IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO: J2211/99**

In the matter between:

PAPER PRINTING WOOD AND ALLIED WORKERS UNION AND OTHERS Applicants

and

METROFILE (PTY) LIMITED Respondent

JUDGMENT

JAMMY AJ

INTRODUCTION AND BACKGROUND

The Respondent is a service company. The facility which it provides for its clients is the storage in a controlled safekeeping environment on its business premises of confidential or sensitive documents, computer data, computer backup tapes and computer discs, such being immediately available to and retrievable by its clients on request. It undertakes the secure collection from and delivery to its clients of what will invariably be material of strategic importance to them. Immediate response to what are frequently urgent requests for retrieval and delivery in that context, is an integral part of its business.

A dispute relating to wages occurred between the First Applicant and the Respondent early in 1998 and on 23 March 1998, following a failed attempt at statutory conciliation, the First Applicant gave the requisite forty-eight hours notice to the Respondent of the intention of its members to embark on protected strike action. Pursuant thereto the First Applicant's members in the employ of the Respondent commenced the strike on the morning of Thursday 26 March 1998 at two sites at which the Respondent carries on

business and which are situated at 3 Gowie Road, Cleveland and 30 Mineral Crescent, Crown Ext 3. For the sake of convenience and as was done throughout the trial of this matter those sites will respectively be hereinafter referred to as “Gowie” and “Crown”.

Neither the First Applicant nor its members involved in the strike sought the Respondent’s permission, before it commenced, to picket on the Respondent’s premises nor indicated to the Respondent their intention to engage in a picket. The Respondent, on the other hand, purported on the day preceding the commencement of the strike, 25 March 1998, to issue a set of “strike rules” which it served on the First Applicant’s shop stewards and which embodied permission to picket on the Respondent’s premises in specific areas demarcated for that purpose.

The hearing of this matter, was an exceptionally extended one. A formidable volume of evidence relating to events and the conduct of the Applicants and the Respondent’s management during the subsistence of the strike was adduced. To traverse that evidence in the detail in which it was presented would, in my view, unnecessarily burden this judgment. The evidence of each witness was subjected to exhaustive examination and cross-examination, augmented by the showing and analysis of a videotaped record of the events of the 26th and 27th March 1998 produced by the Respondent. Where disputes of fact have arisen in that context I will review the probabilities which, on balance, have led to the conclusions which I have reached. I will then deal with the legal submissions arising therefrom, made by counsel for the respective parties.

THE RESPONDENT’S CASE

The seventy-one individual Applicants in this matter were dismissed by the Respondent, following disciplinary enquiries conducted in that context, for misconduct. It is common cause that whilst, in certain respects, overlapping, the misconduct relied upon by the Respondent was not the same in respect of all the individuals involved. It fell into five categories and they are the following.

Sixty-four employees were found guilty of obstructing the entrance gate at the Respondent's Gowie premises on 26 March 1998, of partial obstruction of that gateway on 27 March 1998 and of a failure to comply with the terms of an urgent interdict obtained by the Respondent and served on the strikers in that context on the morning of 27 March 1998.

One employee, Bernadette Lawson, was found guilty of obstruction of the Crown entrance gate on 26 March 1998, partial obstruction of the Gowie entrance gate on 27 March 1998, intimidation and incitement.

Another employee, Denise Lewis was found guilty of similar acts of obstruction at Crown and Gowie and of intimidation.

A third individual employee, Moses Thlabiyane was found guilty of the same acts of obstruction and of intimidation by firing gunshots into the air, having been incited by Bernadette Lawson to do so.

. Finally four individual employees, Paulos Dlamini, Veli Sithole, Isaac Nyanthi and Anthony Makombothi were found guilty of participation, on 2 April 1998, in a violent assault upon a non-striking employee, Simon Thilivali, in Soweto. The case against these four individuals, referred to during the hearing for convenience as "the Thilivali four," is not disputed by the Applicants and is conceded to have been established.

. The Respondent's deputy managing director, Graham Wackrill, testified regarding the delivery, in expectation by management on 25 March 1998 that a blockade would be attempted, of the so-called strike rules to both the Crown and Gowie shop stewards. The First Respondent's reaction was a letter from its regional organiser, Themba Buthelezi, on the morning of 26 March, the strike having commenced, proposing a meeting at 15h00 that day. Mr Buthelezi did not arrive for that meeting and a request was received from

the shop stewards that it be deferred until 08h30 the following morning.

. The striking workers, Mr Wackrill testified, did not remain within the area demarcated by management at Gowie but collectively and with total effect, positioned themselves in front of the entrance gate, with the resultant obstruction of entry to and egress from the premises.

. Management had, as a contingency in relation to the delivery of tapes and documents to its clients on 26 March, arranged for vehicles off-site to be loaded with clients' material.

. During the course of 26 March, Mr Wackrill personally was refused access to the Gowie premises when he arrived for work that morning. He personally observed an incident when an attempt by certain Dave Wilson, an employee of the company, to drive out of the premises in order to go to the bank, was blocked. He was only allowed a passage through the striking group once he had left his vehicle to talk to the shop stewards and one of the striking group had required him to open the boot of the vehicle and had then inspected it, manifestly to ensure that no deliveries were being made by him.

. The vehicles which had been positioned by management away from the premises on 26 March for delivery purposes had not been allowed re-entry to Gowie when they returned and could therefore not be reloaded with material to be delivered to clients.

. The blockade had the effect, said Mr Wackrill, of totally disrupting the Respondent's business, resulting in the receipt by the Respondent of irate complaints from its clients in that context.

. The situation at Crown, when he went there to assess it, Mr Wackrill testified, was little different. The striking workers had congregated in the area there demarcated by management, singing and toyi-toyiing, but shortly thereafter moved away from that area to a position in front of the entrance to the premises and thereby blockading it. Earlier in the day threats had been made to contract workers retained by the Respondent to

perform the critical functions affected by the strike and when he, Mr Wackrill, attempted to discuss the situation with the senior shop steward at Crown, Bernadette Lawson, her reaction was that the strike rules had not been discussed or agreed and eventually, in relation to the threats to the contract workers, that these were denied.

