an Act of Parliament.”** Sec 231(5) provides that the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect. Sec 232 provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Sec 233 reads thus: **“(When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”** Mr Rubin also referred to sec 3 (c) of the Act. Sec 3(c) provides that any person applying this Act must interpret its provisions in compliance with public international obligations of the Republic. Although Mr Rubin did not refer to sec 3(a) and (b) of the Act, for the sake of completeness, it is appropriate to bear the provisions thereof in mind. They are to the effect that any person applying the Act must interpret its provisions to give effect to its primary objects and in compliance with the Constitution.

[24] Mr Rubin submitted that the provisions of ILO Convention 87 on Freedom of Association and the Right to Organise and ILO Convention 98 on the Right to Organise and Collective Bargaining are part of our law. He submitted that this was the effect of the

provisions of sec 231(5) and 233 of the Constitution. He submitted that the result of those conventions being part of our law is that an employer has no right to dismiss employees for participating in a strike of any nature - in other words including what the Act refers to as an unprotected strike. The effect of this submission was that our law is that employees

can go on strike without having to follow the procedures prescribed by the Act and when they do that an employer has no right to dismiss them.

[25] Mr Rubin later qualified this submission by contending that the employer would have no right to dismiss striking employees if they were engaging in a strike that was legitimate. He was asked whether the distinction which the Act drew between a protected strike and an unprotected strike was not the distinction between a legitimate strike and an illegitimate strike. In this regard Mr Rubin sought to argue that, except for the requirement of a strike notice in the Act, the conditions which the Act requires to be met before a strike can be resorted to in order for it to be a protected strike were not really necessary or justified and, by implication, could not therefore affect the legitimacy or otherwise of a strike. In the end Mr Rubin's contention was that the appellants were within their legal rights to refuse to work as they did and the first respondent had no right to dismiss them. He submitted that the commissioner's finding was based on a misconstruction of the law.

[26] Mr Rubin's submissions are wholly without foundation. There is no provision in Conventions 87 and 98 to the effect that employees can resort to a strike as and when they please without following any procedures that may be laid down by national law or that national law falls foul of these conventions if it prescribes procedures that must be followed before there can be an exercise of the right to strike. In its report *Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the application of Conventions and Recommendations International Labour Conference* (1994) the ILO clearly acknowledged the validity of such limitations on the right to strike. In paragraph 170 of its Report, a requirement in national legislation of approval by a certain percentage of workers before a strike can take place is found not to be contrary to the Convention provided the method,

quorum and majority required are not such as to make the exercise of the right to strike difficult or improbable. In paragraph 171, there is a recognition that the requirement that conciliation and mediation procedures must be exhausted before a strike can be called is compatible with article 4 of Convention 98. In paragraph 172, advance notice of a strike is found to be compatible with the Conventions. Paragraph 176-178 of the Report also recognise that sanctions against strikers are not incompatible with the Conventions provided the sanctions are proportionate to the seriousness of the violations.

[27] In our judgement it is a misrepresentation of the position to suggest that the ILO Conventions inevitably preclude national legislation from prescribing the type of conditions contained in the Act before there can be an exercise of the right to strike. Indeed, if Mr Rubin's submission was to be accepted, it would, in effect, destroy some of the most important pillars of our strike law and open the door to industrial chaos rather than legitimate regulation of our labour relations. Our Constitution envisages a careful balance between the right to strike and the regulation thereof. Section 23(2)(c) of the Constitution provides that every worker has the right to strike. The right to strike must be seen as part of the process of collective bargaining. Section 23(5) then provides that national legislation may be enacted to regulate collective bargaining. It contemplates that such legislation may limit the right to bargain collectively but requires any such limitation to comply with the provisions of section 36(1) of the Constitution. There was no suggestion that in so far as the provisions of the Act which prescribe certain pre-strike procedures may be said to be limitations on the right to strike, they do not comply with the requirements of sec 36(1) of the Constitution

[28] The Act prescribes conditions which must be met before employees can exercise their right to strike. Such conditions are, generally speaking,

justifiable in order to regulate collective bargaining. In so far as they may be said to be limitations of the right to strike, no sound reason was advanced by Mr Rubin why they cannot be said to fall within the ambit of sec 36(1) of the Constitution. Accordingly the position is that the Act does not confer the right to strike unless the conditions it prescribes have been met.

[29] Furthermore the Act makes a clear distinction between a protected strike and an unprotected strike. It sets out the effect and implications of both types of strikes in secs 67 and 68. In sec 67 it, among other things, provides for immunity from civil liability and from dismissal for striking to anyone who engages in a protected strike or who engages in conduct in contemplation or in furtherance of a protected strike. In sec 68 it provides that the Labour Court may grant not only an interdict against an unprotected strike and conduct in contemplation or in furtherance of an unprotected strike but it also gives the Labour Court power to order payment of compensation for any loss suffered as a result of an unprotected strike or conduct resorted to in contemplation or in furtherance of an unprotected strike.

[30] There can be no doubt that the Act is legislation which is contemplated by sec 23(5) of the Constitution. That being the case, it is constitutionally acceptable that the Act should regulate the right to strike as an integral part of collective bargaining which it does by making various provisions connected with collective bargaining. The Act regulates the right to strike by making the provisions that it makes in, among others, sections 64,65,67 and 68. There is no doubt that, if the conduct of the appellants constituted a strike, it was an unprotected strike. That means that the strike was illegitimate in terms of the Act. In those circumstances we are satisfied that the commissioner's finding that the dismissal was substantively fair is not only justifiable but correct. Accordingly the

appellants' appeal against the Court a quo's finding in this regard falls to be dismissed.

