CCMA

COMMISSION
FOR
CONCILIATION, MEDIATION & ARBITRATION

ARBITRATION AWARD

Commissioner: **Floors Brand**
Case No.: **EC17900**
Date of Award: **22-Jan-2001**

In the arbitration between:

BONISILE JAMES MZEKU & OTHERS **Union/Applicant**

and

VOLKSWAGEN SA - BK SMITH **Respondent**

Union/Applicant's representative: J Surju Attorneys
Union/Applicant's address: PO Box 2680
Durban
4000
Telephone: (031) 306 3663
Telefax: (031) 306 2681

Respondent's representative: Advocate Wallis S C instructed by Chris Baker & Associates
Respondent's address: PO Box 27005
Greenacres
6057
Telephone: (041) 373 3840
Telefax: (041) 373 2296

DETAILS OF HEARING AND REPRESENTATION

This matter was heard at Uitenhage over a period of 20 days. Due to the unavailability of the Applicants' representative on the last day of the hearing, it was agreed that he would file written Heads of Argument and that the Respondent's representative could file Replying Heads.

Extension for the issuing of the award was granted in terms of section 138 (8) of the Labour Relations Act, No 66 of 1995 (the LRA) until 22 January 2001.

The Applicants were represented by Mr Surju of Surju Attorneys and the Respondent by Adv Wallis SC, assisted by Adv Redding and instructed by Chris Baker & Associates.

ISSUE TO BE DECIDED

Whether the dismissal of the Applicants was substantively and procedurally fair or not.

The Applicants seek retrospective reinstatement.

JURISDICTION

In so far as it might have been necessary the parties agreed in terms of section 141 of the LRA to the jurisdiction of the CCMA to arbitrate in the dispute.

BACKGROUND TO THE DISPUTE

The Respondent is a motor manufacturing company with its production site at Uitenhage. It employed approximately 6 000 employees of which about 4 500 were hourly-paid. Approximately 80% of the hourly-paid employees were members of the National Union of Metalworkers of South Africa (NUMSA).

NUMSA became the sole collective bargaining agent for all hourly-paid employees in November 1990 when the Respondent entered into a recognition agreement with NUMSA.

In 1998 the Respondent was awarded with an export contract for A4 Golfs to the United Kingdom and Europe. This required that the Respondent more than double its local production. In order to achieve this, negotiations took place between Management and NUMSA and in August 1998 the so-called A4 Export Agreement was signed. The agreement was extensively communicated within the factory and NUMSA's General Secretary expressed support for the export order. It resulted in the recruitment of 850 new employees and the introduction of new work practices such as group work, a holiday corridor, reduced tea breaks, etc.

It would appear that a group of workers, styling themselves as "Concerned VW Workers", had some concerns with the agreement and with the shop stewards and NUMSA officials who were part of the resolutions which resulted in the signing of the agreement. They wanted changes in the shop steward ranks and before the shop steward elections, which were held in March/April 1999, they circulated a list of proposed candidates. The result of the election was that about half of the 32 shop stewards elected, were new.

Soon after the election it also became clear that there was division within the Shop Stewards Council between those who were re-elected and the newly elected, and also between the newly elected shop stewards and the local officials of NUMSA.

On 17 July 1999 the Respondent was informed by NUMSA that it had suspended 8 shop stewards and that they should be advised to return to the positions that they held before being elected. This was done by the Respondent, but on Monday, 19 July 1999, a few hundred of the workers downed tools and started toyi-toying through the factory. They demanded the reinstatement by NUMSA of the suspended shop stewards.

On 20 July 1999 the Respondent obtained a Labour Court Order declaring the strike action illegal and interdicting and restraining all hourly-paid workers from participating in any strike action for the purposes of remedying the alleged grievance or dispute relating to the suspension by NUMSA of the shop stewards concerned.

On 21 July 1999 NUMSA decided to lift the suspension of the 8 shop stewards and the striking workers returned to work. But, on 27 July 1999, 18 shop stewards resigned in protest against the reinstatement of the 8 others. Because the number of vacancies created difficulties in maintaining the labour relations structures, the matter was taken up with NUMSA. On 6

August 1999 NUMSA informed the Respondent that elections would be conducted in due course and warned that no unofficial appointments should be recognised.

There was no endeavour by the officials of NUMSA to replace the shop stewards who had resigned and in September 1999 the remaining 13 shop stewards indicated to the Respondent that certain individuals had been nominated to replace those who resigned. The Respondent was not prepared to recognise the nominees as shop stewards and a number of meetings between all concerned were held, but the matter could not be resolved.

On 22 December 1999, the day before the closure for the annual recess, NUMSA advised the Respondent that some of the 13 shop stewards had been expelled from NUMSA, following a disciplinary enquiry held on 17 December 1999.

The expelled shop stewards approached Pagdens Attorneys and on January 2000, Mr Zide of Pagdens wrote a letter to the Respondent, stating that his clients were in dispute with NUMSA over their expulsion. He also said that his clients intended to consult and deal directly with NUMSA in regard to the issue and that they would try everything in their power to avert a strike and to resolve the internal squabble amicably with NUMSA.

On 17 January 2000 the Respondent's Attorneys, Chris Baker & Associates received a further letter from Pagdens, advising that their clients' expulsion from NUMSA had been revoked and that they were suspended as shop stewards, pending the outcome of a disciplinary enquiry in respect of charges against them.

On the same day, 17 January 2000, NUMSA held a General Quarterly Meeting at the Respondent's premises where the issue of the shop stewards would be discussed. National Office Bearers, including its National President, Mr Tom, would attend this meeting. The next day, 18 January 2000, the Respondent received a letter from NUMSA, confirming the suspension of the shop stewards concerned and requiring that they vacated their offices.

On 19 January 2000, NUMSA brought an urgent application to the Labour Court for an interdict, restraining the 13 shop stewards from continuing to act as NUMSA representatives and from interfering with NUMSA's activities at Volkswagen. On the same day the Respondent's Attorneys received a letter from Pagdens, advising that the urgent application had been resolved by way of a settlement agreement in terms of which their clients would, (a) cease to act as shop stewards, (b) vacate the shop stewards' offices and (c) return the 3 union cars.

On 20 January 2000 a number of workers again downed tools and assembled at the main gate at the plant. They demanded the reinstatement of the suspended shop stewards and continued to refuse to work. As a result of this, the plant was closed from 24 January 2000 to 28 January 2000 whilst endeavours were made to resolve the situation.

On 28 January 2000 the Respondent concluded an agreement with NUMSA. It was agreed that the plant would re-open on 31 January 2000, that the workers would return to work and that they would sign an undertaking that they would work normally in terms of their contracts of employment.

According to the Respondent this agreement was widely published in the press and over the radio. Some of the workers returned on 31 January 2000, but a number of workers did not return in accordance with the agreement and on 1 February 2000 the Respondent issued an ultimatum to all "striking workers" to return to work on 3 February 2000 or be dismissed. The bulk of the Applicants failed to respond to the ultimatum and were accordingly dismissed.

The thrust of the Applicants' challenge to the substantive fairness of their dismissal during these proceedings was that the strike was a justified response to unjust conduct by the Respondent. They challenged the procedural fairness of their dismissal on the basis that the Respondent failed to comply with the *audi* rule. The Applicants also suggested that the ultimatum was not sufficient.

The Respondent argued that the Applicants failed to comply with the requirements of sections 64 (1) of the LRA and the provisions of the Recognition Agreement and therefore, that the strike was illegal and unprotected. The Respondent also contended that it met the requirements of the *audi* rule and that the ultimatum satisfied the requirements of a fair ultimatum.

SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENT

Substantive Fairness -

If it is common cause that an employee has been dismissed, the employer bears the onus in terms of section 192 (2) of the LRA of proving that the dismissal of the employee was fair. In terms of section 188 (1) a dismissal is not unfair if the employer proves that the reason for dismissal was a fair reason based on the employee's conduct (and that the dismissal was in accordance with a fair procedure).

For the purposes of determining the substantive fairness of the Applicants' dismissal it is necessary to look at the nature of and the reasons which prompted the Applicants' conduct.

It is common cause that the Applicants refused to work from 20 January 2000 until 3 February 2000 (15 days). Initially the dispute, which was the subject matter of the strike, was described as "an internal union dispute relating to the suspension of initially 8 and subsequently all 13 shop stewards at the plant for alleged breaches of the NUMSA's Constitution and policies". This emerges *inter alia* from the following evidence:

(a) The letter written on 11 January 2000 by Pagdens Attorneys, representing 8 of the shop stewards, wherein Mr Zide described the dispute as being "an internal dispute of the union".

