

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 424/14

In the matter between

DIKOLE MOSES RASENYALO

Applicant

And

MOQHAKA LOCAL MUNICIPALITY

Respondent

Delivered: 5 January 2019

JUDGMENT

MAHOSI J

Introduction

- [1] The respondent referred a dispute of an alleged dismissal in terms of section 191(5)(b)(iii) of the Labour Relations Act (LRA),¹ the second reason for his dismissal having arisen from participating in an unprotected strike.
- [2] The parties agreed that this Court may also assume jurisdiction in terms of section 158(2)(b) of the LRA in order to determine the dispute of alleged unfair dismissal relating to misconduct and make an appropriate order which the commissioner would have been entitled to make with regard to the first reason for the applicant's dismissal which reason arose from the acts of misconduct that were committed during the unprotected strike.
- [3] This matter was heard from 5 February 2018 until 9 February 2018. At the end of the trial, both parties requested to have the record transcribed and also to submit written heads of argument which request was granted. The transcribed record was filed on the 5 April 2018 and the respondent filed the heads of argument on 18 April 2018 and the applicant failed to file the heads of argument. This judgment was made without the applicant's heads of arguments.

Background

¹ Act 66 of 1995, as amended.

- [4] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.
- [5] The applicant was employed by the respondent on 1 August 2005 as a General Worker. On 3 September 2012, the respondent appointed the applicant as a Clerical Assistant in the Occupational Health and Safety Office based at its Head Offices in Kroonstad. He earned a salary of R8 220,00 per month, which amounted to R98 640,00 per annum.
- [6] On 28 January 2014 the applicant applied for a vacation leave to commence from 3 February 2014 until 24 February 2014. His immediate supervisor recommended that the said leave be approved and it was allegedly approved on 30 January 2014 by the Departmental Head, Mr E.M Mthwalo.
- [7] It was common cause that the respondent's employees embarked on an unprotected strike with effect from 6 February 2014 until 17 February 2014, except on 9 and 10 January 2014. However, the applicant denied that he participated in the strike.²
- [8] Two ultimata were issued to the strikers on 11 and 12 February 2014 urging them to resume duties. The applicant denied that he received any or both of the said ultimata.

² Amended pre-trial minute

- [9] On 17 February 2014, the applicant received a letter of dismissal. The reasons for the applicant's dismissal were stated as follows:

'You are hereby notified that you are in contravention with the High Court interdict (case 171/2014) in that you interfered with or obstructed the Municipal Manager and directors from performing their duties, and threatened or intimidated the applicant's Municipal Manager, Directors and/or any other employees in its service.

You also engaged in an illegal, unlawful, unprotected strike and gathering. Despite two ultimata, dated 11 and 12 February 2014, you also did not return to your work station as previously notified and instructed. In view of your actions your services have been terminated with immediate effect.

- [10] Aggrieved by the respondent's decision, SAMWU then referred an unfair dismissal dispute to South African Local Government Bargaining Council (SALGBC) on behalf of the applicant and other employees. The matter was conciliated unsuccessfully on 4 April 2014 and a certificate of non-resolution was issued on the strength of which the matter was referred to the Labour Court for adjudication.

- [11] The issues, as reflected in the pre-trial minute, the Court has to determine are:

11.1 Whether the applicant's dismissal was substantively and procedurally fair;

- 11.2 Whether the applicant complied with the two (2) ultimata given by the respondent;
- 11.3 Whether the applicant did engage in and participated in the illegal and/or unprotected strike as well as committed an act of misconduct that was in breach of the court order granted in favour of the respondent by the Free State High Court on 17 January 2014;
- 11.4 If the applicant's dismissal is found to have been unfair, to determine the appropriate relief.

Preliminary issue

- [12] On 9 February 2018, the applicant made an application for me to recuse myself as a presiding judge on the basis of alleged biasness and pre-judgment of the matter. To this effect, the applicant contends that his legal representative informed him that from the discussions I had with both legal representatives in chambers it was clear that I had prejudged the matter. The respondent opposed this application on the basis that the allegations were factually not true.
- [13] The principles that govern the allegations of bias, were set out by the Constitutional Court in *Bernet v ABSA Bank Ltd (Bernet)*³ as follows:

³ [2011] 4 BCLR 329 (CC) at paras 28-29.

