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Case No 239/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE ADMINISTRATOR OF TRANSVAAL	First Appellant
THE DIRECTOR OF HOSPITAL SERVICES	Second Appellant
THE SENIOR ADMINISTRATOR OF VEREENIGING HOSPITAL	Third Apellant

and

LIZZY THELETSANE	First Respondent
SARAH MASEOLA	Second Respondent

CORAM: BOTHA, SMALBERGER, STEYN, F H GROSSKOPF JJA et NICHOLAS AJA

HEARD: 5 NOVEMBER 1990

DELIVERED: 30 NOVEMBER 1990

JUDGMENT

BOTHA JA:-

I have had the benefit of reading the judgment of my Brother SMALBERGER. I respectfully disagree with him. For convenience, and to facilitate the writing of my judgment, I shall, in stating my views, frequently link them to the contrary views expressed by my Colleague, and in doing so I shall refer to his judgment as "the main judgment".

The foundation of the respondents' claim for relief in their application to the Court a quo is to be found in the excerpts from the first respondent's affidavit which are quoted in the main judgment. It was that they were not afforded a hearing of any kind at all prior to their dismissal on 10 December 1987. That allegation is said in the main judgment to be manifestly improbable. I agree, but I go further: in my view the allegation is so fanciful as to be absurd and unworthy of any credence. I shall return to this aspect of the case later in this judgment. For present purposes it is to be noted that the respondents'

foundational allegation formed no part of the grounds upon which they obtained relief in the Court a quo. Nor was it relied upon in this Court on behalf of the respondents. On the contrary, their counsel's argument was based on the premise that the respondents had indeed been afforded a hearing prior to their dismissal. The argument was that the opportunity which was offered to the respondents to make representations was not a proper opportunity complying with the requirements of the audi rule. The case thus sought to be made out for the respondents is an entirely new one. In support of it, three contentions were advanced: (a) that no notice was given to the respondents that their dismissal was being contemplated, before or at the time that the interviews with them were held; (b) that the interviews as offered to them were expressed to be limited in scope to representations regarding their reasons for having stayed away from work; and (c) that the interviews as held in fact excluded representations

as to (other) reasons why they should not be dismissed. No trace of a case based on these contentions can be found in the respondents' affidavits.

In the main judgment it is said that the respondents are entitled to make out a case for relief on the appellants' own averments if the latter provide a proper foundation for relief. As a general proposition I accept that that is so. However, when the proposition is applied to the particular circumstances of the present case, my approach differs fundamentally from that which is reflected in the main judgment.

Part of the reasoning in the main judgment may, for ease of reference, be stated as follows: the appellants were not specifically required to deal with the form of the hearing given, but they chose to deal fully with the events of the day in question, not only to show that the respondents had been afforded a hearing, but also that the hearing had been a proper

and fair one; consequently they will not be disadvantaged or prejudiced if their affidavits are relied upon to determine not only whether a hearing took place, but also the nature and ambit thereof; and in considering the appellants' affidavits the test is whether they are reasonably capable of being interpreted in such a way that they raise a valid defence to the relief sought by the respondents, i e that the respondents were given a fair hearing in relation to why they should not be dismissed. With respect, I am wholly unable to subscribe to this manner of approaching the appellants' affidavits. It was not for the appellants to show that the respondents were given a proper hearing; they were called upon only to meet the specific allegations put forward by the respondents in support of the relief claimed. The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing; they were not called upon in any other way to raise a

valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents were required to address their minds. It is not permissible to consider the appellants' affidavits in isolation, divorced from the context of the case which they were answering. To the extent that the appellants' deponents went further than may have been necessary to answer the case as presented, it cannot be postulated à priori that they will not be prejudiced if their affidavits are relied upon to determine the nature and ambit of the hearing that took place. To do so may be unfair to the appellants and in effect is tantamount to reversing the onus.

Another part of the reasoning in the main judgment may be stated as follows: the fact that the appellants' affidavits are not consistent and unequivocal concerning the nature of the hearing given

does not preclude a consideration of the affidavits with a view to determining the true case being put forward by the appellants; when dealing with the equivocality evident in the affidavits one should adopt "a robust, common-sense approach" in deciding what case is being put forward in them; that involves that due regard must be had to the probabilities; at the same time, due consideration must be given to the possible advantages of viva voce evidence as a means of elucidating or resolving equivocal statements; and regard must be had to the substance and true meaning of the affidavits, disregarding if necessary words or phrases totally inconsistent therewith. With respect, I again find myself wholly unable to accept this manner of approaching the affidavits. It negates the incidence of the onus; it fails to give due effect to the contextual setting of the affidavits as being an answer to the case put forward by the respondents; and it may lead to the drawing of conclusions which are unfair to

the appellants. The "true case" put forward by the appellants was that the respondents had been given a hearing before their dismissal; it was no part of the appellants' case to anticipate and counter possible unstated contentions concerning the supposed inadequacy of the hearing given, with reference to its precise nature and ambit. It is not permissible to base factual findings regarding such contentions on a mere weighing up of probabilities. I do not wish to comment on the statement that in considering the affidavits one should adopt "a robust, common-sense approach"; there is no need for me to do so. For my purpose it is enough to say that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities, unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers, or

that viva voce evidence would not disturb the balance of probabilities appearing from the affidavits. This rule, which is trite, applies to instances of disputes of fact (see e g Sewmungal and Another NNO v Regent Cinema 1977 (1) SA 814 (N) at 818G-821G and the authorities discussed there) and also in cases where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits (see Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C and the authorities cited there). It is clear, in my view, that the room for deciding matters of fact on the basis of what is contained in a respondent's affidavits, where such affidavits deal equivocally with facts which are not put forward directly in answer to the factual grounds for relief on which the applicant relies, if it exists at all, must be very narrow indeed.

Reference was made above to the onus. I do

not think it can be doubted that in regard to the "issue" (raised in argument, but not on the papers) as to whether the hearing that was given was a proper one, the onus is on the respondents to prove that it was not. Their counsel sought to argue to the contrary, contending that a proper hearing constituted a "jurisdictional fact" in relation to the Administration's power to dismiss summarily. I do not agree with this view of the situation. The power of dismissal owes its existence to the contract of service, and it exists independently of the manner in which it is exercised. In the latter respect, a proper hearing is required by virtue of the principles of natural justice, which are imprinted on the contract because of the relevant legislative provisions, but these bear on the manner of the exercise of the power only, and not on its existence as such. The respondents' case is that their dismissal was wrongful and unlawful because of the manner in which they were dismissed. In accordance

with ordinary principles they must establish the facts relating to one or more of the three contentions mentioned earlier in this connection, in order to justify a finding that the hearing was inadequate and that, in consequence, they were dismissed wrongfully and unlawfully.

