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**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no:

JA50/02

In the matter between:-

Early Bird Farm (Pty) Limited

APPELLANT

and

Food & Allied Workers Union

1st

RESPONDENT

Msiza Lucas and Others

2nd & FURTHER

RESPONDENTS

JUDGMENT

ZONDO JP AND JAFTA AJA

Introduction

[1] The appellant is Early Bird Farm (Pty) Limited (“**the appellant**”), a

company engaged in the chicken farming industry and owns farms where chickens are reared. The appellant is also the owner of abattoirs where chickens from its farms are slaughtered and supplied to the market. The first respondent is Food and Allied Workers Union (“FAWU”) which is a well – known trade union whose members form part of the appellant’s workforce. The second and further respondents were employees of the appellant. They are also members of FAWU.

[2] On 30 December 1998 the second and further respondents (to whom we shall refer as the individual respondents) were dismissed from work by the appellant following their participation in a strike. A dispute then arose between FAWU and the individual respondents, on the one hand, and, the appellant, on the other, about the fairness of that dismissal. The respondents referred that dispute to the Labour Court for adjudication. The respondents contended that the individual respondents’ dismissal was automatically unfair in that their participation in the strike was lawful and the strike was a protected strike. They further contended that, even if the dismissal was not automatically unfair, it was unfair for lack of a fair reason and was also procedurally unfair. They sought reinstatement and compensation.

[3] The appellant maintained that the dismissal was not automatically unfair nor was it unfair for lack of a fair reason or for any failure on its part to follow a fair procedure in dismissing the individual respondents. It sought the dismissal of the respondents’ claim. The Court a quo found that the dismissal was not automatically unfair but was unfair for lack of a fair reason to dismiss and also for a failure on the part of the appellant to follow a fair procedure before dismissing the individual respondents. It ordered the reinstatement of the individual respondents with a limited amount of retrospectivity of the operation of that order and the payment of a certain amount of compensation. With the leave of the Court a quo, the appellant now appeals against the whole of that judgement and order. Before we can deal with the issues on appeal it is necessary to set out the facts relating to this matter.

The facts

[4] The appellant is a supplier of chickens. It has a number of farms in which the chickens are reared. It also has a processing plant at which the chickens are killed, cleaned and packaged for distribution. The appellant has two plants. The one is in Olifantsfontein, the other in Standerton. There are farms in both plants. The farm sections of the plants include what the appellant calls farm services which in turn include the operations of “LBH” drivers which the second and further respondents were. In the Olifantsfontein plant the appellant recognised two trade unions, namely, FAWU, the first respondent in this appeal, and, the National Union of Food Beverage, Wine, Spirits and Allied Workers (NUFBWSAW). The respondent was recognised in respect of the processing plant whereas NUFBWSAW was recognised on the farms section. This matter related to the farms section and the processing plant at Olifantsfontein.

[5] The appellant employed about 3700 employees. However, only about 435 of these were employed in the farms section in Olifantsfontein. NUFBWSAW enjoyed about 59% membership on the farms section at Olifantsfontein. This means that that union was the majority union on the farms section in Olifantsfontein. In the processing plant the majority union was the first respondent which enjoyed about 70% membership.

[6] According to the evidence of Mr Tshabalala, the appellant’s Human Resources Manager, from 1997 to 1998 the appellant used to negotiate wages and other terms and conditions of employment with FAWU in respect of the processing plant and with NUFBSWAW in respect of the farms section. On his evidence once the appellant and FAWU had concluded an agreement with regard to the processing plant, the agreed wage increase would be implemented to all the employees in the processing plant including employees who were not members of FAWU.

Once the appellant and NUFBSWAW had concluded an agreement on wages and other terms and conditions of employment in respect of the farms section, such increase would be implemented to all the employees on the farms section including the second and further respondents. During those years the two unions had not sought to negotiate with the appellant on behalf of their respective members employed where they were not recognised.

- [7] At the end of the annual wage negotiations of 1998 NUFBWSAW reached an agreement with the appellant on wages and other terms and conditions of employment in respect of the farms section. The appellant extended the benefits of the agreement to employees who were not members of NUFBWSAW including the individual respondents.
- [8] On the 21st September 1998 FAWU addressed a letter to the appellant in regard to LBH drivers. That letter reads thus:

“ re LBH Drivers

This serves to confirm with you that a meeting was held with our members from this department.

They have also mandated us to negotiate wages on their behalf because they are employed at Olifantsfontein.

Should you are (sic) welcome to forward your response in writing at least before the 23. 09. 98.”

The appellant responded by way of an undated letter in these terms:-

“ LBH DRIVERS

In response to your letter dated the 21 September 1998 regarding negotiating wages on behalf of the drivers.

- 1. The LBS Drivers fall under the farms division.**
- 2. Their wages has (sic) already been negotiated with NUFBWSAWU which is the representative union on the Farms.**
- 3. A wage settlement was reached through mediation on the 24th August 1998.**
- 4. The increase was backdated to the 1st July 1998.**

Because of the abovementioned reason negotiating on behalf of the LBH drivers is therefore no (sic) practical.”

- [9] FAWU’s response was to dispute the allegation that the LBH drivers fell under the farms section. It asked the appellant to provide documentary proof that the individual respondents fell under the farms section. FAWU said that it felt very strongly that the LBH drivers were its constituency and should, therefore, benefit from its negotiations. During his evidence Mr Tshabalala initially made an attempt to say that during the wage negotiations FAWU abandoned its stance of including the LBH drivers among those on whose behalf it was negotiating. However, it became clear during his cross-examination as well as during the evidence of Mr Mashilwane, the union official who testified for the respondent, that there was no basis for that suggestion.

