IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: PA5/01

In the appeal between

MARITIME INDUSTRIES TRADE UNION OF SOUTH AFRICA **1st Appellant**

O'BREIN AND OTHERS **2nd and further Appellants**

and

TRANSNET LIMITED **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

JOHAN NIEHAUS N.O **Third Respondent**

JUDGEMENT

ZONDO JP

Introduction

[1] The first appellant in this appeal is the Maritime Industries Trade Union of South Africa (**"the union"**). The second and further appellants (**"the individual appellants"**) are some of the union's members who are employed as tugmasters by Transnet Limited, the first respondent, at

Portnet, which has been described in the papers as a division of the first respondent. The third respondent (**"the commissioner"**) is a commissioner in the employ of the Commission for Conciliation, Mediation and Arbitration (**"the CCMA"**) which is the second respondent in this appeal.

[2] A dispute arose between the appellants and the first respondent concerning the obligations, if any, of the first respondent to, as it was put by the appellants, afford the individual appellants training necessary for them to acquire a qualification known as the Standard Training Certificate for Watchkeeping (**"the STCW"**). The appellants alleged that the first respondent was contractually obliged to afford them an opportunity to undergo the said training but was refusing to do so. The first respondent disputed the alleged contractual obligation, stated that in any event it had provided them with training that enabled them to qualify for the job that they had been employed to do and there was no warrant for it to incur the large costs that would go with the said training. The appellants claimed that the first respondent's conduct in this regard constituted an unfair labour practice as defined in item 2(1)(b) of schedule 7 to the Labour Relations Act, 1995 (Act no 66 of 1995) (**"the Act"**). They sought that the first respondent be compelled to afford them the training they sought. Item 2(1)(b) of schedule 7 provides that, for purposes of item 2, an unfair labour practice means **"any unfair act or omission that arises between an employer and an employee, involving -**

(a) ....

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits of an employee;"

[3] The appellants referred the dispute to the CCMA for conciliation.

Thereafter they requested, in terms of the provisions of item 3(4)(b) of schedule 7, that the dispute be arbitrated. Item 4(2) of schedule 7 confers on the arbitrator dealing with such a dispute power to determine it **"on reasonable terms".** The CCMA appointed the commissioner to arbitrate the dispute. The commissioner found in favour of the appellants and issued a detailed award in the appellants' favour and against the first respondent. The award is now reported as **Maritime Industries Trade Union of SA & others v Portnet (2000)21 ILJ 2519 (CCMA).** It is not necessary to reproduce the terms of the award in this judgement. Aggrieved by the award, the first respondent brought an application in the Labour Court to have that award reviewed and set aside. The Labour Court granted the application. The judgement of the Labour Court is reported as **Transnet Ltd v CCMA & others (2001)22 ILJ 1193 (LC)**. With the leave of that Court, the appellants now appeal to this Court against that judgement. Before dealing with the appeal, it is necessary to set out the facts of the matter and some of the evidence that was led in the arbitration proceedings before the commissioner.

The facts

[4] Through Portnet, the first respondent provides certain services at South African ports to both local and foreign shipping vessels. One of the services that it provides is the operation of tugs that are used to tow ships into and out of harbours. They are operated by tugmasters.

[5] Prior to 1997 the qualification that was required for one to be a tugmaster was the STCW. This qualification enabled a tugmaster to operate a tugboat both within a port and at sea. Naval officers could not be employed by Portnet as tugmasters at the time because their qualifications were not recognised. The first respondent suffered a

serious shortage of tug masters in 1997. It entered into discussions with the Department of Transport which had the statutory regulatory power in regard to maritime safety at the time, with a view to finding a solution to the problem. The result of the discussions was that the Department of Transport permitted the first respondent to employ naval officers under certain conditions. It did this by way of a circular that it issued on the 24th April 1997 that was known as Marine Circular no 10 of 1997.

[6] The content of marine circular no 10 is of critical importance in this matter. For this reason it is necessary that it be reproduced in full. It reads thus:

"MARINE CIRCULAR NO. 10 OF 1997

TO ALL PRINCIPAL OFFICERS

THE EMPLOYMENT OF NAVAL OFFICERS ON PORTNET TUGS

1. In the continued development of its policy to allow the employment of naval officers on commercial vessels and in discussions with Portnet, the Department has agreed to their employment on Portnet tugs subject to the following conditions:

(a) the employment is permitted on exemption in terms of Section 83 of the Merchant Shipping Act;

(b) it is initially for a period of six months in the position as mate of a tug. This six months covers the Portnet training phase. Thereafter, it is as

master on exemption if Portnet reports favourably on the training phase;

(c) because the officer does not hold a STCW equivalent certificate, the exemption is for port limits only and not for voyages to sea;

(d) the officer concerned must have at least two years' bridge watchkeeping experience on naval vessels of more than 24m in length, a medical certificate and have passed a DOT eyesight examination. Furthermore, he must have held a naval bridge watchkeeping board examination certificate during the period he gained the two years' experience mentioned above; and

(e) the application for exemption is to come from Portnet.

