THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: CA8/2023

In the matter between:

SA STEELWORKS
A DIVISION OF SA METAL GROUP (PTY) LTD **Appellant**

and

METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL **First Respondent**

GAIL MCEWAN N.O. **Second Respondent**

ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION ("AMCU")
OBO MZAMO AND 14 OTHERS **Third Respondent**

Heard: **10 September 2024**

Delivered: **06 December 2024**

Coram: **Savage ADJP, Davis AJA *et* Jolwana AJA**

JUDGMENT

JOLWANA, AJA

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Introduction

[1] This appeal, which is with the leave of the Labour Court, concerns the issue of the jurisdiction of the first respondent. The Labour Court had, on review, determined that the Metal and Engineering Industries Bargaining Council (MEIBC) had no jurisdiction to hear and determine the fairness of the dismissal of the third respondent's (AMCU) members. It thereupon set aside the arbitration award issued by the arbitrator and directed AMCU to approach the Labour Court for the adjudication of the dispute between the appellant and AMCU's members (employees. The arbitrator had concluded that the dismissal of the employees was fair and dismissed the review application.

Factual background

[2] The appellant is in the metal recycling business which, by its very nature, has to run 24 hours a day, seven days a week. It therefore operates on a shift system comprising three teams which are colloquially referred to as the orange, purple and blue teams. The dismissed employees were all members of the blue team working on the same shift. The employees, in the past, worked two-day shifts, followed by two-night shifts and closed off their working week with two days off duty. The appellant introduced a new shift system in terms of which the employees were required to work a four-day shift followed by two days off duty, and a four-night shift followed by two days off duty.

[3] It is the introduction of this new shift pattern that was the catalyst to the events that led to the disciplinary processes and ultimately the dismissal of the employees.

At arbitration

[4] AMCU, acting on behalf of the dismissed employees, referred an unfair dismissal dispute to the MEIBC challenging the substantive fairness of the dismissal of its members, the affected employees. The appellant's evidence was that by means of a memorandum dated 12 November 2018, it advised all its employees that the shift cycle would change from the first day of work in January 2019 for operational reasons. The employees were advised to submit

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any comments in writing by 23 November 2018. On 14 November 2018, AMCU shop stewards sent a written response signed by most melt shop employees indicating that they would like to continue working according to the old shift pattern to avoid loss of overtime, fatigue and exposure to heat and chemicals. The appellant responded in writing and pointed out that the new shift pattern would not lead to loss of overtime or increases in the number of hours worked. The employees insisted that the new shift pattern could not be introduced without their agreement and rejected it. Despite its rejection, the appellant advised its employees and AMCU that the new shift pattern would be implemented with effect from 9 January 2019. The appellant shut down for the end of the year on 12 December 2018 and reopened on 9 January 2019 with the new shift pattern being implemented. In terms of the new shift pattern the employees were put on a night shift for 9 January 2019.

[5] The appellant testified that members of the blue and purple teams embarked on a work stoppage. There was a meeting between the management of the appellant and a representative of each one of the three teams. The employees claimed that they never agreed to the new shift pattern and insisted on working according to the old shift pattern. In this meeting, the appellant told the employees that the previous shift pattern had been discontinued and that they had been advised that from 9 January 2019, the new shift pattern would be implemented. The employees were further told that non-adherence to the new shift pattern would result in disciplinary action being taken. It was then agreed that the employees would start working according to the new shift pattern with the night shift of 10 January 2019 as they had spent the entire day in the meeting on 9 January 2019 and were too tired to go on duty at 19:00 on that day. The 19:00 shift of 9 January 2019 was in accordance with the new shift pattern.

[6] The employees worked according to the new shift pattern on 10 January 2019. There was a meeting between the appellant and AMCU and the same issue of the new shift pattern was discussed and AMCU was told that going back to the old shift pattern was not an option. However, there were no disruptions on the 10 January 2019. On 11 and 12 January 2019, the employees did not avail

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themselves to work as scheduled in the new shift pattern and indicated that they would not be adhering to it but would present themselves according to the old shift pattern. On 13 January 2019, the employees used their own transport and went to work according to the old shift pattern. They were, however, not allowed access by the appellant's security as they were not scheduled to be on that shift.