[31] On behalf of the appellants it was also contended that another ground on which the commissioner's finding relating to substantive fairness should be set aside was that the commissioner had, in considering the matter, taken into account a certain memorandum prepared by Mr Andre Van Niekerk without giving them an opportunity to respond to its contents. That memorandum was delivered to the commissioner by the first respondent in order to deal with Mr Rubin's contentions relating to the ILO conventions. It was common cause that, after the commissioner had received the memorandum, he had not invited the appellants' representatives to respond to its contents before he completed his award and had it issued. It was contended on behalf of the appellants that, as a result of such omission on the part of the commissioner, the appellants' right to be heard had been violated. Because of this, so the argument ran, the commissioner's finding that the dismissal was substantively fair should be reviewed and set aside.

[32] It appears to us that this complaint was not included in the appellants' answering affidavit - which is the affidavit in which the appellants set out the grounds of their counter review application. The result of this would be that it is not open to the appellants to rely on such ground to seek to set aside the commissioner's finding. In any event there is no merit in the argument. The position, as we understood it during argument, was that, when the matter was argued before the commissioner, the first respondent's Counsel requested an opportunity to later on supplement his replying argument to the appellants' contentions relating to the ILO conventions in writing. Such request was granted and the memorandum was subsequently delivered to the commissioner. The contents of the memorandum were not evidence but part of legal argument in reply to

arguments presented on behalf of the appellants. If the appellants' legal representative so wished, they could have asked the commissioner to give them an opportunity to respond to the memorandum. They could have asked this during argument or soon after they had been served with the memorandum. They did not do so. In those circumstances the commissioner must have justifiably concluded that the appellants did not seek to reply to the memorandum. This is not a case where the appellants were represented by co-employees or shop stewards - people who might justifiably not have known what to do or what the procedure was if they wanted to reply or who may not have appreciated that they had a right of reply if they wanted to reply. These were an attorney and an advocate - the latter being apparently also a present or past professor of law. They only have themselves to blame. Accordingly the appellants' contention in this regard cannot be upheld.

**DID THE FIRST RESPONDENT COMPLY WITH THE  
AUDI RULE BEFORE IT DISMISSED THE APPELLANTS?**

[33] The commissioner held that the first respondent was obliged to have given the appellants an opportunity to state their case before it could dismiss them. For this he relied on the judgement of this Court in **Modise & others v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC); 2001 (2) SA 406 (LAC)**. He held further that in this case the first respondent had failed to observe this obligation which rendered the dismissal procedurally unfair.

[34] Before us Mr Wallis, who, together with Mr Redding, appeared for the first respondent, indicated that he did not seek a departure from the judgement of this Court in *Modise*. He submitted that the first respondent had observed the audi rule before it dismissed the appellants. He attacked the commissioner's finding as being egregious as that term

is used in *Toyota SA Motors (Pty)Ltd v Redebe & others* (2000) 21 ILJ 340 (LAC) at 355 A-D which amounts to a gross irregularity. He also submitted that the commissioner misconceived the whole inquiry in respect of the audi rule and misconstrued the evidence that was before him. He submitted that, in any event, the commissioner's finding was irrational and not justifiable in terms of the reasons given for it.

[35] In the majority judgement in *Modise* this Court held that an employer is obliged to afford strikers an opportunity to state their case before it can dismiss them. It held that such an opportunity would have been afforded to the strikers if the employer gave the strikers' union or the strikers' representatives such opportunity. It held further that there were recognised exceptions to this general requirement. It pointed out that the form which the giving of such an opportunity takes will depend on the circumstances of each case (see par 96 of the *Modise* judgement). This Court affirmed this position in the majority decision in ***Karras t/a Floraline v S.A. Scooter & Transport Allied Workers Union & Others*** (2000) 21 ILJ 2612 (LAC). In this matter, too, this Court reiterates this general requirement, which, as was stated in *Modise*, is subject to recognised exceptions.

[36] The question which arises is whether the first respondent complied with the audi rule in this case. If it did not, then the commissioner's finding will stand and the cross-appeal will have to be dismissed. If we find that the first respondent did comply with the audi rule, that will not mark the end of the inquiry in regard to this part of the appeal. In that case the next question will be whether or not the commissioner's finding that the first respondent did not comply with the audi rule falls foul of any of the grounds of review advanced by the first respondent.

[37] The question whether or not the first respondent complied with the audi rule before it dismissed the appellants must be considered in the context of the meeting which the first respondent had with the employee delegation on the 20<sup>th</sup> January, the meetings which the first respondent had with the union and the correspondence exchanged between the first respondent, on the one hand, and, the union, the employees and the suspended shop stewards, on the other. We now turn to consider these.

