

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

held in Johannesburg

**Case No: JA
78/99**

In the matter between:

DIANE D. KARRAS t/a FLORALINE

Appellant

and

**SOUTH AFRICAN SCOOTER AND TRANSPORT
ALLIED WORKERS UNION AND 26 OTHERS**

Respondents

JUDGEMENT

ZONDO JUDGE PRESIDENT

Introduction

- A. Application for the dismissal of the appeal, application for Condonation of the late delivery of : (I) the record of appeal, the power of attorney and the appellant's heads of argument.**

[1] Before us are an application brought by the respondents in this **“appeal”** for the dismissal of the appeal noted by the appellant, an application by the appellant for the condonation of its late delivery of the record of appeal, its power of attorney

and its heads of argument. The facts and matters relevant to the application for the dismissal of the appeal overlap with those relevant to the application for condonation. For that reason it is convenient to deal with the two applications simultaneously. In fact if the application for the dismissal of the appeal fails, the application for condonation for the late delivery of the record must succeed and vice versa.

[2] The matters relevant to the two applications are that:.

(a) rule 5(6) requires an appellant to deliver the record of appeal within 60 court days from the date when the Labour Court granted leave to appeal;

(b) in this matter the Labour Court granted the appellant leave to appeal on the 20th October 1999; this meant that the appellant had until the 18th January 2000 to deliver the record to the registrar of this court;

(c) as a matter of fact the appellant delivered the appeal record on the 14th March 2000; this means that the period by which the appellant was out of time with the delivery of the record is about eight weeks;

(d) in terms of rule 5(17), if an appellant fails to deliver an appeal record, he is deemed to have withdrawn the appeal unless he approaches the respondent for consent to an extension of time for the delivery thereof; should the

respondent not grant consent to such extension, the appellant may approach the Judge President and request him to extend the period within which the record may be delivered; in this case the appellant approached the respondents for their consent but they withheld their consent; the appellant did not approach the Judge President for an extension; in fact the appellant did not even launch an application for condonation of its failure to deliver the record within the time specified by the rules of this Court - which should include an application to reinstate the appeal - until the respondents had filed an application for the dismissal of the appeal;

(e) on the 15th November 1999 the appellant's attorneys sent a letter to the registrar and another one to Vic and Dup Transcription Enterprises CC, the company which recorded the proceedings in the trial in the court a quo; in the letter to Vic and Dup the appellant annexed a copy of the letter to the registrar; in the letter to the registrar, the attorneys for the appellant requested the registrar to **“allow Vic and Dup Transcribers to transcribe the record”** in this matter; in the letter to Vic and Dup, the appellant's attorneys said they were enclosing a letter addressed to the registrar **“requesting that the record of the hearing under case number J886/97 be made available in order to enable us to proceed with an appeal in respect of which an (sic) appeal has been granted.”** In the second and only other paragraph of the letter the appellants' attorneys said to Vic and Dup: **“We await your quotation as to the cost of the**

transcription and will forward the deposit to you immediately upon receipt of your quotation.”;

(f) On the 30th November 1999 Vic and Dup sent a letter to the appellant’s attorneys in response to their letter of the 15th November; in that letter Vic and Dup gave a quotation estimating the costs for the transcription (and, also, I assume, preparation,) of the record at +- R 18 000,00;

(g) On the 1st December 1999 - which was the day following upon the one on which the appellant’s attorneys had received Vic and Dup’s quotation, the appellant’s attorneys faxed a letter to the appellant requesting payment of the amount required by Vic and Dup for the preparation of the record;

(h) the appellant has stated in her affidavit that the letter of the 1st December 1999 from her attorneys did not reach her - she says she believes that the reason why it did not reach her is the work pressure she worked under at the time;

(I) the appellant says on the 10th December 1999 she went on holiday and did not return until about the 11th January 2000 - a period during which she was out of contact with her attorneys; in the meantime her attorneys were trying in vain to get hold of her in connection with the payment to Vic and Dup of the required deposit;

(j) when, after she had returned from her holiday, the appellant learnt of the need for the payment of the deposit, she immediately paid the deposit within 24 hours of her return;

(k) on the 11th January 2000 the appellant's attorneys sent a written request to the first respondent (which is the trade union which was recognised by the appellant at the time the dispute arose which is the subject of this appeal) asking for the respondents' consent to an extension of time for the delivery of the record; in that letter the attorneys said that as a result of the festive season, it was not going to be possible to deliver the record within the stipulated period; by way of a letter dated the 13th January the union refused to grant the extension and gave no reasons for its refusal;

(l) On the 19th January the appellant's attorneys sent the required cheque to Vic and Dup and requested that the preparation of the record be given urgent attention;

(m) during the period from the end of January 2000 and the date of the delivery of the record, some further correspondence was exchanged between the appellant and the respondents as well as between the appellants and Vic and Dup in relation to the record;

(n) as indicated earlier, the record was finally delivered

to the registrar on the 14th March 2000;

Period of delay and the explanation therefor

[4] The period of delay can be divided into two. The one is from soon after the granting of leave to appeal upto about the 12th January 2000 when the appellant provided her attorneys with the payment required by Vic and Dup. The respondents submitted that there was no justification for the appellant's attorneys' failure to have obtained the payment from their client sooner than they did. They made this submission because the appellant's attorneys' explanation for the delay during this period is that they had not obtained the necessary funds from the appellant and the appellant had not become aware of the requirement for this payment until around the 11th January. I am satisfied that the appellant has furnished a satisfactory explanation on why there was a delay upto the 11th or so of January 2000. They had requested a quotation from Vic and Dup reasonably early; within a day or two after Vic and Dup had furnished its quotation, the appellant's attorneys immediately sent a fax to the appellant requesting payment of the amount required by Vic and Dup. The appellant had gone on holiday without being aware of the fax from her attorneys; when she returned and learnt of the requirement, she promptly paid the required amount.

[5] The other period of the delay begins around the 12th

January 2000 when the appellant made funds available to her attorneys to enable the record to be prepared. It then goes upto the date of the delivery of the record. After the appellant's attorneys had been placed in funds by the appellant, they made payment to Vic and Dup within seven days. The relevant letter is dated the 19th January. After the appellant's attorneys had made this payment, the delay which occurred thereafter was no longer due to anything they did or they might have done after the 19th January. The whole matter of the record was at that stage in the hands of Vic and Dup. I cannot see why it took Vic and Dup two months or so to prepare the record in this matter. Nevertheless, such fault as there may be in this regard lies not with the appellant or her attorneys, but with Vic and Dup. In all the circumstances I consider that good cause has been shown and that the late delivery of the record should be condoned. That also means that the application for the dismissal of the appeal on account of the appellant's failure to deliver the record timeously should be dismissed.

