REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO. D 298/98

In the matter between:

TRANSPORT & GENERAL WORKERS UNION	**First Applicant**
E MUTENGWE & OTHERS	**Second to Further Applicants**
and	
COIN SECURITY GROUP (PTY) LTD	**Respondent**

JUDGMENT

BASSON, J

[1] The second to further applicants ("the individual applicants" - the names appearing in Annexure "A" to the applicants' statement of claim) were dismissed by the respondent, Coin Security Group (Pty) Ltd (also referred to as "the company"), on 12 and 13 March 1998, allegedly for participating in an unprotected strike. It was common cause, however, that applicants fifteen, forty-six and seventy-one were not dismissed and therefore are not applicants before Court.

[2] The Transport and General Workers Union ("the union") is the first applicant. There is a dispute whether all the individual applicants were members of the union. I will return to this matter below.

[3] The applicants contended that the said dismissal was unfair and claimed relief in the form of retrospective reinstatement. Initially, the applicants also claimed compensation but in the heads of

argument it appeared that the claim was for retrospective reinstatement only.

[4] Most of the 126 individual applicants were guards in the employ of the company. Some of the individual applicants were drivers, controllers and supervisors (about ten in number). All of the individual applicants (who worked at the Durban branch of the company) were dismissed for allegedly participating in an unprotected strike. When I refer to the individual applicants hereinafter I will thereby primarily be referring to the individual applicants who were guards. Only when such distinction becomes necessary, will the factspertaining specifically to the drivers, supervisors and controllers be discussed.

[5] The company operates a two-shift system, that is, a day and a night shift. The normal working hours for the day shift is from 06H00 to 18H00 and that of the night shift is from 18H00 to 6H00. The respondent operates in the security industry and the guards division provides guards for the safeguarding of the premises of its clients.

[6] Most of the company's guards in Durban resided in the hostel next to the company's premises in Isipingo, but there were some who did not stay at the hostel.

[7] It was also common cause that all of the individual applicants took part in an industry wide and nation wide protected strike over wages from 20 February 1998 to 6 March 1998.

[8] The national wage negotiations and the protected strike (which involved the company's workers in the guards division) was settled on 6 March 1998 by way of a written agreement. Not all of the company's workers participated in the strike. The union supported the strike and it was common cause that all the union's members "the individual applicants included" participated in the strike (see the common cause facts listed at p 88 of the pleadings bundle and also the discussion at paragraph [151] below).

[9] It was further common cause that, up until the national strike, the respondent normally provided transport for the guards staying at the hostel to and from their posts. It was also the evidence (especially of Mr R Rampashad, the Durban administrative manager of the respondent - "Rampashad") that even the guards who were within walking distance of their posts usually took the company transport. In addition, some of the workers not staying at the hostel were also provided with company transport. These workers were picked up from various pick-up points before the start of their shifts. Some of the guards who did not reside at the hostel were also transported from their posts to these pick-up points.

[10] The respondent's two Dyna trucks or troop carriers were usually used, before the national

strike, to transport the workers in the Durban guards division in the manner described above.

[11] It appeared from the evidence that, although these vehicles were normally used by management, it was common cause that two Toyota Ventures as well as a Hilux bakkie were also used to transport the guards (especially the evidence of Mr M Perumal, the Durban service/branch manager of the respondent - "Perumal"). All of these vehicles, including a Ford Lazer (used by management), were thus utilised in the respondent's guards division in Durban.

[12] A few workers (guards) who did not stay at the hostel but near their posting stations reported directly to their posts without going to the parade grounds near the hostel at the Isipingo premises.

[13] The other guards all had to appear at the parade ground before being posted to the company's clients.

[14] At the parade ground a "drop-off" schedule or sheet was read out. It regulated where a worker was to be posted. It appeared from the evidence that such drop-off sheets were prepared from a "duty roster".

[15] If a guard did not go to the parade ground, he or she would be booked "absent" and replaced. The worker's presence or absence from work was recorded in a schedule.

[16] During February 1998 (when the national industry wide strike was in progress), the company informed the union that, amongst other things, it intended to stop providing transport to guards: 1. Between their pick-up points and the parade ground; 2. Between the parade ground and the workers' postings; and 3. Between the hostel and town.

[17] Negotiations then took place on the issue of the proposed taking away of company transport on 24 February 1998 on the national or industry level between the respondent and the union's national shop stewards' council. At the same time there was also a dispute about the closure of hostels and the withdrawal of accommodation. This last-mentioned dispute was referred to arbitration and has no real bearing on the present matter.

[18] At the meeting on 24 February 1998 the company agreed not to implement its proposals to take away company transport, until 16 April 1998 "so that further negotiations could take place" after the union had consulted with its membership (the pre-trial minutes at p 89 of the pleadings bundle list

these common cause facts). The union was to provide a written response to the company by 23 March 1998 and a further meeting was arranged for 31 March 1998 "to discuss alternatives".

[19] It was also clear from the minutes of the meeting of 24 February 1998 (exhibit A18) that the respondent was prepared to consider other alternatives such as a transport allowance.

[20] However, events overtook this negotiation process on the issue of the taking away of company transport. As it will also appear more fully below, the individual applicants were dismissed (on 12 and 13 March 1998) before the negotiations on the taking away of company transport could resume.

[21] After the start of the protected strike on about 23 February 1998 the company also cancelled the transport customarily provided to the hostel residents to enable them to attend to their own personal needs. Mr D Steyn, the general regional manager of the respondent in KwaZulu/Natal ("Steyn"), issued a notice in this regard (exhibits A13 to A14), cancelling the transport because of alleged "misuse". However, when giving evidence, Steyn admitted that there was no evidence of such abuse by the individual applicants in Durban.

[22] After the strike was called off late in the evening on Friday 6 March 1998, following settlement of the issues giving rise to the protected strike, it was agreed between the company and the union parties that the workers in Durban would commence work on the night shift on Monday 9 March 1998.

[23] An important notice dated 9 March 1998 (exhibit B16) was issued by the company's managing director, Mr D Jordaan ("Jordaan"). It was addressed to all employees in the guards division (including the Durban workers).

[24] The notice stated that the company's vehicles would be "withdrawn" and re-evaluated for compliance with the Road Traffic Act and that this entailed a "detailed mechanical inspection". The reason for this was that striking workers had allegedly "mechanically interfered with the company's vehicles at a national level". It was clear that this was a reason different from the negotiation proposals on the taking away of the company transport (discussed above at paragraphs [16] to [20]).

[25] Paragraph 4 of the notice bears closer scrutiny and reads as follows:

"Workers are duly informed that if they are unable to make their own arrangements for reporting for duty at their allocated post on time, using alternative transport within 12 hours of serving this

notice, management may have no option but to consider terminating the employment relationship with such workers".

