

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

**Case No: JA38/2004**

In the matter between

**TSI HOLDINGS (PTY) LTD** **1<sup>ST</sup>**

**APPELLANT**

**TSI SCAFFOLDING (PTY) LTD** **2<sup>ND</sup>**

**APPELLANT**

**TSI PAINTING (PTY) LTD** **3<sup>RD</sup>**

**APPELLANT**

**TSI INSULATIONS (PTY) LTD** **4<sup>TH</sup>**

**APPELLANT**

**and**

**NATIONAL UNION OF METAL**

**WORKERS OF SOUTH AFRICA** **1<sup>ST</sup> RESPONDENT**

**MAXWELL MASEKO & OTHERS** **2<sup>ND</sup> AND FURTHER  
RESPONDENTS**

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**JUDGMENT**

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## ZONDO JP

### Introduction

[1] The first appellant is a registered company. The second, third and fourth appellants are also registered companies. They are subsidiary companies of the first appellant. In the founding affidavit the deponent refers to the second, third and fourth appellants as divisions of the first appellant. The appellants were referred to collectively in the papers as the applicant. For convenience, in this judgment I shall refer to the appellants collectively as **“the appellant”**. The first respondent (**“the union”**) is a registered trade union which has the majority of the appellant’s employees as some of its members. The second and further respondents (**“the individual respondents”**) are the employees of the appellant and members of the union.

[2] The appellant brought an application in the Labour Court for a rule nisi calling upon the respondents to show cause why an order should not be granted declaring as unprotected a strike that the individual respondents had embarked upon or were about to embark upon and interdicting them from taking part in it. An interim interdict was also sought. The matter came before Schoeman AJ who granted the order which, though intended as a rule nisi, was not couched in the conventional terms of a rule nisi. The order read thus:

**“1. a Rule nisi is ordered-**

**1.1 declaring the strike embarked upon by the**

**respondent on 4 November 2003 illegal;**

**1.2 declaring the notice given by the respondents of their intention to strike invalid.**

**2. The rule nisi is made returnable on the 11 November 2003.**

**3. The respondents are notified of their right to anticipate the return day on 48 hours notice to the Applicant in terms of the rules of Court.**

**4. The costs of this application are reserved for the determination on the return day.**

**5. The applicant is granted leave to supplement the founding papers if necessary.”**

[3] It would seem that Schoeman AJ did not grant any interim order. On the return day the matter came before Fulton AJ. The respondents opposed the confirmation of the **“rule”** and sought a **“discharge”** thereof. Fulton AJ reserved judgment. Later she delivered a judgment in terms of which she found that the strike was protected, discharged the rule and ordered the applicants to pay the respondents’ costs jointly and severally, the one paying, the others to be absolved. With the leave of the Labour Court, the appellant now appeals to this Court against Fulton AJ’s judgment and order. Before I consider the appeal, it is necessary to set out the

relevant events and facts which gave rise to the proceedings in the Labour Court.

### **The Facts**

- [4] One of the managers employed by the appellant was a Mr Attie Van Zyl. A shopsteward employed by the appellant, a Mr Maxwell Maseko, was given a report by two of the union's members, a Mr Elias Mayisela and a Mr Albert Moholola, on the 19<sup>th</sup> June 2003 to the effect that Mr Van Zyl had used racist language towards them. It was alleged that, when those members of the union informed Mr Van Zyl that they needed a ladder to complete a task that he had given them to do, he said to them: **“poes, kaffirs, ek wil nie saam met julle praat nie.”**
- [5] Mr Maseko apparently lodged a grievance with the appellant against Mr Van Zyl. The document that was used to lodge the grievance, if it was lodged in writing, was not included in the papers. On the 24<sup>th</sup> July 2003 a meeting took place in which Mr Henry Stopforth, the appellant's human resources manger, asked the complainants concerned to tell him what had happened. Messrs Elias Mayisela and Albert Moholola, the two complainants, attended the meeting. The two complainants told their version in that meeting. Mr Nhlapo, the union official who represented the union in its dealings with the appellant, stated in the union's answering affidavit that at that meeting Mr Stopforth told Mr

Maseko to refer the matter to a Ms Yvonne Barnard who was the site manager in the boiler department of the appellant.

