

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C153/2008

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

JOHN WILLIAM VAN DEN HEEVER

Second Applicant

BENJAMIN JOHAN VASS

Third Applicant

and

BLACK MOUNTAIN MINING (PTY) LIMITED

Respondent

JUDGMENT

AC BASSON, J

Parties

[1] The first applicant is the National Union of Mine Workers (hereinafter referred to as “NUM” or “the union”) the majority union at the respondent’s workplace. Both the second and third applicants were shop

stewards at the time of their dismissal. The second applicant is Mr. Van den Heever (hereinafter referred to as “Van den Heever”). At all relevant times he was the chairperson of the union’s branch committee at the respondent’s mine. The third applicant is Mr. Benjamin Johan Vass (hereinafter referred to as “Vass”), who was employed as a full-time shop steward by the respondent. The respondent is Black Mountain Mining (Proprietary) Limited.

Dispute

- [2] This case concerns the dismissal of the said two employees who were both former shopstewards of the respondent. Both applicants were dismissed for particular acts of misconduct which occurred during the course of a strike. It is not in issue whether or not the strike as a whole was justified. The applicants also alleged that in dismissing them, the respondent acted *contrary to section 5* of the LRA (s187(1) and/or that the reason for the dismissal was:

“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 IV” (s187(1)(a)).

- [3] The allegations were therefore that the dismissal was automatically unfair. This was in dispute. I will return to this issue at the end of my judgment. Suffice to point out that no evidence was placed before the Court to substantiate a claim for automatically unfair dismissal. I have

thus proceeded to consider whether the dismissals were fair on the basis of misconduct.

- [4] Most of the facts pertaining to this matter are not in dispute. What is, however, in dispute are certain of the facts relating to the charges against the two applicants. In essence it was the case for the respondent that the evidence establishes that the two applicants are guilty as charged. The applicants essentially aver that their conduct was justified by the fact that they were acting as union representatives and not as employees. The respondent, however, argued that the fact that the two applicants were acting as union representatives and not as employees, is not borne out by the established facts and circumstances and does not, in any event, amount to a valid defense.

Brief outline of the relevant facts¹

- [5] The respondent is a base metal mine with approximately 800 employees. There were 9 shop stewards. Van Den Heever was the chairperson of the Shop Steward's Committee, Abie Maarman the regional chair and Vass the fulltime shop steward. The respondent's turnover is approximately R1.5 billion per annum. Nearby the mine is a residential area known as Aggeneys where the respondent's employees are housed. The residential area of Aggeneys comprises two parts: The north village and the south village. Prior to 1994 and in accordance with

¹ Both parties have submitted comprehensive heads of argument and I have relied liberally on the heads in summarizing the facts and the evidence.

apartheid legislation in place at the time, the north village was reserved for white employees, while black employees resided in the south village. Since 1994 both of the villages have become racially integrated. The more senior employees stay in the north village. At the time of his dismissal, Van den Heever had been resident in the north village.

[6] There are two entrances to the mine. The main entrance to the mine is at what is known as the boom gate. Some 1 to 1½ kilometers away from the boom gate, is the concentrator gate.

[7] The mine operation also includes the mine itself, a plant and workshops. Adjacent to the plant and workshops is what is known as the Broken Hill mining operation, which is the old part of the mine. There is also an administration block for the mine in the town of Aggeneys which contains the offices from where most of the mine's senior management operates. The main gate is located here.

Applicable collective agreements

[8] It was common case that certain agreements applied to the relationship between the union and the respondent. These agreements are the recognition and procedural agreement concluded in December 2001 (hereinafter referred to as "the recognition agreement") and the full-time shop steward agreement also concluded in December 2001 (hereinafter referred to as "the full-time shop steward agreement")

The recognition agreement

- [9] The following paragraphs of the recognition agreement are of particular relevance. Paragraph 7.3.2, which deals with the channels for communications that the union and its shop stewards must use if they wish to issue communications in the respondent's workplace. It reads as follows:

"7.3.2 Any notice or leaflet for display shall be submitted by a Shop Steward to the Human Resources Manager, or his designate, and initialled by both parties before it is displayed. Where the Company raises an objection to the content of any notice or leaflet, the parties shall jointly decide on the rewording of the text of the document in question."

- [10] Paragraph 8.1 and in particular paragraphs 8.1.1 and 8.1.2, which deal with the arrangements in terms of which the respondent will make facilities available to the union for meetings at its premises, reads as follows:

"8.1.1 The Union submits a request to the Manager for consent to hold a general meeting within a reasonable period of time before the time of the proposed meeting;

8.1.2 The Union advises the Manager of the names and official designations of Union officials and office-bearers who are not employees of the Company who shall attend the meeting."

- [11] Paragraph 12.5, which deals with the terms and conditions and status of employee representatives of the first applicant and reads as follows:

“12.5 The recognition of the employees representatives in terms of this agreement shall not be construed as conferring upon such employee representative any special privilege or preferential treatment in relation to his position as an employee of the Company and the employee representative shall at all times and in all respects be bound by the same terms and conditions of employment which apply to all other employees in the same occupation without detracting from the provisions of clause 11.6. An employee representative shall not, however, be victimized for carrying out his rights and duties as referred to in this clause.”

The Full-time shopstewards agreement

- [12] The following paragraphs of this shopstewards agreement are also relevant. Paragraph 1.2, which deals with the nature of the full-time shop steward position, reads as follows:

“1.2 The full-time shop steward shall be in the full-time employ of the Company and be subject to the Company’s conditions of service and all procedures and practices in existence and in operation at the Company.”

- [13] Paragraphs 4.1 and 4.2 deals with the full-time shop steward’s reporting line and limit the duties of the shopsteward to matters relating to

the respondent.² Paragraph 4.3 and in particular paragraphs 4.3.6 to 4.3.8 deal with the more specific functions of the full-time shop steward. It is important to refer to the contents thereof:

“4.3 The functions of the full-time shop steward shall include:

.....

4.3.6 discouraging and taking steps to prevent any unlawful action by Union members;

4.3.7 ensuring that the Union complies with its duties and obligations as specified in the Recognition Agreement annexed hereto as Annexure A, any other agreement entered into between the parties and all applicable legislation;

4.3.8 promoting co-operation and understanding between Company management and the Union members by means of communication with and liaison between the recognised shop stewards, other members of the Union and the appropriate levels of Management, thereby assisting in avoiding or resolving grievances and/or disputes and conflict. In this regard the full-time shop

² “4.1 The full-time shop steward shall report to the Senior Human Resources Officer at the Company. The Senior Human Resources Officer shall be responsible for the supervision of the full-time shop steward during his normal working hours in respect of all procedures, terms and conditions of employment, which apply to the full-time shop steward.

