MEDIA WORKERS ASSOCIATION OF SOUTH AFRICA AND OTHERS v PRESS CORPORATION OF SOUTH AFRICA LTD ('PERSKOR')

APPELLATE DIVISION

BOTHA JA, E M GROSSKOPF JA, GOLDSTONE JA, KRIEGLER AJA and HARMS AJA

1992 August 27, September 17

Labour law—Labour Relations Act 28 of 1956 s 17A—Labour Appeal Court—Role of assessors—'Question of law' in s 17A(3)(e)*(ii) of Act—Rigid classification of all matters to be decided by court of law as either questions of law or questions of fact unnecessary—Third category of questions exists, viz matters of judicial discretion—Question whether particular facts constituting unfair labour practice a matter of judicial discretion—Assessors to take part in deciding such question—Exclusion of assessors from determining such question rendering decision of Labour Appeal Court void—Matter to be remitted to that Court, properly constituted, for consideration of matter afresh.*

There need not be a rigid classification of all matters to be decided by a court of law as being either questions of fact or questions of law. The expression 'question of law' may be used in a more limited sense to exclude not only questions of fact but also a third category of questions which are neither questions of law nor questions of fact, but matters of judicial discretion.

In deciding whether certain facts constitute an unfair labour practice in terms of the Labour Relations Act 28 of 1956, the Labour Appeal Court is not dealing with a 'question of law' within the meaning of s 17A(3)*(e)*(ii) of the Act, nor with a 'question of fact' for the purposes of s 17C(1)*(a)*. The issue falls within a third category of questions which has its genesis in the extraordinary jurisdiction established by the Act, and which requires the Court to pass a moral judgment on a combination of findings of facts and opinions. It follows that the Chairman of the Court's prerogative of deciding questions of law in terms of s 17A(3)*(e)*(ii) need not stand in the way of the conclusion suggested by the other provisions of the Act, viz that assessors should participate in answering the question of whether certain facts constitute an unfair labour practice.

The Court, in an appeal from the Labour Appeal Court, accordingly held that the Court *a quo* had erred in holding that the assessors had no part to play in deciding the question as to whether the facts found constituted an unfair labour practice, and that the assessors were full members of the Court for the purpose of deciding this question. The Court further held that the failure of the assessors to take part in deciding this issue rendered the purported decision of the Court *a quo* void, and that in the circumstances it was appropriate that the matter be remitted to be considered afresh by the Court *a quo* properly constituted. The Court further held that, should the Court *a quo* decide that there had been an unfair labour practice, it would have to decide whether the remedy granted by the industrial court was appropriate, and that in determining that aspect too the assessors were full members of the Labour Appeal Court.

The order in the judgment of *Perskor v Media Workers' Association of SA en Andere* (1991) 12 *ILJ* 86 (LAC) set aside.

Appeal from a decision of the Labour Appeal Court (Transvaal Division) reported at (1991) 12 *ILJ* 86 (Spoelstra J and assessors). The facts appear from the judgment of E M Grosskopf JA.

A *M S M Brassey* and *E Cameron* for the appellants.
M C Maritz and *E S J van Graan* for the respondent.

Cur adv vult.

Postea (September 17).

B

E M Grosskopf JA: The first appellant in this matter is the Media Workers Association of South Africa, an unregistered trade union. Together with some of its members individually it brought unfair labour practice proceedings in terms of s 46(9) of the Labour Relations Act 28 of
C 1956 ('the Act') against the respondent, a publishing company. The proceedings arose out of the dismissal of the individual appellants consequent upon a strike at the respondent's business. The industrial court held that the dismissal of the individual appellants was unfair, but did not grant them reinstatement. Instead they were granted sums of money in lieu of severance pay. The industrial court's determination is
D reported: see *Media Workers Association of SA and Others v Perskor* (1989) 10 *ILJ* 1062 (IC).

The respondent appealed in terms of s 17(12A) of the Act to the Labour Appeal Court (Transvaal Division) against this determination. The appellants cross-appealed against the refusal of the industrial court to
E grant reinstatement. A further dispute, viz whether the respondent was guilty of unfair selective re-employment, is no longer an issue in this appeal, and I need say no more about it.