I referred earlier to the danger of drawing conclusions from the appellants' affidavits which may be unfair to them. In my opinion that danger does not permit of a finding in favour of the respondents in this case. The reality of such a danger can best be demonstrated by examining the main source of the equivocation which is to be found in the appellants' affidavits. It relates to the "issue" whether the opportunity which was offered to the respondents to make representations, was expressed to be an unlimited one, embracing all reasons as to why they should not be dismissed, or a restricted one, confined only to reasons as to why they stayed away from work. In this

regard the affidavits of the appellants' deponents abound with two phrases:

(i) "redes waarom hulle nie ontslaan moet word nie";

and (ii) "redes waarom hulle nie gaan werk het nie".

These expressions are not mutually exclusive of each other; (i) is simply wider than (ii). If (i) is considered by itself, it suggests prima facie that all reasons relevant to dismissal are being contemplated; but if the user of the expression happens to believe that *only a satisfactory explanation of the stay-away* from work is relevant to a dismissal, his use of (i) would signify no more than (ii). Conversely, if (ii) is considered by itself, it suggests prima facie that only reasons relevant to the stay-away were being contemplated; but if the speaker knows that such reasons are only part of the wider ambit of reasons which are relevant to a dismissal, his use of (ii)

would signify only that he was contemplating part of (i). So it is the use of (i) and (ii) side by side in the affidavits which lies at the root of the ambiguity reflected in them. But with regard to the "issue" whether the opportunity given was an unlimited or a restricted one, it is important to observe that (i) and (ii), considered by themselves, are neutral to a resolution of the issue; and that neither (i) nor (ii), by itself, is inconsistent with the notion of either an unlimited or a restricted opportunity. From this analysis it seems to me that a number of vital conclusions must follow. The very fact that each of the appellants' deponents uses both the expressions (i) and (ii) shows quite plainly that they were not addressing their minds to any possible difference in meaning between the two. They had obviously not been alerted to the possibility that there might be significance in using either the one or the other expression. They cannot be faulted for not having been

more careful in their choice of language, having regard to the respondents' affidavits and the factual allegations that they were called upon to answer. In these circumstances I am convinced that it would be unfair to the appellants to decide the case against them purely on what is contained in their affidavits. Moreover, the affidavits being equivocal in the manner explained above, and having regard to the incidence of the onus, I can see no ground upon which the Court can give preference to the possible construction which favours the respondents and reject the other possible construction which favours the appellants, whatever the probabilities may be. It certainly cannot be said that the construction favouring the appellants is so fanciful or clearly untenable that it falls to be rejected out of hand as being false. And I do not see how the Court can be satisfied that viva voce evidence would not produce credible testimony that the deponents intended to refer to an opportunity to be heard in the

wide sense and not in the narrow sense only.

I propose to refer briefly only to some features of the individual affidavits as analyzed in the main judgment. Olivier, in paragraphs 7.6 and 17, uses expression (i), but in paragraph 9.1, in dealing with the questionnaire, he uses the equivalent of expression (ii). On the face of it, his choice of language cries out for an explanation. There are probabilities, mentioned in the main judgment, suggesting that for Olivier an enquiry in the sense of (ii) was of overriding importance, thus eclipsing (i). But his use of (ii) is not irreconcilably inconsistent with (i); nor is the use of the questionnaire, or any of the other probabilities. An explanation that (ii) was intended to be referred to merely as a particular facet of (i) is by no means excluded. The same point emerges even more strongly from the affidavit of Harmsen. In paragraph 9(b) the impact of his use of expression (i) is clear. This is fortified by

paragraph 13(a). Harmsen's statement that the workers were told they were "now" being given an opportunity "to put their case", considered in the light of the history of the preceding court proceedings, puts paid to the contention that the respondents were not informed that their dismissal was being contemplated. In the main judgment it is said that the case which each worker was invited to put appears from Harmsen's response to paragraph 13(b) of the first respondent's affidavit, in which Harmsen uses the equivalent of expression (ii). With respect, I do not agree with this interpretation of his affidavit. He was dealing specifically with the respondents' allegation that they had been told the forms were required to be filled in simply for record purposes, to enable them to carry on their work; his reply related only to the purpose of completing the forms; and there is no reason to surmise that he was thereby qualifying the generality of his previous statements as to the wide nature of the

opportunity to be heard. With regard to Nel, I respectfully disagree with the manner in which his affidavit is interpreted in the main judgment. Paragraphs 2 and 5, at best for the respondents, are ambiguous; they are certainly not inconsistent with the notion that an unrestricted opportunity was being offered, relating generally to reasons why the workers should not be dismissed. Paragraph 9 must be read in that light. So reading it, I can see no justification for rejecting out of hand Nel's conclusion stated therein, by reason of the terms of the questionnaire and the probabilities. In regard to Bossert, it follows from what I have said already that I respectfully disagree with the inferences from his affidavit which are drawn in the main judgment.

The foregoing survey of the appellants' affidavits shows that there is no clear and unequivocal statement to be found anywhere in them that the respondents were not informed that their dismissal was

being contemplated, or that the opportunity offered to them to make representations was in terms limited in its scope, or that the interviews as held were actually restricted as to the ambit of the representations that were allowed. The findings in the main judgment in favour of the respondents on these points, leading ultimately to the conclusion that the requirements of the audi rule had not been complied with, are all based on a process consisting of the interpretation of the affidavits, the drawing of inferences therefrom, and the assessment of the probabilities. Such a process is not permissible in motion proceedings, as a general rule; none of the recognized exceptions to the general rule is applicable in this case. Moreover, the respondents seek to base a case on the appellants' affidavits, which is a new case, not foreshadowed in their founding affidavits. In my opinion the process to which I have referred is a fortiori not permissible in these circumstances.