[26] The applicants legal representative, *Mr Moodley*, argued that this notice was indicative of an intention to dismiss the workers in order to compel them to accept a demand. In this regard he referred to section 187(1)(c) of the Labour Relations Act, 66 of 1995 ("the LRA") which defines a dismissal as "automatically unfair" if the reason for the dismissal is "to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee".

[27] *Mr Moodley* argued on the basis of the judgment in *Gauteng Provinsiale Administrasie v Scheepers & Others* (2000) *ILJ* 1305 (LAC) at 1309I that this demand related to a diminution of existing rights (the right to company transport) and that this must be classified as a dispute of mutual interest.

[28] Moreover, it was clear that the company and the union was negotiating at the time on the very issue of the taking away of company transport, albeit for different reasons (see the discussion above at paragraphs [16] to [20]).

[29] In my view, it was clear that Jordaan, for alleged operational reasons, demanded that the workers make their own way to their posts timeously and that this constituted a "demand" for the purposes of section 187(1)(c) of the LRA (quoted above at paragraph [26]). This is especially so because it was clear that, at the time, the taking away of company transport was a matter for negotiation between the company and the workers. The provision of company transport was also a term and condition of employment of the workers (this matter will be discussed more fully below at paragraphs [34] to [37]).

[30] The managing director further threatened dismissal should the workers not do so "within 12 hours". The question therefore immediately arises: were the individual applicants who did not comply with this demand, in effect, dismissed on 12 and 13 March 1998 for this very reason?

[31] Although other events intervened, especially an alleged unprotected strike, it would appear that there is indeed merit in the argument that the *causa causans* of the dismissal was the refusal by the individual applicants to comply with the company's demand to make their own way to their posts.

[32] As it will appear more fully below, the "demand" of the individual applicants was for the restoration

of company transport. However, this "demand" was **preceded** by the demand of the company (in the said notice of 9 March 1998) that they make their own way to their respective posts (or be dismissed).

[33] After all, when the company made this demand on 9 March 1998 it was common cause that the individual applicants could not have been on strike. They were only required to resume work on the night shift on 9 March 1998 (see the discussion at paragraph [22] above). In any event, as will become clear below, there were also other factors *in casu* rendering the dismissal of the individual applicants unfair.

[34] It was further argued in the same vein on behalf of the applicants that the provision of company transport was part and parcel of their employment contracts.

[35] This appears to be borne out by the fact that the respondent sought to negotiate away the provision of company transport (see paragraphs [16] to [20] above). The company's director of human resources, Mr T Bax ("Bax") also indicated that this was part and parcel of the express terms of the employment contracts of guards up until 1996. This would include the overwhelming majority of individual applicants who were employed before this date. I was referred in this regard to the applicants' details contained in the bundle of documents (exhibits B112 to B116).

[36] In my view, the fact that most of the guards were continually provided with company transport and that only a very small minority used their own means to get to their posts points to the fact that, even for the small minority whose contracts did not expressly stipulate that company transport would be provided, this benefit constituted a tacit term of their contracts of employment. After all, it was clear that guards would not necessarily be permanently posted to a specific client but could be moved around. In the event, it was clear that the company provided transport to guards whenever it was needed and that this was a term and condition of their employment contracts.

[37] It follows that the withdrawal of company transport in terms of the notice of 9 March 1998 (discussed above at paragraphs [23] to [27]) also constituted a unilateral change to the terms and conditions of employment of the individual applicants.

[38] It is further important to note the common cause fact that the respondent did not consult with the union or the workers prior to implementing on 9 March 1998 the requirement that workers make their

own arrangements for transport to their posts (recorded in the pre-trial minute at p 95 of the pleadings bundle).

[39] Further, it was only on Monday 9 March 1998, the date on which the workers were to resume work following the protected strike, that the workers were informed that the company vehicles were to be withdrawn, allegedly for mechanical inspection, and that workers would be obliged to make their own arrangements for transport to their posts (see the common cause facts listed in the pre-trial minute at p 90 of the pleadings bundle). Some of the witnesses of the respondent appeared to indicate that meetings with some of the workers (shop stewards) did take place during the preceding weekend but this evidence was, of course, at odds with the agreed common cause facts. It was therefore clear that the workers were afforded very little opportunity to make the required "arrangements".

[40] There was a dispute whether the union was informed on or about 5 March 1998 (in a letter - exhibit A25) about the alleged sabotage to the company's vehicles and about the fact that it was intended that, allegedly in order to ensure the safety of the company's employees, to withdraw the vehicles for inspection.

[41] Be that as it may, in a telefax dated 9 March 1998 (exhibit B17), the union's national official, Mr J Ngcobo ("Ngcobo"), objected to the withdrawal of transport on the basis that it constituted a unilateral change to the terms and conditions of employment of the individual applicants and violated clause 17 of the wage agreement signed on 6 March 1998.

[42] The union then referred this matter to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), on 13 March 1998, apparently to invoke the provisions of section 64(4)(b) of the LRA (I will return to a full discussion of this matter below at paragraphs [127] to [133]).

[43] On 9 March 1998, after the report back meeting, the company's workers met at the company's premises in Durban. As usual, the workers (guards) paraded. After the workers were booked present, they were told which posts to proceed to. They were also told to use their own transport to get to and from their posts.

[44] The workers who resided in the hostel remained at the company's premises and did not proceed to their posts on the night shift of 9 March 1998. In fact, none of the workers who were posted or any of the other individual applicants attended the posts. "Casual" workers were used by the respondent during the period 9 March to 12 March 1998 to replace the individual applicants who were thus posted but failed to go to their posts.

[45] On 10 March 1998 the company responded to the union's objection that the withdrawal of transport constituted a unilateral change to the terms and conditions of employment in a letter to Ngcobo written by Bax and dated 9 March 1998 (exhibit B18). Bax denied that there was a unilateral change to the terms and conditions of service.

[46] Bax also proposed a meeting with Ngcobo on Wednesday (11 March 1998) to discuss the problem.

[47] Ngcobo responded in a faxed letter to Bax dated 10 March 1998 (exhibit B19), still maintaining that there was a unilateral change to the terms and conditions of employment of the workers. Ngcobo declined the request for the meeting due to his alleged unavailability, the fact that the shop stewards were not identified by name and that the date of the meeting was allegedly "missing".

[48] It appeared from Ngcobo's evidence that he had no real reason for not attending this meeting and I am therefore willing to accept that he was recalcitrant in refusing to meet with Bax as at 10 March 1998.

[49] On 10 March 1998 the workers who resided in the hostel in Durban went to the parade ground and paraded, were booked present and posted. However, after being posted, the workers remained at the premises. In fact, once again, none of the individual applicants went to the allocated posts.