- [6] It would appear that, when the matter was referred to Ms Barnard, she refused to deal with it. Mr Maseko then took the matter to a Mr Van Rensburg who was the appellant's manager in charge of the Secunda branch of the appellant. On the 13<sup>th</sup> August a meeting was held that was chaired by a Mr Van Rensburg. Mr Van Zyl was present. The complainants and Mr Maseko were also present. Mr Nhlapo stated in the respondents' answering affidavit – and this is admitted in the appellant's replying affidavit - that Mr Van Zyl told Mr Van Rensburg at this meeting that he did not swear at the complainants in a personal manner. I am not sure what this was supposed to mean but, when regard is had to the summary of discussion which was prepared by Mr Van Rensburg and put up as the minutes of that meeting, it would seem that that is what Mr Van Zyl said. In this regard it needs to be pointed out that, for a reason that does not appear to be explained by the appellant anywhere in the affidavits, Mr Van Rensburg allowed all those attending the meeting to remain in attendance while the complainants and Mr Maseko gave their version of what had happened but he asked them to leave the room when he required Mr Van Zyl to give his version. He only called them back to the room after Mr Van Zyl and he had remained in the room by themselves while Mr Van Zyl was giving his version of what had happened. The “**minutes**” of that meeting reveal this as well.

- [7] The “**minutes**” of the meeting chaired by Mr Van Rensburg reveal, if they are to be relied upon as accurately reflecting the version that Mr Van Zyl told Mr Van Rensburg in the absence of the complainants and Mr Maseko, that Mr Van Zyl inter alia told Mr Van Rensburg in Afrikaans: **“Ek se toe vir hulle dat hulle moet gaan kyk in die ‘fokken’ yard vir ‘fokken’ lere of scaffolding wat daar le en bou self ‘n raamwerk. Dit het hulle toe gedoen. Anders as die ‘fokken’ word het ek nie egter gevloek nie. Ek ontken dat ek hulle persoonlik gevloek het of die woorde ‘poes kaffirs’ teen hulle gebruik het. Derek Coetzer het gehoor wat ek vir hulle gese het.”** In the “**minutes**” soon after Mr Van Zyl’s version appears a heading indicating that what followed thereunder was a statement by Mr Derek Coetzer.
- [8] The “**minutes**” also reveal that Mr Derek Coetzer gave his version or statement to Mr Van Rensburg while the complainants and their representative were out of the meeting. In other words this happened before they were called back into the meeting. The minutes reflect that they were called back into the meeting after Mr Coetzer had finished giving his version. Apparently, when they rejoined the meeting, it was “**put**” to them that Mr Van Zyl was denying having “**sworn at them personally**” and having used the offensive words. In other words Mr Van Rensburg did not let Mr Van Zyl repeat his version in the presence of the complainants and their representative but simply told them that Mr Van Zyl was denying that he had sworn at them “**personally**” and that he had

used the offensive words they said he had used. The meeting failed to resolve the complaint.

- [9] Absent an explanation why Mr Van Rensberg asked the complainants and Mr Maseko to temporarily leave the room while Mr Van Zyl gave his version of what had happened, it appears that he treated the complainants differently from the way he treated Mr Van Zyl in that he wanted Mr Van Zyl to hear their version but did not want them to hear his version. Why Mr Van Rensberg did this causes me much concern, particularly when he was chairing a meeting dealing with a complaint of racism. I note that Mr Stopforth denies in the appellant's replying affidavit that the complainants and Mr Maseko were asked to temporarily leave the meeting room before Mr Van Zyl could give his version but I do not know why Mr Stopforth denies something that is stated clearly in black and white in the so-called "**minutes**" of that meeting which, he admits, were prepared by Mr Van Rensberg who confirms this in a confirmatory affidavit. Mr Van Rensberg also confirms that what Mr Stopforth says in the replying affidavit that relates to him is true and correct. By saying this in his confirmatory affidavit, Mr Van Rensberg gives two conflicting versions about whether the complainants and Mr Maseko were asked to leave the meeting before Mr Van Zyl could tell him his version. According to his "**minutes**", the complainants and Mr Maseko were specifically asked to leave. In the second page of the minutes which, for some unknown reason, is marked "**page 3**" parallel to the last paragraph of the page, Mr Van Rensberg specifically

wrote: **“Requested aggrieved and representative to leave room to enable Mr Attie Van Zyl to present his version of events.”**

[10] After the end of Mr Derek Coetzer’s version, Mr Van Rensburg specifically wrote in the **“minutes”**: **“All parties called into board room to discuss matter further.”** And yet Mr Stopforth saw fit to say in paragraph 50.5 of the appellant’s replying affidavit – which Mr Van Rensburg confirmed as true: **“I deny that Mr Maseko or the complainants were told to leave the room while Mr Van Zyl made his statement.”** In support of this denial Mr Stopforth referred, and Mr Van Rensburg agreed, to what clearly occurred after the complainants and Mr Maseko had been called back into the meeting. I find all of this very strange.

[11] It would appear that another meeting was held on the 19<sup>th</sup> August 2003 which was chaired by a Mr Swart, one of the appellant’s directors, to try and resolve the complaints or the grievance. Such meeting also failed to resolve the matter.