'It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution. This case concerns the apprehension of bias. The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.'

The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court. [Footnotes omitted]'

- [14] Having had regard to the parties' submissions, I dismissed the application as the applicant failed to make a case for my recusal in that his apprehension of bias was not based on correct facts. This was confirmed by Mr Lebea who was present during the meeting. In addition, to have the matter started *de novo* before the Judge President or the senior judge would have the effect of prejudicing both parties given that the trial was almost complete.

[15] The trial was set down for three days, but it became apparent on the third day that the matter was not going to be concluded. Labour court being a continuous court, the matter proceeded on the fourth day. At the end thereof, I invited the parties to my chambers to discuss the timeframes. During the discussions, Mr Mokhele disclosed that he could not be available the following day as he was booked in for an epilepsy operation. It was at this point that I proposed that the parties should have a discussion to see if the parties could settle the dispute.

[16] The legal representatives were clearly informed that I have neither prejudged the matter nor formed a *prima facie* view. It is normal for judges to encourage parties to settle disputes amicably if that would lead to a cheaper and faster dispute resolution. This is in line with the spirit of the LRA and the Constitution. There was, therefore, nothing that could have given the applicant a reasonable apprehension of bias.

Evidence adduced

[17] The applicant led evidence in support of his case and five witnesses led evidence for the respondent.

The respondent's case

[18] Mr Sekaledi Jeremiah Tsibulane testified on the role he played during the unprotected strike. He was a constable employed by SAPS in the Public Order Policing Unit and between the period of 22 February 2014 to 22 February his role was that of a video operator. He identified the applicant as an employee who

attempted to attack him for taking the video on the January 2014. The applicant was further identified on the video footage of 17 February 2014 when the dismissal letter was read to all the employees.

- [19] Mr Nicolus Willem Christoffel Van Zyl, the respondent's Chief Security Service Officer, testified that he witnessed the applicant participating in the strike from 6 January 2014 until 17 February 2014. Further that the applicant participated in the forceful removal of the Chief Financial Officer and other respondent's senior managers on the January 2014.
- [20] Mr Eric Mthunzi Mthwalo, the respondent's Director of Corporate Services, testified that on 13 December 2014, the applicant was part of the group of strikers who invaded his office, threatened him and forced him to leave his office. He confirmed that although the applicant had been granted leave, he was at work and he participated in the unprotected strike. Further that the applicant failed to obey the ultimata as he failed to return to work.
- [21] Ms Tshabalala, the respondent's Director of Community Services, testified that on 6 January 2014, at the invitation of the Municipal Manager, she attended a meeting at Allen Rautenbach Hall where all employees of the respondent, including the applicant, were gathered. The meeting was chaired by Mr Thebe Morena who read a memorandum of demands in terms of which the Municipal Manager and the directors were called to resign with immediate effect. The Municipal Manager informed the employees that their demand would not be adhered to because he and the directors were not appointed by employees but by the Council. This led to the beginning of shutdown and the Municipal Manager and the managers were accosted and directed to immediately leave the respondent's workplace.

- [22] Ms Tshabalala's house was under SAPS guard, which caused a lot of anxiety trauma and stress to herself and her family leading to her admission to Bloemfontein Care. In addition, the parental home of one of the employees who were not on strike was petrol bombed and the ratepayers were victimised and prevented from paying their rates and taxes.
- [23] Ms Connie Mazibuko, the respondent's security officer, testified that she saw the applicant at the meeting that was held on 6 January 2014 at Allen Rautenbach Hall after which the employees, including the applicant, forcefully remove the Chief Financial Officer and other respondent's senior managers. She further testified that she saw the applicant participating in the unprotected strike from 6 January 2014 until the 17 February 2014 with the exception of 9 and 10 January 2014. Some of the illegal acts that the employees, including the applicant, participated in included gathering outside the main entrance of the respondent's main building where they chanted and sang struggle songs after which they would enter the building in order to forcefully remove the Municipal Manager, directors and other managers.

The applicant's case

- [24] The applicant testified that he did not attend the meeting on 6 January 2014 and that he worked as usual and only took his lunch break at 13h00 after which he returned to work until 16h30. He was aware of the meeting that was held at Allen Rautenbach Hall, but he did not attend as he was not invited. At around 16h55, as he was going to the parking lot, he noticed employees who were talking to the CFO. He could not hear what the employees were saying to the CFO. Subsequently, he saw the CFO driving out of the respondent's premises.