2. The above is an interim measure. Portnet is developing a training programme and plan to take officers through from rating to master. There will be a programme for certificates limited to port operations and another to enable the officer to obtain an STCW endorsement to his or her certificate of competency.

3. It is the aim of the programme to slot naval officers into these training programmes and in so doing dispense with the need for exemptions. Should a Naval Officer want to obtain a Deck Officer certificate of competency with STCW endorsement, the current system and practice calls for him or her to show proof of the following for the issue of a Deck Officer Class 3 certificate of competency.

(a) 12 months' sea service on trading vessels on

long voyages. Those officers who have sea service on fleet replenishment ships such as the "Drakensberg", may apply to the senior examiner for masters and mates for such time to be recognized;

(b) a pass in the examinations "Naval Architecture" and "Cargo Work and Shipping Practice" for D.O. Class 3;
(c) a pass in the DOT eyesight examination;
(d) equivalency or a pass in:

(i) survival craft;
(ii) efficient deck rating;
(iii) first aid at sea;
(iv) fire fighting; and
(v) electronic navigation systems; and

(e) at least 2 years' sea service as a watchkeeping officer whilst holding a naval bridge watchkeeping board examination certificate.

4. The above is as matters now stand. The current revision of the Examination and Manning Regulations will accommodate the above and place it on a more permanent footing.
5. Please do not hesitate to contact Chief Director Shipping or Director Shipping Competency should you require further clarification or explanation

For DIRECTOR-GENERAL: TRANSPORT"

[7] Subsequent to the issuing of circular no 10 the first respondent caused an advertisement to be published in the Sunday Times for vacant

posts of tug masters. In this matter the content of the advertisement is also important. For that reason an example of the text of such advertisement is reproduced hereunder. It reads:

> **"PORTNET, a division of Transnet Limited, manages and controls South Africa's commercial ports. The following vacancies exist within the Marine Department at Richards Bay:**
>
> **TUG MASTER**
>
> **(4 POSTS)**
>
> **Applicants should be in possession of a recognised South African Certificate of Competency as Deck Officer (Minimum Class 5 with a command endorsement), or an accepted and approved Naval Watch Keeping Officer Certificate. Experience in the handling of sea going craft will be an advantage.**
>
> **The salary is attractive and includes an excellent range of large-company fringe benefits. Opportunities for self-realisation and career advancement within the Group exist.**
>
> **Interested persons can forward an application accompanied by a detailed CV.**"

[8] The individual appellants responded to the advertisements in the newspapers. They were interviewed. The first respondent then sent them offers of employment by way of letters. In due course the first respondent proceeded to conclude written contracts of employment with the

individual appellants. Clause 18.1 of the contracts of employment of the individual appellants was to the effect that the **"agreement constitutes the entire service agreement between the parties and substitutes any previous agreements that may have been entered into between the parties and any such previous agreement shall have no further effect."** Clause 18.2 reads thus: **"No variation or amendment of this agreement shall have any legal effect unless reduced to writing and signed by the parties".**

[9] The offers of employment had an annexure **"A"** which was the remuneration package. The last sentence of annexure **"A"** stated that **"(t)his appointment is also subject to you obtaining a Tug Handling Certificate within 12 months of your appointment as Tugmaster-in-Training".** The first respondent told the individual appellants in their letters of appointment that **"(t)his offer of employment is subject thereto that you comply with the requirements of Marine Circular no 10 of 1997 in respect of the employment of Naval Officers on Portnet tugs."**

[10] Soon after their employment, the individual appellants underwent training for six months as mates of tugmasters as required by marine Circular no 10. Thereafter they were granted exemptions in terms of sec 4(a) and 85 of the Merchant Shipping Act, 1951 (Act 57 of 1951). The exemptions were granted by the South African Maritime Safety Authority (**"SAMSA"**) which had, in the meantime, taken over from the Department of Transport as the regulatory body in respect of maritime safety. The granting of exemptions was an interim measure pending the promulgation by SAMSA of regulations that would be binding on all operations in the industry with regard to the employment of ex-naval

officers. The exemptions were extended from time to time.

[11] In due course the first respondent developed a qualification called the Port Operations Certificate. That certificate qualified its holders to operate tugs only within ports whereas the STCW certificate qualified its holders to go to sea as well. Furthermore, the STCW qualification is an internationally recognised qualification whereas the Port Operations Certificate does not enjoy international recognition. The first respondent required the individual appellants to sit for the examination of the Port Operations Certificate.

