IN THE LABOUR COURT OF SOUTH AFRICA

Case No. P 88/01

Before Landman J

In the matter between-

td Applicant

and

O First respondent

and

Commission for Conciliation, Mediation
Second respondent

and

Bonsile James Mzeku and others Further respondents

JUDGMENT

LANDMAN J:

Introduction

1. Volkswagen of SA (Pty) Ltd (VW) has launched an application to review and set aside an award made by Commissioner Floors Brand of the Commission for Conciliation, Mediation and Arbitration (the CCMA) on 22 January 2001. The award concerns the reinstatement of Mr B J Mzeku and other workers (I shall refer to the further respondents collectively as the workers) who were dismissed by VW on 3 February 2000 after engaging in industrial action for 15 days**.**

2. The workers oppose the relief sought and have purported to file a counter application. The counter application to review the award does not contain a prayer. But I am prepared to assume, as they contend that their dismissals were substantively unfair, that they wish the award to be amended to grant them reinstatement retrospectively to the date of their dismissals. It may also be that if the reinstatement order is reviewed that they would wish to be compensated but they have not indicated this.

3. The operation of the award has been stayed pending the outcome of this application. The application and counter-application were heard on 23 February 2001 out of turn as a matter of urgency.

The facts

4. I have gathered the salient facts from the award of the commissioner. Mostly I have rearranged his record of the facts.

5. VW is a motor manufacturing company with its production site at Uitenhage, Eastern Cape. It employed approximately 6 000 employees of which about 4 500 were hourly-paid. Approximately 80% of the hourly-paid employees were members of the National Union of Metalworkers of South Africa (NUMSA).

6. NUMSA became the sole collective bargaining agent for all hourly-paid employees in November 1990 when VW entered into a recognition agreement with NUMSA.

7. In 1998 VW was awarded an export contract for A4 Golfs to the United Kingdom and Europe. This required VW to more than double its local production. In order to achieve this, negotiations took place between Management and NUMSA and in August 1998 the so-called A4 Export Agreement was signed. The agreement was extensively communicated within the factory and NUMSA's General Secretary expressed support for the export order. It resulted in the recruitment of 850 new employees and the introduction of new work practices such as group work, a holiday corridor and reduced tea breaks.

8. Apparently a group of workers, styling themselves the "Concerned VW Workers" (the CVWW), had some concerns with the agreement and with the shop stewards and NUMSA officials who were part of the resolutions which resulted in the signing of the agreement. They wanted changes in the shop steward ranks and before the shop steward elections, which were held in March/April 1999, they circulated a list of proposed candidates. The elections took place. About half of the 32 shop stewards elected were new faces (the new shop stewards).

9. Soon after the election it became clear that there was division within the Shop Stewards' Council between those who were re-elected (the old shop stewards) and the new shop stewards, and also between the new shop stewards and the local officials of NUMSA.

10. On 17 July 1999 VW was informed by NUMSA that it had suspended 8 shop stewards (the 8 shop stewards) and that they should be advised to return to the positions that they held before being elected. VW complied. But on Monday, 19 July 1999, a few hundred of the workers downed tools and started toi-toing through the factory. They demanded that NUMSA reinstate the 8 shop stewards.

11. On 20 July 1999 VW obtained a Labour Court order declaring the "strike action" (not a strike) illegal and interdicting and restraining all hourly-paid workers from participating in any "strike action" for the purposes of remedying the alleged grievance or dispute relating to the suspension by NUMSA of the 8 shop stewards.

12. On 21 July 1999 NUMSA decided to lift the suspension of the 8 shop stewards and the striking workers returned to work. But, on 27 July 1999, 18 shop stewards resigned in protest against the reinstatement of the 8 shop stewards. Because the number of vacancies created difficulties in maintaining the labour relations structures, VW took the matter up with NUMSA.

13. On 6 August 1999 NUMSA informed VW that elections would be conducted in due course and warned that no unofficial appointments should be recognised.

14. No endeavours were made by the officials of NUMSA to replace the shop stewards who had resigned. In September 1999 the remaining 13 shop stewards indicated to VW that certain individuals had been nominated to replace those who resigned. VW was not prepared to recognise the nominees as shop stewards and a number of meetings between all concerned were held, but the matter could not be resolved.

15. On 22 December 1999, the day before the closure for the annual recess, NUMSA advised VW that some of the 13 shop stewards had been expelled from NUMSA, following a disciplinary enquiry held on 17 December 1999.

16. The expelled shop stewards approached Pagdens Attorneys and on January 2000, Mr Zide of Pagdens wrote a letter to VW. He stated that his clients were in dispute with NUMSA over their expulsion. He also said that his clients intended to consult and deal directly with NUMSA in regard to the issue and that they would try everything in their power to avert a strike and to resolve the internal squabble amicably with NUMSA.

17. On 17 January 2000 VW's attorney, Chris Baker & Associates, received a further letter from Pagdens, advising that their clients' expulsion from NUMSA had been revoked and that they were suspended as shop stewards pending the outcome of a disciplinary enquiry in respect of charges against them.

18. On the same day NUMSA held a general quarterly meeting at VW's premises where the issue of the shop stewards was discussed. National office-bearers, including its National President, Mr Tom, attended this meeting. The next day, 18 January 2000, VW received a letter from NUMSA, confirming the suspension of the shop stewards concerned and requiring that they vacate their offices.

19. On 19 January 2000, NUMSA launched an urgent application in the Labour Court for an interdict, restraining the 13 shop stewards from continuing to act as NUMSA representatives and from interfering with NUMSA's activities at Volkswagen. On the same day VW's attorneys received a letter from Pagdens, advising that the urgent application had been resolved by way of a settlement agreement in terms of which their clients would: (a) cease to act as shop stewards, (b) vacate the shop stewards' offices and (c) return the 3 union cars.

20. On 20 January 2000 a number of workers again downed tools and assembled at the main gate at the plant. They demanded the reinstatement of the suspended shop stewards and continued to refuse to work. Shortly after about 07:00 some 400 to 500 people downed tools and assembled at the main gate of the plant. At about 08:00 VW contacted the NUMSA Regional Office and informed them of the position at the plant. NUMSA was asked to intervene. At the same time VW's attorneys wrote to Pagdens referring to the settlement agreement reached on the previous day in the application between them and NUMSA requesting their compliance with it. Attempts were also made by members of the Human Resources Division to persuade the shop stewards to attend a meeting to address the issue. The shop stewards responded by saying that they had been suspended and advised Management to speak to NUMSA. They indicated that they would meet with Management in the presence of their attorney.

21. Mr B K Smith of VW then took the next step (still on 20 January 2000) of addressing a letter to the shop stewards concerned, stressing that it was imperative that immediate steps be taken to minimize losses and resume normal production, and furthermore:

    requiring them to give immediate effect to the previous undertaking to inform employees currently on strike to resume normal duties;

    stressing that employees on the afternoon shift on the 20th should commence duties at 14h00 as usual and requiring them to take all steps necessary to inform employees accordingly;

    pointing out that employees should refrain with immediate effect from further blockading the entrances to the plant and requiring them to take all steps necessary to secure compliance with this requirement; and

    pointing out that VW would take whatever steps were necessary to ensure that its legitimate requirements were met, including the dismissal of those employees who persisted in their refusal to resume normal duties.

22. As at 12:00 no attempts had been made by NUMSA or its officials to enter the plant or intervene with a view to resolving the issue a further letter was addressed to NUMSA's Regional Office. Mr Smith pointed out the consequences to VW of the continuing strike action and requested that immediate arrangements be made to have their representatives attend at the plant to inform the employees of the agreement entered into between them (NUMSA) and the suspended shop stewards and to prevail upon the employees to resume their duties. Copies of this document were forwarded to the President of NUMSA, Mr Tom and the Acting General Secretary, Mr Dantjie.