(b) A further letter from Pagdens dated 17 January 2000 in which they described the dispute as being "our clients expulsion from NUMSA".

(c) An undated pamphlet issued on behalf of the dismissed workers, stating that "we stood firm on the policies of our union, workers control and trade union democracy" and complaining that union officials and some shop stewards had undermined their democratic right to elect their shop stewards and claimed that they were defending their right to control their union.

(d) The description of the dispute in a further pamphlet distributed on behalf of the dismissed workers as "a disagreement over who can be elected as office bearers of the Shop Stewards Committee at an NUMSA-organised plant".

(d) In letters dated 25 and 27 February 2000 the Applicants' attorney, Mr Zide, stated that the affected employees are in dispute with NUMSA.

(e) On 5 April 2000, the date on which the conciliation took place, the Applicants indicated that "their dismissal was a result of a dispute which they had with their Union – "not with the Respondent" and also that the dispute was "not against the Company".

During these proceedings the Applicants mainly relied on alleged misconduct on the part of the Respondent. It is argued that over a considerable period of time the Respondent engaged in a campaign of undermining effective collective bargaining. The evidence of Mr Mzeku was that the Respondent had a close relationship with the shop stewards and that Management interfered in internal union activities. He referred to certain incidents, but I will refer to them later. He went on to say that "we have elected some people to represent us (but) they have been removed from those positions which we have elected them into …We found that …our right of representation by the people elected by ourselves has been violated. That is why we (are) saying to the Management it must call the union officials to come to resolve this problem". It was argued that the Respondent should have exercised its rights under the Recognition Agreement to place NUMSA on terms and by taking NUMSA to Court. For these reasons Messrs Mr Mzeku and Mtotoba suggested that the workers were also engaged in a dispute with the Respondent.

Mr B K Smith denied these allegations, but for the purposes of determining the nature of the Applicants' dispute, i.e. whether their action constituted a strike as contemplated by the definition of strike in section 213 of the LRA, it is not necessary to deal with the merits of the allegations because I believe that I should determine the nature of the dispute as put forward by the Applicants.

The evidence shows that these concerns with Management's conduct and the fact that they wanted Management to call NUMSA to the plant were, from time to time, raised during communications. But, there is no evidence that they were put forward as a demand or the reason for the strike. In my view the evidence overwhelmingly shows that their demand was the reinstatement of the suspended shop stewards. As was said by Mr Mtotoba, they wanted their right of representation restored.

Section 213 of the LRA defines a "strike" as follows:

"(T)he partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee".

On the evidence before me it is clear that the Applicants regarded their conduct, i.e. the refusal to work, as a "strike" and so did the Respondent, but if I accept that the dispute was against their union, NUMSA, then the dispute was not in respect of any matter of mutual interest between employer and employee, and therefore, technically as a matter of law, not a strike within the purview of the law. If I accept that there was also a demand against the Respondent, in the sense that they

demanded the Respondent to refrain from interfering in internal union matters and that the Respondent was requested to call the union to the plant to address the suspension of the shop stewards, it might well fall within the definition of a strike as contemplated by section 213 of the LRA. But, be that as it may, Mr Wallis suggested that both parties regarded the conduct of the Applicants at the time as a "strike" and Professor Rubin as well as Mr Surju argued the Applicants' case on the basis that the Applicants were on strike. In the circumstances I believe it would be proper to determine the fairness of the Applicants' dismissal with reference to the guidelines laid down for strike-related dismissals.

Section 64 (1) of Chapter IV states that every person has the right to strike if the issue in dispute has been referred for conciliation. With certain exceptions, it also requires 48 hours notice of the commencement of the strike to the employer. In terms of section 65 (1) no person may take part in a strike if a collective agreement prohibits it or if the dispute is arbitrable or justiciable or, subject to certain exceptions, the person is engaged in essential or maintenance service.

Furthermore section 68 (5) of the LRA states that:

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

Item 6 (1) of Schedule 8 reads as follows:

"Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –

(a) the seriousness of the contravention of this Act,
(b) attempts made to comply with this Act, and
(c) whether or not the strike was in response to unjustified conduct by the employer".

Clauses 13 and 14 of the Recognition Agreement contemplated by section 65 set out certain procedures that must be followed to resolve both disputes of interest and disputes of right before "legitimate action" may be taken.

That workers have a right to strike over certain disputes between them and their employer is clear and enshrined in the LRA and the Constitution, but in my view, the concept of the "right to strike" in section 23 (2) of the Constitution and the LRA does not contemplate action directed at the workers' trade union. Furthermore, I do not believe that the right to strike embodied in the Constitution and the LRA is one that is absolute and unrestricted as suggested by the Applicants. As Seady and Thompson stated in South African Labour Law, Vol 1, PAA 1 at 304:

"This Act gives effect to the right to strike as guaranteed in the Constitution and required by its international law obligations. Although the right is announced in bold terms, it is hedged by both procedural and substantive limitations. The right to strike, like any other right is not absolute. It must be regulated in a way that takes account of social and economic costs that flow from its exercise. A ban on strikes may reduce collective bargaining to 'collective begging' by employees, but an unrestricted right to strike may well reduce the country to international investment begging in the global economy order. Compliance with the procedural and substantive provisions of the Act is rewarded by and extensive range of protections for strikers and their unions… Strikers that do not comply with the provisions of the Act, no longer attract any criminal sanction, but strikers and their unions are exposed to dismissal".

In *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Limited* (1999) 20 ILJ 321 (LAC) at 326, Cameron JA stated:

"Conformity with the Constitution entails inter alia that the provisions of the LRA must be considered against the background of the Constitution which is the supreme law of the land and which itself requires that this Court when in interpreting the LRA promote the spirit, purport, and objects of the Bill of Rights."

And, in paragraph 21 of the judgement that –

"It is plain that the right to strike, conferred without express limitation in the Constitution, is subjected to a number of significant, expressly stated, limitations in the LRA. The statute not only sets formal pre-conditions for the exercise or the right to strike, but imposes material limitations on who may strike. Strikers or those acting in contemplation or furtherance of a strike whose conduct falls outside the statute's limitations are deprived of the protection Section 67 provides, and are accordingly vulnerable (if employees) to dismissal … ."

There is no dispute that the Applicants did not comply or seek to comply with the requirements of section 64 (1) of the LRA in participating in the industrial action. Nor did they comply or seek to comply with the provisions of Clauses 13 and 14 of the Recognition Agreement concluded between the Respondent and NUMSA of whom the Applicants on the evidence of Mr Mzeku and Mr Mtotoba were members at the time. So if it was a strike, the strike was clearly unlawful. It was unprotected because there was no compliance with the requirements of section 64 (1). It was unlawful because it was contrary to the provisions of section 65 (1). It was also unprotected in terms of section 67. In the premises the conduct of the Applicants constituted misconduct in terms of item 6 (1) of Schedule 8 to the LRA.

From the wording of item 6 (1) of Schedule 8 it is clear that non-compliance with the provisions of Chapter IV does not mean that once that has been determined, dismissal would be substantively fair. As in all other cases of misconduct the seriousness of such misconduct should be considered. Fairness of a dismissal is a matter of proof. Item 6 (1) *inter alia* requires that one should look at any attempts made by the strikers to comply with the statutory requirements, but as I have said, the Applicants in this matter made no attempt whatsoever to comply with any of the statutory requirements and the reality is that they refused to work, thereby disrupting the production of the Respondent for 15 days. No acceptable reason has been forthcoming for the Applicants' failure to comply with the relevant statutory requirements or that any attempt to comply had been made. The reason for such failure could be that they believed that the provisions did not apply because they were not in dispute with the Respondent. The evidence Mr Mzeku and Mr Mtotoba showed that they were of the view that they did not have to comply. However, this conduct has repeatedly been condemned by the Labour Court (see *Marapula & Others v Canteen (Pty) Limited* (1999) 20 ILJ 1837 (LC); *National Union of Metal Workers of SA & Others v Malcomess Toyota a Division of Malbak Consumer Products (Pty) Ltd* (1999) 20 ILJ 1867 (LC) and *Workers Equally Support Union of SA & Others v Jacobs* (2000) 21 ILJ 1680 (LC).)