8. He personally witnessed, said Mr Wackrill, the obstruction of a large truck belonging to one of the Respondent's customers, which was attempting to leave the Crown premises. Its path continued to be blocked notwithstanding his attempted intervention, which was ignored by the shop stewards and it was only after a delay of some fifteen minutes that the truck was permitted to leave.

9. The warehouse supervisor at Crown, Cecil August, had succeeded earlier that morning in removing a van which had been parked in the Crown driveway but when he later returned to the premises, he was refused entry. Again Mr Wackrill attempted to intervene to no avail and he eventually advised the driver, through the window of the vehicle, that he should leave the area and park the vehicle elsewhere.

10. The effect of this conduct at both sites, said Mr Wackrill, was that he felt threatened and intimidated and he was concerned not only for his own safety but for that of others who might attempt to enter or exit from the premises. The police were accordingly summoned and spoke to the strikers who, notwithstanding, persisted with the blockade. He received reports of other incidents of interference, of a telephone threat to his personal safety which had been received by one of the Respondent's employees, Mary Lehmann, who was told that "they", presumably the strikers, were aware of his and his wife's car registration numbers and that "something bad was going to happen" to him.

11. In the face of what it regarded as an untenable state of affairs, the Respondent made urgent application for and obtained a court order on the afternoon of 26 March, interdicting in broad terms the general obstructive, threatening and intimidatory conduct on the part of the strikers of which the Respondent complained. A great deal of evidence regarding the service of the court order at both the Crown and Gowie sites was led and analysed. It is unnecessary in my view that it be traversed in any detail and I would

merely state that I am satisfied that, in the result, effective service took place and that the substance of the order was made known to and understood by the striking employees.

. The interdict was ignored at Gowie, said Mr Wackrill and, whilst recognising the protected legitimacy of the strike itself, management could not continue to condone the acts of intimidation, the blockades, the threats and the violence that accompanied it and determined in the circumstances that disciplinary action should be instituted against the perpetrators.

. On 27 March 1998 therefore the Respondent issued a notice addressed to "The Shop Stewards – Metrofile," with a copy to the union, and which read as follows:

"NOTIFICATION TO ATTEND A DISCIPLINARY ENQUIRY

This serves to confirm that striking workers prevented both access and exit of vehicles from the company's premises between 07h30 and 16h45 on 26 March 1998.

In response thereto the company applied for and was granted an urgent court interdict (case No. J639/98) interdicting and restraining employees of Metrofile, from, *inter alia,* engaging in any blockade of, obstruction of or interference with the entrance and/or exits of our business premises, or with other employees, contract employees, customers and suppliers, or any acts of intimidation. The said obstruction resulting from the worker blockade is an act of strike-related misconduct. In addition thereto, and at the time of writing this memorandum, the strikers continued to be in breach of the court interdict which has been served on them.

As a consequence of the above, a disciplinary enquiry will be held at Metrofile Gowie on Monday 30th March 1998 at 13h00.

The object of this enquiry will be to investigate the following charges against the striking workers.

1 Obstruction of entrance gate on 26 March 1998.

2 Partial obstruction of gateway on 27 March 1998.

3 Failure to comply with the urgent interdict served on strikers at approximately 08h40.

Shop stewards are requested to attend the disciplinary enquiry on behalf of all striking workers at which time they will be given an opportunity to motivate why strikers found guilty of the above charges should not be dismissed. In the event that you choose not to attend this enquiry, the enquiry will continue in your absence".

4. That notification met with a response from the union on 30 March 1998, copied to the shop stewards in the following terms:

: INDUSTRIAL ACTION AT METROFILE/INTENDED DISCIPLINARY HEARINGS

It has been brought to our attention that your Company has applied to the Labour Court for an interdict and further that the interdict was granted by the Labour Court on 26 March 1998.

We are further informed that over and above this action, the Company intends holding disciplinary enquiries today at 13h00 in terms of your letter dated the 27th March 1998. It is our belief as the Trade Union that this action by yourselves is intimidatory and tantamount to undermining the right of employees to participate in a protected strike. We believe also that this is harassment and is aimed at interfering with a protected strike.

To this effect, we inform yourselves therefore that employees will not be attending those hearings as scheduled because of the reasons submitted above. Should the Company want to continue with the hearings, this can only be done after the strike has been resolved and not during the strike. Take further note that our letter dated the 26th March still has relevance".

That letter, it should be mentioned, called upon the company to negotiate strike rules and to convene a meeting with the shop stewards for that purpose, to be conducted with the assistance of a CCMA Commissioner with a view to reaching an interim agreement "to attend to immediate

problems".

5. The Respondent replied immediately to that letter to the effect that the disciplinary hearing "is in no way directed at striking workers as a consequence of their participation in the current protected strike". It would "address the strike-related misconduct of the strikers" of which details had been submitted to the shop stewards in a memorandum dated 27 March. An appeal was made "to the union and shop stewards that the shop stewards attend the disciplinary enquiry at 13h00 today, as this will afford them an opportunity to state their case in defence of the striking workers – an opportunity which they would effectively waive and lose should they choose not to attend".

6. This notwithstanding, the shop stewards did not attend the enquiry and later that day the Respondent addressed a further memorandum to them confirming that fact. The following was then stated:

> **"Notwithstanding the fact that the company had declared its intention to proceed with the disciplinary hearing in the absence of the shop stewards, in the event that they failed to attend the said enquiry, we are as an act of good faith prepared to postpone this enquiry to 14h30 on Tuesday 31 March 1998.**
>
> **Your attention is again drawn to the fact that in the opinion of the company, the interests of the striking workers would be best served by the shop stewards attending the enquiry so as to enable them to present a proper defence in relation to the alleged acts of misconduct".**
>
> This memorandum was copied to the union.