- [10] Soon after the appellant had completed its wage negotiations with NUFBWSAW, it began wage negotiations with FAWU. In its demands FAWU included the second and further respondents as some of its members on whose behalf it was sending its demands and on whose behalf it intended to negotiate with the appellant. This much was admitted by Mr Tshabalala. FAWU and the appellant could not reach an agreement at their negotiations. According to the evidence of Mr Mashilwane, during those negotiations FAWU persisted with its stance that it was also acting on behalf of the individual respondents. In the correspondence exchanged between the parties, the appellant insisted that the individual respondents fell outside of the bargaining unit in which FAWU was recognised. This was disputed by the union which pursued the negotiations on behalf of all its members including the individual respondents.
- [11] When the negotiations between the parties failed, FAWU declared a dispute which was then referred to the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”) for conciliation but the matter could not be resolved. FAWU then conducted a ballot among its members in order to determine whether they were in favour of a strike. The individual respondents participated in that ballot. The individual respondents participated in the ballot. The question that those taking part in the ballot had to answer was: do you agree to go on strike in support of a R40,00 increase? The majority of FAWU’s members voted in favour of a strike. On 3 December 1998 FAWU issued a notice informing the appellant that the union members would engage in a strike as from 7 December 1998. The appellant responded by issuing a notice of a lock – out which was to commence on the same day as the strike.

[12] All FAWU members in the processing plant as well as on the farms section including the individual respondents commenced a strike on 7 December 1998. The individual respondents' participation in the strike prompted the appellant to issue letters to the individual respondents calling upon them to return to work on 14 December. The letters were issued on the 11th December. In those letters the appellant wrote that **“[The appellant] has observed that, despite your salary increase being implemented in August this year and accepted by you, you have elected to join the striking workers.”** The appellant also stated that the individual respondents' conduct in refusing to work constituted a material breach of their contracts of employment. It went on to say: **“We hereby wish to inform you that we consider your conduct as unlawful and unprocedural in that no grievance exists between yourself and the company which prevents you from rendering your service or permits you to join the striking workers.”** Lastly the appellant called upon the individual respondents to return to work by 14 December 1998 and said it reserved its right to institute disciplinary action against them.

[13] On the 14th December 1998 FAWU responded to the appellant's letters of the 11th December sent to the individual respondents and disputed the appellant's contention that the individual respondents were not entitled to participate in the strike. In the letter FAWU wrote in part to the appellant:

“You seem to want to disregard the LRA, the code of Good Practice and the constitution of the country. All these acts

referred to recognises (sic) the right of all employees and supporters to engage in a strike action.

The Recognition Agreement also recognises that all workers have a right to engage in a strike after following the dispute procedure.

Given all this the union therefore challenges you to withdraw your intended action for reasons stated above.

Should you disregard this the union will exercise its rights in terms of the Act and the recognition agreement.”

- [14] On the 14th December 1998 the individual respondents did not return to work. In response to FAWU’s letter of the 14th December, the appellant sent FAWU a letter dated the 15th December 1998 in which it stated that the individual respondents were part of the **“Farms Bargaining Unit with NUFBWSAW as the sole negotiating agent”**, that they were not part of the **“Processing Plant Bargaining unit”** and that, because of that, they could not participate in the strike. The letter also contained an ultimatum in terms of which the individual respondents were called upon to return to work on 17 December or face dismissal. They continued with the strike and did not go back to work on the 17th December. On the 29th December 1998 the appellant issued yet another ultimatum to the

individual respondents calling upon them to return to work by the 30th December 1998 failing which their services would be terminated. On the same day it also sent a letter to the same effect to FAWU. The individual respondents did not return to work on the 30th December and were dismissed with effect from that date.

- [15] The appellant did not hold any disciplinary enquiry before it dismissed the individual respondents. However, it did subsequently invite the individual respondents to an **“appeal hearing”** where they were going to be given an opportunity to deal with the question whether they had been guilty of the aforesaid misconduct. The individual respondents went to the venue where the **“appeal hearing”** was to be held. This was in January 1999. They brought to the hearing an employee based at the processing plant to represent them. The chairman of the appeal hearing took the attitude that in terms of the appellant’s policy their representative was supposed to be an employee from the farms section. He said that he could not allow them to be represented by an employee from the processing plant. The individual respondents then withdrew from participating in the appeal hearing. Subsequently the unfair dismissal dispute that ensued was referred to the Labour Court for adjudication.

Proceedings in the Labour Court

- [16] In the Labour Court the appellant accepted that the FAWU’s members employed in the processing plant were entitled to participate in the strike but maintained that the individual respondents were not entitled to

participate in that strike. Accordingly, the appellant's position was that as far as FAWU's members employed in the processing plant were concerned, the strike was a protected strike but, as far as the individual respondents were concerned, the strike was an unprotected strike. In our view the correct way to approach the matter is not to determine whether the strike was protected or not because it certainly was a protected strike. The proper way to approach the issue is to determine whether the individual respondents were entitled to participate in the strike. If they were entitled to participate in the strike, their participation was protected and the appellant's conduct in dismissing them for such participation would constitute a breach of sec 187(1)(a) of the Act which makes a dismissal for such a reason automatically unfair.