[7] The employees were issued with notices to attend disciplinary hearings on 17 January 2019. They were charged with misconduct, which led to their dismissal.

[8] Mr Mzamo, an AMCU shop steward, was the only witness who gave evidence on behalf of all the employees. He testified that the appellant had proposed a new shift pattern but no one had agreed to it as it was perceived to be dangerous with insufficient rest periods. The new shift pattern would affect their overtime and it did not take fatigue into account considering the dangerous working environment which exposed them to heat and furnaces. They had received written communication on 4 December 2018 confirming that this new shift pattern would be implemented with effect from 9 January 2019. On 9 January 2019, the employees went to work along with the orange and purple teams and told the appellant that they would not work according to the new shift pattern. The blue team employees said that they should not have been on the night shift on that day in terms of the old shift pattern. On 10 January 2019, the employees worked the night shift. In terms of the old shift pattern, they would have been off duty on both 11 and 12 January 2019. On 13 January 2019, the employees were turned away by the appellant's security. They returned to work on 15 January 2019 but were placed on suspension.

[9] On 15 January 2019, the employees would have been on a day shift in terms of the new shift pattern whereas according to the old shift pattern, they would have been on the night shift. They were dismissed following a disciplinary hearing. Mr Mzamo refuted being absent without authorisation as he would not have been working on both 11 and 12 January 2019. He had come to work on 9 January 2019 to deal with the problem of the introduction of the new shift pattern. All the teams had mandated him to tell the appellant that they would not obey the new shift pattern. The employees wanted the appellant to first

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reach an agreement with AMCU about the new shift pattern. The employees were charged with unauthorised absence or refusal to work their shift starting on 11 January 2019; unauthorised absence or refusal to work their shift on 12 January 2019; breach of company policy for their failure to notify the employer of their absence; gross insubordination for their refusal to abide by the 2019 shift structure; and gross insubordination for refusal to abide with the employer's instructions regarding the new shift structure.

[10] In her award, the arbitrator summarised the issue as being whether, by seeking to introduce a new shift pattern, the appellant was implementing a change to the terms and conditions of employment or whether the introduction of a new shift pattern merely constituted a work practice. She found that in the employees' contracts of employment there was a clause providing for a 44 hour work week from Tuesday to Monday. They were required to work continuous rotating shifts with the manager or supervisor advising of the actual working hours and shifts. The arbitrator found that the appellant was not bound by shift times or cycles. Therefore, the introduction of the new shift pattern was a work practice and did not constitute a change in the terms and conditions of the employees' employment.

[11] The arbitrator concluded that the appellant was not compelled to reach an agreement with its employees regarding the introduction of the new shift pattern. It was just prudent courtesy that the appellant consulted the employees about the changes. The employees had no contractual right to work specific shifts forever. The appellant was entitled to unilaterally introduce the changes and the employees had not demonstrated that the changes affected their contractual rights.

[12] The arbitrator found that the employees were excused from working their shift on 9 January 2019 because they were tired after the negotiations. They were, however, required to work their shift from 10 January 2019 onwards like the other teams. Mr Mzamo's evidence showed that the workers intended not to comply with the new shift pattern and were absent without permission and without notifying the employer on 11 and 12 January 2019. Their absence was due to a refusal to work according to the new shift pattern which was

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unauthorised and was without communication with the employer as required by the company policy. Therefore, the employees were in breach of the company policy. The arbitrator, on these bases, found that the employees were guilty as charged. She concluded that the refusal to abide by the instruction to work according to the new shift pattern was gross insubordination. Therefore, the dismissal of the employees was, in all the circumstances, substantively fair and that the trust relationship which hitherto existed had been irrevocably damaged.