[12] On the 20<sup>th</sup> August 2003 Mr Tseane, a director of the appellant, addressed a letter/ memorandum to Messrs Elias Mayisela, Mr Albert Moholola and Mr Attie Van Zyl. In the memorandum Mr Tseane stated that the grievance had reached the stage where it had been heard by Mr Swart and **“no conclusive evidence could be gained to enable further action against a guilty party.”**

Mr Tseane also informed the three that arrangements had been



made for a polygraph test to be conducted to test the veracity or otherwise of the statements of the three about what had happened. He stated that the directors wished to see **“corrective action as necessary as taken(sic).”** He informed the three that the directors could see no other way of testing the evidence other than through a polygraph test. The test was to be conducted on the 25<sup>th</sup> August 2003. He also informed them that each one of them would be allowed to bring along one representative to the test.

- [13] On the 21<sup>st</sup> August 2003 Mr Maseko wrote a letter to one of the appellant’s directors about the grievance. In the letter Mr Maseko referred to a step which he did not specify which he said he understood the appellant sought to take in order to deal with the grievance. He stated that he did not support such step and proposed that the grievance be referred to arbitration. He indicated that to this end the union was going to assist with the referral of the matter to the Commission for Conciliation, Mediation and Arbitration (**“the CCMA”**). It would seem that this letter may have been a reaction to Mr Tsaene’s letter of the 20<sup>th</sup> August which he had addressed to Messrs Van Zyl, Moholola and Mayisela. If that is correct, the step that Mr Maseko must have been referring to must be the polygraph test that the appellant had indicated would be conducted on the 25<sup>th</sup> August 2003.

- [14] On the same day, that is the 21<sup>st</sup> August 2003, the appellant

responded to Mr Maseko's letter. The appellant did not agree to the proposal to have the matter referred to arbitration. It stated that it was firmly of the view that the best way to deal with the matter was through a polygraph test. However, it stated that, since Mr Maseko had indicated that the union did not support that proposal, it had cancelled the appointments it had made for Mr Mayisela and Mr Moholola to undergo a polygraph test on the 25<sup>th</sup> August 2003. The appellant pointed out, however, that Mr Van Zyl would go ahead and subject himself to the test. It appears that Mr Van Zyl did undergo the polygraph test and "**allegedly**" passed it. However, no information has been put up in connection with that test. The grievance remained unresolved even after a number of meetings that had been held to try and resolve it. Various suggestions as to how it was to be resolved had been made but either parties did not agree or the one side thought that an agreement had been reached but the other had reneged on the agreement.

- [15] It would appear that on the 19<sup>th</sup> September 2003 the union referred a certain dispute to the CCMA. It described that dispute as follows in the column of the CCMA referral form where it was required to summarise the facts of the dispute:

**"The company site manger have (sic) unfairly call (sic) our members with names as POESS KAFFIRS."**

In a space in the referral form provided for the specification of the result desired out of the conciliation process, the union wrote: **"we demand the dismissal of the racist manager."** In a space

provided for the description of the nature of the dispute in the referral form, the union categorised the nature of the dispute as **“victimisation.”** Attempts at conciliation failed to produce a resolution of the matter.

[16] On the 31<sup>st</sup> October 2003 the union gave the appellant a written strike notice. The notice was to the effect that the union and its members employed by the appellant were **“hereby giving notice of 48 hours as from the date above in terms of section 64 of the Labour Relations Act No 66 as updated 2002.”** The strike was going to commence on the 4<sup>th</sup> November 2003 at 08h00. The strike would take the form of a total withdrawal of labour. Part of the notice read thus:

**“BE PLEASE NOTICE (SIC) THAT OUR DEMAND (SIC) ARE AS FOLLOWS**

**1. We demand that the manager Attie Van Zyl be total (sic) dismissed from the company for calling our members with Poes Kaffirs.” The dismissal be with immediate (sic) effect.”**

Thereafter the notice read:

**“Kindly note that the union NUMSA and its Shopstewards will remain open for further engagement as attempt to resolve the strike.”**

[17] It also appears from Mr Stopforth’s founding affidavit and Mr

Nhlapo's answering affidavit that Mr Van Rensburg did speak to Mr Nhlapo on the 3<sup>rd</sup> November 2003 and requested the latter to agree to the suspension of the strike pending a disciplinary inquiry for Mr Van Zyl that would be chaired by an independent chairman. Mr Nhlapo's version is that he did not agree to this immediately as he wanted to raise the proposal with the union members first. It seems that he subsequently did so and the union members agreed to suspend the strike pending an urgent meeting between the parties to discuss the matter. It seems that that meeting did not take place as planned and Mr Nhlapo had to return to his office.