4.2 The full-time shop steward shall, during normal working hours, solely concern himself with matters relating to the Company and shall not conduct any non-Company Union business during such normal working hours, except with the Company’s prior consent.”

steward shall have access to the Company's management through the Senior Human Resources Officer."

In regard to this paragraph it was argued that it is clear that this agreement imposes, by agreement, certain positive duties and standards upon shop stewards to promote co-operation between the parties and to assist in conflict resolution.

- [14] Paragraph 4.4 and in particular paragraphs 4.4.1 to 4.4.3 deal with specific actions from which the full-time shop steward shall refrain and read as follows:

"4.4 The full-time shop steward shall not, either directly or indirectly:

4.4.1.1 interfere in any way with the management, business or running of the Company and its operations or any aspect thereof;

4.4.1.2 interfere with the performance of duties or the carrying out of lawful instructions by employees;

4.4.1.3 give instructions to any employee or countermand any lawful instruction given to any employee by his supervisor concerning the performance of his work;

....

4.4.6 absent himself from work without the prior approval of the Senior Human Resources Officer."

Disciplinary code

- [15] In addition to the two agreements referred to above, the respondent's disciplinary code, which forms part of the recognition agreement, is also relevant. The third unnumbered paragraph under paragraph 1 deals with the rights of managers and supervisors to take disciplinary action against employees who have acted in a manner that is prejudicial to the company's interests and reads as follows:

"The taking of appropriate disciplinary action is an indefeasible right of any supervisor and manager in the Company where a subordinate employee has acted in a manner prejudicial to the interests of the Company or in breach of company standards."

- [16] The last sentence of the paragraph under the heading "Schedule of Offences, Proposed Action and Policy Guidelines" states that:

"The seriousness of misconduct must be considered in light of all the circumstances surrounding the misconduct."

- [17] Page 7 of the disciplinary code deals with what are considered to be major offences, of which the following were specifically raised in evidence:

"Intimidating or inciting employees to violence of any form;

Threatening violence – to do physical injury to any other person;

Striking illegally or participating in unlawful unrest;

Refusal to perform any lawfully assigned regular work practice not involving unusual physical risk, or to obey instructions given the employee by the designated supervisor without just or reasonable cause, the onus being on the employee to justify the refusal and/or disobedience;

Unauthorised and/or uncommunicated absenteeism where such absence is longer than three successive working days, unless the employee offers a formal, reasonable and legitimate excuse for the absence, the onus in this case on the employee to justify the unauthorised and/or communicated absence;”

- [18] On page 5 of the disciplinary code under the heading “Very Serious Offences” the following is identified:

“Misuse of company property for private purposes (which is theft);”

Career development system

- [19] It is important to refer to the dispute that gave rise to the industrial action. A dispute had, over some time, developed in relation to a career development system at the respondent (hereinafter referred to as the “CDS”). The union wanted employees to be trained as fast and possible so that they could earn better wages. The union regarded the lack of training of black employees as part of the legacy of apartheid and as reflecting the apartheid wage. Van Der Mescht’s evidence was that the essence of the dispute concerned the number of people who would

eventually benefit from training. There were only a limited number of posts and the system thus had to be vacancy based. This stance was not acceptable to the union.

- [20] During the 2005 salary negotiations between the union and the respondent it was agreed that the parties would meet with each other and consult on the grading of positions within the respondent's business. These discussions started in approximately July 2005 and the respondent had, by August 2005, proposed a job grading system. Vass was not satisfied with the respondent's proposal in this regard and suggested that he would revert to the respondent with an alternative job grading system that NUM had used within its own organisation. Nothing was, however, forthcoming from Vass by the end of 2005 when Vass went on annual leave. When Vass returned from leave in January 2006, he advised the respondent that the union's members were disgruntled because their upgrading had not been implemented as from the beginning of that year. According to the respondent, it was surprised because no discussion had by that time taken place in respect of any upgrading. Whilst the respondent and NUM were in discussion in relation to this issue, an unlawful strike occurred. This unlawful strike resulted in the dismissal of three shop stewards and 111 employees being given final written warnings. A dispute in relation to the above disciplinary action was referred to the Commission for Conciliation Mediation and

Arbitration ("the CCMA"), which dispute was ultimately resolved by the parties agreeing to revoke the dismissal of the three shop stewards and replace their dismissals with final written warnings, and to shorten the period of validity of the final written warnings of the 111 employees (from of 12 months to 6 months).

- [21] During the course of 2006 further attempts were made to address the CDS dispute. A consultancy group known as Proudfoot was appointed to advise the respondent in regard to the issue. Proudfoot completed its work towards the end of August 2006. Discussions between NUM and respondent regarding the CDS continued through a series of meetings in December 2006, during which the parties made good progress to the extent that it was the respondent's view that the issue would be finalised at a last meeting in December 2006. This meeting was scheduled, but on the day that it would take place an accident in the mine resulting in a fatality occurred and the meeting had to be postponed. When the respondent attempted to revive the discussions with a view to concluding the outstanding issues, the union introduced a new demand that the respondent pay each employee R500 as a fine ("boete-geld") because the CDS dispute had not as yet been finalised. This, according to the respondent, derailed the consultation process and in January 2007 the union declared a dispute. The dispute was referred to the CCMA and a certificate of non-resolution was issued.

[22] At that stage the respondent's business was being managed by an acting general manager. The new general manager, Mr. Olaf Meijer (hereinafter referred to as "Meijer"), took up his position with effect from 1 May 2007. Under Meijer's direction the respondent made various further unsuccessful attempts to resolve the dispute.

[23] On 14 June 2007 the union gave the respondent notice of a strike that would commence on the evening of 17 June 2007.

The Strike

[24] It is common cause that the strike commenced on Sunday evening, 17 June 2007 at 18h00. The crux of the strike was whether the career development process would be vacancy based or not.

[25] Van Den Heever did not join the strike. He was, however, contacted by Van Der Mescht on 18 June 2007 when Van Der Mescht requested him to leave the workplace and attend to his members at the main gate who were on strike and to ensure that the strikers were under control.

[26] It was the evidence on behalf of the respondent that it received various reports that the strikers were congregated at the main gate of the mine and that they were obstructing the flow of traffic in and out of the mine. These reports and other incident reports received right through the course of the strike were recorded in a so-called "strike register", which was predominately kept by Van der Mescht.

