

**The dismissal of unprotected strikers and the
audi alteram partem rule**

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by

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I Introduction

When the *Labour Relations Act* was introduced in 1995, two of its main aims were to give effect to Section 23 of the *Constitution of the Republic of South Africa*.¹ The *Labour Relation Act 66 of 1995* had sought inter alia, to codify the law of the labour relation principles relating to fair procedure prior to dismissal. Section 23 of the Constitution of the Republic of South Africa ,amongst ,other specifies as follows:

- Every worker has the right to fair labour practices.
- Every worker has the right to form and join a trade union, to participate in the activities and programmes of a trade union and a right to strike.

The notion of section 23 of 1996 Constitution is to give every worker the right to strike; it does not qualify whether it is the right to a protected or an unprotected strike. It is the Labour Relation Act² that makes a distinction between a protected and an unprotected strike. Section 64 of the 1995 LRA laid down some requirement for a protected strike. This would mean that all strikes which do not comply with this requirement, will be unprotected and thus in contravention of the law. In order for the employees contemplating a strike to acquire the protection accorded by the LRA, those employees must follow the prescribed statutory procedures unless different procedures are prescribed by an applicable collective agreement. The Code of Good Practice on Dismissal in Schedule 8 of the Labour Relation Act provides for the procedures, which need to be followed in order for the strike to be

¹ Act 108 OF 1996.

² Act 66 of 1995

Protected and outlines the consequences that might follow in terms of both protected and unprotected strikes. As under the common law, participation in an unprotected strike constitutes a form of misconduct. In line with section 23 of the *Constitution of the Republic of South Africa*, which provides for fair labour practices for everybody, Section 185 of the 1995 LRA provide for the right not to be dismissed unfairly. To effect a dismissal in a fair manner, the dismissal should be procedurally and substantively fair. It is, however, not always possible to comply with the rules of procedural fairness in the normal way when a large number of striking employees are involved. The question is whether participation or involvement in an unprotected strike takes away an employee's right to be heard before he or she can be dismissed.

2 The requirements for protected strike

The requirements for a protected strike as set out in section 64 of the 1995 LRA are as follows:-

- The issue in dispute must have been referred for conciliation by bargaining council having jurisdiction or, if there is none by the CCMA. The employees may not strike until the Commissioner has issued a certificate to the effect that the parties have been unable to resolve the dispute or if the 30 days period has been passed since the date of referral, whichever occurs first.
- Secondly, the intended strikes must give the employer, bargaining council or employer's organisation as the case may be at least 48 hours notice before the commencement of the strike.

In the case of *Ceramic Industries Ltd T/A Betta Sanitary Ware v National Construction Building & Allied Workers Union & others*³ the court rejected the argument of the employer that the fact that employees did not specify the exact time at which the strike was to start, rendered that to be illegal. The court further stated that employees are not obliged to commence the strike at the time stipulated in the notice, the right to strike acquired by the proper giving of notice is not waived if the employees commence the strike within a reasonable period after the stipulated time.

However, there are other situations where the strike will still be protected even if the protected strike requirements are not met. These are laid down in section 64 (3) of the Act.⁴

These requirements are:

- Where the parties have complied with the provisions of a collective agreement by which they are bound.
- Where the parties to the dispute are members of a bargaining council and the dispute has been dealt with in terms of the council's constitution.
- Where the strike is in response to an illegal lockout by the employer.
- Where the employer has introduced unilateral change to the employees' terms and conditions of employment and has failed to comply with a request that he/she either refrains from implementing or revokes the change for 30 days.

³ (1997)ILJ 671 (LAC)

⁴ Supra on page 1

In a situation where there is collective agreement reached but the employees fail to meet the provisions of the collective agreement but comply with the provisions of the LRA the strike will still be protected. The employees who meet the requirements set out in Section 64 of the Act⁵ enjoy protection by the law and the protection is spelled out in Section 67 of the Act.

These are:

- Immunity from civil action.
- Not to be interdicted or otherwise compelled to work.
- Free from dismissal.
- The right to payment in kind.

On the other hand, there are also consequences for participation in an illegal strike. These are contained in Section 68 of 1995 LRA and the employees may face the following: *Dismissal, lockout, termination of contract, compensation and interdict*. Now the question, which needs to be answered, is whether employees who participate in an illegal strike are entitled to a hearing before dismissal.

3 The *audi alteram partem* rule

The maximum *audi alteram partem* expresses a principle of neutral justice that is part of our law. The rules of natural justice are common law rules applicable to administrative enquiries and hearings. These rules aim to ensure that public authorities do not act arbitrary and that they take decisions that are fair and in the public's interest.⁶ They focus primarily on procedural

⁵ Supra on page 1

⁶ Olivier 1994 5 APL 50

protection, since they require that a fair procedure be followed. Broadly speaking, two basic principles are said to form the rules of natural justice.⁷

The first principle is that the affected individual, as a rule, be given the opportunity to state his case before the intended prejudicial action is taken. This implies that sufficient and timely notice of the intended action must be given, as well as reasonable time to prepare a defence. Furthermore, the affected individual must have ample opportunity to be heard, which will often, though not necessarily always, mean that personal appearance by the individual, oral proceedings, the right to present and controvert evidence, cross-examination, and legal representation be allowed. The charge, including any potentially prejudicial fact and consideration, must be communicated to the individual concerned, to allow rebuttal⁸.

The second principle is that of impartiality (the so called *nem oiudex in sua causa* principle) its purpose is to ensure the absence of bias and of any interest, whether pecuniary or personal, on the part of the decision taker.

Traditionally the court had categorised administrative acts into so called pure, “quasi judicial” and judicial acts. “Quasi judicial” administrative acts imply that existing rights had been prejudicially affected, and that the rules of natural justice should have been adhered to. However, in the case of pure administrative acts no violation of existing rights occurred and the rules of natural justice would therefore not apply. In the public employment sphere, it had been found that a civil servant could, generally speaking, not insist on

⁷ Baxter Administrative Law 542-568

⁸ *Holgate v Minister of Justice* 1995ILJ 426 (E)

adherence to the rules of natural justice before dismissal, as no rights would be affected by the dismissal.⁹ The categorisation of administrative acts and the unfair effects flowing from that had been criticised. Eventually, in *Administrator, Transvaal v Traub*,¹⁰ the Appellant Division (as it then was) concluded that the classification of an administrative act might just as well eliminate the step of classification and proceed straight to the question whether the decision does prejudicially affect the individual concerned. The primary question therefore is whether the decision maker has acted fairly.