The Applicants tried to justify their conduct by saying that the strike was a response to unjustified conduct by the Respondent. As I have said this was never put forward as a reason for the strike or as a demand. It was only during these proceedings that Management's alleged collusion with NUMSA officials and shop stewards, and interference in internal NUMSA matters had been raised to substantiate their claim for reinstatement. Reference was made to alleged refusal by Management to accept petitions for the removal of shop stewards, the acceptance of the resignation of the 18 shop stewards without union officials confirming, the agreement to an early quarterly meeting in January 2000, that Mr B K Smith sought to influence the election of shop stewards, that the Respondent refused to recognise that the shop stewards had been petitioned out, a meeting held in November 1999 between Union Officials and Management without the knowledge of shop stewards, that there was too close a relationship between the Respondent's Management and shop stewards, etc. The alleged close relationship was apparently manifested by conduct of socialisation on a trip to Spain and the provision of cars to the NUMSA shop stewards. Reference was also made to the provision of assistance for the holding of a union meeting at the East Cape Training Centre and the publicising of union affairs in the Respondent's newspaper, Fanfare. Mr B K Smith explained the conduct of the Respondent in this regard and denied that the shop stewards were favoured or that the Respondent undermined effective collective bargaining by involving itself in internal trade union activities. But, be that as it may, if that was the reason for the strike, fairness dictates that such grievance should have been conveyed to the Respondent at the time when the strike began or at least during the strike. This never happened. At all material times it was said that the dispute was against their union. It was only on 20 January 2000 that the Respondent was asked to call NUMSA to the plant to address the problem about the suspension of the shop stewards. In the circumstances I do not believe that the Applicants should be allowed to rely on the alleged unfair conduct by the Respondent to justify the strike. In any event, I am not convinced on the evidence before me that the Respondent's conduct in this regard could be critised because at the time the shop stewards were NUMSA shop stewards of whom the Applicants were members. If they, as members of NUMSA, were dissatisfied with the quality or conduct of their representatives they had to take it up with their union. The Respondent was certainly not in a position to remove shop stewards or for that matter, compel the union to reinstate them. That would be to say the least, unlawful interference in internal union activities. It has repeatedly been said by the Labour Appeal Court that members of a trade union are bound by the decisions of their union. (See *Ramolesane & Another v Andrew Mentis & Another* (1991) 12 ILJ 329 (LAC), *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale & Others* (1994) 15 ILJ 277 (LAC) at 280 and *Ngcobo & Another v Blyvooruitzicht Goldmining Co Ltd* (1999) 20 ILJ 1896 (LC).) For the same reason the argument that the Respondent is guilty of misconduct by failing to negotiate with the employees should be rejected. The Applicants never revoked the authority of NUMSA to act on their behalf. This is clear from the statement on 20 January 2000 at the meeting with the representative committee when Management was told to speak to NUMSA. It is also clear from the letter on 21 January 2000 by the shop stewards' Attorney, Mr Zide, in which he told the Respondent to deal with the union in accordance with the Recognition Agreement. Even on 3 February 2000, at the Cashbuild site, the Applicants responded enthusiastically to Mr Ndandani, saying "viva NUMSA viva".

I have considered the evidence in this regard very carefully and I must say that I find it very difficult to read anything more into it than common place interactions between the Company's Management and its collective bargaining partner. A good relationship between shop stewards and the trade union officials on the one hand and management on the other, and the supporting of the collective bargaining procedure, do not necessarily prove collusion. The evidence, in my view, does not prove such collusion. Clearly the two sides have a common interest in effective collective bargaining and the holding of meetings to resolve potential obstacles to the efficiency of the Company and the fulfillment of the workers aspirations as a whole, cannot be seen as "a campaign of undermining effective collective bargaining by (involving) itself in internal union

activities against the interest of the Applicants." They were at all material times members of the very same union. It was NUMSA that suspended the shop stewards and the argument that the Company should have negotiated with the employees in dispute with their union, would be inconsistent with the complaint that the Company improperly involved itself in union affairs. The Applicants themselves relied on this approach by asserting that Management should have spoken to and called the union to resolve the dispute. In my view the assertion that the industrial action was in some way directed towards the Respondent is merely an attempt to avoid the legitimate criticism that they could not have gone on strike in support of a dispute which they had with their union.

In the circumstances, and even if the conduct of the Applicants was technically, as a matter of law, not a strike, I do not hesitate to find that the Applicants' conduct by withholding their services for a period of 15 days in support of a dispute between them and the union, without complying or even attempted to comply with the provisions of the LRA and contrary to the Court Order of July 1999, causing the Respondent to lose millions of rands and even jeopardising the A4 Export Order constituted serious, deliberate and willful misconduct for which there was no justification on the basis that it was a legitimate and/or reasonable response to the conduct of the Respondent – whether it was during an unprotected strike or otherwise.

The Applicants also seek to justify their conduct with reference to the principles enunciated by the International Labour Organisation (the ILO). Broadly speaking, they suggested that I am bound by those principles and that in terms thereof the strike was a legitimate means at the disposal of the Applicants to respond.

Before I deal with this issue, I must say that these submissions were made by Professor Rubin on behalf of the Applicants on the last day of the hearing. He did not tender his submissions as evidence, i.e. he did not testify as an expert witness. Mr Wallis briefly responded to Professor Rubin's submissions and it was agreed that further submissions in this regard would be made in the Respondent's Replying Heads of Argument.

When I received the Respondent's Replying Heads of Argument a memorandum compiled by Mr Andrè van Niekerk, an admitted attorney, in response to Professor Rubin's submissions was annexed. Mr Surju objected to the annexure, stating that Mr Van Niekerk was not involved in the arbitration proceedings and accordingly barred from presenting any argument. He also stated that the content of the memorandum presents an opinion which is tantamount to expert evidence to counter the argument advanced on behalf of the Applicants. Mr Surju asked me to ignore the memorandum.

I invited the Respondent's representatives to respond to Mr Surju's objection. They pointed out that as in the case of Professor Rubin, Mr Van Niekerk's submissions are not evidence, but merely legal argument and that a litigant may appoint any person (of course who qualifies to represent him) at any time in the course of the litigation to assist him.

A litigant is certainly not bound to use the same representative or even only the representative he employed at the beginning of the litigation. The arbitration was not over and therefore I can see no reason why the Respondent could not engage the services of Mr Van Niekerk to compile the memorandum or for that matter, to respond to Professor Rubin's submissions.

In his memorandum Mr Van Niekerk explained the structures of the ILO and its supervisory bodies, but for the purposes of my award it is not necessary to deal with that. What I have to decide is whether I am bound by its recommendations and if so, whether they provide some form of justification for the actions of the Applicants. That in my view is a question of interpretation - not a fact-finding exercise where you have to rely on evidence. Although one might prefer that such submissions be made during the hearing, there is, in my view, no rule in law or principle which prevents me from allowing or even requesting written legal argument after the hearing. In the circumstances I will accept Mr Van Niekerk's submissions as legal submissions made on behalf of the Respondent on this issue.

I now turn to deal with the submissions by Professor Rubin and Mr Van Niekerk.

Professor Rubin suggested that by virtue of the Republic of South Africa's membership of the ILO and by virtue of the ratification by South Africa of ILO Conventions 87 and 98 the exercise of a right to strike by the Applicants is to be considered in terms of the principles enunciated by the supervisory bodies of the ILO, and in particular the Governing Body's Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

The first question is therefore whether these Conventions and Recommendations are binding upon employees, employer or their organisations and upon me, sitting as an arbitrator. I accept that membership and ratification of a Convention place certain obligations on that member state, but my understanding of the ILO's Constitution is that membership and ratification only require that particular State to take such action as may be necessary to make effective the provisions of such Convention, which may be by the enactment of legislation or other actions. In my view it only creates an obligation on the Government of that State at international level to bring into effect the terms of the treaty or convention in a manner which the Government deems appropriate for the conditions of that country – which is normally by way of appropriate legislation.

In *Pan American World Airways Inc v SA Fire & Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 161 C – D, Steyn C J stated as follows:

"It is.. trite.. law that in this country the conclusion of a treaty, convention or agreement by the South African Government with another
Government is an executive and not a legislative act. As a general rule the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process in the absence of any enactment giving (its) relevant provisions the force of law, (it) cannot affect the right of the subject".

See also *S v Tuhadeleni and Others* 1969 (1) SA 153 (A) at 173 – 175 and Dugard, *International Law: A South African Perspective*.