- [27] As a result of these reports it was decided to allow non-striking employees to use the concentrator gate, which was usually reserved for heavy duty vehicles taking concentrate out of the mine, to enter the mine through that gate. The respondent also called in the assistance of the South African Police Service (“the SAPS”) to be present in and around the mine as from 18 June 2007 onwards to monitor the ongoing strike.
- [28] Van der Mescht testified that threats were also made against him personally. He testified that he became so concerned that he had laid a charge of intimidation with the SAPS.
- [29] On 6 July 2007 the union advised the respondent that it intended suspending its strike action but that the dispute between the parties could not be regarded as resolved.
- [30] The dispute remained unresolved and the employees also did not return to work en masse immediately. The respondent accordingly elected to resort to a lock-out to try and bring a resolution to the dispute. Notice of the lock-out was given on 11 July 2007. The lock-out commenced on 14 July 2007.
- [31] The strike and lock-out were ultimately resolved on the basis that the employees accepted the respondent’s terms and returned to work.
- [32] After the strike it was decided to discipline the two shopstewards.

Applicable legal principles

[33] Employees who embark on a protected strike are afforded protection against dismissal in terms of section 187(a) of the LRA. Employees who commit misconduct during the course of a protected strike are, however, not protected against disciplinary action. In *CEPPWAWU & Others v Metrofile (Pty) Ltd* [2004] 2 BLLR 103 (LAC) the LAC succinctly summarised the position as follows:

*“The purpose of a protected strike is to enable employees to engage in a form of power play with the employer with a view to influencing the employer into offering better conditions of employment. What this entails in practice is that employees are entitled to withdraw their labour and are also entitled to engage in pickets in furtherance of their strike action. **What is also clear, however, is that the right to engage in a protected strike is not a license to engage in misconduct.**”³*

An employer has the right to institute disciplinary action at any time against employees engaging in misconduct particularly of a criminal nature At the end of the day employees engaging in protected strike action need to know that they may only engage in legitimate activities intended to advance the course of their protected strike. Fairness also demands that an employer should not wait for a strike

³My emphasis.

to end to institute disciplinary action for strike-related misconduct. By its nature, illegitimate strike-related misconduct, if unchecked, affords strikers an unwarranted advantage. Due to the illegitimacy of the misconduct it cannot be expected of an employer to tolerate it indefinitely.”⁴

[34] It is clear that employees may be dismissed for strike-related misconduct. What is not, however, always clear is to what extent this applies to disciplining shop stewards for misconduct during a strike. It is accepted that especially a full-time shop steward is in a fairly unique situation in the workplace. His salary may be paid by the employer but he devotes all his time to serving the interests of the union. The job description of a shopsteward is usually also contained in a collective agreement. When the agreement is breached by the union, the employer may retaliate by canceling the agreement. One of the remedies at the disposal of the employer, who is dissatisfied with the conduct of the full-time shopsteward, is to use the dispute procedures provided for in the collective agreement (as was done in this case on a previous occasion). However, the fact remains, and this will become clear when the case law is examined, that a shop steward remains an employee and thus remains under the disciplinary control of the employer. It is, however, accepted that a more lenient approach towards disciplining

⁴ At paragraphs [53] to [54].

shopstewards may be warranted where the shop steward acts as a shop steward. I will examine this issue in more detail hereinbelow.

- [35] It is also trite that the onus is on the employer to prove that the dismissals were procedurally and substantively fair.⁵ The employer must prove, in the context of a rehearing, that the employee was indeed guilty of the misconduct for which he was dismissed. In general misconduct implies the contravention of a valid or reasonable rule or standard regulating conduct in the workplace.

Disciplining shop stewards

- [36] When shopstewards are dismissed for alleged misconduct committed while performing their duties as shop stewards, the first issue that must be established is whether or not they were in fact committing misconduct as employees or whether the alleged misconduct was merely an action ancillary to the duties of a shop steward. Furthermore, where it is established that the shop steward was indeed committing misconduct in relation to his duties as a shop steward, the limits of the immunity from disciplinary action that should be extended to shop stewards must be determined.

- [37] Mr. Kahanovitz referred the Court to various decisions in which it was recognised that shop stewards play a dual role in the workplace. See for example: *NUM on behalf of Sekgoeng and Impala Platinum Limited*

⁵ Section 192(2) of the LRA.

(2006) 27 (ILJ) 2187 (CCMA). In this matter the Commissioner accepted that shop stewards has a dual relationship with the employer and that a shop steward carry out the will of the collective structure that he forms part of. It is also accepted that shop stewards play a very important role in looking after the interests of its members and that the negotiation style of shop stewards may not always be acceptable to the employer. However, it is equally accepted that the mere fact that a shop steward fulfils this dual role does not give him or her the license to do as he or she pleases.

[38] Both Mr. Kahanovitz and Mr. Pretorius referred the Court to the decision in *Adcock Ingram Critical Care v CCMA & Others* (2001) 22 ILJ 1799 (LAC). In this judgment the LAC considered what it called the court a quo's 'anything goes' approach in respect of the conduct of shop stewards and held as follows:

"One cannot divorce the bargaining situation from reality. The negotiation pertains to the workplace and the employment situation. The employer negotiates as employer and the employee as employee and the fact that both negotiating teams represent their principals does not alter this. The fact that meetings often degenerate does not mean that one should jettison the principle that as in the workplace also at the negotiating table the employer and the employee should treat each other with the respect they

both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. Of course the criminal law can be invoked should there be a criminal act, but that is the last thing one looks for in the bargaining process. Of course the refusal to negotiate further in the face of abuse is an option, but why should the inhibitory effect of possible disciplinary action in case of serious transgressions not be allowed to lubricate the process into civility?”⁶

[39] The Court, however, came to the conclusion that the immunity granted to trade union representatives in terms of section 97(3) of the LRA (which grants immunity from civil liability to trade union representatives) extend only for *bona fide acts*.

[40] Item 4(2) of the Code of Good Practice: Dismissal also deals with discipline of trade union representatives. The Code reads as follows:

“Discipline against a trade union representative or an employee who is an office bearer or official of a trade union should not be instituted without first informing and consulting the trade union.”

[41] What is, in my view, clear from the foregoing is that disciplinary action can be taken against shop stewards provided that such misconduct was not *bona fide*. There is therefore not, in principle, a bar against disciplining shop stewards for acts of misconduct. However, in doing so,

⁶ Ad paragraph [15].

certain procedural steps must be taken (item 4(2) of the Code of Good Practice).