23. About the same time (12:00) five persons, namely Messrs Mzeku, Swartz, Jacobs, Ralo and Mokmosi presented themselves to Management, indicating that they represented the striking workers. They required VW to secure the upliftment of the suspension of the shop stewards. They also blamed VW for allowing NUMSA to hold the General Quarterly Meeting on 17 January 2000. VW warned them of the consequences of the current industrial action which was threatening the A4 Export Order and thousands of jobs at Volkswagen and related industries in the area. It was also pointed out that the current situation had nothing to do with VW, that the action was unprocedural and illegal, and that VW required them to resume their duties immediately. They were warned that if the employees continued with the illegal strike action they would face disciplinary action which would include dismissal. The representatives undertook to communicate VW's position to the employees and appealed to Management to secure the intervention of NUMSA'S Regional Office at the plant to explain the suspension of the 13 shop stewards. A written confirmation of VW's position was also handed to the representatives and they were requested to read it out to the workers. Mr Mzeku said that they went to the workers and reported to them, but the workers responded by saying, "We did not send you (to collect) that, so if our representatives are

not brought back we are going to see what we can do". The workers dispersed.

24. A letter was also addressed to the Minister of Labour, informing the Minister of the position at the plant and appealing to him to use whatever influence he may have to resolve the dispute. Copies were also forwarded to the General Secretary of COSATU, Mr Vavi, the President of NUMSA, the MEC for Economic Affairs: Eastern Cape and the Deputy Director General of the Department of Labour.

25. As there was no response to the earlier communication to Pagdens, a further letter was addressed to them at about 13:30 (on 20 January 2000), pointing out that an attempt was made to meet with the shop stewards, but that they would only meet in the presence of their attorney. The letter states that:

"Your clients are invited:

(a) To meet with our client immediately;

(b) to discuss with our client the basis upon which they may communicate with their supporters in order to avoid any further prolongation of the current strike.

Our client reiterates that if your clients persist in their refusal to give effect to this legitimate requirement, there is every prospect:

That the current industrial action will continue; and

That our client's losses will escalate further. . .

Our client intends to hold your client responsible for these losses.

You are requested to communicate this information immediately to our clients, informing of the invitation on the part of our client that they meet with our client, in compliance with the undertaking giving to your offices, and with a view to bringing the current industrial action to an end."

The afternoon and night shifts were shut down.

26. The next morning, 21 January 2000, the strike continued and it was decided to also close the morning shift. A notice was issued to all employees leaving the plant which reads as follows:

"1. You were called on at the commencement of work today (Friday, 21st January) to

resume your normal duties.

2. *You have failed to do so.*

3. *The Company is no longer prepared to tolerate this behaviour.*

4. *You are advised as follows:*

4.1 *Employees are required to report to their workstations at the commencement of their shift on Monday, 24th January and to resume normal work.*

4.2 *Any employee who fails to give effect to this requirement will face serious consequences which may include dismissal.*

5. *You are urged to ensure that you comply with the Company's lawful requirements in this regard."*

27. On the same day a letter was received from NUMSA, advising VW that the employees had been advised through the printed and electronic media that they should discontinue their strike action. VW was also informed that pamphlets had been distributed in the plant to this effect. The relevant portion of the pamphlet reads as follows:

"[it] is important to understand that this Order of Court (referring to the Settlement Agreement, which was made an Order of Court on 19 January 2000,) was sought in order to enforce the provisions of the Constitution (of the Union) and the authority of the Union in VWSA. . .

The decision to suspend the 13 shop stewards was further endorsed in a Quarterly General meeting held in the factory on Monday the 17th January 2000.

Any form of industrial action by a group of employees who want to blackmail the Union into submission will not be tolerated by the leadership of the Union.

We call upon loyal members of the Union not to be deceived by a group whose agenda is to destroy the Union in the factory and in the community.

We will not change the decisions that we have taken in the interest of building a strong

Union in VWSA and in Uitenhage."

28. Mr Smith responded on the same day, pointing out that NUMSA will not be relieved of its responsibility to maintain a presence on Company premises on Monday, 24 January 2000, and to take all reasonable steps to address the concerns of its members and persuade them to resume their duties.

29. A letter was also received from Pagdens, stating that their clients (the suspended shop stewards) were of the view that it was NUMSA's officials who were responsible for calling on employees to resolve their unlawful strike action. Pagdens also contended that their clients would deal directly with NUMSA and would appeal to the workforce that an unprocedural strike be averted at all costs. It was furthermore said that it was the view of the general workforce that they want NUMSA officials to come and address them. Pagdens also advised that if VW wished to communicate with anybody it should do so through the committee which had been constituted and in view of the Recognition Agreement, that it was incumbent on VW to call on NUMSA officials to dissuade employees from pursuing their strike action.

30. Mr Smith then addressed a letter to NUMSA, requiring NUMSA to call on its members to resume their duties on 24 January 2000, failing which they will face serious consequences which may include their dismissal. VW also issued a press release to this effect. Apparently a document prepared by the ANC/COSATU/SACP Alliance, condemning the action of those who caused "division within VWSA" and encouraging all workers to refrain from participating in divisive action which could jeopardise their security, was also distributed.

31. But on Monday, 24 January 2000, VW still experienced extensive absenteeism and the plant was closed at about 14:30 until further notice. A notice to this effect was issued to all hourly-rated employees and a letter was also addressed to NUMSA. At the same time a communication was addressed to COSATU and the President of NUMSA, calling upon the national leadership of COSATU and NUMSA to become involved and pointing out that the job security of VW workers was at stake.

32. On the same day NUMSA issued a press release to the local press, the SABC TV and various news agencies *inter alia,* calling upon its members and other workers to disassociate themselves from further strike activities and to present themselves for duty. It also reminded employees of the potential of dismissal in the event of them continuing the strike action.

33. On 25 January 2000 the local media carried several reports dealing with the call upon workers to return to work.

34. On the same day, Dr Schuster, Head of International Labour Relations at VWAG, and Mr Uhl, the General Secretary of the VWAG Group Works Council, arrived in South Africa to evaluate the strike and to assist Management to negotiate an end to the strike. That same evening they met with the regional leadership

of NUMSA and urged NUMSA to intervene immediately and secure a return to work. NUMSA said that they would have a meeting with members the following day in order to convince them to resume their duties. They also consulted with the national leadership of NUMSA and with local and provincial political leaders.

35. The discussion with Mr Jim, the Regional Chairperson of NUMSA, Mr Chatai, the Regional Organiser and some members of the national leadership of NUMSA, concerned "the process to be followed in having people resume their duties and the need to structure an agreement providing the necessary undertaking to secure the return to work." This meeting broke up at about 15:00 to enable NUMSA to hold a meeting with its members. When the meeting reconvened, later that day, NUMSA reported that it was not well attended. But that workers had indicated that they would resume their duties on 28 January 2000.

36. According to the evidence of Mr Kasika two separate requests were also made to the 13 shop stewards to meet with Dr Schuster and Mr Uhl, but they were unsuccessful.

37. The next day, 26 January 2000, the press carried a number of articles relating to the strike with comment on the strike from NUMSA, COSATU and VW's Management. The Evening Post of 29 January 2000 carried an article under the heading: "Strikers are on their own", stating that NUMSA *inter alia* said that should the workers fail to return to work, the union will not be held responsible for any of its members who may lose their jobs as a result of their participation in the current illegal strike. They were intended to stress the seriousness of the situation and to request workers to resume their duties.