[18] On the 3<sup>rd</sup> November 2003 the appellant suspended Mr Van Zyl from work with full benefits. In its letter of suspension to him it stated that this was after the allegation that had been made against him regarding **"foul language used against TSI staff."** It also stated that there had as yet not been any conclusion to the investigation but that the suspension was being effected **"upon pressure of industrial action against the company by the union and members."** It was stated that the suspension was **"pending the outcome of negotiations and legal proceedings to be held."** The letter also informed Mr Van Zyl that he would be informed shortly of **"a date for the proceedings, once this has been set."**

[19] On the 3<sup>rd</sup> November 2003 the appellant's attorneys addressed a letter to the union in which they advised that the appellant would seek to have the certificate of outcome issued by the CCMA in

regard to the grievance rescinded. In that letter the attorneys also dealt with the union's demand that the appellant dismiss Mr Van Zyl. In this regard they wrote:

**“Regarding your demand that the manager, Mr Attie Van Zyl, be dismissed, our client cannot comply with your request. It was previously indicated to yourself that our client is prepared to appoint a neutral attorney or advocate alternatively any other person the parties may agree upon, to do the disciplinary hearing of Mr Van Zyl. Our client previously also indicated that there is conflicted evidence (sic) in the matter of Mr Van Zyl and should he be unfair (sic) dismissed, our client may face another CCMA hearing.”**

[20] On the 4<sup>th</sup> November 2003 most of the appellant's employees commenced a strike. This was pursuant to the strike notice issued earlier by the union. On the morning of the 4<sup>th</sup> November 2003 Mr Nhlapo consulted with the individual respondents about the proposal earlier made by the appellant that the strike be suspended. According to Mr Nhlapo the individual respondents, who were already on strike on the morning of the 4<sup>th</sup> November when Mr Nhlapo arrived in the appellant's premises, agreed to suspend the strike pending a meeting that the appellant had agreed should be held at about 13h00 on that day. On that day, too, the appellant brought the urgent application referred to earlier in the Labour Court. It was on that day that Schoeman AJ granted the order

referred to earlier.

- [21] On the 4<sup>th</sup> November 2003 the appellant's Mr Stopforth addressed a letter to the union which he marked for the attention of Mr Nhlapo. In the letter he purported to confirm a telephone conversation that seems to have taken place that day between Mr Van Rensburg and Mr Nhlapo. It would seem that, according to Mr Stopforth, in that telephone conversation Mr Van Rensburg and Mr Nhlapo had agreed that Mr Van Zyl be suspended with immediate effect pending the outcome of legal proceedings against him and that the union would in turn call the strike off. Mr Nhlapo's version is that he did not conclude any agreement at that stage but he had undertaken to consult with the union members on the possibility of the suspension of the strike and revert.

### **Judgement of the Labour Court**

- [22] On the return day of the “**rule nisi**” that was issued by Schoeman AJ, the matter came before Fulton AJ in the Labour Court. Fulton AJ found that the demand for Mr Van Zyl's dismissal was not necessarily a demand that he be dismissed unfairly or without a hearing. For that reason she held that it could not be said that the demand was one that required the appellant to act unlawfully in the sense of breaching provisions of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”). Accordingly, she held that the strike was a protected strike and discharged the “**rule**” with costs.

**The appeal**

- [23] On appeal the appellant persisted in its contention that the strike was unprotected and that the Court a quo erred in concluding otherwise. In support of his contention Counsel for the appellant submitted that the demand for Mr Van Zyl's dismissal was an unlawful demand and a strike that was made up of a concerted refusal to work in support of an unlawful demand could not be a protected strike. Counsel for the respondents conceded that he could not think of any basis on which it could be argued that such a strike would be a protected strike. However, he submitted that the strike in this case did not have as one of its elements an unlawful demand. He submitted that the purpose of the strike was to get the appellant to have Mr Van Zyl subjected to a fair disciplinary process. He submitted that the respondents were prepared to accept whatever outcome was reached as a result of such a process.
- [24] Counsel for the appellant drew our attention to the fact that, when the appellant suspended Mr Van Zyl and asked the union to also suspend the strike, it refused to do so. He submitted that, if the union sought Mr Van Zyl to be subjected to a fair disciplinary process that could result either in his dismissal or retention as an employee, it would have agreed to that suggestion. He submitted that the reason why the union did not agree to that suggestion was that it wanted Mr Van Zyl to be dismissed without any fair procedure and was not prepared to accept anything short of his dismissal as the ultimate result. Counsel for the respondents drew

our attention to the fact that at some stage the union had proposed that the grievance be referred to arbitration but the appellant had rejected the proposal. He submitted that the fact that the respondents had made that proposal was indicative of the respondents' attitude that they wanted Mr Van Zyl to be subjected to a fair process and that they would have accepted whatever result flowed from such a process. It is therefore necessary to determine from the outset what the purpose of the concerted refusal to work was or what the demand was the rejection of which led the respondents to resort to a concerted refusal to work.

