IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA 29/99

In the matter between

MODISE AND OTHERS **Appellants**

and

STEVE'S SPAR BLACKHEATH **Respondent**

JUDGEMENT

ZONDO AJP

Introduction

[1] This is an appeal against a determination made by the industrial court in terms of sec 46(9) of the now repealed Labour Relations Act, 1956 (Act No 28 of 1956) (**"the old Act"**) in a dispute between the appellants and the respondent. The dispute was whether or not the respondent had committed an unfair labour practice in dismissing the appellants. The appellants had contended that the respondent had committed an unfair labour practice in dismissing them whereas the respondent contended that it was entitled and justified in dismissing the appellants and it had not committed any unfair labour practice. The determination of the industrial court was that the respondent had not committed an unfair labour practice and the appellants' claim was dismissed. No order as to costs was made. It is against this determination that the appellants appeal. Before considering the appeal, I propose setting out those facts of the matter which appear to me to be

relevant in the light of the issues in the appeal.

The facts

[2] The appellants were in the employ of the respondent. The respondent had other employees in addition to the appellants. On the 9th November 1994 the majority of the respondent's employees embarked upon a strike. That strike continued until the 18th November 1994 when the respondent issued the strikers with letters of dismissal. The letters of dismissal purported to effect the dismissal from the previous day, namely, the 17th November 1994.

[3] Although it appears from the record that it was in dispute whether the appellants had taken part in the strike, during argument it was clarified that the appellants were not denying that during the strike they were part of the group of workers who were on strike. The appellants' point was that they were not willing participants in the strike. The strike had been organised by the South African Commercial, Catering and Allied Workers Union (**"SACCAWU"**) of which some of the respondent's employees were members. The appellants' case is that they were not members of that union. The respondent maintains that they were.

[4] There is also a dispute between the appellants and the respondent on what the demand was which was sought to be enforced through the strike. The respondent contends that the demand was that it and other Spar stores in the region in which the respondent operated should bargain regionally with SACCAWU. In argument it was contended on the appellants' behalf that the demand was that the respondent and the other Spar stores in the region should agree to form a regional bargaining forum in which collective

bargaining would take place regionally.

[5] Following upon dicta by Goldstone J in **Barlows Manufacturing Company Ltd v Metal and Allied Workers Union & Others 1990 (2) SA 315 (W) at 322H-I** and by Golden JA in **SA Commercial, Catering and Allied Workers Union & Others v Transkei Sun International Ltd t/a Wild Coast Sun Hotel, Casino & Country Club (1993) 14 ILJ 867 (TKA)** at **874F-I,** the respondent contended that, in so far as the demand was that it and the other Spar stores should bargain regionally with SACCAWU, that was a demand which was impossible to achieve because there was no regional bargaining structure in which regional bargaining could take place. On behalf of the appellants it was conceded that, if the demand was found to be the one contended for by the respondent, then such demand was incapable of achievement. For purposes of this judgement I will assume, without deciding, that the demand was the one contended for by the respondent. I will also assume, without deciding, that the dicta of Goldstone J and GoldenJA referred to above under the old Act that a demand which is incapable of achievement would render a strike illegal are correct.

[6] The respondent and other Spar stores had either refused or failed to comply with SACCAWU's demand. Indeed, attempts by SACCAWU both before and after the referral of the dispute to conciliation to have meetings with the Spar Stores concerned had failed. SACCAWU had then applied for the establishment of a conciliation board in terms of sec 35 of the old Act. The statutory period of 30 days required in terms of sec 35 had lapsed without the dispute being resolved. SACCAWU had then conducted a ballot in terms of the old Act to determine whether the required size of its members participating in the ballot supported the calling of a strike. Such ballot was

required to be conducted secretly in terms of sec 8 read with sec 65 of the old Act. Those participating in the ballot had to be members in good standing of SACCAWU.

[7] According to the respondent the strikers engaged in unacceptable conduct of various kinds during the strike with the result that on the 15th November 1994 it sought an urgent interim interdict from the Witwatersrand Local Division of the then Supreme Court. A rule nisi with an interim interdict was granted by that Court on an urgent basis. The interim order interdicted the strikers from, inter alia, continuing with the strike pending the return day on the basis that the strike was illegal. The urgent application had proceeded without opposition. The record does not reveal any evidence that the rule was subsequently confirmed.

[8] It does not appear that the service of the Court order took the form of each striker being personally handed the order. As a result the evidence did not reveal that definitely each one of the strikers became aware of the contents of the court order. On the 16th November the respondent issued an ultimatum for the strikers to return to work or face dismissal. Initially, the deadline for the strikers to return to work was 10h00. There is a conflict between the version of the appellants and that of the respondent on whether the ultimatum was subsequently extended. The respondent says it extended the ultimatum to the end of the day on the 16th and told the strikers that they had to resume work the following morning failing which they would be dismissed. The appellants denied that there was such an extension of the ultimatum.

[9] The appellants' version is that they were dismissed on the 16th after the ultimatum had expired without them returning to work. The respondent says it issued letters of dismissal only on the 18th November. The letters said that the strikers were dismissed with effect from the 17th November 1994. The respondent said the dismissal followed the strikers' failure to heed the ultimatum. It is common cause that the strikers did not report for duty on the 17th November. It is also common cause that, unlike on the other days of the strike, namely from the 9th upto the 16th November when the strikers were outside the respondent's premises, from the 17th November onwards they were not outside the respondent's premises. They were simply nowhere to be seen.

The Parties' Argument

[10] The Appellants submitted that the court a quo erred in finding that they were willing participants in the strike. They submitted further that, in any event, even if they were willing participants in the strike, that strike was a legal strike and therefore their dismissal for participating in it was unfair. As to the second argument, if the appellants sought to rely on the contention that the strike was legal the onus was on them to prove that the strike was legal. However, they failed dismally to show that the ballot that was conducted was regular in terms of the Act. They could not show that it was secret. They could not show that those who voted in the ballot were eligible to vote nor could they show that those who voted were only those who were eligible to vote. For the reason that the ballot was not conducted in accordance with the old Act, the strike was, definitely, illegal in terms of the old Act. It may also have been illegal for the reason that the demand which it sought to enforce was incapable of achievement.

[11] In argument before us Counsel for the respondent sought to draw a distinction between a dismissal for striking and a dismissal for a failure to comply with an ultimatum. It appears that he did this in the belief that, if the workers were dismissed for failing to comply with the ultimatum, that would enable the respondent to escape such obligation to observe the *audi alteram partem* rule (**"the audi rule"**) as it might have had. I think the distinction is an artificial one on the facts of this case. The strikers were on strike. The respondent did not approve of their strike and wanted to bring it to an end. If the strikers stopped striking and returned to work, they could not have been dismissed. If they continued with the strike, they would be dismissed. In any event a reading of the respondent's heads of argument reveals an acceptance that the dismissal was for participation in an illegal strike. It seems that the attempt to draw the distinction referred to above was an after thought.

[12] One of the grounds on which the appellants contended that their dismissal constituted an unfair labour practice is that the respondent did not observe the *audi* rule before it could dismiss them. They contended that they were entitled to be heard before they could be dismissed because the decision to dismiss them was one which adversely affected their rights and source of livelihood. In response to this argument, Mr Jammy, who appeared for the respondent both in this Court and in the Court a *quo*, submitted that there was no obligation on the part of the respondent to observe the *audi* rule. In any event, submitted Mr Jammy, should it be found that there was such an obligation on the respondent, such obligation had been discharged because, after the respondent had issued the ultimatum, there was an opportunity for the appellants to have come forward and said why they should not have been

dismissed and as they had failed to make use of that opportunity they could not complain. Mr Jammy submitted further that our law has never imposed such an obligation.

[13] During argument I asked Mr Jammy what the basis was for his submission that in this case the respondent was not obliged to comply with the *audi* rule, if one were to assume that there was an obligation such as is referred to above in our law. Mr Jammy responded by saying that the basis for his submission was the same as the basis which the Appellate Division, as the Supreme Court of Appeal then was called, decided to reject the *audi* argument in **National Union of Metal Workers of SA v Vetsak Co- Operative Ltd & others (1996) 17 ILJ 455 (A)**. The relevant passage is at 468E-G. I will return to this later in this judgement.

[14] On behalf of the appellants it was submitted that the appellants' case was not that, in order to comply with the *audi* rule, the respondent had to adhere to any particular form of compliance with the rule. Their argument was simply that in one form or another the respondent should have complied with the rule. It was submitted that compliance with the *audi* rule would take such form as would be dictated by the practicalities and exigencies of the situation at the time. I deem it necessary, in considering this point, to review our case law to see what the attitude of our courts has been towards the application and observance of the *audi* rule in cases of dismissals of strikers. However, before I can do so, I propose to make a few general observations on the *audi* rule and the advent in our law of the concept of the justiciable unfair labour practice.

GENERAL OBSERVATIONS ON THE *AUDI* RULE

[15] The *audi* rule is part of the rules of natural justice which are deeply entrenched in our law. In essence the *audi* rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect such party's rights or interests or property. Historically, the *audi* rule is part of our administrative law and, as a general rule, has no application to private contracts. (see **Embling v The Head Master, St Andrews College (Grahamstown) & Another** (1991) 12 ILJ 277 (E)**; Damsell v Southern Life Association Ltd** (1992) 13 ILJ 848 (C) at 859 E-H**; Sibanyoni & Others v University of Fort-Hare** 1985 (1) SA 19 (CK)**; Mkhize v Rector, University of Zululand & Another** 1986 (1)SA 901 (D) at 904 F). (In passing I mention that the correctness of the conclusion in the last two decisions that the *audi* rule did not apply is, to say the very least, open to serious doubt because universities are public institutions which are funded, at least partly, with public funds and are governed by statute). However, there is one exception to the general rule that the *audi* rule does not apply to private contacts. That is where a private contract contains a provision which either expressly or by necessary implication incorporates the right to be heard. (see **Lace V Diack & others** (1992) 13 ILJ 860 (W)**; Lamprecht & Another v Mc Nellie** 1994 (3) SA 665 (A) at 668B -J; **Moyo & Others v Administrator of the Transvaal & Another** (1988) 9 ILJ 372 (W) at 384E-J)**.**

The advent of the justiciable unfair labour practice

[16] About 20 years or so ago the concept of a justiciable unfair labour practice was introduced into that branch of our law which has come to be known as labour law. Had it not been for the introduction of a justiciable unfair labour practice in our law, the acknowledgement made above that, as a general rule,

the *audi* rule has no application in private contracts would have marked the end of the enquiry on the *audi* argument in this matter. The introduction of the justiciable unfair labour practice in our law brought about a significant change in the law of employment in the private sector. Whereas under the common law an employer had a right virtually to hire and fire as he pleased, a serious inroad was made into that right under the unfair labour practice dispensation. Whereas under the common law an employer could fire for a bad reason or for no reason at all provided the dismissal was on notice, under the unfair labour practice dispensation, he became obliged not to dismiss even on notice - unless he could prove the existence of a good reason to dismiss. Whereas at common law an employer did not have to hear the employee's side of the story before he could dismiss him, under the unfair labour practice dispensation the employer became obliged to hear the employee's side before he could dismiss him. There must be few concepts, if there are any, in the history of our law which have brought about such fundamental change in our law as the introduction of a justiciable unfair labour practice has done in our employment and labour law. In due course this concept was to ensure that our employment law would undergo so fundamental a change that it will never be the same again. Fortunately, the change was for the better.

[17] Over the past two decades or so since the establishment of the industrial court and, later, of the old Labour Appeal Court, the application of the *audi* rule in the sphere of private contracts of employment in our law has been fully and irrevocably entrenched. Accordingly it can now be said with a sufficient degree of certainty that the *audi* rule applies to contracts of employment in South Africa which are subject to the Labour Relations Act

even if such contracts do not contain a provision which, either expressly or by necessary implication, incorporates such rule. It is against this background that I propose to consider our case law over the past two decades or so.

[18] Is there an obligation in our law on an employer to observe the *audi* rule before it can dismiss strikers?

In considering our case law the inquiry is whether or not in our law there is an obligation on an employer to observe the *audi* rule when contemplating the dismissal of strikers. This question needs to be considered because Counsel for the respondent submitted that in our law there has never been an obligation on an employer, who is faced with a strike, to observe the *audi rule* before it can dismiss strikers. In this regard I must mention that he did not make any distinction between legal and illegal strikers nor did he make one between strikers in the private sector and strikers in the public service. Not that I think he should have for I do not think that such a distinction would have any basis in law.

[19] For the reasons that follow I am unable to uphold the submission that in our law there has never been an obligation on an employer, who is faced with a strike, to observe the *audi* rule before it can dismiss strikers. When the audi rule was introduced, into our employment law in the private sector through the justiciable unfair labour practice the *audi* rule applied to all dismissals, irrespective of the reason for dismissal. It applied to dismissals for misconduct which at that stage in the development of our law encompassed both strikes which complied with statutory procedures [section 65 of the Labour Relations Act, 1956 (**"the old Act"**)] and those which did not comply

with such procedures, to retrenchments - hence the duty to consult- and to dismissals for incapacity.

[20] In our law there has always been exceptions to the general rule requiring the observance of the *audi* rule in the sphere of administrative law. When the *audi* rule was introduced into the sphere of private contracts of employment in our law, there is no reason to suggest that it came without the same exceptions that we know it to have in our administrative law. By this I do not necessarily mean that the audi rule was introduced into our employment law in the private sector via our administrative law. A reading of the first cases of the industrial court reveals that the industrial court derived the *audi* rule from the good practices which some employers had already implemented, from some English cases and from the ILO Convention on Termination of Employment No 158 of 1982. The advent of the justiciable unfair labour practice did not introduce the *audi* rule in the law of employment in the public sector. The *audi* rule has always been applicable in certain circumstances where a public functionary contemplates taking a decision that could prejudicially affect the rights or interests or property of an individual. In my view the dismissal of public servants for striking would, generally speaking, have fallen within the sphere of application of the *audi* rule in the administrative law context. Obviously, even in the public sector there would have been exceptions where the employer could not have been said to be obliged to observe the *audi* rule.

