REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D938/08 & D795/09

In the matter between:

D938/08

MBEKENI W SITHOLE	**First Applicant**
JACOB BERT KHANYE	**Second Applicant**
BHEKI C MMOLA	**Third Applicant**
THULASIZWE SIMON NGWENYA	**Fourth Applicant**

and

NI-DA TRANSPORT (PTY) LTD	**Respondent**

D795/09

MBONISENI ANDRIES FAKUDE	**First Applicant**
EPHRAIM NDABAYAKHE CHONCO	**Second Applicant**
THEMBA ZWANE	**Third Applicant**
	And 98 others
	(as per the attached list)

And

NI-DA TRANSPORT (PTY)LTD	**Respondent**

Heard: 11 – 15 March 2013

Delivered: March 2013

Summary: Automatically unfair dismissal alternatively unfair dismissal. Parties consenting to the Court arbitrating in accordance with Section 158(2)(b) Respondent accepting *onus* to prove fairness of dismissals and duty to begin Failing to lead any evidence to establish dismissals were fair- Application granted and applicants reinstated.

JUDGMENT

GUSH J

[1] The applicants in both of these matters are erstwhile employees of the respondent. The applicants were dismissed by the respondent and referred the disputes concerning the fairness of their dismissals to the Bargaining Council for the Road Freight Industry where the disputes were unsuccessfully conciliated and certificates of outcome issued by the CCMA.

[2] As the applicants had averred that they had been automatically unfairly dismissed, the disputes concerning their dismissal were referred to this Court. The applications in respect of the applicants in case numbers D938/08 and D795/09 were filed with the court on 23 December 2008 and 29 October 2009 respectively.

[3] Both applications were opposed by the respondent. In application D795/09, the applicants applied for condonation for the late filing of the statement of claim which application was granted by consent on 11 August 2010. On 29 October 2010, again by consent, it was ordered that both matters were to be heard "simultaneously" and that the parties were to file a pre-trial minute in respect of both matters after the close of pleadings.

[4] The parties duly conducted a pre-trial conference and prepared and filed a consolidated pre-trial minute, whereafter the applications were enrolled for trial.

[5] During the course of the hearing, the parties handed in a list of agreed applicants in respect of both matters. The list of agreed applicants is attached to this

judgment. It was agreed that these applicants had been dismissed by the respondent. The applicants in case number D938/08 appear as numbers 1 to 4 on the "list of agreed applicants" and the applicants in case number D795/09 as numbers 1 to 102.

[6] In case number D938/08, the four applicants were dismissed on 23 July 2008, 4 August 2008, 1 July 2008 and 28 August 2008 respectively. The applicants averred that the dismissal was substantively unfair in that they had been dismissed for allegedly speeding in circumstances where they denied speeding, "alternatively if they had been speeding they had not been speeding to a degree which justified their summary dismissal".[1] The applicants in this matter however, further averred that the respondent not only had not dismissed other drivers for similar misconduct but had dismissed them (the applicants) because of their involvement with their trade union and in attempting to persuade the respondent to recognise the trade union to which they belonged. The applicants' also averred that their dismissals were procedurally unfair in that they did not receive proper notice of the disciplinary enquiry, the charges of misconduct were too vague, they were not afforded sufficient time to prepare and that they had not been given a proper opportunity to challenge the evidence.

[7] The applicants' claim that they had been automatically unfairly dismissed was based on their averment that the respondent's reason for dismissing them was due to their membership of and participation in the activities of their trade union including attempts to persuade the respondent to recognise the union.[2]

[8] In case number D795/09, the first three applicants, numbers 1, 2 and 3 on the list of agreed applicants, had been dismissed in virtually identical circumstances to the applicants in case number D938/08. They had been dismissed on 28 and 30 July 2008 respectively. These applicants challenged the fairness of their dismissals on the same basis as the applicants in case number D938/08.

[9] The remainder of the applicants under case number D795/09, viz 4th to 102nd applicants, had been dismissed allegedly for participating in an unprotected strike.

[1] Pleadings page 7 para 16.2.
[2] See sections 4 and 187 of the Labour Relations Act 66 of 1995.