Clearly, the drafters of the LRA were fully aware of the Government's obligations on international level because section 1 (b) of the LRA states that the purpose of the LRA is "to give effect to obligations incurred by the Republic as a member state of the ILO. The terms of the LRA should therefore be seen as the manner in which Parliament deemed it appropriate for the conditions of our Country, to apply the Conventions. The meaning of section 3 (c) of the LRA is, in my view, clearly reflected in the wording of section 233 of the Constitution which reads as follows:

" *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".*

In my view section 233 contemplates legislation which is open for more than one reasonable interpretation. It does not say that one should ignore the clear and unambiguous intention of such legislation merely because it would be inconsistent with international law. It is the prerogative of Parliament to make laws and I, as an arbitrator, have to interpret and apply them in a manner which would give effect to the intention of the Legislature and the objects of our Constitution.

The Constitution and the LRA acknowledge the right to strike and as I have said, both parties believed at all relevant times that the workers were on strike. It is therefore not necessary to look at ILO Conventions or Recommendations or other decisions to establish the right to strike. The question is whether an interpretation of, in particular, sections 64 and 65 of the LRA "in compliance with the public international law obligations of the Republic" (section 3(c)), contemplates any basis on which it can be said that the "strike" or actions of the Applicants were legitimate?

The principles formulated by the Committee of Freedom of Association and the Committee of Experts accord the right to strike to workers' and employers' organisations and I could find no basis on which it can be said that a dispute between workers and their trade union of which they are members, falls within the ambit of the legitimate objectives and scope of the right to strike. Therefore the Applicants cannot claim any protection which might be recognised in respect of strikers. (See 1994 General Survey at par 165 - 174) But, if I have to accept that the actions of the Applicants were for "labour problems of any kind which (were) of direct concern to the workers" as contemplated by the Committee of Experts (see par 200 and 205 of 1994 General Survey) and that that was a legitimate reason to withhold their services from their employer (which I doubt), it was not an absolute right. It was hedged by both procedural and substantive limitations and those who did not comply with the procedural and substantive requirements of the LRA (sections 64 and 65) were exposed to dismissal. (See Seady and Thompson and *Plascon* (*supra*).) I am also of the view that the requirements contemplated in sections 64 and 65 of the LRA are not inconsistent with the conditions attached to the right to strike by the Committee of Freedom of Association and the Committee of Experts. In the 1996 Digest, the Committee of Freedom of Association stated the following:

"**502.** *The obligation to give prior notice to the employer before calling a strike may be considered acceptable.*

503. *The obligations to give notice to take strike decisions by secret ballot are acceptable.*"

The Committee also accepted the obligation to have resource to conciliation, mediation and voluntary arbitration procedures. Furthermore section 65 of the LRA protects the primacy of the collective agreement on which the Applicants themselves rely.

Professor Rubin also suggested that the issuing of the ultimatum was a power play on the part of the Respondent. I cannot agree. The issuing of an ultimatum is required by item 6 (2) of Schedule 8 to the LRA and I could find no indication in the principles enunciated by the ILO and its structures which precludes the issuing of an ultimatum. The issuing of an ultimatum is in the interest of the striking workers. It is intended to call upon the workers and to give them reasonable time to reflect on their position. It has always been a procedural requirement in our law and many employers have been ordered by our courts to reinstate workers because they had failed to issue proper and reasonable ultimatums.

For these reasons I am unable to find any justification for the Applicants' actions in the principles enunciated by the ILO and its supervisory bodies.

The Applicants also argued that since considerable time had elapsed from the day on which the strike started, the Respondent must be "deemed to have waived its right to dismissed since it was long aware of the serious misconduct". I cannot agree. It is trite that waiver of any right is not lightly to be inferred and that the party alleging waiver must prove it. As was said by the Appellate Division of the High Court in *Laws v Rutherford* 1924 AD 261 at 263, where conduct is relied upon to prove a waiver of a right, such conduct must be "plainly inconsistent with an intention to enforce such right" (see also *Hepner v Roodepoort-Maraisburg Towncouncil* 1962 (4) SA 772 (A) at 778 F – G).

The evidence shows that the Respondent's attitude was, from the first day of the strike to the date of dismissal, that the striking workers were engaged in misconduct and that they were rendering themselves liable to be dismissed. That, in my view, is not inconsistent with any intention on the part of the Respondent to enforce its right to dismiss them.

In the circumstances, I am of the view that the dismissal of the Applicants was substantively fair.

Procedural Fairness -

As I have said section 188 (1) of the LRA states that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure and section 188 (2) enjoins that the provisions of the *Code of Good Practice: Dismissals* be taken into account when the fairness of a dismissal is considered.

If the conduct of the Applicants amounted to "misconduct", other than that contemplated in item 6 of Schedule 8, it needs no authority to say that the Respondent was compelled to give the workers or their representatives a fair opportunity to state their case before dismissing them, unless the Respondent was able to prove that there was reason to dispense with pre-dismissal procedures (see item 4 of Schedule 8). This requirement of procedural fairness is usually met by affording the alleged perpetrator(s) a hearing. Clearly there is no evidence that the Respondent attempted to comply with the provisions of item 4 or that there was sufficient reason for not doing so. Therefore, if I have to apply the test as contemplated in item 4, I have to find that the dismissals were procedurally unfair. But, I believe that the reason for not following such procedures was simply because both parties believed that the workers were on strike and therefore, that item 6 of Schedule 8 was applicable. The Applicants also advanced a case based on a strike-related dismissal. The question therefore is whether item 6 of Schedule 8 also requires a "hearing" before dismissal can be effected and if so, whether the Respondent complied with such requirement?

Item 6(2) provides as follows:

"Prior to dismissal, the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."

I believe that the pre-dismissal procedure that is required to satisfy the requirements of procedural fairness should be determined with reference to the circumstances of each case, but it is clear from item 6(2) of the Code that there are at least two steps that an employer, who is faced with an unprotected strike, is required to take before he can dismiss the strikers. The first is that he must, at the earliest opportunity, contact the union to discuss the course of action he intends taking. The second is that he should issue an ultimatum. In *Modisise & Others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC); (2000) 21 ILJ 519 (LAC), Zondo AJA (as he then was) who delivered the majority judgement, considered the procedural requirement contemplated by item 6(2) with reference to the jurisprudence over a period of 20 years in terms of the old Act

(the 1956 LRA) and came to the conclusion that if workers are entitled to hearings before being dismissed for misconduct, there is no reason why strikers should be denied such a right. This view is also supported by the terms of item 6 (1) of the Code which clearly state that participation in a strike that does not comply with the provisions of Chapter IV is misconduct. Zondo AJA stated the following at p 525 – 526, par 79 – 88:

"(T)he discussion envisaged by item 6(2) between the employer and the union constitutes an opportunity which the employer is required to give the strikers through their union to state their case before the employer can decide whether to pursue 'the course of action it intends to take' referred to in item 6(2). In my view that would meet the essential requirements of the audi rule (referring to the audi alteram partem rule).

The discussion contemplated by item 6(2) is not, and could not have been, intended to be, a one-way traffic where the employer simply instructs or tells the union what to do. It was intended to be an opportunity for the union to hear what the employer has to say about the strike and what he intends doing about it so that the union has an opportunity to say whatever it may have to say about the strike and, more importantly, about the course of action which the employer tells them he intends taking. It is an opportunity for the union to persuade the employer not to dismiss or not to issue an ultimatum which would result in the dismissal of the strikers in the event of non-compliance therewith and/or depending on the circumstances, to persuade the strikers to resume work even before an ultimatum can be issued (see also Grogan Workplace Law 4ed at 297-298).

The employer would be obliged to consider the union's representations properly and in a bona fide manner before it can decide to pursue its intended course of action, whatever it may be, including dismissal without an ultimatum or the issuing of an ultimatum which will result in the dismissal of those strikers who fail to comply therewith. That does not mean that the employer should necessarily agree with the union's representations or views. But also the employer would not be entitled to ignore such representations and to simply go through the motions pretending to be considering them when in fact he is not.

Although item 6(2) of the Code refers to a union official as the person whom the employer must contact, I do not think that, where there is no union, the employer has no obligation to initiate a discussion such as the one contemplated in item 6(2). I think in such a case it is the leaders or representatives of the strikers that he must contact and have the discussion referred to in item 6(2) of the Code with."