[6] There was also the matter of the appellant's failure to deliver her heads of argument timeously. The heads of argument were late by a period of about 12 days. The explanation given by the appellant's attorneys for the failure to deliver the heads of argument timeously was not satisfactory. They said that they had learnt about the judgement of this Court in **Modise** (which is referred to later in this judgement) which, they understood, could be relevant to this appeal and

they wanted to obtain a copy thereof and to study it first before they could deliver the appellant's heads of argument. I find this explanation unsatisfactory. I cannot understand why it would have taken about 12 days to get a copy of that judgement or why obtaining a copy of that judgement could have caused a delay of 12 days. In any event the appellant could have delivered her heads of argument before studying that judgement and complied with the time limits and could have filed supplementary heads of argument later. However, there was no prejudice to the respondents as a result of the late delivery of the heads of argument because the matter was postponed on the 6th June 2000 to the 28th June 2000. Notwithstanding the unsatisfactory explanation for the appellant's delay in the delivery of her heads of argument, I am of the opinion that the failure should be condoned because no serious prejudice was caused to the respondents. In respect of the late delivery of the power of attorney by the appellant, there was also no serious prejudice caused to the respondents. That failure, too, should be condoned.

[7] In the premises I make an order in the following terms:-

(a) the respondents' application for the dismissal of the appeal is dismissed with no order as to costs.

(b) the appellants's application for condonation of the late delivery of the record of appeal is hereby condoned with no

order as to costs.

(c) the appeal is hereby reinstated and enrolled.

(d) the appellant's failure to deliver her heads of argument and the power of attorney timeously is hereby condoned.

I now turn to consider the merits of the appeal.

The Appeal

[8] This is an appeal against a judgment of the Labour Court in a dispute between the appellant and the respondents. The dispute was whether the dismissal of the second and further respondents by the appellant was fair. The Labour Court gave a judgment to the effect that the dismissal was unfair and awarded the second and further respondents compensation. No order on costs was made. With the leave of the court a quo, the appellant appeals to this court against the whole of that judgment. Although the respondents had also noted a cross-appeal, such cross-appeal was later withdrawn for reasons that are not relevant to this judgment. I set out below the facts of this appeal.

The facts

[9] The appellant, an adult woman, runs the business of importing, manufacturing, selling and distributing artificial silk flowers under the name Floraline. The first respondent is a

registered trade union. The second and further respondents are members of the first respondent and are former employees of the appellant who were dismissed from the appellant's employment on or about 1 September 1997.

[10] In July or so of 1997 the appellant and the first respondent concluded a recognition agreement in terms of which the appellant agreed to recognise the first respondent as the sole collective bargaining agent of its members. On the afternoon of the 6th August 1997 the second and further respondents walked out of their workplace before the normal knock-off time. This was at about 16h00. They alleged that they had been threatened by one Mr Nkuna that they would be killed. Apparently Mr Nkuna had a younger brother who had assumed duty as a temporary employee of the appellant that same morning. Mr Nkuna was apparently a taxi driver. According to the respondents, the source of the problem between themselves and Mr Nkuna was demanding that they should stop making all kinds of demands he understood them to be making on the appellant. Apparently he threatened that he and other taxi-drivers would return at 17h00 when the respondents would be knocking off and shoot them dead; hence the second and further respondents' departure from the workplace before knock-off time. They did not report for duty for the rest of August.

[11] After the second and further respondents had left their workplace, they proceeded to the union office. The union office

was apparently closed for the day when they arrived. They returned to the union office the following morning. They reported what had occurred to the general secretary of the union, a Mr Sibiya. As a result of the report made to Mr Sibiya by the second and further respondents, the alleged threat by Mr Nkuna was reported to the local police station. It would appear that the report to the police also included an allegation of a pointing of a firearm by Mr Nkuna. Mr Sibiya also wrote a letter to the applicant on the matter. In that letter, which was dated the 7th August 1997, Mr Sibiya stated in effect that the second and further respondents had left the premises of the appellant before knock-off time because they feared for their safety or lives after a threat had been made that at 17h00 taxi-drivers would come and shoot them. In part he said the following in that letter: **“We are unable to send them back to your premises until such time that police (sic) and the relevant authorities including CCMA are notified and they have deliberated on this matter.”** After accusing the appellant of long having wanted to find a way to rid itself of all union members, Mr Sibiya concluded his letter by suggesting that a meeting be held to find a **“speedy resolution which will guarantee the safety of our members.”**

[12] The appellant testified that on the afternoon of the 7th August Mr Sibiya came to the gate of its premises and caused **“havoc.”** She testified that she was called to the gate where she found Mr Sibiya. She testified that, when she heard that Mr

Sibiya was at the gate, she thought that Mr Sibiya was there in order to discuss with her the problem relating to the previous day. She testified that she welcomed what she thought was an opportunity to discuss the problem. However, when she came to the gate, said the appellant, Mr Sibiya threatened her, called her a criminal, thief and liar and said that she was going to be arrested and sent to jail. The appellant said Mr Sibiya was not open to discussion but demanded to see one of her employees called Anna. Anna refused to come to the gate and meet Mr Sibiya. The appellant had to call in the security before Mr Sibiya could leave. This evidence by the appellant stands uncontradicted because Mr Sibiya did not testify in the Court below.

[13] The appellant responded to the union's letter by way of a letter dated the 8th August. In that letter the appellant stated that she had no knowledge of the allegations contained in the union's letter. The appellant accused the union and the second and further respondents of threatening management. She sought an **"urgent written guarantee"** from the union and the second and further respondents **"concerning the safety of non-union members, management and staff including Miss D. Karras."** That letter was on the letterheads of a certain advocate M. Beän who appears to have acted as a legal adviser to the appellant on labour matters at the time.

[14] On the 11th August the appellant decided to supplement

its earlier reply to the union's letter of the 7th August. It did so by way of a letter dated 11th August. In that letter the appellant accused the union of distorting facts in its letter of the 7th August in order to **“keep your members away from work.”** The appellant said she had no objection to the police being present on its premises in order to ensure everyone's safety. The appellant then said in the letter: **“We wish to advise you that your members' absence is illegal and serious and you are requested to instruct them to return to the premises under the protection of the police.”** It also said: **“If [the second and further respondents] fail to return we intend to institute appropriate action.”** The appellant's letter of the 11th August did not succeed in getting the second and further respondents back at work. In the meantime the union had also referred the matter of the threats allegedly made to the second and further respondents to the Commission for Conciliation, Mediation and Arbitration (**“the CCMA”**).