In the Labour Court

Grounds of review

[13] The grounds of review set out by AMCU were that the arbitrator did not properly apply Schedule 8 of the Code of Conduct for Good Practice: Dismissal[1] in that, in determining that dismissal was an appropriate sanction, she did not consider the totality of the circumstances; the importance of the rule that had been breached; the harm caused by the employees' conduct; whether any training would assist the employees in not committing the same offences and the service records of the employees. It was contended that some of the employees had been in the employ of the appellant for a period in excess of 10 years. Therefore, a final written warning would have been an appropriate sanction thus making the dismissal sanction too harsh. The Union further averred that the undertaking by one of the employees to adhere to the new shift pattern if his union agreed was indicative of the possibility of resolving the dispute without dismissals was not properly considered. The arbitrator also took into account the attendance of the EFF and some employees at the appellant's premises. However, she failed to properly consider that there was no intimidation and only an EFF member was talking loudly.

[14] AMCU's further grounds of review can be summarised as follows:

14.1 AMCU averred that the arbitrator misconceived the nature of the enquiry and thus failed to consider the central dispute which was whether the employees were guilty of the misconduct they had been charged with

[1] Schedule 8 of the Labour Relations Act 66 of 1995, as amended.

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and been found guilty of. The union further submitted that the arbitrator misconceived the concept of insubordination, that she did not even consider whether the individual employees were guilty of subordination or gross insubordination and further that a reasonable decision marker would have been alive to the differences between insubordination and gross insubordination. The arbitrator ignored the reasons why the employees failed to report to work which was crucial to the determination of the matter. The reason was the employees' genuine belief that the appellant could not unilaterally change the shift pattern which the appellant could only do by way of agreement with the employees. There was therefore no wilful disobedience in the refusal to work according to the new shift pattern as the employees genuinely believed that the appellant's instruction was unreasonable and unlawful, as the union contends.

14.2 The Union further contended that the arbitrator determined the matter on the basis that the change to the shift pattern was a work practice which required no agreement and therefore the refusal to adhere to it amounted to gross insubordination, based on the arbitrator's own view that the employees' understanding of the law in relation to unilateral changes to terms and conditions of employment was incorrect. In doing so, the arbitrator did not consider the facts and the reasons for not following the instructions to work according to the new shift pattern. She failed to consider whether the misconduct was participation in an unprotected strike and if so, the appropriateness of the dismissal sanction or whether the bargaining council had jurisdiction to deal with the matter. She therefore took into account irrelevant considerations, ignored relevant considerations and reached an unreasonable conclusion. She failed to consider material facts and evidence and made findings that were not supported by the objective facts.

Appellant's case

[15] The appellant submitted that the employees were disingenuous in that during the disciplinary hearings they admitted engaging in other work during the rest

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periods including selling alcohol, doing other odd jobs, working for an NGO and installing burglar bars and security gates. In doing these activities, the employees compromised their rest periods. The employees did not have fair and valid health and safety concerns but were motivated by their desire to defy the appellant's authority and work according to a shift pattern that better accommodated their personal circumstances. In arriving at 07h00 on 9 January 2019 instead of 19h00, the blue team employees intended to defy the new shift pattern by insisting on following the old shift pattern. The appellant elected not to subject the employees to disciplinary processes in order to foster good relations and to encourage them to accept the new shift pattern. However, the employees failed to work their new shifts on 11 and 12 January 2019. This was after they had been given instructions to go to work but insisted on working according to the old shift pattern and displayed a determination to refuse to abide by the new shift pattern thus overthrowing the new shift pattern as a whole.

[16] The appellant contended that a final written warning was not appropriate for repeated, deliberate and wilful insubordination which was therefore gross insubordination. The arbitrator applied her mind to the elements of Schedule 8 and her conclusions were one a reasonable arbitrator would have reached. The employees' insistence that the appellant could not unilaterally change the shift pattern without their consent was explicitly communicated to it by AMCU in writing on 10 January 2019. In the disciplinary hearings, the employees said that AMCU advised them to reject the new shift pattern and continue tendering their services in accordance with the old shift pattern. AMCU described the dispute in its referral to the MEIBC as pertaining to the unilateral change of the terms and conditions of employment. At arbitration, AMCU's representative argued that the employees' insubordination was a legitimate response to a unilateral change to the shift pattern and the arbitrator dealt with this argument in the award.