The appeal to the Labour Appeal Court was argued before Spoelstra J and assessors. *In initio* the Court was called upon to decide a question
F relating to its functioning, viz were the assessors required to take part in the decision whether the proven facts constituted an unfair labour practice? The Chairman (Spoelstra J) held that the assessors had no role to play in this regard.

After considering the merits of the dispute, the Court upheld the appeal and determined that the dismissal of the respondent's employees did not
G constitute an unfair labour practice. No order as to costs was made.

The two assessors signed the judgment subject to the following qualification:

'Ons stem saam slegs ten opsigte van die uiteensetting van die feite.'

The judgment of the Labour Appeal Court is reported as *Perskor v*
H *Media Workers Association of SA en Andere* (1991) 12 *ILJ* 86 (LAC).

The Labour Appeal Court granted leave to appeal against its judgment and order. The issues on the merits before this Court were:

(a) Was the dismissal of the individual appellants an unfair labour practice?

(b) If so, what relief should the appellants be granted?

I Prior to the hearing before us, counsel on both sides were requested by the Court to submit argument on the following questions:

'1. Was the learned Judge *a quo* correct in holding that the assessors had no part to play in deciding the question as to whether or not the facts found constituted an unfair labour practice?

J 2. If not, what are the consequences in the present appeal?'

After hearing argument on the above questions, and before the merits were canvassed, the Court reserved judgment. The present judgment consequently relates only to these questions.

To decide what role is assigned to the assessors it is necessary to analyse the relevant provisions of the Act in some detail. Section 17A makes provision for the establishment of a Labour Appeal Court. That Court consists of a Judge of the Supreme Court, who is the Chairman of the Court, and two assessors appointed by the Chairman (s 17A(3)*(a)*). In terms of ss (3)*(b)* an assessor 'shall be a person who, in the opinion of the Chairman of the Court, has experience of the administration of justice or skill in any matter which may be considered by the Court'. The matters which may be considered by the Court are those arising out of its functions which are set out in s 17B. They are *(a)* to decide any question of law reserved for its decision by an industrial court in terms of s 17(21)*(a)* of the Act; *(b)* to decide any appeal in respect of a dispute concerning an alleged unfair labour practice determined by the industrial court in terms of s 46(9) of the Act; and *(c)* to determine reviews of the proceedings of industrial courts. Section 17A(3)*(e)*(ii) lays down that only the Chairman of the Court shall decide on a question of law or whether or not a matter is a question of law, and that for such purpose he shall sit alone. Quite clearly, therefore, it is not the function of an assessor to participate in decisions on reserved questions of law. Although an assessor could conceivably play a role in the decision of reviews and may be appointed for his skill in such matters, he is much more likely to be appointed for his skill in matters concerning alleged unfair labour practices which form the major part of the work of the Labour Appeal Court. And if he may be appointed for his skill in such matters, it is hardly to be supposed that the Legislature would have intended him to play no role in respect of the matter in which his skill may be of the greatest assistance to the Court, ie in deciding the ultimate question whether particular facts constitute an unfair labour practice. This is precisely the sort of question in respect of which a Judge may find it helpful to have the assistance of somebody who has experience in labour matters. For the sake of brevity I shall hereafter refer to this question as 'the ultimate question'.

There are also other provisions in the Act which indicate that an assessor is expected not only to take an active part in the adjudication of matters concerning alleged unfair labour practices, but is also required to participate in the determination of the ultimate question. Thus s 17A(3)*(c)* requires him to take an oath or make an affirmation 'that he will, on the basis of the evidence put before him, give a true decision in respect of the matters which have to be decided'. And s 17A(3)*(e)*(i) lays down that, in matters which are not questions of law, 'the decision or finding of the majority of the members of the Court shall be the decision or finding of the Court'. Thus the Act requires an assessor, whose main task is to sit in cases concerning unfair labour practices, to consider the evidence and to take part in the findings and decisions of the Court. In this regard the Court *a quo* said the following (at 101E–102A of the reported judgment):

'Die gebruik van die woorde "beslissing" (decision) en "bevinding" (finding) wek die indruk dat dit die bedoeling van die Wetgewer is dat die assessore 'n groter rol speel as om bloot feite vas te stel. *Die Afrikaanse Woordeboek* (deel 1 *sv*