[15] On or about the 19th August the appellant lodged an urgent application in the Labour Court for an interdict. The main complaint of the appellant in the urgent application was that the conduct of the second and further respondents constituted an unprotected strike. Accordingly it sought, among others, an order restraining them from continuing with their strike. The appellant's urgent application was heard by the Labour Court on the 29th August which was a Friday. A rule nisi

with an interim interdict was issued on that day. Mr Sibiya was present in court but the second and further respondents were not in court. The interim order interdicted the second and further respondents from continuing with the alleged unprotected strike. Also the interim order was to the effect that the second and further respondents should **“cease forth with their conduct”** of **“refusing to tender their services to the appellant.”**

[16] On the morning of Monday the 1st September 1997 the second and further respondents arrived at the gate of the appellant's premises just before their normal time for starting their work. The parties have divergent versions of what occurred between them that morning. The appellant's version is that the second and further respondents were rowdy, unruly and were toy-toying outside the gate with no intention to tender their services and that they were then dismissed. The second and further respondents' version is that they arrived at the gate pursuant to the order of court and were there to report for duty but that they were dismissed despite this. What is common cause is that the second and further respondents were informed that morning that they were dismissed. It is also common cause that the appellant did not comply with the *audi alteram partem* rule before taking the decision to dismiss them. In terms of the pre-trial minute agreed to between the parties, it is also common cause that the appellant did not issue any ultimatum before it decided to dismiss the second and further respondents. It also did not on the 1st September contact the

union in any way before it could dismiss the second and further respondents.

[17] The appellant's decision to dismiss was conveyed to the second and further respondents by way of identical letters of dismissal. Each letter told each one of the second and further respondents that: **"Your services are hereby terminated with immediate effect due to, amongst others, your participation in an illegal/unprotected strike."** It also referred each one of the second and further respondents to a notice which appears to have been attached to the letters marked: **"Notice for Floraline Employees."** The contents of that notice read thus:-

"1. On Friday 29 August 1997, the Labour Court ruled that you are engaged in an unprotected, and therefore illegal strike.

B. The Labour Court further awarded an order of costs against you (each of respondent 3 to 28) and the Union (SASTAWU) in respect of the application. The legal representatives of Floraline estimate that these aforesaid costs that will have to be paid by you and the Union, to amount to approximately R30-000-00.

C. The relationship between employer and employee is one of trust and confidence, and there is a duty on both to conduct themselves

in a manner not damaging this relationship.

- D. Your actions and replies in regard to the unprotected strike, and the replies by your Union, were placed before the Labour Court.**
- E. Neither you, nor the Union, denied these actions.**
- F. Your misconduct, poor work performance and unprotected and therefore illegal strike actions have therefore not been denied. The actions of your Union representative have also not been denied.**
- G. The Appellate Division of the High Court/Supreme Court of South Africa ruled in the case of CSIR v Fijen (1996) 17 ILJ 18 (A) that if employees make themselves guilty of conduct that is in breach of the trust and confidence relationship which should exist between employer and employee, the innocent party is entitled to cancel the employment contracts.**
- H. In view of the above, your contracts of employment have been cancelled with immediate effect.**

- I. Your dismissal notices will be handed to you outside the main gate of the premises of Floraline.**
- J. Kindly note also that further action may be brought against your representative in the High Court/Supreme Court of South Africa.**

WE REQUEST YOU TO RESPECT THE LAWS OF THIS COUNTRY AND TO LEAVE THE PREMISES OF FLORALINE AFTER YOU HAVE RECEIVED YOUR DISMISSAL NOTICES IN A PEACEFUL AND ORDERLY FASHION.”

[18] On the 23rd September the Labour Court discharged the rule nisi which it had issued on the 29th August. It held, per Landman J, that the appellant had failed to show that the conduct which the second and further respondents had engaged in constituted a strike. The appellant was ordered to pay the respondents' costs.

Consideration of the merits of the appeal

[19] It seems from the record that in the court a quo the appellant experienced some difficulty in stating clearly and unequivocally what the reason for the dismissal of the second and further respondents was. During argument before us its Counsel was called upon to inform the court what the reason

for the dismissal was. In response he submitted that the reason for dismissal was that the second and further respondents had repudiated their contracts of employment which had entitled the appellant to cancel their contracts of employment.

[20] During argument our attention was drawn by the respondents' representative to the fact that the letters of dismissal which informed the second and further respondents of their dismissal bore the date of the 31st August and not the 1st September which is the date one would have expected them to bear if the decision to dismiss was taken on the 1st September after the appellant concluded that the second and further respondents were not reporting for duty that morning. It was suggested on behalf of the respondents that the fact that the letters of dismissal bore the date of the 31st August demonstrated that the decision to dismiss was taken by the appellant on the 31st August and not on the 1st September as the appellant would have us believe. It was argued that, if this were the position, then the dismissal of the second and further respondents could not have had anything to do with any conduct that they may have engaged in on the morning of the 1st September.

[21] The explanation which the appellant gave under cross-examination for the fact that she had testified that the decision to dismiss was taken on the morning of the 1st September and

yet the letters of dismissal bore the date of the 31st August was: It was purely coincidental, purely that it was at the end of the date (sic) at the end of the month. The appellant rejected the suggestion that the decision to dismiss was taken before the 1st September. In continuing with her explanation she said: **“I actually had [the letters of dismissal] typed out on the morning of the 1st [September] and took it to the fax shop, the copy shop to make copies of it, I have a piece of paper, it was on 1 September that I made the copies out for their dismissal.”** She also said that she was nervous that day and **“it was impossible to control anything.”** That was the appellant’s evidence under cross-examination.

[22] In her evidence in chief the appellant’s explanation was:- **“Well all notices, it was purely coincidental, are given at the end of a month. It was purely coincidental. I had that printed on the morning of the 1st.”** In my view that explanation is not very convincing, more so because it is at variance with the explanation which the appellant’s original Counsel (Mr Elliott) had told the court the appellant would give in evidence. That was in an opening statement that was given at the beginning of the trial before Maserumule AJ who later recused himself because it appeared that the parties had a dispute about part of what had taken place before him when he dealt with the appellant’s urgent application on the 29th August.

[23] In his opening statement before Maserumule AJ, Mr Elliott is recorded as having informed the court that the appellant's evidence was going to be that the letter of dismissal and copies thereof had been prepared on the 31st August in anticipation of the second and further respondents returning on the 1st September but continuing with what the appellant thought would be the same unacceptable behaviour which they had allegedly indulged in in the past. It was said that this had been done in order to avoid a situation where the appellant would have to run around making copies in the morning if that eventuality materialised. If the appellant had given this explanation in her evidence, I would have found it more convincing than the one she gave. In the light of the view I take of this matter I do not consider it necessary to decide whether the decision to dismiss was taken on the 31st August or only on the 1st September.

[24] One of the grounds on which it was argued on behalf of the second and further respondents that their dismissal was unfair is that the appellant had failed to observe the *audi alteram partem* rule before it could dismiss the second and further respondents. Reliance was placed on the decision of this Court in **Modise and Others v Steve's Spar Balckheath** (2000) 21 ILJ 519 (LAC) in which this Court decided that, subject to certain recognised exceptions, an employer has an

obligation to observe the *audi alteram partem* rule when it contemplates the dismissal of strikers. It was said that the form which the observance of the *audi* rule would take in any particular case would depend on the circumstances of each case but, fundamentally, the strikers or their union representatives must be given an opportunity to be heard before a decision to dismiss can be taken. (see par 96 of the **Modise** judgment at 551).