[17] The arbitrator determined correctly that the nature of the dispute was an unfair dismissal dispute related to misconduct and dealt with this matter on that basis. She determined that the employees wilfully, repeatedly and persistently refused

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a lawful and reasonable instruction. Therefore, the arbitrator was alive to the definitional principles of gross insubordination and evaluated the evidence on that basis in reaching the conclusion she did. The individual employees did not place their individual circumstances before the commissioner and chose to call only one witness. The arbitrator could not consider evidence that was not led. The employees knew that they were acting in defiance of the new shift pattern on 11 and 12 January 2019 when they repeatedly refused company transport to go to work. They did not communicate their absences which were unauthorised. On 11 and 12 January 2019, the employees showed egregious insubordination whereas the members of the orange and purple teams had accepted the shift changes and worked according to the new shift pattern. AMCU did not raise a jurisdictional objection at arbitration. The insistence by the employees on a shift pattern that suited them was not unprotected strike action but a deliberate attempt to defy and overthrow the new shift pattern.

Judgment of the Labour Court

[18] In determining the matter, the Labour Court considered the appellant's letter to AMCU dated 9 January 2019 wherein AMCU was requested to advise the employees that their conduct of not being at work in accordance with the new shift pattern constituted an unprotected strike and that it should be stopped by 12h30 failing which an ultimatum would be issued advising them that their actions amounted to misconduct. Resultantly, disciplinary action would be instituted against every employee who did not return to work by 12h30 on 9 January 2019. It further referred to the disciplinary proceedings in which a finding was made that the appellant informed the employees that their conduct amounted to an unprotected strike.

[19] The Labour Court determined the matter on the basis that, in the analysis of the evidence before the arbitrator, the issue to be decided was whether the appellant was implementing a change to the terms and conditions of employment in introducing a new shift pattern or whether this constituted a work practice. It said that such an enquiry was requisite in deciding whether the employees were engaged in a protected strike or not when "*the employees downed tools*". It concluded that when the employees downed tools, they

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engaged in an unprotected strike and the acts of misconduct for which they were charged took place in the context of an unprotected strike. It concluded that in terms of section 191(5)(b)(iii) of the Labour Relations Act[2] (LRA), MEIBC did not have jurisdiction to entertain the dispute and that it should have referred it to the Labour Court. The Court criticised the arbitrator for not enquiring into the nature of the dispute in order to ensure that she had jurisdiction to hear it. It then granted an order reviewing and setting aside the arbitrator's award for want of jurisdiction.

Submissions on appeal

[20] The appellant argued that the review application typically amounted to an attack on the reasonableness of the award, in particular, the finding that the dismissals were substantively fair. It was submitted that it was never AMCU's case in the review application that the employees had in fact engaged in an unprotected strike and that therefore the MEIBC lacked jurisdiction over the dispute. The issue that the MEIBC lacked jurisdiction was not pleaded or canvassed in the papers before the Labour Court. AMCU sought to rely on this point because in their view, the true nature of the dispute concerned dismissals for participation in an unprotected strike, therefore the MEIBC lacked jurisdiction to entertain the dispute. Such a dispute could only be adjudicated by the Labour Court in terms of section 191(5)(b)(iii) of the LRA. This was not the case as AMCU elected to pursue arbitration and not adjudication at the Labour Court.

[21] It was argued that the new point on a lack of jurisdiction by the MEIBC stood in stark contrast to AMCU's position throughout the internal disciplinary enquiry, arbitration proceedings and its pleaded review grounds. This notwithstanding, the court *a quo* determined the review application on this basis, upheld it and set aside the arbitrator's award for lack of jurisdiction. The court *a quo* went on to permit AMCU to refer a new unfair dismissal dispute to the Labour Court relating to an unprotected strike. It was submitted that the new dispute would have to proceed from the starting point that the instruction to work according to the new shift pattern was lawful. This would be a complete obverse of the case

[2] Act 66 of 1995, as amended.