7. Once again, the shop stewards did not attend the enquiry which, as they, the striking workers and the union were informed in a memorandum dated 1 April 1998, duly commenced in their absence at 15h30 on 31 March. The memorandum informed them that "the enquiry was not able to be completed on 31/3/1998 and was therefore adjourned until 12h30 on the 1/4/98. The company urges the Shop Stewards to attend the enquiry and draws the attention of the striking workers to their failure to attend".

8. Later on 1 April 1998, a further memorandum was addressed to the union and copied to the shop stewards as follows:

> **"DISCIPLINARY HEARING IN RESPECT OF STRIKE-RELATED MISCONDUCT : VERDICT OUTCOME**
>
> **We hereby confirm that the above meeting was continued and was completed. The Chairman has advised that the verdict will be handed down in the Boardroom at Metrofile – Gowie at 07h30 on the 2/4/1998.**
>
> **Once again the Shop Stewards are invited and encouraged to attend this continuance at 07h30 tomorrow".**

9. In the interim and on 1 April 1998, notices to appear before a disciplinary enquiry were issued in by the Respondent individually to Bernadette Lawson, Denise Lewis and Moses Thlabiyane. Once again, I consider it appropriate to set out the terms of those notices fully.

10. The charges against Bernadette Lawson were the following:

"1 Obstruction of the entrance gate on the 26 March 1998.

2 Partial obstruction of the Gowie gateway on 27 March 1998.

3 Intimidation in that at approximately 16h00 on the 27th March 1998 you threw a stone at Elizabeth Ngwenya which narrowly missed her. You also shouted to Moses Thlabiyane who had a firearm, to "shoot the bitches, shoot the scabs". He then fired shots into the air".

Her disciplinary enquiry, she was informed, would be held at 16h00 on the 7th April 1998 in the Respondent's boardroom at Crown.

11. The charges against Denise Lewis were the following:

"1. Obstruction of the entrance gate on the 26th of March 1998.

2. Partial obstruction of the Gowie gateway on the 27th of March 1998.

3. Intimidation in that at approximately 14h00 on the 26th of March 1998 you threw a rock at Carl Bergover which hit him on the left thigh.

Her enquiry was also scheduled for 16h00 on 7 April 1998.

. The charges in the disciplinary enquiry notice issued to Moses Thlabiyane were the following:

"1 Obstruction of the entrance gate on the 26th March 1998.

2 Partial obstruction of the gateway on the 27th March 1998.

3 Intimidation in that at approximately 16h00 on the 27th March 1998 you fired shots into the air after B Lawson had shouted at you to 'shoot the bitches, shoot the scabs'. The people being referred to were Elizabeth Ngwenya and Patience Nyakane".

This enquiry, he was informed, would be held at 16h00 on 8 April 1998 in the Respondent's Crown boardroom.

. On 2 April 1998 the chairman of the disciplinary enquiry against the striking workers and which, as has been indicated, had been held on 31 March and 1 April 1998 in their absence and that of their shop stewards, handed down his findings and verdict. The charges against them, it will be recalled, were:

"1 Obstruction of entrance gate on 26 March 1998.

2 Partial obstruction of gateway on 27 March 1998.

3 Failure to comply with the urgent interdict served on strikers at approximately 08h40.

Recording the failure of the shop stewards to attend the enquiry after having being furnished with notices to do so, and the names, but not the substance of the testimony, of the Respondent's witnesses, the chairman concluded thus:

"Having analysed the evidence led by the company, I find that, as per the evidence of the video tapes and witnesses, the Metrofile (Gowie) strikers, as listed in annexure A, are guilty of all three charges. The following Metrofile (Crown) employees are also guilty of all three charges by virtue of the fact that the video footage shows them to have been present at Metrofile (Gowie) on 27 March 1998, and to have participated in the refusal to immediately comply with the interdict once served, and also to have been party to subsequent interference and obstruction at Metrofile (Gowie):

1 A van der Rost
2 E Similane
3 P Rasenyalo
4 D Lewis
5 E Scholtz
6 A Neethling
7 E Bloem
8 S Cape

The remaining Metrofile (Crown) employees are guilty of charge 1 only.

Mitigating and aggravating circumstances will be heard at 7.30 a.m. on 6 April 1998 in the boardroom of Metrofile (Gowie)".

4. On 7 April 1998 the enquiry chairman handed down a document entitled: "Sanction recommendation in relation to the disciplinary enquiry held against striking workers at Metrofile (Gowie & Crown facilities) for strike-related misconduct on 26 and 27 March 1998".

Recording the failure once again of the shop stewards and/or the employees to attend at the scheduled mitigation hearing on 6 April and the aggravating circumstances submitted by the Respondent on that occasion, the chairman made "the following sanction recommendations"

"1 In my opinion, the misconduct for which the Metrofile (Crown) strikers were found guilty, whilst serious, amounts to lesser misconduct than that of the Metrofile (Gowie) strikers, in that they were only found guilty of charge #1. The possibility exists that the Metrofile (Crown) strikers were unsure of the acceptability or otherwise, of their conduct on the morning of 26 March 1998. I believe that they should be given the benefit of the doubt as they desisted from interfering with or obstructing the normal flow of traffic in and out of the premises from approximately 1 p.m. on 26 March 1998. By virtue of the fact that they were not found guilty of charges 2 and 3, I recommend that they receive Final Written Warnings.

2 The Metrofile (Gowie) strikers were found guilty of all 3 charges. It is clear from their conduct that it was purposeful and ongoing. It is commonly accepted that picketers may not physically prevent members of the public, including customers, other employees and service providers from gaining access to or leaving the employer's premises. There is a preponderance of evidence to indicate that the Metrofile (Gowie) strikers did just that, as did a number of Metrofile (Crown) strikers who were at the premises of Metrofile (Gowie) on the morning of 27 March 1998 i.e.:

2.1 A van der Rost

2.2 E Similane

2.3 P Rasenyalo

2.4 E Scholtz

2.5 A Neethling

2.6 E Bloem

2.7 S Cape

Given that these and the Metrofile (Gowie) strikers were guilty of all 3 charges which amounted to protracted interference and obstruction over a 2 day period, I recommend that they be summarily dismissed".