In the judgment of the Court a quo the order made in favour of the respondents was based on grounds found to exist by means of a process of reasoning similar in nature to that reflected in the main judgment. It follows from what I have said that the order granted cannot be supported on those grounds.

In argument before this Court counsel for the respondents advanced a number of other grounds in support of the order granted. It was contended that the hearing afforded the respondents was not a fair one, for three reasons: the short period of the notice given before the interviews took place; the short time taken over each individual interview; and the failure to inform the respondents that it was intended to hold it against them that some of the other workers had not been deterred by the strike from performing their duties. In my opinion these contentions must fail, because of the exigencies of the peculiar situation that existed. It was obviously necessary for the

Administration to determine the position of the workers concerned as quickly as was reasonably possible. A very substantial number of the Hospital's work force were involved. The situation had been preceded by Court proceedings in which the workers were represented by attorneys and counsel. In these circumstances I do not consider that it was unreasonable or unfair to hold the interviews at short notice, and not to plan for, or to arrange, interviews of protracted duration. In any event it seems to me that these complaints are really untenable, in view of the fact that the respondents have made no attempt to show that they required, or requested, a longer period of notice or interviews of longer duration in order to state their case adequately. As to the failure to notify them that account would be taken of the fact that other workers did not participate in the strike, it suffices to say that I do not think that failure, in the particular circumstances of this case, resulted in an unfair

hearing. The next argument was that Olivier had exercised his discretion improperly by excluding relevant material from the enquiry. In my view there is no room for this argument. On the conclusions stated earlier, it must be accepted that the scope of the hearings had not been unduly curtailed and that the respondents were free to make any representations they wished to make. Olivier's views as to what was relevant are accordingly of no consequence. Finally, it was argued that the dismissals were wrongful and unlawful because Olivier had decided to give the workers, including the respondents, 24 hours' notice, whereas the notices served on them provided for a shorter period of notice in effect. There is no substance in this argument. It is clear from Olivier's affidavit that he believed that summary dismissal for misconduct was justified. The respondents have not contended to the contrary. The fact that Olivier's intention to give 24 hours' notice was not carried into effect is

irrelevant.

There remains one matter to be dealt with. In view of the conclusion arrived at earlier, the question arises as to what order is to be made now in respect of the respondents' application. In this Court their counsel submitted that, if his main argument based on the appellants' affidavits failed, the application should nevertheless not be dismissed, but should be referred to viva voce evidence. This is in accordance with the stance taken up by counsel in the Court a quo. In Kalil v Decotex (Pty)Ltd and Another 1988 (1) SA 943 (A) at 981D-E CORBETT JA, after referring to a number of cases in which it was held that an application to refer a matter to evidence should be made at the outset and not after argument on the merits, observed that that was no doubt a salutary general rule, but that he did not regard it as an inflexible one. The recent tendency of the courts seems to be to allow counsel for an applicant, as a general

rule, to present his case on the footing that the applicant is entitled to relief on the papers, but to apply in the alternative for the matter to be referred to evidence if the main argument should fail: see Marques v Trust Bank of Africa Ltd and Another 1988 (2) SA 526 (W) at 530E-531I and Fax Directories (Pty) Ltd v S A Fax Listings CC 1990 (2) SA 164 (D & C) at 167B-J. It seems to me that such an approach has much to commend itself, for the reasons stated in the last-mentioned two cases, but for the purposes of the present case there is no need to pursue the point. Here the respondents were granted relief on the papers, but wrongly as it has now turned out. I shall assume that this Court has a discretion to substitute for the order of the Court a quo an order referring the matter to evidence. In my judgment, however, there are cogent reasons why such a course ought not to be followed. I mentioned earlier that the respondents' application was founded on an allegation that was so far-fetched as to

be absurd. Their case amounted to this, that the Administration's officials deliberately set out to mislead and deceive them in a manner so clumsy and blatant that there is no prospect of it being believed. The allegations were persisted with in the replying affidavits. To begin with, therefore, there is nothing in the respondents' affidavits which is worthy of investigation by viva voce evidence. Turning to the appellants' affidavits, they do not give rise to a "dispute of fact" in the ordinary meaning of that expression. The respondents tried in argument to build up a case on the foundation of those affidavits, quite different from the case put forward by them. It has now been found that the appellants' affidavits are ambiguous and consequently not capable of establishing the case sought to be made out. In these circumstances the submission that the matter should now be referred to evidence amounts to a second application, in the alternative, to be given an opportunity of trying to

make a case purely out of the cross-examination of the appellants' deponents. In the meantime about three years have elapsed since the respondents' dismissal, and nearly two years since the Court a quo delivered its judgment. In my opinion justice requires that the application to refer the matter to evidence must be refused.

The order of the Court is as follows:-

1. The appeal is allowed with costs, including the costs of two counsel.

2. The order of the Court a quo is set aside, and there is substituted for it the following order:

> "The application is dismissed with costs, including the costs of two counsel."

A.S. BOTHA JA

STEYN JA
F H GROSSKOPF JA · CONCUR
NICHOLAS AJA

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N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE ADMINISTRATOR OF TRANSVAAL	First Appellant
THE DIRECTOR OF HOSPITAL SERVICES	Second Appellant
THE SENIOR ADMINISTRATOR OF VEREENIGING HOSPITAL	Third Appellant

and

LIZZY THELETSANE	First Respondent
SARAH MASEOLA	Second Respondent

CORAM:	**BOTHA, SMALBERGER, ~~STEYN~~ F H, GROSSKOPF, JJA et NICHOLAS, AJA**
HEARD:	**5 November 1990**
DELIVERED:	**30 November 1990**

J U D G M E N T

SMALBERGER, JA :-

The first and second respondents (as applicants) sought an order in the Witwatersrand Local

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Division against the appellants (as respondents) declaring, inter alia, that their purported dismissal on 10 December 1987 from the employ of the Transvaal Provincial Administration ("the Administration") was wrongful and unlawful. The matter came before STREICHER, J. The learned judge granted the application and issued the following order:

> "1. It is declared that the applicants are in the lawful employment of the Transvaal Provincial Administration.
>
> 2. It is declared that the applicants' dismissal on 10 December 1987 was wrongful and unlawful.
>
> 3. It is declared that the applicants are entitled to be paid their salaries as employees of the Transvaal Provincial Administra= tion for the period 11 December 1987 to date.
>
> 4. The respondents are directed to take all steps necessary to cause and to ensure that the applicants

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are paid their salaries as employees of the Transvaal Provincial Administration for the period 11 December 1987 to date.