Zondo AJA said that the obligation to observe the *audi* rule when contemplating the dismissal of strikers, does not require the holding of a formal disciplinary hearing in accordance with a disciplinary code, but only "any acceptable form of the observance of the *audi* rule" (p 517, par 62). He also acknowledged that as in the case of all general rules, there are exceptions to this general rule and stated that the form which the observance of the *audi* rule must take will depend on the circumstances of each case, including whether there are any contractual or statutory provisions which apply in a particular case. At p 529, par 96, he stated that:

"In some cases a formal hearing may be called for. In others an informal hearing will do. In some cases it will suffice for the employer to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike. In the latter case the strikers or their union or their representatives can send written representations or they can send representatives to meet the employer and present their case in a meeting. In some cases a collective hearing may be called for whereas in others – probably a few – individual hearings may be needed for certain individuals. However, when all is said and done, the audi rule will have been observed if it can be said that the strikers or their representatives or their union were given a fair opportunity to state their case. That is the case not only on why they may not be said to be participating in an illegal strike but also why they should not be dismissed for participating in such strike (see Zenzile's case at (1991) 12 ILJ 259 (A) at G-H)".

As was said by Hoexter JA in the *Zenzile* appeal (*Administrator, Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (AD) at 37 B – C), "even if the offence cannot be disputed, there is almost always something that can be said about sentence. And if there is something that can be said about it, there is something that should be heard".

Zondo AJA also drew a clear distinction between the requirement to issue an ultimatum and the hearing to observe the *audi* rule. At p 521, par 73 the following is to be found:

"A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur, or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is

not to elicit any information or explanations from the workers but to give the workers 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 consequences of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequences of a failure to comply with an ultimatum is usually, and, is meant to be, a dismissal. In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty, and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to use the opportunity provided by an ultimatum to reflect on the situation, before deciding whether or not he will comply with the ultimatum. In the light of all these differences between the audi rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgment, for the proposition that the giving of a fair ultimatum is or can be substitute for the observance of the audi rule …

Maybe the right time for the observance of the audi rule is before an ultimatum can be issued because, at that stage, unlike when the ultimatum has been issued, the employer may be more amenable to persuasion". (par 75&97).

The Court also observed that the right of employers to respond collectively to collective action by their employees is not inconsistent with the obligation to adhere to the *audi* principle. It merely means that employers are entitled to deal with the strikers as a group rather than individually, and to afford them the opportunity to make representations as a group.

Although the Labour Appeal Court was dealing with the procedural requirements contemplated by the old LRA of 1956 in strike-related dismissals, it is clear from the judgement of Zondo AJA that item 6 of Schedule 8 of the new LRA also contemplates compliance with the *audi* rule before illegal strikers can be dismissed and that the mere issuing of an ultimatum does not serve such purpose. Therefore the next question is: Did the Respondent comply with the *audi* rule before dismissing the Applicants?

The Applicants contended that the Respondent failed to give them a "hearing". They further argued that the Respondent should have discussed the matter with the individuals or their representatives before dismissing them. They also complained that the Respondent failed to follow the procedures provided for in the Recognition Agreement for resolving problems that arise in the relationship.

The Respondent argued that it not only engaged in discussions and negotiations with the trade union, it also concluded an agreement on 28 January 2000 with the union which contemplated that should the workers not return to work, Management would take "further disciplinary action which will include dismissal". It is furthermore argued that the Respondent endeavoured, in addition to discussions with the trade union, to engage in discussions with representatives of the workers, but that these endeavours were rejected with the workers asserting that the Respondent should engage in discussions with NUMSA. The Respondent stated that it was only after the agreement with NUMSA had failed to achieve the desired result on 31 January 2000 that an ultimatum was issued.

To determine whether the Respondent met the essential requirements of the *audi* rule one has to look at the contents of the discussions, communications. etc. The discussions and communications which are relevant for the purposes of answering this question started on 20 January 2000, shortly after about 07:00 when some 400 – 500 people downed tools and assembled at the main gate of the plant. At about 08:00 the Respondent contacted the NUMSA Regional Office and informed them of the position at the plant. NUMSA was asked to intervene. At the same time the Respondent's Attorneys wrote to Pagdens Attorneys, who represented the suspended shop stewards at the time, referring to the Settlement Agreement reached on the previous day in the application between them and NUMSA and requesting compliance therewith. According to the evidence of Mr B K Smith attempts were also made by members of the Human Resources Division to get the shop stewards to attend a meeting to "address the issue". The shop stewards responded by saying that they had been suspended and

advising that Management should speak to NUMSA. They indicated that they would meet with Management in the presence of their Attorney. Mr B K Smith then took the next step (still on 20 January 2000) by addressing a letter to the shop stewards concerned, stressing that it was imperative that immediate steps be taken to "minimize losses and resume normal production", and furthermore –

(a) requiring them to give immediate effect to the previous undertaking to inform employees currently on strike to resume normal duties;

(b) stressing that employees on the afternoon shift on the 20th should commence duties at 14h00 as usual and requiring them to take all steps necessary to inform employees accordingly;

(c) pointing out that employees should refrain with immediate effect from further blockading the entrances to the plant and requiring them to take all steps necessary to secure compliance with this requirement; and

(d) pointing out that VWSA would take whatever steps were necessary to ensure that its legitimate requirements were met, including the dismissal of those employees who persisted in their refusal to resume normal duties.

As at 12:00 no attempts were made by NUMSA or its officials to enter the plant or intervene with a view of resolving the issue and a further letter was addressed to NUMSA'S Regional Office. Mr B K Smith pointed out the consequences to the Company of the continuing strike action and requested that immediate arrangements be made to have their representatives attending at the plant to inform the employees of the Agreement entered into between them (NUMSA) and the suspended shop stewards and to prevail upon the employees to resume their duties. Copies of this document were forwarded to the President of NUMSA, Mr Tom and the Acting General Secretary, Mr Dantjie.

Round about the same time (12:00) five persons, namely Messrs Mzeku (Applicant No 1), Swartz, Jacobs, Ralo and Mokmosi presented themselves to Management, indicating that they represented the striking workers. A minute, which was kept of the meeting by Mr Kasika, a human resources specialist and confirmed by him, *inter alia* reflects that they required the Respondent to secure the upliftment of the suspension of the shop stewards. They also blamed the Respondent for allowing NUMSA to hold the General Quarterly Meeting on 17 January 2000. According to the minute their representatives were again warned of the consequences of the "current industrial action" which was threatening the A4 Export Order and thousands of jobs at the Respondent and related industries in the area. It was also pointed out that the current situation had nothing to do with the Company and that the action was unprocedural and illegal, and that the Company required them to resume their duties immediately. They were warned that if the employees continued with the illegal strike action they would face disciplinary action which would include dismissal. The representatives undertook to communicate the Company's position to the employees and appealed to Management to secure the intervention of NUMSA'S Regional Office at the plant to explain the suspension of the 13 shop stewards. A written confirmation of the Respondent's position was also handed to the representatives and they were requested to read it out to the workers. Mr Mzeku said that they went to the workers and reported to them, but the workers responded by saying, "we did not send you (to collect) that … so if our representatives are not brought back we are going to see what we can do". The workers dispersed.

A letter was also addressed to the Minister of Labour, informing the Minister of the position at the plant and appealing to him to use whatever influence he may have to resolve the dispute. Copies were also forwarded to the General Secretary of COSATU, Mr Vavi, the President of NUMSA, the MEC for Economic Affairs: Eastern Cape and the Deputy Director General of the Department of Labour.

As there was no response to the earlier communication to Pagdens, a further letter was addressed to them at about 13:30 (on 20 January 2000), pointing out that an attempt was made to meet with the shop stewards, but that they had pointed out that they would only meet in the presence of their Attorney. The letter states that:

"Your clients are invited:

(a) To meet with our client immediately;

(b) o discuss with our client the basis upon which they may communicate with their supporters in order to avoid any further prolongation of the current strike.

Our client reiterates that if your clients persist in their refusal to give effect to this legitimate requirement, there is every prospect:

(a) That the current industrial action will continue; and

(b) That our client's losses will escalate further…

Our client intends to hold your client responsible for these losses.

You are requested to communicate this information immediately to our clients, informing of the invitation on the part of our client that they meet with our client, in compliance with the undertaking giving to your offices, and with a view to bringing the current industrial action to an end"

The afternoon and night shifts were shut down.

The next morning, 21 January 2000, the strike continued and it was decided to close the morning shift also. A notice was issued to all employees leaving the plant which reads as follows:

"1. You were called on at the commencement of work today (Friday, 21st January) to resume your normal duties.

2. You have failed to do so.

3. The Company is no longer prepared to tolerate this behaviour.

4. You are advised as follows:

4.1 Employees are required to report to their workstations at the commencement of their shift on Monday, 24th January and to resume normal work.