. The disciplinary enquiry against Bernadette Lawson, who failed or refused to attend it, was held on 6 April 1998 in her absence. On 9 April, the enquiry chairman Mr A Healy (who also presided in the collective enquiry with which I have dealt above) recorded his findings and conclusion as follows:

"Having adjourned to consider the aggravating circumstances, as well as the mitigating circumstances, Mr Healy recommended that Ms Lawson be summarily dismissed for the following reasons:

1 Whilst protected strike action is a legitimate right which is acquired as a consequence of compliance with certain pre-requisites as contained in law, picketing is not permitted nor legitimate insofar as it includes the physical prevention of members of the public, including customers, other employees and service providers from gaining access to or leaving the employer's premises.

2 Violent conduct in relation to fellow employees amounts to an act of gross misconduct. It cannot and should not be tolerated and warrants the most severe of sanctions".

. The disciplinary enquiry against Denise Lewis was held on 7 April 1998, similarly in her absence and that against P Dlamini, V Sithole, I Nyathi and A Makomboti, on 8 April 1998 when they too, failed to appear. Each was found guilty of the charges against them and their summary dismissal was recommended.

7. In the result the recommendations of the enquiry chairman pursuant to each of the enquiries initiated by the Respondent, were implemented both as concerned the issue of the final written warnings and the dismissals in question. Sixteen of the dismissed Gowie employees appealed against their dismissal and a collective appeal hearing before an independent chairman was held on 30 April 1998. The procedures followed and the submissions made in that hearing on the part of the employees and the company were analysed in the chairman's findings which he recorded in writing as follows:

> **"In reaching my decision I took into account –**
>
> **1 The nature of the offences.**
>
> **2 All mitigating factors including the sense of remorse evidenced by the Appellants.**
>
> **All factors considered I am of the opinion that the relationship between Metrofile and the Appellants has broken down to such an extent that no reasonable person could expect the relationship to be re-established. Every contract of employment involves elements of trust and goodwill. I am satisfied that the conduct of the Appellants has destroyed these elements permanently.**
>
> **In the circumstances I confirm the decision of the Chairman of the disciplinary enquiry".**

THE APPLICANTS' CASE

8. It is contended on behalf of Bernadette Lawson, Denise Lewis and Moses Thlabiyane, that, aside from their association and alignment with the collective conduct of the body of striking workers in what is contended by the Respondent to be the blockade of the Respondent's premises at Gowie and Crown, no cases of individual misconduct have been established against any of them. Denise Lewis, as has been stated, is alleged to have thrown a rock at Carl Bergover on 26 March 1998, the first day of the strike, which hit him on the left thigh. Bernadette Lawson, in addition to having allegedly thrown a stone at Elizabeth Ngwenya, narrowly missing her, is alleged to have urged Moses Thlabiyane "to shoot the bitches, shoot the scabs", thereby inciting him to fire gun shots in the air.

. Denise Lewis testified that it was not she, but another striker, a certain Alta van Der Rost, who had thrown the stone at Carl Bergover and that this had in fact been done playfully and jokingly as he walked passed. Both Bernadette Lawson and Moses Thlabiyane denied the alleged incitement and shooting on 27 March 1998.

. To the extent to which the Respondent's contentions relating to those events were placed in issue by the Applicants, the challenge in my opinion was one more of form than of substance. Although Elizabeth Ngwenya did not testify regarding the stone throwing allegation against Bernadette Lawson, evidence in that regard was submitted by another witness, Patience Nyakane. The only substantive attack on that testimony was that whilst it had been included in a prior statement signed by the witness, it was only under cross-examination that it had been offered to the court.

. The fact that he was struck on the leg by a small stone was confirmed in his evidence by Carl Bergover who also testified that, using the Zulu terms in that regard, the strikers had called him a "spy" and a "rat".

. Contradictions in the evidence of two of the Respondent's witnesses, Tessa Kleinsmith and Patience Nyakane, regarding the number of gunshots allegedly fired by Moses Thlabiyane and the position of Denise Lewis when she allegedly threw a stone at Carl Bergover, were emphasised by Advocate H van der Riet, representing the Applicants. Each was examined minutely regarding their respective positions within the area at the time that these incidents allegedly took placed – where they were walking and who they were with. Discrepancies in that context were highlighted and in the face of these contradictions in what was submitted as material aspects of their evidence, the court is asked to reject it in its entirety on the grounds that it is improbable.

. The attack on the dismissal of the sixty-four striking Gowie employees is premised on the contention that it constituted an unjustified selective dismissal when examined in relation to the sanction of final written warnings visited upon the strikers at Crown.

4. The essence of their conduct, it is contended, at both sites, was the same, as evidenced by the charges against them – obstruction on 26 March 1998, partial obstruction on 27 March 1998 and the failure to comply with the urgent interdict served on that date. The basis of that differentiation, as it emerged in the disciplinary enquiry, was that the Crown employees were found guilty of only one of the charges, that of obstruction of the gateway on 26 March 1998 whilst those at Gowie were found guilty of all three of the charges against them.

5. This unfair discrimination, the Applicants submit, manifests itself in two respects. The evidence before the court does not, the Applicants contend, substantiate the allegation that the reaction of the strikers at Gowie to the court order served upon them was to ignore it. What they did was to reposition themselves in the area of the entrance so as to continue their picketing and demonstration but at the same time to allow free passage into and out of the premises. Secondly with regard to the uncontested evidence that a number of employees from Crown travelled on the morning of 27 March to Gowie, and having acquainted themselves with the terms of the order which had been posted on the gate post, nevertheless joined the demonstrating and picketing Gowie employees, a further manifestation of the unfair and selective discrimination perpetrated by the Respondent was the fact that four of them were nevertheless not dismissed but received the lesser sanction referred to.