5. The respondents are ordered to pay the costs of the application jointly and severally, such costs to include the costs occasioned by the employment of two counsel."

The appellants appeal against this order with leave of the judge a quo.

The relevant events preceding those of 10 December 1987 (which will be dealt with in some detail later) are common cause and to the following effect. The first and second respondents have been employed by the Administration as cleaners at the Vereeniging Hospital ("the Hospital") since 1974 and 1971 respectively. They have, since 1978 and 1976 respectively, been members of, and monthly contri= butors to, a pension scheme which now falls under the Temporary Employees Pension Fund Act 75 of 1979.

On 27 October 1987 workers at the Hospital went on strike. The reason for the strike was the refusal of the Hospital's authorities to recognise the trade union to which the workers belonged and the subsequent dismissal of four of their leaders. The first respondent was on leave at the time, but she subsequently failed, when her leave ended, to return to work. The second respondent likewise stayed away from work. The Administration proceeded to dismiss workers participating in the stay-away. It did so without giving them a hearing. In this way both first and second respondents came to be dismissed. The first respondent and three of her co-workers thereupon brought an urgent application in the Witwatersrand Local Division for an order declaring their purported dismissal wrongful and unlawful and of no force and effect. The matter came

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before GOLDSTONE, J, who granted the application. The judgment is reported as Mokoena and Others v Administrator, Transvaal 1988(4) SA 912 (W).

The learned judge in Mokoena's case held that the applicants' membership of the pension scheme entitled them to a hearing before they could be dismissed, in accordance with the principles of natural justice enshrined in the maxim audi alteram partem ("the audi rule"). He stated (at 917 G)

> "That someone in the position of Mrs Mokoena or the other applicants who were members of the pension scheme can be dismissed and the right to their pension thereby destroyed on the whim of an official and without enquiry, must be repugnant to any reasonable and decent person. The unfairness of it is really patent."

He consequently held that the applicants were entitled to a hearing before a decision was taken to terminate their employment and so destroy their right to a pen= sion upon retirement. He further stated (at 918 B)

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that the official determining the question of their dismissal "would have been obliged to give honest and bona fide consideration to any representations made by them. Failure to have done so would have vitiated such a decision". In addition to declaring the purported dismissal of the applicants wrongful and unlawful, GOLDSTONE, J, also granted an order declaring that the applicants "remain in the lawful employ of the Transvaal Provincial Administration". The effect of the judgment, therefore, was that the applicants (including the first respondent) were reinstated in their employment. It was accepted by all concerned that the judgment in Mokoena's case applied equally to all workers at the Hospital (including the second respondent) in a position similar to that of the applicants in that case. The judgment in Mokoena's case was delivered on 9 December

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1987. Its correctness was not challenged in the present appeal. It is common cause that compliance with the audi rule was a prerequisite for the lawful dismissal of the first and second respondents. It is against this backdrop that I turn to consider, for the purposes of the present appeal, the events which it must be accepted occurred on 10 December 1987, and the legal consequences flowing therefrom.

At approximately 05h45 on the morning of 10 December 1987 a number of reinstated workers, including the two respondents, presented themselves for work at the Hospital. There is a marked dispute on the affidavits concerning the ensuing events, which culminated in the dismissal of 189 workers. The case advanced by the respondents was that they were again dismissed without a hearing. As to what occurred, the first respondent alleged the following (in paragraph 13(a) and (b) of her founding affidavit):

"(a) In particular, I state that at about 07h30 the Third Respondent, Mr Harmsen, arrived. He addressed the assembly so gathered by means of a loud hailer. There were several hundred of us. He informed us that he was too busy preparing the necessary forms required to enable us to resume work. He further advised that we ought not to be surprised to see the presence of other workers employed during our absence as the said workers were going to complete their employment on the 10th December 1987. We, however, would only be able to resume our positions on the following day, namely the 11th December 1987. He asked us to be patient and to wait whilst the forms necessary for us to resume our work were prepared.

(b) Apart from this address, Mr Harmsen did not explain to us why it was necessary to sign any form. We all understood the position to be that these forms related to administrative procedures which had to be complied with so as to enable us to resume employment the following day."

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After setting out how she was called to a certain hall where an official of the Administration interviewed her and filled in a form, her affidavit continues (paragraph 14):

> "Later that day, I was presented with a document by the Administration's officials. This document, which is headed, Termination of Employment, indicated that I had allegedly been given an opportunity on the 10th December 1987 to advance reasons why I should not be dismissed. It is alleged that it was verbally intimated to me that my services had been terminated with effect from the 11th December 1987, and that that verbal intimation was confirmed by the said notice. My last working day was therefore to be the 10th December 1987."

Reverting to what occurred when she was questioned in the hall she claimed (paragraph 16 (a)):

> "It was never stated to me that my questioning at the table in the hall was in fact a hearing requiring me to advance reasons why I should not be dismissed. Furthermore, no adverse facts were ever brought to my attention as being relevant to such an enquiry. As I have already indicated, the whole purpose of answering

> questions and signing the form was represented to me as being necessary to enable the Administration to attend to its bureaucratic paperwork so as to facilitate the resumption of employment on the 11th December 1987, and to secure my arrear salary. The Third Respondent had made it clear to all the workers assembled that our employment would be recommencing on the 11th December 1987."

Similar allegations are made by the second respondent.

The appellants strenuously deny the respondents' allegations. They claim that the respondents were given a fair hearing before their dismissal. I shall in due course analyse the affidavits filed on behalf of the appellants in some detail in order to determine what form the hearing took, and whether the requirements of the audi rule were complied with. It is common cause that at the commencement of the hearing the appellants, on account of the irreconcilable factual disputes, took up the attitude that the matter should be referred to oral

evidence. The respondents contended that the matter could be decided on the appellants' affidavits; alternatively they asked that the matter should be referred to evidence. In the event the judge a quo, applying the principles laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 620 (A) at 634 E - G, arrived at his judgment having regard to the averments made by the appellants together with such facts as were common cause.