4.2 Any employee who fails to give effect to this requirement will face serious consequences which may include dismissal.

5. You are urged to ensure that you comply with the Company's lawful requirements in this regard".

On the same day a letter was received from NUMSA, advising the Respondent that the employees had been advised both through the printed and electronic media that they should discontinue their strike action. The Respondent was also informed that pamphlets had been distributed in the plant to this effect. The relevant portion of the pamphlet reads as follows:

"It is important to understand that this Order of Court (referring to the Settlement Agreement, which was made an Order of Court on 19 January 2000,) was sought in order to enforce the provisions of the Constitution (of the Union) and the authority of the Union in VWSA…

The decision to suspend the 13 shop stewards was further endorsed in a Quarterly General meeting held in the factory on Monday the 17th January 2000.

Any form of industrial action by a group of employees who want to blackmail the Union into submission will not be tolerated by the leadership of the Union.

We call upon loyal members of the Union not to be deceived by a group whose agenda is to destroy the Union in the factory and in the community.

We will not change the decisions that we have taken in the interest of building a strong Union in VWSA and in Uitenhage."

To this Mr B K Smith responded on the same day, pointing out that NUMSA will not be relieved of its responsibility to maintain a presence on Company premises on Monday, 24 January 2000, and to take all reasonable steps to address the concerns of its members and persuade them to resume their duties.

A letter was also received from Pagdens, stating that their clients (the suspended shop stewards) were of the view that it was NUMSA'S officials who were responsible for calling on employees to resolve their unlawful strike action. Pagdens also contended that their clients would deal directly with NUMSA and would appeal to the workforce that an unprocedural strike be averted at all costs. It was furthermore said that it was the view of the general workforce that they want NUMSA officials to come and address them. Pagdens also advised that if the Respondent wished to communicate with anybody it should do so through the committee which had been constituted and in view of the Recognition Agreement, that it was incumbent on VWSA to call on NUMSA officials to dissuade employees from pursuing their strike action.

Mr B K Smith then addressed a letter to NUMSA, requiring NUMSA to call on its members to resume their duties on 24 January 2000, failing which they will face serious consequences which may include their dismissal. The Respondent also issued a press release to this effect. Apparently a document prepared by the ANC/COSATU/SACP Alliance, condemning the action of those who caused "division within VWSA" and encouraging all workers to refrain from participating in divisive action which could jeopardise their security, was also distributed.

But on Monday, 24 January 2000, the Respondent still experienced extensive absenteeism and the plant was closed at about 14:30 until further notice. A notice to this effect was issued to all hourly-rated employees and a letter was also addressed to NUMSA. At the same time a communication was addressed to COSATU and the President of NUMSA, calling upon National leadership of COSATU and NUMSA to become involved and pointing out that job security of VWSA workers was at stake.

On the same day NUMSA issued a press release to the local press, the SABC TV and various news agencies *inter alia,* calling upon its members and other workers to disassociate themselves from further strike activities and to present themselves for duties. It also reminded employees of the potential of dismissal in the event of them pursuing the strike action.

On 25 January 2000 the local media carried several reports dealing with the call upon workers to return to work.

On the same day, Dr Schuster, Head of International Labour Relations at VWAG, and Mr Uhl, the General Secretary of the VWAG Group Works Council, arrived in South Africa to evaluate the strike and to assist Management to negotiate an end to the strike. That same evening they met with the Regional leadership of NUMSA and urged NUMSA to intervene immediately and secure a return to work. NUMSA said that they would have a meeting with members the following day and in order to convince them to resume their duties. They also consulted with the National leadership of NUMSA and with local and provincial political leaders.

According to the evidence the discussions with Mr Jim, the Regional Chairperson of NUMSA, Mr Chatai, the Regional Organiser and some members of the National leadership of NUMSA, were to discuss "the process to be followed in having people resume their duties and the need to structure an agreement providing the necessary undertaking to secure the return to work". This meeting broke up at about 15:00 to enable NUMSA to hold a meeting with its members. When the meeting reconvened later that day, NUMSA reported that it was not well attended, but that workers had indicated that they would resume their duties on 28 January 2000.

According to the evidence of Mr Kasika two separate requests were also made to the 13 shop stewards to meet with Dr Schuster and Mr Uhl, but they were not successful.

The next day, 26 January 2000, the press carried a number of articles relating to the strike with commence on the strike from NUMSA, COSATU and the Respondent's Management. The Evening Post of 29 January 2000 carried an article under the heading: "Strikers are on their own", stating that NUMSA *inter alia* said that should the workers fail to return to work, the union will not be held responsible for any of its members who may lose their jobs as a result of their participation in the current illegal strike. I have read these articles (and do not intend repeating them herein), but it is clear that they were intended to stress the seriousness of the situation and to request workers to resume their duties. But, in my view these articles do not include any element of any invitation by Management to NUMSA or the strikers, or for that matter, NUMSA to the strikers to put forward reasons why their action should be tolerated or why an ultimatum should not be issued, or why they should not be dismissed.

On the same day the Uitenhage Crisis Committee, of which Mr Mzeku (Applicant No 1) was the deputy chairperson, issued a document expressing their dissatisfaction with local NUMSA officials and demanding the resignation of a local NUMSA official and the immediate withdrawal of the allegations against the 13 shop stewards in order to resolve the issue.

On 27 and 28 January 2000 further meetings were held between Management and NUMSA in order "to reach agreement on an end to the strike and a process to secure normal production" and the re-opening of the plant.

On 28 January 2000 an agreement was struck between Management and NUMSA on the basis on which the plant would re-open on Monday, 31 January 2000. According to the evidence of Mr B K Smith, NUMSA leadership asked to adjourn the meeting before the agreement could be signed so that they could consult on certain aspects of the proposed agreement. When they returned, the agreement was signed. The agreement stated that both NUMSA and Management condemned the illegal action taken by the workers and provided *inter alia* that if employees persisted in their illegal strike action VWSA would take further disciplinary action against them "which will include dismissal". It was also agreed that all employees who tender their service should sign an agreement that they "will work normally in terms of their employment contract, which includes observing all collective agreements". The Respondent also warned NUMSA that if employees did not heed the agreement, VWSA would be left with no alternative other than to issue an ultimatum, with the consequence of dismissal of those

who failed to comply with the ultimatum. The Respondent also indicated that they were prepared to afford NUMSA the opportunity "to secure a complete return to work in terms of the agreement".

The content of this agreement was widely published. It was done by way of notices, press releases, radio reports, etc. In addition, all employees entering the plant on 31 January 2000 were provided with notices, referring to the agreement and stating that employers were required to sign an undertaking. It was also stressed that any employee who failed to comply with the instructions would be dismissed without any further warning.

On 31 January 2000 it became obvious that the strike was still continuing and because of the high level of absenteeism, it was not possible to commence normal production (but the plant remained open) and a press release was issued by the Respondent, urging employees to return to work. Mr Jim reported that NUMSA would be holding a meeting the next day, 1 February 2000, in a final attempt to secure the return of the striking workers. The Respondent assisted NUMSA to facilitate such a meeting at a hall in KwaNobuhle.

However, on the evening of 31 January 2000, Mr Ndandani (not an employee of VWSA), who appeared to be the leader of the striking employees and chairperson of the Crisis Committee, announced on national television that the "strike starts today", and at 18:00 that same evening Management took a decision to issue an ultimatum, requiring the striking employees to resume their duties on 3 February 2000 or face dismissal. The printers were instructed on the same evening to prepare the ultimatum and it was forwarded to the press, the radio and a distribution company was also engaged to drop 50 000 copies in and around the Uitenhage areas.

On the morning of 1 February 2000 a further meeting was held between NUMSA and Management. The ultimatum was read out at the meeting. NUMSA was advised that drastic action would be taken in order to protect the jobs of the workers at VWSA and others in the supply industry and warned that VWSA would not "backtrack" on the ultimatum, and that employees would be dismissed if they did not comply. NUMSA then advised the Respondent that a meeting would be held that evening in the Babs Madlikana Hall and that it would be addressed by Mr Vavi, Mr Tom, and other political and community leaders in an attempt "to persuade the people that the Company was serious about the ultimatum and that people should return to work".

Mr B K Smith also stated that from 31 January 2000 to 3 February 2000 the level of attendance improved each day. On 3 February 2000, 71% of the hourly-paid workforce reported for duty. Some 1 336 employees did not report and they were dismissed with effect from the same day.