6. It is contended for the Applicants that the Respondent's case that the strikers at Crown, as opposed to those at Gowie, heeded the terms of the interdict once it was served upon them, is based solely on the unsubstantiated evidence of Graham Wackrill. That evidence however it is submitted, is fraught with contradictions and, in that context cannot be relied upon. In the face of emphatic rebutting evidence from both Denise Lewis and Bernadette Lawson that the court order was never served at Crown, Mr Wackrill's uncertain and often self-contradictory testimony regarding the fact, circumstances and time of service of that order must, it is submitted, be rejected in its entirety.

7. The next basis of challenge to the dismissals argued on behalf of the Applicants was that

the dismissals were unnecessary and could have been avoided but that what they illustrated was that the Respondent "used the strike to rid itself of a unionised workforce it did not want".

8. In making this submission, Mr van der Riet examined in considerable detail the involvement of the police at the behest of the Respondent and emphasised its failure to enlist their further assistance in dealing with what was perceived as misconduct rather than to resort to a legal process clearly directed and channelled towards achieving the dismissals which it sought.

9. Developing this argument, Mr van der Riet examined the historical commercial factors leading to the dispute and the impasse between the parties which developed therefrom. Indicative of its attitude, it is submitted, is the fact that the Respondent did not seek to achieve consensus on strike rules before unilaterally issuing its own decree in that regard. Whilst ostensibly endeavouring to resolve the issue by setting up meetings with the shop stewards and the union representative, the company nevertheless, without notice to them of its intention to do so, sought and obtained an interdict order. The dismissal of what was perceived clearly to be the troublesome workforce at Gowie as opposed, with a few exceptions, to those employed at Crown was a further indication of the Respondent's objective to rid itself of employees whose services it had not longer wished to retain.

10. The contention of procedural unfairness in those dismissals is sourced in its entirety in the fact that the disciplinary enquiries which led to them were conducted during the strike and in the absence of the employees concerned. A further exacerbating factor in that context was that the notices to attend those enquiries were addressed only to the shop stewards and not directly to the individuals involved. It does not seem to me however that that aspect of the matter was pursued with particular energy on behalf of the Applicants, for whom the main argument advanced was that the reason for their absence from the hearings was the union's view that there was no reason why they had to be held during a protected strike. The right to hold enquiries, if perceived necessary, was not disputed but they should have been held after the strike had terminated and not

during its subsistence.

. Much was made during the course of this trial and in argument regarding the manner of service of the disciplinary enquiry notices on Moses Thlabiyane and the "Thilivali four". Apart from the fact that I am satisfied that, through the medium of Bernadette Lawson, who the Respondent contended accepted service on their behalf, notice of those enquiries would have been brought to the attention of the persons concerned, there is nothing to suggest to me that in the prevailing circumstances, it would not have been treated with the same disdain and rejection as was the case with every other disciplinary notice issued by the Respondent during the strike.

THE LEGAL ISSUES

. This matter comes before this court by way of referral in terms of Section 191(6) of the Labour Relations Act 1995 ("the Act"). That it is, in that context, to be dealt with as a hearing *de novo* is not, in my view, open to question and is clearly not a disputed issue as between the parties.

See: Gibb v Nedcor Limited (1998) 19ILJ364 (LC)
County Fair Foods (Pty) Ltd v CCMA and Others (1999) 20ILJ1701 (LAC)

. There is a plethora of authority in the Labour Courts to the effect that the entitlement of employees to implement and participate in protected strike action once the statutory conciliation process necessarily preceding it has been properly exhausted, does not embody the right to misconduct themselves by blockading the employer's work premises, more especially where such conduct is accompanied by unlawful intimidation and threatening behaviour. In the ordinary course, an acceptable level of demonstration in, on, or in the vicinity of, the employer's business premises will be defined by strike rules and/or the relevant Code of Good Conduct. It is common cause that in the instant case, and irrespective of where the responsibility to have initiated the process lay, no such strike rules were at any stage formulated.

4. The videotaped record of the events of 26 and 27 March 1998 is compelling evidence of what then occurred. I am left in no doubt from the *conspectus* of the visual and oral evidence presented in that regard, that, from the inception of the strike and until the court order was served, the blockade of the entrance gates to the Respondent's premises at both sites was a total one. Much evidence during the hearing was directed by both sides to the disputed fact and time of the service of the court order at Crown. That aspect of the matter does not, in my view, merit detailed analysis. There is no doubt that the order was served at Gowie and the Respondent's evidence, allowing for discrepancies as to the time that it occurred, is emphatic that it was eventually served at Crown. Certainly the Crown shop stewards were aware of it and of its terms and there can be no doubt that in one way or another, they were conveyed to the striking workers there. Mr Wackrill's evidence that the conduct of the Crown employees was in general terms less threatening and intimidatory than that of the strikers at Gowie and that after they became aware of the court order, their blockade ended, is not seriously challenged as a fact by the Applicants' witnesses, whose testimony relating to the occurrences there was directed more to the allegations of individual, rather than collective, misconduct. In the result, and save for the actions of certain of the Crown employees who travelled to Gowie after the order had been served there, I accept as having been established on the probabilities, that the collective activity of the striking Crown employees may legitimately be differentiated, in the context of the degree and extent of their misconduct, from that of those at Gowie.

5. Prominent in a formidable array of case authority submitted by counsel for the Respondent on the issue of blockade misconduct in strike action is the unreported Labour Appeal Court Judgment in –

Imperial Car Rental (Pty) Ltd (Jetpark) v Transport and General Workers Union and Others (Labour Appeal Court, Transvaal Division NH11/2/22/436)

The strike in that matter, as here, was a protected one in which, Myburgh JP stated, the strikers were, through picketing, entitled to dissuade others, including fellow employees and temporary workers, from assisting the company in the conduct of its business. By blockading the company's

premises however the strikers made themselves guilty of serious misconduct. What had occurred in that matter, was that –

"The union failed to draw a distinction between action which was functional to collective bargaining, such as embarking on a strike, and misconduct of the kind in question"
(Judgment: Page 10: second paragraph)

The judgment, at page 13, continued thus:

"The fact that the company was compelled to cope with the crisis by making alternative arrangements does not mean that the company was able to conduct its business in a normal manner. The barricade had the effect of preventing the company from operating the Jetpark Depot properly; … poor quality service had the potential to prejudice the company's business and reputation".