[21] Furthermore, the submission by the respondent's Counsel runs contrary to a number of cases which can be found within the breath and length of our law over the past twenty years or so where dismissals of strikers, both in the

private sector and public sector, were found to be unfair (in the private sector) or unlawful (in the public service) on the basis that, although the employers in those cases had been obliged to observe the *audi* rule before they could dismiss their striking employees, they had failed to do so. (See **Chemical Workers Industrial Union and Others v Electric Lamp Manufacturing of SA (PTY) Ltd (1989) 10 ILJ 347 (IC) at 351H-352C**; **BAWU & Others v Palm Beach Hotel (1988) 9 ILJ1016(IC) at 1024D-E**; **BAWU & Others v Edward Hotel (1989) 10 ILJ 357 (IC) at 374B-E**; **Shezi & Others v Republican Press (1989) 10 ILJ 486 (IC)** at 488G-J; **Black Electrical and Electronic Workers Union & Others v M D Electrical (1990) 11 ILJ 87 (IC)** at 95 H-96A; **Lebona & Others v Trevenna (1990) 11 ILJ 98 (IC)** at 104F-G; **Mathews & Others v Namibia Sugar Packers (1993) 14 ILJ 1514 (IC) at 1527B-J**; **NUMSA & Others v Lasher Tools (Pty) Ltd (1994) 15 ILJ 169 (IC)** at 180A-D and 182C-D; **Food and Allied Workers Union & others v Mnandi Meat Products & Wholesalers (1995) 16 ILJ 151 (IC) at 161E-G; Mayekiso v Minister of Health and Welfare & Others(1988) 9 ILJ 227 (W) at 230E-H; Mokoena & Others v Administrator of the Transvaal (1988) 9 ILJ 398 (W) at 404A-G; Mokoponele en andere v Administrateur, Oranje- Vrystaat en Andere 1989 (1) SA 434 (O)at 440D-442I; Zenzile & others v Administrator of the Transvaal & Others (1989)10 ILJ 34 (w) at 38I-41A; Administrator, Transvaal & Others v Zenzile & Others 1991 (1) SA 21(A); (1991) 12 ILJ 259 (A)at 265H-270B; Nkomo & Others v Administrator, Natal & Others (1991) 12 ILJ 521 (N) at 526F-528A; Zondi & Others v Administrator, Natal & Others (1991) 12 ILJ 497 (A) at 505B-D.**) [A reading of some of the cases emanating from the private sector reveals that in some of them the employers had attempted to observe the *audi* rule and in others the employers had made no attempt whatsoever to observe the *audi* rule. In others the employers had internal disciplinary procedures

on which the industrial court based its finding but in others, the industrial court's finding was based simply on its unfair labour practice jurisdiction.]

[22] Some of the cases I have included above are stay-away cases whereas others are normal strike cases. I have included stay-away cases because the difference between a normal strike and a stay-away is technical. If one accepts that generally speaking a strike is a collective refusal to work by workers for the purpose of compelling compliance with their demands, a stay-away would probably fit into that loose definition. I cannot see why it can be said that a worker who participates in a stay-away is entitled to the benefit of a hearing before he can be dismissed but one who participates in a normal strike is not entitled to a hearing before he can be dismissed. Such an approach would encourage stay-aways more than normal strikes. Under the old Act stay-aways in the form of strikes for political reasons were absolutely prohibited whereas normal strikes were only prohibited in certain circumstances.

[23] In addition to the above cases reference can also be made to Black and **Allied Workers' Union & Others v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14 ILJ 963 (LAC).** At 971 E, the old Labour Appeal Court held, albeit obiter, that the argument that an employer had an obligation to afford strikers a hearing before it could dismiss them had merit. However, the Court, per PC Combrinck J (sitting with assessors), stated that the *audi* rule would only apply to the dismissal of illegal strikers and not to that of legal strikers because the former would be committing misconduct by going on an illegal strike whereas the latter would not be committing any misconduct by going on a legal strike but would be doing what is permissible in our law. I have difficulty with this because it seems to suggest that those who obey the

law are denied the benefit of the *audi* rule and those who do not obey the law are entitled to the benefit of the *audi* rule. There may be a temptation to say: If the strike is a legal or protected one, what is the need for the audi in such a case? The answer to this is that there are situations where, arguably, an employer may be entitled to dismiss legal strikers e.g. where the legal strike has taken too long a time may come when the employer may be entitled to dismiss the legal strikers. I can see no reason why in those circumstances the legal strikers can be said to have no right to state their case before they can be dismissed. Already sec 67(5) of the new Act contemplates that legal strikers may be dismissed where the reason for their dismissal is based on the employer's operational requirements. In such a case it seems clear that under the new Act the employer would be obliged to comply with the consultation requirement of sec 189 of the new Act which is a form of the observance of the *audi* rule. I can see no reason why an employer would be obliged to observe the *audi* rule in the form of consultation if the reason for the dismissal of legal strikers is based on the operational requirements of the employer but would not be obliged to observe the *audi* rule in whatever form if the reason for dismissal is based on the notion that the strike, being illegal, constitutes misconduct.

[24] Mr Jammy's submission also runs contrary to the views expressed by certain eminent academic writers and labour law practitioners, namely, Edwin Cameron [now Mr Justice Cameron], Prof Martin Brassey, Prof Halton Cheadle, and Rycroft and Jordaan.

[25] In 1990 Prof Martin Brassey wrote an article titled : **"The Dismissal of strikers"** which appeared in (1990) 11 ILJ 213-240. At 225-226 Brassey wrote

that individual hearings before strikers could be dismissed would be impractical and senseless but emphasised that **"a hearing should nonetheless be given to the collective bargaining representative of the strikers and to those who bona fide believe that, as a result of whatever reason, their absence was justifiable." With this I agree. (See also Martin Brassey's arbitration award in Man Truck & Bus SA (Pty) Ltd v United African Motor and Allied Workers Union (1991) 12 ILJ 181 (Arb) at 192F-H** where Martin Brassey, sitting as an arbitrator in a dispute of the dismissal of strikers, accepted that an employer must give strikers a collective hearing in the sense that their case must be put for them by their representatives.)

[26] In Current Labour Law, 1997, at 38 Cheadle expressed his views on whether strikers are entitled to be heard before they can be dismissed in the following terms :- **"A good case can be made out that an employer should give employees or their trade union an opportunity to address the employer on sanction before dismissal. This can be effected by giving the trade union an opportunity to make representations on sanction or including in the ultimatum itself an invitation to employees to make such representations. This should be supplemented by an invitation to individual employees to approach the employer after dismissal if the reason for not working is not participation in the strike. This does not impose too heavy a burden on the employer - it is common labour relations practice and it goes a long way to ensure that the employees are fairly treated. There is also the argument that the Code of Good Conduct : Dismissal imposes a more stringent requirement than the general application of the rule developed by the courts under the old LRA. It is only in 'exceptional circumstances' that the employer may dispense with pre-dismissal procedures (para 4(4) of Schedule 8). Accordingly, the employer may have to go further than was expected of**

it under the old LRA."

[27] As long ago as 1986 Edwin Cameron wrote an article entitled: **"The Right to a Hearing before Dismissal - Problems and Puzzles."** It appeared in two parts in (1986) 7ILJ 183-217 and (1988) 9 ILJ 147-186. A reading of that article reveals that Cameron acknowledged that as a general rule or requirement a worker is entitled to an opportunity to be heard before he can be dismissed. Thus Cameron says at the top of p165: **"The starting point is that every employee faced with a dismissal is entitled to a hearing..."** Cameron then acknowledges that there are exceptions to this general rule. He gives these as the so-called crisis zone situations, a waiver or quasi waiver situation and situations where, although the denial of procedural justice is not condoned, the employee is nevertheless not granted any relief by reason of the employer's failure to ensure procedural fairness (see pp 173-178 in the second part of the article). Cameron rejects the attempts evident in some cases to create further exceptions to the requirement for a pre-dismissal hearing by stating that an employer is exempted from giving a pre-dismissal hearing where there are many workers involved or where the workers act collectively (see bottom of page 176 upto the top of p177 of the second part of his article.) He rejects also the notion that no hearing is required in mass dismissals. (See p.170 of the second part of his article.) It seems to me that, upon a proper analysis of Cameron's article, his view is that the situations where an employer would be exempted from complying with the general rule or requirement for a pre-dismissal hearing are the three exceptions to the audi rule that I have referred to above which Cameron acknowledges in his article as the true exceptions. Subject to what I say elsewhere in this judgement about a waiver and the article in general, I have no quarrel with Cameron's views in this regard.

[28] In their book: A Guide to South Labour Law: 2nd edition, Rycroft and Jordan say at 207 **" while circumstances might warrant an attenuated hearing, the right to a hearing is so fundamentally important in the context of industrial relations that only exceptional circumstances such as those referred to by Cameron will warrant dismissal without a hearing of any kind."** At 225 the learned authors say that, where a strike is not **"legitimate"**, this may provide the employer with a **"substantively fair reason for terminating the employment relationship for good.**" Then they continue and say: **"Before it can do so, however, two requirements have to be met: the employer has to give the employees an opportunity to address it either through their union ... or through an elected committee so that they could debate their decision to strike', and, secondly it is required to issue an ultimatum in order to give the employees sufficient time to consider the matter and return to work**."

[29] In their book: The South African Law of Unfair Dismissal, 1994, 2nd ed, Le Roux and Van Niekerk discuss the dismissal of strikers from 293-316. There they do not deal with the issue of a hearing in the context of a dismissal of strikers. However, at 152-183 the learned authors deal with procedural fairness of dismissals. They acknowledge the existence of the general requirement for a fair hearing before an employee can be dismissed. Then at 174-176 they deal with exceptions to the *audi* rule. It is significant that they do not anywhere suggest that the dismissal of strikers is one of the exceptions where an employer does not have an obligation to have a hearing. On the contrary at 183 they make the point that the normal rules regarding procedural fairness **"will, in all probability, apply to discipline for group misconduct"**. Participation in an illegal or unprotected strike is, obviously, group or collective misconduct.

[30] Article 7 of ILO Convention on Termination of Employment No 158 of 1982 provides as follows:.

"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity."

It is clear from the provisions of article 7 that international standards are such that the only basis on which an employer can escape the obligation to give a hearing where the reason for dismissal is based on the employee's conduct, or performance is if he cannot reasonably be expected to give such a hearing in a particular case. There is no provision for another exception in the form of a dismissal for participation in a strike.

[31] In his book: Labour and Employment Law Wallis SC deals with the right to a hearing prior to dismissal in par 36. There the learned author affirms that it is sensible and equitable that an employer affords an employee a hearing before it can dismiss him. Although Wallis does not specifically discuss a hearing for strikers, also he does not say that the right to a hearing he refers to does not apply to a dismissal for participation in a strike.

[32] What is the basis for requiring an employer to observe the *audi* rule if he contemplates the dismissal of his striking employees? The basis on which it was found in the cases of Mayekiso (supra) and Mokoena (supra) by Goldstone J that the employers in those cases were obliged to observe the *audi* rule before they could dismiss was that the workers were members of a compulsory pension fund

the benefits of which they would lose if they were dismissed. Goldstone J's reasoning was followed by **Coetzee J in Zenzile & Others v Administrator**

of the Transvaal & Others (1989) 10 ILJ 34(W). In the Zenzile appeal (1991 (1) SA 21 (A) ; (1991) 12 ILJ 259 (A)) the Appellate Division found it unnecessary to rely on the strikers' membership of a pension scheme in order for it to decide whether the employer had been obliged to give the strikers a hearing before it could dismiss them. The Appellate Division said once the dismissal was for misconduct, there was such an obligation. It needs to be pointed out that the Appellate Division did acknowledge that there could be cases where the employees' membership of a pension scheme could possibly be relied upon. In fact in Zondi's case (supra) the Appellate Division did approve Goldstone J's reliance on membership of a pension scheme as given in Mokoena and Mayekiso as a basis for the application of the *audi* rule in those cases. (See Zondi's case (1991) 14 ILJ 497 (A) at 503D.)

[33] In the light of the rationale for the finding of the Appellate Division in Zenzile, I am of the view that, where the dismissal is for misconduct, as would be the case where the employer's reason for dismissal is that employees have participated in or are continuing with, an illegal strike, an employer is obliged to observe the *audi* rule before it can dismiss strikers. However, I do not think that, where the basis for the decision to dismiss is not misconduct, there would be no such obligation. On the contrary, I think that there still would be such an obligation. In regard to public service, this view would be supported by cases such as **Administrator, Natal & Another v Sibiya & Another 1992 (4) SA 532 (A) and; Minister of Water Affairs v Mangena & others (1993)14 ILJ 1205 (A)**

[34] At 538E-I in Sibiya Hoexter JA had the following to say about when a decision can be said to attract the *audi* rule:

"The rule does not require that the decision of the public body should, when viewed from the angle of the law of contract, involve actual legal infraction of the individual's existing rights. It requires simply that the decision should adversely affect such a right. No more has to be demonstrated than that an existing right is, as a matter of fact, impaired or injuriously influenced. Here the contract of service created reciprocal personal rights of the respective parties. Of immediate significance for the respondents was their right to receive regular remuneration in exchange for their services. The existence of that right was linked to and depended upon the duration of the contract. The appellants' right under the contract to give notice terminating it cannot alter the fact that the decision to give notice palpably and prejudicially affected the existing rights of the respondents. In approaching the Court below, the respondents in no way challenged the appellants' contractual right to give them notice. They did no more than to assert their claim to be treated in a procedurally fair manner before the appellants exercised such right."

Hoexter continued at 538J-539B and said:

"The classic formulation of the *audi* rule encompasses not only 'existing rights' but also "the property' of an individual when it is prejudicially affected by the decision of a public official. The word 'property' would ordinarily tend to connote something which is the subject of ownership. In my view, however, the concept of 'property' to which the *audi* rule relates is wide enough to comprehend economic loss consequent upon the dismissal of a public sector employee. To workers in the position of the respondents (and more particularly the first respondent, an elderly individual with eight dependants) the immediate financial consequences of dismissal are

likely to be very distressing."

[35] Although all the above remarks by Hoexter JA as to when the *audi* rule applies were made in relation to the dismissal of employees in the public sector where their employer would be exercising public power when dismissing them, in my judgement they apply equally to the dismissal of employees in the private sector whose employment was governed by the Labour Relations Act, 1956 after the introduction of the justiciable unfair labour practice in our law. I say this because it was when the industrial court sought to give content to the unfair labour practice provisions of the old Act that it decided to introduce the requirement of a hearing before dismissal into our employment law applicable to the private sector.

[36] In the light of all of the above it, therefore, seems to me that it can be said with a sufficient degree of certainty that, in the context of dismissal, an employer is obliged to observe the *audi* rule where his decision may adversely affect an employee's rights. In this regard, it is sufficient, it seems to me, if, as Hoexter JA said in Sibiya's case, an existing right is, as a matter of fact, impaired or injuriously influenced. It can also now be accepted that in our law an employer's decision to dismiss an employee is a decision of that kind in that it adversely affects an employee's right to regular remuneration in exchange for his services. An employer's decision to dismiss is a decision that causes the kind of economic loss to the employee that attracts the application of the *audi* rule.

[37] For the overwhelming majority of workers in this country their job is about all they and their families depend upon for a living. If you take away their

job, you almost take away their whole being and you subject them, their families and, sometimes, their communities to famine and starvation. The latter point is easily demonstrated in dismissals of large numbers of workers in the mines. In my judgement basic justice between employer and employee dictates that a decision with such implications for those affected by it and their families should not and cannot be taken without the worker(s)or their union or representatives concerned being afforded an opportunity to be heard in one way or another .

[38] I think it is necessary at this stage of this judgement that I make one thing crystal clear. That is that, when I say, as I have done above, that there is a general rule or requirement that, when an employer contemplates the dismissal of his striking employees, he should observe the audi rule or he should give them an opportunity to state their case, I am not referring to any special obligation on the part of the employer or to any special right which attaches to strikers by virtue of their being strikers per se. What I am referring to is the basic general rule which everyone accepts exists in labour law which says that an employer is obliged to give an employee a hearing or an opportunity to state his case before he can dismiss him.

[39] The above general rule is my point of departure. I then reason that a striker is an employee and, therefore, he, too, is entitled to a hearing before he can be dismissed. I take the view that, when an employee goes on strike, he does not lose the basic right to a hearing which he otherwise has. Indeed, if going on strike made him lose such a right, then the law would be treating him worse than it does, an employee who has stolen from his employer because such an employee would still be entitled to a hearing before he can be

dismissed. If that is how our law treated an employee who may well be seeking to participate in the process of collective bargaining - for a strike is an integral part of the collective bargaining process- which our law seeks to promote, then, in my judgement, that would make neither logic nor sense. Fortunately I think on this point our law

demonstrates more logic and sense than that .