A "beslissing") gee die betekenis van "beslissing" aan as: "1. Einduitspraak en 2. Besluit; die daad om te beslis; uitkoms." "Bevinding" se betekenis word aangegee as: "1. Uitkoms of resultaat van 'n waarneming of ondersoek. 2. Wat i/d gemoed ondervind word as gewaarwording—veral godsdienstige ervaring." "Decision" beteken volgens *The Shorter Oxford Dictionary*: "1. The action of deciding (a contest, question, etc); settlement, determination (with *a* and *pl*) a B conclusion, judgement: *esp* one formally pronounced in a court of law." Die tersaaklike betekenis van "finding" word aangegee as: "1. The action of find *v*." "Find" het verskillende betekenisse waarvan die volgende waarskynlik die mees toepaslik is: "1. 5 To discover on inspection or consideration" en "II. 5 *Law*. To determine and declare to be; to agree upon and bring in (a verdict); to ascertain the validity of (an instrument)." Aan elkeen van hierdie woorde wat in die Wet C gebruik word, moet vir sover moontlik 'n sinvolle betekenis gegee word. Hulle word klaarblyklik nie as sinonieme gebruik nie. In gangbare regstaal word daar gewoonlik tussen die twee begrippe onderskei deur "bevinding" tot feite te beperk en "beslissing" as sinoniem van "uitspraak" te gebruik (vgl bv *Herbert Porter & Co Ltd v Johannesburg Stock Exchange* 1974 (4) SA 781 (W) op 794 en *R v Dhlumayo* 1948 (2) SA 677 (A) op 695–6). Dit skyn te strook met die woordeboekbetekenis, D naamlik: "Beslissing" as einduitspraak en "bevinding" 'n resultaat van 'n waarneming of ondersoek na feite. As die assessore beperk word tot feitebevindings, kan hulle nie deel in die uiteindelike "beslissing" nie. Dit verontagsaam die uitdruklike bepalings van die Wet.'

I am in full agreement with this passage, and would add only a few E additional considerations. Concerning the meaning of 'decision', reference may also be made to *Judes v District Registrar of Mining Rights, Krugersdorp* 1907 TS 1046 at 1049 where Innes CJ said:

'Now to "decide" a matter means to take it into consideration and to settle it. And in the absence of any qualification in the statute it follows that the F determination of a question by a person clothed with the right to decide it must be a final determination. . . .'

'Decision' obviously has a corresponding meaning. Now in the present statute the words 'decide' and 'decision' are used without qualification, first in respect of the powers of the Court, which include the power to 'decide' any appeal relating to alleged unfair labour practices (s 17B(1)(*b*)), G and, second, in respect of the powers of the assessors who are granted the power in terms of s 17A(3)(*e*)(i) to participate in the Court's decisions or findings in such appeals. 'Decide' in s 17B is clearly used in the sense indicated by Innes CJ as being the normal one, namely to make a final determination. The Legislature is presumed to use words in the same H sense throughout an enactment. The word 'decision' in s 17A(3)(*e*)(i) must therefore be taken to have been used to mean a final determination, not only for the reasons stated by the Court *a quo* (ie that it is the natural meaning of the word, and that there would otherwise be tautology in the expression 'decision or finding'), but also for the further reason that the Legislature used the word 'decide' in that sense in the other related parts I of the statute.

The sum up: the Legislature clearly intended that assessors would play a useful role in the determination of disputes concerning unfair practices. It seems most unlikely that the Legislature would have intended this role to be limited to the determination of what the facts are, as distinct from the J ultimate decision whether such facts constitute an unfair labour practice.

And the terms of the Act indicate that the Legislature did not intend an assessor's role to be so limited. A

Despite these considerations the Court *a quo* held that the assessors were not to take part in the ultimate decision. It did so on the ground that this decision is a decision on a question of law which is the exclusive domain of the Chairman in terms of s 17A(3)(*e*)(ii) of the Act. It is, of course, conceivable that clear language in that section may override the indications found in other parts of the Act that the assessors should take part in the decision of the ultimate question. The question then is: is the language of s 17A(3)(*e*)(ii) sufficiently clear? B