[50] In the event, commencing with the night shift on 9 March 1998, the workers on that shift and every shift thereafter until the workers' dismissal on 12 and 13 March 1998, reported for duty and were posted to their duties at the parade but failed to go to their posts.

[51] A dispute existed whether all of the individual applicants or workers, including those who were indicated as "off -duty" in terms of the duty roster and the posting sheets, were required to attend the parade and were thus posted. I will return to this issue below.

[52] Discussions took place between the shop stewards and the company management in Durban on 10 March 1998. Steyn confirmed in writing that there were no damage to the company's vehicles in Durban to his knowledge.

[53] On 10 March 1998 Bax sent a telefax to the union's Durban branch, warning the union that, unless the

workers attended to their duties by 17H00 on 10 March 1998 and use alternative transport, the company would have to "reconsider the employment relationship" (exhibit B20).

[54] On 11 March 1998 the union's branch organiser telefaxed a response (dated 10 March 1998) denying that there was any damage to the company's vehicles and stated that the union believed that the company was still responsible for the provision of transport (exhibit B23).

[55] On 11 March 1998 Bax on behalf of the company sent a "final ultimatum to return to work" to the union (Durban). This was received at about 09H40. The ultimatum stated that the company believed that "the collective refusal by Durban workers to return to work constitutes unlawful and unprotected strike action by such workers" (exhibits B24 to B25).

[56] The ultimatum required the workers to return to work by 14H00 on that day, failing which they would be "summarily dismissed". The ultimatum ended with the following paragraph: "**Trade union officials** or workers representatives **may make representations** to the undersigned (Bax) by fax (012) 800 - 1264 prior to the expiry of the above deadline. The undersigned will reserve his rights as to whether such representations as are made constitute a valid reason for non-compliance with the instruction. Should no representation be received, the final ultimatum shall stand and the workers shall be dismissed" (emphasis supplied).

[57] At about 12H37 on 11 March 1998 the company sent the union a telefax informing the union that their 14H00 deadline in respect of the ultimatum "still stood" (exhibit B28).

[58] It was common cause that a meeting took place between Durban management and the local shopstewards on 11 March 1998 at about 14H00 (see the pre-trial minutes at p 98 of the pleadings bundle). At the meeting the following issues were discussed: 1. Alternative transport, particularly how workers were getting to their posts; 2. The transportation of guard dogs and firearms; 3. The reasons why drivers, supervisors and controllers were notworking; and 4. Whether the workers were participating in unprotected and illegal strike action. It was common cause that Steyn shredded the minutes of this meeting. I will return to a discussion of the meetings between Steyn and the shopstewards below.

[59] At about 17H15 the company's Head Ofice (Bax) informed the union's Durban branch that it had extended the ultimatum until **9H00 on 12 March 1998** for day shift workers and **18H00 on 12 March 1998** for night shift workers (exhibit B26). In a letter by the KwaZulu/Natal branch of the union (exhibit A81) the union

stated that there was no damage to vehicles in KwaZulu/Natal.

[60] In an important communication dated 11 March 1998 Ngcobo telefaxed a letter (exhibit B29) to Bax, referring to the **ultimatums** handed to the members of the union, and stating the following:
"In view of your threat to carry out the above action without consciously thinking about repercussion (*sic*), **we will suggest as a matter of urgency that we meet with yourselves and the shopstewards on 12 March 1998 at your office or your Midrand office at 12H00**. This will be without prejudiced (*sic*). The meeting should at least close at 15H00 since thereafter I will be leaving for another pressing appointment in Durban ... Awaiting your urgent confirmation and hoping that you will not proceed with the said ultimatum which in our view is grossly unfair, given the referral to the CCMA" (emphasis supplied).

[61] In response to this letter Bax faxed a letter dated 12 March 1998 to Ngcobo (exhibit B32) stating the following:
"In your correspondence of 10 March 1998 you declined a request by the undersigned for a meeting. As a result, the writer has made alternative plans. I sincerely regret not having been able to meet with you to discuss the current situation".

[62] Bax then proceeded to dismiss the individual applicants (exhibits A100 and A101). Bax apparently dismissed the day shift workers already at 6H05 on 12 March 1998, that is, even before the deadline of the ultimatum of 9H00, and dismissed the night shift workers not at 18H00 but the following morning (on 13 March 1998) morning at 9H00.

[63] Bax explained when giving evidence that the said "alternative plans" had been that he was summonsed to a meeting with the shareholders who "wanted to know what is going on with the industrial conflict". However, it was clear that Bax considered the workers to be dismissed already at 6H05 (above at paragraph [62]), that is, even before attending the meeting with the shareholders which meeting, stated Bax, was scheduled for 9H00 on 12 March 1998. Further, it is interesting to note that the alleged meeting with the shareholders would have discussed the very topic on which Ncgobo had wanted to meet with Bax about.

[64] The refusal by Bax to meet with Ngcobo before dismissing the workers directly contradicted his invitation to meet with a union organiser (expressed in his letter of 11 March 1998 - *supra* at paragraph [56]).

[65] In my view, the refusal by Bax to meet with Ngcobo also contradicted his purported intention to do "whatever possible to get the workers back to work". This was, of course, his duty, in fairness to the

workers who were facing a sanction of the last resort, that is, they stood to be dismissed, allegedly for partaking in an unprotected strike.

[66] Even if I accept the respondent's contention that the individual applicants had embarked upon an unprotected strike (the only reason that the respondent gave for dismissing them), the guidelines for fairness are clear.

[67] The relevant provisions of item 6(2) of schedule 8 to the LRA require the following: "Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action that it intends to adopt". The only exception being: "If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them". No such exceptional circumstances were alluded to by the respondent *in casu*.

[68] In fact, the reason for refusing to meet with the national union official, Ngcobo, appears, on the face of it, the mere inconvenience of a previous arrangement. On closer inspection, Bax's written refusal referred to the fact that Ngcobo declined the previous offer of a meeting (see the quotation of Bax's letter at paragraph [61] above).

[69] However, Bax did not state in evidence that the intransigent attitude of Ngcobo previously was the reason for his refusal to meet with him now. In my view, such purported justification would, in any event, be untenable. There is clearly a duty on the employer to, in fairness, meet with a union official before resorting to the final sanction of dismissing the striking workers. After all, the relevant union official himself was now requesting an opportunity to meet and the reasons proffered for Bax's refusal appear to be tenuous, to say the least.