[25] Although the **Modise** case dealt with a strike situation, this Court stated that the employer's obligation to observe the *audi* rule in the context of a strike dismissal was not a special obligation which arises simply because the employees whose dismissal is contemplated are on strike. This Court said that that obligation is the same obligation which an employer has when it contemplates that an employee's job may be in jeopardy because he may have made himself guilty of misconduct (see par 37 at 532 of **Modise**). There can be no basis for an approach that, if an employee faces the prospects of losing his job by reason of anything he has done wrong, he is entitled to be given an opportunity to state his case but where what he has done wrong is going on strike, he has no right to be given an opportunity to state his case. (see par 39 at 532 of **Modise's** case).

[26] I also think that the provisions of sec 188(1)(b) support the view that an employer is obliged to observe the *audi alteram partem* rule when it contemplates the dismissal of employees

irrespective of what the reason is for the contemplated dismissal; in other words even if the reason for dismissal is participation in a strike - including an unprotected strike. Sec 188(1)(b) provides that a dismissal that is not automatically unfair as contemplated in sec 187 is unfair if the employer fails to prove **“that the dismissal was in accordance with a fair procedure.”** There can be no basis for any suggestion that, when the reason for dismissal is conduct other than participation in a strike, the requirement of a fair procedure in sec 188(1)(b) means the observance of the *audi* rule but when the reason for participation in a strike, the same provisions mean something different, namely, no observance of the *audi* rule at all - in whatever form. I would rather say sec 188(1)(b) requires the observance of the *audi* rule but the form which that observance of the *audi* rule may take in a strike dismissal context need not be the same as in the case of a single employee who is facing the prospect of losing his job because of individual misconduct.

[27] If there be any doubt about how sec 188(1)(b) should be interpreted, then the provisions of sec 3(c) should be resorted to. Sec 3(c) provides that any person applying the Act must interpret its provisions **“in compliance with the public international law obligations of the Republic.”** In this regard the provisions of article 7 of the ILO Convention on Termination of Employment 158 of 1982 are relevant. (See them and the comment of this Court on them in par 30 of the **Modise** judgment at 530.). Finally sec 188(2) of the Act

provides that any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of the Act. Item 6 of the Code of Good Practice: Dismissal provides guidelines of what an employer should do when contemplating the dismissal of strikers. The first sentence of item 6(2) says: **“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.”** In **Modise** this Court held that that provision contemplates a form of the observance of the *audi* rule. (see paras 79-83 at 548 in **Modise’s** case). Conradie JA, who gave a dissenting judgement in **Modise**, also held item 6(2) of the Code to contemplate a form of a hearing (see p.568A of the **Modise** judgement).

[28] During the hearing of argument the question arose whether this case can be distinguished in any way from **Moside’s** case. The only basis which was advanced by the appellant’s Counsel to distinguish this case from **Modise** is that **Modise’s** case was governed by the old Act whereas this case is governed by the new Act. In my view this is not a material basis to distinguish the two cases. In this regard I think the provisions of sec 188(1)(b), which apply in this case, simply reflect a requirement which also existed under the dispensation of the old Act. Accordingly the contention that this case can be distinguished from **Modise** on that basis has no merit.

[29] Counsel for the appellant also submitted that it would be unfair to hold that the appellant should have observed the *audi* rule before it could dismiss the second and further respondents. In support of this submission Counsel relied on what, on the appellant's version, the second and further respondents had done, namely that:

- (a) they did not tender their services on the 1st September;

- (b) they had stayed away from work for over three weeks, and

- (c) they had blown whistles, danced and had been rowdy on the morning of the 1st September when they were supposed to tender their services.

In my view none of this constitutes justification for the appellant's failure to observe the *audi* rule before it could dismiss the second and further respondents.

[30] With regard to the finding that the appellant was obliged to have observed the audi rule, perhaps it may be asked what was there for the appellant to inquire into. This is an issue which this court considered in *Modise*. (See par 52 at p 536 of *Modise*). In any event the need for the observance of the audi rule in this case was even greater when regard is had to the fact that the appellant included as part of the reasons for the dismissal of the second and further respondents alleged conduct on their part which remains to this day remains

unspecified. It is not clear whether it is conduct of the 1st April only or also conduct prior to that upto the 6th August or also conduct before the 6th August.

[31] As to what the second and further respondents did on the 1st September, the appellant could have easily suspended them from duty, in so far as this may have been necessary, and told them to come back the following day to make representations why they should not be dismissed for whatever conduct (which would have had to be specified) which the appellant found unacceptable. If the second and further respondents did not make such representations, they could not complain that they had not been afforded an opportunity to be heard if they were thereafter dismissed. In any event what the second and further respondents did or did not do should have been the subject of the representations that the appellant should have invited unless what the second and further respondents did constituted a waiver of their right to be heard or unless what they did made it impractical or impossible for the appellant to observe the *audi* rule. In those circumstances I am of the view that the appellant was obliged to observe the *audi* rule before it could dismiss the second and further respondents. Its failure to do so rendered the dismissal unfair.

[32] In the minority judgement, which appears after this judgement, Nugent AJA states that the second and further respondents did not raise as part of their case the complaint

that the appellant had not observed the audi rule before it could dismiss them. For this he relies on the absence of any reference to such complaint in the respondents statement of claim as well as in the pre-trial minute. However, during the trial this issue was canvassed by the respondents' representative and the appellant was cross-examined on it. (See lines 3-17 p 206 vol 3 of the record.) The appellant did not object to the complaint being canvassed at trial. Indeed, during argument in the court a quo the respondent's representative included the point of the audi rule in his argument. (See line 26 p.289 - line 3 p. 291 vol 4 of the record.)

[33] On appeal, even prior to the respondents' delivering their heads of argument on the merits of the matter, it appears that the appellant already knew that the audi rule argument was part of the respondents' case. I say this because, in the appellant's application for the condonation of the late delivery of her heads of argument - which was filed with the registrar before the respondents' heads of argument on the merit could be prepared, the appellant stated that the delivery of her heads of argument was delayed because her legal team was trying to obtain a copy of a judgement handed down by this Court **"indicating that, in the event that employees are on an illegal strike, a dismissal can only follow after hearings were conducted irrespective of ultimatums being given."** She then says that, when a copy of the judgement was obtained, her legal team found that the judgement related to the dismissal of strikers under the previous dispensation and was therefore **"not directly applicable to our case."** This is the same argument which was advanced before us on behalf of the appellant. The judgement she refers to must be the judgement of this court in Modise. In the light of this there can

be no doubt that the complaint that the dismissal occurred without the respondents being afforded an opportunity to state their case was the respondents' case at the trial and on appeal.