The 4th to 102nd applicants alleged that they had been dismissed on 4 September 2008 when they had attempted to return to work after being advised of a court order obtained by the respondent interdicting and restraining the applicants from engaging and continuing with an unprotected strike and directing them *inter-alia* to return to work.

[10] The 4th to 102nd applicants averred in their statement of case that their dismissals too were automatically unfair.

[11] The applicants averred that their dismissals were:

(a) Substantively unfair in that the respondent had dismissed them because of their involvement in attempting to persuade the respondent to recognise their union, that they had attempted returning to work on 4 September 2008; and that they were not given an opportunity to properly defend themselves at the disciplinary enquiry which took place on 5 September 2008;

(b) Procedurally unfair in that they had not received proper notice of the disciplinary enquiry in that it had been served on their union representative late in the afternoon of 4 September; the charges of misconduct were too vague; they had insufficient time to prepare; were not properly informed of their rights and were not given a proper opportunity to challenge the respondent's evidence.

[12] The applicants averred not only that they had attempted to return to work on 4 September 2008 but that the respondent had not permitted them to return to work and further that they had attempted to attend the disciplinary enquiry but that they were prevented from doing so and had been dismissed in their absence.

[13] It was also common cause that the respondent had, on 4 September 2008, issued the 4th to 102nd applicants with a notice to attend a disciplinary enquiry on 5 September 2008 at 08H00 and had allegedly dismissed the 4th to 102nd applicants following the enquiry that had taken place in their absence.

[14] The notice to attend a disciplinary enquiry reads as follows:

'NOTICE TO ATTEND A DISCIPLINARY ENQUIRY

TO: GARS THAMI SAMUEL KHANYE AND 99 OTHER EMPLOYEES OF NI-DA TRANSPORT (PTY) LTD, WHOSE IDENTITIES ARE SPECIFICALLY LISTED IN THE NOTICE OF MOTION OF NI-DA TRANSPORT (PTY) LTD TN CASE D637/08 IN THE LABOUR COURT OF SOUTH AFRICA HELD AT DURBAN, herein represented by THE SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION

SUITE 11, 1^{sT} FLOOR, COMMERCIAL CENTRE, 19 VOORTREKKER STREET, NEWCASTLE

You are hereby notified to attend a disciplinary enquiry on Friday, 5 September 2008 at 08:00 which will be held in the Board Room, 2nd Floor, DBM Building, 52 Scott Street, Newcastle to answer to the following charges:

CHARGE 1

You are guilty of misconduct in that on or during or about the period **1** September 2008 to 4 September 2008 you engaged in or continued with an unprotected strike and refrained from engaging in the strike notwithstanding an order of the Labour Court of South Africa, held at Durban in Case nr D637/08

AND KINDLY FURTHER TAKE NOTICE that you have the right to be present and to be heard. You further have the right to be represented by a fellow employee of your choice who shall have the right to cross-examine any person called as a witness in support of the charge, to peruse all documents provided or submitted as evidence, to call persons as witnesses, and you shall have the right to give evidence yourself.

AND you are requested, to acknowledge receipt hereof.

Your failure to attend the disciplinary hearing, either in person or through a fellow employee, shall in no way invalidate the proceedings and the proceedings may be conducted in your absence.'[3]

[3] Applicants' Bundle page 40

[15] The respondent pleaded that at the conclusion of the enquiry the 4th to 102nd applicants in case number D795/09 were found guilty of misconduct and dismissed as per the notice of outcome of the disciplinary enquiry as set out below:

> **'NOTICE OF THE OUTCOME OF A DISCIPLINARY HEARING HELD AT THE OFFICES OF COSTS DE JAGER BAQWA MARITZ INCORPORATED ON 5 SEPTEMBER 2008**
>
> In the matter between
>
> NI-DA TRANSPORT (PTY) LTD Employer
>
> And
>
> EMPLOYEES AS CONTAINED IN THE
>
> NAMELIST ANNEX HERETO
>
> MARKED ANNEXURE "A" AND "B" Accused
>
> Presiding Officer: Mr Labuschagne
>
> Prosecutor: Mr Coetzee
>
> **CHARGE NUMBER 1**
>
> **KINDLY TAKE NOTICE** that you, the accused persons, whose identities are specifically listed in the name list attached hereto marked annexure "A" and "B" have been found guilty by the Presiding Officer of misconduct in that you engaged in and/or continued with an unprotected strike over the period 1 September 2008 to 4 September 2008.
>
> **AND FURTHER** that you continued with the unprotected strike as stipulated despite having been ordered by the Labour Court of South Africa held at Durban in case number D367/08 to refrain from engaging in the strike.
>
> **SANCTION**
>
> The following aggravating circumstances deposed to under oath be taken into account to arrive at a suitable sanction: –