**THE MEETING OF THE 20<sup>TH</sup> JANUARY BETWEEN THE FIRST RESPONDENT AND THE EMPLOYEE DELEGATION AND THE AUDI RULE.**

[38] As already stated, a meeting took place between the first respondent and an employee delegation representing the striking employees on the 20<sup>th</sup> January. That delegation consisted of Messrs Mzeku, Swarts, Jacobs, Ralo and Mokmosi. The first respondent was represented in that meeting by Messrs B.K, Smith, PJ. Smith and Kasika. A summary of what transpired at that meeting was provided by the first respondent. That summary reflects that at the commencement of the meeting Mr B.K. Smith asked the employee delegation **to identify who they represented and to outline the reasons for the current illegal strike action which started this morning.**

[39] What is important about this is that it reflects that the first respondent invited the employee delegation to explain the conduct of the striking employees. The employee delegation informed the first respondent that they were not the leaders of the employees but that the leaders of the employees were the suspended shop stewards. However, they said that they had been mandated by the striking employees to communicate the employees' demands to the first respondent. The explanation for the conduct of the employees which the employee delegation gave to the first

respondent was that the union had suspended the shop stewards and the striking employees wanted the union to lift the suspension. The employee delegation also said that the employees wanted the first respondent to ensure the reversal of the suspension of the shop stewards.

[40] Mr Smith informed the employee delegation that the strike was illegal and unprocedural. He also pointed out that the strike was in contravention of a court order which had been granted by the Labour Court in favour of the first respondent in July 1999 over the same issue and asked the delegation if they were aware of this. The employee delegation responded that they were aware of that court order and its implications but said that the employees were angry at the way the union had handled the matter. Mr. B.K. Smith warned the employee delegation of the consequences of the strike action including that it was threatening the first respondent's Golf 4 export order and thousands of jobs. He emphasised that the first respondent required the employees to return to work and resume their duties immediately and that, if they continued with the strike, they would face disciplinary action which would include dismissal.

[41] When the first respondent said that, if the employees continued with their strike, they would face disciplinary action which would include dismissal, the employee delegation had an opportunity to tell the first respondent it could not dismiss the employees if they continued with the strike for whatever reason. The employee delegation did not do so but instead they said that they would communicate the first respondent's position to the employees. If they wanted to ask the first respondent to give them another opportunity at a later stage, they could have asked for such an opportunity but they did not. This suggests that they themselves had nothing further to say to the first respondent about, among others, its statement that the strike was illegal and unprocedural and that, if the

employees continued with it, disciplinary action, which would include dismissal, would be taken against them.

[42] The first respondent gave each one of the members of the employee delegation a copy of a letter which set out its position. It did this in order to avoid any possible misunderstanding as to its position. The first respondent made it clear to the employees in that letter, among others, that: **“[i]f employees refuse to, among others, resume their duties without any further delay the [first respondent] will take whatever steps are necessary to ensure that its legitimate requirements are met. This will include the dismissal of employees who persist in their refusal to resume normal work immediately.”** In the letter the first respondent urged the delegation to convey the first respondent’s position to the employees and to take all steps to persuade them to resume their duties.

[43] There can be no doubt that the first respondent’s position in this regard was conveyed to the employees. To the extent that Mr Mzeku may have sought in his evidence to suggest otherwise, his evidence falls to be rejected as highly improbable if not outright false. However, even if the employee delegation did not convey this, the employees would have their own delegation, and not the first respondent, to blame for that. After learning of the first respondent’s position, the employees could have conveyed to the first respondent whatever representations they wished to make to say that the first respondent had no right to, or should not, dismiss them for their conduct even if they were not prepared to resume work. Instead of the employees sending the employee delegation back to the first respondent if they had anything further to say to the first respondent about its contemplated action, they dissolved this delegation. They failed to utilise that opportunity and can, therefore, not be heard to complain that they were not afforded such an opportunity.

[44] The employee delegation seems to have taken the attitude that the fact that the employees were unhappy with the suspension of the shop stewards from their positions as shop stewards by the union and the manner in which the union had handled the matter gave the employees the right to refuse to work. Of course that attitude was simply wrong and without any basis in law. The position was that, if the employees were unhappy with the decision of the union to suspend the shop stewards, they, as members of the union, were not only entitled to but were obliged, if they wanted to raise their concerns, to follow internal channels within the union. They were not entitled to withhold their labour against the first respondent. This is also the attitude that was adopted consistently by the first respondent. The first respondent was correct in adopting this attitude. In our view even the dealings which the first respondent had with the employee delegation on the 20<sup>th</sup> January so sufficiently shows that the first respondent afforded the employees an opportunity to state their case through the delegation before it could dismiss them that we find the commissioner's finding to the contrary inexplicable.

**COMPLIANCE WITH THE AUDI RULE: THE SUSPENDED SHOP STEWARDS.**

[45] When the employee delegation met with the first respondent on the 20<sup>th</sup> January, it informed the first respondent that the leaders of the employees were the suspended shop stewards. There was a suggestion that the first respondent should have dealt with the suspended shop stewards in order to give the employees an opportunity to state their case. The position is that the first respondent's attorney wrote a letter on the 20<sup>th</sup> January to the attorneys representing the suspended shop stewards. In the letter he invited the suspended shop stewards to meet with the first respondent to discuss the basis upon which the suspended shop stewards may

**communicate with their supporters in order to avoid any further prolongation** of the strike.

[46] The suspended shop stewards responded to that letter by way of a letter from their attorneys to the first respondent's attorneys dated the 21<sup>st</sup> January. In the letter the suspended shop stewards took the attitude that:-