[34] Nugent AJA also says in the minority judgement : **“In my view, it is reasonable to infer from [the second and further respondents’] conduct on 1 September, in the absence of explanation, that they were not genuinely intent upon returning to work but intended instead to persist in their earlier conduct.”** I am unable to see how an adverse inference can justifiably be drawn against the respondents for **“the absence of an explanation”** for their conduct on the 1st September when they were not afforded an opportunity to give such an explanation before they could be dismissed. In my view this demonstrates why such an opportunity should have been afforded to them. When workers whom an employer has dismissed without giving an opportunity to explain their conduct complain that their dismissal is unfair, it cannot, in my view, be open to such employer to say: But they gave no explanation for their conduct.

[35] Nugent AJA also states that he does not see what purpose it would have served to afford the respondents an opportunity to state their case before they could be dismissed. He says the respondents have not themselves suggested any purpose which could have been served by such an opportunity. I have two or so observations to make with regard to this. Firstly, it

was never the appellant's case that such an opportunity would not have served any purpose. Secondly, to say it would have served no purpose to afford the respondents such an opportunity constitutes speculation. That is the same speculation which occurs when the denial of an opportunity to be heard is sought to be justified on the basis that giving such an opportunity to a person would not have made any difference in the end. That is the so-called **"no difference rule."** The **"no difference"** approach has been rejected in our law. (See **Administrator, Transvaal & others v Zenzile & others 1991 (1) SA 21(A) at 37C-F**)

[36] The court a quo found that the appellant ought to have issued an ultimatum before it could have dismissed the second and further respondents. That an employer should issue an ultimatum before it can dismiss strikers has become a general requirement in our law although it is not an absolute requirement. It is not necessary to refer to the numerous cases which have dealt with this requirement in our law. Also item 6(2) of the Code of Good Practice: Dismissal reiterates the requirement of the issuing of an ultimatum before strikers can be dismissed. Such an ultimatum is required to give the strikers a sufficient opportunity to consider the matter and consequences of non-compliance with the ultimatum as well as to

seek advice before taking the decision to comply or not to comply with the ultimatum. The appellant did not give the second and further respondents anything of that kind. In my view the court a quo's finding in this regard cannot be faulted.

[37] After the court a quo had found the dismissal unfair, it

proceeded to consider the issue of what relief should be granted to the second and further respondents. It decided that it would be inappropriate to grant them reinstatement in the circumstances of this case. However, it awarded them compensation equivalent to 12 months' remuneration. Counsel for the appellant submitted that the court a quo ought to have declined to grant the second and further respondents any compensation. He submitted that a reading of the judgment of the court a quo reveals that the court a quo did not consider the issue whether or not the second and further respondents should be awarded any compensation in the first place. I do not think that there is merit in this submission. That the court a quo did not in its judgement specifically refer to the question whether or not any compensation should be awarded does not necessarily mean that the court did not consider that issue nor does it mean that the court a quo took the view that, if it did not grant reinstatement, it was bound to grant compensation.

[38] In any event it appears to me that, even if the court a quo had not considered the issue referred to in the paragraph immediately above this one, this Court would in all probability have had to consider that issue itself rather than refer it back to the court a quo-and therefore delay finality in the matter-and if this Court had to consider the issue itself, in my view there would not have been sufficient grounds to deny the second and further respondents compensation altogether. The likelihood is that this Court would have exercised its discretion in favour of awarding compensation to the second and further respondents. If it awarded compensation, I do not think that this Court would have awarded a lesser amount of compensation than the amount awarded by the court a quo.

[39] In the light of all the above I would not interfere with the judgment of the court a quo. With regard to costs, the respondents were not represented by attorneys. Accordingly it appears to me that there is no warrant for any order of costs. In the premises the appeal is dismissed. No order as to costs is made.

R. M. M. ZONDO
Judge President

I agree

C.R NICHOLSON
Judge of Appeal

NUGENT AJA:

[40] I have had the privilege of reading in draft form the judgment of the Judge President. I agree with his conclusions relating to the procedural issues, but I am unable to agree with his conclusions relating to the merits of the appeal, for the reasons which follow.

[41] In my view, the events that occurred on 1 September 1997 should not to be viewed in isolation, but must be seen in the context of the relationship which existed between the appellant and the respondents at that time.

[42] In about February 1997 the South African Scooter and Transport Allied Workers Union, represented by a certain Mr Sibiya, sought recognition from the appellant as the bargaining agent of the individual respondents (whom I will refer to hereafter as “the respondents”). The evidence does not disclose the nature of the initial discussions (if any) that took place, but I think it is clear that after the initial approach there was no further direct contact between Mr Sibiya and the appellant.

[43] The appellant was thereafter subjected to repeated harassment and disruption of her business. By 1 July 1997 Mr Sibiya had referred alleged disputes to the Commission for Conciliation, Mediation and Arbitration on three occasions, without once having raised or discussed any of the alleged grievances with the appellant. On each occasion the dispute was said to relate to a number of alleged grievances, most of which were framed in broad and unspecific terms. Simultaneously, according to the appellant, the respondents embarked upon a course of abusing and threatening her and members of the office staff, and refusing to accept instructions. The appellant said that various of the respondents regularly threatened her and members of her staff with physical harm, and it became common for the respondent to disrupt the orderly conduct of the business by singing, toy-toying, blowing whistles, and jeering at her. Warnings that were issued by the appellant from time to time in consequence thereof in due course constituted the basis of more grievances that were referred to the Commission. The appellant’s evidence on that issue was largely unchallenged.

[44] On 7 July 1997 the appellant signed a written recognition agreement that had been submitted to her by the union. On 31 July 1997 she attended a meeting at the offices of the Commission, which had been called to consider the various disputes which by then had been referred to it by Mr Sibiya. At that meeting the appellant and Mr Sibiya agreed to meet again on 12 August 1997 to discuss the alleged

grievances amongst themselves before calling upon the Commission to intervene.

[45] Shortly thereafter, on 6 August 1997, an incident occurred at the appellant's premises, that is alleged to have constituted the basis for the respondents' refusal to work thereafter. It is necessary to examine the evidence in relation to that event in some detail, because in my view its significance to the respondents' later conduct has been materially exaggerated.

[46] It is common cause that one of the respondents, Mr Evidence Mfamana, was having difficulty coping with his work, and required assistance. At that time the appellant employed a certain Ms. Evelyn Moatshe in domestic service. Ms Moatshe's boyfriend was a certain Mr Wilson Nkuna, who was a taxi-driver, and he had a younger brother, Mr Daniel Nkuna. The appellant decided to employ Mr Daniel Nkuna in her business temporarily, in order to assist Mr Mfamana.

[47] On the morning of 6 August 1997 Mr Daniel Nkuna arrived at the appellant's premises to commence work. It is not disputed that while the appellant was introducing him to the staff in the office, one of the respondents, Ms. Johanna Mataboga, entered the office and told Mr Nkuna that if he worked for the appellant, he would be assaulted by the other employees. The appellant reprimanded Ms Mataboga for issuing the threat, but she merely repeated it. That notwithstanding, Mr Nkuna commenced work assisting Mr Mfamana.