It can be concluded that the duty to act fairly and in compliance with the rules of natural justice is applicable to all, and not to just some, administrative acts. Furthermore, it has been accepted that the rules of natural justice will apply, except in so far as the statute expressly or by necessary implication excludes them. However in view of fundamental rights relating to administrative justice entrenched in the Constitution, this will no longer automatically be the case. Every infringement or exclusion of the rules of natural justice, where the rules will otherwise be applicable, is only permissible to the extent that it fits within the limitation grounds contained in the Constitution.¹¹

The principle of *audi alteram partem* rule has been recognised by International Organisations. This means that if one adheres to this rule, he or she will be aligning himself with the international standard. *The International Labour Organisation Convention on Termination of*

⁹ Le Roux v Minister van Bantoe- Administrasie en ontwikkeling-1989(1) SA 48 (A)

¹⁰ 1989 (4)SA 731

¹¹ President and Government of Bophuthatswana v Sefularo 1994 Lcd 214 (Bop)

*Employment*¹² contains a general rule that an employer may not dismiss a worker for reason based on conduct or work performance without having first given such a worker an opportunity to defend himself/herself. This is envisaged by Article 7 of the ILO Convention on Termination of Employment Act, which reads as follows, envisages this:-

The employment of a worker shall not be terminated for the reason related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

In the case of *Mahlangu v CIBM Deltak Gallant, VCIM Deltak*,¹³ the court dealt with the issue of whether the *audi alteram partem* rule had been observed. The brief summary of the case was that the two applicants were dismissed by the employer for allegedly having committed misconduct. This occurred after several unsolved thefts occurred at the employer's company and as a result of which the employer called the services of an investigator who conducted voice analysis tests with the consent of certain employees, including the applicants. These tests allegedly indicated that the applicant had been involved in theft; they, however, denied this and agreed to further lie detector tests which again were alleged to prove positive. The interviews and several meetings were held whereafter the two applicants were dismissed. Judge Bulbulia who delivered the judgment looked into the interviews and the discussions that took place between the applicants and the respondents and found that they could not be equated with the kind of inquiry contemplated under the *Recommendation 119 on Termination of*

¹² Act 158 of 1982

¹³ 1986 -(7)ILJ 316

Employment (1963) of International Labour Organisation or Termination of Employment Convention 158 (of June 1982).

The employee who is accused of certain misconduct or poor performance must be given a chance to account for his behaviour. Where management prematurely decides that the employee is guilty and does not give that employee an opportunity to say anything in his defence, will be entirely unfair. The onus of proving the employees misconduct or poor performance lies with management, that is to say, it is not the responsibility of the employee to prove his innocence. He has the right to challenge any statements, which are detrimental to his credibility and integrity.

The other requirement for a fair disciplinary hearing was also mentioned in the present case, which include:

- The right to be informed about the nature of the offence or misconduct with relevant particulars of the charge,
- The right of a hearing to take place timeously,
- The right to be given adequate notices prior to the inquiry,
- The right to some form of representation (the representation can be anyone from the work either a shop steward, work council representatives, a colleague or even a supervisor, so as to assist the employee and ensure that the discipline procedure is fair and equitable),
- The right to call witnesses,
- The right to an interpreter
- The right to a finding (if found guilty he should have the right to be given reasons for the verdict),

- The right to have previous service considered,
- The right to be advised of the penalty imposed (verbal warnings, written warnings, termination of employment); and
- The right of appeal i.e. usually to the highest level of management.

Another case where the principle of natural justice was an issue is found in the recent case of *Nationwide Airlines (Pty) Ltd v Mudau & others*.¹⁴ In this case the respondent employee, a flight engineer was dismissed “with immediate effect” after receiving a poor performance rating in a flight simulator test. He was called to attend a meeting wherein he was again told that he performed poorly. During this meeting, he was given an opportunity to defend his performance and was thereafter dismissed. The court looked into the facts of the case and ruled that the rules of natural justice were not observed, in that he was not timeously informed of the nature of the charge, he was not given an opportunity to prepare his case, and he was not informed of the right to representation.

The other argument advanced by the employers among other things were that the employee was holding a position of seniority and that in that type of situation the rules of natural justice should be dispensed with. This argument is wrong. The *audi alteram partem* rule must be observed at all times in terms where a person’s liberty or property or existing rights are to be affected. It does not give exceptions based on type of liberty, property, or

¹⁴ (2003) BLLR 279 (LC)

existing rule to be affected.¹⁵ That is in the case of *JDG Trading (Pty) Ltd T/A Price & Brundsdan*¹⁶ it was decided as follows:

The fact that an employee is a senior manager does not; give the employer licence to dispense with the observation of the audi alteram partem rule. Such an employee is also entitled to the observation of the audi alteram partem rule. What may be relaxed in the case of a senior manager may be the form, which the observance of the rule may take.

The opportunity which is given to a senior employee must still meet at least two basic requirement of the audi alteram partem rule, namely he must be given notice of the contemplated action and a proper opportunity to be heard. The reference of notice of the contemplated action necessarily implies that the action has not been decided upon finally yet but it is one, which may or may not be taken depending on the representations, which the affected person may give.

There are many cases which one can visualise in this sphere where an adherence to the formula of liberty, property and existing rights will fail to provide a legal remedy when the facts cry for one and will result in a decision much appeared to have been arrived at by procedure which was already unfair being immune from review. The law must in such cases be made to reach out and come to the aid of persons prejudicially affected. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration. Traditionally, the inquiry has been limited in such cases to the prejudicial effect upon the individual's liberty, property and existing rights, but under modern circumstances, it is appropriate to also include his legitimate expectations¹⁷

¹⁵ Supra on page 6

¹⁶ (2000)21 ILJ 501 (LAC)

¹⁷ Supra on page 6

4 Legitimate expectation and the *audi alteram partem* rule

Traditionally the South African courts adopted the approach that the rules of natural justice would only apply where liberty, property or existing rights had been affected. The fact that mere interests or expectations, not amounting to rights liberty or property, can be affected was consequently of no avail. Within the context of the employment relationship the courts often focus the inquiry on the question whether any right of the affected individual will be affected by, for example, the individual's dismissal or transfer.¹⁸ The refusal to grant relief in the form of enforcing compliance with the rules of natural justice, in the absence of the existence of a definite right, had grossly unfair results. This caused the then Appellate Division, in response to international developments in administrative law to this effect and some earlier Supreme Court jurisprudence in this regards, to formally recognise and introduce the doctrine of legitimate expectation into our law.