The case put forward by the respondents in their affidavits (apart from the question of whether they were given adequate notice) is, as I have already pointed out, that they were not given a hearing before their dismissal. The appellants deny this. In the light of the preceding events which culminated in the judgment of GOLDSTONE, J, in Mokoena's case it is

manifestly improbable that the respondents were not afforded a hearing of any kind. If it is accepted (at any rate for the purposes of this appeal) that they were given a hearing, then one must look to the appellants' affidavits to determine the nature and ambit of such hearing. Notwithstanding the fact that the appellants' allegations are (in the respects that matter) at total variance with theirs, the respondents are entitled to make out a case for relief on the appellants' own averments if they provide a proper foundation for such relief. This would seem to follow logically from what was stated in the Plascon-Evans case (supra) at 634 H - I. In this regard I am mindful of the fact that the case the appellants were called upon to meet was that the respondents had not been afforded any hearing before dismissal. They were not specifically required to

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deal with the form which the hearing they claim to have given the respondents took. However, it is apparent, from a proper perusal of the appellants' affidavits, that they chose to deal fully with the events of the day in question. The purpose thereof was not only to show that the respondents had been afforded a hearing, but that the hearing had been a proper and fair one. Because of the course they chose to adopt the appellants will not, in my view, be disadvantaged or prejudiced if their affidavits are relied upon to determine not only whether a hearing took place, but the nature and ambit thereof. I did not understand Mr Weinstock, for the appellants, to contend to the contrary. Once the nature and ambit of the hearing afforded the respondents has been established, the next step will be to enquire whether such hearing satisfied the requirements of the audi

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rule.

Before analysing the appellants' affidavits I need to consider the correct way in which to approach them. A problem arises in the present matter because the appellants' affidavits are not entirely consistent and unequivocal concerning the nature of the hearing they claim the respondents were given on 10 December 1987. After carefully considering the affidavits deposed to by the appellants' officials concerned, the judge a quo arrived at the following conclusion:

> "The Administration conducted an inquiry which consisted of no more than a series of questions to the applicants. All the questions related to the question whether the applicants had stayed away from work and what the reason for them staying away was. The applicants were not given an opportunity to state their contentions not related to the stay-away but related to the decision to dismiss. The applicants were therefore not afforded a proper hearing and a proper opportunity to state their contentions as to

> why they should not be dismissed, but only a very constricted opportunity to state some of their contentions."

This finding was reached notwithstanding passages in the appellants' affidavits which suggest that a wider enquiry was held, and that the respondents were afforded an opportunity to advance reasons why they should not be dismissed. The equivocality evident in the appellants' affidavits does not preclude a consideration of the affidavits with a view to determining the true case being put forward by the appellants. Just as in the case of disputes on motion, so too, when dealing with equivocality of the kind present in the appellants' affidavits, one should adopt "a robust, common-sense approach" (per PRICE, JP, in Soffiantini v Mould 1956(4) SA 150 (E) at 154 G) in deciding what case is being put forward in the affidavits. As further stated by PRICE, JP,

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in Soffiantini's case at 154 H (in a slightly different context, but equally applicable here): "Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised on affidavits". See, too, in this regard the remarks of COLMAN, J, in Carrara & Lecuona (Pty) Ltd v Van der Heever Investments Ltd and Others 1973(3) SA 716 (T) at 719 G, viz: "I accept the duty to avoid fastidiousness and to make a robust approach to the matter, applying as much common sense to the problem as I may happen to command". The application of common sense to a problem such as the present requires that due regard be had to the probabilities. At the same time, due consideration must be given to the possible advantages of viva voce evidence as a means of elucidating or resolving equivocal statements (cf Sewmungal and Another NNO v Regent Cinema 1977(1) SA

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814 (N) at 820 E - F). In each case the proper approach to adopt will needs depend upon the peculiar circumstances of such case (cf. Wiese v Joubert en Andere 1983(4) SA 182 (O) at 203 C). Ultimately, it seems to me, the test is whether an opposing party's affidavits (bearing in mind the possible effect of viva voce evidence) are reasonably capable of being interpreted in such a way that they raise a valid defence to the relief sought by the applicant. Differently put, there must be reasonable certainty that the opposing affidavits are not capable of sustaining a defence. This boils down to the question, in the present matter, whether the appellants' affidavits are reasonably susceptible of the interpretation that the respondents were given a fair hearing in relation to why they should not be dismissed. In considering this matter regard must be

had to the substance and true meaning of the affidavits, disregarding if necessary words or phrases totally inconsistent therewith.

I turn now to consider, firstly, the affidavit of Mr Olivier, a director of Hospital Services in the Administration in charge of "arbeidsaangeleenthede en spesifiek wegbly- of staking -aksies by provinsiale hospitale en inrigtings". It fell largely to him to decide what steps, if any, were to be taken concerning the respondents' continued employment. It was he who co-ordinated the procedures followed and the interviews held on 10 December; he too ultimately decided on the fate of the workers. His approach and attitude must inevitably have influenced and guided the officials under him. In paragraph 7.6 of his affidavit Olivier said the following:

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> "Na die uitspraak van die hof het ek na ek regsadvies ontvang het, besluit dat die werkers wat aan die pensioenfonds vir tydelike werknemers behoort en wat versuim het om aan te meld vir hulle normale diens toe hulle moes, aangehoor behoort te word om redes aan te voer waarom hulle nie ontslaan moes word nie. Die applikante het onder hierdie groep resorteer."

In a later passage in his affidavit (in paragraph 17) Olivier states:-

> "Die uitspraak van die hof maak dit duidelik dat nieteenstaande die bepalings van die applikante se dienskontrakte, diegene wat pensioenbydraes gemaak het, 'n geleentheid gegee moes gewees het om te verduidelik waarom hulle nie ontslaan moes word vir hulle versuim om te werk nie."

This reflects the correct approach - if their dismissal was contemplated the respondents were entitled to be informed accordingly and given an opportunity to put their case. But despite what he says, is this really what Olivier had in mind, or did he contemplate some lesser, more restricted enquiry? Earlier actions speak louder than subsequent words,

and to answer this question one needs, in the first place, to look at what he did. Thereafter one must examine the considerations which governed his decision to dismiss the respondents. These are the true pointers to his state of mind at the time, and are indicative of the likely nature of the hearing the respondents would have been afforded.