To answer this question it is convenient first to consider a few jurisprudential analyses of the concepts of questions of law and questions of fact as an aid to the possible meaning of the expression 'question of law'. This topic is discussed in an illuminating section of *Salmond on Jurisprudence* 12th ed at 65–75. The term 'question of law,' the learned author states, is used in three distinct though related senses. In the first place it means a question which a Court is bound to answer in accordance with a rule of law—a question which the law itself has authoritatively answered to the exclusion of the right of the Court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression 'question of law' is used arises from the division of judicial functions between a Judge and jury in England and, formerly, in South Africa. The general rule is that questions of law in both the aforegoing senses are for the Judge, but that questions of fact (that is to say, all other questions) are for the jury. However, for various reasons many questions of fact are withdrawn from the cognisance of the jury and answered by the Judge. By an illogical though convenient usage of speech, any question which is thus within the province of the Judge instead of the jury is called a question of law, even though it may in the proper sense be a pure question of fact. *Salmond* gives various examples of such questions from English law but it is unnecessary to repeat them. C D E F G

When dealing with questions of fact, *Salmond* states that in its most general sense it includes all questions which are not questions of law. As the expression 'question of law' has three distinct applications, it follows that a corresponding diversity exists in the application of the contrasted term. H

The learned author then continues in a passage (at 68–9) which I quote *in extenso* because of its particular applicability to the present case:

'There is, however, a narrower and more specific sense, in which the expression question of fact does not include all questions that are not questions of law, but only some of them. In this sense a question of fact is opposed to a question of judicial discretion. The sphere of judicial discretion includes all questions as to what is right, just, equitable, or reasonable—so far as not predetermined by authoritative rules of law but committed to the *liberum arbitrium* of the courts. A question of judicial discretion pertains to the sphere of right, as opposed to that of fact in its stricter sense. It is a question as to what ought to be, as opposed to a I J

A question of what is. Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but of argument, and are submitted to the reason and conscience of the court. In determining questions of fact the Court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the B accused has committed the criminal act with which he is charged is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. The Companies Act empowers the Court to make an order for the winding-up of a company if (*inter alia*) the company is unable to pay its debts or the Court is of opinion that it is just and equitable that the company should be wound up. The first of these questions C is one of pure fact, whereas the second is a question of judicial discretion. The Divorce Court is empowered to grant divorce for adultery, and to make such provision as it may deem just and proper with respect to the custody of the children of the marriage. The question of adultery is one of fact; but the question of custody is one of right and judicial discretion.

Doubtless, in the wider sense of the term fact, a question whether an act is right D or just or reasonable is no less a question of fact than the question whether that act has been done. But it is not a question of demonstrable fact to be dealt with by a purely intellectual process; it involves an exercise of the moral judgment, and it is therefore differentiated from questions of pure fact and separately classified.'

A third meaning of the expression 'question or matter of fact' is when it is contrasted with a question or matter of opinion.

E

'A question of fact is one capable of being answered by demonstration—a question of opinion is one that cannot be so answered. The answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong. The past history of a company's business is a matter of fact; but its prospects of successful business in the future is a matter of opinion.'

F (*Ibid* at 69.)

Salmond's conclusion is stated as follows (at 70–1):

'Matters and questions which come before a court of justice, therefore, are of three classes:

(1) matters and questions of law—that is to say, all that are determined by G authoritative legal principles;

(2) matters and questions of judicial discretion—that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law;

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise H its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, its duty is to exercise its intellectual judgment on the evidence submitted to it in order to ascertain the truth.'

It should be noted that 'discretion' is used in the above discussion in a wide sense to convey 'the action of discerning or judging; judgment; discrimination' (*The Shorter Oxford Dictionary sv* 'discretion').

I

Reference may also be made to W A Wilson, 'A Note on Fact and Law' (1963) 26 *MLR* 609. This article starts off by defining the various questions which come before a Court. One of them is a 'description-question', ie whether the facts fall within a certain description. These 'description-questions' may be answered in various ways, which the J learned author classifies as 'A', 'B', 'C' or 'D' inferences. 'A', 'B' and 'C'

inferences all have involved in them universal propositions which, if present, indicate that the facts fall within the definition, or when absent, indicate that they do not. A 'D' inference arises in the following circumstances (at 617):

'Often the court is unable to say that a necessary characteristic is absent or that sufficient characteristics are present. It may then say that it is a question of degree or impression, that the answer depends on the amount present of some characteristics or on the weighing of some statements pointing one way against statements pointing in the other direction.'

At 620 the learned author discusses whether the making of a 'D' inference gives rise to a question of fact or a question of law and refers also to other commentators. Views differ: some regard it as a question of fact, some as a question of law, and some as *sui generis*—neither fact nor law.