The issue of legitimate expectation was dealt with in the case of *Administrator, Transvaal and others v Traub and others*,¹⁹ the respondents, all of whom were medical doctors, unsuccessfully applied to the second applicant (the Director of Hospital Services) to be appointed to the position of Senior House Officer. The applications of all of the respondents were not approved and it was common cause that the applications were rejected because the respondents had signed a letter in a medical journal in which the Provincial Administration was severally criticized for its attitude towards the

¹⁸ Gwala v Director of Education – Natal Region 1988 ILJ 789 (17 B).

¹⁹ Supra on page 6

conditions in the medical wards. The respondent successfully applied to the local Division for an order setting aside the Director's decision. The applicant on the other hand argued that the respondents had been given a fair hearing, and that the respondents were not entitled to a hearing.

The learned judge noted that the duty to give the respondents a hearing is a duty which existed at common law and not one directly imposed in terms of a particular act. The then Chief Justice remarked:

There may be many cases where the adherence to the formula of liberty, property and existing rights would fail to provide a legal remedy, when the facts cry out for one, and would result in a decision, which appeared to have been arrived at by a procedure which was clearly unfair been immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected.

The court found that the refusal to appoint some and reappoint other doctors as Senior House Officers affected their legitimate expectation to be so appointed and reappointed, in view of the existing practice to do so, and bearing in mind that the appointment or reappointment constituted a rung on the professional progress ladder in the hospital hierarchy. In contemplating a departure from past practice, a fair hearing should have been given before the potentially prejudicial decision was taken.

The notion of the *audi alteram partem* rule is that a person has the right to be heard before the decision affecting him is taken unless the statute expressly or by implication indicates contrary. In many cases, the application of the rule was ignored due to the fact it was excluded by the statute. In some cases the court found that the exclusion was not necessary applied, the correct approach to the *audi alteram partem* rule with reference

to its application in statute, is that, set out by Rump ff J.A. in the case of *Publication Control Board v Central News Agency*²⁰ where it was noted as follows:

I am of the opinion that the act discloses a clear intention by Parliament that the board, in exercising its functions under Section B(a) of the act, is not required to afford a hearing to a person affected by its decision. It is of course, firmly established in our law that when a statute gives judicial or quasi-judicial powers to different prejudicially the rights of person or property, there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected, should be given an opportunity to defend or of being heard. If, however, on a proper construction of the statute, it appears that the legislature did not intend the person affected to have the right of being heard, the implied right will be held to be excluded.

It was further stated in Traub's case that one of the functions of natural justice is precisely to avoid idiosyncratic and potentially arbitrary decisions.

5 Is there an obligation in our law on an employer to observe the *audi alteram partem* rule before dismissing the unprotected strikers?

Our law has been guaranteeing employees a measure of job security, firstly under the law of unfair labour practice provisions of the previous Labour Relations Act 28 of 1956 and now under the unfair dismissal provisions in the current Act (LRA 66 of 1995). Their general effect has been to prohibit dismissal without cause and to require the employer to give the employee a hearing before the decision to dismiss is taken. Under the previous Act, employees had no reason to complain about this regime, but the employers

²⁰ (1970 (3)SA 479 488-489

were quite frequently heard complaining that it represented an unwarranted invasion of free -maker principle and managerial prerogative. The general rule is that the striking employees are entitled to a hearing before they can be dismissed, unless circumstances are so exceptional as to justify departure from the rules of natural justice.

This general rule is also recognised by the International Labour Organisation. Article 7 of the ILO on Termination of Employment²¹ Act states the following:

The employment of a worker shall not be terminated for the reason related to the worker's conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide with this opportunity.

The Labour Relation Act of 1995 provided a solution to many South Africans within the labour fraternity more especially the provision of Item 6 of Schedule 8.

6 Item 6 of the Code of Good Practice provides as follows:-

Participation in a strike that does not comply with the provisions of Chapter IV is considered misconduct. However, like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of the dismissal in these circumstances must be determined in the light of the facts of each case, including:

- The seriousness of contravention of the act;
- Attempts made to comply with this act; and

²¹ Supra on page 7.

- Whether or not the strike was in response to unjustified conduct by the employer.

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

It is clear from Item 6(2) of the code that there are at least two steps that the employer, who is faced with an unprotected strike, is required to take before he can dismiss the strikers. The first is that he must contact the union at the earliest opportunity to discuss the course of action he intends taking. The second is that he must issue an ultimatum.

The issue of fair hearing for striking employees was discussed in the case of *Modise and others v Steve's Spar Blackheath*.²² In this case, the four appellants were dismissed for taking part in an illegal strike that had lasted for four days. They claimed that they were not willing participants in a strike, and that they were not members of the trade union that had called the strike in support of a demand for centralised bargaining with the stores in the region that formed part of the franchise to which the respondent belonged.

²² 2000 5 BLLR 496 (LAC)

During the trial in the court *a guo*, the appellants pleaded that, if it were to be found that they had participated in the strike, the strike was not illegal and that, even if it had been illegal, the dismissal was unfair for lack of an adequate ultimatum and because six other employees, who had also participated in strike, had not been dismissed. The appellants' contention was also that their dismissals were unfair although the respondent argued that the strike was unlawful and that the appellants had been dismissed together with other strikers after a proper ultimatum.

Honourable Justice Zondo dealt with the two issues of fair hearing and a fair ultimatum. He stated as follows:

The discussion envisaged by Item 6(2) between the employer and the union constitutes an opportunity which the employer is required to give the strikers through their union to state their case before the employer can decide whether to pursue the course of action it intended to take referred to in Item 6(2). This would meet the essential requirement of the *audi alteram partem* rule. The discussion contemplated by Item 6(2) is not, and could not have been, intended to be, a one way traffic where the employer simply instructs or tells the union what to do. It was intended to be an opportunity for the union to hear what the employer has to say whatever it has to say about the strike and, more importantly, about the cause of action, which the employer tells them, he intends taking. It is an opportunity for the union to persuade the employer not to dismiss or not to issue an ultimatum, which would result in the dismissal therewith, and/or depending on the circumstances, to persuade the strikers to resume work even before an ultimatum can be issued.

The employer will be obliged to consider the union's representations properly and in a bona fide manner before the employer can decide to pursue the intended course of action, whatever it may be, including dismissal without an ultimatum or the issuing of an ultimatum that will result in the

dismissal of those strikers who fail to comply therewith. This does not mean that the employer must necessarily agree with the union's representations and to go through the motion pretending to be considering them when in fact he is not. Although Item 6(2) of the code refers to union officials as the person whom the employer must contact, this does not mean that where there is no union, the employer has no obligation to initiate a discussion such as the one contemplated in Item 6(2) of the code.