- (a) the strike engaged in by the employees was illegal;
- (b) they would only meet with the first respondent in the presence of their attorney as they wished **"to abide by the Court order granted in the Labour Court on 19 January 2000"**;
- (c) as the first respondent had a recognition agreement with the union, it should adhere to the recognition agreement which they said meant that **"if there should be a way of resolving the dispute, NUMSA's officials should be called to address their members"**;
- (d) they had already done everything in their power until the previous day **"to prevent the current strike action from taking place and if your client had also confronted the NUMSA officials about dealing with the matter, the current difficulties would not have arisen"**;
- (e) they noted the first respondent's **"invitation to meet"** but said that **"a committee has been appointed by the employees to discuss the basis upon which they may communicate with their general workforce at [the first respondent]."**

[47] In the last paragraph of that letter the suspended shop stewards reverted to the first respondent's invitation to them to meet with it. They said that such invitation was **not acceptable for the reasons stated above, there being a recognition agreement between NUMSA's officials and your client to deal with the current difficulties and also there being a committee elected by the employees to communicate with [the first respondent].** It is clear, therefore, that the suspended shop stewards informed the first respondent not to deal with them but to deal with the union and the committee. As already indicated above, the first respondent had met the committee on the 20<sup>th</sup> January and had heard the employees' side on why the employees had decided to engage in the conduct they were engaging in. It had conveyed to the committee what action it contemplated taking if the employees did not return to work. In that way it allowed an opportunity for the committee and the employees to make representations if they believed that it should not proceed with its contemplated action. As the suspended shop stewards themselves declined the first respondent's invitation on the basis, inter alia, that it should deal with the union, the appellants cannot blame the first respondent for not dealing with them through the suspended shop stewards as their leaders in terms of giving them an opportunity to be heard.

**COMPLIANCE WITH THE AUDI RULE: INTERACTION BETWEEN THE FIRST RESPONDENT AND THE UNION.**

[48] In dealing with the first respondent in regard to the strike, the union adopted a clear stand from the beginning about the legality of the strike. It said that the strike was illegal and unprocedural. On this it and the first respondent as well as the suspended shop stewards were agreed. As to whether the employees should have continued with the strike, the union also made it clear that the employees should stop the strike and resume

their duties. On this it and the first respondent were also agreed. The union's attitude was conveyed to the first respondent as early as the 21<sup>st</sup> January in a letter from the union's Port Elizabeth regional office to the Human Resources Director of the first respondent. In subsequent interactions the union maintained the stance that the strike was illegal and unprocedural and that the employees should resume their duties.

[49] The first respondent conveyed to the union its contemplation of the dismissal of those employees who would fail or refuse to resume their duties. The union's attitude in this regard was, understandably, not one of seeking to make representations to the first respondent that such employees were not guilty of misconduct. Its attitude was to protect all employees' interests by negotiating a reasonable time within which it could secure the employees' return to work. That was, without any doubt, the most sensible and practical way to avoid the dismissal of the striking employees and also to avoid the possible loss of the Golf 4 export contract which would have resulted in the loss of jobs by even other employees who were not on strike.

[50] There can be no doubt that the union had no representations to advance to the first respondent to justify the conduct of employees who refused to return to work even after all reasonable efforts had been exhausted to get them to return to work. This is not surprising because the union accepted that the strike was illegal and unjustified and itself saw no reason why the strike should be continued with at such great risk to the jobs of thousands of employees in the plant and in the region. In any event, if the union had any further representations to make, it had ample opportunity to make them but failed to do so. The representations it made to the first respondent to avoid the dismissal of the striking employees, were the only representations available to it, namely, to persuade the first respondent to be tolerant of the employees' unlawful and unacceptable conduct for

more than two weeks while it made all efforts to get the workers back at work so that they would not be dismissed. In the light of the above the finding by the commissioner that there was no invitation by the first respondent to the union **“to explain why”** the employees’ conduct should be tolerated or why an ultimatum should not be issued and why they should not be dismissed is difficult to understand.

[51] This is so because the union had conveyed to the first respondent from a very early stage of the strike that it regarded the strike as illegal, unprocedural and was unjustified. The union had taken the attitude that the employees should stop the strike without any delay. It had indicated that it would not be held responsible for the dismissal of employees who failed to return to work. It had succeeded in getting the first respondent to delay taking the decision to dismiss for over two weeks. How could the first respondent then say to the union: **“Now defend your members’ actions!”** The union had already said such action was unjustified. The union agreed in the agreement of the 28<sup>th</sup> January that employees who failed to resume duties on initially the 31<sup>st</sup> January - which was later moved to the 3<sup>rd</sup> February at the request of the union- would be dismissed. How could the first respondent, after the union had agreed to this, turn to the union and say: **“Tell us why we should not dismiss the employees who have failed to resume duties”**? There would be no logic in this approach.

[52] In these circumstances we are satisfied that the commissioner misconstrued the nature of the inquiry in relation to the audi rule as well as the evidence before him. There is clear evidence that, before the first respondent dismissed the appellants, it afforded them not only through their union but also via the employee delegation that met the first respondent’s management on the 20<sup>th</sup> January 2000 and the suspended shop stewards an opportunity to

state their case on why they engaged in the conduct they engaged in and why they should not be dismissed. Indeed this evidence is so overwhelming that the commissioner's finding to the contrary is completely inexplicable. We are therefore of the view that, to say the least, that finding is wholly unjustifiable in relation to reasons given for it and falls to be set aside. The Court a quo erred in coming to the conclusion that there was no basis to interfere on review with the commissioner's finding in this regard. The first respondent's cross appeal must therefore succeed.