[70] Further, although it would appear that Ngcobo was indeed intransigent when Bax proposed a meeting on 10 March 1998 (see the discussion above at paragraph [48]), Ngcobo explained when giving evidence that the purpose of the meeting proposed on 10 March 1998 was completely different from the purpose of the meeting requested by the union on 12 March 1998. The purpose of the meeting proposed for 10 March 1998 was namely that the parties were to discuss the notice of 9 March 1998 (discussed at paragraphs [23] to [24] above) and the issue of the alleged unilateral change to the terms and conditions of employment of the individual applicants. On the other hand, the union's request for a meeting on 12 March 1998 came **after** the ultimatums were issued and the purpose thereof was accordingly to discuss the implications of the ultimatums. Ngcobo's contention appears to be borne out by the contents of the said letters (discussed above

at paragraphs [41] to [48]; [53] to [56]; and [59] to [61] - exhibits B16; B17; B18; B19; B26 and B29).

[71] Further, the *ratio* for this requirement is clear: the employer must comply with the duty to afford the union official the benefit of the *audi alteram partem* before, as a last resort, dismissing the workers, thereby infringement on their rights.

[72] The importance of observing the *audi alteram partem* principle in strike dismissals was stressed in a recent decision of the Labour Appeal Court in the judgment of *Modise & Others v Steve's Spar Blackheath* (2000) 21 *ILJ* 519 (LAC). In essence, it was held that the striking workers must be offered an opportunity to make representations.

[73] The respondent's legal representative, *Mr Fabricius*, argued that this case dealt with the provisions of the previous Labour Relations Act and was therefore not binding on the Labour Court *in casu* in the application of the provisions of the present LRA. Nevertheless, the Labour Appeal Court stressed that *audi alteram partem* principle should in general apply and I respectfully agree with the sentiments expressed in regard to the importance of this principle, also and especially in the context of strike dismissals.

[74] In my view, item 6(2) of schedule 8 to the LRA (quoted above at paragraph [67]) gives effect to and codifies the *audi alteram partem* principle in the context of a strike dismissal under the provisions of the LRA in that the clear purpose of these provisions is that a union official should be granted an opportunity to make representations on behalf of striking workers at the very earliest opportunity. Moreover, in the absence of the striking workers being granted such opportunity individually (such as was the position *in casu*), it is of the utmost importance that their union official be granted such opportunity on their behalf. In other words, a union official should be granted the opportunity to deal with the situation collectively at the very least. It follows that the refusal to do so is a serious impediment to the fairness of a strike dismissal.

[75] In the event, the refusal of the company to meet with the union official before it dismissed the workers who were allegedly taking part in an unprotected strike rendered the dismissal of the individual applicants *in casu* unfair.

[76] In other words, it was simply not legitimate or fair to dismiss the individual applicants without first allowing the union official the opportunity that he requested for a meeting with the company's management. In my view, the fact that the individual applicants were participating in an unprotected strike therefore did not, at the stage when they were dismissed, constitute a valid or fair ground for their dismissal. It follows that, for this reason alone, the individual applicants are entitled to their relief. I will

return to the matter of the relief claimed below.

[77] This is especially so because of the collective nature of strike action. It happens more frequently than not that striking workers do not all receive the ultimatums. The present matter is a case in point. The representatives of management admitted that they could not say that all of the individual applicants had, indeed, received a copy of the above ultimatums which were given only to the shop stewards (see, *inter alia*, the evidence given by Perumal and Rampashad). It is therefore important that a union official be allowed to investigate the position on the ground and make any necessary representations.

[78] There was the further problem *in casu* in that some of the individual workers were marked "day-off" on the duty roster and the posting sheets.

[79] No other duty roster or posting sheets were ever provided to cater for the alleged strike situation. In fact, Mr J Monauna, the project/operations manager at the respondent's Durban branch ("Monauna'), admitted that the duty roster for this period (exhibits B126 to B137) from which the relevant posting sheets were drawn was used as a "guideline" and that they were "bound" by it. Not all of the individual applicants were required to go to their posts on every day from 9 to 12 March 1998 as some were thus marked "day-off". He further admitted that the rule in terms of which the workers who were marked "day- off" were also to report to the parade ground was not "totally" enforced. This was confirmed by Perumal.

[80] In the event, there was the very real possibility that the ultimatums which failed to distinguish between those workers who were indeed posted and those workers who were not posted at all but marked "day-off" (even on the very last shifts on 12 March 1998) could lead to confusion.

[81] In fact, the question arises whether the ultimatums under these circumstances were indeed "clear and unambiguous" as is required in terms of the further provisions of item 6(2) of schedule 8 to the LRA. This problem with the ultimatums could therefore be another reason to hold that the strike dismissals *in casu* were unfair.

[82] There was another compelling reason to hold that the strike dismissals *in casu* were unfair. The question was whether the alleged strike action was in response to unreasonable or unjustified conduct by the respondent-company.

[83] First, the question of whether the individual applicants embarked upon an unprotected strike must

be answered.

[84] Mr E Mutengwe, an individual applicant and the shop steward who played an important role in the run-up to the dismissals ("Mutengwe"), testified that it was "impossible" for the individual applicants to make their own way to their posts. However, on the evidence presented (also in regard to the agreed distances between some of the posts and the parade ground), some of the individual applicants could have walked to their posts, given the fact that some of the posts were less than 2 kilometres from the parade ground. I believe that it was possible for them to do so despite the evidence that the terrain was dangerous. It was, of course, also possible for the individual applicants to make use of public transport such as taxis.

[85] Strictly speaking therefore, at least some of the individual applicants could have gone to their posts and worked. However, not a single individual applicant went to an allocated post during the period 9 to 12 March 1998.

[86] It would appear that the most probable inference to be drawn from these facts is that there was a concerted refusal to work by the applicants because of the withdrawal of the company transport. Further, it would appear that the applicants would work only if company transport was reinstated. In this regard, a letter by Mutengwe (exhibit A38) referring to the notice issued on 9 March 1998 (exhibit B16 - discussed at paragraphs [23] to [25] above) that required workers to make their own way to their posts stated: "N.B. No change in conditions of employment until such change is discussed and agreed upon by both parties, is accepted by employees" (see also exhibit A81). Nothing at all is said about the alleged impossibility of making their own way to their posts. In my view, this amounted to a demand that their grievance be addressed before they would return to work (at their allocated posts). It is clear that such action falls squarely within the definition of a strike contained in section 213 of the LRA.

[87] There is accordingly no merit in the argument presented on behalf of the applicants that their refusal did not have the purpose of addressing a grievance.

[88] This may, however, be true of the drivers, controllers and supervisors and those individual applicants posted at Mdeni Meats because they could not work as no work was available to them.

[89] See in this regard the evidence of Monauna, who admitted that the controllers had no vehicles to control and that the supervisors had no guards to supervise. Rampashad also admitted that there were "no duties for the supervisors or drivers". In the same vein, paragraph 48.3 of the respondent's statement of

defence (at p 55 of the pleadings bundle) declared: "The supervisors and controllers were therefore **unable to comply with these duties notwithstanding that they were willing to do so"** (emphasis supplied). There was accordingly no question of a refusal to work on the respondent's own version.