[12] The individual appellants adopted the attitude that the first respondent was obliged to afford them the training necessary for them to acquire the STCW and were not prepared to sit for the examinations of the Port Operations Certificate. The first respondent told them that it was not obliged to train them to acquire the STCW. It said that there was no warrant for the costs that it would have to incur in providing them with the training necessary for the STCW when it had already developed a qualification that met its needs and enabled the individual appellants to be tugmasters. It emphasised that the individual appellants had been appointed to be tugmasters and the qualification that it had developed would qualify them to be tug masters. It threatened them with dismissal if they did not sit for and passed the examination. Ultimately, the individual appellants relented and wrote the examinations. Except for one, they all passed and were then employed by the first respondent as tugmasters. As already stated above, a dispute then arose between the parties on this and, in due course, the dispute was the subject of arbitration proceedings.

Arbitration proceedings

[13] At the commencement of the arbitration the commissioner urged the parties to try and agree what the dispute or issues before him were and what he was called upon to decide. A discussion ensued that led to the commissioner making a statement that sought to identify the issues that he was called upon to decide. None of the representatives indicated to him that his formulation of the issues did not correctly reflect the issues that he was called upon to decide. Even after the arbitration none of the

parties did so. It, therefore, seems that it can fairly be accepted that the commissioner's statement was seen by the parties as correctly reflecting the issues he was called upon to decide. He said that the issues were:.

> (a) whether or not there was an agreement that the individual appellants **"were entitled to undergo the STCW training and,**
>
> **(b) whether [the respondent]'s conduct in not allowing the [individual appellants] to undergo that training is in fact unfair looking at the totality of circumstances."**

[14] In this Court the appellants have made it clear in par 44 of their heads of argument that "**(a) the appellants' case as presented in the CCMA was premised squarely on a claim that they were contractually entitled to undergo STCW training; (b) the parties in fact agreed that the existence or otherwise of such an entitlement was the first issue to be determined by the commissioner."** In par 50 of their heads of argument the appellants further stated that **"the commissioner correctly identified as the core issue before him whether the [individual appellants] were entitled to receive training for the STCW certificate in terms of their contracts of employment."** In par 52 of their heads they went on to state that **"(t)he dispute can accordingly not be described as anything other than a dispute about the existence of an alleged right to training."**

[15] The appellants led the evidence of Mr Barington-Smith, Mr O'Brien, Mr Purdon (wrongly spelt as Perlin in the CCMA record) and Mr Keller. The first respondent only led the evidence of Captain Van der Krol. The commissioner concluded that it was a term or condition of employment of the individual appellants that the first respondent would afford them the

training that they sought. He also held that the first respondent had failed or refused to afford them such training. He concluded that such failure or refusal constituted changing their conditions of service and that such conduct on the first respondent's part was arbitrary, irrational and constituted an unfair labour practice. He stated that in coming to the conclusion that such was their term or condition of employment, he had relied on the advertisement, Marine Circular 10 and the evidence of Messrs O'Brien, Purdon , and Keller. It is therefore necessary to refer to those parts of their evidence that seem relevant to this issue. Thereafter it will also be necessary to refer to portions of the evidence of Captain Van der Krol.

Mr O'Brien:

In his evidence in chief Mr O'Brien did not give evidence suggesting that in the interview he was promised that he would undergo the STCW training and on what basis or terms such training would be undertaken nor did he give any such evidence under cross-examination. There was no re-examination. Accordingly there is no evidence that Mr O'Brien gave which the commissioner could have relied upon to conclude that in Mr O'Brien's interview an agreement was reached between Mr O'Brien and the first respondent about the STCW training. Mr O'Brien testified that, after his appointment and during the training period no mention was made of any training for the STCW or examinations or course which would have to be completed to comply with Marine Circular No 10.

[16] Mr O'Brien also testified to an impromptu meeting with Captain Van der Krol at some stage where the issue of the individual appellants

obtaining the STCW was discussed. He said that the captain had told them that, if they wanted to go to sea in order to obtain the STCW, they could resign and do it in their own time. Mr O'Brien gave his understanding of part of the contents of circular no 10 as being that the first respondent was going to establish two programmes and it was going to be up to the employee to choose which one he wanted to do. Mr O' Brien testified that in order to get the STCW, one had to do **"the theoretical block at Technikon, you then go to sea to comply with the minimum seatime required by SAMSA. On completion of those two you can then sit an examination."** Under cross-examination Mr O' Brien testified that the provision in his letter of appointment by the first respondent that such offer was subject to him complying with marine circular no 10 of 1997 in respect of employment of Naval Officers on Portnet meant that at some stage or another **"we have to comply.... either a Master Port Operations Certificate which did not exist at that time or an STCW qualification."** He was then asked why it was necessary for them to comply with that. He replied that that was in order for them to be able to **"legally drive a tug without exemption"**. He conceded that it was a Portnet tug that they were being enabled to drive legally.