1. that you ignored the ultimatum to return to work at 13H00 on 1st September 2008;

2. That your ignored the ultimatum to return to work on 4th September 2008;

3. That you deliberately disobeyed a Court Order granted on 4th September 2008 under case number D367/08 not to further participate or engage in this unprotected strike after having consented to abide by the Order.

I therefore find that no other suitable sanction than the following could be imposed:-

1. Dismissal with immediate effect from the services of the employer of all employees listed in annexure "A" and "B" attached hereto.

THUS DONE and **SIGNED** at **NEWCASTLE** on this the **5th** day of **SEPTEMBER 2008.'**[4]

[16] The respondent averred that the disciplinary enquiry had proceeded in the absence of the 4th to 102nd applicants on 5 September at 09H00 after having telephonically contacted the applicants' union representative, on the morning of the enquiry, who had advised them that he was consulting with the applicants and would be at the venue within 15 minutes. The respondent averred that the 4th to 102nd applicants had been dismissed on 5 September 2008 at the conclusion of the enquiry.

[17] At the commencement of the trial, the parties confirmed the contents of the pre-trial minute which recorded the following:

(a) under the heading "ISSUES THE COURT IS REQUIRED TO DECIDE"

1. Whether the dismissals of the applicants were procedurally and substantively unfair; and/or

2. Whether the dismissals of the applicants were automatically unfair in that they were motivated by discrimination on the basis of the

[4] Respondents bundle at pages 21 and 22.

applicant's involvement in union activity and/or for the pro-union and pro-employee activities.[5]

(b) under the heading "duty to begin and onus"

1. the respondent bears the overall onus of proving the fairness of the dismissals;

2. the applicant will revert by 30 June 2011 regarding the respondents submission that the applicants bear the onus of proving the discrimination;

3. the respondent will be required to prove, if necessary, that the discrimination was fair;

4. the respondent has the duty to begin.[6]

[18] There was no suggestion by either party that any agreement had been reached regarding the issue of discrimination and the matter proceeded in accordance with the provisions of the pre-trial minute.

[19] At the outset given the specific recordal by the parties of the “issues the court [was] required to decide”, the sequence in which these issues were set out in the pre-trial minute and the agreement that the respondent was to begin and bore the *onus* to prove the fairness of the dismissals, the parties confirmed that the matter was to proceed in accordance with the pre-trial minute.

[20] In light of the fact that, in respect of certain of the applicants, it could “become apparent that the dispute ought to have been referred to arbitration”, as provided for in section 158(2) of the Act[7], both parties agreed that should this materialise it would be expedient for the court to continue with the proceedings sitting as an arbitrator in respect of those applicants.

[21] It was common cause between the parties that the respondent averred *inter alia* that the 4th to 102nd applicants were dismissed as a result of their ‘participation in a

[5] Pre trial minute para 5.
[6] Pre trial minute para 11
[7] Labour Relations Act 66 of 1995

strike that [did] not comply with the provisions of Chapter IV' thereby entitling the applicants to refer the dispute to this Court.[8]

[22] In accordance with the pre-trial minute, the respondent began.

[23] It is important to record that the respondent, having agreed in the pre-trial minute that 'the **respondent bears the overall onus of proving the fairness of the dismissals'** (my emphasis), in order to discharge the *onus*, the respondent was required to adduce sufficient evidence to prove the substantive and procedural fairness of the dismissals.

[24] In assessing the respondent's evidence and having regard to the fact that in so far as the respondent averred that the dismissals were for misconduct and that they had conducted formal disciplinary enquiries this matter was in effect a hearing *de novo*. As will become obvious below, the nature extent and contents of the evidence the respondent elected to adduce in discharging the *onus*, the evidence of the respondent's witnesses does not require that it be summarised in detail.