- [25] The applicant denied that he participated in the unprotected strike and testified that he went on leave on 31 January 2014. He further denied participating in Mr Mthwalo's eviction on 13 December 2013. Although he heard about the progressive group, he did not know its members and what they did. He attended a meeting on 22 January 2014 where they were informed about the strike but denied that he attempted to assault Mr Tsibulane.
- [26] On 17 February 2014, Mr Mathe (the shop steward) called the applicant to attend a meeting at the respondent's premises where they were to receive their dismissal letters. The applicant attended the said meeting and he was duly served with the dismissal letter. Further that he was never served with ultimata.
- [27] The applicant confirmed that all Mr Van Zyl, Ms Mazibuko and Ms Tshabalala knew him very well and further that they would not mistake him for anyone.

Did the applicant participate in an unprotected strike?

- [28] The applicant's case was that he never engaged in, embarked on or participated in an unprotected or illegal strike during the period between 6 January 2014 until 17 February 2014. However, prior to the trial, the parties entered into an amended pre-trial minute in terms of which it was common cause that the strike that was embarked upon by the respondent's employees was indeed unprotected. The first issue to be determined is therefore whether the applicant participated in the unprotected strike.

- [29] The evidence of the respondent's witnesses, namely Mr Van Zyl, Mr Mthwalo, Ms Mazibuko and Ms Tshabalala, supported its case and have all placed the applicant at the scene of the unprotected strike as from 6 January 2014 when the strike commenced until 17 February 2014 when all the employees who participated in the unprotected strike were dismissed. In fact, the applicant also testified that the respondent's witnesses knew him very well and that they could never mistake him for anyone else.
- [30] Mr Muthwalo's evidence was that the applicant was part of the group that forcefully evicted him from his office on 13 December 2013. However, the applicant denied his involvement and testified that he would not have been able to have seen the incident as his office was on a different floor from that of Mr Muthwalo. Again, this is despite his testimony that Mr Muthwalo would not mistake him for anyone else.
- [31] The applicant was further placed in the meeting of the 6th January 2014 after which the respondent's employees, including the applicant, forcefully removed the respondent's management. He denied that he attended the meeting and based his reason for not attending on the fact that he was not served with a notice of the meeting by e-mail. However, during cross-examination, he could not explain why he attended the meeting of 22 January 2014 on the invitation of Mr Mathe who did not send a notice of the meeting by e-mail but just telephoned him.
- [32] Going back to the video footage of 06 January 2014, the applicant is shown directing the actions of the employees who were on strike and talking on his cellphone. Under cross-examination, the applicant testified that he went out of his office to use a bathroom, but ended going outside the building as he was not

sure if the employees were approaching him to attack him. This is despite his testimony that around 16h55, he went to the parking where he noticed employees who were talking to the CFO after which the CFO left as usual. He conceded though, under cross-examination, that it was not normal for the CFO to be escorted and/or accompanied by a number of employees to his vehicle.

- [33] The video footage of 22 January 2014 also placed the applicant within the group of the employees who were on strike. The applicant could not deny that it was himself on the footage, he simply denied that he threatened and attempted to assault Mr Tsibulane and argued that the video footage was taken after hours.
- [34] The applicant was further placed at the workplace with the employees who were on strike on 17 February 2014 when the letters of dismissal were served on them. In the statement of claim, the applicant submitted that after having been on leave, he reported for duty on 25 February 2014 on which date he was denied access to the workplace. It was on this day that he was allegedly served with the dismissal letter. However, in the amended pre-trial minute, the applicant changed his version and admitted that he was on the respondent's premises on 17 February 2014 and that he was personally served with the dismissal letter by the sheriff.
- [35] During the examination-in-chief, the applicant testified that he was telephoned by Mr Mathe at approximately 12h20 who informed him to collect his dismissal letter from the respondent's premises. He further testified that he left his home at 12h30 and that the travelling time between his home and the respondent's offices was one hour. When it was put to him under cross-examination that he would then have arrived at the respondent's premises at 13h00, he added another five minutes walk which meant that he arrived at work at 13h05. This is despite the

fact that the sheriff's return shows that the applicant was served at 12:30 which was the time he claimed to have left his home.