- [25] In their argument Counsel for both parties referred either to the strike in support of a demand or to the purpose of the strike. To refer to the purpose of a strike or to a strike in support of a demand is inaccurate in our law. This is because in terms of the definition of a strike in sec 213 of the Act a strike is not a refusal to work or an obstruction or retardation of work only but it is such refusal, obstruction or retardation when it is concerted and is resorted to for a purpose contained in the definition of the word “**strike**” or, when regard is had to the definition of “**issue in dispute**” in sec 213, it can also be said that it is such conduct when it is in support of a demand. A strike is defined in sec 213 of the Act as meaning:

**“the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter**



**of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory;”**

The definition of the phrase **“issue in dispute”** in sec 213 of the Act is: **“issue in dispute in relation to a strike or lock-out means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out.”**

The demand is linked up with the purpose – not of a strike – but of a concerted refusal to work, or the retardation or obstruction of work contemplated in the definition of the word **“strike”**.

[26] In terms of the definition of the word **“strike”** the purpose of a concerted refusal to work, retardation or obstruction of work can be to remedy a grievance, or to resolve a dispute in respect of any matter of mutual interest between employer and employee. Under the Labour Relations Act, 1956 (Act 28 of 1956) (**“the old Act”**) the definition of a strike did not include the purpose of remedying a grievance or resolving a dispute. The purpose provided for in the definition of the word **“strike”** in sec 1 of the old Act was the compulsion of the employer to agree to a demand or request or proposal made by employees in regard to terms and conditions of employment or in regard to a matter of mutual interest. This resulted in many cases where, if workers had refused to work or had engaged in a work stoppage without articulating any demand to the employer, their conduct was held not to constitute a strike. Accordingly, what the definition of the word **“strike”** does is to acknowledge that, even in a situation where workers stop working

or refuse to start work without articulating a demand or request or proposal to their employer, they have a grievance of one kind or another which they want their employer to remedy and their conduct constitutes a strike. Other concerted refusals to work or retardations or obstructions of work are those where disputes exist or a demand has been made to the employer but the employer has yet to respond thereto. A dispute will exist where a demand has been made on the employer and he has rejected it or where there is disagreement between the parties on a particular issue.

- [27] A concerted refusal to work or a concerted retardation or obstruction of work which is resorted to for the purpose of resolving a dispute is the one where the union or employees have made a demand on the employer and the employer has either rejected such demand or has neglected to comply with it. The reference to a demand, a grievance or a dispute in relation to a strike or lock-out in the definition of the phrase “**issue in dispute**” confirms the existence of three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute. There can be no doubt that, where there is a concerted refusal to work or a concerted retardation or obstruction of work which is accompanied by a demand, such a demand is the issue in dispute. It is necessary at this stage to determine whether the purpose of the concerted refusal to work in this case, or the demand, was that the appellant dismiss Mr Van Zyl, as contended for by the appellant, or, whether it was simply that the appellant subject Mr Van Zyl to a fair disciplinary process which could result in Mr Van Zyl continuing in the appellant’s employment or in Mr Van Zyl being dismissed, as

contended for by the respondents.

**Purpose of the concerted refusal to work**

[28] As already stated above, Counsel for the respondents submitted that the purpose of the concerted refusal to work was not to get the appellant to dismiss Mr Van Zyl but to get it to subject him to a disciplinary process which could have seen him dismissed or retained and given some other sanction or even found not guilty. As I said earlier Counsel for the respondents drew our attention to the fact that the respondents had at some stage proposed that the matter of the racist language allegedly used by Mr Van Zyl be referred to arbitration. In this regard he submitted that that was an indication that all the respondents wanted was that Mr Van Zyl be subjected to a fair disciplinary process. He pointed out that it was the appellant that had rejected that proposal. Another matter that Counsel could have referred to in support of his contention in this regard is the fact that, according to the minutes of the meeting held on 13 August 2003 attended by, among others, Messrs Mayisela, Moholola, Attie Van Zyl, when the representatives of the employees were asked what action they wanted to be taken against Mr Van Zyl, they responded that Mr Van Zyl should be demoted. They did not say that they wanted him to be dismissed.

[29] The purpose of the concerted refusal to work must be determined in the light of all the conduct of the respondents. This includes what the respondents wrote in the referral of the dispute to

conciliation and in the strike notice where these can shed light on such purpose. In the form used for the referral of the dispute to conciliation there is a space where the form required the respondents to state what they desired as an outcome of the conciliation process. In the referral used in this matter the respondents wrote as follows in that space: **“We demand the dismissal of the racist manager.”**

[30] One accepts that in a conciliation process a party may make a demand which he is prepared to later moderate and that a party may sometimes put up a demand that it is aware the other party will not agree to. But the respondents have not said anywhere in their affidavits that what they wrote there was not a true reflection of what they wanted to happen. It would therefore be impermissible to assume that that was not what they really wanted to achieve.