It is apparent that *Wilson's* 'D' inference covers much the same field as *Salmond's* matters of judicial discretion, although the latter would appear to be narrower and to require some element of moral judgment. Since, as I propose indicating later, disputes concerning alleged unfair labour practices must be decided in accordance with moral precepts, *Salmond's* analysis appears to be particularly relevant.

Although the above analysis of the concepts of matters of law and fact have, as far as I know, not been approved in our law, some of the distinctions have been recognised. Of particular importance for present purposes is the threefold distinction between matters of law, matters of discretion, and matters of fact. In *Mahomed v Kazi's Agencies (Pty) Ltd and Others* 1949 (1) SA 1162 (N) a Full Bench was dealing with the appealability of an order sanctioning the acceptance of a compromise in terms of s 103 of the Companies Act 46 of 1926. At 1168 the Court (*per* Broome J) accepted that, 'in as much as the section requires the Court to come to a decision upon a matter which is neither an issue of law nor an issue of fact, it vests that Court with what is loosely called a discretion'. The Court was, however, not prepared to accept that the exercise of such a 'discretion' granted the order made pursuant thereto any special immunity from challenge on appeal. (See also the Full Bench case of *Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another* 1989 (4) SA 31 (T) for an interesting discussion on the appealability of orders made pursuant to discretionary powers, the correctness of which in all its aspects need not be considered in the present case.)

In principle, therefore, there need not be a rigid classification of all matters to be decided by a Court of law as being either questions of fact or questions of law. The expression 'question of law' may be used in a more limited sense to exclude not only question of fact but also a third category of questions which are neither questions of law nor questions of fact, such as that which *Salmond* called matters of judicial discretion. If the expression was used in this sense in s 17A(3)(*e*)(ii), this might serve to reconcile the Chairman's sole authority to decide on questions of law with the provisions of the Act which indicate that the assessors are to have a voice in the answering of the ultimate question. To see whether such a reconciliation is possible, one must determine whether the characterisation of particular facts as an unfair labour practice can be regarded as falling within this third category.

A The starting point is the definition of 'unfair labour practice'. It is common cause that the appropriate definition in the present case is that which pertained prior to the amendment of the Act by Act 83 of 1988. The definition then read as follows:

' "(U)nfair labour practice" means—

B *(a)* any labour practice or any change in any labour practice, other than a strike or a lock-out, which has or may have the effect that—

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

C

(iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in para *(a)*.'

D It will be noted that the definition is based on the effect which a particular practice has or may have on matters such as employment opportunities, work security, welfare, the disruption of an employer's business, the promotion of labour unrest, etc. The question whether particular facts have or may have such effects can hardly be described as E a question of law. But the matter does not end there. The Court is not only to decide whether such effects have been caused or may be caused, but must also have regard to considerations of fairness or unfairness. This is stated expressly in paras (i) and (ii) of the definition, but is also implicit in the very concept of an unfair labour practice. It is further underlined by F the provisions of s 17(21A) which establish the jurisdiction of the Labour Appeal Court in relation to unfair labour practice disputes. Subsection *(c)* empowers the Court on appeal in such matters to 'confirm, vary or set aside the order or decision appealed against or make any order or decision, including an order as to costs, according to the requirements of the law and fairness'. Clearly, the Court's view as to what is fair in the G circumstances is the essential determinant in deciding the ultimate question. See *Marievale Consolidated Mines Ltd v President of the Industrial Court and Others* 1986 (2) SA 485 (T) at 498J–490I; Brassey and others *The New Labour Law* at 12–13, 58–9; Van Jaarsveld and Coetzee *Suid-Afrikaanse Arbeidsreg* vol 1 at 328.