Mr Purdon (spelt as Mr Perlin in the transcript)

[17] In his evidence in-chief Mr Purdon was asked what was said at the interviews that he attended. He replied that **"the point of further training was brought up especially with respect to class 3 certification."** He went on to say: **" It was mentioned that [the first respondent] would be sending us to actually get the qualification. Class 5 Port Operations was never mentioned."**It is noteworthy that at this stage of his evidence Mr Purdon did not say when it was said that

they would be sent to obtain the qualification nor did he say on what basis they would be sent. He did not say whether this would be on the basis of full-pay, part-payment or on the basis of unpaid leave.

[18] Mr Purdon also testified that he was only short of six months' seatime for his class 3 certificate. He then stated that he requested permission to go to sea for an additional six months. He was told, he said, that **"we would be released but we needed to find our own boats."** He continued thus: **"I enquired when it came to Unicorn, Unicorn informed me that I would need an exemption from SAMSA to say that I could sail as a Class 3 certificated person and Unicorn would actually send me on a tanker course in order to sail. However, SAMSA was not willing to give us those dispensations so the possibility of going to sea with the Unicorn was not available. The possibilities of going to sea with Safmarine, we were informed by them that Portnet has a training programme with them and in order for us to go to sea with them we would need to get on some Portnet cadet training programme.**"

[19] It is also important to note that Mr Purdon did not say in his evidence that, when he was told that they would be released to go to sea in order to obtain the STCW but that they would have to find their own boats, he protested and said that in terms of an agreement with the first respondent, the first respondent was obliged to either provide the boats itself or to make the necessary arrangements for him to get a boat. Instead he proceeded to try and make arrangements on the basis of what the first respondent had said. That is not the conduct of a person who believed that his contract of employment obliged his employer to actually provide all the necessary for that training.

[20] Within the context of Marine Circular 10, Mr Purdon was asked whether there was any indication that he would have an opportunity to

obtain the STCW qualification. His reply was:

> **"Yes there was an effort from Portnet's side to a specific point and every time it was yes, you can go and all of a sudden there were reasons why we were not able to go to sea, either it was not in the company's interests, you cannot be released. The following person is not available or you cannot, you also have to go to the cadet training programme. Every time you made some effort to further yourself it was blocked somewhere."**

It is important to observe that Mr Purdon did not give any evidence to show that the reasons that were given to him at different stages as to why he could not be sent to training or the basis on which he could be sent to training were not true or valid. The commissioner has also not said why those reasons should not be accepted as having been genuine, true and valid.

[21] Mr Purdon also gave evidence about the importance to him of obtaining the STCW. He said that it would ensure his career advancement within the first respondent and mobility within the industry. He also said that, although he was not willing to leave the first respondent, the STCW would ensure that he was not **" stuck in one specific company for another 35 years until the age of 63."** He said that the Port Operations Certificate put him in the same job for the next 35 years.

[22] Mr Purdon also testified that the Bridge Watchkeeping Certificate was discussed in his interviews as well as how much sea time he required for his Class 3 certificate. He then said: **" that was basically the things that we discussed at my interview with regard to training.**

Then it was they wanted to know how much further training Portnet would actually have to have before I had a class 3 certificate." A little later his representative asked him this leading question :- **"So there was considerable discussion, so you could say there was some sort of meeting of minds?"** Not unexpectedly, Mr Purdon's reply was in the affirmative. At some stage during Mr Purdon's evidence - in- chief the commissioner warned Mr Purdon's representative not to **" put words in the witness' mouth".** He also told him that **"(a)t the end of the day you are going to do your case a lot of harm because I am going to take it into account when I make my award."** It is also important to observe that Mr Purdon never at any stage testified that any representative of the first respondent had ever said that the training would be provided on the basis that the first respondent would alone bear all the costs and that during the training he would be on full pay or what the position would be about his salary during his training period.