[31] What is said in the strike notice is particularly important because it will probably reflect the views of the union or the strikers at the time that they were notifying the employer of the commencement of their strike. The respondents did not say in their strike notice that their demand was that Mr Van Zyl be charged with misconduct in a disciplinary inquiry or that he be subjected to a fair disciplinary process. Instead, they wrote in the strike notice:

**“We demand that the manager Attie Van Zyl be total (sic) dismissed from the company... the dismissal be with immediate (sic) effect.”**

If the purpose of the respondents' concerted refusal to work was as innocuous as it was suggested to us in argument, why then did the respondents choose to put in their strike notice a demand that was not their true demand? It is also true that in the strike notice the respondents wrote that the union and shopstewards would remain open **"for further engagement as attempt to resolve the strike."** However, that does not change the fact that the demand in support of which they sought to engage in a concerted refusal to work, retardation or obstruction of work was given in the referral form and the strike notice as the immediate dismissal of Mr Van Zyl.

[32] If one has regard to the respondents' case as set out in its answering affidavits, there is no serious suggestion anywhere that the purpose of the respondents' concerted refusal to work was to get Mr Van Zyl to be subjected to a fair disciplinary process which did not need to result in his dismissal. If it had been the respondents' case at the time of the concerted refusal to work that all they wanted was that Mr Van Zyl be subjected to a fair disciplinary process, it is in their answering affidavits that one would have expected them to say that this was the case. They do not say so in the answering affidavits.

[33] In paragraph 10 of the founding affidavit Mr Stopforth stated that Mr Nhlapo **"confirmed the intention to strike based solely on the ground that Van Zyl be dismissed with immediate effect."** Mr Nhlapo's response thereto in paragraph 19 of the answering affidavit does not in effect deny that allegation. Accordingly, it can

be taken to be admitted. Indeed, what Mr Nhlapo says in paragraph 19.2 of the answering affidavit is consistent with the proposition that the concerted refusal to work had as its purpose the compulsion of the appellant to dismiss Mr Van Zyl. In paragraph 19.2 of the answering affidavit, Mr Nhlapo says that, if Mr Van Zyl was dismissed, the dismissal would not constitute an unfair labour practice. The question arises: why was Mr Nhlapo talking about Mr Van Zyl's dismissal that would not constitute an unfair labour practice? Why wasn't he saying: Mr Van Zyl's dismissal did not arise as far as the respondents were concerned because the purpose of their concerted refusal to work was not Mr Van Zyl's dismissal but simply that he be subjected to a fair disciplinary process which could or could not result in his dismissal? It seems clear that the reason Mr Nhlapo sought to defend the fairness of the dismissal referred to was that Mr Van Zyl's dismissal was the purpose of the respondents' concerted refusal to work.

- [34] In paragraphs 19 and 20 of the founding affidavit, Mr Stopforth stated that Mr Van Rensburg had explained to Mr Nhlapo that **“to dismiss an employee without proper grounds would result in the (Appellants) contravening the Labour Relations Act.”** He went on to say that this would lead to the appellant having an (arbitration) award handed down against it. Mr Stopforth said that Mr Nhlapo refused to change his stance on the intended strike. In the answering affidavit Mr Nhlapo does not challenge these statements at all or in any effective way.

[35] Furthermore, in paragraph 25 of the founding affidavit Mr Stopforth stated that he was informed by Mr Nhlapo that the respondents' intention was, in Mr Stopforth's words, to **"persist with this action until such time as Mr Van Zyl has been dismissed by the [appellant]."** In the respondents' answering affidavit Mr Nhlapo did not in effect deny this allegation. In the light of all the above I find that the purpose of the respondents' concerted refusal to work was to get the appellant to dismiss Mr Van Zyl and to do so immediately. I reject the submission that the purpose was that Mr Van Zyl be subjected to a fair disciplinary process which did not need to result in his dismissal. That submission is devoid of any evidential basis.

[36] I think that the fact that at some stage a proposal had been made that the grievance be referred to arbitration and the fact that at some stage there was a suggestion that Mr Van Zyl be demoted are not sufficient to justify a conclusion that the purpose was that Mr Van Zyl be subjected to a fair disciplinary purpose. These took place much earlier in the process. The suggestion of the demotion was made on the 13<sup>th</sup> August. The arbitration proposal was made in the letter of the 21<sup>st</sup> August. The referral of the dispute to the CCMA, and, the strike notice, in which the respondents wrote that their demand was that the appellant dismiss Mr Van Zyl immediately, were on or about 19 September and 31 October 2003 respectively. The strike began on the 4<sup>th</sup> November.

[37] There is no evidence which suggests that the respondents' attitude in October and early November was anything other than that they stood by their demand unequivocally stated in the referral form and the strike notice, namely, that the appellant dismiss Mr Van Zyl immediately.