[48] Shortly after the lunch break on that day, Mr Wilson Nkuna arrived at the premises in his taxi. It is common cause that he had a licensed firearm at his side, which he habitually carried. The only direct evidence of what then occurred was that of Mr Mfamana. Mr Mfanana said that when Mr Nkuna arrived at the gate in his taxi, he (Mr Mfamana) opened the gate to admit him. He said that Mr. Nkuna drove onto the premises, alighted from the taxi, and approached him, whereupon a verbal interchange occurred. He said that Mr Nkuna asked if Mr Mfamana knew him, to which Mr Mfamana replied in the negative. Mr Nkuna insisted that he should be acknowledged by Mr. Mfamana, and then the following occurred:

"He forced that I know him and by his right hand touched his gun. I was frightened but I informed him that I don't know him. He told me that I must tell all the women who are working there to leave all they're in need of from their employer and they are going to collect other taxis from West (street) at about five they will be there. As I can see that the yard is surrounded by an electric fence we won't be able to escape."

[49] That is the full extent of Mr. Mfamana's evidence of what was said. Mr Nkuna then asked where the appellant was, and was directed to her office. The appellant was in her office with a customer when Mr Nkuna arrived. He told her that he had come to see his brother, and then asked if he could look around the showroom as he had never been there before, which he then did. The appellant walked to the gate

with her customer, passing Mr Mfanana en route, and then returned to her office. At the office she again met up with Mr Nkuna, who said that he was leaving, but would return to fetch his brother later that afternoon, and he then left. According to Mr Mfanana, the appellant accompanied Mr Nkuna to the gate, but whether that is so is not material.

[50] Shortly after Mr Nkuna left, there was a commotion amongst the respondents. Upon making enquiry, the appellant was told that Mr Mfanana had reported to the respondents that Mr Nkuna had threatened to return to the premises at closing time that day, with other taxi-drivers, in order to harm the respondents. The respondents turned their fury upon Mr Daniel Nkuna, who was at that time in the offices, and the appellant locked him into an office to prevent the respondents from having access to him. Gradually the respondents left the premises, and went to the offices of the union. The union office was by then closed, and they dispersed. Those of the respondents who lived on the appellant's premises returned at about 17h00.

[51] At about 18h00 Mr Wilson Nkuna returned to the premises to fetch his brother. The appellant confronted him with the allegations that had been made, but he denied that he had issued any threats. She asked him to explain this to those of the respondents who were on the premises and he went to do so but they declined to listen to him, and Mr Nkuna and his brother left the premises.

[52] The following morning none of the respondents reported for work, but they all went to the offices of the union instead. In the course of the morning the appellant received a telefax from Mr Sibiya in the following terms:

“DEATH THREATS AGAINST OUR MEMBERS BY YOUR EVIL FORCES

It has been brought to our immediate attention that on 06 August at about 15h00 a man wielding or branding a firearm entered your premises accompanied by your maid Evelyn and threatened to shoot all union members for having given you personal problems. This man did this in your presence and stated in your presence and that of the affected employees that he and the taxi owners and drivers from West street branch will come at 17h00 (knocking off period) to do so.

As a result of these threats our members left your premises at about 16h00 before the arrival of the taxi people. The taxi they were using was identified by some of them and your maid left with the taxi. We are unable to send them back to your premises until such time that police and the relevant authorities including CCMA are notified and they have deliberated on the matter.

It has been your intention at all times to rid your company of these unioned employees. This is not the way to do it. We await your urgent written guarantee and suggest an urgent meeting to be held at CCMA offices or alternative venue to discuss same and to find a speedy resolution which will guarantee the safety of our members, whom are all women. We await to hear from you soon, by fax.”

[53] At the suggestion of Mr Sibiya, Mr Mfanana also reported the incident to the police that morning, and made a statement. After relating how Mr Nkuna had

insisted that his identity should be acknowledged, the material part of the statement which he made reads as follows:

“He (Mr Nkuna) proceeded talking about demands which we are busy at work negotiating with our employer, that we workers we must stop demanding from our employers saying all those words having the firearm in his hands, as I felt that he was threatening us with fire-arm, saying that if we go on about our demand at work, he will be back and kill us all.”

[54] Making allowance for what might have been poor translation of the evidence given by Mr Mfamana, and of the information he provided to the police, there are material differences between these three accounts of the incident. Some of facts alleged in the letter written by Mr Sibiya were palpably untrue. Not only did Ms Evelyn Moatshe say that she was not present, but Mr Mfamana acknowledged as much in cross-examination. Furthermore, on his own evidence the alleged threats were not made in the presence of the appellant. Indeed, there is no evidence to suggest that the appellant had any connection with the alleged conduct of Mr Nkuna. Moreover, the statement made by Mr Mfamana to the police does not support the allegation that Mr Nkuna threatened to return with others at 17h00 that afternoon. Indeed, it is most unlikely that the respondents had any genuine belief that he might do so, for some of them returned to the premises at about that time with no apparent concern, and nor did they exhibit any concern when Mr Nkuna arrived at the premises later that day.

[55] On the day following the incident, the appellant was talking to one of the employees who lived on the premises, a certain Ms Anna Mlambo, who was apparently suffering from a psychological condition, when she heard a noise emanating from the gate. She went to investigate, and found Mr Sibiya at the gate. Anticipating that he had come to discuss the matter with her, she greeted him, to which Mr Sibiya responded by shouting at her that she was a criminal and he would see to it that she was imprisoned, and he demanded to see Ms Mlambo. Ms Mlambo refused to see Mr Sibiya. It was only after the appellant had summoned security officers that Mr Sibiya departed.

[56] On the following day the appellant's legal representative responded to Mr Sibiya's earlier letter, refuting the allegations that had been made. On the same day Mr Sibiya sent a further telefax to the appellant, in which the following was said:

“As we have stated on the 7 August 1997 our members are unable to set their feet inside and/or near the parameters of the company premises for fear of the alleged taxi-operators invited by Miss Diane Karras and her maid Evelyn.

We have suggested in the meantime they should gather in our offices until such time that

your organisation brings about a speedy resolution which will enable them to resume their normal duties without fear.”

[57] In my view the grounds which were advanced for the failure to return to work were quite disingenuous, and there were no proper ground for refusing to return to work. I have already pointed out that the respondents who resided on the premises returned shortly after the incident occurred, and showed no apparent concern when Mr Nkuna himself returned to the premises. Furthermore, it is clear from his letters that Mr Sibiya exaggerated the incident, and in my view it is probable that he did so in order to provide grounds for what followed. The respondents refused to return to work that day and for some three weeks thereafter. Instead they gathered at the union offices each day, and Mr Sibiya appears to have gone about his other business. Apart from referring the matter to the Commission on 11 August 1997, Mr Sibiya made no further attempt to resolve the matter. Why he acted as he did has been left entirely unexplained, for Mr Sibiya did not give evidence.