38. On the same day the Uitenhage Crisis Committee, of which Mr Mzeku was the deputy chairperson, issued a document expressing its dissatisfaction with local NUMSA officials and, to resolve the issue, demanded the resignation of a local NUMSA official and the immediate withdrawal of the allegations against the 13 shop stewards.

39. On 27 and 28 January 2000 further meetings were held between Management and NUMSA in order "to reach agreement on an end to the strike and a process to secure normal production" and the re-opening of the plant.

40. On 28 January 2000 an agreement was struck between Management and NUMSA on the basis on which the plant would re-open on Monday, 31 January 2000. According to the evidence of Mr Smith, the NUMSA leadership asked to adjourn the meeting before the agreement could be signed so that they could consult on certain aspects of the proposed agreement. When they returned, the agreement was signed. The agreement stated that both NUMSA and Management condemned the illegal action taken by the workers and provided, *inter alia,* that if employees persisted in their illegal strike action VW would take further disciplinary action against them "which will include dismissal." It was also agreed that all employees who tender their service should sign an agreement that they "will work normally in terms of their employment contract, which includes observing all collective agreements". VW also warned NUMSA that if employees did not heed the agreement, VW would be left with no alternative other than to issue an ultimatum, with the consequence of dismissal of those who failed to comply with the ultimatum. VW also indicated that they were prepared to afford NUMSA the opportunity "to secure a

complete return to work in terms of the agreement".

41. The content of this agreement was widely published. It was done by way of notices, press releases, radio reports, etc. In addition, all employees entering the plant on 31 January 2000 were provided with notices, referring to the agreement and stating that employers were required to sign an undertaking. It was also stressed that any employee who failed to comply with the instructions would be dismissed without any further warning.

42. On 31 January 2000 it became obvious that the strike was still continuing and because of the high level of absenteeism, it was not possible to commence normal production (but the plant remained open). A press release urging employees to return to work was issued by VW. Mr Jim reported that NUMSA would be holding a meeting the next day, 1 February 2000, in a final attempt to secure the return of the striking workers. VW assisted NUMSA to facilitate such a meeting at a hall in KwaNobuhle.

43. However, on the evening of 31 January 2000, Mr Ndandani (not an employee of VW), who appeared to be the leader of the striking employees and chairperson of the Crisis Committee, announced on national television that the "strike starts today". At 18:00 that same evening Management took a decision to issue an ultimatum, requiring the striking employees to resume their duties on 3 February 2000 or face dismissal. The printers were instructed on the same evening to prepare the ultimatum and it was forwarded to the press and the radio. A distribution company was also engaged to drop 50 000 copies in and around the Uitenhage area.

44. On the morning of 1 February 2000 a further meeting was held between NUMSA and Management. The ultimatum was read out at the meeting. NUMSA was advised that drastic action would be taken in order to protect the jobs of the workers at VW and others in the supply industry and warned that VW would not "backtrack" on the ultimatum, and that employees would be dismissed if they did not comply. NUMSA then advised VW that a meeting would be held that evening in the Babs Madlikana Hall and that it would be addressed by Mr Vavi, Mr Tom, and other political and community leaders in an attempt "to persuade the people that the VW was serious about the ultimatum and that people should return to work".

45. Mr Smith also stated that from 31 January 2000 to 3 February 2000 the level of attendance had improved each day. On 3 February 2000, 71% of the hourly-paid workforce reported for duty. Some 1 336 employees did not report and they were dismissed with effect from the same day.

Jurisdiction

46. The commissioner records in his award: “In so far as it might have been necessary the parties agreed in terms of section 141 of the LRA to the jurisdiction of the CCMA to arbitrate in the dispute”. Section 141 of the LRA allows a commissioner of the CCMA to arbitrate a dispute which would otherwise be adjudicated by the Labour Court. The commissioner is authorised to make any order which the Labour Court could make.

47. In order to afford counsel an opportunity, prior to the hearing, to consider some of my concerns regarding the review, I had a series of questions submitted to counsel. One of the questions was whether the arbitration was a consensual one. Mr MJD Wallis SC (with him Mr AIS Redding) for VW contended that it was not. Mr J Surju who, with Mr N Ruben, appeared for the workers, took the view that it was.

48. Mr Wallis pointed out that the dispute was referred to the CCMA for conciliation in terms of the provisions of section 191(1) of the LRA as appears from LRA Form 7.11. On 5 April 2000 the CCMA certified that the dispute remained unresolved. The workers did not allege that the reason for the dismissal was one which fell within s 191(5)(b) of the LRA. Their stance was that the action which they had taken did not fall within the definition of a “strike” in terms of the LRA. Accordingly there was no allegation that the dismissal fell within s 191(5)(b)(iii) and the matter was properly referred for arbitration by the CCMA in terms of s 191(5)(a). It was in the light of those circumstances that it was recorded in the pre-arbitration minute that there were no jurisdictional objections to the CCMA processing the matter. It follows, contended Mr Wallis that once the workers requested the CCMA to arbitrate the dispute it was required to do so. VW was obliged, if it wished to resist an award in favour of the workers, to participate in the arbitration. The arbitration was accordingly not consensual but was one conducted in terms of the LRA in accordance with the general provisions laid down in s 138.

49. Mr Surju referred me to a number of letters which, he submitted, constituted VW’s consent to the arbitration. These letters do not bear out this. They merely confirm VW’s intention to enter the lists and to defend the relief sought in the arbitration tribunal.

50. After I had reserved judgment I invited the commissioner to place any evidence or representation which he might wish to do before me and copy them to the other parties. The commissioner referred me to the signed pre-arbitration minute (which did not serve before me) which supports the statement quoted above from his award. Both VW and the workers have dealt with this issue. VW stands its ground. I am prepared to assume, for the purposes of this judgment, that the commissioner’s note is correct.

The test for review

51. Initially both VW and the workers relied on s 145 of the LRA and on the Promotion of Administrative Justice Act 3 of 2000 (PAJ) as the foundation for their respective applications to review the award. However, in answer to my query communicated to the parties prior to the hearing, counsel for VW abandoned any reliance on the PAJ. At the hearing Mr Surju did likewise.

52. Mr Wallis motivated his decision as follows:

(a) In terms of the definition of "administrative action" in s 1 of the Act it means:

"Any decision taken, or any failure to take a decision"

by, *inter alia*, an organ of State exercising a public power or performing a public function in terms of any legislation;

(b) in the same section "decision" is defined as meaning:

"any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision..." (Emphasis supplied);

(c) the question whether a decision is one of an administrative nature must be considered in the light of the trilogy of cases in the Constitutional Court dealing with the nature of administrative action under the Constitution of the Republic of South Africa of 1996 namely: **Fedsure Life Assurance Limited and others v Greater Johannesburg Transitional Metropolitan Council and others** 1999 (1) SA 374 (CC), paras. 28-42; **President of the Republic of South Africa and others v South African Rugby Football Union and others** 2000 (1) SA 1 (CC), paras. 140-143, 66-68; **Pharmaceutical Manufacturers Association of SA and another: In re Ex Parte President of the Republic of South Africa and others** 2000 (2) SA 674 (CC). The Constitutional Court considered the concept of administrative action in the Constitution and held that it needs to be distinguished from legislative acts (**Fedsure and the Pharmaceutical Manufacturers**) or executive acts (**SARFU)** and needs to be related to the process of public administration.