[42] It thus appears that the legislature (and the LAC in *Adcock Ingram supra*) recognizes that there must be a balance between the right of shop stewards to exercise their functions as representatives of a union (and of its members) and the right of employers to discipline shop stewards even when exercising their duties as shop stewards for acts of misconduct. On the one hand it is thus recognized that employers cannot abuse their position to badger shop stewards into submission. On the other hand, it is also recognized that employees who abuse their position as shop stewards may be subjected to disciplinary action by their employers. The LAC further recognized that judges and arbitrators can scrutinize such abuse. What should also not be left out in the equation is the fact that once negotiations end, the employment relationship resumes. The “*anything goes*”-approach can therefore not be accepted at face value and employers must have the right to take disciplinary action against employees who brandish weapons, threaten management or make false allegations of racism to exert their will during negotiations. It is, however, accepted that employers are expected to tolerate a certain level of insolence on the part of shop stewards and even a degree of disrespectful behaviour on the part of shop stewards especially during

negotiations during a strike which otherwise may have been regarded as unacceptable.

- [43] It is therefore in the borderline situations (excluding obviously situations which involve violence, intimidation or racism) involving insolent or even disrespectful behaviour that it is left to the Court or to the arbitrator to make a value judgment between what is considered to be tolerable conduct during negotiations (especially during a strike situation as in the present case) and what is not. In making this value judgment, all the circumstances of each particular case will have to be taken into account. This was recognized by the LAC in *Adcock* as follows:

“[17] It may be accepted that an employee enjoys greater leeway than normal when he acts as a negotiator. This flows from his dual capacity (as an employee and as negotiating representative). But it would be wrong to lay down that he has free rein to do or say whatever he wants. He remains an employee, and that relationship has to be taken into account as well.”

- [44] In *SACTWU & Another v Ninian & Lester (Pty) Ltd* (1995) 16 ILJ 1041 (LAC) the LAC, for example rejected a shop steward's plea that she had been unfairly selected for dismissal after she had led a walk out of the workstation. The LAC held that her conduct was not “collective” as she claimed and also took into account that her employment record

demonstrated “an attitude of militancy, open defiance and non-cooperation”. The Court concluded as follows:

“Sound and healthy labour relations are built up by reasonableness, understanding, fairness and the ability to negotiate – not by militancy, belligerence, obstinacy and the refusal to consider a point of view other than yours.” (At 72H.)

[45] In *Mondi Paper Co Ltd v PPWAWU & Another* (1994) 15 ILJ 778 (LAC) the LAC the Court acknowledged that a shopsteward has a particular roll to play. The LAC also acknowledged that this is not a license for unruly behaviour. In this particular case the shop steward was dismissed for deliberately disrupting a meeting with management. The Court held as follows:

“No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However, this is no license to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to ‘mitigate’ conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.” (At 780.)

[46] A similar view was expressed in *BIFAWU & Another v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) where the LAC held as follows:

“That an employee, even when he or she is representing a fellow employee at a disciplinary enquiry or arbitration hearing, owes certain duties to an employer cannot be doubted. Among these is the duty to act honestly. ... After all, when an employee represents a fellow employee at a disciplinary enquiry or arbitration hearing, he or she does so precisely in that capacity of being a fellow employee. The fellowship does not transubstantiate the continuing employment relationship between the employer and the representing employee.

... the right and duty to represent a fellow employee to the best of one’s ability is not an unbridled licence; it is constrained by the duty to do so honestly. Without honesty on the part of the representatives of the parties, the system would be unviable.” (At paragraphs [19] and [21].)

[47] The theme emerging from all of the cases referred to here is clear. Although shop stewards who are performing their functions as shop stewards cannot be victimised for performing their functions (as union representatives), they nonetheless still have an obligation to their employers to conduct themselves in a responsible manner. Should they

engage in disorderly or disrespectful conduct (although it is acknowledged that it is not always clear to what extent such behaviour should be tolerated by an employer) they can be discipline. I agree with the submission that the test would seem to be whether a shop steward's conduct can be said to fall within the realms of fair and acceptable bargaining conduct and whether it can be said to be reasonably related to the performance by the shop stewards of their functions as such. I am further in agreement that if a shop steward's behaviour does not satisfy this test, and the employer takes disciplinary action, they cannot rely on the privileges that otherwise attached to their position.

The conduct of Vass and Van den Heever

[48] Against these principles, I will now consider the substantive fairness of the action taken against the Vass and Van den Heever.

The evidence in respect of Vass

[49] It was the evidence on behalf of the respondent that various incidents gave rise to the charges against Vass. He was charged with the following:

Charge No. 1

"Refusing to obey a lawful instruction in that on 30 May, 1, 5, 14 and 15 June 2007, you used the company computer network to distribute union notices/letters to all employees registered on the

company e-mail system, without the required prior permission, despite being explicitly warned not to continue with this practice.

Alternatively

Unauthorized use of Company property: in that on 30 May, 1, 5 and 15 June 2007, you used the company computer network for purposes that you were not authorised to do, by distributing union notices/letters to all employees registered on the company e-mail system, without the required prior permission, despite being explicitly warned not to continue with this practice.”

Charge No. 2

“Making false, inflammatory/inciting/offending/insulting accusations and statements: in that on 22 June 2007, whilst addressing a crowd of striking employees at the gates of the Main Offices, you accused management of being “soos diewe in die nag” and accused the General Manager of racism, thus instigating racial disharmony amongst the striking employees during a very sensitive time. On 29 June 2007 during a meeting you once accused the General Manger of racism.”

Charge No. 3

“Intimidating and making of inciting statements: in that on 19 June 2007, whilst addressing a crowd of striking employees at the boom gate you made the following intimidatory and inciting statement,

*“Ons kan nie vir Malcolm vd Mescht se veiligheid waarborg nie”,
resulting in striking employees displaying placards with threatening
messages against Malcolm vd Mescht at the Main Offices gate
during a protest gathering later that day.”*

Charge No. 4

*“Intimidatory, Provocative and Threatening behaviour towards
members of management in that on 14 and 15 June 2007 at the
Broken Hill offices you acted in an provocative, intimidating and
threatening manner towards members of management. “*

Evidence in respect of charge 1

[50] Extensive evidence was led on all the charges. I intend to give only a brief summary of the evidence that was led in respect of each charge. Van Der Mecht's evidence was that Vass had sent out e-mails on 30 May 2007, 1 June 2007, 5 June 2007, 14 June 2007 and 15 June 2007 without the authority to do so and despite an instruction from Van der Mescht given on 30 May 2007 not to do so. Van der Mescht testified that he was one of the recipients of an e-mail dated 30 May 2007 sent by Vass. The e-mail he saw was a notice for a mass meeting which had been sent to all of the recipients on the respondent's e-mail system.