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the employees elected to present at arbitration. The effect of the Labour Court's judgment is to permit a litigant who has lost the dispute he elected to pursue at arbitration and to prosecute the opposite or different case in court contrary to every principle of effective dispute resolution which is one of the primary objects of the LRA.

[22] The appellant submitted that the arbitral jurisdiction of the CCMA or a bargaining council and the adjudicatory jurisdiction of the Labour Court are founded on three legal principles. First, it is the referring party's categorisation of the dispute that triggers either its arbitration by the CCMA or bargaining council on the one hand or adjudication by the Labour Court on the other. Second, the above principle is subject to the arbitrator's duty to deal with the substantial merits of the dispute. This requires the arbitrator to ascertain the real dispute between the parties, regardless of the labelling ascribed to it by the parties. Third, where one dispute straddles the jurisdiction of the Labour Court and the CCMA or bargaining council, it is permissible for the referring party to narrow the ambit of the dispute so as to fall within the jurisdiction of the appropriate forum. The appellant contended that in terms of section 191(5)(b)(iii) of the LRA, the Labour Court's jurisdiction is only trigged where the employees have alleged that the reason for their dismissal was participation in an unprotected strike. However, there can be no unprotected strike unless the employees are under a contractual obligation to render the services they intend to withhold but have not followed the provisions of Chapter IV of the LRA.

[23] The appellant contended that the court *a quo*'s understanding that the dispute at arbitration was whether the employees had engaged in a protected or unprotected strike was flawed as the employees never said that they had engaged in a protected strike. The issue was whether or not the employees had committed misconduct by refusing to obey a lawful instruction. Therefore, the arbitrator was correct in determining the dispute as being whether the employees were entitled to resist an 'unlawful' instruction (as they claimed), in which case they would not have committed misconduct or whether they committed misconduct in refusing to comply with lawful instructions as the appellant contended. This in turn depended on whether the changing of the shift

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pattern amounted to a unilateral change to the terms and conditions of their employment, which is impermissible or whether doing so was within the employer's prerogative. The issue of whether the employees' conduct amounted to a protected or an unprotected strike was not the dispute before the arbitrator. The employees throughout the disciplinary proceedings and at arbitration were adamant that they were entitled to refuse to work. The arbitrator dismissed the claim on the merits. This did not entitle the employees to pursue a different cause of action in a different forum which amounts to impermissible forum shopping.

[24] AMCU's case on appeal was that the facts before the arbitrator demonstrated that the employees were dismissed for participating in an unprotected strike. The examples cited by AMCU include the letter addressed by the appellant to it dated 9 January 2019.[3] The other examples cited were the use of words in the record of arbitration such as ultimatum, refusal to work, tools down, no work no pay, and lock-out which, it was argued, are normally associated with strikes. It was argued that the arbitrator failed to enquire about the true nature of the dispute and based on that, whether the MEIBC had jurisdiction to deal with the matter. The essence of AMCU's case on appeal was that the true nature of the dispute was that the employees were dismissed for their participation in an unprotected strike consequent to which the MEIBC lacked jurisdiction to determine the dispute. Therefore, so went the argument, the court *a quo* was correct in its finding that the true nature of the dispute was that the individual employees were dismissed for their participation in an unprotected strike and as a result, the MEIBC lacked jurisdiction to determine that dispute.

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[3] The content of that letter was the following:
'URGENT: UNPROTECTED STRIKE OF THIS MORNING, 9 JANUARY 2019, as of 7h00 this morning a full shift, comprising 11 of your members, has entered our premises, downed tools and refused to work. The strike is unprotected in every respect, no process in accordance with the Labour Relations Act has been followed whatsoever. We will shortly engage with the shop stewards amongst this shift in efforts to avert this strike. We further notify you and request that you convey to your members that should this unprotected strike not be stopped by 12h30, SA Steelworks will:
[1] Issue an ultimatum to all employees involved advising then that their actions amount to misconduct;
[2] Advise employees involved that this misconduct of severe detriment to our business and will be consider gross in nature;
[3] Implement disciplinary action in respect of every employee who does not return to work by 12h30 today.'