[38] The question can also be approached on the basis of determining what the issue in dispute was in relation to the strike. The definition of the phrase **"issue in dispute"** contained in sec 213 of the Act has been given above. However, it is convenient to also refer to it in relation to the point now under discussion. The phrase **"issue in dispute"** is defined in 213 of the Act as meaning **"in relation to a strike or lockout the demand, the grievance or the dispute that forms the subject matter of the strike or lock-out."** Reverting to the three categories of strikes that I have referred to earlier, namely, a strike that has as one of its elements a demand, a strike that has no demand but has a grievance as well as a strike that has a dispute as part of its elements, it must then be clear that the concerted refusal in this matter was one that had a demand. That demand formed part of the dispute. It certainly was not a strike where no demand had been articulated. As it was a strike that had a demand as its integral part, that demand was the issue in dispute. Accordingly, the issue in dispute was the respondents' demand that Mr Van Zyl be dismissed.

[39] Now that I have found that the purpose of the respondents' concerted refusal to work was to compel the appellant to dismiss



Mr Van Zyl, the next question for determination is whether or not such a demand was an unlawful one. I shall assume, without deciding, in favour of the respondents that it is permissible in our law for employees to engage in a concerted refusal to work in support of a demand that the employer dismiss an employee fairly. In this regard I have in mind the case of an employee who has been charged with, and found guilty of, misconduct that is sufficiently serious to render his dismissal fair but whom the employer decides not to dismiss. Let us say that employees found guilty of fraud have consistently been dismissed in a particular company for many years but in one case the employer decides that in a particular case he will not dismiss the employee because of some unacceptable reason such as that he is white and the others who had been dismissed for similar offences were black. Let us assume that the loss resulting from such fraud for the employer is a million rand. It seems that in such a case, if the employee was guilty of such serious misconduct that would, quite clearly, be a fair reason for his dismissal. In such a case it may well be that, if there was a disciplinary inquiry and such employee was found guilty of such serious misconduct but was not dismissed on such unacceptable grounds as racist grounds, a demand that the employer dismiss such employee cannot be said to be a demand for the employer to act unfairly. It may well be that in such a case it is arguable – and I put it no higher than that – that such a demand may form part of a protected strike.

[40] I did not understand Counsel for the respondent to be arguing in

the alternative that, if we found that the purpose of the respondents' concerted refusal to work was to get the appellant to dismiss Mr Van Zyl, we should find that the purpose was that the appellant dismiss Mr Van Zyl fairly. However, I propose, nevertheless to consider whether or not the respondents' demand that Mr Van Zyl be dismissed was an unlawful demand in the sense that it was a demand that he be dismissed in violation of his right not to be unfairly dismissed provided for in the Act.

[41] The statutory provisions that are relevant to the respondents' demand for Mr Van Zyl's dismissal are those contained in sections 185 (a) and 188 of the Act. Sec 185 of the Act provides:

**“185 Right not to be unfairly dismissed or subjected to unfair labour practice. - Every employee has the right not to be:**

**(a) unfairly dismissed.”**

Sec 188 provides:

**“188. Other unfair dismissals.**

1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -

**(a) that the reason for dismissal is a fair reason**

**i) related to the employee's conduct or capacity;**

**ii) based on the employer's operational requirements; and**

**(b) that the dismissal was effected in accordance with a fair procedure.**

**2) 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 this Act.”**

[42] Section 185(a) of the Act confers upon every employee, including Mr Van Zyl the right not to be dismissed unfairly. The provisions of sec 188(1)(a)(i) and (b) of the Act provide that a dismissal which is not an automatically unfair dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to, in a case such as this one, the employee’s conduct, and, that the dismissal was effected in accordance with a fair procedure.

[43] If we were to conclude that Mr Van Zyl’s dismissal, as demanded by the respondents, would have been a fair dismissal and, therefore, would not have violated his right not to be dismissed unfairly, it would have been necessary that there be sufficient evidence before us that Mr Van Zyl was guilty of making the racist remarks he is alleged to have made. On the evidence before us we cannot make such a finding because not only is there no admissible evidence before us that Mr Van Zyl made those remarks but also the respondents have not in their papers approached this matter on the basis of making out a case before the Court a quo, and, therefore, before us as well, that there is enough evidence to suggest that Mr Van Zyl is guilty of making the offensive remarks.