(d) in two judgments of this court it has been held that a decision by an arbitrator, in the one case a CCMA arbitrator and in the other a private arbitrator, is not an administrative act but something which has judicial or quasi-judicial characteristics. See **Shoprite Checkers (Pty) Limited v Ramdaw NO and others** (2000) 21 ILJ 1232 (LC) paras. 88-90 and **Seardel Group Trading (Pty) Limited t/a The Bondwit Group v Andrews NO and others** (2000) 21 ILJ 1666 (LC), paras. 36-38, 1672.

(e) this conclusion is consistent with the judgment of Mpati J (as he then was) in **Patcor Quarries CC v Issroff and others** 1998 (4) SA 1069 (SECLD) at 1082D-G and is not inconsistent with the decision of the Labour Appeal Court in **Carephone (Pty) Limited v Marcus N.O. and others** (1998) 19 ILJ 1425 (LAC) where the court held that it was unnecessary under the Constitution to categorise the different functions of the State administration into judicial, quasi-judicial and administrative, an approach which is inconsistent with that laid down by the Constitutional Court.

(f) the approach set out above is supported by the decision in the Constitutional Court in **Nel v Le Roux NO and others** 1996 (3) SA 562 (CC), para. 24, 576; where it was held that a summary sentencing procedure under s 205 of the Criminal Procedure Act 51 of 1997 “is clearly judicial and not administrative action”. It is clear therefore that the Constitutional Court recognises that classification.

53.I should add that there are two other reasons why the PAJ is not applicable to this review. In the first place it does not seem that the PAJ repeals s 145 of the LRA. Secondly, assuming that it does, the Act, strange but true, does not apply, as far as the Labour Court is concerned, until rules have been promulgated. See s 7 (4) of the PAJ. The Labour Court is not a High Court although it has the a similar status and standing. Mr Wallis, who is a member of the Rules Board, stated that rules had yet been drafted.

54.In Landman and Van Niekerk **Practice and Procedure in the Labour Courts** at A-44 (4th revision) it is observed that the decisions which have dealt with constitutional review in terms of the Constitution, including **Carephone (Pty) Ltd v Marcus NO & others** have been overtaken by the enactment of the PAJ.

55.When was the PAJ enacted? The choice seems to lie in the following range: when the Bill was passed by the Legislative Assembly and the National Council of Provinces or when it was assented to and signed by the President or when it was promulgated partly or wholly. **The New Shorter Oxford English Dictionary**

defines, as one meaning of "enact": "2 Make (a bill etc.) into an act." In terms of the Constitution "A Bill assented to and signed by the President becomes an Act of parliament..." See s 81 of the Constitution. The PAJ was assented to on 3 February 2000 and presumably also signed on that date.

56. The enactment of the PAJ has the effect that the interim or transitional wording of ss 33(1) and (2) (see *23(2)(b)* of Schedule 6 to the Constitution) falls away and is replaced by the final wording which reads:

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

57. If the Carephone test, which was based on the previous wording, were to be adapted then it is clear that the "justifiability" test is no longer appropriate. However, it is doubtful, as Wallis AJ, pointed out in **Shoprite Checkers (Pty) Ltd v Ramdaw NO & others** whether arbitration, even that which is involuntary, constitutes administrative action. See on this case John Grogan "Justifying the unjustifiable - New challenge to *Carephone*" 2000 **Employment Law** 10.

58. The Constitutional Court, as Wallis AJ points out at para 85, accepted the need to distinguish between instances where the actions of organs of state constitute administrative action and those where they do not in order to give effect to the express language of the Constitution. This was done in **Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & Others**. The same approach was followed in **Pharmaceutical Manufacturers' Association of SA (Association Incorporated in terms of section 21) & another: In re the Ex Parte Application of the President of the Republic of South Africa & others**.

ree with the sentiments expressed by Wallis AJ at para 90 that:

"Other than the fact that the CCMA is an organ of state acting in terms of statutory

authority and exercising statutory powers, neither of which is decisive as the Constitutional Court has made clear, I can find no reason to characterize the work of a commissioner of the CCMA presiding over an arbitration in terms of s 136, 138, 139 or 141 of the LRA as being administrative action. The fact that the commissioner is not performing judicial functions under the Constitution and does not form part of the judicial arm of the state or come within the judicial process (*Carephone* para [18]) is neither here nor there. The question is whether the conduct of such an arbitration is administrative action and the answer is that it is not."

60.The constitutional niche which applies is in my opinion s 34 of the Constitution which reads:

S 34. Access to Courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

61.It follows, that s 145 of the LRA, which is virtually identical to s 33 of the Arbitration Act of 1965, must be applied in the same manner. Generally the High Court's interpretation of ss 33 must inform the interpretation of s 145 of the LRA. It was for this reason that Walllis AJ conducted an examination of s 33 of the Arbitration Act of 1995. He concluded in para 56 that:

"I have set this out in some detail because it can I think be seen from this broad and general exposition of the effect of s 33 (1) of the Arbitration Act that the conduct which under the Act warrants the setting aside of an arbitration award is as much conduct which should justify the setting aside of an arbitration award made by a commissioner acting in terms of the LRA. The provisions of the Arbitration Act and the finality which its limited power of review provides in respect of awards have been applied and approved in relation to arbitrations in the field of labour relations (**Amalgamated Clothing & Textile Workers Union v Veldspun Ltd; Bester v Easigas (Pty) Ltd & another**).

62.In **Eskom v Hiemstra NO and Others** 1999 (11) BCLR 1320 (LC) at para 23, I expressed the view that:

"... compatible with the Constitution, section 33 (1) of the Arbitration Act of 1965 permits a court to interfere with the award on grounds which essentially are directed at a lack of independence, for example bias or corruption and impartiality as well as

gross irregularities. A court may also interfere if there is a lack of jurisdiction, arising from various causes, because it destroys the fundamental requirement that there be a submission to arbitration."

63.I will consequently adopt what may be termed the narrow or traditional test of review in reviewing the commissioner's award. By doing this I am conscious that this court is probably turning its back on what has been in spite of **Carephone,** a rather interventionist approach. An approach prompted by some glaring instances of injustice. This was attributable to the inexperience and lack of legal background of a large number of CCMA arbitrators. But, drawing on, Cora Hoexter "The Future of Judicial Review in South African Administrative Law" 2000 **SALJ** 484, a comment on the PAJ, perhaps it is time that the Labour Court recognises that the legislature intended that certain labour disputes be arbitrated by the CCMA for better or for worse.

Substantive fairness

63. The workers submit that the award is defective as the commissioner should have found their dismissals to have been substantively unfair. This submission is not founded so much on the facts as on the law and in particular on the "right to strike" as governed by international law and the constitution and conventions of the International Labour Organisation (ILO). This aspect of the workers' case was argued before the arbitrator and in this court by Mr Neville Ruben, an advocate, professor of law and former distinguished official of the ILO.

64.Mr Ruben complained about the commissioner's use of a memorandum (an opinion) by one Andre van Niekerk attached to Mr Wallis's heads. It was submitted that the opinion was in the nature of expert evidence. I do not see any difference between the arguments advanced at the arbitration by Mr Ruben and that by Mr van Niekerk save that one was oral and the other in writing. A response could have been filed to it. But that was not done.

65.The nub of Mr Ruben's submissions, and the case for arguing that the dismissals were substantively unfair, lies in his characterisation of the industrial conduct engaged in by the workers as a legitimate strike. This is argued on the basis that s 3(1) (c) of the LRA requires the Act to be interpreted *"in compliance with the public international law obligations of the Republic"*. Reliance is also placed on s 233 of the Constitution.