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Discussion

[25] At the Labour Court, the matter was determined on the basis that the arbitrator did not delve into the issue of whether or not the MEIBC had the requisite jurisdiction to entertain the dispute. This being a review in terms of section 145 of the LRA, the starting point must therefore be the evidence and the material that was placed before the arbitrator. That material shows that after the refusal of the employees to work according to the new shift pattern, and their ignoring of repeated warnings to abide by the new shift pattern, the employees received notices to attend disciplinary hearings in which it was indicated that they were being charged with misconduct. The five misconduct charges that they were alleged to have committed were indicated, they were found guilty of those charges and the employees were dismissed. The employees then referred their dismissal to the MEIBC. The referral form to the MEIBC said nothing about an unprotected strike and at the conciliation stage, a notice of set down sent to them by the MEIBC specifically stated that the dispute was a dismissal related to misconduct. The certificate of outcome which was issued subsequent to the conciliation process also reflected the dispute as an alleged unfair dismissal dispute. The matter was then referred to an arbitrator. The notice of set down for arbitration also reflected the dispute as a dismissal related to misconduct. Therefore, up to this point, nothing was said about an unprotected strike by AMCU which made the referrals on behalf of its members.

[26] The matter then served before the arbitrator and an application for legal representation was made by the appellant. In the appellant's founding affidavit in respect of that application, it was stated that the employees were called to disciplinary hearings for misconduct related to their refusal to adhere to the new 2019 shift structure. Nothing was said about an unprotected strike. At the commencement of the arbitration, the commissioner stated her understanding of the dispute in her opening remarks as being that the employees were dismissed due to misconduct of gross insubordination and the employees' failure to arrive for their shifts. The AMCU official who represented the 15 employees did not object to the arbitrator's characterisation of the nature of the dispute. He did not suggest that the misconduct was that of participation in an

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unprotected strike or that the employees were on strike when they were disobeying the instruction to work according to the new shift pattern.

[27] The arbitrator made a ruling allowing the appellant legal representation. She thereafter gave the parties an opportunity to make opening statements for the commencement of the actual arbitration proceedings. The AMCU official confirmed that they were not challenging procedure and that "*the procedure was conducted correctly*". In regard to substantive fairness, the AMCU official stated that the employees did not commit any of those acts of misconduct but he said nothing about an unprotected strike. Then the commissioner asked, "*insubordination you mean?*" The AMCU official's unequivocal response was yes, and said that the employees were working the shift pattern they knew they had agreed with the applicant to work and that they were disputing the implementation of the new shift pattern.

[28] Section 191(5) of the LRA[4] creates two streams of referrals for dismissed employees depending on the nature of the dispute. The delineation of disputes and the determination of whether a dispute should follow the arbitration or adjudication route largely depend on what the employee alleges the dispute is. The employee is the referring party after all. It was common cause that the dispute between the employees and the appellant arose because the appellant introduced the new shift pattern. The employees repeatedly said from the onset

[4] 'If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the council or the Commission received the referral and the dispute remains unresolved –

(a) the council or the Commission must arbitrate the dispute at the request of the employees if –
  (i) the employee has alleged that the reason for dismissal is related to the employee's conduct or capacity, unless paragraph (b) (iii) applies;
  (ii) the employee has alleged that the reason for dismissal is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the employee alleges that the contract of employment was terminated for a reason contemplated in section 187;
  (iii) the employee does not know the reason for dismissal; or
  (iv) the dispute concerns an unfair labour practice; or
(b) the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is –
  (i) automatically unfair;
  (ii) based on the employer's operational requirements;
  (iii) the employee's participation in a strike that does not comply with the provisions of Chapter IV; or
  (iv) because the employee refused to join, was refused membership of or was expelled from a trade union party to a closed shop agreement.'

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that the appellant could not do so without reaching an agreement with them and defied the new shift pattern. They went on to tender their services according to the old shift pattern ignoring repeated warnings and admonitions by the appellant's officials. That dispute, which in essence was about the appellant's entitlement to change the shift pattern unilaterally, led to the disciplinary charges and eventually the dismissal of the employees. At no stage during the disciplinary hearings and the referrals of the dispute to the MEIBC for conciliation and arbitration did AMCU (which represented the employees throughout the dispute), mention an unprotected strike. Even during the arbitration proceedings, AMCU never raised the issue of the dismissal of the employees for their participation in an unprotected strike nor was it ever suggested by AMCU that the employees were on strike, protected or not, on the dates relevant to the charges.