[17] The basis upon which the appellant contended that the individual respondents were not entitled to participate in the strike was that, since, as far as it was concerned, they were based at the farms section where it had reached an agreement with NUFBWSAW – which was recognised in that section – and it had extended the benefits of such agreement to them, they were bound by the wage agreement between itself and NUFBWSAW despite the fact that they were not members of NUFBWSAW. FAWU's contention was that the individual respondents were not based at the farms section but at the processing plant. FAWU contended that, as its members, the individual respondents were entitled to participate in the strike together with other FAWU members. In this regard FAWU highlighted the fact that the individual respondents were among the members who had mandated it to negotiate wages with the appellant on their behalf and that it had specifically informed the appellant of this at the beginning of the wage negotiations.

[18] Early after the commencement of the proceedings in the Court a quo, the Learned Acting Judge in the Court a quo recorded that the appellant accepted that the individual respondents were not members of NUFBWSAW and that there was no recognition agreement or substantive

wage agreement that, by satisfying the requirements of sec 23(1)(d) of the Labour Relations Act, 1995 (Act 66 of 1995)(“**the Act**”), became binding on the individual respondents. The Court a quo then defined the issue before it thus: **“The crisp issue for decision is whether there can be circumstances other than those contemplated by section 23(1)(d) in which a collective agreement can be binding on persons who are not members of the union party to the agreement.”** Sec 23 deals with the legal effect of collective agreements. Sec 23(1)(d) provides that a collective agreement binds:

“(d) employees who are not members of the registered trade union or trade unions party to the agreement if –

- (i) the employees are identified in the agreement;**
- (ii) the agreement expressly binds the employees; and**
- (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.”**

[19] It appears that during the opening statements before the leading of evidence, the Court a quo deemed it necessary to order a separation of issues to see to what extent it was possible to determine the matter by, as the Court a quo put it, **“exception”**. It is clear from the record and the ruling of the Court in this regard that the Court a quo sought to separate issues because the appellant’s case was that the individual respondents were bound by the wage agreement concluded between itself and NUFBWSAW. The Court a quo said in its ruling on the separation of issues:

“Ultimately what Mr Hardie [the respondent’s attorney] was constrained to argue was that there was by conduct a variation of the recognition agreement that was concluded on 23 July 1991, and that this variation by conduct occurred notwithstanding the express provisions of that agreement. It seems to me that that was the only basis upon which he escapes the reach of section 23(1)(d). Section 23(1)(d) requires of any agreement, whether recognition agreement or wage agreement, that the category of non-members whom it is to govern must be expressly stated therein.

After lunch Mr Hardie said that he had another point to make. This was that the strike in which the applicants were participating was a strike to replace an agreement that had been concluded for a bargaining unit of which they were not the members. That aspect of the case requires evidence.”

[20] It seems from the ruling of the Court a quo on the separation of issues that the Court a quo dealt with two points. The one point was that, although the recognition agreement between the appellant and NUFBSWAW provided that NUFBSWAW was to negotiate on behalf of its members and did not purport to extend NUFBSWAW’s mandate beyond its members, there had been a variation of the relevant provisions of that agreement through conduct and, as a result of such variation, NUFBSWAW negotiated on behalf of non-members as well in the farms section. The other point on which the appellant’s case was based was that the strike in which the individual respondents participated was aimed at replacing an agreement that had been concluded for a bargaining unit of

which they were not members and that this rendered their striking unprotected. The Court then made a ruling that any evidence to prove the variation of the agreement that the appellant sought to prove would be inadmissible but that for the rest of the appellant's case evidence could be led that was admissible.

[21] There was a dispute between the parties in the Court a quo on whether the individual respondents were based in the processing plant or in the farms section. FAWU contended that they were based in the processing plant whereas the appellant contended that they were based in the farms section. During the hearing of oral evidence the appellant's case was simply directed at showing that the individual respondents were based on the farms section and not in the processing plant. It was only during the cross-examination of Mr Mashilwane, the union official who had represented FAWU during the wage negotiations, that an attempt was made on behalf of the appellant to suggest another point and that was that the individual respondents had participated in the strike in support of their own demands as opposed to the demands in support of which the rest of the FAWU members participating in the strike were striking. This had not been suggested to the individual respondent who had testified prior to Mr Mashilwane testifying. It was never suggested what those separate demands were in support of which it was suggested that the individual respondents had gone on strike. The Court a quo found that the individual respondents were based on the farms section and not in the processing plant.

[22] The Court a quo also said that the representative of the individual respondents who appeared for them in that Court – who was a union official - had accepted that the individual respondents had been on strike in support of a wage increase for themselves. The Court a quo held that this concession was correctly made. The Court a quo stated that the correctness of this concession was borne out by a letter that pertinently placed the individual respondents' claims to an increase on the negotiating table. The Learned Acting Judge a quo then said: **“Since the dispute referred by FAWU to the CCMA was over higher wages for**

Olifantsfontein employees, a demand for better wages for themselves would fall outside its compass and a strike in pursuit of the demand, not having been made the subject of an independent referral to the CCMA, would fail to satisfy the preconditions for a procedural strike contained in sec 64.” The Court a quo said that the union official who represented the individual respondents at the trial made no effort to argue that the individual respondents had gone on strike in support of their colleagues’ demands in the processing plant.