The issue of whether the striking employees were given a fair hearing was also discussed in the case of *Mzeku & others v Volkswagen South Africa (Pty) Ltd & others*.²³ In this case the employees decided to down tools after they had a dispute with their union regarding the suspension of some of the shop stewards by the union. The strikers wanted the employer to intervene in the dispute and ensure that the union lifted the suspension. The employer tried to persuade the employees to stop striking and to go back to their work but without success. One of the questions, which the court was faced with, was whether the striking employees who were embarking on an unprotected strike had been given an opportunity to be heard in accordance with Item 6 of Schedule 8 of Code of Good Practice, in other words, whether the *audi alteram partem* rule had been observed.

The Code of Good Practice on dismissal enjoins employers to contact a trade union official at the earliest opportunity before dismissing strikers in order to discuss the course of action (the employer) intends to adopt. This provision applies only when the strikers are union members. The requirement that employers must contact strikers' unions is a safeguard, especially in the case

²³ SA (Pty)Ltd & others (2001) 22ILJ 1575 (LAC).

of “wildcat” strikes (i.e. those that have broken out without the union’s knowledge or support). The purpose of the contemplated discussion is to give the union an opportunity to dissuade the employer from dismissing the strikers and to persuade the workers to return to work. When employees are dismissed after a union’s involvement, the test must be whether it was probable, that the union could have succeeded in ending the strike within a reasonable time.²⁴

In the case of *performing Arts Council (Transvaal) v Paper Printing Wood & Allied Workers Union and others*²⁶ in which the court stated as follows:

“Having regard to the six factors mentioned above, in my opinion there was a distinct probability that had a fair ultimatum been given to the employees the strike would have come to a speedy conclusion. It appears from the evidence that the trade union was certainly opposed to the strike and that attitude would, as a probability has weighed with the employees, at any rate after they had cooled down.”

The requirement that an employer discusses the proposed course of action is not meant to give the union an opportunity to delay matters so that the strikers can continue to exert pressure through the medium of an illegal strike.²⁵

In determining that fact the court looked into majority judgment delivered in the case of *Steve’s Spar*, where it was held that an employer is obliged to accord the strikers an opportunity to state their case before it can dismiss them. It was held further that such an opportunity would have been afforded to the strikers’ representatives.

²⁴ John Grogan Workplace Law 359

²⁵ National Union of Mine Workers & others Goldfields Security Ltd (1999)20 ILJ

In determining whether the employer complied with the *audi alteram partem* rule before dismissing the employees in this case, the court considered the employer is meeting on the 20th January with the union and the correspondence exchanged between the employers, on the one hand the union, the employees and the suspended shop stewards, on the other. This clearly shows that the employer invited the employee delegation to explain the conduct of the striking employees. The employees' delegation promised to communicate the employer's position to the employees and they did not request another opportunity from the employer to enable them to communicate with the employees.

This suggest that they themselves had nothing further to say to the employer about, amongst others, the statement that the strike was illegal and not according to procedure and that, if the employees continued with it, disciplinary action, which would include dismissal, would be taken against them. The employer gave each one of the members of the employee delegation a copy of a letter that set out the employer's position. The employer did this in order to avoid any possible misunderstanding as to the employer's position. The letter made it clear to the employees that if employees refused to, among others to resume their duties without any further delay the employer would take whatever necessary steps to ensure that legitimate requirements were met. This include the dismissal of employees who persisted in their refusal to resume normal work immediately. In the letter, the employer urged the delegation to convey their position to the striking employees and to take all steps to persuade them to resume their duties. Instead of the employees sending the employee

delegation back to the employer about its contemplated action, they dissolved the delegation.

They failed to utilize that opportunity and can therefore, not be heard in order to complain that they were not afforded such an opportunity. The court concluded that the meeting that the employer had with the employees on the 20th January sufficiently showed that the employer afforded the employees an opportunity to state their case through the delegation before it could dismiss them.

It is also one of the ingredients of the principle of natural justice that the employer who is facing the strike should be obliged to consider the union's representations properly and in a bona fide manner before the employer can decide to pursue his/her intended course of action, whatever it may be, including dismissal without an ultimatum or the issuing of an ultimatum which would result in the dismissal of those strikers who fail to comply.

In Mzeku's case the court was also faced with the question of whether the employer, by meeting with the union of the striking employees, had accorded them fair hearing. The CCMA Commissioner found that any attempt by the employer to give the striking employees an opportunity to state their case by giving such opportunity to the union as the striking employees' representatives, would not have constituted compliance with the *audi alteram partem* rule. The Commissioner based this on the fact that there was a rift between the union and the strikers; the union was not entitled to represent the striking employees in dealing with the employer and that the employer was no longer entitled to regard the union as the representative of

the employees. The contention of the Commissioner was wrong. In dealing with this issue the court noted that it seems that until an employee has resigned as a member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, entitled, and obliged, to regard the union as representative of the employee and to deal with it on that basis.

In the case of *Baloyi v M&P Manufacturing*²⁶ an employee who was a member of the union with which the employer consulted in respect of the retrenchment of certain employees, including the appellant was unhappy about his retrenchment. It also seems that he was unhappy with the consultation that the employer had had with his union. He challenged his retrenchment on the basis that, apart from consulting his union, the employer should have consulted him too. The court rejected that argument stating that the employer's obligation was to consult with the employee's union and that there was no obligation to consult in addition with the member of the union. This would mean that the employer's conduct of dealing with the union as the striking employees' in the Mzeku case was justified.

Stay away is also regarded as a strike as this is envisaged by its inclusion in the definition of a strike contained under Section 213 of the LRA.²⁷ The only difference between an ordinary strike and a stay away is technical. If one accepts that a strike is generally a collective refusal to work by workers for the purpose of compelling compliance with their demands, a stay away would probably fit into the loose definition. There is no reason why it can

²⁶ (2001)4 BLLR 389 (LAC)

²⁷ Supra on page 1

be said that workers who participate in a stay away strike is entitled to the benefit of a hearing before he can be dismissed but one who participates in a normal strike is not entitled to a hearing before being dismissed. Such an approach will encourage stay aways more than a normal strike.