[25] The first witness was Jacobus Lodewikus Maritz. Maritz testified that he was employed by the respondent now as operations director and at the time of the dismissals as the operations manager. He explained that the respondent was a transport business engaged in the conveyance of general goods. The respondent was situated in Newcastle and had branches in Gauteng and Durban. On 31 August 2008, he had been contacted by one of the respondent's drivers who advised him that a group of drivers were preventing the respondent vehicles from leaving the respondent's Newcastle premises.

[26] Maritz had gone to the premises where he encountered between five and 10 employees who were apparently the people who were preventing the vehicles from leaving. He had approached the group and had ascertained that the employees had various demands including reinstatement of a number of drivers who had been dismissed. During the course of the day the group had grown in number due as he described it 'as drivers were forced to stay outside'. Later that day, at 17H00, he had together with a Mr Danie Wessels, met with a number of

[8] Section 191(5)(b)(iii) of the Labour Relations Act; see also pages 19 and 21 of the Bundle B.

the employees during which meeting the employees had raised a number of demands namely:

(a) reinstatement of the dismissed drivers;

(b) bonuses to be paid directly into the drivers bank accounts;

(c) suspension of disciplinary procedures;

(d) non-compliance with the bargaining Council agreement in respect of an alleged failure to register the drivers, pay the prescribed minimum wage, remunerate in accordance with the agreement as opposed to being paid per load, registration with an ABSA Provident fund; and

(e) a request for the deduction of union membership fees and various other demands.

[27] Maritz in his evidence suggested either that he was unaware of the details regarding the issues raised or denied that there was non-compliance by the respondent with the bargaining Council agreement.

[28] Maritz was under the impression it had been agreed that the drivers would all return to work on Monday 1 September and that the matter would be further discussed. On Monday no one returned to work and the respondent took steps to obtain the interdict (referred to above) which was granted on 4 September 2008.

[29] Having obtained the interdict on Thursday 4 September, Maritz had together with a Mr Coetzee "the lawyer" approached the employees at the gate and told them that an interdict had been granted. Maritz's evidence was as follows:

> "When the interdict came, Mr Coetzee accompanied myself and Danie to outside the gate ... [intervention]
>
> Sorry, could you just explain who is Mr Coetzee? --- He was the lawyer at that stage that was handling the case on our behalf, the situation.
>
> ...
>
> You went to the gate with Coetzee. --- Ja, and said that the interdict was granted

and that they need to come to work, the guys that want to work. That was repeated about three or four times. Mr ... [inaudible] and Edgar Mbina who was also standing there translating in Zulu.

Mr Mbina being? --- The SATAWU representative.

Did Coetzee read the order out? --- Ja, he did and then ...[inaudible] translated it.

Who translated it? --- Mbina, Edgar Mbina. There was an ultimatum given to them a few times to return to work.

Together with the interdict? --- Ja, that was after the interdict, ja.

All right, and did anyone return to work? --- Not one returned to work, they were prevented.

They were prevented? --- …Ja, they were prevented by the same group of Sunday.

Those were the 7 or 8 people who were at the gate ... [inaudible] --- Ja.'

[30] As far as the four applicants in case number D938/08 and the first three applicants in case number D795/09 were concerned, Maritz was barely able to confirm that they were dismissed but was unable to give any detail regarding the charges of misconduct, other than suggesting that the misconduct was "over speeding" and that he had been the initiator/prosecutor or interpreter in these matters. Maritz was unable to confirm the dates upon which the applicants had been dismissed or to provide any detail whatsoever regarding the alleged misconduct that had lead to their dismissal. He gave no evidence as to the extent of the supposed "overspeeding", the date on which the misconduct was allegedly committed, the evidence proving the misconduct, nor the circumstances which led to any of these dismissals.

[31] Maritz, who apparently was ostensibly called to give evidence to satisfy the requirements of section 192 of the Act namely to "prove that the dismissal was fair", regarding the dismissal of the applicants in case number D938/08 and the first three applicants in case number D795/09, was unable to provide any evidence to this effect. Maritz's evidence was littered with vague generalities. For example he was unsure of the dates upon which these applicants were dismissed;

had no knowledge of the specific circumstances regarding the misconduct and garnished his evidence with spurious suggestions such the dismissed applicants had had "several warnings". He was clearly not in a position to provide any specific evidence regarding the misconduct the applicants had committed which would have justified their dismissal let alone to prove that the dismissals were fair.