[53] As an alternative to his finding that the dealings which the first respondent had with the union did not constitute giving the union an opportunity to state the appellants' case, the commissioner found in effect that any attempt by the first respondent to give the appellants an opportunity to state their case by giving such opportunity to the union as the appellant's representatives would not have constituted compliance with the audi rule. He gave as the reason for this the fact that there was a rift between the union and the striking employees including the appellants which was well-known to the first respondent. The effect of this reasoning is that, because there was a rift between the union and the appellants, the union was not entitled to represent the appellants in its dealings with the first respondent and the first respondent was no longer entitled to regard the union as the representative of the appellants and deal with it on that basis.

[54] We do not agree. In our judgement this finding is without any legal basis and is contrary to provisions of the Act. The reasoning underlying the finding is untenable. On the reasoning of the commissioner, whenever an employee who is a member of a union is dissatisfied with the union about something and the employer is aware thereof such obligation as the employer may normally have to deal with such employee's union as the

latter's representative ceases and such employer is obliged to then deal with the employee himself or with such other representative as such employee may appoint or choose. One question that arises is whether any measure of dissatisfaction has this result or whether it is only dissatisfaction of a certain degree that has such a result. It can reasonably be expected that, as in any organisation, there would at any one time be a number of employees in any workplace who may not be happy with their union for one reason or another. That a member of a union may be unhappy with his or her union at any one time does not necessarily mean that such member no longer wants to continue as a member of the union nor does it necessarily mean that the member no longer wants the union to continue to be his or her representative.

- [55] It seems to us that, until an employee has resigned as a member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, generally speaking, entitled, and obliged, to regard the union as the representative of the employee and to deal with it on that basis. We say generally speaking because there are situations where, even if an employee has resigned as a member of a union, such union remains entitled to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee. The latter situation will occur, for example, where the union is a representative union that enjoys majority status in a workplace or in a sector because in such a case such union may conclude a collective agreement with the employer, or, employers, in the case of a sector, which binds even those employees who are not its members and those who may have been its members but have since resigned as well as those employees who will be employed by the employer or employers during the currency of such collective agreement. (For example see sec 23(1)(d); sec 25 (agency shop agreement); sec 26 (closed shop agreements); sec 32( extension of collective agreements). That this is the case is because

majoritarianism is the system that the legislature has preferred in a number of areas in our labour relations system.

[56] In **Baloyi v M & P Manufacturing [2001] 4 BLLR 389 (LAC)** an employee who was a member of the union with which the employer consulted in respect of the retrenchment of certain employees including the appellant was unhappy about his retrenchment. It also seems that he was unhappy with the consultation that the employer had had with his union. He challenged his retrenchment on the basis that, apart from consulting his union, the employer should have consulted him, too. This Court, per Davis AJA, with Zondo JP and Goldstein AJA concurring, rejected that argument holding that the employer's obligation was to consult with the employee's union and that there was no obligation to consult in addition with the member of the union.

[57] To take this issue further, one can have regard to other provisions of the Act with which the finding of the commissioner is completely inconsistent. In this regard sec 200(1) reads thus:—

**□A registered trade union ... may act in any one or more of the following capacities in any dispute to which any of its members is a party —**

- (a) in its own interest;**
- (b) on behalf of any of its members;**
- (c) in the interest of any of its members.□**

It is clear to us that the effect of sec 200(1) is to give a union that is registered - as opposed to one that is not registered- a statutory right to represent any of its members in anyone or more of the three capacities there set out. This, therefore, means that in this matter the union was entitled to act on behalf of the appellants in dealing with the first respondent about the conduct of the appellants which threatened not only their own employment but also the employment of many of its other

members who were not on strike. If the union was entitled to act on behalf of the appellants, the first respondent had to respect that right. The way to respect that right was to deal with the union on the basis that it was acting on behalf of its members. For the commissioner to have found, as he did, that the first respondent was not entitled to deal with the union as a representative of the appellants was to make a finding that is contrary to the express provisions of the Act.

[58] Sec 202(1) provides: **“If a registered trade union ... acts on behalf of any of its members in a dispute, service on that trade union ... of any document directed at those members in connection with that dispute will be sufficient service on those members for the purposes of the Act.”** It is, therefore, clear also that sec 200(1) gives a registered union the right to act on behalf of its members when there is a dispute involving anyone or more of its members and that sec 202(1) takes this further and provides that, once a registered trade union acts, as it is entitled to, on behalf of its members, the employer has a right not to serve documents on the individual members themselves but to serve them on the union. It provides that such service on the union is as good as service on the members of the union themselves. If this is so, the position must be that even with regard to the giving of the opportunity to be heard, the employer is entitled to deal with the union.

[59] By virtue of the provisions of sec 210 of the Act the commissioner could not apply provisions of any law that could be in conflict with the provisions of the Act on whether the first respondent was entitled to deal with the union as the representative or agent of the appellants. Sec 210 provides that in the event of a conflict between provisions of any law and provisions of the Act, the provisions of the Act prevail over the provisions of any other law except the Constitution or an Act expressly amending the Act. In the result we are of the view that the

commissioner's finding that the first respondent was not entitled to deal with the matter on the basis that the union was a representative of the appellants is contrary to the provisions of the Act which clearly entitled the union to represent the appellants as its members as well as its other members who were not on strike.