Further, at paragraph 48.4 in regard to the drivers the following was stated: "Due to the fact that the two Dyna trucks were returned to Pretoria, the drivers could not be utilised". Again, there was no question of a refusal to work.

[90] It would appear therefore that these individual applicants (numbering about ten) were dismissed together with the individual applicants who were guards, regardless of the fact that they did not strike as there was no refusal to work. For this reason alone, their dismissal for allegedly partaking in an unprotected strike was accordingly manifestly and substantively unfair.

[91] The position of the drivers was further exacerbated by the fact that a letter was written by Bax, intending to "retrench" them and dated 12 March 1998 (exhibits A111 to A112). This, of course, also indicated that the withdrawal of transport was not a temporary measure as the respondent had alleged.

[92] As an aside, it must be noted that the applicants' insistence that they did not refuse to perform their duties ruled out the possibility of relying on a contractual remedy. In other words, it was not the applicants' case that they refused to perform their duties unless and until the respondent performed its reciprocal duty in terms of the employment contract to provide company transport (see *Coin Security (Cape) Pty Ltd v Vukani Guards and Allied Workers' Union & Others* (1989) 10 *ILJ* 239 (C) at 245I).

[93] It is of the utmost importance to remember that the respondent had made the first demand even before the strike commenced in that it unilaterally suspended company transport and demanded that the individual applicants make their own way to their posts and, if not, threatened them with dismissal (see the evidence discussed at paragraphs [23] to [33] above).

[94] This was clearly an intention of contemplated unfair dismissal that was being conveyed to the individual applicants. In the event, their conduct in not reporting to their posts and demanding the reinstatement of company transport in order to get to their posts was, in my view, precipitated by this unjustified threat of the company. In other words, the demand of the applicants was, in this sense, made to counter the unfair demand and threat of the respondent.

[95] Further, it appears that it was not reasonable for the respondent to expect from the individual

applicants to get to their posts on time.

[96] Bax stated that the guards had approximately a half hour to get to their posts after being posted on parade. Monauna stated that it would take the workers from 65 to 70 minutes to get to their posts by public transport. Although the evidence on how to get to the various posts and how long such journey would take was conflicting, I am satisfied that a large number of the individual applicants would not have been able to make their own way to their posts (by taxi) and arrive on time.

[97] Some of the respondent's witnesses indicated that the workers would not have been dismissed or disciplined if they did not arrive on time. However, this flies in the face of the notice which threatened them with dismissal should they not arrive on time (exhibit B 16 - see paragraphs [23] to [25] above). In fact, Steyn stated categorically that the guards were required to make it to the posts on time. A guard who testified on behalf of the respondent, Mr A Zezwe ("Zezwe"), also stated that guards were expected to be at their posts at 6H00 (the start of their shift) and if not, they were late.

[98] I am therefore satisfied that the company did expect the workers to be on time. Bax even referred to the services rendered by the guards as an "essential service" and the nature of the business was to protect the clients' premises. This leaves very little room for lackadaisical guards arriving late for their shifts.

[99] Further, it was unreasonable for the company not to offer proper financial assistance to the guards to pay for public transport.

[100] Steyn admitted that the shop stewards had meetings with him on 9 and 10 March 1998 where the fact that the workers had no money was raised by the shop stewards. He also admitted that he knew that the fact that they had no money would be "a problem". Steyn stated that he wanted to give the workers a cash advance but that it was "too late in the evening to fetch money" and that "the banks were closed".

[101] However, Steyn appeared to contradict this evidence when he also stated that the workers did not want the advance. Steyn also stated that this issue (together with the issue of using alternative vehicles - see the discussion at paragraphs [107] to [114] below) first had to be referred to the national level, that is, Head Office in Pretoria, that had to take a decision on whether to offer such advance.

[102] The respondent has, however, failed to satisfy me that it did indeed afford the workers even this measure of assistance.

[103] The pleadings were silent on this issue; the affidavit made by Steyn in the application for an interdict (exhibits B42 and B44 - discussed at paragraphs [141] to [143] below) was likewise silent on this issue; and not one of the written communications that were sent to the union (especially to Ngcobo) mentioned the very important fact that the company was willing to offer financial assistance. After all, Steyn stressed that such decision would have to be taken at the national level and that, of course, involved Bax. He also stressed that he had, indeed, referred the matter to Head Office. See in this regard also exhibits B30 to B31, that is, a letter where Steyn confirms that the matter had to be referred to Head Office. Mutengwe stated that he could remember Steyn saying that the issue of an advance had to be approved by Head Office.

[104] Moreover, if this was true, it was, of course, all the more reason for Bax (at Head Office) to meet with Ngcobo (at the national level) before dismissing the individual applicants, as this important information about an alleged advance was never relayed to the union officials (see the discussion at paragraphs [60] to [70] above where the unfair refusal of Bax to meet with Ngcobo is discussed).

[105] At the very best for the respondent, on Bax's version, the company offered the workers a cash advance or a loan which they allegedly refused. Mutengwe denied that Head Office was ever forthcoming with such offer.

[106] It was, in my view, unreasonable to expect from workers who had not received any income for the period of three weeks when they partook in a legitimate and protected strike to pay for public transport to take them to their posts. Even to offer a mere loan falls far short of the expected behaviour of an employer that protested that it wanted the workers back at work and had unilaterally withdrawn the company transport which was provided for the last six years. The cost to the workers of paying for their own transport (or repaying such "loan") was prohibitive. The evidence that such cost would amount to at least 10% of their income was not meaningfully challenged.

[107] Another important fact is that the company failed to assist the workers by providing them with the available alternative transport.

[108] All the vehicles that were used to transport the guards (see the discussion at paragraphs [9] to [11] above) were taken to the Gale Street premises of the respondent (which was a high security area) already during the nationwide protected strike on 23 February 1998. This was the evidence of, *inter alia*, Monauna.

[109] Steyn stated that on 9 March 1998 the two Dyna trucks were taken to Pretoria (on instructions from Head Office - see also the notice of 9 March 1998 - exhibit B16 discussed at paragraphs [23] to [25] above). However, the two Ventures (one of which was damaged due to an earlier accident) and the Hilux bakkie remained behind. As it was also pointed out above (see the discussion at paragraph [11]) these vehicles had in the past been used to transport the guards.

[110] However, Steyn testified that Head Office had stopped all vehicles from being used and that this included the Venture and the Hilux bakkie. It is important to note that these vehicles were not damaged in the least.