[32] As far as the dismissal of the 4th to 102nd applicant's in case number D795/09 was concerned, Maritz took the matter of the fairness of their dismissals no further. His evidence was simple. He did not identify the applicants who were present at the gate of the premises, he simply described how they had not returned to work and he did not attend or give evidence at the disciplinary enquiry that took place on 5 September. Accordingly, he was unable to give any evidence regarding what had transpired at the enquiry and why the decision to dismiss was fair. As regards the enquiry in response to a question from Ms Oliver who represented the respondent he said:

> 'Ms Oliver: Now just a quick question with regards to the disciplinary hearing, were you present? --- Is that the big one?
>
> Yes. --- No I wasn't.'

[33] The respondent's second witness was Mr Daniel De Wet Wessels. Wessels testified that he is and was the financial director of the respondent at the time of the dismissals. Apart from his responsibility for the finances of the company he dealt with labour and disciplinary enquiries. He had been advised by Maritz on 31 August 2008 of the situation at the depot in Newcastle and had met with the employees on that Sunday afternoon.

[34] He confirmed that he had presided over the disciplinary enquiries of the first four applicants in case number D938/08 viz. Sithole, the first applicant; Khanye the second applicant; Mmola the third applicant and Ngwenya the fourth applicant. All four applicants had had been given a written "notice of charges", been found guilty of "over speeding", and had been dismissed.

[35] As with Maritz, Wessels gave no evidence as to when or where the alleged misconduct took place or what evidence had been adduced at the disciplinary

enquiries to prove the misconduct. In the case of Mmola, he said he recalled that Mmola had also been charged with using a company vehicle for private purposes but gave no evidence as to when and where. This type of misconduct, he explained normally involved going shopping off the route. Mmola had according to Wessels admitted that he had used the vehicle to go to his house and that he sometimes went over the speed limit. Wessels however gave no other detail regarding the misconduct or why he had decided to dismiss the applicants. In the case of Ngwenya, he said that he thought that Ngwenya had also absconded from work.

[36] An example of the type of detail Wessels set out in his evidence is the following:

> 'Ms Oliver Yes, I apologise. Were you the presiding officer in the hearing of Mr Fakude, Tshanke and Zwane [1st 2nd and 3rd applicants in case number D795/09]? --- Yes, I was.
>
> Do you remember what they were dismissed for? --- I must say, it is quite a while back. I do not recall every single dismissal.'

[37] Wessels' evidence was (despite his poor memory) that none of these applicants had complained of any prejudice. He was able to confirm however that their dismissals had been referred to the Bargaining Council for conciliation.

[38] Regarding the dismissal of the 4th to 102nd applicants this is the evidence adduced by Wessels to prove the fairness of the decision to dismiss:

> 'Now after obtaining the interdict could you take us through what happened? --- After obtaining the interdict we informed the striking people that we had obtained the interdict and we thereafter, again, asked them to return to work.
>
> When you say we, who are you referring to? --- I, myself, was there, Mr Maritz was there, Mr Coetzee was there at that stage when we asked them to return to work.
>
> Was anyone else there? --- I think Mr Labuschagne was present as well and, ja, the applicants.
>
> You say he informed them of the interdict, could you just take us through that, how was this done? --- We had a copy of the interdict and, at that stage, I know Mr Coetzee explained to them in detail the content of the interdict, and explained to

them that they were to immediately return to work and that the strike was unlawful and that they were to stop intimidating the people and that they were to stop damaging company property.

And did these employees return to work? --- No, they did not return to work.

Okay, just proceed with the events of that afternoon. --- We asked them to return to work, so by 5.00 o'clock that afternoon when the last ultimatum was there, they still hadn't returned to work. We then continued ...[intervention]

Sorry, can I just stop you there. You say the last ultimatum, what are your referring to? Are you referring to the letters, the ultimatum to the letters? --- Yes.

All right. --- We asked them to return to work. I was actually outside with Mr Coetzee, when we for a final time asked them, please return to work, if you do not return to work by that time then disciplinary steps will be taken against you.

And what was the time you are referring to? --- The last opportunity we gave them was for 5.00 in the evening.