Olivier organized eight teams of two persons each to conduct the necessary enquiries and to question each worker who qualified for a hearing. For this purpose standard prepared questionnaires were used on which the workers' answers were to be recorded. Once completed the questionnaires were to be attested by a commissioner of oaths. These questionnaires are of great significance - so much so that they are, in my view, ultimately conclusive of the nature of the hearing that took place. The pro

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forma questionnaire reads as follows:-

"AFFIDAVIT CLOCK NO: ___

NAME: _____

REFERENCE NO: _____

ADDRESS: _____

1. Did you clock in on 27 October 1987? Yes/No.
   (a) At what time? _____
   (b) Did you leave the Hospital premises of your own will? Yes/No.
2. Did you clock out on 27 October 1987? Yes/No
3. On what reason did you leave the Hospital premises on 27 October 1987? _____
4. Did you report for duty on the days following 27 October 1987? Yes/No.
5. Were you day - off/on leave/sick leave on 27 October 1987? _____
6. When did you resume duty? _____ "

It will immediately be apparent from the wording of the questionnaire that it is concerned only with the events of 27 October 1987 and the subsequent stay-away. It seeks only to elicit information relevant thereto. It does not invite the worker to advance any reason why he or she should not be dismissed for staying away from work - as one would

confidently have expected if that had been the purpose of the enquiry. The wording of the questionnaire strongly suggests an enquiry or hearing limited to whether the workers could satisfactorily explain their absence from work. The form and content of the questionnaire are at variance with any suggestion of a hearing designed to give the workers an opportunity to state their case against dismissal. Support for this view is to be found in paragraph 9.1 of the affidavit of Olivier where he said:

> "Afgesien van die betrokke vrae is aan elke algemene assistent op taktvolle wyse gevra of hy enige bykomende besonderhede wil verstrek waarom hy op 27 Oktober 1987 of daarna nie gewerk het nie. Ek verwys na die eedsverklarings van MNR NEL bylae 'JWO4' en MNR BOSSERT bylae 'JWO5'. Sodanige bykomende inligting is dan op die blanko gedeelte paslik aangebring deur die betrokke span."

As Olivier was not himself concerned with the completion of the questionnaires he was obviously not speaking from personal knowledge - but his statement no doubt mirrors his instructions to his subordinates. And that any further questions were limited (at least in the case of the first and second respondents) to why "[s]y op 27 Oktober 1987 of daarna nie gewerk het nie" appears from the additional information recorded on their respective questionnaires. In this regard the first respondent is recorded as having said "Was met verlof. Toe ek wou terug keer, het mense gesê die baas sê niemand mag kom werk nie. Sy was bang. Die radio het ook gesê dat almal afgedank is en dat nuwe mense in diens geneem is. Ek het nie geweet wat om te doen nie." The second respondent simply stated "Ek was bang om terug te keer werk toe." It seems to me improbable in the extreme that if either respondent

had been asked to advance reasons why they should not be dismissed their answers would not have focussed on that question. One would at least have expected some reference to their length of service, the financial prejudice they would suffer, the absence of previous disciplinary steps against them and perhaps even a promise or undertaking not to again participate in a stay-away. After all, following on the application before GOLDSTONE, J, their minds must have been attuned to such considerations faced as they had been with the danger of dismissal. I cannot accept that they would have been so astute as to have deliberately refrained from giving answers of that kind in order to strengthen their hand in a later application for the setting aside of their dismissals. Their lack of response also indicates a subjective belief on their part that the question of their dismissal was not being considered at

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that stage. The questionnaires' total silence, both in respect of questions and answers, in relation to reasons why the respondents should not be dismissed, to my mind overwhelmingly indicates that they were never asked to advance any reasons in that regard.

A perusal of Olivier's affidavit reveals that he considered only the questionnaires and that his dismissal of the two respondents was based on the fact that they could offer no acceptable explanation for staying away from work. In paragraph 9.3 of his affidavit he states that:

> "Nadat die verskillende kommissarisse van ede met die vorms gehandel het, het ek elke individuele vorm met enige bykomstige redes, behoorlik nagegaan. Nie in een geval kon ek grondige rede vind waarom die persoon toegelaat moes gewees het om dienste onvoorwaardelik voor te sit nie."

He then proceeds to provide details of the numbers of workers who did not participate in the strike or stay-away, and continues (paragraph 9.4):

> "Daar is van die standpunt uitgegaan dat as al hierdie persone met hulle werksaamhede kon voortgegaan het is die rede wat deur sommige ontslane werkers aangevoer is, nl. dat hulle geintimideer was, nie aanvaarbaar nie, en dat daar hoegenaamd geen substansie vir hulle bewering is dat hulle nie geweet het dat hulle moes kom werk het nie."

In relation specifically to the first respondent he concludes (paragraph 9.6):

> "Insgelyks is die eerste applikant LIZZY THELETSANE se redes waarom sy nie haar normale dienste voortgesit het nie, gemeet teen voormelde feite, nie aanvaarbaar nie."

He essentially adopts a similar attitude towards the second respondent.

The only yardstick for dismissal applied by Olivier was whether there was an acceptable explanation for staying away from work. Nowhere does he refer to any other consideration. That being so, it is more than likely that the interviews would have been confined to the question whether the

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workers could satisfactorily explain their absence from work. Olivier obviously failed to appreciate the distinction between an enquiry that (1) asked for reasons to be advanced why a worker had stayed away from work, and (2) one that called for reasons why such worker should not be dismissed. He equated the one to the other, whereas they are separate and at times distinct enquiries. The first is narrower than the second; the second, being a broader enquiry, could encompass the first. The first enquiry alone would not satisfy the requirements of the second; in many instances the second enquiry would only arise if the first produced no satisfactory explanation. The approach Olivier adopted precluded him from ever reaching the second enquiry. He appears to have simply taken up the attitude that if a worker could not provide a satisfactory explanation for his or her

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absence from work, dismissal had to follow as a matter of course. This is partly evidenced by the fact that he dismissed all the workers who returned to work on 10 December 1987.

I turn next to consider the affidavits of Olivier's subordinates Messrs Harmsen, Nel and Bossert. I do so against the background of Olivier's affidavit, bearing in mind that they would have followed Olivier's instructions and directives with regard to the procedures to be followed and the form of interview to be held. They would therefore not have pursued a course other than that indicated by Olivier.