- [23] The Court a quo referred to an argument presented on behalf of the individual respondents to the effect that, even if the Court a quo found that they were based on the farms section, they were entitled to participate in the strike as they were members of FAWU as well and they were on strike over the same demands as the rest of the employees, namely, the employees which the appellant admitted were based at the processing plant and whose participation in the strike the appellant accepted to be lawful. The Court a quo said that in support of this submission reliance had been placed on the decision of this Court in **Chemical Workers Industrial Union v Plascon Decorative (Inland). (Pty)Ltd (1999) 20 ILJ 321 (LAC)**.

- [24] The Court a quo concluded that the individual respondents’ strike was unprocedural in the sense that it failed to satisfy the conditions upon which the conferment of the right to strike is made to depend. The Court made this finding on the basis that the individual respondents’ demand was for their own wage increase which, the Court a quo said, had not been

referred to conciliation as required by sec 64. The Court a quo found, in the light of this, that the dismissal was not automatically unfair. The Learned Acting Judge held that the fact that he had found that the strike by the individual respondents was unprocedural because the preconditions of sec 64 had not been met did not mean that it was prohibited and thus unlawful. The Learned Acting Judge explained the latter point by saying that **“(p)rohibitions on striking focus on the strike itself”** and that **“(s)ec 64 contains no such prohibitions and they can be enforced by interdict proceedings and ultimately by state sanctions such as committal for contempt of Court.”** On this basis the Learned Acting Judge expressed the view that strikes fall into three categories, namely, those that are protected, those that are prohibited and those that are neither. He then referred to the appellant’s contention that the individual respondents’ strike constituted a breach of the provisions of scc 65(1)(b) or (c) of the Act which, according to the Court a quo, **“in effect prohibit striking if the issue in dispute is one of right”**. This was based on the assertion that the individual respondents were bound by the wage agreement concluded with NUFBWSAW. The Court dismissed this latter contention and the one to the effect that the strike was a breach of sec 65(1)(b) or (c) then fell away. The Court a quo dismissed this contention simply on the basis that the recognition agreement between the appellant and NUFBWSAW itself provided that NUFBWSAW represented its members and that, as the individual respondents were not members of NUFBWSAW and sec 23(1)(d) had not been complied with, the individual respondents were not bound by the NUFBWSAW agreement.

[25] The Court a quo nevertheless found that there was no fair reason to dismiss the individual respondents because dismissal as a sanction was too harsh since they could have easily turned their strike into a protected strike and because they had genuinely believed that they were based at the processing plant whose employees' participation in the strike was protected. The Court a quo also found that the dismissal was procedurally unfair on the basis that the appellant did not give the individual respondents a hearing before it dismissed them. The appellant was ordered to reinstate the individual respondents and to pay them compensation equal to 12 months remuneration. The Learned Acting Judge was not prepared to order the payment of compensation for the whole period. In this regard he took into account, and, disapproved of, the fact that the individual respondents had rejected a with prejudice offer that the appellant had made to them at some stage. He thought that even though the offer was not one that the individual respondents could be expected to accept, they could have made a counter offer to return to work at the lower grade pending the final resolution of the dismissal dispute. Save for wasted costs of a certain opposed application for a postponement heard on 30 May 2002 which the respondents were ordered to pay, the appellant was ordered to pay the costs.

The appeal

[26] Before dealing with other aspects of the appeal, we think it is necessary to immediately dispose of the suggestion made in the Court below by the appellant that the fact, if it be a fact, that the individual respondents were based in the farms section and not in the processing plant meant that they had no right to participate in the strike. That fact on its own is irrelevant to the issue of whether or not the individual respondents were entitled to participate in the strike. It would only become relevant if it were coupled with another factor such as that the issue in dispute was whether or not the appellant should increase the wages of employees based at the processing plant and even then only if the individual respondents' participation in the strike was in support of a wage increase to themselves and a dispute on the latter had not been referred to conciliation. With regard to the finding of the Court a quo that the individual respondents were based at the farms

section, we shall approach this appeal on the assumption – without deciding – that such finding is correct, although, as we have said, we take the view that on the facts of this case that finding makes no difference in this appeal.

- [27] There are three broad questions for determination in this appeal. They are:
- (a) whether the Court a quo's decision that the individual respondents' dismissal was not automatically unfair was correct;
 - (b) whether, if the answer to (a) above is that that the Court a quo's decision on that issue was correct, its decision that the dismissal was, nonetheless, unfair for lack of a fair reason, was correct;
 - (c) whether, if the Court a quo's decision referred to in (b) above was correct, its decision that the dismissal was procedurally unfair was also correct.

An answer to the first of the above questions to the effect that the dismissal was automatically unfair may make it unnecessary to deal with the other two questions. However, such an answer will raise the question of what the appropriate relief is that should be granted to the individual respondents since there was no cross-appeal against the limited nature of the relief that the Court a quo granted to the individual respondents.

Was the dismissal automatically unfair?

- [28] The first question for determination is whether or not the individual respondents' dismissal was automatically unfair. As already indicated above, the Court a quo answered this question in the negative. The answer to that question depends on whether or not the individual respondents were entitled to participate in the strike because, if they were entitled to participate in the strike, then the appellant acted in breach of sec 67(4) of the Act in dismissing them for participating in the strike and in terms of sec 187(1)(a) of the Act such dismissal would be automatically unfair. Sec 67(4) provides that: **“(a)n employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.”** Such a dismissal would be automatically unfair because sec 187(1)(a) of the Act

provides that “**(a) dismissal is automatically unfair, ... if the reason for the dismissal is ...**

a) that the employee participated in or supported, or, indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter VI.”