66.Mr Ruben points to **Freedom of Association and Collective Bargaining - a General Survey by the Committee of Experts on the Application of Conventions and Recommendations** 1983 para 200 (which is recorded in the record, section 7, page 1213). It is said that the right to strike is there for the promotion and protection, inter alia, of: "labour problems of any kind which are of direct concern to the workers". As I understand it, it is argued that this covers a dispute between a union and its members of the kind which took place between the workers and NUMSA. It is submitted that the

strike was legitimate and only procedurally defective in so far as 48 hours notice was not given of the strike. Presumably it follows from this that the dismissals were, with reference to schedule 8 of the LRA, substantively unfair.

67. I am not at all convinced that the passage cited from the general survey is authority for the proposition that members of a trade union may engage in a strike if they have a dispute with their union particularly where the employer has not caused or contributed to the dispute. But even if that were to be so, then the correct way to challenge the definition of a strike in s 213 of the LRA is to attack it constitutionality. This was not done. Neither the arbitrator nor this court may ignore the plain wording of the LRA (even if it is expressed in plain Canadian English) and give effect to decisions of the ILO or its committees. In any event the majority judgment of the Supreme Court of Canada in **Re Public Service Employee Relations Act** vol 7 International Labour Law Reports 75 at 103 expressed the opinion that:

"The decisions of the Committee on Freedom of Association and the Committee of Experts are not binding though, as M Forde points out, the former `comprise the cornerstone of the international law on trade union freedom and collective bargaining': `The European Convention on Human rights and Labour law' (1983) 31 **Am J Comp L** 301 at 302."

68. It was noted, on behalf of the workers, that the commissioner found that the dispute that motivated the industrial action was one between the employees and their union NUMSA and not one between VW and the workers. It was submitted that there was, on the evidence, two disputes. The one internal to the trade union between officials of the union and the some members, being the workers. The other dispute was between the workers and VW on the right to representation. Both disputes, it is contended, arise out of the removal of the elected shop stewards. The dispute between the workers and VW, it was contended, was a matter of mutual interest.

69. I was not referred to any passages in the record which go to show that the commissioner committed a gross irregularity in this regard. My own reading of the record does not show that the commissioner misdirected himself on this score.

70. In the arbitration proceedings it was accepted that the concerted, collective conduct of the workers, ie the industrial action, engaged upon by the workers was a strike. The commissioner proceeded from this premise. But he was clearly uncomfortable with this classification. He expressed reservations in the course of giving his reasons for the award. Clearly it illogical to consider, as the Code of Good Practice enjoins, the failure to comply with the procedure for striking laid down in the LRA if the "strike" is substantively impermissible.

71. VW's counsel support the commissioner's finding that the industrial action, although labelled a strike, "constituted serious, deliberate and wilful misconduct for which there was no justification..."

72. It becomes imperative to decide, as a matter of law, the nature of the workers' industrial action. It is to this that I turn.

73. In order to arrive at the proper juristic description of the industrial action embarked on by the workers it is necessary to start some time before the enactment of the LRA.

74. In the turbulent years of the late 1940's a struggle developed for the leadership of various trade unions. The most notable and bitter struggle being the internecine strife in the Mine Workers' union (Mynwerkers Unie). This is described by E S (Solly) Sachs in **The Choice before South Africa** (1952) at 171 as follows:

"On 27th February, 1947, about 6,000 European miners stopped work. No demands for higher wages or better conditions were submitted by the strikers; in fact, the leaders of the strike were most apologetic to the Chamber of Mines and repeatedly explained that they were not fighting against the mine-owners but against a clique which was ruling the Mine Workers' Union. This was a strike unique in the history of the South African Trade Union Movement. The strike lasted for nearly seven weeks for which period workers forfeited their pay and the gold mines themselves incurred a loss of over two million pounds. The result of the strike was that the government appointed a Commission to hold fresh elections for office bearers in the Union."

See also "White Trade Unionism, Political Power and Afrikaner Nationalism" by Dan O'Meara especially at 171- 178 in Eddie Webster **Essays in Southern African Labour History** (third impression 1983).

75. This industrial action because its demands were not directed at employers was not a strike. See **R v Tshongono and others** 1957 (2) SA 486 (C) regarding action which did not constitute a strike in terms of the Black Labour Regulation Act 48 of 1953.

76. The troubles of the Mine Workers' Union did not abate. A fresh crisis arose between protagonists of Mr Gr¸ndling and Dr Ras Beyers. See **Gründling v Beyers & others** 1967 (2) SA 131 (T). This also led to industrial action but it too was not a strike. The result was the enactment in 1966 of s 65(1A) of the Industrial Conciliation Act 28 of 1965 which sought to outlaw industrial action aimed at a demand which could not lead to a legal strike. Such action became commonly known, in later years, as a stay-a-way.

77. The present definition of a strike does not permit the protected withdrawal of labour in order to remedy a grievance about an internal trade union matter. See s 213 of the LRA sv "strike". A strike means:

"(T)he partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee".

78. The phrase "matter of mutual interest" has a well defined meaning. See **Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)** 1941 TPD 108. It does not refer to an internal trade union dispute.

79. In the result I am satisfied that the commissioner correctly proceeded from the premise that the industrial action in question did not constitute a strike but rather collective action which constituted a breach of contract and which could be characterised as misconduct. The finding by the commissioner that the dismissals were substantively fair cannot be assailed.

Procedural fairness

80. The commissioner considered whether the dismissals were procedurally fair. He had regard to **Modise & Others v Steve's Spar Blackheath** (2000) 21 ILJ 519 (LAC); [2000] 5 BLLR 496 (LAC) which had not been decided when the workers were dismissed. For comment on the **Steve's Spar** case see John Grogan "Emasculating the Ultimatum - Pre-dismissal hearings for strikers" 2000 **Employment Law** 4, M M Botha "**Modise v Steve's Spar Blackheath** 2000 ILJ 519 (LAC) - Are unproteced strikers entitled to a disciplinary hearing?" 2000 **De Jure** 405, Tlhotlhemaje in **Printing Wood and Allied Workers Union and other v Solid Doors (Pty) Ltd** (2001) 22 ILJ 304 at para 22 and Wayne Hutchinson "The Audi Rule in Strike Dismissals" 2000 **Labour Law News & CCMA Reports** 1.

81. The commissioner investigated whether prior to the ultimatum VW had afforded the workers a hearing about their possible dismissals. Clearly this had not been done after the ultimatum had been issued. The commissioner concluded that as there had been no hearing the dismissals were procedurally unfair.

82. John Grogan writing in **Labour Law Sibergramme** 2 / 2001 says:

"*Steve's Spar* was the rabbit which the dismissed VW employees pulled out of the hat to persuade the commissioner that they should be re-employed, in spite of his finding that their conduct was thoroughly deplorable, and deserved dismissal. *Steve's Spar,* it will be recalled, laid down the principle that illegal

strikers are entitled to a hearing before the employer dismisses them - even if they have already been given an ultimatum warning them that they will be dismissed should they refuse to return to work."

83.I am bound by the judgment in **Steve's Spar**. I do, however, associate myself with the minority judgment of Conradie JA and with the judgment of Nugent AJA in **Karras t/a Floraline v SASTAWU and others** [2001] 1 BLLR 1 (LAC). If striking workers do not obey an ultimatum it is difficult to see how they could be persuaded to attend a disciplinary hearing or even a less formal inquiry.