Harmsen is the assistant director of the Hospital. He was present at the Hospital on 10 December 1987. In regard to the arrangements made to give the workers a hearing he stated the following (in paragraph 9(b) of his affidavit):

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"Aangesien daar opdrag gegee is deur MNR OLIVIER dat al die werkers wat aan die pensioenfonds behoort en gestaak het die geleentheid gegee moet word om aangehoor te word, waarom hulle nie ontslaan moet word nie, is daar verskeie beamptes se hulp verkry en was agt spanne behulpsaam. Elke span het bestaan uit twee beamptes wat werkers dan individueel gespreek het. Tydens hierdie gesprek is die werkers gevra om die vorm, bylae 'JWO3' te voltooi en gevra of hy enige redes wil aanvoer waarom hy nie ontslaan moes word nie. Indien hy sodanige redes wou aanvoer was dit op die vorm neergeskryf. Beide applikante het verdere redes aangevoer soos blyk uit die vorm, bylaes 'JN1' en 'FB1'. Nadat die vorms voltooi is, is die werkers na 'n Kommissaris van Ede geneem wat die verklaring beëdig het waarna die vorm na MNR OLIVIER geneem is wat dan besluit het of die werker ontslaan moes word al dan nie. MNR OLIVIER het besluit dat beide applikante ontslaan moes word.

At a later point in his affidavit he says: "Ek ontken dat die applikante onbewus was van die feit dat hulle gespreek is om redes aan te voer ten einde ontslag te verhoed." Much of paragraph 9(b) of Harmsen's affidavit is hearsay. He is unable to speak

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personally of what transpired when the respondents were questioned and, in particular, whether they were asked to advance reasons why they should not be dismissed. While I accept Harmsen's present belief that Olivier gave the instruction referred to in the quoted passage it is unlikely, having regard to Oliviers' probable state of mind, that the instruction would have been given in those terms. What Harmsen claims he was told must be tested against his conduct at the time. In response to the allegations in paragraph 13(a) of the first respondent's affidavit he stated:

> "Ek het die werkers, 189 in getal, met 'n megafoon toegespreek en vir hulle gesê dat hulle nou 'n geleentheid gebied sal word om hulle saak te stel."

The case each worker was invited to put appears from his response to paragraph 13(b), viz:

> "Dit was duidelik gestel dat die vorms voltooi moes word om elke werker se werksbywoning te bepaal en hom die

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> geleentheid te gee om sy werks-afwesigheid te verduidelik."

(This, it may be observed, is in keeping with Olivier's perception of what form the hearing should take.) Significantly, nowhere in Harmsen's affidavit does he specifically state that he personally ever advised the workers that they were to be allowed an opportunity to put forward reasons why they should not be dismissed. If anything his affidavit, viewed in relation to what he actually did, points to the workers being given an opportunity to explain their absence from work - nothing more.

Nel was the official who conducted the interview with the first respondent. From my analysis of Olivier's affidavit it seems very unlikely that he would have instructed Nel to ask the first respondent (or, for that matter, any other worker) for reasons why she should not be dismissed. The opening sentence of

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paragraph 2 of his affidavit is entirely consistent with Olivier's probable directives. It reads:

> "Op 10 Desember 1987 was ek een van die persone wat behulpsaam was ten einde die werkers wat versuim het om te kom werk sedert 27 Oktober 1987 aan te hoor en 'n verduideliking te vra vir die versuim."

With regard to the interviews he conducted, Nel stated (in paragraph 5 of his affidavit):

> "Ek het vir die werkers duidelik gemaak dat die ondersoek gehou word sodat hulle kon verduidelik waarom hulle van die werk afgebly het sedert die staking op 27 Oktober 1987 en dat dit gedoen moet word ten einde hulle in staat te stel om hulle werk te behou <u>en dat hulle vir my enigiets moet vertel wat hulle wil vertel in hierdie verband</u>."
> (My underlining.)

The words underlined could, notionally and grammatically, relate to either "waarom hulle van die werk afgebly het" and "ten einde hulle in staat te stel om hulle werk te behou". But having regard to their general context, the instructions Nel would probably

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have been given by Olivier, and the passage from paragraph 2 of Nel's affidavit quoted above, they must, in my view, be taken to refer to why they stayed away from work. That, after all, was the focal point of the enquiry according to Olivier. In any event, asking workers to explain their absence from work in order that they might retain their employment (on the basis, presumably, of their furnishing a satisfactory explanation for such absence) is not quite the same as asking workers to furnish reasons why they should not be dismissed. The latter is a broader, more explicit enquiry. But even going so far as accepting that Nel believes that he asked the workers to furnish reasons why they should not be dismissed, it is improbable that he did so. Because if he did, one would have expected the first respondent to have reacted positively, or Nel to have elicited information relevant thereto. It is

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quite apparent from the questionnaire completed by the first respondent that neither happened. In the concluding paragraph of his affidavit (paragraph 9) Nel states:

> "Ek bevestig dat nie alleen die eerste applikant nie maar al die werkers wat ek ondervra het, baie duidelik bewus was van die rede waarom hulle aangehoor is en dat dit was om redes te verskaf waarom hulle nie ontslaan moet word nie."

This is a conclusion which Nel draws which is not justified when regard is had to the terms of the questionnaire and the probabilities. Significantly, too, it is the first time in his affidavit that Nel makes specific reference to the reasons for the interviews being to enable workers "om redes te verskaf waarom hulle nie ontslaan moet word nie".

The official who interviewed the second respondent was Bossert. What I have said in regard to Nel is of equal application to Bossert, whose affidavit

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is couched in similar terms to that of Nel, with one important exception. Bossert does not draw the conclusion which Nel does in paragraph 9 of his affidavit. What Bossert does say (paragraph 5) is that:

> "Na voltooiing van die vraelys het ek elke werker gevra of daar enigiets is wat hy of sy wil vertel waarom hy nie die betrokke dag gaan werk het nie."

This was the cardinal enquiry which Olivier had in mind, and the question one would, in the circumstances, expect to have been asked of the workers. The "vraelys" contained no questions remotely related to reasons why second respondent should not be dismissed. The only other question which Bossert asked is that referred to in the above quotation. That too did not constitute an invitation to provide reasons against dismissal. It follows from what Bossert said he <u>did</u> that he never afforded the second respondent an

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opportunity to furnish reasons why she should not be dismissed. If Bossert did not do so, why would Nel? They were, after all, both carrying out the same instructions and performing the same duties.