In the light of the above, the first question that must be determined is whether the individual respondents had a right to participate in the strike. That question must be answered with reference to the Constitution and the Act.

Were the individual respondents entitled to participate in the strike?

[29] Sec 23(1)(c) of the Constitution provides that “**(e)very worker has a right to strike.**” Like all fundamental rights contained in the Bill of Rights in our Constitution, the right to strike can be limited by a law of general application provided that the requirements of sec 36 of the Constitution are met. The Act is an Act of general application.

[30] Sec 64(1) of the Act confers on every employee “**the right to strike ... if**” certain conditions prescribed therein have been met. It is not necessary for purposes of this judgement to set out all of those conditions. It is sufficient to say that the first condition is that the issue in dispute - that is the demand or grievance over which the strike is called – must have been referred either to a council with jurisdiction or the CCMA, as the case may be, for conciliation and either a certificate must have been issued to the effect that the dispute remains unresolved or a period of 30 days must have lapsed from the date of the referral of the dispute for conciliation.

[31] Sec 64(3) sets out the circumstances in which a person may participate in a strike even though the conditions prescribed by sec 64(1) have not been met. In this matter there are no such circumstances. It is also necessary to say that the appellant accepts that all the conditions prescribed by sec 64 were met but says only in respect of the FAWU members based in the processing plant. Sec 65 of the Act sets out limitations to the right to strike. It seems that what sec 65 refers to as limitations to the right to strike is what the Court a quo referred to as prohibitions against striking. Sec 65(1) sets out situations where no person has a right to strike. Sec 65(3) sets out further situations in which no person may take part in a strike. It is not necessary to enumerate all those situations. It suffices, for purposes of this matter, to refer to two. These are provided for in sec 65(1)(b) and (c). Sec 65(1)(b) and (c) have been mentioned already earlier in this judgment in the context of the Court a quo dealing with an argument that was presented to it which was based on sec 65(1)(b) and (c). Sec 65(1)(b) and (c) read thus:-

- “(1) No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if**
- (a)that person is bound by an agreement that requires that issue in dispute to be referred to arbitration;**
- (b)the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;”**

[32] Before us Counsel for the appellant submitted that the issue in dispute over which the individual respondents went on strike had not been referred to conciliation as required by sec 64(1) of the Act and that that rendered their strike unprotected. He submitted that the issue in dispute in support of which they had gone on strike was a wage increase for themselves. In this regard he submitted that the dispute that was referred by FAWU to conciliation related to wages and terms and conditions of employment for the FAWU members employed in the processing plant and, thus continued the argument, that did not cover a wage increase for the individual respondents because the latter did not fall under the processing plant but fell under the farms section. Since the Court a quo also made a finding about what the issue in dispute was that the individual

respondents sought to support by their participation in the strike, it is necessary to determine what the demands were for which the individual respondents participated in the strike.

[33] The Court a quo found that the individual respondents went on strike for their own separate demands as opposed to the demands in support of which the other FAWU members participated in the strike. In this regard the Court a quo was upholding a submission that had been made on behalf of the appellant. The Court a quo did not specify in its judgement what the individual respondents' separate demands were nor does it appear that the appellant's attorney did before the Court a quo. In fact it was not even put to Mr Msiza, the individual respondent who testified on behalf of the respondents, that the individual respondents had participated in the strike in support of their own separate demands as opposed to the demands of the rest of the FAWU members who took part in the strike. During Mr Msiza's evidence all parties dealt with the matter on the basis that the wage increase which the appellant was being demanded to agree to would be paid to the individual respondents as well. That is the basis upon which the evidence of Mr Tshabalala had been led as well. However, during his cross-examination, Mr Mashilwane was asked whether he agreed that the individual respondents were part of the **"principal strike to advance their own cause"** and he answered in the affirmative. A little earlier he had been asked by the attorney who appeared for the appellant in the Court below whether the individual respondents had been **"going out in respect of their wages and conditions of employment"** and he had answered: **"yes"**. It appears that Mr Mashilwane's answers to these questions led to a submission on the appellant's behalf, and, a finding by the Court a quo, that their participation in the strike was in support of their

own separate demands.

[34] It seems quite clear that, to the extent that it can be said that the individual respondents' participation in the strike was in support of their own demands, such demands could only be demands for an increase to their own wages and other terms and conditions of employment. What is also clearly established in the evidence and was never disputed by the appellant is that the individual respondents gave FAWU a mandate at a certain meeting to negotiate on their behalf with the appellant. Furthermore, it is common cause that FAWU then wrote the letter of the 26th September 1998 to the appellant informing it of precisely this. Mr Mashilwane's evidence that during the negotiations FAWU included the individual respondents in its proposals was never challenged. Even Mr Tshabalala was not able under cross-examination to say that FAWU accepted that the individual respondents should no longer be part of the proposed agreement.