6. Outlining the options open to the company in those circumstances – the obtaining of an interdict, the enlisting of police assistance in removing the barricade and/or an attempt to persuade the strikers to remove it, the learned judge concluded that –

"The workers were guilty of misconduct. All the company was obliged in this case to do was to attempt to persuade them to desist from their misconduct, before taking the extreme measure of dismissal".

7. That dissuasion, as I have indicated, in the form of the court order which the Respondent obtained, was to all intents and purposes effective at Crown. I am not persuaded however in the face of the oral testimony and the videotaped record of what transpired at Gowie, that that was what happened there. It is apparent that following service of the court order and the explanation of its substance, the body of workers took up what I regard as a relatively insignificantly different position in the immediate vicinity of the entrance gate. That is where the circles of singing and toyi-toyiing individuals were formed. The obstructive objective of their conduct and demeanour in that context however did not appear to me to have been altered. There was no free or unobstructed or non-negotiated passage through the gateway for a considerable period of time after

the order was served and to that extent, coupled with the individual acts of misconduct to which the Respondent's witnesses convincingly testified, the court order was ignored.

8. In those circumstances, the position of the sixty-four Applicants who participated in, and were dismissed as a consequence of, the unlawful blockade at Gowie, as well as that of those individuals from Crown who joined them, is no different from that of the employees in the **Imperial Car Rental** case to which I have referred above. They were guilty of similar misconduct and in the circumstances in which that misconduct occurred and having regard to its effect on and its consequences to the Respondent's business, it was as serious as that classified by Myburgh JP in that case as warranting the extreme sanction of dismissal.

9. I have concluded therefore, for the reasons which I have stated, that the imposition of final written warnings to the Crown strikers and the dismissal of the body of sixty-four striking employees at Gowie was, in the prevailing circumstances, substantively fair and justified and I turn now to deal with the individual cases of Bernadette Lawson, Denise Lewis and Moses Thlabiyane. Nothing more, in my view, needs to be said about the Thilivali four. The case against them, as I have said, was conceded by the Applicants as having been established and the extreme seriousness of their conduct was not challenged. On any basis of assessment therefore the justification for their dismissal is not open to question.

10. **Bernadette Lawson** was the senior shop steward at Crown. Her incitement of Moses Thlabiyane to "shoot the bitches, shoot the scabs" was described in the consistent evidence of Tessa Kleinsmith and Patience Nyakane. Their evidence is challenged by the Applicants on the basis of contradictions in the number of shots alleged to have been fired and where each of them was positioned when that occurred. Those issues are contended to be so material that the evidence in question should be rejected in its entirety.

11. In my view however any assessment of the probative value of that evidence, and indeed

of other testimony adduced in this matter in which contradictions in detail are sought to be highlighted on behalf of the Applicants, must of necessity take into account the fact that the evidence in question was presented in this court nearly three years after the incidents to which it relates occurred. That human memory in relation to isolated aspects of those incidents as opposed to the broad picture of what occurred, may be fallible after so long a period of time, is to my mind understandable and acceptable. What is required therefore where, as here, the allegations are denied, is their determination on a balance of probabilities.

. The Applicants argue that it cannot be contended that the version of her behaviour presented by the Respondent's witnesses is more probable than the Applicants' version. This latter version however if it can properly be so classified, was not presented in the form of a factual rebuttal, but was sourced in an attempt, in the course of cross-examination of the Respondent's witnesses, to identify improbabilities in their recounting of the events in question.

. That challenge, in my view, was an unconvincing one and on a broad evaluation of the Respondent's evidence in that context, I am left in no doubt that Ms Lawson behaved in the unacceptable manner which was described. That conduct was inimicable with standards of responsible participation, particularly at shop steward level, in protected and orderly strike action. In my view, Ms Lawson's dismissal on that basis was substantively fair and justified.

. The allegation of individual misconduct against **Denise Lewis** was that she was guilty of intimidation in that, at the Crown premises on 26 March 1998, she had thrown a rock at a non-striking employee, Carl Bergover, which hit him on the leg. Both Tessa Kleinsmith and Patience Nyakane testified that they had witnessed this incident and Bergover himself described how he had been hit by the stone whilst walking passed a group which included Denise Lewis who, he was informed by the two witnesses referred to, was the person who had thrown it.

. Denise Lewis' denial in that regard involved the allegation that the stone had in fact been

thrown by another person, Alta van der Rost, who was not however called by the Applicants to corroborate that fact – perhaps understandably. Save therefore for that allegation, the evidence of the two witnesses who saw the incident and of Bergover himself who confirmed it, stands unrebutted. Once again the probabilities are overwhelmingly in favour of its acceptance.

6. Whilst that single incident of individual misconduct, standing alone, might not have justified the extreme penalty of dismissal but rather a sanction of less severity, Ms Lewis was, as has been indicated, found guilty of association with and participation in the unlawful blockade of the Respondent's Gowie premises, conduct which I have held to have constituted a justifiable basis for the dismissal of the employees involved. The allegation of substantive unfairness as it is stated to apply to the termination of her own employment, cannot therefore be sustained.

7. With regard to the dismissal of **Moses Thlabiyane**, the evidence of the Respondent's witnesses was, in my view, compelling and unassailable. Tessa Kleinsmith testified that she had seen him, instigated to do so by Bernadette Lawson, fire gun shots in the air and testified further regarding threats against her husband which were subsequently made by him to her. Jose Magaia described how, returning to work after participating in the strike for approximately a week and then reconsidering his position, he was approached by Mr Thlabiyane who produced a fire arm, pointed at him, accused him of being an informer and threatened him with harm.