In the light of the above analysis what conclusion can be reached (despite the degree of equivocation present in their affidavits) regarding the appellants' version of the relevant events of 10 December 1987? In my view the appellants' version can be said with reasonable certainty to amount to the following:

(a) Olivier was aware of the fact that the respondents were entitled to an opportunity to make representations if their dismissal was being contemplated;

(b) Olivier was of the view that all that needed to be established was whether or not the respondents had

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a satisfactory explanation for staying away from work;

(c) What was conveyed to the respondents by the appellants' officials prior to and during the interviews held with them was that what was to be canvassed were their reasons (or explanations) for having stayed away from work;

(d) The interviews held were in fact confined to this limited sphere of investigation;

(e) The respondents were not asked to advance reasons why they should not be dismissed from their employment. Nor were they specifically made aware by the appellants' officials that their dismissal was being contemplated.

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(f) The only consideration which Olivier considered relevant in deciding whether the respondents should be dismissed was whether they had an acceptable explanation for having absented themselves from work.

In my view the appellants' affidavits, on a proper approach thereto, are not reasonably capable of the interpretation that the respondents were afforded an opportunity to advance reasons why they should not be dismissed (as opposed to reasons why they had stayed away from work). The probabilities are so overwhelmingly in favour of the conclusions reached that viva voce evidence is unlikely to bring about any change in the situation - particularly as the impact of the questionnaire will essentially remain unaffected by viva voce evidence.

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Have the requirements of the audi rule been satisfied in the present matter having regard to what I have found the appellants' version of the events of 10 December 1987 to be? Before dealing with this there is another matter which requires to be mentioned and disposed of. There is no justification for holding (in the absence of any specific intimation to them by the appellants' officials to that effect) that the respondents, when interviewed, appreciated (or must of necessity have appreciated) that what was being contemplated was their dismissal, and that they should therefore of their own accord have advanced reasons against their dismissal. In finding for the applicants in Mokoena's case GOLDSTONE, J, held that they were entitled to a fair and proper hearing before their dismissal. He did not direct that they should be afforded a hearing of any kind. His order simply reinstated the dismissed workers. They would have

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returned to work in the belief that they could continue their employment. The respondents, unless advised accordingly, would not have known the precise purpose of the interviews. At best for the appellants it can be said that the respondents must have suspected that the interviews had to do with the continuation of their employment. But it cannot be said that they must have appreciated that what they were being afforded was an opportunity to state reasons why they should not be dismissed.

It is neither necessary, nor desirable, to attempt to define the parameters of the audi rule. Its principles are flexible, and should remain so. In the words of TUCKER, LJ, in Russell v Duke of Norfolk and Others [1949] 1 ALL ER 109 [CA] at 118:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

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> Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

(See Turner v Jockey Club of South Africa 1974(3) SA 633 (A) at 646 D - F.) What the audi rule calls for is a fair hearing. Fairness is often an elusive concept; to determine its existence within a given set of circumstances is not always an easy task. No specific, all-encompassing test can be laid down for determining whether a hearing is fair - everything will depend upon the circumstances of the particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair; there must be notice of the contemplated action and a proper opportunity to be heard. Applied to the facts of the present case, the respondents should at least have been made aware of the

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fact that their dismissal was being contemplated, and have been afforded an opportunity of advancing reasons why they should not be dismissed. It is not necessary to decide whether the notice of the contemplated action should always precede the opportunity to be heard, or whether they can occur concomitantly. Circumstances may justify an attenuated hearing e g where prompt and decisive action is called for (cf The Administrator of Transvaal and Others v Zenzile and Others, unreported Appellate Division judgment delivered on 27 September 1990 at p 55). An attenuated hearing is one limited as to the form it takes but not as to its essential nature. The enquiry must still go to the heart of the matter, and not to some lesser consideration. When all is said and done, however, the ultimate test of whether the notice was adequate and the opportunity of being

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heard a proper one is whether the overall proceedings, objectively considered, were fair in the circumstances.

In the present instance it is common cause that the respondents were entitled to be heard before any action to dismiss them was taken. They were, more specifically, entitled to be heard in relation to the question of their dismissal. A failure to afford them a proper opportunity to advance reasons why they should not be dismissed would vitiate any decision to dismiss them. Such failure occurred in the present case. The respondents were not given a fair hearing on the question of whether or not they should be dismissed. They were given a limited hearing - an opportunity to explain why they had stayed away from work - when the real issue was the broader one of their dismissal. Once the respondents were entitled to be heard on the question of why they should not be dismissed, it was

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not sufficient to provide them only with an opportunity to explain their absence from work. The hearing they were given therefore did not satisfy the requirements of the audi rule.

There remains one further matter to be considered. It is this. It was contended in the alternative by the appellants (and I quote from their heads of argument) "that it is for the Administration to decide what information is relevant and what matter should be taken into account and that the matter ends there". This contention is based on an accep= tance that Olivier had decided that the only consideration relevant to the respondents' dismissal was whether they could satisfactorily account for their failure to return to work, and had therefore restricted the hearing to such consideration. It was argued that no interference with the exercise of Olivier's

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discretion in this regard was justified. For this argument reliance was placed on a passage in the judgment of this Court in the case of Minister of Law and Order v Dempsey 1988(3) SA 19(A) at 35 D - F. It is not necessary to consider the passage concerned (the correctness of which may be open to some doubt). In relation thereto the judge a quo said the following:

> "This passage is however no authority for the proposition that the Administration could, without having heard the workers, decide what was relevant and what not. A decision as to what was relevant and what not was part of the decision to dismiss, and if the audi alteram partem rule had to be complied with that decision could not have been taken before an opportunity had been given to the person concerned to make representations as to why he should not be dismissed."

I agree. In any event, if a functionary misconceives the true nature of the enquiry he is called upon to hold because of an incorrect perception of what is relevant, and consequently conducts the

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wrong enquiry, the enquiry is deficient in law. The person affected by the outcome of the enquiry would not have had a fair hearing, and the audi rule would not have been satisfied.

In the result the appeal in my view should fail. It accordingly becomes unnecessary for me to consider any of the other contentions raised by the respondents.

J W SMALBERGER
JUDGE OF APPEAL