[51] Van der Mescht further testified with reference to the recognition agreement and in particular paragraph 7.2.3 thereof that it is clearly stipulated that union notices need to be approved by the respondent and

can only thereafter be displayed on the various notice boards. He further testified that no notices had previously been sent out on the e-mail system. It was put to Van der Mescht that the recognition agreement did not relate to the use of e-mail by the union. Van der Mescht, however, claimed that it was clear from the context of the agreement that the same applied whether publication was produced in an electronic format or in hard copy. The union disputed that the relevant clauses of the recognition agreement also include the use of e-mail.

[52] Van der Mescht took the matter up with Vass. He testified that he advised Vass that his conduct was unacceptable. He also told Vass that he did not want to take disciplinary action against him and said to Vass *“dat hy hierdie gebruik moet onmiddelik staak”*. According to him Vass merely stated *“point taken”* or words to that effect. According to Van der Mescht he understood by this response that Vass understood that he should refrain from this conduct. However, despite this conversation Vass again sent out similar communications on the respondent’s e-mail system on 1, 5, 14 and 15 June 2007. These emails were also copied to members of respondent’s management. Both Van der Mescht and Meijer received the e-mails.

[53] Vass denied that he had received the instruction from Van der Mescht. According to him Van der Mescht merely told him that the people *‘in die gang’* did not like the e-mail that he had sent out. He said he merely

understood management was unhappy with the e-mail and not that he was not permitted to use the e-mail system. He, however, agreed that Van der Mescht had said these were sensitive times and that he had responded “*point taken*” or words to that effect. Vass also testified that other members of the workforce had used the e-mail in a similar fashion for social purposes and that he was not aware of any rule that required prior approval by the General Manager of the respondent.

[54] Vass’s main point seemed to be that because the e-mail related to union business the matter should have been taken up with the union and not with him in his personal capacity as an employee. He was also of the view that the instruction would in any event be unlawful as it precluded legitimate trade union activity. Van der Mescht’s conceded that he had not given the union an instruction not to send out similar e-mails, but was adamant that he had given such an instruction to Vass.

[55] I am in agreement with Mr. Pretorius’ submission that Vass’ version of what transpired in relation to the e-mails is improbable and should be rejected in favour of Van der Mescht’s version. It is not in dispute that there was a conversation about the e-mails. I find it unlikely that Van der Mescht would merely have told Vass that management was upset particularly in light of the fact that Vass admitted that Van der Mescht told him that it was a sensitive time. Vass also admitted that he said to Van der Mescht “*point taken*”. I am thus in agreement that it is more likely that

Van der Mescht had told Vass that he needed prior approval for sending out these notices. However, and more importantly, Vass was a full time shop-steward. He must have known that he required prior signing off on union notices going on its notice boards. He therefore must have known that he also required prior approval of notices that the union wanted to send out via the respondent's email system (even in electronic format). Even if I were to accept that Van der Mescht only told Vass that management was unhappy (which is Vass' version), his conduct of sending out further notices shows Vass's general defiance of management (see the discussion in respect of the other charges).

[56] Lastly, the argument raised by Vass that the instruction not to use the e-mail system was unlawful as it prevented legitimate union activity (in other words that it constitutes victimisation), cannot stand. Firstly, there is no duty on the respondent in terms of any agreement that it must make its e-mail system available to the union, and secondly, at the time of the sending out of the e-mails, the strike had not yet been announced. It can, therefore not be argued that the instruction prevented strike action. I therefore do not accept the argument that Van der Mescht was endeavouring to secure an advantage in the power play.

[57] In light of the foregoing I am satisfied that Vass is guilty as charged. I will deal with the appropriate penalty later in the judgment. I must, however, point out at the outset that I agree with Mr Kahanovitz that

dismissal for this transgression on its own would have been disproportionate. I must, however, also point out that Vass was not only charged with this count, he was charged with much more serious charges each of which if found guilty may well attract the sanction of dismissal. I will now turn to charge 2.

Evidence in respect of charge 2

[58] From this charge it is clear that Vass allegedly accused the Respondent's management of acting "*soos diewe in die nag*"; that management thought that "*swart mense hooligans is*"; and management "*moet ophou om vir hulle soos kaffers te behandel*".

[59] Meijer was the respondent's main witness in respect of these allegations. In brief, Meijer testified that he had commenced employment with the respondent on 1 May 2007. One of his aims was to finally settle the ongoing CDS dispute. He testified that the parties were not able to resolve the dispute and that it resulted in a strike (commencing on the evening of 17 June 2007). He testified that it was important for the respondent that the community of Aggeneys be made aware of the strike. He also testified that the respondent wanted those employees who wished to continue working to understand that it was within their right to do so. A letter was delivered on the evening of 21 June 2007 to the community of Aggeneys.

[60] Meijer testified what transpired the next morning. He was called to the main gate at the administration block to receive another memorandum. When he arrived there, Vass was busy addressing the crowd of strikers from the back of a bakkie. Vass, *inter alia*, talked about the letter of the previous evening. Meijer testified that Vass told the crowd that management had distributed the letters of the previous evening 'soos diewe in die nag'. Vass also stated that the letters were only distributed in the south village where the black employees stayed. He further stated that management would not even listen when a black person talked and that it appeared that management again thought black people were hooligans. Meijer testified that the statements were directed at him personally because he sent out the letter and he was there that morning to receive a memorandum. He also said that Vass looked directly at him when he made the statements in question.

[61] Vass did not deny that he made the statements but testified that the statements had to be viewed in context and that his comments were justified. He claimed that the manner in which the letters were distributed was suspect particularly because it was only distributed to the south village. He further viewed the letters as an attack on the union and that the union found it offensive because the respondent was trying to galvanise the community against the union in circumstances where the union was trying to gather support for a sympathy strike. The reference

to “diewe in die nag” should be seen in the context that management did something behind the union’s back,

[62] It was further Vass’ evidence that the Respondent targeted women and those living in the historically black part of the town with the letters. Because management had tried to mobilise the community against the union, it was decided by the union to also take steps to mobilise its members hence the meeting at the gate the next day as a show of solidarity.