[58] The appellant’s legal representative wrote to Mr Sibiya on 11 August 1997, requesting him to advise the respondents to return to work under the protection of the police, but the letter elicited no response. It will be recalled that the appellant and Mr Sibiya had agreed to meet on 12 August 1997 in order to discuss the matters that had been the subject of the earlier referrals to the commission. On 11 August 1997 Mr Sibiya wrote to the appellant’s legal representative, advising that he would be “committed at the industrial court on another matter” on that day, and accordingly the meeting did not take place.

[59] On 19 August 1997 the appellant launched an urgent application to the Labour Court in an attempt to get the respondents to return to work. The application came before Maseremule AJ on Friday 29 August 1997. Although the relief that was sought in the notice of motion was sweeping, to say the least, the appellant appears to have moved for relief in more confined terms at the hearing. Shortly before the lunch adjournment, the learned judge granted an interim order in the following terms:

“1. Declaring the conduct of the (respondents) in refusing to tender their services to the applicant to constitute unprotected strike action for non-compliance with section 64 of the Labour Relations Act 66 of 1995.

2. Directing the (respondents) to cease forthwith with the conduct referred to in 1 above.”

[60] The appellant returned to her premises, expecting that the respondents would return to work that afternoon. The respondents, in the meantime, had gathered at the offices of the union, where the order that had been made by the Labour Court was explained to them by Mr Sibiya. According to Mr Mfamana, by the time they had completed discussing the matter, it was too late to return to work.

[61] What occurred on Monday 1 September is in dispute. The appellant said that she arrived at her premises at about 08h10. The usual working day commenced at 08h30. She said that towards 08h30 the respondents arrived outside the premises, where they gathered in an unruly group, shouting, toy-toying and blowing whistles. She said that she went to the gate and repeatedly pleaded with them to desist from their conduct and return to work in an orderly manner, to which they responded by blowing whistles and jeering at her. She said that she was not willing to admit them to the premises in those circumstances, bearing in mind the disruption they had caused in the past. After pleading with the respondents repeatedly, all to no avail, she said that she returned to her office where she telephoned her legal representative and reported what had occurred. Her legal representative advised her to appeal to the respondents again, and if they persisted she was entitled to dismiss them. She said that she returned to the respondents and again appealed to them to , but they responded as before. She then summoned the police and her security company, and when they arrived, the security officer read and translated a notice to the respondents (the content of which appears from the main judgment) and then handed standard-form notices of dismissal to each of them.

[62] It is clear from the content of the notice that was read to the respondents that it was drafted with legal assistance, and it is quite probable that the appellant’s legal representative also drafted the form of the notices of dismissal. Bearing in mind that the appellant’s legal representative was not

present on the morning in question, it follows that the documents must have been drafted some time earlier, but I do not think that is necessarily significant. Matters had been brought to a head by the granting of the order, and in my view it would not have been untoward for the appellant to have made preparations to dismiss the respondents if they persisted in their refusal to return to work on Monday morning, bearing in mind that they had not returned to work immediately after the order was made, nor had they given any indication of what they intended doing the following week. There was some suggestion in the course of cross examination that the appellant had decided on the week-end to dismiss the respondents, irrespective of whether they were willing to return to work, which the appellant denied. In my view it is improbable that she did make such a decision, for reasons which I will deal with presently. Before doing so, there is one further aspect of her evidence that I should deal with briefly.

[63] The Judge President has pointed out that the appellant said that the notice of dismissal was typed on the morning of 1 September and then copied at a nearby shop, and she provided an explanation for it bearing the date of the previous day. That evidence is said to be in variance with what was said by her previous counsel at the commencement of an earlier hearing of this matter which was subsequently aborted. I do not think that is necessarily so. The appellant's counsel said on the occasion that because the respondent's conduct was anticipated, "the relevant notices were prepared" and dated the previous day, but it is clear that he was referring to what he called "master copies" (in what form was not stipulated) of the two notices. I do not think that is inconsistent with the appellant's evidence, which was no more than that the notice of dismissal in the form in which it was given to the respondents was typed and copied on 1 September, and nor, in my view, is it inconsistent with her evidence as to the reason for choosing the date which was placed on the document. I have already indicated that it is indeed probable that at least a draft form of the notices was prepared before the morning of 1 September, which is what her former counsel was clearly referring to, but that is not the issue

upon which the appellant was being questioned. I would in any event be most hesitant to disbelieve her evidence on this basis alone, bearing in mind that the supposed conflict was not canvassed in the evidence.

[64] Mr Mfamana denied the appellant's version of what occurred. He said that he and other employees arrived at the premises at about 08h10, at which time the police and security officer were already present. He said that at about 08h25 they went to the gate, intending to work, but they were stopped at the gate and handed notices of dismissal. He denied that any rowdiness took place before that.

[65] Although the appellant's evidence of what occurred on that morning was not challenged in cross examination, I have not taken that into account in assessing the evidence, bearing in mind that the respondent's case was not conducted by a legal practitioner.

[66] The learned judge in the court a quo held that the respondents had indeed arrived at work singing and toy-toying as alleged by the appellant, and in my view that is indeed probable. If the respondents had arrived for work in the normal course, as alleged by Mr Mfamana, it is improbable that they would not immediately have proceeded to the gate for that purpose. What they were doing from 08h10 to 08h25 has been left unexplained. Furthermore, his evidence would suggest that the appellant had indeed decided to dismiss the respondents when they arrived that morning, irrespective of whether they were genuinely willing to return to work. In my view it is also improbable that the appellant would have gone to the trouble of launching court proceedings that were clearly aimed at getting the respondents to return to work, only to dismiss them when that objective had been achieved. No reason was suggested to the appellant for why she should have done so. Furthermore, it was not disputed that she telephoned her legal representative in the course of the morning in order to obtain advice, which is inconsistent with such a decision already having been made.

[67] I might add that the learned judge also found it probable that the police and the security officer were already present when the respondents arrived. The only basis for that finding was that it would have been consistent with the state of the relationship between the parties at that time for the appellant to have summoned them before the respondents arrived. In my view that does not support the contention that it probably occurred, but I do not think that issue is really material.

[68] Accepting, as he did, the evidence of the appellant as to the manner in which the respondents arrived at the premises that morning, the learned judge nevertheless held that there was no justification for dismissing them. I think it would be helpful to set out his reasoning in full:

"In casu the fact of the matter is that the individual applicants engaged in conduct which prompted the Respondent to dismiss them. It therefore remains to be determined whether the Respondent was justified in dismissing the individual applicants. The court has already

stated that there was no justification for the individual applicants to stay away from work on the basis of the alleged threat issued to Mfamana especially after 11 August 1997.