- [36] In my view, the evidence is compelling that, although the applicant was on leave, he participated in the unprotected strike and that the reasons for his dismissal related to his participation therein. Therefore, it is not necessary to decide the fairness of the dismissal for reasons related to other misconducts. The next issue to be decided is whether his dismissal was substantively and procedurally fair.

Legal principles and analysis of evidence

- [37] In the amended pre-trial minute, the parties recorded that the applicant's dismissal does not constitute an automatically unfair dismissal as defined in section 187 of the LRA. Section 188 of the LRA provides as follows:

'(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; or

(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.'

- [38] Section 68(5) of the LRA provides that the participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal and further that in determining whether the dismissal is fair, the Code of Good Practice Dismissal in Schedule 8 must be taken into account. Item 6 thereof provides as follows:

'Dismissals and industrial action

- (1) Participation in a strike that does not comply with the provisions of Chapter is misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including -
 - (a) the seriousness of the contravention of this Act;
 - (b) attempts made to comply with this Act; and
 - (c) whether or not the strike was in response to unjustified conduct by the employer.

- [39] Having found that the applicant participated in the unprotected strike and that the reasons for his dismissal related to participation in the unprotected strike, the issue is whether the respondent discharged the *onus* of establishing both substantive and procedural fairness.

Substantive fairness

[40] In *National Union of Metalworkers of South Africa (Numsa) and Others v CBI Electric African Cables*,⁴ the LAC stated as follows:

[29] In my view the determination of substantive fairness of the strike-related dismissal must take place in two stages, first under item 6 when the strike-related enquiry takes place and secondly, under item 7 when the nature of the rule which an employee is alleged to have contravened, is considered. It follows that a strike-related dismissal which passes muster under item 6 may nevertheless fail to pass substantive fairness requirements under item 7. This is so because the illegality of the strike is not “a magic wand which when raised renders the dismissal of strikers fair” (*National Union of Mineworkers of SA v VRN Steel* (1991) 12 ILJ 577 (LAC)). The employer still bears the *onus* to prove that the dismissal is fair.

[30] In his work Grogan expresses the view that item 6 of the Code is not, and does not purport to be, exhaustive or rigid but merely identifies in general terms some factors that should be taken into account in evaluating the fairness of a strike dismissal. He therefore opines that in determining substantive fairness regard should also be had to other factors including the duration of the strike, the harm caused by the strike, the legitimacy of the strikers’ demands, the timing of the strike, the conduct of the strikers and the parity principle. I agree with this view as the consideration of the further factors ensures that the enquiry that is conducted to determine the

⁴ (2014) 35 ILJ 642 (LAC)

fairness of the strike-related dismissal is much broader and is not confined to the consideration of factors set out in item 6 of the Code.’

- [41] The substantive fairness of the dismissal related to a strike must, therefore, be determined under Item 6 and Item 7. As aforesaid, item 6 requires that the substantive fairness of dismissal in an unprotected strike action be determined in the light of the facts of the case, including the seriousness of the contravention of the Act, attempts made to comply with the Act, and whether or not the strike was in response to unjustified conduct by the employer.
- [42] In the current matter, it is apparent from the evidence that the applicant and his fellow strikers had no intention to comply with the provisions of the Act prior to engaging in or participating in the strike and the strike had all the hallmarks of a violent strike and was protracted. From the wording of the memorandum dated 6 January 2014 addressed to the Municipal Manager and the directors,⁵ it is clear that the strikers’ intention was to render the respondent ungovernable, to shut down all its services to its customers and to proceed with the unprotected strike until their main demand of forcing the Municipal Manager and all the directors to resign was met.
- [43] It was not the applicant’s case that the illegal strike was in response to unjustified conduct by the respondent. In fact, there was no evidence of unjustified conduct on the part of the respondent that was adduced. Instead, the applicant denied that he participated in the unprotected strike during the period between 6 January 2014 and 17 February 2014.

⁵ Respondent’s bundle of documents, Page 6.