[63] A perusal of the letter does not show that there was a personal attack on the union. This much was in any event conceded by Vass. Meijer’s evidence that the reason why the letter was not distributed to the whole north village because they ran out of copies before it could be distributed to the whole village, was not disputed with the respondent’s witnesses when they were cross examined;

[64] In respect of the words issued by Vass, it is accepted that a strike situation is often highly emotive and often explosive. It is for that reason that it is expected of shop stewards and the union to exercise caution when addressing their members. It is accepted that the verbal communications with members are often forceful and that shop stewards and union officials could be outspoken and even be highly critical of management. This show of power and solidarity is not only part of the power play but generally acceptable. After all this is a strike situation.

However, it is equally accepted that there are limits to what will be considered to be acceptable conduct during the course of strike action. On this particular day management was invited to the boom gate to receive a memorandum from the workers. I accept that the purpose of the meeting was to show union solidarity. However, I am in agreement with Mr. Pretorius that Vass' conduct exceeded the boundaries of reasonable conduct during a strike. The allegations, especially those that smack of serious racism, are serious. I must also point out and this is a point that will be made again hereinbelow: Racism in the workplace is unfortunately still a reality. If there are issues of racism it should be taken up with management. In the present case no effort was made by the union to bring such issues to the attention of management. Vass also conceded that his statement in relation of black people being hooligans was serious and that no attempt has been made to clarify the issues underlying this statement with management. The context within which these statements were made should also be considered. They were made during a time when the relationship between the parties was strained as a result of the strike. The statements were clearly aimed especially at the general manager as it was he who signed the letter. It also cannot be ignored that no attempts have been made to take up the racial issues with management. Lastly, the content of the letter did not, in my view, justify the response from Vass. The letter essentially reminded

workers of their right to work. The letter further requested workers to encourage the union to reach a meaningful settlement. Although it is accepted that the union can take issue with any letter sent to its members especially during a strike, I am not persuaded that this letter justified the racial insults directed at Meijer.

- [65] As far as the remarks at the boom gate are concerned, it is therefore concluded that they were unwarranted and unacceptable.

The remarks made on 29 June 2007

- [66] The remark of 29 June 2007 (which also formed part of the charge) warrants separate evaluation. Three witnesses on behalf of the Respondent testified what occurred at the meeting on 29 June 2007. Van der Mescht, Meijer and Glyn Barton (hereinafter referred to as "Barton") confirmed that a meeting took place on 28 June 2007 (the previous day). It appeared to management that progress had been made in respect of the resolution of the CDS dispute to the extent that the respondent was hopeful that the matter would be resolved the following day. Van der Mescht was asked to provide the union with actual figures in relation to the opportunities for advancement in terms of the respondent's latest proposal, which he did via email to the union. The meeting resumed on 29 June 2007. Meijer confirmed that the requested information had been sent to the union the previous evening but that the union took issue with the information. Meijer testified that this was done

in a courteous manner. Meijer and the union discussed the issue in order to find out why the union was dissatisfied with the information. Meijer explained to the union that the figures sought by the union were not available and that it would take some time to compile it. The evidence was that Vass then out of the blue (*“uit die bloute”*) and completely out of the context of the meeting interrupted the meeting by stating that *“bestuur moet ophou om vir hulle soos (stupid) kaffers te behandel”*. Meijer testified that Vass was “fairly aggressive”. Meijer testified that he was offended and taken aback and that he then decided to end the meeting and leave. Van der Mescht recorded a note of the meeting.

[67] Vass admitted that he used the words. He explained that the statement was not aimed at Meijer but at Van der Mescht. He then explained that Van der Mescht had a history of racism and that he had taken the matter up with Van der Mescht and other managers.

[68] I have several difficulties with the evidence of Vass. Firstly, the allegation of racism leveled at Van der Mescht was raised for the first time at the trial. It has never been raised before. Secondly, Meijer was at the stage of the outburst not even talking to Vass. Thirdly, allegations of racism have never been leveled against Van der Mescht formally. This was raised for the first time at trial. Grievances were raised against Van der Mescht during the strike which was dealt with. It is indeed strange that a

serious allegation of racism was not also raised at that stage. The first grievance called for the removal of Van der Mescht's from negotiations and for his dismissal because he did not play a positive roll. No mention was made of racism. The second grievance also makes no mention of any racism. It is highly improbable that if Van der Mescht was perceived as a racist that this issue would not have been raised earlier. As I have already pointed out, our workplaces are no strangers to this evil. If it existed in this workplace, I am of the view that it would have been raised earlier. I am lastly not persuaded that the verbal attack was directed at Van der Mescht. This was the evidence of Meijer and it was not contested. In fact, Vass accepted that Meijer stormed out of the meeting because he was of the view that the verbal attack was directed at him. Lastly, even if the attack was directed at Van der Mescht, I am still of the view that it was completely unwarranted.

[69] Mr. Kahanovitz conceded that the contents of this statement extended beyond the immunities that should protect union leadership in a strike context or to promote the freedom of expression. Although I will return to the appropriateness of the sanction later in the judgment, suffice to point out that it was submitted that mitigating circumstances existed. Mr. Kahanovitz pointed out that Vass was under considerable stress at the time and that the strike was frustrating. These words were also, so it was submitted, expressed in the heat of the moment. Mr. Kahanovitz also

disputed that racist accusations can only be made if it can be proven that the allegations are true. He argued that this is part of the political rhetoric and that it is based on perception. I agree in part with this submission. I agree that racism is often a perception that a person has for which, if investigated, no substantiating facts may be found. However, the context within which these words were uttered cannot be ignored. Vass was a shop steward. He was not an employee with no muscle power. He had the full force of a respected and powerful union behind him. If there had been issues in respect of racism, those could have been raised at any time. The context in which the words were uttered should also be considered. Vass' words were unprovoked and unwarranted.

[70] In light of the foregoing I am satisfied that Vass is guilty as charged. As far as the sanction of dismissal is concerned, although I will discuss that hereinbelow, I must point out that I am not persuaded that the mitigating circumstances (if they are indeed such) excuse his conduct. Vass was a shopsteward. Although this position brings certain privileges and to a certain degree protection against disciplinary action, it also brings about certain responsibilities. Vass as a shop steward was there to protect and advance the interests of his members. Instead he resorted to personal and unwarranted verbal abuse. This is not acceptable and it cannot be expected of management to tolerate such behaviour – not even from a shop steward.