[44] I say that there is no admissible evidence because the people who were with Mr Van Zyl when he allegedly made the offensive remarks and who allegedly heard the remarks did not depose to any affidavits in this matter. These are Messres Mayekiso and Maholola. There seems to be a suggestion that Mr Derek Coetzer was also close enough to have heard. Of course, there was also Mr Van Zyl. In the record none of these persons deposed to any affidavit. That being the case, we cannot decide the matter on the basis that there is sufficient evidence that Mr Van Zyl had made the remarks or that there was a fair reason for the appellant to dismiss Mr Van Zyl. Indeed, we must approach the matter on the basis that there is no evidence before us that, if the appellant had dismissed Mr Van Zyl as demanded by the respondents, it would have been able to prove that he had made the remarks and that there was a fair reason for his dismissal based on his conduct. This leads inevitably to the conclusion that the appellant would have dismissed Mr Van Zyl unfairly if it had complied with the respondents' demand. Such a dismissal would have been a violation of Mr Van Zyl's right not to be unfairly dismissed that is provided for in sec 185(a) of the Act in that there would have been no fair reason for his dismissal.

[45] I should not be taken to be saying that Mr Van Zyl did not as a matter of fact use the racist language that the complainants apparently said he used. He may well have. Indeed the statements that he made to Mr Van Rensburg at the meeting of the 13<sup>th</sup>

August 2003 that he did not swear at the complainants personally are strange. However, all I am saying is that in the record before us no attempt was made to prove that he had used the racist language, probably because it was thought that the determination of the question whether or not he had used such language would be dealt with in another forum. Racism continues to be a cancer in our society. The workplace is no exception to this. Employers, unions, employers' organisations and employees should play their role in eradicating it. Of course, in this regard only lawful and fair means are acceptable. This is no licence for people accused of racism to be treated unfairly for they, too, are entitled to be dealt with fairly in the determination of whether they are guilty or not of racist conduct and whether or not in a particular case they should be dismissed. However, the situations which would render unfair the dismissal of a person guilty of racist conduct resorted to in the full knowledge that it is racist or racially offensive must be very limited. It is hoped that, if the complainants' complaint has not been resolved, it can still be, and will be, subjected to an inquiry or process which would either result in an amicable resolution thereof or which will result in a determination that will put finality on whether or not the complainants were subjected to the racist and offensive language to which they accuse Mr Van Zyl of having subjected them.

- [46] In the light of the conclusion I have reached that on the evidence before us Mr Van Zyl's dismissal as demanded by the respondents would have been without a fair reason, it is unnecessary for me to

determine whether it would also have been procedurally unfair.

[47] Once Mr Van Zyl was aware of the respondents demand to the appellant that the latter dismiss him in breach of his rights provided for in sec 185 read with sec 188 of the Act, he might well have been able to approach a court or forum of competent jurisdiction and sought either a declarator that such dismissal, if effected, would be unfair and in breach of sec 185 and sec 188 or he could have sought an interdict restraining the appellant from dismissing him. This is on the assumption that other requirements for an interdict could be met in the case. In such a case the appellant would in all likelihood not have opposed such proceedings. Indeed, it may well have consented to such order or interdict being granted.

Once such an interdict had been granted against the appellant, not only would the appellant definitely be entitled to refuse to comply with the respondents' demand but also the respondents could not persist with the demand at that stage as the demand would in effect be requiring the appellant to act in contempt of an order of Court and, therefore, to commit the crime of contempt of court.

[48] The above scenario shows, in my view, beyond any doubt that the demand such as the one made by the respondents to the appellant in this case falls outside the category of demands that can be supported by a concerted refusal to work, retardation or obstruction of work envisaged in the definition of the word “**strike**” in sec 213 of the Act. (Compare with what was said in **Bader Bop (Pty) Ltd v NUMSA & others (2002) 23 ILJ 104 (LAC) at 121B-123 I (paras 40-50.** That question did not arise in **NUMSA & Others v Bader Bop (Pty) Ltd & Another (2003) 24 ILJ 305 (cc) at 321**

footnote19.) Accordingly, it seems to me that the purpose of the concerted refusal to work or retardation or obstruction of work contemplated in the definition of the word “**strike**” in sec 213 of the Act cannot be conduct that would constitute a violation of the right not to be dismissed unfairly provided for in sec 185 read with sec 188 of the Act.

[49] In these circumstances I am of the view that the appeal should succeed. As to costs, there was a legitimate dispute between the parties which required to be decided by the courts. There is also a continuing relationship between the parties. In these circumstances I am of the view that the requirements of law and fairness dictate that no order as to costs should be made in this matter.

[50] In the premises I make the following order:

1. The appeal is upheld.
2. The order of the Court a quo is hereby set aside and replaced with the following order:

**“(a) The rule is confirmed.**

**(b) No order as to costs is made”**

**ZONDO JP**

I agree.

**NICHOLSON JA**

I agree.

**McCall AJA**

**Appearances:**

For the appellant : Adv. J.J Reyneke SC and Adv. APJ Du Plessis

Instructed by : VRM Attorneys

For the respondent : Adv J.G. van de Riet

Instructed by : Ruth Edmonds Attorneys

Date of judgment : 8 March 2006