8. That evidence was not discredited either in cross-examination or by direct rebuttal, to any material extent and I have no difficulty in concluding that Mr Thlabiyane's conduct in that context constituted unassailable substantive justification for his dismissal.

9. A further allegation of unfairness on the part of the Respondent was based on the contention that, in selecting for disciplinary action only the Gowie strike participants and certain, but not all of the Crown employees who joined them on 27 March 1998, as opposed to the remainder of the body of striking workers, the Respondent was guilty of

unfair discrimination. I have already traversed the circumstances relevant to and, in my view, the acceptable basis for differentiation of, the Crown strikers, when compared with those at Gowie, a basis which I have concluded was a valid and acceptable one. I am also prepared to accept as entirely credible, the Respondent's submission regarding the fact that certain Crown employees who joined the Gowie strikers were not subjected to disciplinary action whilst others were, that this was because those not charged could not be positively identified in the video recording. For those reasons, I conclude that the allegation of unfair selective dismissal has not been established by the Applicants.

THE ISSUE OF PROCEDURAL FAIRNESS

. It is this aspect of this matter with which I have had the greatest difficulty. The Applicants contend, as I have stated, that the disciplinary process was fatally flawed on two grounds – the form and manner of service of the disciplinary enquiry notices and the fact that the enquiries were conducted during the strike and in the absence of the employees charged. I will deal with each of these issues in turn.

. The fact that there were sixty-four employees collectively engaged in the picketing and demonstration at Gowie is not disputed. Their shop stewards were known as such to, and were in fact in communication with, the Respondent's management. Attempts had been made, as shown, to set up meetings and the shop stewards themselves had been individually approached from time to time by members of management regarding the events taking place at the site. The shop stewards in that context were manifestly representing the body of strikers and although not officially designated as such in the context of formal picketing rules and the requirements of the legislation, were ostensibly controlling and driving the process. The situation was a volatile one and I agree entirely with the Respondent's submission that, to have attempted to serve individual disciplinary enquiry notices on each of the participating strikers would in the circumstances have been a futile and impractical exercise. There was clearly a line of communication to them through the shop stewards and the Respondent was justified, in my view, in constituting them the conduit through which notice of its intention to institute disciplinary proceedings should be channelled.

. The decision to subject only the shop stewards and not the body of strikers themselves, whether individually or collectively as the case may have been, as the subject of the proposed disciplinary enquiries relating to the blockade, is another matter. This issue was traversed by the Labour Appeal Court in

Modise and Others v Steve's Spar Blackheath (2000) 21ILJ519(LAC)

in which this was stated:

"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 a 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 representatives to meet the employer and present their case in a meeting. In some cases a collective hearing may be called whereas in others – probably 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".

. The overriding factor in this matter is that the Respondent itself perceived the holding of formal disciplinary enquiries as a prerequisite to any sanction properly to be imposed upon the striking employees. This was not a case, as contemplated in **Modise,** where informal hearings, memoranda or invitations to make representations were considered adequate or appropriate. A proper formal procedure was to be followed and the question that then arises is whether, again as perceived as necessary by the Labour Appeal Court, fair opportunity was afforded to the strikers, their union or their representatives to state their case.

4. The strike to that point, as I have stated, had been a volatile one, necessitating an urgent application by the Respondent to this court for interdict protection. The collective and individual conduct which constituted the charges formulated in the disciplinary enquiry notices, was conduct falling squarely within the restrictions and prohibitions of that order – as the notices expressly indicated. The assistance of the police had already at one stage been enlisted and if the order was not being complied with, there was no apparent reason why that assistance could not have been sought again at a level appropriate to its enforcement. That is a common phenomenon in strike situations.

5. There had been little or no co-operation from the union or the strikers thus far and it seems to me that the Respondent could have had no such realistic expectation with regard to the scheduled enquiries. Conversely, the perception on the part of the union and its members that disciplinary action at the stage that it was invoked was inimical to and undermining of the legitimate collective bargaining power play inherent in the strike and that fair and objective adjudication in the prevailing circumstances would be unlikely, was to my mind a reasonable one.

6. For the Respondent, however, to have constituted the shop stewards as the representatives of the body of strikers in the proposed hearings was, notwithstanding the Applicants' submissions to the contrary, neither unfair nor improper. Its right to do so is legislated by Section 202(1) of the Act and was confirmed by the Labour Appeal Court in the recent important case of

Mzeku and Others v Volkswagen SA (Pty) Ltd (2001) 8 BLLR 857 (LAC)

At paragraph 58 of the judgment, (a judgment, it should be noted, which is expressly stated as being that of "the full Court"), this is stated:

"Sec 202(1) provides: **"If a registered trade union … acts on behalf of any of its members in a dispute, service on that trade union … of any documents directed at those members in connection with that dispute will be sufficient service on those members for the purposes**

of the Act". It is, therefore, clear also that sec 200(1) gives a registered union the right to act on behalf of its members when there is a dispute involving any one or more of its members and that sec 202(1) takes this further and provides that, once a registered trade union acts, as it is entitled to, on behalf of its members, the employer has a right not to serve documents on the individual members themselves but to serve them on the union. It provides that such service on the union is as good as service on the members of the union themselves. If this is so, the position must be that even with regard to the giving of the opportunity to be heard, the employer is entitled to deal with the union."

The shop stewards at any workplace are, with regard to workplace issues which would include disciplinary procedures, the union's designated representatives of its members and it will follow that the reference in this extract to "the union" may, in that context, validly be deemed to include those shop stewards in their official capacities.

7. With regard however to the timing of the enquiries, for the Respondent to have taken disciplinary action at the stage that it did so, did not serve to dilute or terminate the strike action. Its right to pursue that course of action if perceived necessary is not open to question but there is no valid reason, in my view, for it not to have done so immediately the strike ended, when all the elements of fairness could properly have been addressed.

8. Finally, on this aspect of the matter, what I have found to be the unfairness of the timing of the enquiries is in my view as applicable to the procedures taken against the persons individually charged as it is to those directed against the striking body of employees. In that specific context, they were in no different position.