H The position then is that the definition of an unfair practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the I term. It is the passing of a moral judgment on a combination of findings of fact and opinions. It follows that the Chairman's prerogative of deciding questions of law (s 17A(3)*(e)*(ii)) need not stand in the way of the conclusion suggested by the other provisions of the Act considered above, namely that the Act contemplates that assessors should participate in J answering the ultimate question. These various sections can exist in

harmony if the expression 'question of law' in s 17A(3)*(e)*(ii) is interpreted strictly so as not to include questions such as the ultimate question. A

In argument before us it was contended that, if the ultimate question is not regarded as a question of law, anomalies would arise in appeals to the Appellate Division. Such appeals are regulated by s 17C of the Act. Appeals are permitted (with leave) against a decision or order of the Labour Appeal Court 'except a decision on a question of fact' (s 17C(1)*(a)*). It was argued that if the decision on the ultimate question is not one of law, it must be one of fact, and that the Appellate Division would consequently have no power to consider it on appeal. That the Legislature intended the powers of the Appellate Division to be so limited, the argument proceeded, is extremely unlikely, and is negatived by cases such as *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) ('the *Ergo* case') and *National Union of Metalworkers of South Africa and Others v Macsteel (Pty) Ltd* 1992 (3) SA 809 (A) ('the *Macsteel* case'). B C

This whole argument is based on the premise that, if a question is not a question of law, it must be one of fact. For reasons already stated, this is not necessarily true. Notionally, there may be a third category of questions to be decided by a court, such as the questions which *Salmond* called questions of judicial discretion. In the present case the ultimate question can clearly fall into such a category—as I have pointed out above, it is a question which, in the final analysis, has to be answered in accordance with conceptions of fairness. It cannot be answered by applying rules of law, nor can it be determined by way of proof or demonstration in the manner in which facts are proved. D E

It seems reasonable to suppose that the Legislature, when introducing this new jurisdiction which, *inter alia*, entailed that decisions would be taken on grounds of both law and fairness, realised that decisions so taken could not readily be classified as decisions either on matters of law or on matters of fact. This would explain why the Act does not reflect a rigid dichotomy between questions of law and of fact—the Chairman of the Labour Appeal Court is given the exclusive power to decide on questions of law, whereas the jurisdiction of the Appellate Division is defined to exclude decisions on questions of fact. These provisions would enable assessors in the Labour Appeal Court to take part in the determination of all matters which are not strictly matters of law, while enabling an appeal to the Appellate Division on all matters which are not strictly matters of fact. The ultimate question falls comfortably within the undistributed middle. F G H

It was also contended that, if the Legislature considered the assistance of assessors helpful in deciding the ultimate question, it would also have provided assessors to assist the Appellate Division when hearing appeals in such matters. This argument is misconceived. Many specialised Courts make (or made in the past) provision for assessors or non-legal members to participate in its decisions. See, for instance, *re* criminal courts, s 145 of the Criminal Procedure Act 51 of 1977, *re* Water Courts, ss 35, 36 and 38 of the Water Act 54 of 1956 before its amendment by Act 73 of 1978; and *re* Special Income Tax Courts, s 83 of the Income Tax Act 58 of 1962. These statutes all allow or allowed appeals to the Appellate Division, I J

A including appeals in respect of decisions taken by, or with the concurrence of, assessors or lay members. Nevertheless, the Legislature has never made provision for assessors in the Appellate Division. There are probably various reasons for this, but one of them is presumably that the skill and knowledge of the assessors or lay members will be reflected in the reasons
B of the Court *a quo*, and will in that way be available also to the Court of appeal. Be that as it may, there is no anomaly in a lower court deciding, with the assistance of assessors or lay members, matters which the Court of appeal decides on its own.

Some argument was also addressed to us on the manner in which an appeal in an unfair labour practice dispute should be approached. If the
C ultimate decision is a matter of judicial discretion, it was contended, this Court should allow an appeal only if the discretion of the lower Court was not properly exercised. See *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335D–E. However, as I stated above, the word discretion is used here in a wide sense. Henning 'Diskresie-uitoefening' in 1968 *THRHR*
D 155 at 158 quotes the following observation concerning discretionary powers:

> '"(A) truly discretionary power is characterised by the fact that a number of courses are available to the repository of the power" (Rubinstein *Jurisdiction and Illegality* (1956) at 16).'

The essence of a discretion in this narrower sense is that, if the
E repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him. I do not think the power to determine that certain facts constitute an unfair labour practice is
F discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court *a quo* on the merits of the matter. In the field of unfair labour practices this has been accepted by this Court in the *Ergo* and
G *Macsteel* cases.