In the case of *Black Allied Workers Union and others v Prestige Hotels CC T/A Blue Waters Hotel*,²⁸ the old labour appeal court held that , the argument that an employer had an obligation to afford strikers a hearing before dismissing them, had merits. However, it was stated further that the *audi alteram partem* rule would only apply to the dismissal of illegal strikers because the former would be committing misconduct by going on an illegal strike whereas the latter would be doing what is permissible in our law. This notion is confusing because it seems to suggest that those who obey the law are denied the benefit of the *audi alteram partem* rule and those who do not obey the law are entitled to the benefit of the *audi alteram partem* rule. It may be tempting to ask that if a strike is a protected one, what is the need for the *audi alteram partem* rule in such a case? The answer to this is that there are situations where, arguably, an employer may be entitled to dismiss protected strikers, e.g. where the strike has taken too long. There is no reason why in those circumstances the protected strikers have no right to state their case before they can be dismissed.

Section 67(5) of the LRA²⁹ contemplates that protected strikers may be dismissed where the reason for their dismissal is based on the employers' operational requirements. In such a case, it seems clear that under the new

²⁸ 1993 14 ILJ 963 (LAC) 97

²⁹ Supra on page 1

Act the employer will be obliged to comply with the consultation requirement of Section 189 of the new Act, which is a form of the observance of the *audi alteram partem* rule. There can be no reason why an employer will be obliged to observe the *audi alteram partem* rule in the form of consultation if the reason for the dismissal of protected strikers is based on the operational requirements of the employer but will not be obliged to observe the *audi alteram partem* rule in whatever form if the reason for dismissal is based on the notion that the strike, being illegal constitutes misconduct.

In his article, Brassey³⁰ wrote that the law obliges the employer to hold the inquiry before the decision to dismiss is taken. As the industrial court has rightly stressed, the form of inquiry is not dictated by the rigid rules, as fair hearing, free of unnecessary formality and wasteful technicality is the object and this is not achieved by obliging all employers to follow a uniform procedure. But there are certain basic requirements: Employee should be informed of the charge against him, he should be given time to prepare his defence, he should be allowed to confront his accusers, and he should have opportunity to present his version of the events and to plead in mitigation of the sanction.

Representation by a co-employee must also be allowed if that is what he requires. If workers were being disciplined in mass, it would normally be impractical to give each striker an individual hearing. It will also be senseless and repetitive, since in most cases the occurrence of the strike, its nature, and the identity of the participants will be incontestable. A hearing

³⁰ The dismissal of strikers 1991 (2) ILJ 18

must nonetheless be given to the collective bargaining representative of the strikers and to those who has a bona fide believe that, because of intimidation, illness or other plausible reasons, their absence was justifiable. If re-employment, selective or otherwise is being contemplated, this too must be made the subject of consultation with the collective representative. The consultation will of course, seldom stop at a mere examination of culpability and the appropriateness of dismissal as the sanction, if there is, however, bargaining over the dispute that caused the strike, it must be an addition to, and not in lieu of, consultation on the issue of discipline.

In the case of *Man Truck & Bus (SA) Ltd v United African Motor Allied Workers Union*³¹ Prof. Martin Brassey, who acted as arbitrator in a dispute of the dismissal of strikers, accepted that the employer must give strikers a collective hearing in the sense that their cases must be put to them by their representatives.

Cheadle in his article³² expressed his views as to whether strikers are entitled to be heard before they can be dismissed and stated as follows:-

A good case can be made out that employer should give employees or their trade union an opportunity to address the employer on sanction before dismissal. This can be affected by giving the trade union an opportunity to make representations and sanction or including in the ultimatum itself an invitation to employees to make such representation. This should be supplemented by an invitation to individual employee to approach the employer after dismissal if the reason for not working is not participating in the strike. This does not impose too heavy burden on the employer. It is common labour relation's practice and it goes a long way to ensure that the employees are fairly treated.

³¹ 1991 (2) ILJ 18

³² The current Labour Law 38

Thus, Cameron ³³ in his article acknowledges the right to a hearing before dismissal but he acknowledges that there are exemptions to this general rule. Rycroff and Jordan say ³⁴ that while circumstances might warrant an attenuated hearing, the right to a hearing is so fundamentally important in the context of industrial relations that only exceptional circumstance such as those Cameron referred to will warrant dismissal without a hearing of any kind. The learned authors continued to say that where a strike is not legitimate, this may provide the employer with a substantively fair reason for terminating the employment relationship for good. They then continue to say:

Before it can do so, however, two requirements have to be met: The employer has to give the employee the opportunity to address it either through the union or through an elected committee so that they could debate their decision to strike, and secondly it is required to issue an ultimatum in order to give the employees sufficient time to consider the matter and return to work. Where employees are dismissed for striking per se, especially after having been given an ultimatum, it was generally held that the strikers acted in full knowledge of the consequences of their actions, and that it would accordingly have been failure to expect the employer to grant hearings. Furthermore, to require the employer to grant a hearing would emasculate an ultimatum, which would have to be subject to the qualification that workers would be dismissed but subject to a disciplinary hearing.

7 Does a hearing and an ultimatum serve the same purpose?

The question of whether a hearing and an ultimatum serve the same purpose was dealt in the case of *Modise & others v Steve's Spar*.³⁵ It was in this case where Judge Zondo, pointed out the differences between the two. A hearing

³³ The right to a hearing before dismissal. Problems and Puzzles (1998) part 2 ILJ 147.

³⁴ A guide to South African Labour Law 2nd Edition

³⁵ Supra on page 16

and ultimatum are two different things. They serve separate and distinct purposes and they occur at different times in the same dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or must be taken against it. The purpose of an ultimatum is not to elicit any information or explanations from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice in making the decision whether to heed the ultimatum or not. Failure to make use of the opportunity of a hearing need not result in dismissal whereas failure to comply with an ultimatum is usually, and meant to be, a dismissal.

In the case of a hearing, the employee is expected to use the opportunity to persuade the employer that he/she is not guilty, and he/she must not be dismissed. In the case of an ultimatum, the employee is expected to use the opportunity provided by an ultimatum to reflect on the situation, before deciding whether he will comply with the ultimatum. From the analysis of the differences between the two, it is clear that the giving of an ultimatum cannot substitute observance of the *audi alteram partem* rule.

It is now clear that a hearing and an ultimatum are two separate things. The other question which, needs to be answered is whether a hearing must be granted before or after dismissal. Zondo J.A. answered this question by that:-

The right time for the observance of the *audi alteram partem* rule is before an ultimatum can be issued because, at that stage, unlike when the ultimatum has been issued, the employer may be more amenable to persuasions. If the observance of the *audi alteram partem* rule must take place before an

ultimatum is issued, the employer will invite the strikers, their union or their representatives to, by a given time, provide reasons why they cannot be regarded as participating in an illegal strike, and if they are, why they must not be issued with an ultimatum to resume work by a certain time or be dismissed. If after hearing or reading the representations, the employer is satisfied that the strike is illegal or illegitimate and that it will not be unfair to issue an ultimatum at that stage, he can then issue an ultimatum calling upon them to resume work by a certain time or face dismissal. If they comply with the ultimatum, they will not be dismissed, but if they fail to comply with the ultimatum then they can be dismissed. In that case, there will have been an observance of the *audi alteram partem* rule and the employer will be able to dismiss those who defy his ultimatum, and there can be no complaint by the strikers that they were not given an opportunity to state their case before they can be dismissed. It may well be that this is how the *audi alteram partem* rule can be observed in the context of a strike and an ultimatum.