[29] AMCU's case at arbitration was never that the employees were dismissed for their participation in an unprotected strike at any stage. If AMCU had done so, it would have necessitated the discontinuation of the arbitration proceedings, so that AMCU would then take the adjudication route before the Labour Court in terms of section 19(5)(b)(iii). Objective facts showed that AMCU, throughout, insisted that the employees had a right to disobey an unlawful instruction. Even when AMCU instituted review proceedings, it did not pertinently raise the MEIBC's lack of jurisdiction as a ground of review in its initial founding affidavit. In its supplementary founding affidavit, jurisdiction is referred to in passing at the tail end of its affidavit in no more than a sentence. This is telling as if anything, it shows that the jurisdiction of the MEIBC to deal with the dispute referred to it was never an issue for AMCU.

[30] In *CUSA v Tao Ying Metal Industries and Others*[5] (*CUSA*), from which I quote liberally, the court made the following instructive observations:

> '[67] Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be

[5] [2008] ZACC 15; 2009 (2) SA 204 (CC) at paras 67 - 68 and 71.

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said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled *mero motu* to raise the issue of the Commissioner's jurisdiction and to require argument thereon. However, as will be shown below, on a proper analysis of the record, the arbitration proceedings, in fact, did not reach the stage where the question of jurisdiction came into play.

…

[71] In determining the real dispute between the parties, the Supreme Court of Appeal appears to have placed much emphasis on the counter-claim by the workers that the exemptions relied upon were invalid for lack of prior consultation. This approach to the identification of the real dispute between the parties does not take sufficient account of the substantial dispute between the parties. That dispute was whether the employer was exempted from complying with the provisions of the bargaining council main agreement. What matters is not the form of a dispute but rather the substance of the dispute. The characterization of the dispute by the parties is not necessarily conclusive as to the nature of the dispute. It is necessary for a commissioner to look at the substance of the dispute in order to ascertain the real dispute between the parties.'

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[31] The proposition apparent in the submissions on behalf of AMCU that the Union, which was involved in the activities of the employees at all material times and went on to represent them both at the disciplinary hearings and arbitration, might not have been certain whether its members had been engaged in an unprotected strike or not, is difficult to understand as I demonstrate below.

[32] First, if one starts with the events of 9 January 2019 and assumes that it was factually correct that the actions of the employees on 9 January 2019 amounted to an unprotected strike, an amicable resolution of that dispute was reached. In terms of that resolution, it was agreed that the employees would go back to work according to the new shift pattern. It was further agreed that they would be excused from going to work on that day as they were tired, having spent the entire day in the appellant's offices in negotiations which culminated in the dispute being resolved. Second, the employees did go to work on 10 January 2019 and worked according to the new shift pattern. That could only be because they had understood and accepted that they were not entitled to insist on working according to the old shift pattern. Third, the strike, protected or not, would only be a strike if the appellant was in fact entitled to decide unilaterally about the shift pattern, which was common cause that it was. That could then lead to a strike which would be unprotected if the requirements for a protected strike were not observed. There never was a strike notice issued by AMCU and at no stage did they ever say they were on strike throughout this issue, including before and after the dismissal of the employees. In any event, it is difficult to conceptualise a strike, protected or not, if the conduct of the employer is unlawful. In other words, refusal to obey an unlawful instruction cannot be described as a strike for the simple reason that workers are under no obligation to obey an unlawful instruction.

[33] This takes me to *CUSA*'s admonition that the commissioners must determine the real dispute between the parties. The question in this regard being what the real dispute between the parties on 11 and 12 January 2019 was. Was it an unprotected strike or was it a refusal to obey instructions to work according to the new shift pattern which amounted to gross insubordination? This is the essence of the appellant's argument that the dispute referred to the MEIBC

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related to a clear and determined disobedience of its instructions by the employees that they were to work according to the new shift pattern. The employees and AMCU were told that it was the prerogative of the employer to decide on matters of shift patterns and that there was no need for consultation much less an agreement being reached with the employees about it.