Did any of the employees return to work? --- No, none of them returned to work.

Now it is common cause that a disciplinary inquiry was held. --- That is correct.

When was this disciplinary inquiry to be held? --- I think it was held on the 4th September.

Was it held on the day of obtaining the interdict? --- I think that that disciplinary inquiry was held on the day after – if I recall correctly – the day of interdict or the day after obtaining the interdict.

Were you present at this disciplinary inquiry? --- Yes, I was present and this disciplinary inquiry was held at the offices of our attorneys, Mr Coetzee's boardroom.

Were the applicants made aware of this disciplinary inquiry? --- Yes, they were made aware. We actually gave the notice of the disciplinary hearing to attend, was handed personally by Mr Coetzee to SATAWU to Mr Mbina, and furthermore, when the hearing commenced and none of them was there to attend, we phoned Mr Mbina and he confirmed that he know about the meeting and they would be in 15 minutes and ...[intervention]

Sorry, when you referred to, none of them were there – who were you referring to? --- None of the applicants in the matter and SATAWU as well, nobody attended the hearing.

Did you personally see this notice given? --- Yes, I did.

Now you say no-one was there and you contacted Mr Mbina. Who contacted Mr Mbina? --- Mr Coetzee contacted Mr Mbina and asked him if they are still coming to the hearing and – yes, so Mr Coetzee contacted him and enquired about it.

How was it that you know that Mr Mbina was contacted? --- I was present, he made a phone call from their boardroom – I was present when he phoned.

What was Mr Mbina's response? --- Mr Mbina said that they would be there is 15 minutes.

How was it that you know what his response was? --- It was on a speaker phone when we spoke to him on the phone, so I could hear the whole conversation on both sides.

Was an explanation given for non-appearance? --- No. He said that he was still consulting with the people and that they would be there in 15 minutes.

Were they there in 15 minutes? --- No, they did not arrive. They never arrived at the end.

Did the inquiry proceed? And what I mean by that is did you lead evidence? --- Yes, the inquiry proceeded. From the company's side I led the evidence.

Did you lead the evidence or did you give evidence? --- I gave evidence.

Did anyone else give evidence? --- No, nobody else gave evidence.

And up to the state of the conclusion of the inquiry, did anyone arrive on behalf of the applicants, or any of the applicants? --- Nobody arrived, other than myself.

Now what is the outcome of this inquiry? --- The outcome of the inquiry was that they were found guilty of participating in an unprotected strike and that they were dismissed as a result of it – that is the applicants.'

[39] The Mr Labuschagne and Mr Coetzee, to Wessels referred in his evidence, were the presiding officer and prosecutor respectively at the disciplinary enquiry that took place the following day, 5 September 2008.

[40] For reasons which remain inexplicable, despite the fact that Wessels was the only witness to give evidence at the disciplinary enquiry he did not see fit to disclose to the court what his evidence at the enquiry was. In fact it is only from the Notice of the Outcome of the Disciplinary Enquiry and the dismissal letter (paragraphs 12 and 15 above) that is possible to discern why the applicants were dismissed. Wessels made no effort to explain the evidence he gave at the enquiry in order to justify the dismissals. His evidence was simply a recounting of what had transpired leading up to the disciplinary enquiry and the dismissal of the applicants.

[41] That concluded the respondent's evidence. Despite the provisions of the "code of Good Practice: Dismissal[9] the respondent's witnesses did not deal with sanction at all. The Code provides:

> '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.'[10]

[42] The respondent led no evidence regarding sanction at all let alone make any attempt to explain why dismissal was the appropriate sanction and what factors, aggravating or mitigating, the respondent took into account before deciding to dismiss the 98 applicants.

[9] Schedule 8 of the LRA.
[10] Item 6(1).

[43] It would appear that the respondent, despite what was in dispute, simply ignored the implications of section 192 of the Labour Relations Act that clearly stipulates the nature of the *onus* in dismissal disputes. The section provides:

1. In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

2. If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

[44] In this matter, the issue of the *onus* couldn't be clearer. The dismissal of the applicants was not in dispute. The substantive and procedural fairness of the dismissals was. The pre-trial minute entered into between the parties not only recorded that the Court was required to decide whether the dismissals were procedurally and substantively fair but importantly records that the respondent accepted and agreed that it bore overall *onus* of proving the fairness of the dismissals.