Evidence in respect of charge 3

[71] On 19 June 2007 approximately 200 strikers assembled outside the boom gate. According to the evidence Vass addressed the ground from the back of his bakkie with a loudhailer. Mr Harry Bray (hereinafter referred to as “Bray”) testified that Vass told the crowd that “*ons kan nie Malcolm van der Mescht se veiligheid waarborg nie*”. Bray who was present testified that he saw this as a treat to Van der Mescht. A poster later appeared depicting the death of Van der Mescht. Van der Mescht received other threats and reported these to the SAPS.

[72] Vass did not deny having said these words to the crowd but justified it by saying that he was merely conveying a view. In the disciplinary enquiry, however, Vass stated that he was merely making a factual statement to the effect that the union would not take responsibility for the safety of Van der Mescht. Vass, however, conceded that there were “hot heads” in the crowd and that some of them consumed alcohol. Vass also conceded that the poster that appeared later the day was a serious threat to the person of Van der Mescht.

[73] I have indicated in the preceding discussion of the law that the conduct of a shop steward should be evaluated in the particular circumstances of each case and that the Court or arbitrator will be called upon to make a value judgment as to what is considered to be acceptable and unacceptable behaviour.

[74] In the circumstances of this case, where it was acknowledged by Vass that the atmosphere was tense and that there were hotheads in the crowd, it was, in my view highly irresponsible to have uttered these words. Coupled with the threats that Van der Mescht received and the placard that displayed his death, these words cannot be trivialized or justified. Vass was irresponsible and his conduct exceeded what is regarded as reasonable behaviour of a shop steward. In the event I am of the view that Vass is guilty as charged. His conduct was willful and constitutes serious misconduct.

Charge No. 4

[75] Vass was found not guilty on this charge and will, therefore not be considered.

Evidence in respect of charge 5

[76] It was not in dispute that Vass absented himself from the workplace from 9 to 13 July 2007 and that he did not have the permission of the respondent. It was further common cause that he attended the South African Communist Party National Conference during that time.

[77] Van der Mescht's uncontested evidence was that Vass approached him on 6 July 2007 for permission for leave for the following week. Van der Mescht refused him permission as he was the full-time shop steward and the strike was still in progress. Van der Mescht also had discussions with the human resources manager at the time and it was decided not to

approve the request for leave. Van der Mescht thereafter informed Vass of the decision.

[78] Vass testified that although he was the chief negotiator at the time in respect of the dispute that gave rise to the strike, he wanted to remove him from the process and allow someone else to take over. It was, however, common cause that this was never communicated to the respondent. Vass did not, in other words, explain to management why he wished to take leave.

[79] I am in agreement with the submission that it was not unreasonable for the respondent to have refused Vass leave whilst the strike was still ongoing particularly where management was not aware of the real reason for wanting to take leave. I am therefore of the view that Vass is guilty of absence without leave.

The position of Van den Heever

[80] Van den Heever was charged with the following:

Charge No. 1

“Intimidation, Incitement and Threatening behaviour – in that on 22 June 2007 at the concentrator gate you verbally threatened that “my mense raak kwaad en gaan brand”.

Charge No. 2

“Interfering with an employee in the execution of his duties – in that on 22 June 2007 you without the authority to do so instructed the

security employee on duty to provide him with the particulars of all persons entering and exiting the concentrator gate.”

[81] Mr. Philip Phetlhane (hereinafter referred to as “Phetlhane”) was called to testify on behalf of the Respondent in respect of the events that transpired at the concentrator gate on 22 June 2007. In brief it was his evidence that he was instructed by Bray to guard the concentrator gate and to provide access to those people that wanted to enter the mine and work. Whilst he was on duty he saw a Bantam bakkie approaching the concentrator gate with two occupants. He recognised Van den Heever who was driving. He testified that he was asked if the route was used by cars or trucks. He testified that he was told that people were angry and that they are going to burn. He said that Van den Heever gave him an order to register cars gaining access and exit to the premises and that Van den Heever would come back to collect the registration sheet. He did not recognise the passenger in the vehicle. He reported the incident to Captain Grey. It was put to him under cross examination that he had said at the hearing that he did not know Van den Heever.

[82] Despite the fact that Phethane was a difficult witness who refused to answer any questions that were not contained in his statement, I did not perceive him to be a dishonest witness. He stuck to his version. When it was put to Phetlhane that it was not Van der Heever who spoke to him

but a man with the name of Tanyane, he was adamant that he spoke to Van den Heever and not Tanyane.

- [83] The Court was thus confronted with two mutually destructive versions. What is, however, common cause was that Van den Heever was at the gate. It is only in dispute who spoke to Phetlhane. It must be pointed out that it was accepted by Mr. Kahanovitz that there were contradictions in the evidence of Van den Heever. On the other hand we had the evidence of Phetlhane (although he was a difficult witness) which was in all respects consistent. I have, however, also taken note of the fact that Van den Heever did not call Tanyane to corroborate his version despite it being on record that his whereabouts (i.e. his place of work) were known to the applicants. In view of the foregoing I am persuaded that Van den Heever was guilty as charged.

Procedural fairness of the dismissal of Vass and Van den Heever

- [84] Two procedural issues were raised. The first is that there was an undue delay between the factual events and the taking of disciplinary action against both applicants. The second is bias. Only the procedural complaint in respect of bias was pleaded.
- [85] Because the complaint about the delay was not pleaded the issue need strictly not be considered. I have nonetheless considered this point. It appears that various events took place after the May and June incidents which formed the basis of the complaints against the Applicants. After

the strike was called off, the workers were locked-out. The lock-out was finally called off on 14 August 2007. On that day the union was given notice of the respondent's intention to investigate allegations of misconduct against shop stewards. The union and the respondent exchanged correspondence and various meetings took place between the parties between 27 August 2007 and 7 September 2007. On 11 September the respondent informed the union that the hearings will commence. The hearings were scheduled for middle September. I have considered the reasons for the delay and I am satisfied that the period leading up to the hearings were taken up by the strike, the lock-out, the exchange of correspondence and various meetings. Once the process was concluded, the respondent instituted disciplinary action. I am thus not persuaded that there was an undue delay in bringing the charges. Also, I should reiterate that this issue was, in any event, not before the Court.