- [60] In this matter there was clearly a dispute between the appellants and the first respondent on whether they were entitled to strike. The first respondent maintained that they were not but they seem to have taken the attitude that they were. The union engaged in discussions with the first respondent representing its members or acting in their interests. Quite clearly the first respondent was entitled to deal with the union as the appellant's representative. It seems to us that the commissioner's finding that the first respondent should not have dealt with the union as a representative of the appellants is one that required the first respondent to act in breach of its statutory obligation. In those circumstances we are satisfied that the commissioner's finding in this regard is, to say the least, unjustifiable in terms of the reasons given for it, is bad in law and should be set aside.

### **THE AGREEMENT OF THE 28<sup>TH</sup> JANUARY AND THE AUDI RULE**

- [61] As already indicated above, the union and the first respondent held a meeting on the 28<sup>th</sup> January. That meeting led to the conclusion of an agreement between the union and the first respondent. Owing to the importance of that agreement, we consider it warranted to quote it in full. It reads thus:

#### **□AGREEMENT BETWEEN NUMSA AND VWSA**

**The parties strongly condemn the illegal strike action taken by VWSA employees over the issue of the suspension by NUMSA of the 13 NUMSA Shop Stewards**

The parties agree to the urgent need to establish long term labour stability at VWSA, so as to safeguard export contracts and thus protect jobs in the local auto industry.

Should NUMSA members continue to participate in illegal strike action over this issue, the National Union reserves its rights to take strong disciplinary action against these individuals.

Before they tender their services at the end of the strike, all employees will be required to sign an individual undertaking as follows:

□That both now and in the future, I will work normally in terms of my employment contract, which includes observing all collective agreements binding on me □

5. **The Company has identified a number of employees who, during this process, were involved in serious misconduct or illegal actions and at the end of the strike, these employees will be suspended pending a fair disciplinary process. NUMSA reserves its rights to represent its members in these hearings. Should employees persist with this illegal strike action, Management will take further disciplinary action which will include dismissal.**
- 6 **NUMSA will, on an urgent basis, re-establish strong union structures within the Uitenhage Plant. To this end, the Union will organise shop steward elections in terms of the Recognition Agreement within two weeks of the opening of the Plant. Over the next few weeks, until this process is finalised, a NUMSA official will be located at the Uitenhage Plant in order to facilitate this process. VWSA and NUMSA will take all steps to strengthen the organisation capacity of the VWSA shop steward structures, this will include allocation of money and facilities for training.**

**Based on the undertakings given in this agreement, VWSA will open the Plant on Monday, 31<sup>st</sup> January 2000, in terms of a start-up plan which will be given to NUMSA today. The parties will do everything possible to communicate the contents of this agreement in order to facilitate an effective start to production.**

**Signed at Port Elizabeth on the 28<sup>th</sup> January 2000"**

- [62] Certain features of this agreement deserve to be highlighted. One is that in the first sentence the union condemned the conduct of the employees as illegal strike action. This had been the union's stance from quite early in the strike and the first respondent was aware of it from an early stage in the strike. The significance of the stance taken by the union and the fact that the first respondent was aware thereof is that the first respondent could not then invite the union to make representations on why the conduct of the employees could not be said to be illegal or to constitute an illegal or unprocedural strike. In other words the union did not seek to defend the conduct of the employees.
- [63] As a representative of its members, the union was entitled to decide how best to protect the interests of its members. This was a case where the first respondent, as the employer, was giving the employees an opportunity to avoid dismissal for their illegal conduct by ending the strike and resuming their normal duties. The union must have decided that in the circumstances of this case the most appropriate route for it to follow was to get the plant re-opened and to try its best to get the employees to resume their normal duties. In other words the union's attitude towards the first respondent was in effect to say: You should not dismiss our members for engaging in the illegal strike if they resume their duties on the re-opening of the plant on the 31<sup>st</sup> January.
- [64] Another feature of the agreement is to be found in clause 4 thereof. That clause dealt with two categories of employees. The one category was that of employees who, on the information available to the first respondent, had engaged **in serious misconduct or illegal actions** during the strike. The other category was that of those employees who would persist with the illegal strike action after the re-opening of the plant on the 31<sup>st</sup> January. In terms of clause 4 the union and the first respondent agreed that there would be a fair disciplinary process to be followed in respect of the first category. In this regard the union took the position that it reserved its right to represent those union members.

[65] In respect of the second category, the parties agreed that the first respondent would **“take further disciplinary action which will include dismissal”**. In this regard the use of the phrase **“will include dismissal”** as opposed to **“may include dismissal”** is significant. In regard to this category the parties did not see fit to make provision for the following of any disciplinary process at that stage. It seems to us that this was an acknowledgement by both parties that in respect of the one category, the union had not made any representations as yet and, was therefore, entitled to such an opportunity but that, in respect of the other category, the union had made all the representations that it could make or wished to make and that it had no further representations to make and that the first respondent would thereafter take disciplinary action which which would include dismissal. In those circumstances there can simply be no doubt that the union was given every opportunity to be heard and that it actually utilised such opportunity in the manner it considered to be in the best interests of all its members. The evidence that reveals that the appellants were given an opportunity to state their case is so overwhelming that the inference that the commissioner misconceived the entire inquiry in relation to the audi rule is irresistible.

[66] Furthermore, the agreement of the 28<sup>th</sup> January was in our judgement, a collective agreement as defined in sec 213 of the Act. A collective agreement is defined in sec 213 as meaning: **“A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and, on the other hand—**

- (a) one or more employers;**
- (b) one or more employers[] organisations; or**
- (c) one or more employers and one or more registered employers[] organisations;[]**

It may, perhaps, be debatable whether or not the agreement of the 28<sup>th</sup> January concerned terms and conditions of employment. It dealt with the basis on which the striking employees would be allowed to resume work. What is clear is that such agreement did concern a matter of mutual interest between the union and the first respondent.