[40] As could be expected, it was not in all the strike dismissal cases over the past 20 years or so that the courts were prepared to find dismissals of strikers unfair or unlawful by reason of employers not observing the *audi* rule when contemplating such dismissals. There were cases where the courts refused to make such findings even when employers had failed to give strikers a hearing or to observe the *audi* rule. Most emanated from the private sector while only two or three emanated from the public service. Some of the cases are: **Lefu & others v Western Areas Gold Mining CO (1985) 6 ILJ 307 (IC); Langeni & others v Minister of Health & Welfare and others (1988) 9 ILJ 389 (W), Moyo & others v Administrator of the Transvaal & Another (1988) 9 ILJ 372 (W); NUMSA & others v Elm Street Plastics t/a Adv Plastics(1989) 10 ILJ 328 (IC); MWASA & others v Perskor (1989)10 ILJ 44I (IC); FAWU & others v Hercules Cold Storage (Pty) Ltd (1989) 10 ILJ 457 (IC); FAWU & others v Hercules Cold Storage (Pty)Ltd(1990)11 ILJ 47 (LAC); FAWU & others v Willowton Oil and Cake Mills (1990) 11 ILJ 131 (IC); PPWAWU & Convencor (1990)11 ILJ 763 (IC); MAN Truck and Bus (SA) (Pty) Ltd v United African Motor and Allied Workers Union (1991) 12 ILJ 506 (Arb); NUMSA v G.M Vincent Metal Sections (Pty)Ltd (1993) 14 ILJ 1318 (IC); NUMSA V G.M. Vincent Metal Sections (Pty)Ltd 1999 (4) SA**

304 (SCA);Metal and Allied Workers Union & others v BTR Sarmcol - A Division of BTR Dunlop Ltd (1995) 16 ILJ 83 (IC); NUMSA & others v Boart MSA (1995) 16 ILJ 1098 (IC); National Union of Metal Workers of SA v Vetsak Co-operative Ltd & others (1996) 17 ILJ 455 (A); Plascon Ink & Packaging Coating (Pty)Ltd v Ngcobo & others (1997) 18 ILJ 327 (LAC)). In **Majola & others v D&A Timbers (Pty)Ltd (1997); 8 ILJ 342 (LAC)** McCall J refrained from deciding the fairness of the dismissal on the basis of argument based on the *audi* rule

[41] Having listed above such cases as I have been able to find which occurred over the past twenty years or so where the courts refused to find dismissals of workers unfair or unlawful on the basis that the employers had failed to afford strikers a hearing, I must hasten to point out that the majority of those cases did not hold that in general an employer does not have the obligation to give a hearing when contemplating the dismissal of workers. Indeed, in the majority of those cases the courts acknowledged the general rule but found grounds of justification for the employer's failure to give the workers a hearing.

[42] In the following cases which are among those referred to above, the courts held either that the strikers had waived or abandoned their right to a hearing or that a hearing would have been pointless or would have served no purpose or that in the particular circumstances the employer could not reasonably have been expected to give the strikers a hearing: **Rikhotso; Lefu; Elm Street Plastics; Perskor; Hercules Cold Storage (industrial court judgement); Conventacor; MAN Truck & Bus (SA) (Pty)Ltd v United African Motor and Allied Workers Union (arbi); Plascon - Ink & Packaging.** Among the cases included in the above list are cases where the courts dealt

with the matters on the basis that the striking employees had been afforded an opportunity to be heard but had not utilised it and not on the basis that the employers did not have the obligation under discussion. **(See Nehawu & others v Administrator of Natal & others (1989) 10 ILJ 675 which was overruled in Zondi's case supra; Hercules Cold Storage (Pty)Ltd (LAC judgement); Boart MSA (supra).**)

[43] Among the cases referred to above, there are some where the basis for the courts' conclusion that the employers' failure to afford the employees a hearing before dismissal did not violate the employees' right to a hearing was that the employees had waived or abandoned their right to a hearing. That is possible in our law and I have no quarrel with the principle. However, by and large, it is with the application of that principle to most, if not, all of the cases referred to above where this was relied upon that I have difficulty. In Man Truck (supra), for example, which was an arbitration, the arbitrator accepted that an employer had an obligation to give its striking employees a collective hearing in the sense that their case must be put for them by their representatives. However, he held that in that case the employer had not been so obliged because the representatives of the workers had refused to meet with the management. From this the arbitrator inferred that they had waived their right to be heard.

[44] Provided that the meeting that the representatives of the workers refused to attend was a meeting whose purpose was for the employer to hear why the workers should not be dismissed, I have no quarrel with the conclusion that, in such a case, the strikers cannot be heard to complain that they were not heard before dismissal. If, however, they were invited to a meeting whose purpose did not include that, then I cannot see how they can be said to have

waived their right to be heard. They may well be happy not to attend a particular meeting for whatever reason, good or bad, but they may be more than keen to attend one the purpose of which is to give them an opportunity to make representations why they should not be dismissed. It is not apparent from the report what the purpose was of the meeting which the workers' representatives refused to attend.

[45] Another case where it was said that striking employees had waived or abandoned their right to be heard was **National Union of Metal Workers of S.A. & others v Elm Street Plastics t/a Adv Plastics** (1989) 10 ILJ 328 (IC). At 338 A - D in that case it was held that there was an obligation on the employer to give the strikers a hearing before they could be dismissed. However, it was emphasised that there would be no such obligation in a case where the workers could be said to have **"abandoned their entitlement to a pre-dismissal hearing"**. It was said that strikers could be said to have abandoned their entitlement to a hearing where the nature of their conduct was such that their employer was justified in regarding it as a repudiation of their contracts of employment or where the strikers' conduct established that no purpose would be served by holding a hearing or where such a hearing would be **"utterly useless"**. In that case the industrial court held that by engaging in an illegal strike the employees had repudiated their contracts of employment and were, therefore, not entitled to a hearing. The industrial court also sought to justify its finding that the workers were not entitled to a hearing by stating that by their conduct the strikers had made it plain that a hearing would be pointless - and that they had waived their right to a hearing (p. 338A - J).

[46] Counsel for the respondent sought to rely on the passage at 338C -F in Elm

Street Plastics. In that passage the industrial court said there is no obligation on an employer to give strikers a hearing before it can dismiss them where the circumstances indicate that the workers have abandoned their entitlement to a pre-dismissal hearing. I have no quarrel with this statement as a matter of law. This is the argument of a waiver. I would simply caution that whether in a particular case it can be said that workers have waived their right to be heard before dismissal is an issue that would have to be decided in the light of three important considerations. The one is that the party who pleads a waiver must prove it. The second is that a waiver is not lightly inferred. The third is that the requirements for a waiver, as they are known in our law, would have to be proved. The onus to prove a waiver is on the party alleging it.

[47] In **Laws v Rutherford 1924 AD 261 at 263 Innes CJ** said in effect that, where conduct is relied upon to found a waiver of a right, such conduct must be **"plainly inconsistent with an intention to enforce such right"**. (See also **Hepner v Roodepoort -Maraisburg Town Council 1962 (4) SA 772 (AD) at 778 F-G)** In this regard, to state what in my view is the obvious, going on, or, participating in, a strike is not conduct plainly inconsistent with an intention on the part of strikers to enforce their right to be heard should the employer contemplate their dismissal. The conduct relied upon would have to be conduct other than striking per se.

[48] It seems to me that in Elm Street Plastics the industrial court decided that the employer's failure to afford the strikers' a hearing was justified because by their conduct the strikers had abandoned their entitlement to a pre-dismissal hearing. The conduct on the part of the workers which the court relied upon there for that conclusion was given as **"participating in mass action (strike),**

the purpose and nature of which is plain (amounting to a repudiation of their contract of employment.)" Although an employer may think it plain that, when workers participate in a strike, they repudiate their contracts of employment, this can simply be no basis for denying strikers the right to be heard before they can be dismissed because if they are granted an opportunity to state their cases they may show that their conduct does not constitute repudiation in the sense that they no longer want to continue with their employment contracts.

[49] As the industrial court also relied on certain views expressed by Cameron in his article, I turn to deal with some aspects of that article. At 176-178 of his article Cameron discussed a waiver and quasi-waiver as some of the exceptions to the requirement for a pre-dismissal hearing. After emphasising that in law a waiver occurs when a person, with full knowledge of a legal right, abandons it, he expressed the view that in the employment context it would be unrealistic to apply the full requisites of the legal doctrine of a waiver before an employee's conduct could be said to exempt an employer from the hearing requirement. He said all that should be required **"is that the employee should indulge in conduct which establishes that the employer can no longer reasonably or fairly be expected to furnish an opportunity for a pre-dismissal hearing."**

[50] At 177 of his article Cameron referred to certain strike dismissal cases and said they showed that circumstances may exist which could entitle an employer to conclude that the workers had abandoned their entitlement to normal pre-dismissal procedure. He said this may be because :-

(a) the workers have repudiated their contracts of employment; or

(b) the workers have engaged in other conduct which renders the

enforcement of pre-dismissal procedures pointless.

[51] With regard to (a) I prefer the view which Cameron expressed earlier in his article where he criticised the **"no difference"** approach to pre-dismissal hearings. If one rejects the no difference approach, one would find it difficult to say an employer need not afford workers a pre-dismissal hearing if they are repudiating their contracts of employment because, while on the face of it, it may appear to the employer (before the benefit of a hearing) that the employees are repudiating their contracts of employment, as I have said above it may well be that, if he afforded them the benefit of a hearing, he could be persuaded that they were not repudiating their contracts of employment. He might never get to know that unless he affords the employees the benefit of a hearing.

[52] In regard to (b) namely the proposition that an employer should be exempted from the requirement of a pre-dismissal hearing where a hearing would be pointless I would prefer the view which Cameron expresses at 162 of his article in the context of commenting on the so- called **"open and shut"** approach. There he emphasised that to say a hearing will not be necessary because it appears that there are no facts to be established assumes, wrongly said Cameron, that the central reason for a hearing is to establish facts. A hearing is also concerned about what sanction should be imposed in the light unacceptable conduct. Even if the facts are known, a hearing may bring a completely different understanding or perception about the conduct complained of.

[53] The only situation which I am able to envisage where it can be said that an

employer's failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: We are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is, indeed, the case. However, in my view, the latter scenario falls within the ambit of a waiver. Accordingly the normal requirements of a waiver must be present. What I say in this judgement about the **"pointless"** approach and the **"utterly useless"** approach must be understood subject to what I have just said. There is no justification for creating an additional exception to the audi rule in order to escape the normal consequences attendant upon a failure to meet the requirements of established exceptions to the audi rule e.g. waiver I can see no difference between this **"pointless"** approach and the **"no difference"** approach. Cameron rejected the **"no difference"** approach in the same article. The **"pointless"** approach seems to be the same approach as the **"utterly useless"** approach. Sometimes the pointless or utterly useless approach is applied where it is thought that the employer was in possession of, information relating to, or, knew, why the employees were striking **(see McCall J in Plascon Ink & Packaging Coating (Pty) Ltd V Ngcobo & others (1997) 18 ILJ** 327 **(LAC) at 339I - 340G).** The utterly pointless useless approach is one where it is said that, an employer is not obliged to afford workers the benefit of being heard where a hearing would have been utterly useless. I think the reasoning adopted by the Appellate Division in rejecting the no difference approach would justify the rejection of the **"pointless"** or **"utterly useless"** approach.

[54] In Sibiya's case (supra) Hoexter JA stated that the necessity for a hearing was present in the mind of the employers but mistakenly they conceived the inquiry to be a one-sided affair. In that case the

employers had taken the attitude that all the information relevant to the inquiry was to be found in the staff files. Because of this they did not give the workers a hearing. In regard of this approach HoexterJA had this to say at 539 F-G in Sibiya: "**But given the opportunity of a hearing, the respondents might have been able to call attention to relevant suggestions as to a solution of the problem of the redundant workers which had not occurred to the appellants. In my view, this was a case in which elementary fairness required that the respondents should have been accorded a hearing before the appellants took their decision to dismiss the respondents."** (See also Hoexter JA in the Zenzile appeal 1991 (1) SA 21 (A) at 37 B-C where he said as a matter of principle if the dismissal is disciplinary or punitive in nature, then **"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..."**)

[55] In the light of this I am of the view that the conclusion reached in Elm Street Plastics that the workers had abandoned their entitlement to a hearing before they could be dismissed was without any factual basis. Finally on Elm Street

Plastics I need to point out that Elm Street Plastics acknowledged the existence of the general obligation or requirement for an employer to give workers a hearing if their dismissal is contemplated. The passage relied upon by Counsel for the respondent relates to those exceptions where it is recognised that the *audi* rule does not apply. In the end the case of Elm Street Plastics does not assist the respondent.

[56] Another case on which respondent's Counsel relied was Media **Workers Association of South Africa & Others v Perskor (1989) 10 ILJ 4 41 (IC)**. In particular Mr Jammy relied on the passage appearing at 455C-D of that case. There the industrial court acknowledged the existence of the general rule that an employer must afford an employee a hearing if he contemplates his dismissal. The acknowledgement of this general rule by the court in that case does not support the submission which Mr Jammy made in his argument that there is no such rule. However, the court held in that case that a hearing would have served no purpose. The industrial court gave no reasons for its conclusion that a hearing would have served no purpose. I have already expressed my views about this approach above and will not repeat them. Just as the industrial court in Perskor gave no reasons for its conclusion that a hearing would have served no purpose, Mr Jammy also made no submissions on why a hearing could not have served any purpose in this case. To my mind a hearing in this case could have served a purpose because the union and the workers could have made representations on why they believed that the strike was a legal strike and why, even if it was not legal, they should not be dismissed.

[57] In FAWU & others v Hercules Cold Storage (Pty)Ltd 1998 19 IJL 457 (IC) the industrial court also followed the approach adopted in Perskor. While in

Hercules Cold Storage the industrial court acknowledged the existence of the general obligation on an employer to observe the *audi* rule, it held that no purpose would have been served by giving the workers a hearing in that case. Unlike in Perskor, in Hercules the industrial court purported to give a reason why a hearing would have served no purpose in that case. It said the strike had been organised by a trade union and all an employee could have said in a hearing would have been how he had voted in the strike ballot and that he was expected to take part in the strike. In my judgement this reasoning is based on speculation and can be no basis for relieving an employer from the general obligation to observe the *audi* rule when contemplating the dismissal of workers. In that case, like in this one, it is clear that the union involved had taken some steps to try and make the strike a legal one. An employee could well have come to a hearing and argued that he only took part in the strike in the reasonable belief that it was a legal strike and that, if the strike was not legal, he would not continue as that could put his job at risk which he did not want to do.