84. Without requiring a hearing prior to the dismissal of strikers the former Appellate Division held in **NUMSA v G M Vincent Metal Sections (Pty) Ltd** 1999 (4) SA 304 (A) para 21 that:

"Whether an employer commits an unfair labour practice by dismissing employees following upon an ultimatum to return to work involves a two-stage enquiry. The first stage relates to the fairness of the ultimatum, having regard, *inter alia*, to the background facts giving rise to the ultimatum, the terms thereof and the time allowed for compliance. The second stage is concerned with the fairness of the actual dismissal. Factors relevant at this stage might include the reaction of the employees to the ultimatum, their efforts to comply, the reasons for non-compliance and the emergence of new facts between the issue of the ultimatum and the dismissal. It should be added that a dismissal in terms of an unreasonable ultimatum would almost inevitably be tarnished as unfair. In order to determine whether the ultimatum and the dismissals were fair, regard has to be had to the particular circumstances of each case. It is obviously not possible to provide an exhaustive list of all factors that could be relevant in determining whether fairness prevailed."

85.This holistic approach has much to commend it. In particular it moves away from the the approach which came to resemble the outmoded "last opportunity rule" or "last touch", a game that children play. Our law relating to the dismissal of strikers was developing in such a way that if the employer failed to observe the minutest procedural niceties regarding an ultimatum the dismissal was invariably found to have been procedurally deficient.

86.It should, however, be borne in mind that, in the instant case, we are not dealing with an unprotected strike. We are dealing with unprotected industrial action. In **National Union of Mineworkers and others v Goldfields Security Ltd** (1999) 20 ILJ 1553 (LC) 1556 I referred to item 6 of Schedule 8 to the LRA and remarked:

"Where there may be no strike it is nevertheless possible to refer a dispute for conciliation even though it may not be possible to take the further step and strike if the outcome of conciliation is unsatisfactory. There may be other steps available to deal with the issue, eg if the subject of the dispute is justiciable by the Labour Court or adjudicable by a bargaining council or the CCMA, and it may be advisable to take these steps. But irrespective of whether it is desirable or not, the right to strike may not be available. It seems that the code does not, in dealing with substantive fairness, take sufficient cognizance of this situation. It is premised primarily on the situation where the strike is unprocedural for lack of compliance with the formalities in contrast to a strike which is impermissible. But the code nevertheless provides guidance, eg one must ask: was the strike in response to unjustified conduct by the employer?"

and at 1560 it was said:

"The scene was set. The strikers were at fault in terms of the law. The equities were on balance against them. GFS were, from a substantive position, entitled in law and fairness to dismiss the strikers if they so wished. However this could not be done without following a fair procedure.

The Code of Good Practice: Dismissals gives an indication of what is to be done in such a situation. This procedure is rather in the nature of a process and is more akin to the procedure required in a retrenchment situation than a disciplinary situation. The aim and object of a fair process in the case of both retrenchments and unprocedural and impermissible strikes is to comply with the constitutional commitment to fair labour practices including the preservation, within the limits of law and equity, of job security. To that end a real and genuine effort must be made to avoid dismissals.

One of the ways to avoid the dismissal of strikers is to call in the assistance of the union. The code refers

to a union official. A union official is a paid employee of the union. Clearly an office-bearer not involved in the strike could be contacted...

The code's insistence on a union representative is a concrete illustration of the principle that outside intervention is most desirable. This is so because the protagonists in the heat of a strike are often unable to appreciate precisely the consequences of their action or what the right thing to do may be. A dose of reality may be required and as this, at least from the employer's perspective, is not being exhibited within the group, it must be injected from outside. Who better than a trusted union official or indeed office-bearer? Sometimes the group might not even have the presence of mind or think it necessary to invoke the assistance of a higher level of the union."

87. There are various reasons why a hearing should be given prior to dismissal. They are considered in H Collins **Justice in Dismissal** (1992) 104 to 111. In the case of a mass withdrawal of work it should not be forgotten that the employer, as a general rule, does not don the mantle of neutral magistrate who is obliged to hear delinquent workers in order to decide whether they have committed an infraction and, if so, what is to be done about it. The employer is not a neutral party. The employer may have invested considerable time and resources in training the workers and it may be the fervent wish of the employer that the workers resume their services as soon as possible. Dismissal may, in this instance, be the employer's last wish. But it could be forced upon the employer if a return to work cannot be secured. One of the ways for an employer to deal with such a situation is not necessarily to concentrate on a "trial procedure" but on addressing and resolving, or assisting in the resolution of, the underlying cause of the withdrawal of labour ie the grievance.

88. In giving effect to the judgment in **Steve's Spar** the commissioner was obliged to inquire whether VW had held an inquiry prior to the dismissal. The inquiry could have been a collective one. The nature of the inquiry would have depended on the circumstances. The commissioner held that this had not been done.

89. The "problem solving activities" of VW regarding the strike are clearly discernible from the recitation of the facts. VW appealed to the workers and met their representatives. VW called NUMSA to the premises. It repeatedly sought to obtain NUMSA's intervention in the situation. Local, regional and national officials and office-bearers were drawn in to assist the process of resolving the dispute. Appeals for assistance were also sent to the Minister of Labour, the Deputy Director-General of Labour, the General Secretary of COSATU, the MEC for Economic Affairs: Eastern Cape. VW interacted with the suspended shop stewards and with their attorney. An agreement was reached with NUMSA which was communicated to the workers through the media and through other means

90. In my opinion VW did all that it could to solve the problem. There was ample opportunity for the workers to address their grievance vis-a-vis the party with whom they were in dispute ie NUMSA. When I asked Mr Surju what the workers would have said, had they been offered an opportunity to speak to their possible dismissal, he stated, and this is borne out by the evidence, that they would not resume their work until their grievance had been satisfied. VW could not comply with their demand.

91. However, it was for the commissioner and not this court to decide the issue. The award of the commissioner is final and binding unless and until it can be shown that it is defective in one of the respects set out in s 145 (1) and (2) of the LRA. These subsections can be called to mind. They read:

"**Review of arbitration awards**

(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator; or
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained."

92. I have examined the reasoning and the arguments advanced by Mr Wallis. But there are no grounds for holding that the award is defective. I think that the commissioner applied the **Steve's Spar** case too strictly but it was for him to apply the law and his application of the law in this manner does not render the award defective. He did what the Labour Appeal Court enjoined him to do.

The remedy

Is reinstatement competent?

93. I turn now to the question whether, in a situation where the dismissal was procedurally unfair, an order for reinstatement may competently be ordered. This is, of course, what the commissioner ordered in this case.

94. It is VW's contention that it is not. The workers contend that it is permissible and that, on this score the commissioner was empowered to make the award which he did.

95. The commissioner says in his award:

"I have found that the dismissal of the Applicants was only procedurally unfair, but in my view section 193 does not contemplate that I may not order reinstatement or re-employment where the dismissal is only procedurally unfair. In my view I have a discretion to order reinstatement or re-employment retrospectively or not, or even from a date in the future, or order compensation only.

There is no convincing evidence before me that a continued employment relationship would be intolerable or that it would not be reasonably practicable for the Respondent to reinstate or re-employ the Applicants. I have been informed that the contracts of the replacement labour that the Respondent engaged provide that reinstatement of the Applicants would be a valid reason for termination of such contracts. I am also of the view that the long period (almost one year) which has lapsed since the dismissal of the Applicants, *per se,* would not be a basis to deny them reinstatement. It is not the Respondent's case that the Applicants were responsible for the delay."