In my view a proper analysis of the nature and contents of the negotiations, communications, notices, press releases and other statements from the day on which the strike began, 20 January 2000, until Management decided to issue an ultimatum, 31 January 2000, and even thereafter, before the dismissal, shows that the striking workers were advised that their action was unprocedural and illegal and of the implications of their conduct for the Company, that it jeopardised jobs of others, that the dispute was an internal union dispute which should be resolved immediately, that the Company cannot allow the strike to continue and that disciplinary action would be taken against them which would include dismissal. It is also clear that NUMSA condemned the activities of the striking workers and that it was adamant not to withdraw the suspension of the 13 shop stewards. It also shows that the leadership of NUMSA, COSATU and other political and community leaders tried to convince the striking workers to resume their duties. Some returned, but the Applicants did not. They wanted the withdrawal of the allegations against and the upliftment of the suspension of the 13 shop stewards. But, in my view, they do not show any invitation on the part of the Respondent's Management to NUMSA or for that matter, the striking workers or their representatives to explain why their conduct should be tolerated, why an ultimatum should not be issued and why they should not be dismissed. It

is one thing to negotiate the ending of the strike and the returning of workers to work, but it is another thing to observe the *audi* rule when dismissal is contemplated. Negotiations to end the strike and the observance of the *audi* rule, and the issuing of the ultimatum serve separate and distinct purposes. In my view it was, over and above the attempts made to negotiate an end to the strike, incumbent upon the Respondent to invite NUMSA or the strikers to make representations why the strikers should not be dismissed. In my view this was not done.

I am also not convinced that the meeting with NUMSA on 28 January 2000 and the subsequent agreement that was struck in terms of which the members of NUMSA would return to work, failing which "they will be dismissed" satisfied the requirements of the *audi* rule. There is no evidence that during this meeting the Respondent called upon NUMSA to defend the actions of the striking workers or their possible dismissals. Even if I accept that NUMSA was the *de jure* representative of the striking workers at the time, there is no evidence that NUMSA agreed to the dismissal of the striking workers in response to an invitation by the Respondent to defend their dismissals or the issuing of the ultimatum. Clearly NUMSA had an axe to grind with them and in clear terms condemned the conduct of the striking workers. They also refused to respond to NUMSA'S call to return to work – so why would NUMSA defend their dismissal.

This brings me to another question, namely whether, in circumstances where it is abundantly clear that there is division or animosity between the collective bargaining agent (the trade union) and its members or where the collective bargaining agent distanced itself from or condemned the actions of its members, it is not, for the purposes of observing the *audi* rule, incumbent on the employer to also consult with the striking workers (the members) directly before dismissing them - be that collectively or otherwise?

In view of the conclusion to which I have come, it may not be necessary for me to deal with this issue, but on the premises that it may successfully be argued that the contents and nature of the consultations or negotiations with NUMSA during the strike in some way prove an attempt by the Respondent to comply with the *audi* rule (as was suggested on behalf of the Respondent), I deem it necessary to deal with this question.

The Respondent argued that Chapter III of the LRA gives primacy to collective bargaining and encourages the conclusion of collective bargaining agreements which regulate matters of mutual interest between the parties. I agree. I also accept that it is in the interest of members of a union as well as Management that labour relations be structured and ordered and that decisions made by trade unions are binding upon their members. (See the *Ramolesane, SA Polymer* and *Ngcobo* matters referred to above.) I also accept that the representatives of the workers on more than one occasion suggested that the Respondent should engage in discussions with the trade union, NUMSA, but it is clear that these suggestions were made in the context of finding a resolution to end the strike and to secure the return of the workers to work. As I have said, the process of finding a solution for the dispute between the striking workers and NUMSA serves that particular purpose, but it does not necessarily serve the purpose of observing the *audi* rule when dismissal is contemplated. These are two different processes and I accept that they can run together, but then there must be evidence that during the discussions, etc, such an invitation was extended. The onus is on the employer to do so. As was said by Zondo AJA at p 510, par 37, "for the overwhelming majority of workers in this country their jobs is about all they and their families depend upon for a living. If you take away their jobs, you almost take away their whole being and you subject them, their families and, sometimes, their communities to famine and starvation … basic justice between employer and employee dictates that a decision with such implications for those affected by it should not and cannot be taken with the workers or their union or representatives concerned being afforded an opportunity to be heard in one way or another". It was certainly correct for the Respondent to negotiate an end to the strike with the union, but when dismissal is contemplated, I am of the view that in cases where division and animosity between

the union and its striking members are obvious, the primacy of the collective agreement should not stand in the way of also communicating with the strikers to ensure the observance of the *audi* rule. I do not see any reason why an invitation to striking members of that union under such circumstances would undermine the collective bargaining relationship. In my view item 6 (2) of Schedule 8 contemplates a normal and healthy relationship between the union and its members who are on strike. The provisions of item 6 (2) are only guidelines and I do not believe that where circumstances require more to ensure that fairness prevails, it would be unreasonable to expect of the employer to take such further steps as may be necessary to satisfy the requirements of procedural fairness.

There is no evidence that the NUMSA made any representations which were intended to defend the contemplated dismissal of the Applicants and it must have been abundantly clear to the Respondent that the Union did not support the actions of the strikers. There was a bitter rift between them and their union. Furthermore, when 29% of the workforce failed to adhere to the agreement concluded between the Respondent and NUMSA and by having regard to the history of the dispute, it must have been obvious that there was no *de facto* representative relationship between them and their union. In circumstances, I am of the view that where there are obvious reasons or no reasonable expectation for an employer to believe that an invitation to the trade union to make representations why its members should not be dismissed or why an ultimatum should not be issued would not have the effect of satisfying the *audi* rule, it is incumbent upon the employer to also extent such invitation to the workers or their representatives to make representations. The said item 6 (2) clearly requires notice to the union and therefore it would be correct for an employer to first contact the union, but I can see no reason why an employer cannot walk that extra mile to ensure that fairness prevails before dismissing his employees. It could only be one extra letter or notice to the strikers or their representatives, inviting them to make written representations by a given time why the strikers should not be dismissed for striking illegally or as, in this matter, for disobeying an agreement reached between the trade union and the employer. I accept that in some cases this would be impractical, but then the Respondent should be able to give reasons why it was impractical and why its failure should be condoned. That will certainly depend on the circumstances of each case.

The Respondent stated that it made several attempts to discuss the matter with the representatives of the shop stewards concerned and was prepared to speak to the committee selected by the workers on 20 January 2000 (which was disbanded the next day, 21 January 2000), but it was fruitless. I accept that, but having regard to the intention behind such attempts, it is clear that they were intended to resolve the dispute which formed the subject matter of the strike and to convince the strikers to return to work - not to invite them to defend their conduct and possible dismissal. Therefore these attempts in my view, do not take the Respondent's case any further.

In the circumstances I am of the view that the dismissal of the Applicants was procedurally unfair in that the Respondent failed to comply with the *audi* rule before dismissing them.

The Ultimatum-

The Applicants did not dispute knowledge of the ultimatum, but alleged that they did not receive it and that the exact terms thereof were not known. They also argued that the distribution of the ultimatum on 1 and 2 February 2000 did not allow sufficient time for the Applicants to consider its implications.

Item 6(2) of Schedule 8 to the LRA requires the employer to issue an ultimatum in clear and unambiguous terms and that it should state what is required of the employees and what sanction will be imposed if they do not comply. It must be communicated in a medium understood by the strikers. (See *Liberty Box & Bag Manufacturing Co (Pty) Ltd v PWAWU* (1990) 11 ILJ 427 (ARB). Item 6(2) (*supra*) also states that the employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it.

The Respondent did issue an ultimatum to all striking employees on 1 February 2000. The ultimatum was issued both in English and Xhosa. According to the evidence of Mr B K Smith it was issued to the local media, the Evening Post and Herald for insertion on 1 and 2 February 2000. On 1 February 2000 the issuing of the ultimatum was frontpage news in the Evening Post in an article headed "Thursday is the Deadline: VW: 'Come back or be fired'". It was also widely covered by all television and radio stations. Radio Algoa and Radio Xhosa read out the text of the ultimatum hourly on 1 and 2 February 2000. On the evening of 1 February 2000 the National leadership of NUMSA and COSATU and other political and community leaders held a meeting in the Babs Madlikana Hall where the seriousness of the ultimatum would be explained. The Respondent also engaged the services of a distribution company to drop 50 000 copies of the ultimatum in and around the Uitenhage area on 1 and 2 February 2000.