Although *Steve's Spar* was decided under the 1956 LRA, the court also dealt with what it considers the position under the current act. It is noted that in terms of Item 6(2) of the *Code of Good Practice*, employers are required to contact the strikers' union to discuss their intended action before issuing an ultimatum. The first step, said the court, constitutes the opportunity to allow the workers to state their case through their union. Such consultation will meet the requirements of the *audi alteram partem* rule if it is conducted in a bona fide manner, the court, however, added that if a union does not represent the strikers, the employer is still obliged to consult their leaders or other chosen representatives. This being the case, it is clear that a mere notice to the union that the employer will issue an ultimatum will not suffice.

In other words, the fact that the strikers are not members of a trade union will not be accepted as an excuse for not issuing an ultimatum or conducting

a hearing before dismissal. Unlike in the *Mzeku case* where the employees' contention was that amongst other things their dismissal was unfair in that they were not given the opportunity to state their case, because they had a dispute with their union, the union was no longer obliged to represent them.

The court found their contention to be wrong and ruled as follows:-

It seems to us that, until an employee has resigned as member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, generally speaking, entitled, and obliged, to regard the union as the representative of the employee and to deal with it on that basis. We say generally speaking because there are situations where even if an employee has resigned as a member of a union, such union remains obliged to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee

In the case of *National Union of Metal Workers of South Africa v Haggie Rand Ltd*,³⁶ the court found no merit in the argument that the dismissal ought to have been preceded by a disciplinary hearing. The employees were engaging in a power struggle with management, which management was in fairness entitled to oppose. The only effective weapon, given the employees' conduct, was the sword of dismissal. To expect management to emasculate the ultimatum by subjecting their threat of dismissal to a hearing would have been to expect them to sheathe the sword and render it ineffective, and that would have been unfair. It is also quite artificial and unacceptable to require of an employer directly affected by the misconduct of an employee to conduct an inquiry into such misconduct after the employer has deemed it necessary to issue a dismissal ultimatum as a result.

In the case of *National Union of Metal Workers of South Africa and Others*

³⁶ 1991 12 ILJ 1876 (IC)

*Malcomes Toyota. A Division of Malbak Consumer Products (Pty)*³⁷ Ltd, the court commented:

In a strike situation, particularly an unprotected strike, where employees are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing just before the dismissal is imposed. Apart from the fact that it promised to be very impractical to have a hearing during an unprotected strike about participation in a strike itself, a requirement for disciplinary hearings, to be held prior to taking action during an unprotected strike would also mean that the employers' endeavours to bring an end to unprotected action is seriously hampered. A requirement to have a hearing after the dismissal has already taken place would be tantamount to the employer second-guessing his decision. Such a process will not resolve the issue at hand in any way.

8 Exceptions to the *audi alteram partem* rule

The other question, which needs to be answered, is whether the employer's conduct of not observing the *audi alteram partem* principle can be justified. The International Labour Organisation's Convention of Termination of Employment³⁸ states that a worker is, before dismissal because of work performance reasons, entitled to an opportunity to defend himself against the allegations made, but this is subject to an exception where the employer cannot be reasonably expected to provide this opportunity. In many cases, the industrial court was not prepared to accept that there are situations that permitted the employer to dispense with the *audi alteram partem* principle. It can be accepted that there are exceptions to the general rule; the question is, however, what these exceptional circumstances can be.

³⁷ 1999 20 ILJ 1876 (IC)

³⁸ Supra on page

There are many exemptions, which were raised by the employers who justify dispensing with the *audi alteram partem* rule. Cameron discussed the exemptions fully in his article, "*The right to a hearing before dismissal Problems and Puzzles*"³⁹ and they will be now discussed in full.

8.1 A hearing would have made no difference

This alleged basis of exception was dubbed a ghost from the past in the case of *Twala v ABC Shoe Store*⁴⁰. The past represents a handful of decisions in the heretical hey-day of the doctrine where the industrial court refused to intervene in a dismissal not preceded by a hearing, or an adequate hearing, on the grounds that the employee would still have dismissed the strikers even if an inquiry had been held. *This argument was rejected by Zondo J.A. in Steve's Spar case* and stated as follows:

The only situation which I am able to envisage where it can be said that an employer's failure to give a hearing may be justified on the basis that a hearing would have been pointless or utterly useless, is where either the workers have expressly rejected an invitation to be heard or where it can, objectively, be said that by their conduct they have said to the employer: we are not interested in making representations on why we should not be dismissed. The latter is not a conclusion that a court should arrive at lightly unless it is very clear that that is indeed, the case.

8.2 No hearing required in mass dismissal

There is a suggestion in the case law that the number of workers involved in a disciplinary infraction, if large enough, may excuse an employer from the requirements of procedural fairness. While it is possible that workers will

³⁹ Supra on page 27

⁴⁰ 1987 (8)ILJ 714

collectively abandon their entitlement to a hearing, the number of workers involved adds no magic to the principle. The necessity for a pre-dismissal hearing and the extent, to which it is required, depends on what is reasonable and fair in all circumstances at the relevant time.

In one case involving 348 workers, the court dismissed the employee's argument that it would have been impractical to hold an inquiry or a number of separate enquiries. The court ruled that there was no reason why the employer could not have arranged for suitable procedures in the circumstances, where it could have laid charges against those whom it intended dismissing, and affording the accused employees a fair and reasonable opportunity of responding to such charges. The fact that it may simply be inconvenient or bothersome to hold an inquiry involving hundreds of employees is no justification for not holding an inquiry at all.

The majority of judges in the case on Steve's Spar⁴¹ case noted that in our law an employer is obliged to observe the audi alteram partem rule when he contemplates dismissing strikers. The form, which, the observance of audi alteram partem rule must take will depend on the circumstances of each case.