Mr Keller

[23] The appellants' representative asked Mr Keller **"to give us a brief account [of] what took place at the interview particularly regarding qualifications and training."** Mr Keller replied: **"I know for Richards Bay. What they did after they interviewed us describing the working conditions and how we are going to work the craft, etcetera ... and then after we have qualified they said they will give us or we will have to go and write the class 5 ticket so that we can go to sea as a watchkeeper."**

[24] When asked by the commissioner to repeat the end portion of the above evidence, Mr Keller said: **"After we-well, what they told me**

there is that from Richard's Bay that we should write the class 5 ticket but that is the STCW class 5 ticket so we can go to sea as a watchkeeper on a merchant ship so we can get the required seatime to get the class 3 tickets." Soon after that he said that in the Port Elizabeth interview **"they did not even make mention of the class 5 ticket. They just said well, we will send you to sea so we can get the STCW ticket."**

[25] Mr Keller also testified that on one occasion Captain Davies had told him and others that they would give them permission to go to sea on condition that **"we actually go and organise our own berths."** He testified to attempts he had made to proceed with arrangements on that basis but was told, it seems by third parties from whom he was trying to secure a berth, that Portnet had a training scheme and he had to go on to the training scheme otherwise those third parties would not give him a berth. He testified that he then tried to get on to the training scheme and was told by a Mrs Fitchley on various occasions that it was not in the first respondent's best interests **"and that was it."**

[26] At a certain stage the appellants' representative asked Mr Keller the following question: **" So what I want to know is when you were employed you were told that you would be able to go to sea and get an STCW class 3 certificate. Is that what you were saying?"** The answer came: **"Yes that is correct."** Then his representative went further and asked: **"Then some period down the line when that was going to come to, actually supposed to take place, they said no it was no longer in their interest. Is that what you? "**The answer came: **"That is correct."**

[27] Another leading question followed from Mr Keller's representative. **"So there was a change, is that correct? You said there was a change?"** The answer: **"That is correct".** Then another leading question: **"In your conditions?"** The answer was long this time but was not the answer suggested by the question. The reply was:

> "**Because we actually went there to clarify the amount of seatime we still require for SAMSA and I have got proof of that as well in my personal capacity and after presenting that evidence I said well, this is how much I still require to get my Class 3 ticket then I was told that it is not in the company's best interests to send us to sea, that a Class 5 Port Operations would be sufficient to meet the company's needs."**The representative then followed up: **"How do you find this change?"** and the answer was: **" I think it is unfair. We are not given a chance."**

[28] Mr Keller testified also that there was a discussion at the local bargaining forum to the effect that **"we must take leave of absence and we will just be - we will be sent away on duty so to speak. They will maintain our Tugmaster's salary and go to sea, get the seatime and then come back and just carry on. "**No clarification was given on who was going to maintain their salaries.

[29] Under cross-examination Mr Keller was asked what his career prospects were within Portnet when he took up his appointment. His answer was that Captain Davies had discussed with him that **"we will spend a period as Tugmaster but there is opportunity for us to become Pilots and that they will provide us with adequate training**

to actually become that and become pilots and to carry onto Port Captain, etc." He was then asked if his case was that the first respondent had changed his conditions of service and he answered in the affirmative. He was then asked what those conditions of employment were. He replied: **"Well, future aspects for one, that we have at least got a future path, a career path (inaudible). At the moment we have not got that."**

Captain Van der Krol

[30] Capt. Van der Krol testified that Marine Circular No 10 was a document addressed to Principal Officers to inform them that there were two options that could be followed in regard to the training, the one being the Port Operations Certificate route and the other being the STCW route. He testified that the Port Operations Certificate allowed the first respondent to do all its training in-house whereas with the STCW route the first respondent had to send its people away to sea for shipping companies to employ them on their ships. He said:**"It was a very costly exercise and it was an exercise that had not borne any fruit. We were looking at an alternative route. That was the one part. The other part was that it also applied to personnel within Portnet who had come up on the tugs who would work as deckhands on tugs and that they could progress to Master's certificate, Master of Port Operation without having to go to sea."**

[31] Captain Van der Krol testified that the Port Operations Certificate was created as a result of a desire to align the South African regulations with **"the international protocol"** which had then to be submitted to the International Maritime Organisation. He said that during this exercise it

became apparent that **"with STCW with the stricter code in terms of revalidations that it would no longer be possible for the port industry to go the same way and that there were alternative routes and those routes were explored and the Port Operations Certificate was born from that. "**Capt Van der Krol also said that in separating the seagoing industry from the port industry, South Africa was doing what the United Kingdom and other countries on the continent had already done. He emphasised that the first respondent was firmly in the port industry and not in the seagoing industry. He testified that it was up to the first respondent to make up its mind which route it had to follow in terms of the two routes contemplated in Marine Circular no 10.