[58] Another case which Mr Jammy referred to in support of his submission is **National Union of Metalworkers of SA v Vetsak Co-operative Limited and others (1996) 17 ILJ 455 (A)**. In particular he relied on the passage appearing at 455C-D. At 468E-G in Vetsak the Appellate Division considered a contention that the company **"committed an unfair labour practice by failing to give each worker a hearing before the decision was finally taken to dismiss him."** The Appellate Division dealt with this argument in the following terms:- **"The workers acted collectively. Vetsak responded collectively. On the Saturday, the day after the ultimatum was issued, the workers met to discuss their response. That response was to refuse to heed Otto's appeal on the Monday morning urging them to return to work. To**

insist on a separate hearing for each worker in those circumstances would be to require Vetsak simply to go through the motions. On the facts of this case there was no duty upon Vetsak to accord each worker a further separate hearing before the dismissals were put into effect."

[59] It is clear from the passage at 468 E-G in **Vetsak** that the argument which the Appellate Division was called upon to deal with was not the same as the argument which this Court has to deal with in the present appeal. There the argument was that the employer should have given the strikers individual hearings. Here the argument is that the respondent should have complied with the *audi* rule in whatever form the circumstances permitted. Also at 468 E it is stated that the unchallenged evidence was that it was only when the workers failed to make further representations or to return to work that the employer commenced with dismissals. This suggests that the employer had invited the workers to make representations why they should not be dismissed and that they had failed to make such representations. If that is what happened, then, in my view, that was compliance by the employer with the *audi* rule. Accordingly it was not open to the workers to complain afterwards that they had not been heard when they, themselves, had failed to take up an invitation to be heard. No such invitation was extended to the strikers in this case. The fact that the conduct of the workers is collective is no basis for denying the workers the right to be heard. I note, as shown elsewhere in this judgement, that in his article Cameron also rejects the notion that the collective nature of the workers' conduct exempts an employer from giving workers a hearing. (See end of p 176 to top of p.177 of second part of Cameron's article).

[60] Mr Jammy also referred to **NUMSA V G.M. Vincent Metal Sections (Pty) Ltd**

1999 (4) SA 304 (SCA). G.M. Vincent is one of a number of cases which arose out of a country-wide strike which was called by NUMSA in the metal industry in 1992. At 318A-D the Supreme Court of Appeal dealt with the argument that the dismissal of the strikers in that case was unfair because the employer had not afforded the strikers a hearing before "implementing the ultimatum" to return to work or be considered as dismissed.

[61] Melunsky AJA assumed, without deciding, that there may be situations where fairness demands that an employee be given a hearing before dismissal pursuant to an ultimatum. He concluded that G.M Vincent was not a case in which fairness demanded that the strikers should have been given a hearing. His reasons for this conclusion appear to have been that:-

(a) the employees in that case had made no effort to comply with the ultimatum, but, in stead, had decided to ignore it; for this reason Melunsky AJA was of the view that the holding of separate hearings or even a collective hearing would have been a pointless and unnecessary exercise;

(b) there would have been practical difficulties in the holding of hearings,

(c) the holding of hearings would have rendered the ultimatum ineffective because they would have resulted in substantial further delay in bringing matters to a head.

[62] I have a few observations to make in relation to the decision in G.M. Vincent. The first is that the Supreme Court of Appeal did not decide that an employer is not, as a general rule, obliged to observe the *audi* rule when it contemplates the possible dismissal of strikers. It said even if there may be situations where fairness demands that, the case before it was not such a case.

Accordingly the decision in G.M. Vincent is no authority for the proposition that an employer has no obligation to observe the *audi* rule when contemplating the dismissal of strikers. The second is that the Supreme Court of Appeal did not deal with a scenario where it is contemplated that the hearing could precede the issuing of an ultimatum. The third observation is that it is clear from the reasons given by Melunsky AJA that he had a formal hearing in mind. In this appeal the reference to a hearing is not intended to necessarily refer to a formal hearing but is intended to include any acceptable form of the observance of the *audi* rule.

[63] The fourth observation I wish to make about G.M. Vincent is that the Supreme Court of Appeal was not referred to those Public Service judgements which have long affirmed the obligation on an employer to observe the *audi* rule when contemplating the dismissal of strikers which have been referred to above. Some of those cases are its own judgements. That the Supreme Court of Appeal was not referred to such cases is to be inferred from the fact that such cases are not included in the list of cases recorded in the report as the cases that Counsel referred the Court to. Also the Supreme Court of Appeal was not referred to the articles of Professors Martin Brassey and Cheadle which I have referred to above in this judgement which clearly support the view that an employer does have the obligation to give strikers a hearing when he contemplates their dismissal.

[64] The last observation relates to the conclusion that it would have been a pointless and an unnecessary exercise for the employer in G.M. Vincent to afford the strikers a hearing. My difficulty with this conclusion is that this was a case where the union had taken various steps prescribed by the old Act for making a strike legal. For that reason, it is not difficult to imagine that,

given a hearing, at least some of the strikers or their union could have presented argument to the effect that the strike was legal and that, therefore, they were entitled to participate in the strike and that they should, therefore, not be dismissed because the employer would be committing an unfair labour practice if it dismissed them in those circumstances. Indeed, it appears from the judgement of the industrial court in the same matter that, when the matter was argued in the industrial court, it was the union's case that it (and, a fortiori, the strikers) believed that the strike was legal **(see NUMSA V G.M. Vincent Metal Sections (Pty) Ltd (1993) 14 ILJ 1318 (IC) at 1320J-1321A)**. In fact the belief of the union and the strikers that the strike was legal could not have been an unreasonable one because an application brought by SEIFSA (the employers' organisation) to the then Supreme Court to interdict the strike on the basis that it was illegal had failed and an appeal had had to be noted to a Full Bench which then granted the interdict. (See 1993 14 ILJ 1318 (IC) at 1321A). In those circumstances I cannot, with respect, see how it could be said that a hearing would have been a pointless and an unnecessary exercise in such a case. I am of the opinion that the approach adopted by the Appellate Division in Zondi and Zenzile is the one to be preferred. To this can be added the expansion of the Zenzile approach by the Appellate Division in Sibiya's case as to the application of the audi rule in dismissal cases.

[65] Lastly, on G.M. Vincent, it was said that disciplinary inquiries would have resulted in a substantial further delay in bringing matters to a head and thus rendering the ultimatum largely ineffective. However, I can see no delay that could have been caused if the employer had given the strikers an opportunity to make written representations within a certain number of hours e.g. 24 or 48 hours why they should not be dismissed. That would have been

compliance with the *audi* rule. I am therefore of the opinion that G.M. Vincent does not assist the respondent in this case.

[66] There are also cases where the view has been expressed that an employer is relieved of his obligation to observe the *audi* rule when contemplating the dismissal of an employee or employees if he cannot reasonably be expected to observe the audi rule in a particular case. That is taken from the provisions article 7 of ILO Convention 158 of 1982 which have already seen referred to above. Also some of the cases (e.g. Haggie Rand, infra,) relied on a similar provision which was in the notorious 1988 amendments to the old Act. The predecessor to the above Convention was ILO Convention no 119 (1963) which had the same provision but without the exception. In my view this exception, in the context of our law, should not be seen as adding to our recognised exceptions to the audi rule but rather as an all embracing phrase under which all those exceptions fall. I see that in their book on the law after the 1988 amendments: **The New Labour Relations Act, Cameron** et al expressed a similar view at 115 when they dealt with the meaning of a similarly worded exception to the requirement of a fair procedure as then contained in par (a)(ii) of the then definition of an unfair labour practice. The learned authors said at 115: **"This seems in effect to confirm the three exceptions which Cameron acknowledges as the true exceptions in his article."**

[67] During argument Counsel for the respondent also submitted that a requirement that an employer should observe the *audi* rule when contemplating the dismissal of strikers would be impractical. However, after I had asked him what would be impractical about the employer sending a letter to the strikers or their union or representatives inviting them to make

written representations by a given time why the strikers should not be dismissed for striking illegally, he conceded that this could be done. To my mind, the concession was properly made.

[68] There are judgements which seem to suggest that an employer who contemplates the dismissal of strikers is relieved of his obligation to afford the strikers a hearing if he issues a fair ultimatum. **(See NUMSA v Haggie Rand Ltd (1991)12 ILJ 1022(LAC) at 1028 F- 1029; FAWU & others v Mnandi Meat Products & Wholesalers CC (1995) 16 ILJ 151 (IC) at 161 F-H; Plascon Ink & Packaging Coating (Pty)Ltd v Ngcobo & others (1997) 18 ILJ 327 (LAC) at 338F-339D)**. I must mention that the Labour Appeal Court which gave the Haggie Rand and the Plascon Ink judgements is the previous Labour Appeal Court which had the status of a High Court and was constituted before a single judge sitting with assessors. Its status was lower than that of this Court which is on the same level as the Supreme Court of Appeal in matters falling under its jurisdiction.

[69] The reasons advanced in Haggie Rand for the above view were that:

(a) **" Management had acted fairly"**;

(b) it **"could not reasonably have been expected"** of the management to **"hold a hearing or inquiry";**

(c) to require the employer to give the strikers a hearing after the issuing of an ultimatum but before dismissal would emasculate the ultimatum because the ultimatum would have to read that the strikers were required to return to work or be dismissed but subject to a disciplinary hearing; this

requirement would amount to demanding the employer to sheathe the sword and render it ineffective in circumstances where the workers are engaging in

a power struggle - and that would not be fair.

(d) it is artificial to require an employer who is directly affected by flagrant, unmistakable misbehaviour of an employee to conduct an enquiry into such misbehaviour after such employer has himself deemed it necessary to issue a dismissal ultimatum as a result thereof.

[70] With regard to the reason given in (a) above, that is not, with respect, a reason at all; it begs the question. With regard to (b), that was based on the specific exception to the *audi* requirement which was provided for in the notorious 1988 amendments to the old Act which was later repealed. The question in regard to (b) is whether there was a proper factual basis for this conclusion. I am unable to find any such factual basis in that case justifying that conclusion . As to (c), I can do no better than refer to what was said in **Betha & others v BTR Sarmcol (A Division of BTR Dunlop Ltd (1998) 19 ILJ 459 (SC) at 514A-F**. There Olivier J.A, whose judgement was concurred in by Zulman JA, said:-

"In my view there is also another underlying misconception in the reasoning of the court a quo, namely,: The court a quo discussed the power struggle between employers and employees in terms appropriate to battle and warfare. It perceived a correlation between a strike, which it characterized as the ultimate weapon of the union, and dismissal, which it saw as the employer's ultimate weapon. The judgement suggests and seems to me to be based on the premise that recourse to the one automatically legitimizes recourse to the other.

It was argued by counsel for the appellants, correctly in my view, that this is neither our law, nor could it be. It is settled law, thus ran the argument, that to strike is a legitimate instrument in the process of collective

bargaining that the Act so emphatically endorses: the threat of it makes collective bargaining realistic and its occurrence serves, by the attrition it entails, to break deadlocks in the process for which there would otherwise be no resolution. Dismissal, in contrast, destroys the relationships of employment upon which collective bargaining is premised and so damages and often wholly destroys the relationship. There is no equivalence between the two and the one that the court a quo set up is illusory. Dismissal is not one of the 'weapons' that an employer might use unless the need to resort to this sanction is compelling. It is, in other words, not a reciprocal right, but an extraordinary one. The court a quo, in my view, reached its decision that the workers were fairly dismissed because they did not capitulate completely and were consequently not entitled to reinstatement, on a faulty perspective of the true legal position."

[71] As to (d) it seems that the effect of what the learned Judge in Haggie Rand was saying is that once an employer has issued an ultimatum, he cannot bona fide consider representations that may be made to say there should be no dismissal. While on the one hand this may be true, it must be remembered that the employer would have to hear workers who, after the issuing of an ultimatum, may make representations to say, for example, that they were not willing participants in the strike. The employer cannot refuse to hear them without taking the risk of being found to have acted procedurally unfairly towards them.

[72] I do not need to say anything about the case of FAWU v Mnandi Meats because there the industrial court relied on Haggie Rand without adding to the reasons given in Haggie Rand. I also do not need to say anything about Plascon Ink in connection with this point because, in that case, too, no

additional reasons were given for this proposition. In Plascon Ink Mc Call J said that the passage in Haggie Rand at 1028G-1029A was quoted with apparent approval by Van den Heever JA in Buthelezi & others v Eclipse Foundries Ltd (1997) 18 ILJ 633 (A) at 642I-643E. In Buthelezi's case the Appellate Division was dealing with the question whether it would be permissible to hold that the employer was obliged to follow a procedure which the workers themselves were insisting was not necessary. In the context in which Van den Heever JA referred to the passage, it does not appear to me that it can be said that he was saying that as a general rule an employer is relieved of his obligation to observe the *audi* rule when contemplating the dismissal of strikers if he gives or has given the strikers a fair ultimatum. At any rate his reference to the passage in Haggie Rand was obiter because later on in his judgement he says that the point about procedural fairness was not pursued on appeal before the Supreme Court of Appeal.

[73] 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 consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence 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 judgement, for the proposition that the giving of a fair ultimatum is or can be a substitute for the observance of the *audi* rule.

[74] Another question which arises once it is accepted that a hearing and an ultimatum are two separate requirements and that the one cannot be a substitute for the other is: which of the two requirements must be complied with first? In other words must an employer first observe the *audi* rule and only later issue an ultimatum or must he first issue an ultimatum and then observe the *audi* rule? Although I incline towards the view that the observance of the *audi* rule must come before an ultimatum can be issued, I am of the view that it is not necessary to decide this issue in this case because no hearing was given in this case either before or after the ultimatum. It is significant to point out that in almost all the cases I have referred to above where the courts upheld the requirement for a hearing in strike dismissals, ultimata had been given before the strikers were dismissed. That did not deter the courts from insisting on the requirement for a hearing nor did the courts have to decide which side of an ultimatum a hearing had to be or should be.

[75] 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. If the

observance of the *audi* rule must take place before an ultimatum is issued, the way it could work may well be the following: the employer would invite the strikers or their union or their representatives to make representations by a given time why they cannot be said to be participating in an illegal or illegitimate strike and, if that is so, why they should not be issued with an ultimatum calling upon them to resume work by a certain time or be dismissed. The dismissal would only result from a failure to comply with such ultimatum. If, after hearing or reading their representations, the employer is satisfied that the strike is illegal or illegitimate and that it would not be unfair to issue an ultimatum at that stage, he could then issue an ultimatum calling upon them to resume work by a certain time or face dismissal. If they complied with the ultimatum, he would not dismiss them. If they failed to comply with the ultimatum, he would then be entitled to dismiss. In that case there would have been an observance of the audi rule and the employer will have been able to dismiss those who defy his ultimatum. In that case there can be no complaint by the strikers that they were not given an opportunity to state their case before they could be dismissed. It may well be that this is how the *audi* rule can be observed in the context of a strike and an ultimatum but, as I have already said, it is not necessary to decide the point.

[76] It has also been said that, because strikers act collectively when they go on strike, an employer is entitled to respond collectively. This has been said in order to make the point that an employer in such a situation is justified in not affording strikers a hearing when he contemplates dismissing them. (See **Vetsak at (1996) 17 ILJ 455(A) at 468E-G**). In my view the employer's right to respond collectively to employees' collective action is not mutually

exclusive with the strikers' right to be heard before they can be dismissed. That an employer is entitled to respond collectively means nothing more than that he can deal with the strikers as a group and not as individuals. The employees' collective action does not give the employer a licence to disregard the audi rule altogether. There is no reason why the employer cannot comply with the audi rule by calling for collective representations why the strikers should not be dismissed.