The case of *Nulawu & others v Bander Bop Ltd & other*⁴² can be seen as good example of a case where mass dismissal took place. In this case, the employer dismissed 427 individuals after they had failed to comply with an ultimatum calling upon them to halt their unprotected strike. The court looked into a number of factors to determine if the employer observed the

⁴¹ Supra on page 16

⁴² 2004 8 BLLR 799(CC)

principle of natural justice. The court looked into the discussion between the employer and the strikers' representatives, in which the strikers had behaved badly, the employer's efforts to pursue the strikers to resume work, the ultimatum issued and the court came to the conclusion that the employer had complied with the *audi alteram partem* rule.

8.3 Managerial employees not entitled to procedural fairness

It used to be a strong contention on behalf of companies that dismissed managerial and executive level employees were not entitled to pre-dismissal fairness. It was argued, because the LRA of 1956 did not apply to them or because it would be inappropriate for the court to lend assistance to high-level employees. It has now also been authoritatively established that there is no jurisdictional bar preventing the court from adjudicating the claims of unfairly dismissed senior executives, including directors of companies. Their claims to procedural fairness before dismissal must therefore be assessed in the same way as those of other employees, namely with due consideration of all the relevant circumstances.

In the *Mudau*⁴³ case, the court rejected the argument pleaded by the employer that because the employee held the position of a flight engineer of a passenger aircraft, was not entitled to a proper observance of the *audi alteram partem* rule. This argument was also rejected in the case of *JDG Trading (Pty) Ltd t/a Price & Brutsdan*⁴⁴ where the court dismissed the argument that managerial employees are not entitled to procedural fairness

⁴³ Supra on page 9

⁴⁴ Supra on page 10

and the fact that an employee is a senior manager does not give the employer licence to dispense with the observation of the *audi alteram partem* rule.

8.4 Workers dismissed for incapacity not entitled to a hearing

It is sometimes suggested that workers who are dismissed due to other reasons than misconduct are not entitled to a hearing. This doctrine is based on the distinction between dismissal for misconduct and the dismissal for incapacity. The distinction is important but the doctrine is wrong. The chief defect of the doctrine is that it fails to consider the basic principle governing discipline. If the employee is disobedient, he or she should be subject to a gradual system of disciplinary sanctions. There is no reason in principle and no reason based on practical considerations, why the allegedly incapable worker, even one who has been warned about poor work performance, may not be granted the same basic right. In the case of an incompetent worker the normal position is that he or she is entitled to an opportunity to be heard before being dismissed for poor work performance.

Item 10 of Schedule 8 on the Code of good practice Good Practice laid down the conditions that must apply in cases of dismissal based on incapacity. It states as follows:-

- Incapacity on the grounds of ill health may be temporarily or permanent. If the employee is temporarily unable to work in these circumstances, the employer must investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonable long in the circumstances, the employer must investigate all possible alternatives short of dismissal. When alternatives are considered, relevant factors may include, the nature of the job, the period of absence, the seriousness of the illness or injury

and the possibility of securing temporary replacement for the ill *or* injured employee. In cases of permanent incapacity, the employer must ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

- In the process of the investigation referred to in Sub-section (1) the employee must be allowed opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
- The degree of incapacity is relevant to the fairness of any dismissal. The cause of incapacity may also be relevant. In the cases of certain kinds of incapacity, e.g. alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider by an employer.
- Particular consideration must be given to the employees who are injured at work or are incapacitated by work related illness. The courts have indicated that the duty is on the employer to accommodate the incapacity of the employee in more onerous in these circumstances.

From what has been said under Item 10 of the Code of Good Practice, it is clear that the concept that an incapacitated person is not entitled to be heard before dismissal, does not hold water. This concept does not contravene the Code of Good Practice only but also the ILO convention on the Termination of Employment. As far as international jurisprudence is concerned, the ILO Convention on the Termination of Employment mandates a hearing before dismissal because of either disciplinary or work performance reasons. It is quite clear from this that there is no justification for attenuating the hearing requirement in the case of dismissal for incapacity.

In his article Cameron, rejected all the claimed exceptions and discussed the true positions of what may be called exceptions to the general rule.

8.4 *Force major*

Under the old (1956 LRA), the court were, in some cases, prepared to accept the crisis zone as exceptional to the *audi alteram partem* rule. The foundation of this exception was laid down in the case of *Lefu v Western Areas Gold Mining Co. Ltd.*⁴⁵ In this case the employer's mine was racked over a two day period by a major riot in which nine people lost their lives, 349 were injured and production losses and damage to buildings and equipment totalled millions. As the situation cooled, the employer took drastic action. Officials positively identified 205 employees as having been amongst those who had encouraged, incited or actively participated in the violence, and sacked them summarily. Many people disputed the fairness of the employer's action, saying they had, been wrongly identified; giving explanations were possible for what they had allegedly been seen doing, or arguing that their actions were mitigated by various considerations. None of this could be brought forward on the day they were dismissed, since there were buses to their migrant homes almost immediately.

In court, the employees urged that the summary procedure adopted raised great risks that substantive unfairness had been perpetrated. They also claimed that they should have been accorded some form of a hearing before they were dismissed. The court stated that acceptance of this submission would involve adopting an arm chair approach to the problem and it would furthermore, not take sufficient account of the fact that a tense situation prevailed whilst the dismissals took place and that the dismissal of 205 persons from a workforce of 1400 black employees may have eliminated

⁴⁵ (1985) 6 ILJ 307 (IC)

fresh unrest. The court relied for this approach on the widespread unrest, which caused loss of life and damage to property and placed other lives and property in danger. Faced with the responsibility of maintaining law and order on the mine, a situation caused by the peculiar circumstances of a mine where the social community consists of employees, it cannot be said that the employer was obliged to hold a hearing in respect of the employees before terminating their services.

In the case of *Leboto and others, v Western Areas Gold Mining Co. Ltd*⁴⁶ the same employer wanted to revoke the principle of the force major to justify the absence of a hearing in the case of employees who were dismissed some weeks after the riot was over. The court was faced with the question as to whether the situation that prevailed on 4 and 10 October 1984, bearing in mind all the circumstances outlined in the papers, was such that it could not reasonably have been expected of the employer to have had an inquiry prior to the dismissal of the applicant.

The court stated that it was not convinced that circumstances were such that no inquiries could or should have been held. The court further stated that there was no justification for holding that because the charges in that case were similar to that of Lefu, the employer could dispense with the procedural formalities which are generally applied once the situation had returned to normal. It is thus evident that the case of Lefu, exists chiefly to show that the hearing requirement is not immutable, once that has been established the clearest facet of the decision is that the exception it creates will be afforded employers only in the most exceptional circumstances.