[32] Captain Van der Krol testified that an ex-naval officer who wanted to obtain the STCW needed certain theoretical knowledge as set out in the relevant regulations and, for the practical knowledge, he would have to spend a period at sea which he thought would be six months plus a period at a Technikon. Asked what the cost implications were for the training necessary to obtain the STCW, he said that there had been instances where people had gone to sea in order to obtain sea going qualifications and the first respondent had allowed them to go to sea on unpaid leave in which case the cost implications for the first respondent had been relatively small but, continued Capt Van der Krol, if people went to sea on full pay, the costs were **"horrendous".**

[33] Captain Van der Krol was asked under cross-examination why the first respondent had not instituted any sort of training programmes for all the individual appellants. His answer was that the individual appellants had all been on training programmes to become tug masters. He was then asked why the first respondent had not just sent some of them to

sea so that they could get some sea time to obtain the STCW because it was in place. His answer was that in terms of capacity it was impossible in the first instance to send people to sea so that, even if the first respondent had wanted to send them to sea, it was not possible. He was asked why it was not possible, and he said **"... Because of the capacity of exchange that we had".** He was then asked to explain what he meant. He explained thus:-

> **"Capacity of exchange is the total number of personnel employed on the marine side. As I have indicated in '96 we were under tremendous pressure. There were great shortages. The Naval personnel were brought in on exemption, we trained them for six months after which it was for six months on full pay, the company had them on full pay whilst training and after that they could perform their job. So only at the end of the first six months could they start adding value to the company. Now if I go to my bosses and say now I am going to send these people to sea for the next year and then they are going to go to Technikon and then I can use them I think I would have been fired."**

[34] Captain Van der Krol testified that until December 1999 the Port Operations Certificate was not available or could not be issued and the only qualification that was available was the STCW which required going to sea. He gave evidence also to the effect that, although the first respondent had a capacity problem and, for, among others, that reason, could not send the individual appellants away to sea, they had sent out some employees on pilot training. This was in regard to what was referred to as the Rotterdam training programme.

[35] Captain Van der Krol was then asked under cross-examination how the first respondent had managed to have the necessary capacity to send some personnel to training on the Rotterdam programme but had not had capacity to send the individual appellants to sea for their STCW training . His reply was that the Rotterdam training was a very special scheme which had been designed as an accelerated training course. He said that the 14 personnel that had been sent on that training had been from formerly disadvantaged groups and they had been at sea with shipping companies and, except for two or three, they had not been part of the normal port complement. He said that they had been brought in and had then been sent off to Rotterdam. He testified also that in that group of 14 there had been ex-naval personnel but stated that those had also been from disadvantaged groups. He said that in East London the capacity had been four tug-masters and two of them had been released to join the Rotterdam training. He testified that the East London management had been prevailed upon to release the two to join the training. He continued: **"We moved heaven and earth, we shook all the trees and we managed to get these people released ..."**

[36] After Captain Van der Krol had testified that Portnet still had some of its employees at sea who were being trained for the STCW, he was asked how come Portnet still had employees at sea when, according to the minutes of a meeting held in Pretoria between SAMSA and Portnet on the 13th July 1999, Portnet had stated that it was no longer its goal to require their staff to hold the STCW. He testified that this goal had changed during 1996 to 1997. He replied that Portnet had two goals. One was operating a tug and the other operating pilotage. He said that the goal for operating a craft was restricted to port operations. He said

that the goal was **"STCW qualifications to Pilot and subsequently at the March workshop we modified that one as well."**

[37] Captain Van der Krol was further asked how Portnet managed **"to organise berths on ships and release [the people who were at sea]"** as he had said that Portnet lacked capacity. He answered that it was at the ports that Portnet lacked capacity. He testified that the people at sea fell outside the complement of the ports. He said that those people who had gone to sea **"are in the nature of cadettes."** He said that they **"come directly from Technikon. We recruit them after they have done their two years at Technikon and they are then sent away with a shipping company in order to obtain their class 3 certificates. We have an arrangement with shipping companies. These cadettes are paid a very low rate and we pay the shipping companies for their board and lodging on board the vessels"** He was then asked under cross-examination whether that facility was available only to cadettes or whether it was also available to any other employees such as the navy personnel to go to sea and obtain the qualifications. He replied that every now and then they got applications from people - mostly on the engineering side - who asked to go to sea and they were given unpaid leave of absence in order to go and get their higher qualification but that depends on the operational requirements.

[38] Capt Van der Krol was then asked whether it was normal practice to employ people on a temporary basis to release people to go to sea. He said that operationally in the ports they have a provision for short term contracts and they use those in most of the ports. He recalled an old pensioner in Durban who was still driving a tug ten years after his retirement. He said that this was done in order to provide relief to

personnel when tugmasters go on leave because of the shortages that the ports had. When Captain Van der Krol was asked whether it would not be possible to make the same arrangement on a staggered basis for the ex-navy personnel, he replied that any request in that regard would be treated on an individual basis. He said that to his "**almost certain knowledge"** nobody had applied on the basis that he would take unpaid leave in order to pursue a seagoing career to obtain his qualifications and then come back to the service but said that if there were, then he would like to see their requests.