[111] Steyn admitted that he could not dispute the evidence of the shop stewards (especially Mutengwe) that they also proposed in meetings him with on 9 and 10 March 1998 that the vehicles that remained behind must be used to transport the workers to their posts. Steyn added that this was a reasonable request but that he had instructions from Head Office that these vehicles were not to be used. Perumal echoed this evidence when asked whether he thought that it was reasonable not to transport the workers with these vehicles: the only justification that he could give was that they had to follow instructions from Head Office. Again, much could be have been gained in a meeting between Bax (at Head Office) and Ngcobo as these decisions clearly rested with Bax (see the discussion of the company's refusal to meet with the union official at paragraphs [60] to [70] above). Importantly, Perumal also added that the "casual" workers who were working in the individual applicants' places were indeed transported in these vehicles when they were stationed at the Gale Street premises.

[112] In the light of this evidence, I am not satisfied that the company was interested at all in assisting the applicants to get to their posts.

[113] After all, there was not the slightest bit of evidence that these workers had ever themselves damaged company vehicles. The protestations of management that the reason for not transporting the workers was because the vehicles were unsafe clearly stands to be rejected in view of the fact that undamaged vehicles in which they were previously transported were, in fact, available.

[114] This action by the company in refusing to transport the workers in the available vehicles was therefore clearly unjustifiable and provoked the reaction by the workers when they refused to go to their posts until company transport was reinstated (see the discussion at paragraphs [83] to [87] above

where it is indicated that this response by the workers constituted unprotected strike action).

[115] Further, on the same topic of company vehicles, I am not convinced that it was necessary for the company to withdraw the two troop carriers (Dyna trucks) from Durban. I accept the evidence that some of the respondent's vehicles were damaged during the nationwide protected strike. This evidence was also not challenged in any meaningful manner by the applicants' witnesses. There was thus the possibility that the vehicles in Durban were also damaged.

[116] However, it was clear from the evidence of the respondent's witnesses that there were very little problems in driving the said two vehicles from Durban to Pretoria. Steyn was also under the impression (at least initially) that no vehicles in Durban was damaged during the protected strike (see exhibits A66 to A67 - dated 10 March 1998) .

[117] The *onus* of proof rested on the respondent to persuade me that it acted reasonably in the dismissal of the workers. I am not convinced on a balance of probabilities that the reason for withdrawing the two Dyna troop carriers in Durban was because they were so unsafe for transporting the Durban guards that they had to be withdrawn. Moreover, as I had already indicated above (at paragraph [113]), the justification of the company that the vehicles were withdrawn in the interests of protecting the workers as there were no safe vehicles available, stands to be rejected.

[118] Added to this was the problem that the company appeared to indicate that the drivers of the Dyna vehicles would be retrenched (see the discussion at paragraph [91] above). This was indicative of a more than temporary withdrawal of the vehicles.

[119] In fact, in the light of the aforegoing discussion, the respondent failed to satisfy me that it wanted to assist the workers in getting to work.

[120] The company failed to offer proper financial assistance for public transport and also failed to utilise the vehicles that were available to transport the individual applicants to their posts. In my view, this amounted to manifestly unreasonable and unjustified conduct, especially when taking into account the notice that the individual applicants would be dismissed should they fail to make their own way to their posts on time (see the discussion above at paragraphs [23] to [25]).

[121] Item 6(1) of schedule 8 to the LRA states the following:

> "Participation in a strike that does not comply with the provisions of Chapter IV 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;

(c) whether or not the strike was in response to unjustified conduct by the employer".

[122] In my view, the substantive unfairness of the strike dismissal *in casu* was seriously compromised in terms of the guidelines for fairness set out in item 6(1)(c) to schedule 8 (above).

[123] The unreasonable and unjustified conduct of the respondent (identified above at paragraphs [94] to [112]) clearly played a major part in the decision of the workers not to make their own way to their posts and to demand company transport to enable them to do so.

[124] Perhaps much of these problems could have been alleviated if the respondent did not act over-hastily and allowed the union official an opportunity to make representations (see the discussion above at paragraphs [60] to [70]). Even the problems with the ultimatums could conceivably have been addressed (see the discussion above at paragraphs [78] to [82]). However, such opportunity was refused.

[125] In the event, the respondent has failed to satisfy me in terms of its *onus* in this regard, that it acted in a fair manner and that the participation of the individual applicants in the unprotected strike action constituted, in the light of the above-mentioned facts to the contrary, a fair and valid reason for their dismissal.

[126] The respondent nevertheless argued that the strike was unprotected, and contended that in the light of the above guidelines, that is, the seriousness of the contravention of the provisions of the LRA and the steps taken to comply (item 6(1)(a) and (b) of schedule 8 to the LRA - quoted at paragraph [121] above) the applicants' case was compromised.

[127] It was clear that Ngcobo referred the dispute about the alleged unilateral change in the terms and conditions of employment of the individdual applicants to the CCMA at a very early stage on 13 March 1998 (see the discussion above at paragraph [42]). It was also clear that the union, in doing so, was intending to invoke the provisions of section 64(4) and (5) of the LRA (see exhibit B17).

[128] In terms of section 64(4)(b) read with section 64(5) of the LRA the respondent would have been obliged to comply within 48 hours with any requirement of the workers or the union to restore the terms

and conditions of employment that applied before the change. Moreover, if the respondent failed to comply, the workers could have embarked upon a protected strike in terms of section 64(3)(e) of the LRA.

[129] The respondent argued that it was easy for the union and the workers to have complied with these provisions and that there was accordingly no need to have embarked upon the unprotected strike. The respondent even contended that Ngcobo conceded that this was the position. However, Ngcobo was asked specifically whether he conceded that the dismissal of the individual applicants was fair because they could and should have complied with these requirements for a protected strike and he answered that he would "not say" that. It was clear that all that he admitted to was that these provisions of the LRA required a waiting period of only 48 hours to make the strike protected. After all, Ngcobo was not in Durban and had to rely on Mutengwe to inform him about the position on the ground. However, no such contention was ever put to Mutengwe.

[130] Further, there are two fundamental problems with the argument that it could legitimately have been expected from the applicants to wait out the periods prescribed in section 64(4) and (5) of the LRA.

[131] First, up until this day (and certainly in terms of the company's correspondence with the union at the time), the company denied that the withdrawal of company transport constituted a unilateral change to the terms and conditions of the individual applicants.

[132] There was accordingly no guarantee that the company would have agreed to restore the change to the terms and conditions of employment on receipt of the notice in terms of section 64(4)(b) of the LRA. On the contrary, it appeared probable that the company would have refused, insisting that there was no such change. In the event, it would have taken the full period prescribed to embark upon a protected strike. Even then, it was improbable that the unilateral change would have been restored and the applicants would have been confronted with the necessity to embark on yet another protected strike (after already suffering the financial hardships of having participated in a nationwide protected strike for the previous three weeks). The individual applicants could, of course, have applied for an interdict at the Labour Court to force the respondent to comply with section 64(5) of the LRA. Ironically, should such application have been successful, the company transport would have been restored and the strike could have ended on the basis that the respondent was now obliged to transport the workers to their posts.