[67] Since the union is a registered union there can be no doubt that it was entitled to conclude a collective agreement with the first respondent to deal with a matter of mutual interest. As the union was a representative union having majority membership in the first respondent's workplace, it could conclude a collective agreement that was binding even on employees who were not its members. That is a benefit which is enjoyed by a registered trade union which has the majority of employees in a workplace as its members. (See sec 23(d) of the Act). If the union in this case could go as far as that, it cannot, in our view, be reasonably suggested that it could not bind its own members (i.e the appellants) by way of the collective agreement of the 28<sup>th</sup> January.

[68] In fact, as the collective agreement of the 28<sup>th</sup> January was binding on the appellants, it may well be that the only way that the dismissal of the appellants could be challenged was that it was not in accordance with that collective agreement. In other words it may well be that, once the first respondent showed that the dismissal was in accordance with that agreement, that should have been the end of the appellants' case in the arbitration. The result of this would be that, if the appellants felt aggrieved in any way by not being able to challenge their dismissal on other grounds, they would have had to raise that with their union but could not sue the first respondent. However, as this point was not argued, it does not merit any further consideration by us in this judgement.

[69] In the light of all of this it is clear that the commissioner's finding that the first respondent should not have dealt with the union as a

representative of the appellants is not only unjustifiable in law but it is a finding which flies in the face of statutory provisions to the contrary. In any event the first respondent had sought to deal with the suspended shop stewards who were said to be the leaders of the striking employees. They took the attitude that the first respondent should deal with the union. The commissioner seems to have ignored this important aspect in considering this issue. Furthermore the first respondent had met with the employee delegation on the 20<sup>th</sup> July and had given them an opportunity to be heard. Once again the commissioner seems to have completely overlooked this as compliance with the audi rule. Lastly the first respondent reached agreement with the union, after extensive consultations, that it could dismiss those employees who failed to resume work on the 3<sup>rd</sup> February. In respect of employees who did not resume work, the union and the first respondent did not see the need to provide in the agreement that there would be a disciplinary process before such employees could be dismissed whereas they did see the need to make a provision to that effect in respect of another category of employees. The first respondent followed the provisions of the agreement in dismissing the appellants. In all of the circumstances we are more than satisfied that the commissioner's finding is unjustifiable and should be set aside.

**IS REINSTATEMENT COMPETENT AS A REMEDY FOR A DISMISSAL WHICH IS UNFAIR ONLY BECAUSE THE EMPLOYER DID NOT FOLLOW A FAIR PROCEDURE?**

[70] The appellants also appeal against the finding of the Court a quo that the commissioner exceeded his powers when he ordered the first respondent to reinstate the appellants. The Court a quo's basis for this finding was that reinstatement was not a competent remedy where the only reason the dismissal was unfair was that the employer did not follow a fair procedure before it could dismiss the employees. The appellants contend that this

finding by the Court a quo is wrong and should be set aside by this Court. The first respondent supports the finding of the Court a quo and has urged us to uphold it.

[71] In support of its contention that reinstatement is competent in a case such as this one, the appellants relied heavily on the provisions of sec 193(2) of the Act. It is necessary to quote the provisions of sec 193. Sec 193 reads thus:—

**¶193 Remedies for unfair dismissal:—**

- (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may —**
  - (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;**
  - (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any date not earlier than the date of dismissal; or**
  - (c) order the employer to pay compensation to the employee.**
- (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless —**
  - (a) the employee does not wish to be reinstated or re-employed;**

- (b) **the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;**
  - (c) **it is not reasonably practicable for the employer to reinstate or re-employ the employee; or**
  - (d) **the dismissal is unfair only because the employer did not follow a fair procedure.**
- (3) If a dismissal is automatically unfair or if a dismissal based on the employer's operational requirements is found to be unfair, the Labour Court in addition may make any other order that it considers appropriate in the circumstances.**

[72] Subsection (1) sets out the powers of the Labour Court or the arbitrator when it has found a dismissal to be unfair. Those powers are to order reinstatement, re-employment or the payment of compensation. Ss (1) does not deal with the circumstances under which each one of those powers may be exercised. That is dealt with in ss (2). Ss (2) uses the imperative word **“must”** to place an obligation on the Labour Court and the arbitrator, where it has found a dismissal to be unfair, to order the reinstatement or re-employment of the employee unless anyone of paras (a),(b),(c) or (d) in that subsection finds application.

[73] What ss(2) makes clear is that reinstatement is the preferred remedy whenever a dismissal has been found to be unfair. However, what ss(2) also makes clear is the legislative recognition that there are certain situations where that should not be the case. Those situations are set out in paras (a),(b), (c) and (d). The question which arises is whether, in those situations, reinstatement remains a competent remedy even though it may not be a preferred remedy. As reinstatement is a very important remedy, it is difficult to resist the initial inclination that the legislature

would have been slow to deprive the Labour Court and arbitrators completely of the power to grant reinstatement even in circumstances where they may consider it appropriate to grant reinstatement. This approach would, therefore, envisage three situations that must be borne in mind. These are (a) where, as a general rule, reinstatement is the preferred remedy, (b) where reinstatement is not the preferred remedy but it ranks equally with other remedies such as compensation and may be granted by the Labour Court or the arbitrator in appropriate circumstances or (c) where reinstatement may not be granted at all (i.e. where it is incompetent.) However, this initial inclination does not survive a careful examination of the provisions of the subsection.