[39] It was suggested that Mr Meintjies, one of the individual appellants, had unsuccessfully tried to be allowed to go to sea and had even been prepared to go on unpaid leave but had been turned down. Capt. Van der Krol testified that no such application or request had been submitted to his office. However, he explained that some of the issues relevant to such a request were operational issues which fell within the power of a Port Captain to decide. An example of such a matter was whether the people could be released or not. He said that other issues fell within the power of his office to decide. An example of such matters was the question whether in terms of policy people went to sea on full pay or on unpaid leave.

[40] Captain Van der Krol was asked what it would cost Portnet to send the individual appellants to get STCW training if they went on full pay. He said that the costs would have to be assessed on the basis that each individual appellant had to do a year at sea and then had to go to Technikon on top of that. He said that there was the cost of the monthly salary of the particular employee for a year and there was the cost of employing someone else who must do his job for a year, which could be at the same salary roughly. He took the case of Mr O'Brien, one of the individual appellants who, it was stated, was earning R 190 000,00 per year. He said that if, for convenience, one rounded that figure to R 200 000,00 per year it meant that Portnet would have to pay R 200 000,00 to Mr O'Brien and another R 200 000,00 to his temporary replacement and rounded the costs to Portnet at about half a million rand per person.

[41] Captain Van der Krol further testified that he was convinced in his own mind that an ex-naval officer who had a Port Operations Certificate

could become a pilot without ever having to go to sea and he was not going to put the company to the expense of half a million rand per person when there was that option of career advancement for the individual appellants. He said that, of course, it was different if an employee took unpaid leave to go to such training because the cost to the first respondent became relatively small.

[42] Captain Van der Krol was asked how under the present system any of the individual appellants could become a pilot. He referred to the minutes of a certain workshop that had taken place in March of that year which he said had outlined the route to becoming a pilot. His answer was that in terms of the minutes of that workshop there were three different routes leading to being a pilot. He said that they did not talk of ex-naval officers in the document. They simply talked about tugmaster's level. He said that tugmasters would have either the class 3 certificate or the Master's Port Operations Certificate. The individual appellants held the Master's Port Operations Certificate. Both categories are then on the same level of qualification.

[43] Captain Van der Krol said that there were two schemes. The one scheme, he said, was the cadet scheme and the other was the internal route which was via skipper port operations. The cadet scheme, he continued, required the STCW qualification to get to the position of pilot. That is the STCW route. In the internal route, he said, the STCW qualification is not a requirement. He said that the internal route accommodated both employees with the class 6 qualification as well as the ex-naval officers. Being tugmasters the individual appellants could then make application to go to Pilot-in-training. If they went to Pilot-in-training, they would have to do either a bridging course or they could attend Technikon and obtain a T3 and, when they have completed that bridging course, they could go to trainee pilot and do the practical training of pilot and then they would be able to go through to pilot. He said that that is how their career path was sketched.

[44] Captain Van der Krol was asked whether Portnet was prepared to pay while the employees were studying the T3 . He answered: **"Yes, Portnet will have to, in terms of the Master's they will have to make certain facilities available for people to study and for them to equip themselves for Pilot-in-training. The bridging course is the preferred one. We believe it is still going to take time to transfer the**

bridging course from Rotterdam to us but in the meantime we say a bridging course or a T3."

[45] He was asked whether the individual appellants could then all go on to the T3 course. Capt Van der Krol's answer was that they could all apply to go on to the T3 course and their applications would be considered. He said that the selection criteria had not been finalised but would be in due course. He said that the process to be followed would be transparent. He further testified that the selection criteria would be fair. He testified that the individual appellants needed to follow the relevant procedure if they wanted to go on to the T3 course. The implication was that, if they did not follow the procedure, they would never know if their applications would have been successful.

[46] Asked whether he had at some stage said to any of the employees that they would have to resign if they wanted to go to sea and obtain the STCW, Captain Van der Krol testified that he may well have said so in terms of Portnet's capacity at the time. He added that he had always maintained that obtaining the STCW for the individual appellants did not add any value to the first respondent but was a personal matter for each individual who wanted it because he could see that it added value to a person. He was then asked why he told or would have told the employees that they would have to resign as opposed to informing them that they would have to take unpaid leave or would be able to go to training when there was enough capacity. He was asked whether this meant that there was no possibility of the individual appellants being allowed to go to training. His answer was that in terms of capacity there was no possibility. He then testified that the situation was that **"when capacity improves and ... there is over capacity of personnel,... it would be in the company's interest to allow them to go off on unpaid leave."**