[77] I have had the benefit of reading the dissenting judgement of my Colleague, Conradie J.A. Conradie JA disagrees that, when an employer contemplates the dismissal of striking employees, as a general rule or requirement, he is, subject to certain exceptions, obliged to give them or their union or their representatives an opportunity to state their case before he can dismiss them. Here below I propose to compare the merits and demerits of the two approaches. I will call my approach the *audi* approach and my Colleague's approach the **"no audi"** approach.

[77.1] The *audi* approach introduces certainty in the law in an area in which uncertainty and confusion abounded under the old Act. This was because the approach adopted by the High Courts in respect of cases of dismissals of public service strikers with regard to the observance of the audi rule and the approach adopted by the industrial court, the previous Labour Appeal Court and the Appellate Division towards the same rule in relation to the dismissal of strikers in the private sector were completely inconsistent. The confusion and uncertainty that I refer to in this area of the law under the old Act is also referred to by John Grogan at 294-5 of his book: Workplace Law, 4th

ed. He calls it **"confusing jurisprudence"**. The no-audi approach will perpetuate this uncertainty. Part of the reason why the no audi approach will perpetuate this uncertainty is that it fails to establish a general rule or requirement one way or the other even if it is one which says as a general rule an employer is not obliged to observe the audi rule before it can dismiss strikers. Instead it says whether or not in a particular case an employer is obliged to observe the audi rule will depend on whether it is fair to do so. That is vague and means that an employer will not be able to know in advance if he is obliged to observe the audi rule. The audi approach brings in certainty because it affirms a general rule which every employer will know in advance. It acknowledges that such a rule is not absolute and therefore acknowledges the existence of exceptions to the rule. The exceptions are also exceptions which are well known in our administrative law in relating to the audi rule.

[77.2] The no-audi approach is contrary to one of the values which our constitution enshrines and seeks to instil in our democratic society, namely, equality before the law. It perpetuates inequality before the law in the way the courts treat striking workers in the private sector and striking workers in the public service. I say this because, in terms of the no-audi approach, it must, in my view, be accepted that, if the striking workers are public sector workers, they certainly will be entitled to the benefit of the audi rule before they can be dismissed. However, if they are from the private sector, then they will probably be

denied the right to be heard before they can be dismissed. This has to be so because there are clear and unmistakable authorities in the form of cases of the Appellate Division to the effect that the audi rule must be observed before striking workers in the public service can be dismissed. These are cases which my Colleague does not say were wrongly decided.

[77.3] The audi approach is principle-based whereas the no-audi approach seems to be lacking in any principle but seeks to have cases decided on a case by case basis. If one studies the cases on which the no audi approach relies, one is driven to the conclusion that they were not based on any principle but each case was decided on its own and, in most of them, without even reference to the High Court judgements in respect of the dismissal of strikers in the public service where it had been held that an employer in the public service was obliged to observe the audi rule. In other words the courts did not ask themselves what, if anything, made the private sector cases distinguishable from those public sector cases where the audi rule had been upheld even in respect of strikers. If they had, I think they would have concluded that nothing did.

[77.4] The audi approach is based on logic whereas the same cannot be said of the no-audi approach. This can be demonstrated by having regard the premise of the audi approach and the conclusion it reaches. This premise is that every worker is entitled to be heard before he can be dismissed; a striker is a worker; therefore a striker, too, is entitled to be heard before he

can be dismissed.

[77.5] The audi approach acknowledges the test emanating from cases of the Appellate Division to the effect that a decision which could prejudicially affect an employee's right to regular remuneration or a decision to dismiss for disciplinary reasons attracts the application of the audi rule (See the Sibiya and Zenzile cases). The no-audi approach does not only not do this but also it fails to explain why the test as pronounced in Zenzile and Sibiya is good enough for dismissals in the public service but not good enough for strike dismissal cases in the private sector.

[77.6] The audi approach is in keeping with international standards. This cannot be said of the no audi approach. I say this because, quite clearly, the ILO Convention on Termination of Employment NO 158 of 1982 contains a general rule that an employer must not dismiss a worker for reasons based conduct or work performance without having first given such worker an opportunity to defend himself against the allegations made against him. In this regard the Convention does not say this does not apply to cases where workers are dismissed for striking. On the contrary it should apply also to the dismissal of strikers because those would fall under dismissals for reasons based on the employee's conduct. The Convention makes provision for one exception which is broad enough to refer to all the exceptions that normally apply to the audi rule. The no-audi approach is either directly contrary to the convention or at least it is inconsistent with it.

[77.7] The no-audi approach will more often than not result in the employer and the workers or union only getting to exchange views about the legality or legitimacy or otherwise of the strike for the first time in court when the dismissal of strikers is challenged- which may be many months or even a year or two after the dismissal. The audi approach seeks to ensure that, before the major decision of dismissal can be taken, the employer and the workers will know each other's case on why the strike may be said to be legal, illegal or illegitimate and why the strikers should or should not be dismissed.

[77.8] The audi approach is likely to strengthen collective bargaining and to avoid dismissals which can be avoided once the employer hears arguments or representations made by the union or representatives of the strikers. The no-audi approach is likely to result in dismissals which could have been avoided.

[77.9] While in terms of the audi approach an employer is unlikely to be prejudiced in anyway if he gave the strikers or their union an opportunity to state their case or to make representations before the strikers can be dismissed, the no-audi approach envisages the strikers losing their jobs without having been given an opportunity to state their case through their union or their other representatives on why they should not be dismissed. This would be seriously prejudicial to the strikers..

[77.10] While the audi approach has the effect of promoting the notion of the same law for all workers which the new LRA also seeks to do, the no-audi approach seeks to promote different laws or

rules for workers which runs contrary to one of the goals of the new LRA which with two or three exceptions, seeks to bring all workers under the same LRA.

[78] One of the grounds that sec 188(1) of the Act says renders unfair a dismissal that is not automatically unfair is the effecting of a dismissal not in accordance with a fair procedure. Sec 188(2) enjoins that provisions of a Code of Good Practice be taken into account when the fairness of a dismissal is considered. Item 6 of the Code of Good Practice: Dismissal deals with the dismissal of employees participating in an unprotected strike. Item 6(2) thereof provides as follows:-

"Prior to dismissal, an 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." (My underlining).

[79] 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 my judgement the 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.

[80] 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, 4th ed at 297-8).**

[81] 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.

[82] 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.

[83] I note that, as I have said above that the discussion contemplated in item 6(2) is a form of the observance of the audi rule, Conradie JA also concedes in his judgement that such a discussion is a form of a hearing. That is one point on which my Colleague and I agree.

[84] Another point on which my Colleague and I agree is that the principles embodied in the Code were distilled from the jurisprudence under the old Act. If that is so, then, with respect, I am unable to see how my Colleague, can, nevertheless, hold the view which he expresses in the minority judgement that there was no general obligation under the old Act and its jurisprudence that strikers, too, were entitled to be heard before they could be dismissed. With respect it seems to me that my Colleague's approach confuses the principle with the form which compliance with that principle must take in a particular case.

[85] In so far as my Colleague believes that I say that, where the Code applies, an employer is generally obliged to give strikers another hearing in addition to the discussion contemplated in item 6(2), I want to make it clear that I do not say so. But this is a case in which the Code does not apply because it occurred under the old Act. One refers to the Code because one seeks to see what principles of the jurisprudence of the old Act have been taken over into the new dispensation.

[86] It further appears from my Colleague's discussion of the provisions of item 6(2) of the Code that his disagreement with me is that he does not believe that the employer is required to intimate to the union that he is contemplating the dismissal of the strikers so that he can hear what representations the union has to make to persuade him that he should not follow that course of action. I am unable to follow this reasoning because item 6(2) is very clear about what the discussion between the employer and the union should be about. It says it must be about **"the course of action"** that the employer intends taking - obviously - in the light of the strike. If that does not mean that, if the course of action the employer intends taking is, or, includes, a dismissal of the strikers either with or without a prior ultimatum, then, quite frankly, I do not know what the discussion contemplated by item 6(2) is supposed to be about.

[87] In any event, even leaving item 6(2) aside, I cannot see how it can be said that an employer has given an employee whom he contemplates dismissing a hearing where he calls the employee in and talks to him about the weather instead of talking to him about his dissatisfaction with him and that he faces possible dismissal.

[88] I have carefully considered my Colleague's judgement in order to determine where exactly he and I differ and why. One possible reason why-and I think this is an important reason-is this one. We both refer to the ILO Convention on Termination of Employment NO 158 of 1982. We also both accept that that convention was one of the sources which at a very early stage the industrial court relied upon to derive the requirement for a hearing before dismissal. There were English cases, too, as well as good practices of the so-called enlightened employers which the industrial court derived the audi rule from. But, whereas in article 7 of the Convention I see a general rule requiring an opportunity to be heard before dismissal with an exception-such

exception being that the general rule need not be complied with if the employer cannot reasonably be expected to give an opportunity to the worker to state his case, my Colleague seems to see a different general rule. That is that an employer is not obliged sees them as saying an employer is only obliged to give a hearing before dismissal if it would be fair to do so. This seems to me to be quite vague and not borne out by the wording of article 7.

[89] My Colleague also refers to a number of judgements of the industrial court in the nineties and suggests that, because in those cases dismissals of strikers were held to be fair despite the fact that only ultimata were given-without any hearing - those cases support the proposition that strikers were not entitled to an opportunity to be heard before they could be dismissed. To this I ask the question: On what basis could the courts in those cases have considered the issue whether the employers had been obliged to observe the audi rule before they could dismiss the strikers if the audi argument had not been raised? The same can be asked in respect of decisions of the previous Labour Appeal Court and the Appellate Division in regard to those cases where the audi argument had not been raised and fell outside the issue the Courts had to consider.

[90] In regard to decisions of the previous Labour Appeal Court which my Colleague relies upon, it is necessary to state that most of those cases do not add anything new to the reasons which had been relied upon in various decisions of the industrial court. I have dealt with the reasons relied upon in those cases. At any rate in terms of the new Act this Court enjoys a superior status than that of the previous Labour Appeal Court. With regard to decisions of the Appellate Division and the Supreme Court of Appeal which my Colleague relies upon, I have dealt with them in this judgement and have either distinguished them or have found that what was said in them

relating to hearings was obiter.

[91] My Colleague seems to dismiss the decisions of the Appellate Division in Zenzile, Zondi as well as decisions of provincial divisions of the High Courts in strike dismissal cases in the public service which have been referred to above (including Makoponele) on the audi rule and the dismissal for striking simply on the basis that Zenzile's case concerned temporary employees or that the other cases were in the public domain. I cannot see why the fact that technically the workers in Zenzile's case were perceived by the Public Service Act of the time as temporary employees (even when some of them had worked in the public service for over 20 years) can serve as a basis for not applying in the private sector the test decided in Zenzile when it is accepted that the dismissal of Zenzile and her co-employees was for participation in a strike and where it is accepted that the audi rule applied to contracts of employment which were subject to the LRA, even though there was no element of public power in the relationship between the employer and the employee.

[92] My Colleague also says in his judgement that in administrative law the rule or principle is that a decision-maker is obliged to give an opportunity to be heard to an affected person if it can reasonably be expected of him to do so. I do not agree that this is the correct formulation of the maxim in our administrative law. The correct formulation of the maxim in our administrative law is to be found in Zenzile's case at (1991) 12 ILJ 259 (A) at 271 **D-F and in Administrator, Transvaal & others v Traub & others 1989(4) SA 731**

(A) at 748G and the decisions collected at 748E-F of the latter case.

[93] It is only in the field of labour law in general and in judgements of the industrial court the previous Labour Appeal Court and the Appellate Division relating to Labour Law in particular that one finds the reference to an employer not being obliged to give an opportunity to be heard if it cannot reasonably be expected to give it. It would appear that the source of that phrase is the ILO convention that I have referred to and a provision which was contained in the definition of an unfair labour practice in the notorious 1988 amendments to the old Act. I see that the Code of Good Practice: Dismissal also contains a provision to that effect. That phrase is used in the Convention to indicate an exception rather than a general rule. The position was the same under the 1988 amendments. There is no reason why it should be different under the new Act.

[94] Lastly my Colleague seems to believe that I call for individual and personal circumstances of strikers to be taken into account as a general rule when strikers are given an opportunity to be heard. That is not what I say. But I do leave room that there may be cases where individuals who may have been intimidated into participating in the strike may have to be heard separately.

[95] In the light of the above I am of the opinion that the conclusion I have reached in this case is consistent with the new Act and the Code of Good Practice: Dismissal. Also it is significant to note that the Code contemplates that the discussion between the employer and the union referred to in item 6(2) is required to be before an ultimatum can be issued. This is in line with the inclination I have expressed above that the observance of the audi rule should probably be prior to the issuing of the ultimatum rather than after.

[96] In the light of all the above I have no hesitation in concluding that in our law

an employer is obliged to observe the *audi* rule when he contemplates dismissing strikers. As is the case with all general rules, there are exceptions to this general rule. Some of these have been discussed above. There may be others which I have not mentioned. 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. 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.)

[97] It was also submitted on behalf of the respondent that, if this Court found that there was an obligation on the respondent to have observed the *audi* rule, it should, nevertheless, find that the respondent did discharge that obligation because, after it had issued the ultimatum, the strikers had an opportunity to come forward and make representations why they should not be dismissed if there were any grounds on which they believed that they

should not be dismissed. It was submitted that, as they did not do this, they could not be heard to complain that the *audi* rule had not been observed. For reasons given above in regard to that approach, I am unable to uphold this submission. I add to those in the next paragraph.

[98] Before an employer can issue an ultimatum;-

(a) he would have made a final decision that the conduct of the workers is unacceptable;

(b) he would not be seeking to engage in talks about whether the conduct of the strikers is or is not acceptable; on that he would already have made up his mind;

(c) he would not be seeking to engage in discussions with the strikers on whether or not he should have issued the ultimatum and what should or should not be the consequences of non-compliance with the ultimatum; on all of that he would have made up his mind in any event on the pleadings it was

not the respondent's case that it had complied with the *audi* rule.

[99] Reverting to the case at hand, I conclude, therefore, that the respondent was under an obligation to observe the *audi* rule before it could dismiss the appellants. It did not comply with this obligation. The need for the respondent to hear the appellants was arguably even stronger in this case because this was a case where, to the knowledge of the respondent, certain steps had been taken by the union which were obviously aimed at making the strike a legal strike. The respondent should have realised that, because such attempts had been made, the strikers could well have been under the

impression that the strike was legal and, that, for that reason, they might have believed that they were entitled to go on strike and even to ignore any calls by the respondent that they return to work. Although the appellant's strike was illegal, they should not, in my judgement, be treated in the same way as strikers who simply flouted the Act and made no attempts whatsoever to comply with it. They deserve some sympathy. Workers must be encouraged to comply with the law. To treat them as if they fall into the same category as strikers who go on a strike without any attempt at all to make their strike legal would not be right. It would not encourage unions and workers to make whatever attempts they can to ensure that their strikes are legal. Accordingly I hold that in dismissing the appellants without having observed the audi rule the respondent committed an unfair labour practice. In making a contrary finding the industrial curt erred and its decision in this regard falls to be set aside.