96. The commissioner considered whether he should order retrospective reinstatement. He expressed this as compensation even though it would, strictly speaking, be back-pay and not compensation:

"Looking at the circumstances of this matter, I am of the view that the Applicants should not be awarded any compensation. I say this because the Applicants' conduct was to say the least, a deliberate and flagrant disregard of all relevant statutory provisions. They ignored the provisions of sections 64 and 65 of the LRA and they were in breach of a Court Order of July 1999 prohibiting any industrial action to remedy the dispute about the shop stewards. Their actions threatened the jobs of

thousands of others in the area, it jeopardised the A4 Golf Export Order and it caused the Respondent Company to lose millions of rands. It also had an impact on our economy as a whole - so much so, that the National Leadership of COSATU, NUMSA and other political leaders had come to appeal to them to return to work. It was apparently also raised in Parliament. The Applicants must know: The fact that I have decided to grant them relief, does not mean that I condone their conduct. Had it not been for the fact that the Respondent, in my view, had failed to comply with the *audi* rule before dismissing them, I would have confirmed their dismissal.

I must say that I also believe that it would be unfair towards the Respondent to order it to pay compensation to the Applicants to the tune of almost one year's wages which will run into millions, because the illegal action of the Applicants already cost the Respondent millions and furthermore, because up and until the **Modise** judgement (*supra*), which was delivered on 15 March 2000 (about one month after the dismissal of the Applicants) the law on this issue was, as is clear for the judgement, always controversial."

97. Section 193 (1) of the LRA provides that where it is found that a dismissal is unfair a court or an arbitrator may order reinstatement or re-employment from a date not earlier than the date of dismissal, or order the employer to pay compensation subject to the provisions of s 194. Section 193(2) states the primary remedy for an unfair dismissal in this country. It provides that:

"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee, unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

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

98. D du Toit et al **Labour Relations Law** (third edition) at 417 fn 466 offer the following comment on the last mentioned situation:

"The Labour Court or arbitrator is therefore not precluded from ordering reinstatement in the event of procedurally unfair dismissal (cf **Ellias v Germiston Uitgewers (Pty)**

Ltd (1998) 19 ILJ 314 (LC). The import of s 193(2) is only that such an order is not mandatory."

99. This is the approach which I have followed in a number of decisions including: **Van der Merwe and others v McDuling Motors** [1998] 3 BLLR 332 (LC), **Savalas v Genfoods** (J 315/99), **NUM and others v Goldfields Security** (supra) and **Basson v Cecil Nurse** (J1648/99). But in each and every case I have found that the procedural irregularity meant that it could not be said, and therefore not be held, that the dismissal was substantively fair.

100. Other judges in the Labour Court have adopted the same approach. See **Food and Allied Workers union and others v National Sorghum Breweries** (1998) 19 LIJ 613 (LC), **Burger v Alert Engine Parts** [1999] 1 BLLR 18 (LC) and **Scholtz v Sacred Heart College** (J649/98).

101. M S M Brassey in **Employment and Labour Law** Vol 3 page A8:70 captures the thinking behind the court's occasional resort to reinstatement as a remedy for procedural unfairness. He says:

"[Reinstatement] will also be invoked when the employee's job has been filled by a replacement, but care must be taken lest this become a ready means by which an employer can escape her obligations. In cases of this sort an employee should normally be reinstated and the employer be left to do what he or she traditionally does when there are too many employees on the payroll - commence the process of dismissal for operational requirements. By such means the court / arbitrator can ensure that the rights of the reinstated employee as an incumbent of the workforce (consequent on seniority or, at least, to pension and severance payouts) are given their proper respect and weight."

102. Chuks Okpaluba has written an enormously comprehensive piece entitled "Reinstatement in Contemporary South African Law of Unfair Dismissal: The Statutory Guidelines" 1999 SALJ 116-847. At 818 he opines that:

"Can the Court or arbitrator reinstate an employee whose dismissal is found to be substantively fair but procedurally unfair? To some this last question would have been irrelevant since the relevant provisions appear plain, but recent decisions and pronouncements of the Labour Court and the Commission for Conciliation, Mediation and Arbitration tend to suggest that the matter is not as clear-cut as one might have thought."

103. I turn now to Mr Wallis's submission regarding the power to order reinstatement in the case of a procedurally defective dismissal. He submitted that in the explanatory memorandum which accompanied the draft Labour Relations Bill (see (1995) 16 ILJ 278 at 320) the following is said:

'Where the employer fails to follow a fair procedure, but there are good grounds for dismissal, the employee '**will not be reinstated'.** He or she will receive compensation equivalent to the amount of wages from the date of dismissal to the date of the award. Where the procedural irregularity is gross, the employer will, in addition, be required to pay full costs of the arbitration." (Emphasis added).

104. Mr Wallis correctly submits that such documents may be used as aids in statutory interpretation, particularly in identifying the purpose for which legislation is passed. **See Black-Clawson International Limited v Papierwerker Waldhof Aschaffenburg A G** [1975] AC 591 (HL), **Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd** 1986 (2) 555 (A) at 562C to 563A, and **Du Plessis & Others v De Klerk & Another** 1996 (3) SA 850 (CC) at 896E-F.

105. Mr Wallis goes on to point out that in **CWIU v Johnson & Johnson (Pty) Ltd** [1997] 9 BLLR 1186 (LC) Zondo AJ (as he then was) stated:

"[T]he legislature . . .took upon itself the task of stating in clear terms the nature and extent of the relief that should be granted by arbitrators and this Court in those cases where the only basis why a dismissal has been found to be unfair is a procedural one. The legislature decided not to leave it to this Court and arbitrators to decide whether they would grant reinstatement or compensation (in which case also the question of its extent would have to be decided) or to refer the dispute back to the workplace for the

employer to follow a fair procedure first. It made a policy choice that, for better or for worse, the nature of the relief will be compensation." At 1220D-F

106.On appeal, the Labour Appeal Court also considered the intention of the Legislature regarding the provisions of ss 193 and 194 of the LRA. Froneman DJP, after examining the relevant provisions, stated the following:

"The express terms relating to the making of a compensation award in s 193 (1) (and s 158 (1) (a) (v)) are permissive in nature ('may'). In contrast **the exclusion of reinstatement or re-employment** as remedies in a procedurally unfair dismissal in s 193 (2) is in peremptory terms ('must')." (Emphasis supplied).
See **Johnson & Johnson (Pty) Ltd v CWIU** at para 38.

107.The deputy judge president went on to state that on a literal reading of the section, compensation need not necessarily be awarded upon a finding of a procedurally unfair dismissal; another option is to grant no consequential relief.

108.The opinion of Zondo AJ in **CWIU v Johnson & Johnson** is obiter. At page 1209H-J (1999 [BLLR]) Zondo AJ said:

"I also do not have to consider the remedy of reinstatement in this case despite the statutory preference of reinstatement as a primary remedy in cases of unfair dismissal as provided for in section 193 (2) because Ms Simon only sought reinstatement in the context of this case if I came to the conclusion that the need to retrench had not been established. I have found that the respondent has quite clearly established that there was a need to retrench."

109.The dictum of Froneman DJP in the **Johnson & Johnson** is clearly an obiter dictum. Froneman DJP was considering the question of compensation and not the remedy of reinstatement or re-employment.