⁴⁶ (1988) 6 ILJ 299

This argument was never supported under the new LRA. In the Steve's Spar,⁴⁷ case the court noted as follows:

An employer is obliged to observe the *audi alteram partem* rule when he contemplates dismissing strikers. The form, which the observance of *audi alteram partem* rule must take, will depend on the circumstances of each case including whether there are any contractual or statutory provisions which apply in a particular case.

In some cases, it will be sufficient for the employer to send a letter or memorandum to the strikers, their union or their representatives inviting them to give reasons by a given time why they must not be dismissed for participating in an illegal strike. In some cases a collective hearing may be called for whereas in others a few individual hearings may probably be needed for certain individuals. However, when all is said and done, the *audi alteram partem* rule will have been observed if it can be said that the strikers, their representatives or their union was given a fair opportunity to state their case.

*In the case of Nulawu & Bander Bop Ltd & Others*⁴⁸ the employer was faced with a situation, which can be described as a force major. In this particular case, the 427 individual applicants were dismissed after they had failed to comply with an ultimatum calling upon them to half their unprotected strike. The strike began after the respondents agreed to a demand by a few workers in one of the divisions that they be paid once off tax free payments of R 300.00 to work a double shift. Workers in other divisions, including the applicants, then demanded a similar payment. When the respondent refused,

⁴⁷ Supra on page 16

⁴⁸ Supra on page 31

they commenced a five-day strike, during which one of their shop stewards confirmed that strikers were so angry that the lives of casual workers and the employer's properties were in danger.

During the strike, the strikers occupied and protested in the area of the main gate to the factory premises as well as the entrances to the factory and administrative building. The strikers blew hooters and whistles in the vicinity of the administration and one of them brandished a wooden replica of an AK47. The employer in this matter did not take advantage of the situation and dispensed with the rule. The employer tried to meet with the strikers' representatives and issued some ultimatums.

The court noted that the discussions between management and the striking representatives, and the employees' invitation to the strikers union, constituted sufficient compliance with the *audi alteram partem* rule. The court further ruled that the strikers had been given sufficient time to reflect on the ultimatum and that they were aware that only an unconditional return to work would prevent their dismissal.

8.5 *Waiver or quasi-waiver*

Waiver in law occurs when a person with full knowledge of a legal right abandons it. In the employment context, it will be unrealistic to apply the full requisites of the legal doctrine of a waiver before an employee's conduct can be said to exempt an employer from the hearing requirement. All that must be required is that the employee must indulge in conduct that

establishes that it is no longer reasonable or fair to expect the employer to provide an opportunity for a pre-dismissal hearing.

Zondo J.A. in his judgment in the Modise case, seem to agree or accept waiver as exception to the *audi alteram partem* rule. He said that whether in a particular case it could be said that workers have waived their right to be heard before dismissal was an issue that would have to be decided in the light of three important considerations.

Firstly that the party who pleads a waiver must prove it, secondly that a waiver is not lightly inferred, thirdly that the requirements for a waiver, as they are known in our law, will have to be proved. The onus to prove a waiver is on the party alleging it.

There is no justification for creating an additional exception to the *audi alteram partem* in order to escape the normal consequences attendant upon a failure to meet the requirements of established exceptions to the *audi alteram partem* rule, e.g. waiver.

There are many cases, which the industrial court had entertained, in which the employers claimed that the employees abandoned their right to a hearing. Zondo J.A. in his judgment looked into those cases and concluded that he thought the cases were wrongly decided by the industrial court. Those are the cases where the industrial court found that the employees had indeed waived their right to a hearing.

One of those cases is the case of *The National Union Of Metal Workers of South Africa and others v CIM Street Plastic T/A ADV Plastic*⁴⁹ where it was stated that there was an obligation on the part of the employer to give strikers a hearing before they could be dismissed. However, it was emphasised that there will be no such obligation in a case where the workers can be said to have “abandoned their entitlement to a pre-dismissal hearing.” It was also stated that strikers will be regarded as having abandoned their entitlement to a hearing when the nature of their conduct is such that their employer is justified in regarding it as repudiation of their contracts of employment or where the conduct of strikers establishes that no purpose will be served by holding a hearing or where such a hearing will be “utterly useless.”

In this case the industrial court held that by engaging in an illegal strike the employees had repudiated their contracts of employment and where, therefore, not entitled to a hearing. The industrial court also sought to justify its findings that the workers were not entitled to a hearing by stating that by their conduct the strikers had made it plain that a hearing would be Pointless and that they have waived their right to a hearing. In the case of *Laws v Rutherford*⁵⁰, Innes C.J said in effect that, where conduct is relied upon to find a waiver of right, such conduct must be plainly inconsistent with an intention to enforce such right.

In this regard, it is obvious that going on or participating in a strike is not conduct plainly inconsistent with an intention on the part of strikers to

⁴⁹ (1989)(10) ILJ 328
⁵⁰ 1924 AD 261

enforce their right to be heard should the employer contemplate their dismissal. All that must be required is that the employee must indulge in conduct that establishes that it is no longer reasonable or fair to expect the employer to provide an opportunity for a pre-dismissal hearing.

According to the majority judgment in *Steve's Spar*, the only circumstances in which an employer's failure to hear strikers before dismissing them may be condoned is where the employees reject an invitation to be heard or where their conduct is seen as waiving their right to a hearing. According to the court, waiver cannot be deduced from the mere fact that the employees are on strike and have declined to respond to an ultimatum. After emphasising that in law a waiver occurs when a person, with full knowledge of a legal right, abandons it, *Zondo J.A.* expressed the view that in the employment context it will be unrealistic to apply full requisites of the legal doctrine of a waiver before an employee's conduct can be said to exempt an employer from the hearing requirement. He also said that all that must be required is that it is no longer reasonable or fair to expect the employer to furnish an opportunity for a pre-dismissal hearing.

9 Conclusion

In the light of all of the above, it can thus be said with a sufficient degree of certainty that, in the context of dismissal, an employer is obliged to observe *audi alteram partem* rule where his decision may adversely affect an employee's rights. It can also be accepted that in our law employers' decision of that kind causes the kind of economic loss in that it adversely affects an employee's right to regular remuneration in exchange for his services.

For an overwhelming majority of workers in this country their job is all they and their families depend upon for a living. If you take away their job, you almost take away their whole being and you subject them, their families and sometimes their communities to famine and starvation. The latter point is easily demonstrated in the dismissal of large numbers of workers in the mines. Justice between the employers and employees dictates that a decision with such implications for those affected by it and their families must and cannot be taken away without the workers, their union or their representatives being afforded an opportunity to be heard in one way or another.

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