[34] It was AMCU who characterised the introduction of the new shift pattern as being unlawful. That has a consequence that the refusal to obey that unlawful instruction cannot be a strike as the instruction itself is, for lack of a better word, nothingness. That being so, the employees could not have it both ways in the sense of being protected from being subjected to a disciplinary process for not obeying an unlawful instruction. The consequence of that is that they could not have their disobedience of what they said as an unlawful instruction being regarded as an unprotected strike. Furthermore, there was evidence by the employees themselves which suggested that their refusal to work according to the new shift pattern might not have been driven by a genuine belief that the new shift pattern was unlawful. The evidence suggested that the employees preferred the old shift pattern because it was convenient for their other side hustles, which they attended to when they were not at work. It is not in dispute that some of the employees worked as welders and made security gates when they were off duty while others were running their own businesses like taverns. It is therefore highly probable that they refused to work according to the new shift pattern disobediently because they wanted a shift pattern that was most convenient for them, taking into account their preferences in light of their other activities.

[35] The reality that the instruction was, contrary to the employees' belief, lawful in the sense that it was the appellant's prerogative to decide on the shift patterns, as the arbitrator found, means that the repeated refusal to obey a lawful instruction amounted to gross insubordination. The dispute is whether the employees were fairly dismissed for the related acts of misconduct. As the appellant had argued, if the commissioner had determined that the dismissal was unfair and reinstated the dismissed employees, the appellant could not, having charged and found them guilty, *inter alia*, of gross insubordination for

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their refusal to work according to the new shift pattern, be entitled to turn around and argue that because of the determination by the arbitrator that the dismissal was unfair, the employees had embarked on an unprotected strike and therefore the arbitrator had no jurisdiction. It would be incorrect to suggest that the arbitrator's jurisdiction could be based on the outcome of the arbitration proceedings as against the real nature of the dispute. That is not what the determination of the real dispute as required by *CUSA* is nor could it be. The determination of the true nature of the dispute cannot be determined selectively and disjunctively disregarding certain aspects of the material before the arbitrator as the court *a quo* seems to have unwittingly done. The arbitrator is certainly not entitled to fashion out a new dispute ignoring the dispute that the employees have chosen to refer or the case they have elected to pursue.

Conclusion

[36] The objective facts show quite clearly that the arbitrator was mindful of her duty to determine if she had jurisdiction to entertain the matter based on the true nature of the dispute between the parties. That is why the arbitrator repeatedly pointed out what her understanding of the true nature of the dispute was and on each occasion, AMCU did not object to her characterisation of the dispute. On the basis of the material before her and the evidence given during the arbitration proceedings, it is clear that the arbitrator had jurisdiction to determine the dispute that had been referred for arbitration which was that of misconduct characterised by repeated refusals to obey lawful instructions. This conduct constituted gross insubordination which justified the dismissals. It is unfortunate that it was AMCU, which should know better, that encouraged if not instigated this gross disobedience for reasons that are shrouded in obscurity.

[37] It was agreed between the parties on appeal that because the Labour Court determined the matter only on the basis of the issue of jurisdiction, and did not determine the other grounds of the review, the matter would have to go back to the Labour Court for the determination of the other review grounds if the appeal succeeded. I agree that that is a sensible approach as the Labour Court must be given an opportunity to deal with the other grounds of review that were referred to it.

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[38] In the result, the following order is made:

Order

1. The appeal is upheld.

2. The order of the Labour Court is set aside and the review application is remitted back to the Labour Court for determination.

3. No costs order is made.

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JOLWANA AJA

Savage ADJP *et* Davis AJA concur.

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Appearances:

For The Appellant:	Adv G Lesley SC
Instructed by:	Guy and Associates
For The Third Respondent:	Adv S Swartz
Instructed by:	LDA Incorporated Attorneys

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