[133] Be that as it may, there is a more compelling reason to hold that, in the light of the steps that were indeed taken to proceed to a protected strike on the issue of a unilateral change to the terms and conditions of employment of the individual applicants, the actions of the individual applicants were

justified. The respondent's unjustified behaviour in triggering or provoking the unprotected strike (identified at paragraphs [94] to [112] above) namely outweighed any criticism against the applicants for not awaiting or implementing the provisions of sections 64(4)(b) and 64(5) of the LRA.

[134] I reiterate that the facts which support this contention are the following. The individual applicants had legitimately participated in a nationwide and industry wide protected strike over wages from 20 February 1998 to 6 March 1998. There was no evidence in the least that the individual applicants had ever been guilty of sabotaging any of the company's vehicles during this strike. The company transport was unilaterally withdrawn on the day that the individual applicants had to resume work (9 March 1998). This was done with almost no prior notice by the respondent. Even before refusing to go to their posts unless company transport is provided, the individual applicants were instructed to make their own way to their posts on time and were threatened with dismissal should they fail to adhere to this unilateral change to their terms and conditions of employment. The respondent's precipitative and unfair demand and threat triggered the counter-demand of the workers that company transport be restored. Further, for the most part, the individual applicants risked coming late at their posts even if they used public transport (taxis). The individual applicants had earned no money during the protected strike but the respondent failed to make a proper offer of financial assistance. In fact, at the very best for the respondent, the loan that was allegedly offered would have had a detrimental effect on the take home pay of the individual applicants. Apart from requesting financial assistance, the shopstewards also requested that the available vehicles be used to transport the workers to their posts. Although undamaged vehicles that were previously used to transport the guards were available, the Durban management refused, claiming that they had instructions from Head Office not to transport the individual applicants in these vehicles. This was despite the fact that the casual replacements who worked at the various posts were sometimes transported in these vehicles.

[135] In my view, the collective impact of this unjustified behaviour of the respondent provoked the unprotected strike and clearly outweighed any possible criticism against the individual applicants for not utilising the mechanisms of the LRA and for embarking upon an unprotected strike.

[136] Coupled with the failure to consult with the union official before dismissing the individual applicants (at paragraphs [60] to [70] above), I reiterate that my conclusion is that the dismissal of the individual applicants for participating in the unprotected strike was both substantively and procedurally unfair.

[137] The applicants claimed retrospective reinstatement in the light of their unfair dismissal.

[138] The respondent argued that the individual applicants should not be reinstated retrospectively in view of their

alleged "attitude" adopted towards Steyn at the meeting on 11 March 1998. Steyn allegedly feared for his life as a result of the alleged misconduct of the individual applicants on this day.

[139] In my view, Steyn's evidence was not persuasive. He was evasive when referring to his meetings with the shop stewards, even to the extent that he initially was unsure if meetings had taken place on 9 and 10 March 1998. This was despite the evidence of witnesses like Monauna who testified that there were frequent meetings with Steyn (the applicants' version).

[140] Further, it was common cause that Steyn had shredded the minutes of the meeting of 11 March 1998 before Mutengwe could prevent him from doing so. This challenging and confronting actions were hardly the actions that one would expect from a man who fears for his life and would therefore rather give in to the demands of the alleged violent attackers. Mutengwe testified that good progress on the transport issue had been made at this meeting until Steyn received a telephone call when his attitude started to harden.

[141] Further, on 12 March 1998 Steyn attested to an affidavit when the company brought an application for an urgent interdict in the Durban Labour Court (exhibits B34 to B49). Nowhere in Steyn's affidavit was any mention made of alleged violent conduct by the individual applicants on 11 March 1998. Nevertheless, Steyn testified in Court about alleged stone throwing and that he feared for his life.

[142] The relief claimed also went no further than requesting an order interdicting the workers from denying access of persons to the premises and that the members of management not be detained.

[143] The alleged "detention" of management must be viewed in the light of the respondent's own evidence that there was a meeting between management and the shop stewards inside the building at the time. When the parties came out the shop stewards jumped over the locked gate together with the members of management (Monauna's evidence, supporting the applicants' version). No arrests were made by the police (who were called in by management) and Mutengwe had a normal conversation with the police, explaining the position of the workers (this was common cause). Allegedly, the workers did not want the vehicles to leave the premises as they first wanted to inspect them for the alleged damage.

It was also clear from Steyn's affidavit that this action related to the alleged refusal of the applicants to allow the company's remaining vehicles to leave the premises. It is also important to note that, once again, there was no proof or even allegations that any of the individual applicants were ever guilty of damaging the respondent's vehicles.

[144] There is accordingly no compelling evidence to support the contention that it would not be reasonably practical to reinstate the individual applicants or that the relationship of trust had broken down due to the actions of the individual applicants on 11 March 1998.

[145] In the event, the respondent has failed to persuade me that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable (in terms of the provisions of section 193(2)(b) of the LRA). It follows that there is no reason why the individual applicants should not get relief in the form of the primary remedy of reinstatement. There is also no reason why the order of reinstatement should not operate retrospectively to the date of their dismissal (in terms of section 193(1)(a) of the LRA).

[146] Both parties asked for an order as to costs should they be successful. I can see no reason in law and in fairness not to order that costs are to follow the result.

[147] Lastly, the respondent contended that twelve of the individual applicants, listed in terms of a notice to amend the statement of defence (at pp 106 to 107 of the pleadings bundle) were not properly before Court. In essence, the respondent contended that these individual applicants were not members of the union as no union fees were deducted from their pay in terms of the company's personnel records (see, *inter alia*, exhibits M1 to M5).

[148] At the outset it must be noted that the accuracy of the company's personnel records were placed in doubt. Mutengwe testified that the failure of the company to deduct union fees was an ongoing problem that was raised with the management continually (see, *inter alia*, exhibit F). This evidence was not challenged in any meaningful manner.

[149] Further, it is important to note that Mutengwe himself was also on the list of "non-union" members. This flies in the face of the fact that it was common cause that Mutengwe was a shop steward of the union who also occupied various other positions in the union structures and, moreover, the shop steward who played a leading role in the run-up to the dismissal of him and his colleagues. There is, in my view, accordingly no reason to believe that Mutengwe was not a member of the union.

[150] Mutengwe also testified that he had personal knowledge that the twelve individual applicants whose membership was being placed in dispute was, indeed, union members. The reason why he could not find the documentary proof was because documents had gone missing when the union frequently moved offices. I can see no reason to reject this evidence as it was not meaningfully challenged during

the hearing.