110.Mr Wallis submits that there is no discretion to award some other relief, such as reinstatement or re-employment. The provisions of s 193 (2) are peremptory ('must'). The peremptory terms extend to the exclusions set out in sub-paragraphs (a) to (d). Accordingly, the deputy judge president states that the section is peremptory: an arbitrator has no discretion to award reinstatement. Mr Wallis finds support for this approach in an analysis of s 193 (2) and the exclusions contained therein. The exclusions are set out disjunctively (this is apparent from the use of the word "*or*") and each exclusion constitutes a basis upon which the Court does not order reinstatement or re-employment. The context makes it clear that this is mandatory and just as reinstatement or re-employment must be ordered where the circumstances in the sub-sections are not present, where they are reinstatement and re-employment must not be ordered. The first such situation is where the employee does not wish to be reinstated or re-employed (sub-section (a)). An award or judgment which ordered reinstatement where an employee did not wish to be reinstated would clearly be perverse and defective. So too an award which reinstated an employee where on the clear evidence a future employment relationship would be intolerable, or where reinstatement is impractical. The section cannot be read as embodying a mandatory exclusion of reinstatement in the first three cases and a discretion to reinstate in the fourth (procedural unfairness). All four are the same and all four exclude reinstatement.

111.All four paragraphs are exceptions to the golden rule that reinstatement or re-employment is the primary remedy. The primary remedy is not imperative or mandatory if one of the four conditions are present. It cannot properly be said that if any one or more of the conditions are present then s 193 (2) is again governed by s 193 (1) which is permissive and which provides that the court may order reinstatment or re-employment.

112.In the case of a reinstatement order for a substantive or procedurally unfair dismissal in the context of a dismissal for operational requirements it has been intended that the employer concerned was not precluded from dismissing the employees for a substantive reason after following a fair procedure. In this case the commissioner has ruled on the issue of substantive unfairness. It is impermissible for VW to redo the process. That VW should simply consider the sanction seems to me to be impractical and points to a solid reason why the legislature intended that the remedy for procedural unfairness should be either compensation or no relief.

113.I therefore conclude that s 193 does not contemplate that the commissioner may order reinstatement or re-employment where the dismissal is only procedurally unfair. The commissioner misdirected himself as to the nature of the relief which he could competently order. In making the order which he did the commissioner exceeded his powers.

Discretion to reinstate?

114.In view of my conclusion it is unnecessary to consider whether the commissioner's exercise of his discretion was faulty. But as the matter will go further I shall deal with it on the assumption that my conclusion about the competency of a reinstatement order is wrong.

115.Mr Wallis submitted that the finding that there was no convincing evidence before the commissioner that a continued employment relationship would be intolerable is unsupportable on the evidence before him. First, the commissioner has found that the conduct of the employees cannot be condoned and warrants dismissal. Secondly, he criticises their actions as being a flagrant disregard of the process and procedures provided for in the LRA and as being extremely financially prejudicial to the company as well as endangering the local economy. The industrial action was protracted, unprovoked, unwarranted and in pursuit of an entirely illegitimate demand. The strikers were undeterred by a court order interdicting them from participating in industrial action on the issue. The employees deliberately avoided adopting any reasonable means of resolving the dispute, retreating behind a demand that the employer negotiate with their Union and requiring their Union to resolve the dispute. Furthermore, their "*leaders*" made themselves unavailable to assist in the resolution of the dispute. Lastly the employees at the arbitration mendaciously attempted to mislead the commissioner on all the material aspects of the case.

116.The findings of the commissioner on the issue of compensation, it is submitted, cannot be reconciled with his decision to reinstate and his finding that there was no evidence that a continued employment relationship between VW and the workers would be intolerable. All the evidence pointed to the fact that the relationship became intolerable prior to their dismissal and the contrary was never put to VW's witness.

117.This combination of factors, contended Mr Wallis, leads irresistibly to the conclusion that the employment relationship between the employees and VW had broken down. It would be intolerable to require an employer to continue to employ employees who have no respect for the provisions of the LRA, the Labour Courts and institutions and are oblivious to the consequences of their actions. Their repeated conduct and complete lack of contrition constitutes further aggravation of the position. Accordingly, it is submitted that the conclusion arrived at by the commissioner flies in the face of the proved facts. It is submitted that the conclusion of the commissioner, lacking reasons as it does, demonstrates that he failed properly to appreciate the nature of the enquiry before him. Accordingly, he failed properly to appreciate the powers he exercised and committed a gross irregularity, alternatively exceeded his powers.

118.The commissioner considered whether he would award compensation or reinstatement. He considered that compensation was not an option. VW finds this decision to be sound. He was alert to the fact he could not order any relief. In his award he says: "The next question to consider is what relief, if any, should be granted to the Applicants." The commissioner goes on to say: "In my view I have a discretion to order reinstatement or re-employment retrospectively or not, or even from a date in the future or to order compensation only".

119.It is true that having cautioned himself that he may order no relief he leaves it there. He does not record why he does not think that it would be appropriate to order no relief. I shall revert to this issue.

120.In exercising his discretion to order reinstatement he considered binding precedent, makes an evaluation about the continuation of the employment relationship, the practicability of a reinstatement order, the effect of a reinstatement order on VW vis-a-vis its obligation to its replacement labour, the lapse of time, and the interests of the employees.

121.There is no appeal against a decision of a commissioner, at least not in this instance. It is therefore not for

this court to decide whether the exercise of the commissioner's discretion was right or wrong. See **Levinsohn's Meat Products (Edms) Bpk v Addisionele Landdros, Keimoes en 'n ander**. A court of review may only interfere if, in this instance, the commissioner has committed a gross irregularity.

122. The main, but not the only, thrust of VW's attack is that the commissioner's decision flies in the face of the facts and leads to consequences which show that the decision is deficient.

123. The commissioner's consideration of the issue of compensation was clearly done in the context of his decision to order reinstatement and may perhaps more clearly be described as a decision about back-pay following on a reinstatement order. It concerned also the exercise of a discretion to order retrospective reinstatement. If this is so then it could technically be said that the commissioner did not consider compensation as relief independent of reinstatement. But his reasoning probably holds good for this option.

Appropriate relief

124. I return to the issue whether any relief should be ordered. I have found that reinstatement was not competent. The commissioner, found on my construction of his award, that compensation should not be awarded for the procedural deficiency. I have considered whether I would remit the matter to the commissioner to consider whether any relief should be granted. But as the option only lies between compensation and no relief I am of the view that it is a matter which this court in the light of the full record can decide. I am of the opinion, in view of the facts described by the commissioner and relied upon by VW (see para 115 above), that the workers should not be granted any relief.

Costs

125. Both parties sought costs in the event that they were successful. I accordingly believe that law and fairness requires that costs should follow the result.

The order

e following order is made:

1. The award of the first respondent dated 22 January 2001 is reviewed and set aside and replaced by the following:

"(1) The dismissal of the applicants whose names appear in the main schedule of the updated version of exhibit "YY" was substantively fair, but procedurally unfair.

(2) No relief is granted in respect of the procedurally unfair dismissal.

There will be no order for costs."

2. The counter application is dismissed.

3. The further respondents are ordered to pay the costs incurred by the applicant in the application to review the award and the applicant's costs in regard to the counter review. The applicant's costs are to include the costs of two counsel.

Leave to appeal

127. The parties were agreed that one or other or both the parties would wish to appeal against whatever

judgment I were to deliver. As a result it was agreed that in delivering my judgment I would grant leave to appeal if there was a reasonable prospect that another court could come to a different conclusion. This would be done to avoid a further application and to facilitate an application to the Judge President of the Labour Appeal Court for an urgent appeal. In the premises leave is granted to the further respondents to appeal against this judgment.

SIGNED AND DATED AT BRAAMFONTEIN THIS 6th DAY OF MARCH 2001.

A A Landman
Judge of the Labour Court of South Africa

23 February 2001

6 March 2001
Adv MJD Wallis SC (with him Adv AIS Redding) instructed by Chris Baker and Associates.

Mr J Surju of J Surju Attorneys and Adv N Ruben.