[45] In order to do so it is trite that (as with an arbitration concerning dismissal dispute) the enquiry into the fairness of the dismissal entails a hearing *de novo* of the enquiry that led to the dismissal in the first place. See *inter-alia County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[11]

[46] Clearly in this matter the respondent simply ignored the *onus* and relied on general anecdotal evidence in a vain and misguided attempt to discharge the *onus* of proving the fairness of the dismissals. Not only did the respondent decline to present evidence of the misconduct upon which it relied during the disciplinary enquiries in finding the applicants guilty of misconduct and the basis upon which it decided that dismissal was the appropriate sanction, it disregarded the Code of Good Practice: Dismissals referred to above.

[47] Whether the dismissals were fair is dependeant upon the respondent proving the facts and circumstances of the misconduct and that it followed a fair disciplinary process. These are issues which the respondent is required to prove that it specifically addressed at the time of the dismissal... The respondents failed to

[11] (1999) 4 LLD 459 (LAC).

adduce any evidence that established that it had followed a fair procedure but also failed to prove the misconduct of the applicants. Neithjer of the respondent's witnesses addressed the question of the sanction of dismissal at all.

[48] It is so that the applicants alleged not only that they were unfairly dismissed they also alleged in the alternative that their dismissal was automatically unfair for reasons relating to discrimination. In the pre-trial minute it was agreed that this issue was to be dealt with as follows:

1. the applicants will revert by 30 June 2011 regarding the respondent's submission that the applicants bear the *onus* of proving the discrimination;

2. the respondent will be required to prove, if necessary, that the discrimination was fair;

[49] There was no suggestion at any stage during the trial that the applicants had reverted to the respondent on the issue of the *onus* of proving the discrimination. The respondent did not deem it necessary to deal with the issue of discrimination in response to the applicants evidence and accordingly save for disputing that the applicant's were dismissed due to their union activity led no evidence to prove that any discrimination that may have been proved was fair. I am satisfied, for the reasons set out below that it is unnecessary to deal with the applicant's allegation that they unfairly discriminated against.

[50] In light of the failure of the respondent to prove the fairness of the dismissals and considering the relief sought by the applicants it is not necessary to summarise or analyse the evidence adduced by the applicants.

[51] The relief that the applicants sought was retrospective reinstatement in the event that it was found that they had been unfairly dismissed. In those circumstances and as the applicants were dismissed in 2008, retrospective reinstatement of the applicants carries with it substantial compensation, to the extent that even had the applicants established that they were automatically unfairly dismissed or discriminated against by the respondent that additional compensation would be warranted.

[52] As the respondent neither submitted nor led any evidence to establish that in the event of the applicants' dismissal being found to be unfair that reinstatement was not reasonably practicable, the remedy to which the applicants are entitled is reinstatement.[12]

[53] As far as the issue relating to the provisions of section 158(2) are concerned the 4th to 102nd applicants', in case number D938/08, dismissal dispute was properly before the court. Insofar as the dismissal of the applicants in case number D938/08 and the 1st, 2nd and 3rd applicants in case number D795/09 are concerned in so far as it may be that they should have referred their dispute to arbitration, I will deal with them in accordance with the provisions of section 158(2)(b) as agreed by the parties.

[54] I am, for the reasons set out above, satisfied that the applicants in both matters were both substantively and procedurally unfairly dismissed.

[55] Given that the applicants were dismissed in 2008 and as the respondent have failed to prove that the dismissal was fair, in accordance with section 193(2), I make the following order:

(a) The dismissals by the respondent of the applicants in case numbers D938 and 795/09 were both substantively and procedurally unfair;

(b) the respondent is ordered to reinstate the applicants in both matters retrospectively to the date upon which they were dismissed;

(c) the back pay due to the applicants is to be calculated in accordance with the minimum wages as determined by the Bargaining Council for the Road Freight Industry from time to time during the period from the dismissal to the date on which they are to report for duty;

(d) the applicants are to report for duty within 14 days of the date of this judgment;

(e) the respondent is ordered to pay the applicants costs in both case numbers D938 and 795/09.

[12] Section 193(2) of the Act.

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D H Gush

Judge

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