Relief

[100] The next question to consider is what relief, if any, should be granted to the appellants. Does it make a difference to the relief that the basis for the finding that the dismissal was unfair is procedural in nature? In this case I do not think that it does. In most of the cases where the dismissal of strikers was found to have been unfair because the employer either failed to issue an ultimatum or because he issued an ultimatum which was found not to be a reasonable and adequate one, our courts have not hesitated to grant reinstatement. Although the basis on which I have found the dismissal in this case to have been unfair has nothing to do with an ultimatum, it, like an ultimatum, is a procedural step. Indeed, it is one which, to my mind, is of far greater significance than the issuing of an ultimatum.

[101] At any rate, in this case, the fact that the union and the strikers made serious

efforts to make their strike a legal one is, in my view, a highly material factor in considering whether or not reinstatement should be granted. Not that if they had not done so, they would necessarily not be granted reinstatement. I think that their case for reinstatement is stronger where they have made the efforts that were made in this case to make the strike legal. Also, although a long period has lapsed since the appellants were dismissed, this would be no basis to deny them reinstatement because it is not the respondent's case that the appellants were responsible in any way for the passage of such a long time before the matter could be completed in the court a quo. There was not much of a delay in the processing of this appeal. The appeal was noted early in 1999 and the appeal was heard in November of the same year.

[102] With regard to the retrospectivity of such reinstatement order as may be made, it was suggested on behalf of the appellants that the retrospectivity of the appellants' reinstatement should not be for a period which is less than six months. I propose granting six months' retrospectivity, as at the date of the decision of the industrial court because, in my view, where this Court, as a Court of Appeal, concludes that the decision of a lower court taken at a certain time was wrong, this Court must give such decision as in its opinion should have been given by the lower court at the time the lower court gave the decision appealed against. As the appellants were dismissed in November 1994 and the judgement of the industrial court was issued in March 1999, even with the six months retrospectivity, they still lose four years' wages. But six months' retrospectivity from the date of judgement of the industrial court is in accordance with the suggestion made on behalf of the appellants. In the result the appeal must succeed. With regard to costs, the appellants were represented by a union official. Accordingly the issue of costs does not arise save in the form of such disbursements as the appellants may have reasonably incurred in pursuing this appeal. They are entitled to those.

[103] In the premises I make the following order :-

1. The appeal is upheld with costs which are limited to disbursements reasonably incurred by the appellants in pursuing this appeal.
2. The determination made by the industrial court is set aside and replaced with the following determination :-
   "(a) The respondent's dismissal of the applicants named in the Modise group of applicants constituted an unfair labour practice and they are reinstated in the respondent's employ with retrospective effect to six (6) months from the date of this determination.
   (b) There is to be no order as to costs."
3. In so far as it is necessary to do so, it is recorded that the order in (2) above applies only to those applicants in the Modise group of applicants in the industrial court who were appellants in this appeal.
4. The appellants must report for duty on or before 27 March 2000 or such other date as may be agreed upon between them or their representatives and the respondent.

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R. M. M. ZONDO

Acting Judge President

I agree

_____

M. T. R. Mogoeng
Acting Judge of Appeal

CONRADIE J A

[103] The appellants are four individuals who, in the industrial court, sought reinstatement after their dismissal from the respondent's employ for participation in what the respondent regarded as an illegal strike. In the case of Moloi & Others against Steve's Spar Blackheath forty individual applicants who were members of the South African Commercial Catering and Allied Workers' Union ('Saccawu') also challenged the fairness of their dismissal for participating in the strike. The two matters were consolidated in the court *a quo*. However, only the four appellants are before the court. In the other matter notice has been given of an application for condonation of the late noting of the appeal. That is still to be heard.

[104] There were numerous procedural difficulties at the start of the appeal. To begin with, the appeal had been noted late. The explanation that there had been late notification of the delivery of the judgment, aggravated by a postal

delay, was acceptable in view of the fact that noting had been no more than a few days late. Similarly, the late filing of the record was condoned. Again, the period for filing had been exceeded by only a few days and the explanation for why this happened was adequate.

The appellants' involvement in industrial action

[105] The case of the four appellants is that none of them had Saccawu membership and that they did not participate in the strike. It was fear which kept them from working. They did not fear reprisals from the strikers who never conducted themselves other than peacefully but from a group of unknown and violent demonstrators from elsewhere who seemed to have taken an interest in the employees' affairs. In this way the four sought to safeguard their own position while simultaneously not compromising that of the forty applicants in the other case. Their version was rejected by the industrial court and, I consider, with good reason. Not only did the excuse for not tendering their services border on the fanciful but acceptance of their version depended on the assertions of the first appellant who maintained that she had, also on behalf of the other three, kept contact with the respondent, assuring it that they were willing to work and receiving from it an undertaking that they would not be dismissed for participation in the strike. The curious feature of this version is that there *were* six employees who fell

within the category of workers who felt themselves intimidated. *They* did keep contact with the respondent. *They* did receive an assurance that they would not be dismissed. Although they were, for the sake of appearances, dismissed with the other strikers, they were shortly thereafter re-employed. The appellants, then, had to persuade the court *a quo* that, although they were in an identical position, the respondent had breached its faith towards them while keeping its word with the other six. Mr Steve Savvides who testified for the respondent denied that any of the four had made contact with him during the strike and on the probabilities this is undoubtedly the correct version.

[106] Late in the trial the four appellants represented by Mr MD Maluleke of the National Entitled Workers' Union amended their statement of case to claim, in the alternative, that if it were to be found that they had been part of the strike, the strike was not illegal and that, even if it had been, their dismissal was unfair for lack of an adequate ultimatum and because six other employees, who also participated in the strike, had not been dismissed. This amendment put the case of the four appellants on the same footing as that of the other forty.

The invalidity of the ballot

[107] I agree with Zondo AJP that there was no valid ballot. It was chaotically conducted. An attendance register was produced at the trial which contained the names of 546 persons. The result of the ballot reflected that the same number had voted. Unfortunately for the appellants the attendance register was also completed by Sophie Motshaba, one of the appellants. Since this tended to show that she was, contrary to her denial, a Saccawu member, the testimony was tailored (so it appears to me) by maintaining that a portion of the attendance register had been lost and that there were persons who had signed the attendance register but were not allowed to vote because they were not union members in good standing. There was no list of eligible voters. No record therefore exists of the persons who voted. They may or may not have been those reflected in the attendance register and they may or may not have been members of good standing. It is unknown how it occurred that only 546 persons voted if (as was maintained by one of the witnesses) 1012 arrived to take part in the ballot. There is also no way of ascertaining whether a majority of the employees of the respondent voted in favour of the strike. The names of only eleven of the employees (out of nearly fifty dismissed for their strike participation) are to be found in the attendance register. That the majority of the respondent's employees did not vote in favour of the strike was, in itself, fatal to its legality. The glaring irregularities in the ballot made

it impossible to say that a majority of employees who were union members in good standing had voted in favour of the strike.

[108] The requirement of a proper ballot was not under the Labour Relations Act 28 of 1956 ('the 1956 Act') simply a technicality. (*National Union of Metalworkers of SA & others v Jumbo Products CC* (1991) 12 ILJ 1048 (IC)) The requirements for a proper ballot before a strike might legally be called were laid down by the labour appeal court in *Sasol Industries (Pty) Ltd & another v SA Chemical Workers' Union* (1990) 11 ILJ 1010 (LAC), later reinforced by the decision of the same court in *Steel and Engineering Industries Federation of South Africa v National Union of Metalworkers of South Africa* (2) (1992) 13 ILJ 1422 (T).

The functionality of the strike

[109] It was the law under the old dispensation and is the law under the new, that participation in an illegal strike is not determinative of whether a striker's employment should be terminated. (See, for example, Le Roux & Van Niekerk, 'The South African Law of Unfair Dismissal' p 304 et seq.; The Labour Relations Act of 1995, 2nd ed. Du Toit *et al* p 419-420; Cf Code of Good Practice: Dismissal under Act 66 of 1995 item 6 ('the 1995 Act')) The

learned authors point out that participants in illegal strikes, provided these were functional, were frequently given protection against dismissal by the courts. It depended on whether the strike was functional to collective bargaining i.e.: whether it, despite its illegality, served to advance the cause of collective bargaining.

[110] In the present case, the strike was, in my view, totally dysfunctional. The subject of the strike was a demand by Saccawu that Spar stores enter into regional negotiations in a collective bargaining forum. The only connection between Spar retailers in the Gauteng region was their compulsory membership of the Spar Guild, an association meant to co-ordinate promotional activities at store level and to regulate the activities of Spar stores in certain limited respects. Saccawu, however, maintained that the Spar Guild was a collective bargaining forum through which regional bargaining could take place.

[111] The Guild had never been a collective bargaining forum. Its constitution did not permit it to engage in negotiations on conditions of service, something which each store was free to arrange itself. Although 140 Spar and Kwik Spar retailers belonged to the Guild in the Johannesburg area, only 61 were

affected by the regional strike. They were stores at which Saccawu had organised employees.

[112] The demand was not one which could have been realised by the sixty-one stores which were chosen as strike action targets acting in concert, let alone by the respondent on its own. Even regionally, the sixty-one stores, assuming them to have all capitulated to Saccawu's demands, could not have carried the day. The demand to create a regional bargaining forum, or to transform the Guild into a bargaining forum needed the consent of all 500 stores belonging to the guild. The respondent was therefore powerless to bring the strike of its employees to an end by acceding to Saccawu's demand.

[113] A strike in support of a demand which is unattainable (or wholly unreasonable?) is not one which is functional to collective bargaining. In *Barlows Manufacturing Company Ltd v Metal and Allied Workers' Union & Others* 1990 (2) SA 315 (W) at 322 D – H Goldstone J held that a strike did not fall within the definition in the Act unless the demand with which it intended to enforce compliance could reasonably be achieved. This may be putting the test somewhat high. It is not necessary to debate the question now. The situation which we have here is exactly that which confronted the

court in *SA Commercial Catering and Allied Workers' Union & others v Transkei Sun International Ltd t/a Wild Coast Sun Hotel, Casino and Country Club* (1993) 14 ILJ 867 (TkA) at 874 D – 875 G. The court held that the appellant's demand for centralised bargaining was unattainable. The respondent could not, whatever it did, create the necessary forum. I am of the view that we should be guided by this decision.

[114] The strike was dysfunctional for another reason. No warning of it had been given to the respondent. Savvides said that he learnt of the demand after the strike had started. This is probably due to the fact that there was, sporadic, communication with the Guild which was thought somehow to represent store owners.

[115] The strike was also dysfunctional for not having been peaceful. The evidence of Savvides was that the presence of the police was repeatedly required to prevent interference with customers as well as the intimidation of temporary workers and the disruption of supplies. Since it is common cause that the police were on the scene, it seems more probable that they were summoned by reason of the strikers' conduct than (as the appellants would suggest) that they were unnecessarily called in by Savvides. None of the appellants' witnesses could see what was happening behind the store where supplies were delivered.

[116] On Friday 11 November 1994 Saccawu notified the respondent that the strike would be called off on Monday 14 November. The move was prompted by an application to court (by one of the other targeted Spar stores in the region) casting doubt upon the lawfulness of the strike ballot. By Saturday afternoon Saccawu had, at the insistence of its members, decided to nevertheless persist with the strike. It sent a telefacsimile to the respondent announcing that 'the situation has changed' and that 'the workers would pursue every legitimate means to ensure that their demands are properly addressed.' It is evident that Saccawu had decided to run the risk of being found to have kept its members out on an illegal strike.

[117] Another opportunity to debate and reflect on the legality of the strike was offered to Saccawu when, on 14 November, the respondent's attorneys communicated to it their views in regard to the strike's legality and disclosed that the respondent intended seeking relief from the court. The letter was ignored. There was similarly no response to the rule *nisi* which had been granted pursuant to the application to court. Two of Saccawu's officials were on the strike scene shortly after the ultimatum and the accompanying court order had been distributed to strikers, but they failed, as they should have done, to advise their members of the declaration of illegality embodied in the

rule *nisi* and that they had been interdicted from participating in the strike. They made no effort to discuss the issue with the respondent.

[118] The strikers' conduct is mitigated by the fact that, according to Savvides, they abided by the terms of the interdict prohibiting picketing within a defined distance of the trading premises, but they did not, despite the interdict, stop striking. Even if the strikers felt disinclined to comply with the ultimatum, they should have obeyed the court order and immediately resumed their work.

[119] It is becoming distressingly obvious that court orders are, by employers and employees alike, not invariably treated with the respect they ought to command. It is a worrying tendency, one which can only be effectively combated by the courts' displaying a marked reluctance to condone non-compliance. Obedience to a court order is foundational to a state based on the rule of law. The courts should by a strict approach ensure that it remains that way. I do not perceive any good reason why the appellants should not be penalised for their non-compliance. They cannot plead ignorance. Their union was closely involved. As we have seen, a Saccawu official was on the scene that very morning, and although his testimony was that the strikers had already been dismissed when he arrived, that evidence, as I shall presently show, falls to be rejected. There is little, then, that can be said in favour of

exercising a discretion in favour of the appellants and I do not consider that they are, taking the above factors together, entitled to this court's assistance.

The ultimatum

[120] Next, Mr Maluleke relied on the alleged inadequacy of the ultimatum. The evidence for the respondent was that Savvides had at about a quarter past eight on 16 November 1994 distributed to the assembled strikers copies of the interim court order which had been granted the previous day together with an ultimatum to them to return to work by ten o'clock that morning. Savvides testified that he consulted with the strikers at about ten o'clock. They were not prepared to return to work. He then extended the ultimatum to eleven o'clock. When, at eleven o'clock, their attitude had not changed, he extended the ultimatum to the start of work the next morning. It is common cause that no strikers came to the shop the next morning.

[121] The respondent then prepared a letter dated 18 November 1994 in which it recorded that the employees had not complied with the ultimatum and that they had therefore been dismissed with effect from 17 November 1994. The appellants, however, contend that the respondent dismissed the strikers the morning of the ultimatum. Two union officials, Mdakane and Mothiba were, so it was asserted, called to the respondent's premises at about half past eight

on 16 November. When they arrived an hour later, they found that the strikers had already been dismissed.

[122] This version relies for its acceptance on an assumption that Savvides summoned the two union officials only to dismiss the strikers before they arrived (which would have been at half past ten, before the expiry of the original ultimatum) and then falsified the dismissal letter which recorded a dismissal effective from 17 November. Assuming that he had had second thoughts about the validity of the ultimatum issued on the sixteenth, Savvides could simply have delivered another. He had nothing to gain by being dishonest and, this being so, it is unlikely that he would have written a dismissal notice containing false information. It is noteworthy that the appellants alleged in their statement of case that the date on which the unfair dismissal of the applicants occurred was 17 November 1994. This allegation deals a serious blow to the acceptability of the appellants' version.

Administrative Law and Labour Law

[123] Mr Maluleke on behalf of the appellants strenuously argued that the respondent was not entitled to dismiss the strikers (including the appellants) without having given them a hearing. Since my views on this topic differ from those of Zondo AJP I shall have to deal with the divergence quite extensively.

[124] Procedural fairness is a dominant theme in both administrative and labour law. In the administrative law a decision-maker must give an affected person an opportunity of being heard if it can reasonably be expected of him or her to do so. If it is not unreasonable to do so, the decision may be taken without input from the person prejudicially affected. What a fair procedure would be, would depend on the circumstances. The only general principle that I can discern, in both administrative and labour law, is that a hearing should be accorded if it is in the circumstances fair to give one. Usually the circumstances are such that it is fair to give a hearing. It is only in this sense that there may be said to be an obligation on an employer: if he encounters circumstances where it is fair to do so, he must give a hearing.