[44] Regarding the steps taken by the respondent to persuade the strikers to end the strike and resume their duties, the evidence is that the respondent allowed COGTA and SALGA officials to attempt to resolve the matter amicably through mediation and two ultimata were issued which were clear as to what was required of each of the strikers and consequences for failure to comply therewith. In addition, letters were sent on 13 February 2014 to both SAMWU and IMATU to which IMATU responded by advising its members to resume their duties, which advice was not heeded. It was common cause that SAMWU, a trade union of which the applicant was a member, failed to respond to the said letter.

[45] In relation to the trust relationship, Mr Mthwalo testified that it has been irretrievably broken down and that continued relationship has also become intolerable given the acts of misconduct that the applicant committed. The applicant has not explained his actions or rebutted the respondent's version.

[46] Item 7 of the Code outlines the guidelines applicable in cases of dismissal for misconduct and it provides as follows:

(a) Whether or not the employee contravened a rule or standard regulating conduct in or of relevance to, the workplace; and

(b) If a rule or standard was contravened, whether or not-

(i) The rule was a valid or reasonable rule or standard;

(ii) The employee was aware, or could reasonably be aware of the rule or standard;

- (iii) The rule or standard has been consistently applied by the employer; and
- (iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.'

[47] To an extent that I already found that there was an unprotected strike which itself constitute misconduct, the issues under Item 7 enquiry are whether the discipline was consistently applied and whether the dismissal was an appropriate sanction.

[48] The applicant has not pleaded inconsistency in his statement of claim and the pre-trial minute. The allegation of inconsistency was only introduced during the cross-examination of Mr Mthwalo when it was suggested that Mr Lejage and Mr Tatsanyane were not dismissed. Mr Mthwalo testified that the employees who were dismissed were only those who failed to comply with the ultimata. Not only was the issue of consistency, not the applicant's pleaded case, but there was no factual or legal basis in support thereof. From the evidence before this court, I am not convinced that the discipline was inconsistently applied.

[49] The remaining issue is whether the dismissal was an appropriate sanction. Considering all the evidence before the court, including the seriousness of the misconduct (namely, the violent and unprotected strike), the conduct of the applicant, the refusal to comply with the ultimata, the effect of his conduct on the trust relationship, the trauma that the Municipal Manager and the managers were subjected to and the applicant's lack of remorse, I am convinced that the dismissal was an appropriate sanction

Procedural fairness

[50] Section 188(1)(b) of the LRA states that a dismissal is unfair if an employer fails to adhere to fair procedure.

[51] It is common cause that the respondent did not hold a pre-dismissal hearing prior to dismissing the applicant. Mr Mthwalo testified on reasons why the pre-dismissal hearing could not be held and stated that the strike which was still on-going made it not feasible and/or practical to hold the hearing, the authority and legitimacy of the Municipal Manager and the directors were not recognised, the Director Corporate Services was chased out of the respondent's premises and could not arrange the disciplinary hearings and Ms Irene Selebogo who was the assistant Human Resource Manager was also on the unprotected strike.

[52] In support of its submissions on problems it was faced with in taking disciplinary steps against the strikers, the respondent referred the Court to an extract from Collective Labour Law⁶ where John Grogan stated as follows:

'The ultimatum serves the same function in the strike context as it does in diplomacy; to warn the recipient that the time is running out and that, unless they desist from their conduct within specified time, unpleasant consequences will follow. In strikes, the most unpleasant consequence allowed by law is dismissal, of which the ultimatum is a formal warning.'

[53] Item 6(2) of Code of Good Practice Dismissal in Schedule 8 deals with the requirements of the ultimatum and it provides as follows:

⁶ Collective Labour Law, Second Edition at page 365.

'Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.'

[54] In *SAMWU obo Salemane and Others v Moqhaka Local Municipality*⁷ which involved the applicant's fellow strikers judgment of which formed part of the record of the current matter, the individual applicants conceded that they received letters of ultimatum dated 11 and 12 February 2014.⁸ Having found that he participated in the strike, the applicant being a SAMWU member would have been aware of the ultimata. In any event, the evidence shows that the applicant was duly served with the two ultimata.