During cross-examination Mr Mzeku, who was the deputy chairperson of the Crisis Committee, stated that he and members of the Uitenhage Crisis Committee were unaware of the fact that any ultimatum had been issued. According to his evidence they only became aware of the ultimatum at about 15:00 on the 3 February 2000 when they were called by NUMSA and told that they had been dismissed. This evidence of Mr Mzeku cannot be truthful. The press statement by Mr Ndandani, the chairperson of the Committee, on 2 February 2000, contemplated that he was aware of the ultimatum when he said, "the committee was disappointed with the company's threat to dismiss workers who do not return to work tomorrow" and that if a compromise is being reached, only the morning shift would be affected and that production could be back to normal "tomorrow afternoon". On the morning of 3 February 2000 Mr Ndandani again addressed the workers and *inter alia* said the following:

"viva NUMSA, viva viva NUMSA viva! Comrade chair! I do not understand you. Management must understand that we will say viva even with that ultimatum of theirs".

Mr Geswindt who attended the meeting, was clearly also in possession of the ultimatum – he was holding it up to the workers. Furthermore, a number of workers reported for duty at 06:00 on the morning of 3 February 2000. They certainly must have known about the ultimatum.

I do not deem it necessary to deal with this issue any further because I am convinced by the overwhelming probabilities that the striking workers and their representatives, which include the members of the Crisis Committee, were not only aware of the existence of the ultimatum to return to work, but also its essential terms. Even if I accept that the distribution of the ultimatum by the distribution Company was only completed by the end of 2 February 2000 and that it did not reach each and every home, the evidence shows that the text of the ultimatum was widely published in the Press and over Radio on 1 and 2 February 2000, and I have no doubt in my mind that their representatives were fully aware of it since 1 February 2000. That in my view was sufficient time to reflect on their position. I must say that in my view they deliberately ignored the ultimatum because they were adamant not to return to work until such time as the 13 suspended shop stewards have been reinstated unconditionally. In the circumstances, I do not believe that the challenge to the insufficiency of the ultimatum holds water.

Alleged Inconsistency -

It was alleged that the Respondent acted inconsistently and reference was made to the cases of Messrs Gaika, Nzakayi and Sakuta and Ms Mlwana. It was alleged that they were dismissed, but thereafter reinstated without any disciplinary processes being followed.

Mr Kasika responded to this by saying that Mr Gaika was granted compassionate leave and therefore had a legitimate reason for not reporting on 3 February 2000. Consequently he remained in the

employ of the Respondent. Mr Sakuta was, together with Mr Kasika, in Germany at the time. Ms Mlwana was apparently on maternity leave. When Mr Kasika was cross-examined about Mr Nzakayi, he indicated that he did not know anything about him and requested more information to enable him to investigate the matter. No further information was forthcoming. In the circumstances there is, in my view, not sufficient evidence before me to conclude that the Respondent acted inconsistently.

Relief -

The next question to consider is what relief, if any, should be granted to the Applicants. The Applicants asked for retrospective reinstatement.

Section 193 (1) of the LRA provides that where it is found that a dismissal is unfair a court or an arbitrator may order reinstatement or re-employment from a date not earlier than the date of dismissal, or order the employer to pay compensation subject to the provisions of section 194. And, section 193 (2) states that a court or an 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.

I have found that the dismissal of the Applicants was only procedurally unfair, but in my view section 193 does not contemplate that I may not order reinstatement or re-employment where the dismissal is only procedurally unfair. In my view I have a discretion to order reinstatement or re-employment retrospectively or not, or even from a date in the future, or order compensation only.

There is no convincing evidence before me that a continued employment relationship would be intolerable or that it would not be reasonably practicable for the Respondent to reinstate or re-employ the Applicants. I have been informed that the contracts of the replacement labour that the Respondent engaged provide that reinstatement of the Applicants would be a valid reason for termination of such contracts. I am also of the view that the long period (almost one year) which has lapsed since the dismissal of the Applicants, *per se,* would not be a basis to deny them reinstatement. It is not the Respondent's case that the Applicants were responsible for the delay.

Our courts have not hesitated to grant reinstatement where it was found that the employer had either failed to issue an ultimatum or issued an ultimatum which was not reasonable. As was said by Zondo AJA in *Modise (supra)*, at p 530, par 100, compliance with the *audi* rule is of far greater significance than the issuing of an ultimatum. In the circumstances I believe that reinstatement would not be inappropriate.

Looking at the circumstances of this matter, I am of the view that the Applicants should not be awarded any compensation. I say this because the Applicants' conduct was to say the least, a deliberate and flagrant disregard of all relevant statutory provisions. They ignored the provisions of sections 64 and 65 of the LRA and they were in breach of a Court Order of July 1999 prohibiting any industrial action to remedy the dispute about the shop stewards. Their actions threatened the jobs of thousands of others in the area, it jeopardised the A4 Golf Export Order and it caused the Respondent Company to lose millions of rands. It also had an impact on our economy as a whole – so much so, that the National

Leadership of COSATU, NUMSA and other political leaders had come to appeal to them to return to work. It was apparently also raised in Parliament. The Applicants must know: The fact that I have decided to grant them relief, does not mean that I condone their conduct. Had it not been for the fact that the Respondent, in my view, had failed to comply with the *audi* rule before dismissing them, I would have confirmed their dismissal.

I must say that I also believe that it would be unfair towards the Respondent to order it to pay compensation to the Applicants to the tune of almost one year's wages which will run into millions, because the illegal action of the Applicants already cost the Respondent millions and furthermore, because up and until the ***Modise*** judgement (***supra***), which was delivered on 15 March 2000 (about one month after the dismissal of the Applicants) the law on this issue was, as is clear for the judgement, always controversial. Even on 15 March 2000 there was still division in the ranks of the Labour Appeal Court on the question of whether illegal strikers should be afforded a "hearing" or whether the mere issuing of an ultimatum would relieve the employer of such obligation.

I accept that the Employer may need time to comply with my order. In view of this and for the reasons stated above, I have decided to reinstate the Applicants with effect from 5 February 2001 and that my order will have no retrospective effect.

The Applicants -

Mr Surju, on behalf of the Applicants, delivered a list containing the names of the Applicants in these proceedings, but at the commencement of the proceedings the Respondent's Counsel indicated that the Respondent had a difficulty with the list of Applicants. He, however, anticipated that an agreed list would be handed to me.

On 1 August 2000 the Respondent's Counsel delivered a list of Applicants marked Exhibit "YY", setting out various categories of Applicants. According to this list, and confirmed by the evidence of Mr B K Smith, some of the Applicants mentioned in the list have never been dismissed, some are unidentifiable and others were dismissed on other occasions and for other reasons. Some of the Applicants also withdrew as Applicants in these proceedings. There were also duplications.

Mr Surju then submitted a further list which was also not an agreed list. The Respondent updated Exhibit "YY" and indicated that the Respondent accepts that those whose names appear in the main schedule of Exhibit "YY" are the names of those who were dismissed in consequence of the events canvassed in these proceedings. In his Supplementary Heads of Argument, Mr Surju suggested that the categorisation should now somehow be ignored or changed. This will have the effect that more people will benefit from my award, even though it is not common cause that they were dismissed in consequence of the events canvassed in these proceedings.

Unless it is common cause, it was for the Applicants to prove that they were dismissed in consequence of the events canvassed in these proceedings. My understanding at all times was, that there was no dispute about the categorisation and it is now to late to simply add names to the list of people who will benefit from my award by requesting me to ignore the categorisation, unless it is by agreement. In the circumstances, only those Applicants whose names appear in the main schedule of the updated Exhibit "YY" will benefit from my award.

If my interpretation of the updated Exhibit "YY" is not correct, the parties may approach me in terms of section 144 of the LRA for an appropriate order.

AWARD

For the above reasons my award is as follows:

1. The dismissal of the Applicants whose names appear in the main schedule of the updated version of Exhibit "YY" was substantively fair, but procedurally unfair.

2. The Applicants contemplated in paragraph 1 above are reinstated in the Respondent's employ on the same terms and conditions which governed their employment relationship prior to their dismissal with effect from 5 February 2001.

3. The reinstatement order in Paragraph 2 will have no retrospective effect.

4. The Applicants must report for duty on 5 February 2001, unless otherwise agreed upon between them or their representative and the Respondent.

5. There will be no order as to costs.

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FLOORS BRAND
CCMA: COMMISSIONER

CCMA Commissioner: **Floors Brand**
Sector: **Motor Manufacture**