In passing I should state, lest I be misunderstood, that even where a decision is not discretionary in the narrow sense considered above, there may be features in the nature of the decision or the composition of the tribunal *a quo* which might call for restraint by a Court of appeal in the
H exercise of its powers. Such restraint would then, however, be exercised for policy reasons, and would not, as with discretionary decisions, flow necessarily from the nature of the decision appealed against. The possibility that such policy reasons may exist in some cases is, however, irrelevant for present purposes. The argument with which I am dealing at present is that if the decision on the ultimate question is a matter of
I discretion, this Court cannot in principle substitute its discretion for that of the Labour Appeal Court. This argument I answer simply by saying that the decision is not a matter of discretion in the relevant sense of the word. See also, in general, *Mahomed*'s case *supra* at 1168–9, the *Tjospomie Boerdery* case *supra* at 41H–42D and *Lennon Ltd and Another v Hoechst*
J *Aktiengesellschaft* 1981 (1) SA 1066 (A) at 1076A–D, 1077F–H (however,

the example of an award of general damages in *Lennon's* case at 1077G–H is, perhaps, not very felicitous).

I turn now to a consideration of the basis upon which the Labour Appeal Court came to its decision. Before that Court much reliance was placed on cases dealing with income tax matters. The need to define the expression 'question of law' arose in such cases out of the provisions relating to appeals. Section 86 of the Income Tax Act 41 of 1917 provided that 'whenever any question of law arises', the Special Income Tax Court shall, when requested by either party or on its own motion, state a case for the determination of such question by the Provincial or Local Division having jurisdiction, which shall give its ruling thereon. From such ruling an appeal lay to the Appellate Division (see *Platt v Commissioner for Inland Revenue* 1922 AD 42 at 48). Provision for appeal on a stated case in respect of a 'question of law' appears also in s 60 of the Income Tax Act 40 of 1925 and s 81 of the Income Tax Act 31 of 1941, as also when the last-mentioned section was substituted by s 10(1) of the Income Tax Act 39 of 1945, except that there was then added a provision that no appeal would lie on a question of fact. This wording was carried forward—see s 86 of the Income Tax Act 58 of 1962. (Of course, since 1976 there is a full appeal—see s 86A as inserted by s 24(1) of Act 103 of 1976.)

In the income tax cases the question for determination was consequently whether a particular point was appealable as a question of law or not. If it was not a question of law, there was no appeal. The term 'question of law' was interpreted in this context. In particular, the scheme of the Income Tax Acts did not suggest that for their purposes there may be a need to assign a restricted meaning to the term, or that there may be questions for determination by a Court which are neither questions of law nor questions of fact. The income tax cases are accordingly not of direct relevance for present purposes. Nor are they helpful and Spoelstra J does not seem to have relied on them. After quoting the well-known passage in *Morrison v Commissioner for Inland Revenue* 1950 (2) SA 449 (A) at 455 (which commented on a test proposed by Lord Parker in *Farmer v Cotton's Trustees* 1915 AC 922 at 932) and analysing the provisions of the Act, Spoelstra J (at 102E) came to the conclusion that, irrespective of whether the test in *Cotton's* case or *Morrison's* case were applied, the ultimate question was one of law because the definition of unfair labour practice could not be applied without recourse to interpretation. In particular, the word 'unfairly' required interpretation. With respect, I do not agree with this reasoning. Interpretation is the process whereby the meaning of language is established. Spoelstra J may well be right in saying that it may sometimes be necessary to interpret words in the definition of 'unfair labour practice' such as 'strike' or 'lock-out' (although both bear statutory meanings). In the present case this need did not arise. Nor was there any problem in determining the meaning of the word 'unfairly'. The Labour Appeal Court was consequently not faced with a question of interpretation. The real problem in the present case is to decide whether particular acts or the consequences of acts are unfair. This is a matter of applying a general criterion to the facts. As *Wilson* classifies it, it is a 'description-question'—do the acts or their consequences fall within a particular

description? This calls, not for a determination of what 'unfairly' means, but for a value judgment on the facts and their consequences.

It follows that, in my view, the reasoning of the Court *a quo* in the respect in issue cannot be supported. The same applies to the similar conclusion reached in *National Union of Metalworkers of South Africa v Vetsak Co-operative Ltd and Others* (1991) 12 *ILJ* 564 (LAC) at 565H–566B.

In conclusion I should refer to a passage from the judgment in the *Ergo* case which was much relied upon in argument. It reads as follows (at 723E–F):

> 'It would appear that we are required to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order. *That is a question of law*. If it did then the appeal must fail. If it did not, then this Court may amend or set aside that decision or order or make any other decision or order according to the requirements of the law and fairness.'