[35] On the facts of this case to say that the individual respondents participated in the strike in support of their own demands makes no difference. This is because, if the position is that they were pursuing their own demands, those demands would have been part and parcel of the demands put forward by FAWU for the other FAWU members as well. The real question is whether the demands which they sought to support by participating in the strike formed part of the issue in dispute as contemplated in sec 64(1)(a) of the Act and whether that issue in dispute was referred to conciliation as required by sec 64(1) and is not hit by any of the limitations in sec 65 of the Act. Having found that the individual respondents' strike was a primary strike to secure better wages for themselves, the Court a quo said that in order for the individual respondents to obtain the protection of the statute, such a dispute should have been made the subject of a separate referral to the CCMA under sec 64.

[36] To the extent that the individual respondents' participation in the strike was in support of their own demands for a wage increase, we do not agree with the finding of the Court a quo that such dispute had not been referred to the CCMA for conciliation in terms of sec 64. In our view it most definitely was. The demand was for a wage increase for members of FAWU which included LBH drivers. The individual respondents were LBH drivers. Even if they were based on the farms section, once FAWU had included a demand for a wage increase to be effected on their wages, and had referred that dispute to conciliation, the fact that they may have been based on the farms section when

the other FAWU members were based in the processing plant became irrelevant. Such a demand was discussed in the wage negotiations between FAWU and the appellant. FAWU did not at any stage prior to the strike withdraw its inclusion of the individual respondents from among those for whom it was making demands. Whether FAWU was doing so in the mistaken belief that they were based in the processing plant or not is irrelevant. The fact of the matter is that it specifically included them. The appellant was never left in any doubt that FAWU was also demanding that the individual respondents be paid an increase. When no agreement was reached, FAWU referred the issue in dispute or the dispute that arose when the negotiations reached deadlock to the CCMA for conciliation. Those negotiations included FAWU's demands for a wage increase for, among others, the individual respondents. A strike ballot was conducted. The undisputed evidence of both Mr Mzila and Mr Mashilwane was that the individual respondents took part in the ballot. The question in the ballot paper was whether the person voting in the ballot was prepared to go on strike in support of a wage increase of R40, 00. It did not refer to a wage increase for FAWU members based at the processing plant only. It was wide enough to include an increase for the individual respondents as well. So the individual respondents sought a wage increase of R40, 00 which was the same wage increase that the other FAWU members from the processing plant also wanted. The dispute about a demand for a R40, 00 wage increase for the 1998/1999 year was referred to the CCMA for conciliation on behalf of all those employees on whose behalf FAWU had been negotiating. Accordingly, the conditions prescribed by sec 64 were met in respect of the issue in dispute over which the individual respondents went on strike.

[37] In any event we do not think that it was permissible for the Court a quo to decide the matter on the basis that the dispute between the individual respondents and the appellant about “**better wages for themselves**”, as it put it, had not been referred to conciliation because that was never the appellant's case in the Court a quo and was never at any stage put to any of the respondents' witnesses during cross-examination to enable them to deal with it. What was put to the union official who testified – and even then at the end of his evidence under cross-examination and was never put to Mr Msiza who was one of the individual respondents – was that the second and further respondents' participation was in support of their own

separate demands – whatever that meant. But even when it was put to the union official the nature of those demands was never put to him. That the dispute about their alleged “**separate demands**” was never referred to conciliation was never at any stage put to the respondents’ witnesses to give them an opportunity to deal with that issue. That is not surprising because that was never the appellant’s case. We have no doubt that, if it had been put to them, they would probably have said that the wage increase that the individual respondents wanted had been put to the appellant in wage negotiations and had been referred to the CCMA for conciliation because they wanted the same thing as the rest of the strikers that the appellant was happy to acknowledge were entitled to participate in the strike. In the light of this we cannot uphold the Court a quo’s finding that the individual respondents’ participation in the strike was unprotected. Indeed, they were fully entitled to participate in that strike. Accordingly, their dismissal by the appellant for their participation in the strike was a breach of sec 187(1)(a) of the Act and was automatically unfair. So far we have dealt with the matter on the assumption that the individual respondents’ participation in the strike was in support of an increase to their own wages and not in support of an increase to the wages of the FAWU members based in the processing plant. What if they were doing so in support of a wage increase for the FAWU members at the processing plant? This is the question we now turn to deal with.

- [38] As already indicated above, although the appellant maintained that the individual respondents were not entitled to participate in the strike, it accepted that FAWU’s members employed in the processing plant were entitled to participate in the strike. The appellant argued that there had

been no dispute between it and the individual respondents because the agreement it had concluded with NUFBWSAW had been extended to them and they had accepted it. The appellant further argued that their strike constituted a breach of s 65(1)(b) or (c) of the Act which prohibits employees from striking if the issue in dispute is one which they are bound by a collective agreement to refer to arbitration or which they have a right in terms of the Act to refer to arbitration or to the Labour Court for adjudication. The appellant argued that the wage increase for the individual respondents had been settled, and that, therefore, any dispute arising from that settlement could only be resolved through conciliation or arbitration and not through a strike.

- [39] Mr Watt – Pringle, who appeared for the appellant, argued that the Court quo was wrong in drawing the distinctions that it drew between an unprotected strike and a prohibited strike and finding that, although the individual respondents' strike was unprotected, it was not unlawful. Once the respondents fell outside the protection afforded by s 187(1)(a), so the argument went, they were in the same position as employees who engaged in an unprotected strike. It was submitted that the decision of the Labour Court denied the appellant as the employer the right to dismiss workers who were engaged in an unprotected strike. It was argued further that, by engaging in a strike in which they were not entitled to participate, the respondents had subverted the entire process of collective bargaining because they had already received a wage increase negotiated in the bargaining unit under which they fell but now participated in a strike relating to a bargaining unit of which they were not part.