[151] Further, the following common cause facts in regard to the protected nationwide strike from 20 February 1998 to 6 March 1998 were listed in the pre-trial minute (at p 88 of the pleadings bundle): "Not all the workers in the respondent's guard division participated in the strike. First applicant supported the strike and accordingly **first applicant's members, the individual applicants included,** participated in the strike" (emphasis supplied).

[152] It is therefore clear that in terms of these common cause facts it was indeed agreed that all the individual applicants were members of the first applicant (the union). Moreover, at the pre-trial conference the respondent stated categorically that it would not be raising any points *in limine* at the hearing (at p 80 of the pleadings bundle).

[153] In fact, it was only at the beginning of the trial that the respondent placed the membership of these individual applicants in dispute for the very first time.

[154] The respondent even attacked the validity of the conciliation proceedings at the CCMA.

[155] Section 157(4)(b) of the LRA declares that the certificate of outcome of dispute constitutes "sufficient proof" of the fact that an attempt has been made to resolve the dispute through conciliation. *In casu* such certificate had indeed been issued in terms of section 136(1)(a) of the LRA (exhibit B61).

[156] Further, the respondent has not sought an order to review and set aside the certificate of outcome *in casu* on the basis of an alleged defective referral. The respondent also did not raise the issue of a defective referral at the conciliation proceedings before the CCMA.

[157] The respondent thereby failed to raise its objections timeously. It is clear that such certificate remains valid until it is set aside by a competent Court. It is therefore not open to attack the validity of the conciliation proceedings at the stage of the hearing of the dismissal dispute in the Labour Court. See in this regard: *Fidelity Guards Holdings (Pty) Limited v Epstein NO & Others* (2000) 21 *ILJ* 2009 (LC); *Fidelity Guards Holdings (Pty) Limited v Epstein NO & Others* 21 *ILJ* 2382 (LAC) at especially 2388B-C; 2388I-J; and 2389E-F.

[158] There is, in my view, no merit in the argument that it was not open to the respondent to complain

about the alleged defects in the referral to conciliation at the CCMA proceedings because the referral as such was not objectionable in that it was validly made by the union on behalf of its members at the time.

[159] I am firmly of the view that the parties before the CCMA knew exactly that the dispute was between the company and all of the workers whom the company had dismissed for allegedly partaking in an unprotected strike on 12 and 13 March 1998. In other words, the dismissal of those individual applicants whose union membership is now being placed in dispute was part and parcel of the strike dismissal dispute that was conciliated at the CCMA. Moreover, this fact was known to both the employer (that had dismissed these very workers) and the union party (that clearly acted on behalf of all the dismissed workers) at the conciliation proceedings. It is therefore clear that the respondent could have objected to the inclusion of these individual applicants already at the conciliation proceedings. Further, it was always open to the respondent to take the issuing of the certificate of outcome on review. There is accordingly no reason why the principles enunciated by the Labour Appeal Court in the *Fidelity Guards Holdings* judgment (above at paragraph [157]) should not apply *in casu*.

[160] The respondent also argued that the referral in terms of section 191(5)(b) of the LRA of the dismissal dispute to the Labour Court by the union on behalf of the alleged non-members was "a nullity". However, even if these individual applicants were not members of the union at the time of their dismissal (and the conciliation proceedings) it must be noted that the individual applicants, including these twelve applicants, signed individual powers of attorney to authorise the union and its attorneys to act on their behalf (see exhibit L). This was done before the matter was referred to the Labour Court by the union's attorneys. It may even be argued that these individual applicants thereby ratified the referral to the CCMA (see: *Nampac Product Ltd v Sweetcore (Pty) Ltd* 1981 (4) SA 919 (T) at 924C-D).

[161] Be that as it may, there is clearly no requirement in terms of the provisions of the LRA that a party who is represented by a union in the Labour Court (in terms of section 161(c) of the LRA) must have been a member of that union already at the time of dismissal.

[162] In the light of the aforegoing, I am satisfied that the first applicant referred the dismissal dispute to the Labour Court in terms of section 191(5)(b) of the LRA on behalf of all the workers (employees) who had signed valid powers of attorney authorising the union and its attorneys to do so. It follows that the dismissal dispute was validly referred to the Labour Court, also by those twelve applicants whose union membership was placed in dispute by the respondent.

[163] In this regard it must also be pointed out that the respondent agreed with the judgment in the case of *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration & Others* (2000) 21 *ILJ* 1634 (LC) at paragraphs [14] to [33] where it was held that a dispute contemplated in section 191(1) of the LRA may be referred to the CCMA by an official of the dismissed employee's registered trade union.

[164] In the event, the respondent conceded that the dispute *in casu* was properly referred to the CCMA as well as to the Labour Court in terms of section 191(5)(b) of the LRA in regard to the individual applicants who were members of the union at the time. See also in this regard the provisions of section 200 of the LRA.

[165] All in all, therefore the respondent's belated objection in regard to these twelve individual applicants appeared to have been based on unsustainable grounds and fuelled by an unduly technical approach.

[166] In regard to applicants numbers 30 and 88 (in Annexure "A" to the applicants' statement of case) the respondent contended that, as they are deceased and no authority was obtained from the executors of their estates to persist with the referral on their behalf, they were not properly before Court as parties in this matter. See, *inter alia*, *Du Toit v Bornman & Another* 1992 (4) SA 257 (C) at 261F-G; *Nyati v Minister of Bantu Administration & Others* 1978 (3) SA 224 (E) at 226F-227B; and *Pentz v Gross & Others* 1996 (2) SA 518 (C) at 523A-E. I agree with this contention and this was also conceded in argument by the applicants' legal representative.

I make the following order:

1. The dismissal of the individual applicants identified in Annexure "A" to the applicants' statement of case (excluding applicants numbered 15, 46, 71, 30 and 88) on 12 and 13 March 1998 was both substantively and procedurally unfair.

2. The said individual applicants (excluding applicants numbered 15, 46, 71, 30 and 88) are reinstated in the employ of the respondent, retrospectively to the date of their dismissals.

3. The individual applicants who wish to be reinstated in terms of paragraph 2 above must present themselves for work at the respondent's branch office at 235 Gale Street, Umbilo, Durban, within 14 days from the date of this order.

4. The backpay to be paid to those individual applicants who present themselves at work in terms of paragraph 3 above must be paid (in terms of paragraph 2 of this order) within 14 days of the date when the individual applicants have thus presented themselves for work.

5. The respondent is to pay the applicants' costs.

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BASSON, J

On behalf of the Applicants:	Adv I Moodley
	instructed by Cheadle, Thompson & Haysom, Durban.
On behalf of the Respondent:	Adv H Fabricius SC and with him
	Adv G van der Westhuizen
	instructed by Mac Robert Inc, Pretoria.
Dates of the Proceedings:	19 to 23 June 2000; 27 to 29 June 2000; and 17 to 19 January 2001.
Date of Judgment:	24 January 2001.