(Emphasis added.)

This passage sets out the manner in which this Court will approach an appeal from a Labour Appeal Court in unfair labour practice cases. From what I have said above, it will be clear that I am in entire agreement with it in that respect.

What was stressed in argument, however, was that the Court in the *Ergo* case characterised the ultimate question as a question of law. Now it must be borne in mind that the classification of questions to be decided by the Court was not in issue in that case. Nor was the function of the assessors in the consideration of the ultimate question—in fact, in the *Ergo* case the two assessors did consider the ultimate question and delivered a joint judgment separately from that of the chairman (see the *Ergo* case *supra* at 722F). The judgments in the Labour Appeal Court are reported as *East Rand Gold and Uranium Co Ltd v National Union of Mineworkers* (1989) 10 *ILJ* 683 (LAC)). When this Court in the *Ergo* case described the question to be decided as a question of law it was accordingly saying no more than that this question could properly be considered and determined by the Appellate Division. In the light of after-knowledge it might have been better to have followed the wording of s 17C(1)(*a*) and to have described the question in issue as not a question of fact. In the *Ergo* case nothing turned on this distinction, and this inaccuracy, irrelevant in its context, clearly cannot serve as a precedent for the present case.

It follows from what I have said above that in my view the wording and purpose of the Act lead to only one conclusion, namely that the ultimate question whether the facts found by the Court constitute an unfair labour practice is neither a 'question of law' within the meaning of s 17A(3)(*e*)(ii) of the Act nor a 'question of fact' for the purposes of s 17C(1)(*a*). It falls within a third category of question which has its genesis in the extraordinary jurisdiction established by the Act.

The answer to the first question which this Court put to counsel is accordingly no—the learned Judge *a quo* was not correct in holding that the assessors had no part to play in deciding the question as to whether or not the facts found constituted an unfair labour practice. The assessors are full members of the Court for the purpose of deciding this question.

I turn now to the second question put to counsel—what are the consequences of the learned Judge's incorrect finding? Clearly the failure of the assessors to take part in deciding the ultimate question rendered the purported decision of the Labour Appeal Court void. The Chairman, who decided this question on his own, did not constitute the Labour Appeal Court for that purpose. The Court, properly constituted, has not yet given judgment in the matter. Compare *S v Gqeba and Others* 1989 (3) SA 712 (A) at 717I–J; *S v Malindi and Others* 1990 (1) SA 962 (A) at 975J–976B. In these circumstances it seems appropriate that we remit the matter to be considered afresh by the Labour Appeal Court properly constituted. That we have the power to do so in terms of s 17C(2) of the Act seems clear.

There was some debate before us concerning the procedure to be followed by the Labour Appeal Court if the case were remitted to it. It seems to me that that is a matter which that Court will have to decide. It has had the benefit of argument on all aspects of the case and may be prepared to consider its judgment without further reference to the parties. On the other hand, it may wish to ask for further argument, either generally or on particular questions. The assessors may wish to concur in the present judgment of the Labour Appeal Court, either as it is or with amendments, or they may wish to write separate judgments, as was done in the *Ergo* case *supra*. There is nothing in the Act which precludes this (see, by way of comparison, s 146 of the Criminal Procedure Act 51 of 1977). The Chairman is also, of course, fully entitled to change his view.

If the Labour Appeal Court were to hold that there has been an unfair labour practice, it will have to decide whether the remedy granted by the industrial court was appropriate. It follows from what I have said that this also is a question of judgment or discretion which, according to the scheme of the Act as interpreted above, does not fall within the sole province of the Chairman. On this aspect also the assessors are full members of the Court.

Finally, I turn to the costs of the appeal. The parties were *ad idem* that, if the matter is remitted for further consideration by the Labour Appeal Court, costs of this appeal should be ordered to be costs in the cause.

In the result the following order is made.

1. The appeal is allowed, and the order of the Labour Appeal Court set aside.
2. The matter is remitted to enable the Labour Appeal Court, consisting of the Chairman and assessors, to reconsider the question whether the proved facts constituted an unfair labour practice, and to give judgment accordingly.
3. The costs of this appeal, including the costs of two counsel, are to be costs in the cause.

Botha JA, Goldstone JA, Kriegler AJA and Harms AJA concurred.

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