[125] The uncertainty inherent in a notion as diffuse as fairness, prompted the legislature in the 1995 Act to lay down precepts and guidelines for procedural fairness which have, to a large degree, been distilled from the practice of the previous fifteen years. The 1995 Act requires a dismissal for misconduct, incapacity or operational requirements to be effected in accordance with a 'fair procedure' (s 188). The Code of Good Practice (schedule 8 item 4) says that to follow a fair procedure an employer should *normally* conduct an investigation to determine whether there are grounds for dismissal. Where it cannot reasonably be expected to conduct such an investigation, the employer need not do so.

[126] Although administrative law, being informed by the same spirit of equity, in appropriate circumstances puts similar obligations on a decision – maker, the employer's obligations were not under the 1956 Act derived from administrative law but from international law and practice and in particular standards proposed by the International Labour Organisation. Our courts, looking for guidance in that quarter, and looking at the way in which enlightened employers locally dealt with their employees, then, using the open-ended fair labour practice concept of the 1956 Act, on a case by case basis, worked out what could, in the South African context, be considered to be fair labour practices. It is these practices one should look at to determine whether an employer has followed a fair procedure, not the guidelines laid down by the courts for public authorities in other situations. (See Wallis, *Labour and Employment Law* Chapter 1 on the Sources of Employment Law)

[127] I do not consider that there is any assistance to be derived from a case like *Administrator, Natal & Another v Sibiya & Another* 1992 (4) SA 532 (A). (applied in *Minister of Water Affairs v Mangena & Others* (1993) 14 ILJ 1205 (A)) The fact that it was considered necessary for a public authority in the exercise of its public power to accord a hearing to employees who were dismissed following the termination of contracts terminable on notice, does not assist in determining whether strikers should or should not be given a

hearing before dismissal, and, more pertinently, whether the strikers in this case should have received a hearing prior to dismissal. These were both cases concerning temporary employees. Another such case was *Administrator, Transvaal and Others v Zenzile & Others* 1991 (1) SA 21 (A). There temporary workers had been dismissed in terms of contracts of service which provided that their services could be summarily terminated for misconduct. Had labour law principles applied, they would before dismissal have been entitled to a hearing on a charge of absenteeism. The fact that the appellate division found a way of coming to their aid by having recourse to the administrative law, is not of any assistance in deciding this case. *Mayekiso v Minister of Health and Welfare and others*(1988) 9 ILJ 227 (W), *Mokwoena & others v Administrator of the Transvaal* (1988) 9 ILJ 398 (W), *Mokopanele & Andere v Administrateur Oranje Vrystaat en Andere* 1989 (1) SA 434 (O), *Nkomo & Others v Administrator, Natal & Others* (1991) 12 ILJ 497 (A) are all cases from the public domain where it was reasonably well established, even before the important appellate division decisions in *Zenzile (supra)* and *Zondi & others & Administrator, Natal & Others* (1991) 12 ILJ 497 (A) that a public sector employer had to observe the *audi alteram partem* principle when taking any decision prejudicially affecting an employee including dismissal for participation in an illegal strike.

Strike dismissals distinguished

[128] There are two types of strike dismissal. The first, and most common, is where employees are out on strike; they are then given an ultimatum to return to work or face dismissal. There is a second, less common, type of strike dismissal where employees, of their own accord (not in response to an ultimatum) return to work and are then disciplined for having participated in an unlawful strike just as they would be if they had taken part in a work-stoppage or an illegal stay-away, or go-slow industrial action. (Cf *National Union of Metalworkers of SA & others v Lasher Tools (Pty) Ltd* (1994) 15 ILJ 169 (IC))

[129] The main distinguishing feature is that when employees are on the premises, they are, depending on whether or not the workplace is in an uproar, amenable to discipline. In this sort of situation the courts have, where it could reasonably have been expected of an employer to hold one, required a hearing before dismissal. (Cf *Maluti Transport Corporation Limited v Manufacturing, Retail, Transport and Allied Workers' Union & Others* [1999] 9 BLLR 887 (LAC)*; see also HL&H Mining Timber v Paper Printing Wood and Allied Workers' Union* (1993) 14 ILJ 250 (ARB) paras [30] & [50]). In the second type of case hearings have, generally speaking, been required. I have no quarrel with that. The only question is what fairness to both employer and employee demands. My disagreement with my brother Zondo concerns the first category of strike dismissal where an ultimatum is

the employer's only practical response and where, as I hope to show, it can seldom if ever be fair to hold a hearing, and our labour courts have never required it.

The decisions relied upon by Zondo AJP as evidence of a practice to afford a hearing

[130] *Black Allied Workers' Union & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) was a s 43 application for interim reinstatement of strikers who, the court found, had been over-hastily dismissed. The ultimatum had been too short. De Kock AM, in balancing the unfairness of the employer's conduct against that of the employees also found that the employer had acted unfairly in not holding a disciplinary enquiry when neither the behaviour nor the number of strikers precluded a hearing. It was only one of several factors he took into account in deciding on provisional reinstatement. *Black Allied Workers' Union & others v Edward Hotel* (1989) 10 ILJ 357 (IC) is a case about a strike dismissal. The court held that although the strike had been illegal, the employees should not have been dismissed. The dismissal was therefore substantively unfair. Although this should have been the end of the case, the court went on to state, *obiter*, that the one hour ultimatum given to the strikers had been too short and to express the further *obiter* view that individual strikers should have been given the opportunity of addressing the employer on whether dismissal was the appropriate sanction.

[131] The circumstances in *Shezi and others v Republic Press* (1989) 10 ILJ (IC) were exceptional. It was a case of selective dismissal: only those employees who had willingly participated in a strike were dismissed. As the court noted, the employer separated the employees into goats and sheep. Once a categorisation of this kind had become a criterion for dismissal, an enquiry to establish who belonged in which camp was clearly indicated. The case is no authority for the proposition that there is a general duty on an employer to hold an enquiry before a strike dismissal.

[132] *Black Electrical and Electronic Workers' Union & Others v MD Electrical* (1990) 11 ILJ 87 (IC) involved an illegal work stoppage in the form of a stay-away, not a strike. Absenteeism is a disciplinary offence. Enquiries into the employees' conduct were clearly indicated. None was held. No ultimatum had been given to get the employees back to work.

[133] *Lebona and Others v Trevenna* (1990) 11 ILJ 98 (IC) was also a case about a work stoppage. The court found that the work stoppage had in the circumstances not been an unfair labour practice. The dismissals were therefore unfair. It further opined that a disciplinary enquiry into the causes of the work stoppage should have been held. *Obiter* or not, the dictum is correct. *Matheus & others v Namibia Sugar Packers* (1993) 14 ILJ 1514 (IC) was a case about a stay-away in the face of an agreement by the employees

not to engage in political stay-aways. It was held that the agreement could not be construed as dispensing with the need to hold proper disciplinary enquiries. Absenteeism is a well-known disciplinary offence.*National Union of Mineworkers of South Africa & others v Lasher Tools (Pty) Ltd* (1994) 15 ILJ 169 (IC) is another case about a stay-away. Employees were dismissed following disciplinary enquiries. It was held that the employer had not approached the enquiries with an open mind, and that they had in any event been procedurally unfair.

[134] In *Food & Allied Workers' Union & others v Mnandi Meat Products Wholesalers CC* (1995) 16 ILJ 151 (IC) Grogan AM decided that a cessation of work, which he found to be a 'walkout' rather than a strike, had been provoked by the employer. He considered that fairness demanded 'the issuing of a clear ultimatum before resort was had to the drastic expedient of dismissal'. In the absence of an ultimatum, the employees should have been offered the opportunity to state their case. The decision is not authority for the proposition that both an enquiry and an ultimatum are necessary.

[135] Of the cases cited in the labour domain by Zondo AJP three dealt with strikes. They are *Bawu v Palm Beach Hotel* (supra), *Bawu v Edward Hotel* (supra), *Shezi v Republic Press* (supra). They are decisions by the same presiding member (De Koch AM) who opined in the first two *obiter* that

enquiries prior to dismissal in a situation where employees were out on strike would have been desirable. In *Shezi v Republic Press* the special circumstances cried out for a pre-dismissal investigation. In two later decisions the same member disapproved of enquiries in this type of situation: *Food & Allied Workers' Union v Willoton Oil and Cake Mills* (1990) 11 ILJ 131 (IC) at 134 F - H and 135 C – 136 D where he considered that no more than a fair ultimatum was required. He followed this up two years later with a decision to the same effect in *Paper Printing Wood & Allied Workers' Union & others v Tongaat Paper Co (Pty) Ltd* (1992) 13 ILJ 393 (IC) at 398 B – F.

Dismissals for illegally striking – industrial court

[136] Industrial court cases in the nineties have taken the view that it is (generally) fair to dismiss workers striking illegally upon non-compliance with an ultimatum: *Paper Printing Wood and Allied Workers' Union & others v Tongaat Paper Co (Pty) Ltd* (1992) 13 ILJ 393 (IC) (per De Koch M); *Msengi & Others v Lupo International Clothing and Sportswear (Pty) Ltd* [1994] 7 BLLR 94 (IC); *Fawu & others v Mnandi Meat Products and Wholesalers CC* [1994] 9 BLLR 7 (IC) at 16 E – F: '… this is a case in which fairness required the issuing of a clear ultimatum…', *Numsa v Rand Bright Steel* [1995] 6 BLLR 60 (IC) at 81 G – H; *Sacaawu & others v Waverley Superstore CC t/a Waverly Spar* [1996] 7 BLLR 916 (IC); *FGWU & others*

v Letabakop Farms (Pty) Ltd [1995] 6 BLLR 23 (IC); *Numsa & others v Datco Lighting (Pty) Ltd* [1995] 12 BLLR 42 (IC). *CWIU & others v Mend-a – Bath International* [1996] 6 BLLR 739 (IC) at 745 H- 746 A; *Metal & Allied Workers' Union & others v BTR Samcol – A division of BTR Dunlop Ltd* (1995) 16 ILJ 83 (IC) at 125 D – 126 B. In *National Union of Metalworkers of SA & others v Boart MSA* (1995) 16 ILJ 1098 (IC) the requirement of 'a fair warning that dismissal is contemplated…' (at 1107 E – F) was emphasised. A fair ultimatum was given. That was considered good enough.

Dismissals for illegally striking – labour appeal court

[137] As might be expected, the topic of strike dismissals also found its way into the labour appeal court. The first decision to which I draw attention is that in N*ational Union of Mineworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC). This case preceded that of *Allied Workers' Union & others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) in which it was said *obiter* that there might be merit in having a disciplinary enquiry prior to a strike dismissal. In the *Haggie Rand* decision (supra) Goldstein J at p 1028 G – 1029 A said this –

> 'I was pressed with the argument that the dismissals ought to have been preceded by disciplinary enquiries or hearings. There is no merit

in this argument. Management acted fairly; moreover in my judgment 'it could not reasonably have been expected…' of management to hold 'a hearing or enquiry'….If one postulates a hearing in the present circumstances one necessarily emasculates the ultimatum, for it would then have to read that workers are to return to work or be dismissed but subject to a disciplinary hearing. It must be remembered that the day-shift was engaging in a power struggle with management which management was entitled in fairness to combat – and the only effective weapon, given the flagrance of the conduct of the day shift, was the sword of dismissal. To expect management to emasculate the ultimatum by subjecting its threat of dismissal to a hearing is to demand of it to sheathe the sword and render it ineffective, or virtually so. An that is not fair. There is also something quite artificial and unacceptable in requiring an employer who is directly affected by the flagrant, unmistakable misbehaviour of an employee to conduct an enquiry himself into such misbehaviour after such employer has himself deemed it necessary to issue a dismissal ultimatum as a result thereof.'

[138] There are other labour appeal court decisions approving the dismissal of striking employees after (no more than) a fair ultimatum. One such decision

is *Plaschem (Pty) Ltd v Chemical Workers' Industrial Union* (1993) 14 ILJ 1000 (LAC) in which one finds the celebrated *dictum* about both parties to the industrial dispute having to allow themselves time to cool off 'so that the effect of anger on their decisions is eliminated or limited' (at 1000 H – I). Another, later, decision is that in *Numsa v SA Wire Company (Pty) Ltd* [1996] 3 BLLR 271 (LAC).

[139] This decision was followed by that of McCall J in *Majola & others v D&A Timbers (Pty) Ltd* [1996] 9 BLLR 1091 (LAC). The learned judge found it unnecessary to decide whether a hearing before dismissal for illegal strike action was required. There is nonetheless a valuable discussion of the rules governing hearings at pp. 1102 B to 1104 A which the same learned judge put into effect in *Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo* (1997) 18 ILJ 327 (LAC) at 339 E – H where it was held that whether a hearing would be fair depended on the circumstances. In *Zondi & Others v The President of the Industrial Court and another* [1997] 8 BLLR 984 (LAC) at 1001 H – 1002 D Myburgh JP rejected an argument that bus drivers dismissed for striking were entitled to individual hearings.

Dismissals for illegally striking – supreme court of appeal

[140] The appellate division had as long ago as 1994 in *Performing Arts Council of the Transvaal v Paper, Printing, Wood & Allied Workers' Union &*

Others 1994 (2) SA 204 (A) given its approval to the dismissal of strikers on an illegal strike following failure to comply with a fair ultimatum. Goldstone JA who delivered the judgment for the court did not suggest that any procedural step other than the giving of a fair ultimatum was required. He left open the question whether an ultimatum would under all conceivable circumstances be the appropriate response to an illegal strike.

[141] *National Union of Metalworkers of South Africa v GM Vincent Metal Sections (Pty) Ltd* 1999 (4) SA 304 (SCA) is the latest decision of the supreme court of appeal to hold that dismissal of strikers pursuant (only) to a proper ultimatum is fair (at 314 D -315 D).Reliance was placed on *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA) where a dismissal pursuant to an ultimatum was held to be fair (at 63 D – E).

Dismissals for unprocedural strikes – labour court

[142] The labour court has held in *Smcwu & others v Brano Industries (Pty) Ltd & others* [1999] 12 BLLR 1359 (LC) that item 6 of schedule B of the 1995 Act (which it held to be largely a codification of the pre- 1995 labour jurisprudence) did not oblige the employer to give strikers a hearing in addition to an ultimatum (1367 [60] – [61]). Shortly before, it had been held by the labour court in *Numsa & others v Malcomess Toyota (A division of*

Malbak Consumer Products (Pty) Ltd [1999] 9 BLLR 979 (LC) at 995 C – E that –

> '[119] In a strike situation, particularly an unprotected strike, where employees are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing just before the dismissal is imposed. Apart from the fact that it promises to be very impractical to have hearings during an unprotected strike about participation in the strike itself, a requirement for disciplinary hearings to be held prior to taking action during an unprotected strike would also mean that the employer's endeavours to bring an end to unprotected action is seriously hampered.
>
> [143] A requirement to have hearings after the dismissal had already taken place, would be, in my opinion, tantamount to the employer second guessing its own decision. Such a process could not serve in any meaningful way to resolve the issues at hand.'