CONCLUSION

9. I have determined therefore that the misconduct of the Second and Further Applicants

which formed the substance of the disciplinary charges against them, has been established as being of such a nature and degree of seriousness as to fully justify their dismissal. I have concluded however, for the reasons which I have stated, that the procedures followed by the Respondent in effecting those dismissals were improper and unfair.

. The relief sought by the individual Applicants in their statement of claim, in the event of a finding of unfair dismissal, is their reinstatement in their employment on terms and conditions no less favourable than those which would be applicable had they not been dismissed, and with retrospective effect to the dates of their respective dismissals. In that context they are in a position similar to that of the body of striking employees in **Mzeku and Others v Volkswagen SA (Pty) Ltd** (*supra*)**.** The dismissal of the employees concerned in that matter for strike-related conduct was referred to arbitration in terms of Section 141(1) of the Labour Relations Act 1995. The presiding commissioner in that arbitration found that the dismissal was substantively fair but procedurally unfair. He held that the dismissed employees were not entitled to compensation but ordered their reinstatement.

. That determination was the subject of review proceedings in the Labour Court in terms of Section 145 of the Act in which the setting aside of the finding that the dismissal was procedurally unfair as well as the reinstatement order, was sought. A counter-application was simultaneously made for the setting aside of the finding that the dismissal was substantively fair and of the order made regarding compensation and reinstatement. The employer's submission that the order of reinstatement should be reviewed and set aside on the basis that the commissioner had no power to order reinstatement in a case where a dismissal was unfair only because no fair procedure was followed, was upheld by the Labour Court and that order was duly set aside. The finding that the dismissal was procedurally unfair however was sustained.

. The dismissed employees then appealed to the Labour Appeal Court *inter alia* against the finding of the Court *a quo* that the commissioner exceeded his powers when he ordered the company to reinstate the appellants. That Court had held that reinstatement was not a competent remedy where the only reason that the dismissal was unfair was that the employer did not follow a fair procedure before it was imposed.

3. In dealing with this issue, the Labour Appeal Court examined the provisions of Section 193 of the Act, recording that sub-section 1 of that section empowers an arbitrator, where dismissal is found to be unfair, to order reinstatement, re-employment or the payment of compensation. Reference is made to Section 193(2), which requires the employer to reinstate or re-employ the employee unless either the employee does not require this, the circumstances of the dismissal have rendered a continued employment relationship intolerable, reinstatement or re-employment is not reasonably practicable or –

) **the dismissal is unfair only because the employer did not follow a fair procedure."**

4. Reviewing each of these exceptions in turn, the Appeal Court at paragraph 78 and 79 of the judgment, said this:

3) **This conclusion is supported by an analysis of paragraph (d). The dismissal envisaged by paragraph (d) is a dismissal of an employee whom the employer has a fair reason to dismiss but in respect of whose dismissal the employer did not follow a fair procedure. Indeed paragraph (d) relates to an employee whose dismissal would have been fair in every respect had the employer followed a fair procedure. It seems to us that, in such a case, absent special circumstances, there is nothing unfair if the employee is not reinstated despite the dismissal being procedurally unfair. In the light of this it seems understandable that the Act may have treated such a case in the same way as those described in paragraphs (a), (b) and (c) and said that in each of such cases reinstatement and re-employment were not competent remedies. In order to ensure that employers will still have a reason to comply with their procedures, the Act left the remedy of compensation still available for that and other situations.**

) **In the light of all of the above we conclude that under the Act the relief of reinstatement is not competent in the case of a dismissal that is unfair only because the employer did not follow a fair procedure. Accordingly, the commissioner exceeded his power in granting the relief of reinstatement in this matter. On that ground alone his award was susceptible to be**

reviewed and set aside. The appellants' appeal must, therefore, fail on this point as well.

. On that basis, the Applicants' claim in this matter for reinstatement, must similarly fail and I turn now to the issue of compensation. In the leading case on the subject –

Johnson & Johnson (Pty) Ltd v CWIU (1998) 12BLLR1209

the Labour Appeal Court reviewed the statutory limits on compensation described in Section 194 of the Act. Froneman DJP, commenting that Section 194 deals with *how* compensation must be calculated in different circumstances, not with *when* and *why* compensation must be awarded, continued as follows:

"If a dismissal is found to be unfair solely for want of compliance with a proper procedure the Labour Court or an arbitrator appointed under the LRA, has a discretion whether to award compensation or not. If compensation is awarded it must be in accordance with the formula set out in Section 194(1); nothing more, nothing less. The discretion *not* to award compensation in the particular circumstances of a case must, of course, also be exercised judicially".

. The serious nature of the misconduct leading to the dismissals of the employees individually charged, as well as the collective conduct of the strikers in their unlawful blockade of the Respondent's premises, their disregard of the terms of the court order and the economic and disrupted client service consequences to the Respondent which were thereby caused, lead me to conclude that this is not a case where an award of compensation to any of the Second and Further Applicants is warranted or appropriate.

. In the ordinary course, an award of costs in matters of this nature will conventionally follow the result, unless there is good reason why this should not be the case. This case, in my view, is such an exception. The conclusions which I have reached in determining this dispute do not seem to me to favour either the Applicants or the Respondent to a degree which would justify an award of costs in favour of either side against the other. Each has been partially successful and has partially failed in its objectives.

. In the result the order that I make in the context of the Applicants' statement of claim,

is the following:

The dismissals of the Second and Further Applicants are declared to have been substantively fair but procedurally unfair.

Their applications for reinstatement and/or the payment of compensation, are dismissed.

There is no order as to costs.

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B M JAMMY
Acting Judge of the Labour Court

22 August 2001

Representation:

Advocate JG van der Riet S.C instructed by Cheadle, Thompson & Haysom

ts: Advocate PJ Pretorius S.C., with him Advocate RM Loader: instructed by Petersen Hertog & Associates