[40] While it is true that the individual respondents received an increase negotiated by the rival union that was recognised in the farms section under which they fell, the crucial issue is whether the collective agreement between the appellant and that union covered the individual respondents and had a binding effect upon them. Dealing with this issue the Court a quo found, upon the interpretation of the recognition agreement between the appellant and NUFBWSAW, that that union was entitled to bargain only on behalf of its members. A perusal of that agreement reveals that this was indeed the position. Clause 2.1 of the agreement states:

“The company recognises the Union’s right to represent its members and to negotiate on behalf of such members their demands in respect of the collective conditions of service and minimum wage rates being paid by the Company at the premises”.

[41] Although the appellant had previously extended agreements reached at the different bargaining units to cover employees in each unit who were not members of the union with which such agreements had been concluded and had in this case extended the wage increase agreed to between itself and NUFBWSAW to cover the individual respondents, the Court a quo found that the extension was a unilateral act of the appellant with no binding effect on the second and further respondents. In our view this finding was correct. Furthermore, the Court a quo found - in fact it seems to have been common cause - that the conditions prescribed by sec 21(3) (d) of the Act which are necessary for a collective agreement to bind

employees who are not members of the union party to the collective agreement were not present. Sec 23(1)(d) requires, among other things, that such employees be identified in the collective agreement. This had not been done in this matter. In the light of this there was therefore no agreement on a wage increase that was binding on the second and further respondents. In the light of this finding the appellant's argument based on sec 65 (1) (b) and (c) falls away.

- [42] In an attempt to persuade the Court a quo to accept that their strike was protected, the individual respondents also argued that, since they belonged to the same trade union with their colleagues who were based in the processing plant whose strike the appellant acknowledged as protected and they had been striking in support of the same demands, they were entitled to strike. For this argument reliance was placed on the decision of this Court in **Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 ILJ 321 (LAC)**. To that case must be added the judgement of the Labour Court in **Afroxx Ltd v SACWU & others (1)(1997) 18 ILJ 399 (LC)** where Zondo AJ, as he then was, established the principle, which was subsequently approved by this Court in Plascon Decorative, that, where members of a trade union employed in one branch of a company or in one bargaining unit are entitled to strike in support of a dispute between themselves and their employer, their colleagues employed by the same employer in another branch or in another bargaining unit also have a right to go on strike in respect of that dispute without having to make a separate referral of the dispute to conciliation. In Plascon Decorative Cameron JA, in whose judgement Myburg JP and Froneman DJP concurred, had this to say in

regard to that principle:

“The issue in the present case is whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike. That parallels the question Zondo AJ dealt with in *Afrox Ltd v SA Chemical Workers Union & others* (1) (supra), where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded at 4031 that ‘once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire that right to strike.’ It follows that in my view this conclusion was correct.”

- [43] The Court a quo took the view that, unlike in **Plascon Decorative** where the workers falling outside the bargaining unit were on strike in support of demands made by their co – employees within the unit, the individual respondents joined the strike in pursuit of their own demands. The Court a quo expressed the view that the strike by non – bargaining unit employees in **Plascon Decorative** was a sympathy strike whereas in the present case the individual respondents were involved in a primary strike because, in that court’s view, they were pursuing their own demands that were separate from the demands that were being pursued by the FAWU members employed at the processing plant. On that basis the Court a quo distinguished the present case from **Plascon Decorative** and rejected the

respondents' argument in the following terms at page 5 of the typed judgment:

“Nothing in the judgment of Cameron JA, properly considered, supports the proposition that participants in one primary strike can profit from the protections enjoyed by co – employees who are participating in a second primary strike, and such a conclusion would be untenable. The object of s 64, which is to encourage the resolution of disputes before recourse to collective action, would be frustrated if the proper referral of one dispute legitimated the circumvention of the process by fellow union members pursuing a separate dispute against the same employer by reason only of the fact that the terms of each demand are the same”.

[44] We agree that there is no such suggestion in Cameron JA's judgement but, would also add, nor is there any such suggestion in Zondo AJ's judgement in Afrox. In Afrox the workers concerned did not go on strike in support of demands different from the ones in support of which their colleagues in the other branch or depot had gone on strike. There is no statement in that Afrox judgement that can in any way be construed to mean that a second group of employees can go on strike in support of new demands and rely on the referral of a different dispute to conciliation by another group for statutory protection.

[45] With regard to the statement by the Court a quo that the individual respondents participated in the strike in support of their separate demands

and not in support of the demands of their colleagues based in the processing plant, we have already said above that the demands which FAWU put on the table for negotiations with the appellant which were ultimately part of the dispute that was referred to conciliation were demands for the wage increase of the employees based in the processing plant as well as of the individual respondents. However, to the extent that the individual respondents' participation in the strike may be said to have been in support of wage demands for their colleagues who were based in the processing plant, the Afrox judgement of the Labour Court, the Plascon Decorative judgement of this Court as well as another judgement of this Court, namely, **SACTWU v Free State and Northern Cape Clothing Manufacturer's Association [2002] 1 BLLR 27 (LAC)** are in point and this matter would not be distinguishable from them. We have already stated what was decided in Afrox and that the principle in Afrox was approved by this Court in Plascon Decorative. In the latter case employers argued that the union members who fell out of the jurisdiction of a bargaining council to which the dispute had been referred for conciliation could only participate in a strike if they complied with s 64(1) by referring the dispute to the bargaining council having jurisdiction over them. After reviewing the authorities **Zondo JP** rejected this argument and stated at para [32]:

“[32] More importantly, the dispute which the intended strike sought to bring to an end, had already been referred to the bargaining council with the requisite jurisdiction for conciliation and such attempts had failed. All the statutory

requirements required to be complied with before there could be a strike over that dispute had been complied with. The same dispute could not be referred to conciliation for the second time. The requirement in section 64 that the issue in dispute be referred to the Commission for Conciliation Mediation and Arbitration or to a bargaining council with jurisdiction for conciliation is a requirement that the issue in dispute be referred to a bargaining council, where there is one with jurisdiction, which has jurisdiction in respect of such issue in dispute. A bargaining council cannot conciliate a dispute in respect of which it has no jurisdiction”.

- [46] The interpretation adopted in **Afrox** was endorsed and applied in **Plascon Decorative**. In the latter case, **Cameron JA** cautioned against reading into s 64(1) limitations upon the right to strike which are not there. This interpretive approach is consistent with the approach set out in **Attorney General v Moagi 1982 (2) Botswana LR 124 at 184** which **Kenridge AJ** repeated in **S v Zuma 1995 (2) SA 642 (CC) at 651 I (par 15)**, with the concurrence of the rest of the members of the Constitutional Court, where he said that “(c)onstitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.”

- [47] The principle established in **Afrox** and other cases is that once a union has complied with the requirements of s 64 by referring a dispute to

conciliation, it is not necessary to refer the same dispute again to conciliation when other members of the same union who are employed by the same employer want to join the strike in respect of the same dispute which is protected. They can join the strike even if they are not directly affected by the dispute as long as the dispute was referred to conciliation. This is the legal position as correctly pronounced in **Afrox, Plascon Decorative and Free State and Northern Cape Manufacturers' Association**.

[48] In the light of the above we hold that, to the extent that the individual respondents' participation in the strike was in support of demands relating only to the FAWU members based in the processing plant, such participation was lawful and protected. In such a case, too, the appellants' dismissal of the individual respondents for participation in the strike was a breach of sec 187(1) (a) of the Act and constituted an automatically unfair dismissal. In the light of this finding, it is not necessary for us to deal with the other submissions made by the appellant. Nor is it necessary to express any view on the correctness of the Court a quo classification of strikes into three categories.

[49] With regard to relief it is clear from the judgement of the Court quo that, when it assessed compensation, it took into consideration the fact that, as far as it was concerned, their participation in the strike was unprotected. As a result, the Court a quo attributed fault to them on the basis that they were involved in a strike which did not comply with the procedural requirements of the Act. We have found that they were entitled to participate in the strike. The Court a quo also took into account against them their having rejected a certain offer that had been made to them by the appellant on a with prejudice basis. While we do not think that the individual respondents should be blamed for not accepting that offer in the light of the fact that their participation in the strike was lawful and protected, we cannot do anything about the issue of relief since the respondents did not note a cross – appeal against the limited nature of the relief that the Court a quo granted them.

[50] Before concluding this judgment, there is one further matter that we wish to deal with. In this appeal the respondents' attorney was required to file heads of argument succinctly setting out the points to be argued at the hearing of the

appeal. A document purporting to be heads of argument was timeously filed on behalf of the respondents. However, it was of such poor quality that it can hardly be described as heads of argument. This Court could not derive any assistance from that document nor was the attorney helpful to the Court at the hearing of the appeal. Properly prepared heads of argument play an important role in the adjudication of a matter- especially in an appeal court. Useful heads of argument cannot be prepared unless the person preparing them has taken the trouble to study the record and has done such research on the legal issues raised by the matter or appeal as may be necessary. Where heads of argument are drawn without the necessary understanding of the facts or the evidence in the record and/or without doing the necessary research on the legal issues that arise in the appeal, such heads - and it is very easy to recognise this in heads of argument - are bound to be of no assistance to the Court hearing the appeal. That kind of conduct on the part of a practitioner is unacceptable. A practitioner should not accept instructions or a brief in a matter if he does not have the time to do justice to a client's case. It is inexcusable for a practitioner to file heads of argument the contents of which bear no relation to the issues raised.

[51] In this case the document purporting to be heads of argument filed by the respondents' attorney was totally unacceptable. The fault lies solely with the practitioner concerned and not with the respondents. In the light of this we invited the respondents' attorney to advance reasons why an order should not be made precluding him from charging his clients any fee in connection with his "**heads of argument**" and for his appearance before this Court. He conceded that there was justification for the making of such order in the present matter. Accordingly, as a mark of its disapproval for this type of conduct, this Court will make an order precluding the respondents attorney from charging fees in connection with the heads of argument as well as for his appearance in this Court.

[52] Accordingly, the following order is made:

1. **The appeal is dismissed with costs.**
2. **The respondents' attorney is ordered not to charge any**

fees in connection with the heads of argument he filed in this appeal and for his appearance before this Court.

Zondo JP

Jafta AJA

I agree.

Davis AJA

Appearances:

For the Appellant	:	C E Watt-Pringle SC
Introduced by	:	Stephen Hardie Attorney
For the Respondents	:	J Surju
Date of Judgment	:	30 April 2004