Marapula & others v Consteen (Pty) Ltd [1999] 8 BLLR 829 (LC) at 841 B – F also held that the code of practice does not contemplate an enquiry. An ultimatum suffices. *SA Scooter & Transport Allied Workers' Union & other*

v Karras t/a Floraline (1999) 20 ILJ 2437 (LC) at 2449 E – G is to the same effect.

Dismissals for unprocedural strikes – labour appeal court

[144] This court has not adopted any different principle. In *Triple Anchor Motors (Pty) Ltd & another v Buthelezi & others* [1999] 7 BLLR 641 (LAC) the dismissal of striking employees on an ultimatum was approved. (655 F – 656 H) This was also the case in *Allround Tooling (Pty) Ltd v Numsa* [1998] 8 BLLR 847 (LAC) at 854 G *et seq*.

[145] On the facts in *National Union of Metalworkers of SA v Vetsak Co –operative Ltd & others* (1996) 17 ILJ 455 (A) the majority found that there was no duty on the respondent to afford each worker a separate hearing before dismissals were put into effect (at 468 F – G.) Collective action, it was held, might be met by a collective response. It is implicit in the judgment that the employees were entitled, but failed, to make representations in response to the ultimatum. That is no doubt why it was argued that *individual hearings should have been given.*

The writers

[146] Some writers on the topic of strike dismissals – and here I mean the dismissal of employees who are out on strike – have, as Zondo AJP has indicated,

favoured the view that hearings ought generally to be held. This does not, as MSM Brassey has acknowledged in an article in Employment Law 'Another Gulp for the Ulp' (Vol 10 Part 5) reflect the jurisprudence of the courts. He remarks that 'strike cases … are steadfastly treated as an exception to the rule.' Academic and other writings, however influential the views of the author might be, are not a source of our labour law. Moreover, I do not believe that any of these authors has investigated the purpose (or practicality) of a hearing in conjunction with an ultimatum in any depth. Nor do I think that the learned authors have paid sufficient regard to the fact that provision for consultation has always been there in the form of early involvement of the striking employees' union.

The supremacy of fairness

[147] The only general rule is that fairness in industrial relations should prevail. There is really no other rule. I agree, with respect, with the *dicta* in *Numsa v GM Vincent Metal Sections (Pty) Ltd* (supra) where Melunsky AJA said:

> '[18] The issue in this case, therefore, is whether the dismissal of the striking employees for failing to comply with the ultimatum was an unfair labour practice. To decide this issue it is necessary to have regard to what was fair in all the circumstances and to apply the concept of fairness in accordance with the rules and norms that have evolved in the field of labour jurisprudence.'

In my view the failure to look to fairness as the lodestar is behind the misguided attempts in cases like *National Union of Metalworkers v Elm Street Plastics (supra)* to introduce common law concepts like repudiation or abandonment or waiver into our labour law. They are unnecessary. If strikers are setting fire to their employer's offices, it is excused from any pre-dismissal procedure, not because the arsonists by their conduct evince an intention to repudiate their contracts of employment or have, by their conduct, waived or abandoned their right to be heard. The employer is excused because it would not be fair to expect him to invite representations before dismissal. It is not necessary and, indeed, undesirable, to look for solutions beyond the dictates of fairness to employer and employee. The labour appeal court in *National Union of Public Service Workers and others v Alberton Old Age Home* (1990) 11 ILJ 494 (LAC) approved the sentiments in *Elm Street Plastics* (supra) something which, in my respectful view, it should not have done. Fairness comes in different guises. What the courts – and latterly the legislature – have regarded as fair in a retrenchment dismissal, is not the same as that which has been and is regarded as fair in a misconduct dismissal. What is fair in a misconduct dismissal is not fair in an incapacity dismissal. A strike dismissal has its own rules predicated upon what is fair to employer and employee in that situation; and, as we have seen, strike

dismissals are required to conform to different norms based upon whether it is an *ex post facto* dismissal or a dismissal of strikers out on strike.

Fairness to the employer

[148] My point of departure in this discussion is that it is not fair to expect an employer to do anything which is pointless. It does not, as I understand the judgment of Zondo AJP, appear that usefulness of purpose is a criterion for inviting representations on the question of dismissal. He criticises *National Union of Metalworkers & others v Elm Street Plastics t/a ADV Plastics* (1989) 10 ILJ 328 (IC) for having held that an employer would be excused from inviting representations if to do so would be 'pointless' or 'useless'. I do not, with respect, find myself in agreement with this approach. The guiding principle under the 1956 Act and under the 1995 Act is fairness. The ultimate question is always what it would be fair to require an employer to do. If it would not be fair to require it to engage in a pointless exercise, then it cannot be penalised for not affording strikers a hearing, no matter how formal or informal. I am unable to fault the approach of cases like *Media Workers' Association & others v Perskor* (1989) 10 ILJ 441 (IC) at 455 D and *Food & Beverage Workers' Union & others v Hercules Cold Storage (Pty) Ltd* (1989) 10 ILJ 457 (IC) at 466 B – D that it was not necessary to hold a hearing because it would have served no purpose. An appeal from the last decision was dismissed (*Food & Beverage Workers' Union & others v*

Hercules Cold Storage (Pty) Ltd (1990) 11 ILJ 47(LAC)), the court of appeal finding that the employees had rejected offers to negotiate before implementation of the final ultimatum.

The purpose of an ultimatum

[149] Participation in a strike which does not comply with the provisions of Chapter VI of the 1995 Act is characterised as misconduct (Schedule 8 - Code of Good Practice item 6) The 1956 Act was silent about it, but under that regime participation in an illegal strike was judicially stigmatised as 'serious misconduct' (Cf *Numsa v SA Wire Company (Pty) Ltd* (supra) at 275 G – J). It was, and is, however, misconduct of a rather special kind. It was, and is, misconduct which can be purged. It can be purged by complying with an ultimatum by the employer to resume work. Upon compliance, the striker may no longer be dismissed. (*Workers' Union (in liquidation) & others v De Klerk NO & another* (1992) 13 ILJ 1123 (A) at 1128 G – H in which reliance was placed on *Administrator Orange Free State & Others v Makopanele and Another* 1990 (3) SA 780 (A) where it was held that a contracting party who has once approbated cannot thereafter reprobate (at 787 E – 788 H); See also *Numsa & others v Dita Products (Pty) Ltd* [1995] 7 BLLR 65 (IC)) It is hardly necessary to add that whether the employer is bound by an election would depend on precisely what, in terms of its ultimatum, it elected to do.

It may, for example, reserve the right to dismiss for misconduct other than the illegal striking.

[150] An ultimatum is, unlike a disciplinary enquiry, not directed at establishing the existence of an offence and then imposing a sanction. It is, in the first place, a device for getting strikers back to work. It presupposes the unlawfulness of the strike, otherwise it could not be given but it does not sanction the misconduct of the strikers. It is as much a means of avoiding a dismissal as a prerequisite to effecting one. One is tempted to say that strikers are put in *mora*. The point is that both under the 1956 regime and under the present one the question of dismissing a striker can only logically arise after non-compliance with an ultimatum.

Pre-ultimatum discussion

[151] Item 6(2) in the Code of Good Practice (schedule 8 to the 1995 Act) illustrates my central thesis that our labour law has in the strike situation settled on a different method of ensuring fairness. There is a form of hearing. It is provided by the requirement that discussions should be held with the union. The union has an opportunity to put the strikers' case. That, the legislature has said, and in my view wisely, is enough at least in all the usual situations. S 188(1)(b) provides that a dismissal is unfair if an employer fails

to prove that it was effected in accordance with a fair procedure. A 'fair procedure' will almost always involve listening to the employee's side of the argument; but that is not to say that involvement and discussion with the union should, in a continuing strike situation, be supplemented by another and discreet hearing of some kind or other. A fair procedure involves discussion with the union as the collective bargaining representative of the strikers on matters relevant to the collective action. Item 6(2) of schedule 8 provides that an employer should, prior to dismissal, do two things. It should 'at the earliest opportunity' contact a trade union official to discuss the course of action it intends to adopt. If it decides to dismiss, '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.' It was, also before the 1995 regime, the law that an employer faced by a strike should involve the union as soon as possible. It was decided that involving the union was good practice in *Black Allied Workers' Union and others v Asoka Hotel* (1989) 10 ILJ 167 (IC) at 179 B. The decision was followed in *Food and Allied Workers' Union & others v Willoton Oil & Cake Mills* (supra) at 135A-C. It is not clear to me why the employer's duty should go further that this or, under the 1956 Act, ever went further than this. If my learned colleague means to say that there was, in addition to the need to involve the union, a need to invite representations on the specific issue of dismissal as a sanction, I do not, with respect, agree. In

my view the good practice advocated by the 1995 code, was good practice also under the 1956 regime. Involvement with the union would inevitably, if that were a bone of contention, bring the legality of the strike to the fore. It was implicit in the 1956 Act that, to make the discussion worthwhile, the employer would have to debate resolution of the strike situation with the union. That requirement is now explicit in the 1995 Act. There would be no need to discuss it again before an ultimatum is issued. It is important not to encumber parties with formalities that have no potential to contribute to the resolution of Labour disputes.

The pointlessness of a pre-ultimatum hearing

[152] The only reason why my brother Zondo favours a pre-ultimatum hearing is that he envisages the possibility of the strikers making individual representations (an exercise which would have to be conducted if circumstances permitted) or their union (or representatives) making individualised representations on their behalf. I must confess that I am sceptical of the utility (and hence the fairness) of holding a pre-ultimatum hearing of this kind.

[153] What can or should strikers debate with their employer in a pre – ultimatum hearing? If, in making representations, they indicate that they will comply with any ultimatum which may be given, there is really not much left to

discuss. Any discussion on why they ought not to be dismissed if they fail to comply would be premature and, given that all or some of them might change their minds, speculative. They might attempt to persuade the employer that, despite the unlawfulness of the strike, they should not be dismissed if they ignore the ultimatum and continue with the strike. I do not believe that such an attempt could succeed. It is one thing for strikers to say, after the event, that, having regard to all the circumstances, their misconduct was not so serious that dismissal was the appropriate sanction. One thinks here of cases on the functionality of illegal strikes such as *Bawu v Edward Hotel* (supra). It is, however, in my view, quite another thing for strikers to say that although their strike is admittedly unlawful, they should be entitled to continue their misconduct without fear of dismissal. That would be intolerable. Persistent strike misconduct, that is to say, in defiance of an ultimatum, is not in this respect different from any other misconduct. An employee may successfully argue that one instance of insubordination should not have led to dismissal; but he could never argue that he might continue being insubordinate without being dismissed no matter what his employment record or his personal circumstances are.

[154] It was, I would imagine, because of the incongruities of a pre-ultimatum hearing that the argument in *Numsa v GM Vincent Metal Sections* (supra)

was that a hearing should have been given before any dismissal pursuant to an ultimatum. The court held that neither individual hearings nor a collective hearing would have had any point, and that the employer need therefore not have afforded such a hearing. I respectfully agree that this is the correct approach.

[156] A post-ultimatum hearing would not be of any greater use than a pre-ultimatum hearing. Those employees who complied with the ultimatum would be safe from dismissal. Only those employees who do not comply with the ultimatum (or the union on their behalf) would be interested in making representations. They would be able to urge the employer either to withdraw the ultimatum on account of the strike being lawful, if that was their contention, or, it is said, to urge that they should, by virtue of their excellent employment records or their family commitments or advanced age or their ignorance of the lawfulness of the strike or their unwillingness to participate in it, be permitted to continue striking unlawfully. This, as I have indicated, is unthinkable. But the principal objection to a post-ultimatum hearing is that it emasculates the ultimatum. It is made subject to a resolutive condition sounding something like this: 'You are to return to work. If you do, nothing further will happen to you. If you do not, and management finds that you have good reasons for continuing with your misconduct, nothing will happen to you either.'

Individual or individualised enquiry

[157] Individual disciplinary enquiries are seldom pointless because even though the commission of a disciplinary offence may be beyond doubt, '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 …' (per Hoexter JA quoting Etienne Mureinik in *Zenzile (supra)* at 37 B – C.) The approach that an employer should be excused from holding an enquiry which would supposedly not have made any difference to an employee's fate anyway has for this reason not been well received. However, in the case of collective dismissals the individual striker (or the union on his on her behalf) is not entitled to put up to the employer individually motivated reasons for wanting to escape dismissal. He or she is part of the collective and is bound by what the collective decides. If it were otherwise, an employer could, on the basis of individual representations, decide to retain those individual strikers with unblemished employment records and dismiss those with tarnished records who would most likely be those it did not particularly wish to keep. This would give rise to immense problems of selective dismissal. (See, for example, *Metal and Allied Workers' Union & others v Siemens Ltd* (Supra) at 554 J to 556 F) and have the labour unions in an uproar. Discussions with individual strikers on whether they ought to be dismissed would, moreover, severely undermine union solidarity and would, for that reason, not be fair to the union.

[158] If one postulates individually based representations by the strikers' union, the position is also untenable. Does the union argue for the dismissal of A and B but not, say, (because of their personal circumstances) for the dismissal of C and D? In particular, an investigation into the *bona fides* of the strikers would be completely misplaced. If *bona fide* belief in the lawfulness of a strike on the part of an individual striker were to be a defence, union members would escape dismissal provided only that an (unscrupulous) union had concealed the unlawfulness of the strike from them. Moreover, no employer (on whom the onus of proving a fair dismissal rests) could reasonably be expected to prove that an individual employee *knew* a strike to be unlawful. If an employer could not issue an ultimatum against a striker before having satisfied itself that it had persuaded the latter that the strike was unlawful, dismissal for illegally (or unprocedurally) striking (although it is misconduct) would be impossible. My learned colleague suggests (para [67]) that individual employees may avoid dismissal by explaining that they were unwilling participants in the strike. There would, in every strike, legal or illegal, almost certainly be reluctant participants: for example, those who voted against the strike but participate because they bow to the will of the majority. It would in my judgment be grossly unfair to require an employer to hold an enquiry into each striker's enthusiasm for the cause before being able to issue an ultimatum against those, and only those, found to be in

favour of the strike. Even if the union acts as representative, does it say to the employer ‘do not dismiss C or D: they voted against the strike’? The absurd result of this would be that the ‘willing’ strikers would be dismissed, but that those who make allegations of intimidation which the employer is unable to disprove may remain on strike unhindered.

The respondent’s involvement of the union

[159] Saccawu was involved from the beginning. The respondent’s attitude to the strike was clearly set out in a letter from its attorneys to Saccawu. It followed this up by an application to court to have the strike declared illegal and to interdict further participation in it by Saccawu and its members. It was an unmistakable invitation to Saccawu to defend its own position. Saccawu did nothing to oppose the rule. It did not even oppose confirmation of the rule after the strike ended. It was not expected of the respondent to do more. In a strike situation discussion (or attempted discussion) with a union acquits an employer of his duty to listen to the other side.

Denial of relief

[160] The four appellants took part in an illegal and dysfunctional strike. They were given a fair ultimatum to which they did not respond. In my view they were properly dismissed. The appeal should fail with costs.

J.H. CONRADIE
Judge of Appeal

Appearances

For the appellants	:	A union official
For the respondent	:	Adv. P. Jammy
Instructed by	:	Miller, Ackerman and Bronstein
Date of hearing	:	9 November 1999
Date of judgement	:	15 March 2000