Despite the lack of justification for the withdrawal of labour from 6 August 1997 the respondent elected to sit it out until it approached the court on 29 August 1997 for an urgent interdict. Having gone that route the Respondent could only claim justification for dismissing the individual applicants if they did not comply with the interim interdict. Whilst it is correct that the individual applicants did not return to work in the afternoon of 29 August 1997 when the interim interdict was granted there is no evidence of any communication between the parties that afternoon.

The fact of the matter is that the individual applicants showed up at the Respondent's premises on 1 September 1997 after an absence of three weeks. There is no dispute that the only reason they turned up was because of the interim interdict in particular clause 1.3 thereof ordering them to cease their conduct of refusing to tender their services. As already stated, the court accepts the testimony by Karras that they did not arrive quietly. According to Karras it is this rowdy and unruly behaviour of the individual applicants that eventually prompted her to dismiss them.

Karras testified that she did not allow the individual applicants to enter her premises while they were behaving in an unruly and rowdy fashion. The fact that employees sing, toyi-toyi, shout and blow whistles, in itself, does not lend justification to their dismissal. This conduct if accompanied by criminal conduct such as intimidation and violence could lend justification to a decision to dismiss. No evidence was led in this court that the so-called unruly and rowdy conduct of the employees was accompanied by criminal conduct.

Unruly and rowdy conduct could conceivable also justify a decision to dismiss if it takes place inside the premises of the employer. In this case it is common cause that the singing, toyi-toying and whistle blowing took place outside the premises of the respondent. The court can therefore find no substantive justification for the dismissal of the individual applicants based on their collective absence and conduct on 1 September 1997. After all section 17 of the Bill of rights in the Constitution of the Republic of South Africa Act No. 108 of 1996 guarantees the right to assemble and demonstrate. “

[69] Insofar as the learned judge held that the respondents were dismissed merely because they were unruly and rowdy, in my view he misconstrued the appellant's evidence. In my view, it is clear from the appellant's evidence that the respondents

were dismissed, not for their rowdiness per se, but because the appellant inferred from their conduct that they had no genuine intention of resuming their obligations, but intended instead to persist in ignoring her instructions and disrupting the workplace as they had done before. The Judge President is of the view that the appellant had difficulty in explaining why she had dismissed them, but I do not agree. The only apparent difficulty she had was in providing an answer to questions which required her to choose from two possible explanations for the dismissal which were put to her when, in truth, the explanation was neither. The reason given by the appellant for the dismissal, consistently and repeatedly, was that she concluded from the respondents' conduct that they had no intention of fulfilling their obligations, albeit that they had presented themselves at work.

[70] In my view, that was indeed a proper ground for dismissal. The fundamental obligation of employees in the contract of employment is to properly undertake their work, which entails, at least, accepting reasonable instructions and not disrupting the workplace. For some five months the respondents repeatedly breached that obligation, and thereafter for three weeks they abandoned it completely. In my view it is reasonable to infer from their conduct on 1 September, in the absence of explanation, that they were not genuinely intent upon returning to work, but intended instead to persist in their earlier conduct. I do not think the appellant was required to allow them on the premises for that purpose, and in my view, their persistence in refusing to properly perform their obligations entitled the appellant to dismiss them. If the respondents indeed had genuine grievances, there were means available for them to seek redress, but in the meantime their obligations did not cease. The machinery provided by the Labour Relations Act 1998 was clearly introduced to provide a means to redress grievances without disruption at the workplace. If employees choose instead to embark upon disruption, as the respondents did in the present case, in my view they ought not to expect that the court will protect them. To do so would merely undermine the objectives of the new industrial relations dispensation.

[71] The court a quo also held that the dismissal were procedurally unfair, in that the respondents were not given an ultimatum before they were dismissed. No doubt it is generally sound practice, if employees refuse to carry out their obligations, to issue a clear ultimatum before resorting to dismissal, but that ought not to be seen as an arbitrary hurdle over which an employer must necessarily leap. The purpose of an ultimatum is to avoid precipitous decisions, which a little circumspection might avoid. As pointed out in *Performing Arts Council of the Transvaal v Paper Printing Wood & Allied Workers' Union* 1994 (2) SA 204 (A) at

216E-F:

“... whether an illegal strike may fairly be met with an immediate dismissal or whether fairness calls for an ultimatum or other appropriate action short of dismissal is an issue which can only be determined on the facts of each case. An illegal strike constitutes serious and unacceptable misconduct by an employee. The present enquiry is whether, on the facts of this case, it would have been unfair to dismiss the employees without giving them a reasonable ultimatum - an opportunity to calm down and reflect upon the serious consequences for them of continuing to act in an illegal manner in breach of their obligations to their employer.”

[72] What was in issue in that case was an illegal strike, but in my view the observations are equally applicable to a refusal to work which does not constitute a strike as defined in the Act, for it is the refusal to work that gives rise to the right to dismiss, not whether the employees' conduct constitutes a strike.

[73] In the present case the respondents had ample time to reflect upon the course which they decided to embark upon, and to take advice. For some three weeks they had refused to work at all, and had gathered at the union's office, where they were in a position to make a considered decision as to how they would proceed. Thereafter they discussed the implications of the Labour Court's order, in the presence of their chosen representative, and furthermore had the week-end during which to reflect. The inference is inescapable that their conduct on Monday morning was not spontaneous, but reflected a course they had deliberately chosen to take. I do not think that further opportunity for reflection was called for in the circumstances. Nor, in my view, was it incumbent upon the appellant to notify the union representative, whom the respondents had had adequate opportunity to consult before acting as they did.

[74] The Judge President is of the view that the appellant was obliged to afford the respondents a hearing before resorting to dismissal, relying in that regard on the decision of this court in *Modise & Others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC). I do not understand it to have been held in that case that a hearing will always be required before dismissing employees who refuse to

comply with their obligation to work, and nor could that be so, bearing in mind that the question in each case is whether the dismissal was “unfair”, which must of necessity depend upon the particular circumstances (*Performing Arts Council*, supra). In the present case I can see no purpose which would have been served by a hearing, and nor have any of the respondents suggested that any purpose would have been served. Furthermore, whether the respondents ought to have been given a hearing was not an issue at the trial. The pre-trial minute records that the respondents’ contention was that “no ultimatum or notice to the (union) was issued to the employees or the union prior to dismissal,” and there is no suggestion that the question of a hearing was even in issue. I do not think it is a matter that ought to be introduced on appeal.

[75] I would accordingly uphold the appeal and set aside the order of the court a quo.

R.W. NUGENT
ACTING JUDGE OF APPEAL

Appearances:

For the Appellant	:	Adv. Leech
Instructed by	:	Fluxman Rabinowitz Raphaely Weiner
For the Respondent	:	The respondents were represented by
a union official		
Instructed by	:	
Date of hearing	:	28 June 2000
Date of judgement	:	17 October 2000