[55] As aforesaid, the amended pre-trial minute recorded that SAMWU did not respond to the letter in terms of which it was notified of the strike and requested to intervene by the respondent. In addition, the applicant did not challenge the respondent's evidence that the ultimata were clear and unambiguous and that it specified what sanction would be imposed if the ultimatum was not complied with. The applicant's only version was to deny participation in the strike and claimed that he was on leave. However, the respondent's evidence placed him at the scene of the unprotected strike during the entire period of the said strike. The

⁷ JS 413/2014.

⁸ Respondent's bundle of documents, Page 186.

applicant has not given the explanation of why he and his fellow strikers did not comply with the two ultimata and why SAMWU failed to respond to the respondent's letter inviting it to intervene.

[56] Although Item 6(2) of the Code requires the discussion with the union and the issuance of the ultimatum by the employer, it is trite the employer is required to take a further procedural step in a form of a hearing. In *Modise and Others v Steve's Spar Blackheath*⁹ The Court held as follows:

‘... in our law an employer is obliged to observe the *audi* rule when he contemplates dismissing strikers. As is the case with all general rules, there are exceptions to this general rule. Some of these have been discussed above. There may be others which I have not mentioned. The form which the observance of the *audi* rule must take will depend on the circumstances of each case including whether there are any contractual or statutory provisions which apply in a particular case. In some cases a formal hearing may be called for. In others an informal hearing will do. In some cases it will suffice for the employer to send a letter or memorandum to the strikers or their union or their representatives inviting them to make representations by a given time why they should not be dismissed for participating in an illegal strike. In the latter case the strikers or their union or their representatives can send written representations or they can send representatives to meet the employer and present their case in a meeting. In some cases a collective hearing may be called for whereas in others - probably a few - individual hearings may be needed for certain individuals. However, when all is said and done, the *audi* rule will have been observed if it can be said that the strikers or their representatives or their union were given a fair opportunity to state their case. That is the case not only on

⁹ [2000] 5 BLLR 496 (LAC).

why they may not be said to be participating in an illegal strike but also why they should not be dismissed for participating in such strike.’

[57] In *Diane D Karras t/a Floraline v South African Scooter and Transport Allied Workers Union and Others*,¹⁰ the Court confirmed its decision and held as follows:

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

[58] It is clear from the LAC’s judgments that the general rule is that *audi alterem partem* rule should be observed prior to the employer dismissing the striking

¹⁰ (JA78/99) [2000] ZALAC 21 (17 October 2000).

employees unless there are exceptions. The respondent's case was that given the striker's conduct, it was impractical to hold disciplinary hearings at the time and further that if the applicant was indeed on leave he should have exercised his right to appeal the dismissal in terms of SALGBC Disciplinary Procedure Collective Agreement. There is no evidence that the respondent attempted to afford the applicant the opportunity to state his case and to provide reasons why he should not be dismissed for participating in the unprotected strike. This could have been done either prior to or post his dismissal.

- [59] On the conspectus of all the evidence, the respondent failed to prove compliance with the *audi alterem partem* rule which renders the applicant's dismissal procedurally unfair.

Relief

- [60] The remaining issue to be considered is the relief to be granted to the applicant. According to Section 193 of the LRA, the primary remedy in instances where the Court found the dismissal to be unfair is reinstatement or re-employment. The Court must require the employer to reinstate or re-employ the employee unless where the employee does not wish to be reinstated, or where continued employment is intolerable, or it is not reasonably practicable for the employer to reinstate or the dismissal is unfair only because the employer did not follow a fair procedure.

- [61] Having found that the applicant's dismissal was procedurally unfair, only

compensation will be the competent relief.¹¹ Section 194(1) of the LRA requires compensation to be just and equitable in all circumstances but not more than 12 months remuneration.

[62] Considering all the evidence and the surrounding circumstances, I hold the view that the applicant must be compensated two months' remuneration calculated at the rate of his remuneration on the date of his dismissal.

Costs

[63] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[64] In the premises, I make the following order.

Order

1. The applicant's dismissal was substantively fair but procedurally unfair.
2. The applicant is awarded compensation in the sum equivalent to two (2) months' salary calculated at the rate of remuneration on the date of his dismissal.

¹¹ *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* (2001) 22 ILJ 1575 (LAC).

3. There is no order as to costs.

D.Mahosi

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:

Mr Mokhele of L.M Mokhele Attorneys

FOR THE RESPONDENT:

Mr Lebea of Lebea and Associates