[74] That this initial inclination cannot be sustained becomes clear when one takes each one of the first three paragraphs under the subsection and asks the question: why would the Labour Court or the arbitrator deem it appropriate to order reinstatement in a situation such as the one contemplated by this paragraph? In the cases contemplated by each one of the three paragraphs there would appear to be no reason why the Labour Court or an arbitrator could wish to order reinstatement. For example, paragraph (a) is a situation where the employee does not wish to be reinstated or re-employed. In such a case the Labour Court or the arbitrator would be acting in a grossly unreasonable manner if it ordered reinstatement. There is, accordingly, no reason to think that the legislature would have intended to give the Labour Court or an arbitrator a discretion to order reinstatement in a case where the employee does not wish to be reinstated. Accordingly the position must be that in a par (a) situation reinstatement is not competent.

[75] A similar conclusion is reached in regard to par (b) of the subsection. This paragraph refers to a situation where **the circumstances surrounding the dismissal are such that a continued employment relationship**

would be intolerable.[] Again the question arises: why would the Labour Court or the arbitrator deem it appropriate to order the reinstatement of an employee in a case where [a continued employment relationship would be intolerable]? Quite clearly, the answer must be that there is no way that the Labour Court or an arbitrator could reasonably deem it appropriate to order reinstatement in such a case. Paragraph (c) deals with a situation where [it is not reasonably practicable for the employer to reinstate or re-employ the employee.]. Again, in such a situation there is no way that the Labour Court or an arbitrator can reasonably deem it appropriate to order reinstatement in such a case.

[76] Par (d) appears to be different. It deals with a situation where [the dismissal is unfair only because the employer did not follow a fair procedure.]. The reasoning that has been used above in respect of the situations described in paragraphs (a), (b) and (c) does not apply as forcefully to (d) as it does to those paragraphs. If one asked the question as to why the Labour Court or the arbitrator would reinstate an employee whose dismissal is unfair only because the employer did not follow a fair procedure, the answer may be that there is a great need for compliance with fair procedures because, if all employers were to comply with fair procedures before they could dismiss employees, this could significantly reduce the number of disputes with which various public institutions have to deal. Notwithstanding this, we are of the opinion that this does not justify the conclusion that par (d) deserves to be treated differently to paras (a),(b) and (c).

[77] In our view, what drives one to the conclusion that paragraph (d) does not fall into a different category to paras (a), (b) and (c) is that it also is subject to the same provisions at the beginning of the subsection that paragraphs (a),(b) and (c) are subject to. Those provisions state that the Labour Court or the arbitrator [must require the employer to reinstate

**or re-employ the employee unless ...**. It cannot be said that in respect of paragraphs (a), (b) and (c) those provisions mean that the Labour Court and the arbitrator have no power to grant reinstatement but that, when used in relation to par (d), the same provisions mean that the Labour Court or the arbitrator has power to order reinstatement. The **or** which appears after the colon in par (c) before par (d) does not, in our view, assist the appellants.

[78] This conclusion is supported by an analysis of par (d). The dismissal envisaged by par (d) is a dismissal of an employee whom the employer has a fair reason to dismiss but in respect of whose dismissal the employer did not follow a fair procedure. Indeed par (d) relates to an employee whose dismissal would have been fair in every respect had the employer followed a fair procedure. It seems to us that, in such a case, absent special circumstances, there is nothing unfair if the employee is not reinstated despite the dismissal being procedurally unfair. In the light of this it seems understandable that the Act may have treated such a case in the same way as those described in paras (a),(b) and (c) and said that in each of such cases reinstatement and re-employment were not competent remedies. In order to ensure that employers will still have a reason to comply with fair procedures, the Act left the remedy of compensation still available for that and other situations.

[79] In the light of all the above we conclude that under the Act the relief of reinstatement is not competent in the case of a dismissal that is unfair only because the employer did not follow a fair procedure. Accordingly, the commissioner exceeded his powers in granting the relief of reinstatement in this matter. On that ground alone his award was susceptible to be reviewed and set aside. The appellants' appeal must, therefore, fail on this point as well.

[80] In the result we make the following order:

1. The appeal is dismissed with costs.
2. The cross-appeal is upheld with costs.
3. The order of the Court a quo is set aside and the following one is substituted for it:
  - (a) **The applicant's application is granted with costs.**
  - (b) **The counter-review application is dismissed with costs.**
  - (c) **The finding by the commissioner that the dismissal in this matter was procedurally unfair is reviewed and set aside.**
  - (d) **That part of the commissioner's award that ordered the applicant to reinstate the respondents is hereby reviewed and set aside.**
  - (e) **There is no order as to costs.**

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**RMM Zondo**  
**Judge President**

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**D.M. DAVIS**  
**Acting Judge of Appeal**

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**B.R. du Plessis**  
**Acting Judge of Appeal**

**Appearances:**

For the Appellants : Mr J Surju of J. Surju Attorneys (with Mr Reuben)

For the First respondent : Mr M.J.D Wallis SC (with Mr A.I Redding)

Instructed by : Chris Baker and Associates

For the 2<sup>nd</sup> and 3<sup>rd</sup> respondent: No appearance

Date of Argument : 19 April 2001

Date of Judgement : 22 June 2001