[86] The second complaint is the alleged bias of the chairpersons. At the outset it should be pointed out that it is quite clear from the record of the disciplinary enquiries that no objections were made in respect of the chairpersons of the hearings. Neither applicant sought the recusal of their chairpersons. Apart from the fact that neither applicant ever objected to their respective chairpersons, no factual basis has been laid to substantiate a claim of bias. At the very least the applicants should

have produced evidence that would have persuaded this Court that the chairpersons were bias. Presiding officers need not recuse themselves merely because an accused employee alleges bias: some foundation must be laid for the claim. A measure of “institutional bias” has generally also been accepted in the Labour Court. I am therefore not persuaded on the evidence and a perusal of the record of the disciplinary hearings that this claim is substantiated. As far as the procedure is concerned I am of the view that the dismissal of both applicants was procedurally fair.

Appropriate sanction in respect of Vass.

[87] I have already indicated that I am of the view that Vass is guilty as charged. Although I would not have imposed the sanction of dismissal if charge 1 was the only charge against Vass, I am, however, of the view, especially having regard to charges 2 and 3 that dismissal is an appropriate sanction. The actions of Vass were serious. Although he was a shop steward and although a certain degree of latitude should be allowed, Vass grossly overstepped the line. His unsubstantiated allegations of racism against senior management were clearly unwarranted. Moreover, Vass’ threats against the person of Van der Mescht are extremely serious and cannot be condoned. In these circumstances I am of the view that the sanction of dismissal is warranted. In respect of charge 5, Vass willfully absented himself from the workplace. This conduct made him guilty of gross insubordination

and insolence. Taking into account all the charges (except for charge 1) I am of the view that dismissal is an appropriate sanction.

Appropriate sanction in respect of Van den Heever

[88] In respect of Van der Heever, I am less inclined to impose the sanction of dismissal. Although I am of the view that Van den Heever's misconduct was also serious (although not nearly to the extent of Vass' misconduct), I am of the view that his personal circumstances outweigh imposing the sanction of dismissal. His evidence was that he and his wife had to leave Aggenys because Aggenys is a mining town. His plan had been to remain in the employ of the respondent until his retirement. He also had strong ties with the community. His evidence also was that he had worked himself up. I have therefore decided to order his reinstatement but not fully retrospective in light of the seriousness of his misconduct. I therefore order Van den Heever's to be reinstated but limit his retrospective reinstatement to 6 months. Van den Heever is further ordered to report for duty no later than 1 February 2010.

The automatically unfair dismissal dispute

[89] One final point must be made in respect of the claim of automatically unfair dismissal. It is trite that the applicants have an evidential burden to prove the true reason for the dismissal. The applicants bear an evidential burden to produce evidence which is:

“sufficient to raise a credible possibility that an automatically unfair dismissal has taken place”, after which the company is required to “produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s187 for constituting an automatically unfair dismissal”.⁷

[90] No such evidence was placed before this Court. In fact, the respondent has provided clear evidence that the reason for the dismissal of Vass and Van den Heever was misconduct. Dismissal for misconduct must be adjudicated by the CCMA. This Court does, however, has a discretion to assume jurisdiction. See in this regard the decision of the Labour Appeal Court in *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) where the LAC confirmed that the Labour Court does not have jurisdiction in respect of disputes which must be referred to adjudication in terms of the provisions of the LRA.⁸ This Court, may, however

⁷ *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at para 28

⁸ “[17] It is clear from s 157(1) that the Labour Court does not have 'exclusive jurisdiction where this Act provides otherwise'. It has 'exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined' by it. However, all of this is subject to the Constitution and s 173 of the Act. Section 173 of the Act deals with the jurisdiction of this court and is of no relevance to the issue before us. Section 157(5) is very important. It provides:

'(5) Except as provided in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration.'

This provision lays down a general rule to which there is only one exception. The general rule is that '[t]he Labour Court does not have jurisdiction to adjudicate an unresolved dispute if this Act requires the dispute to be resolved through arbitration'.

continue with hearing the dismissal dispute. It was on that premise that this Court proceeded to hear the unfair dismissal dispute on the basis of misconduct:

“[18] The exception to the general rule referred to above is the one provided for in s 158(2). Section 158(2) of the Act provides:

‘(2) If at any stage after a dispute has been referred to the Labour Court, it becomes apparent that the dispute ought to have been referred to arbitration, the Court may -

(a) stay the proceedings and refer the dispute to arbitration; or

(b) with the consent of the parties and if it is expedient to do so, continue with the proceedings with the Court sitting as an arbitrator, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make.’

[19] It seems to us that the effect of s 157(5) read with s 158(2) is in part that the only situation where the Labour Court has jurisdiction to deal with a dispute that is otherwise required to be referred to arbitration in terms of this Act is a situation that falls within the ambit of s 158(2). Leaving out s 158(2)(a) which does not

This contemplates, for example, a dispute concerning the fairness of a dismissal where the reason for the dismissal as alleged by the employee is misconduct or alleged misconduct on the part of the employer of the view that reasons other than those employee. This means that as a general rule the Labour Court has no jurisdiction to adjudicate such a dispute.”

seem to contemplate the Labour Court adjudicating such a dispute, that scenario seems to be only the one contemplated by s 158(2)(b) of the Act. Even if both parties to a dispute were to agree to ask the Labour Court to resolve a dispute which ought to have been referred to arbitration, for example, a dispute concerning a dismissal for misconduct that would not be enough to confer jurisdiction on the Labour Court to resolve such a dispute. In addition to the consent of both parties, it would have to be shown that it is expedient for the court to continue with the proceedings but, even then, it will not sit as a court but its judge will have to sit as an arbitrator.”

Costs

[91] Despite the fact that the applicants have been partly successful I am still awarding costs in favour of the respondent as it has been substantially successful.

Order

[92] In the event the following order is made:

1. The dismissal of the second applicant, Mr. John William van den Heever was substantively unfair but procedurally fair.
2. The respondent is ordered to reinstate the second applicant retrospectively but limited to six months.

3. The second applicant is ordered to report for duty no later than 1 February 2010
4. The dismissal of the third respondent was substantively and procedurally fair.
5. The applicants are ordered to pay the costs including the costs in relation to the employment of senior counsel.

AC BASSON, J

DATE OF TRIAL: 8 – 12 June 2009 and 30 – 31 July 2009

DATE OF JUDGMENT: 2 December 2009

FOR THE APPLICANTS:

CS Kahanovitz

Instructed by Cheadle Thompson & Haysom

FOR THE RESPONDENTS:

PJ Pretorius SC.

Instructed by Edward Nathan Sonnebergs Inc.