[47] At some stage Captain Van der Krol was asked what Portnet's costs were on marine training. He replied that the Rotterdam training was wholly subsidised by the Dutch Government including the salaries. With regard to the cadets at sea, Captain Van der Krol testified that they were costing Portnet a lot of money once they were cadets. Portnet paid them their wages as well as for their accommodation. He was referred to a statement he had allegedly made earlier to the effect that it took about ten years to train people to class 1 level and it was suggested that this should be quite costly to Portnet. His answer was that it actually was not costly with regard to those. He said that this was **"because with them what happens is we train them until they get their first STCW qualification and from then on they go on unpaid leave and they can then look after themselves, they get paid by the shipping company and from then on really the only cost involved to us are the periods at Technikon. So it is quite cost effective for us."**

[48] A question was asked of Captain Van der Krol whether Portnet had ever considered negotiating **"some sort of arrangement"** between the union representatives of the individual appellants and Portnet to reduce the cost to Portnet of the training. Captain Van der Krol's answer was that discussions on those types of issues took place between Port Captains and individuals and **"it was said to them that they can go on unpaid leave but we certainly cannot pay their full wages but no approaches have been made for negotiations on any of these scores to say can naval officers go to sea and can anything better be negotiated and then on no pay."**

[49] Captain Van der Krol further emphasised that consultation is**"a two-way street"** and that **"what we do from the company is to look**

after the company's interest first and foremost, so we train in accordance with the strict company needs. If there are areas where that training starts going over into other areas we are always open to approaches from other unions. That door is never closed. If you consider that the Master Port Operations Certificate and certain modules go towards STCW, if a person professes an interest in going for STCW we have said the unpaid leave option is always open."

[50] Captain Van der Krol emphasised that the individual appellants were unqualified when they started with Portnet. He said that they were trainees. The first respondent had then put them on a six months training on full pay. That training had been necessary to enable them to perform their job. In the light of that, continued Captain Van der Krol, it could not be expected of a commercial organisation that from the day that they completed that training and were then able to do their work, it would then start training them for their next job when they were required on their job. He emphasised that Portnet had trained the individual appellants for the job that they had applied for.

[51] Captain Van der Krol also emphasised that his goal was to keep the operation going. Everybody had managed to get a Master's Port Operation Certificate and could now drive a tug legally without needing an exemption from SAMSA. He then said: **"We are busy building capacity which translates into being able to release people and yes, we would welcome any proposals coming from the side of Labour where they see that they can improve their prospects and to see if this can be dovetailed with the company but I mean that is something for the future, that is certainly not something that was**

on the table at the time. What was on the table at the time was to get legal."

[52] At no stage did the appellants' representative during cross-examination challenge Captain Van der Krol's credibility nor did he at any stage suggest to the captain that the veracity of his evidence was being disputed in any way. The result of this was that Captain Van der Krol's evidence was not challenged in any material respect.

The commissioner's finding that an agreement had been reached between the individual appellants and the first respondent that they be afforded STCW training.

[53] The commissioner found that there was an agreement between the individual appellants and the first respondent that the former would receive training necessary to acquire the STCW. He then said that, as an alternative to that finding, it was his finding that **"there was at least an agreement to the effect that the individual appellants would [be] afforded the opportunity to obtain a qualification substantially equal to STCW".** He went on to say that the first respondent had failed to provide the STCW training and that its insistence on the individual appellants completing the Port Operations Certificate could not be regarded as compliance with its original contractual obligations.

[54] In considering this aspect of the dispute, the commissioner stated that he had considered the contents of the advertisement, the maritime circular no 10, the interviews of the three individual appellants who testified, and the letters of appointment of the individual appellants. The contents of the advertisement have been quoted above. The only part of the advertisement that is relevant is the one that reads **"opportunities for self-realisation and career advancement within the Group exist."**

The commissioner found that this could not on its own be relied upon to conclude that there had been an agreement that the individual appellants were entitled to undergo training to obtain the STCW. He said that it created nothing more than a hope. In my view all the advertisement said in this regard was that there were opportunities but left it to the parties to later explore such opportunities. It also did not say anything about the STCW training

[55] The commissioner then proceeded to examine the marine circular no 10. Clause 1 of the circular recorded that the Department of Transport had agreed to the employment of ex-naval officers by the first respondent as well as the conditions subject to which such agreement had been reached. Clause 2 said that what was stated in clause 1 was an interim measure. It then proceeded to say that **"(t)here will be a programme and plan to take officers through from rating to master."** It further stated: **"There will be a programme for certificates limited to port operations and another to enable the officer to obtain an STCW endorsement to his or her certificate of competency."**

[56] The first sentence of clause 3 of the circular provided that it was the aim of the programme **"to slot naval officers into these training programmes and, in so doing, dispense with the need for exemptions."** Clause 3 went on to set out what the system required at that stage if a naval officer wanted to obtain a Deck Officer certificate of competency with an STCW endorsement. The commissioner made reference to clause 2. He said that the parties argued about who of them was given the choice of the programmes. He said that the first respondent argued that it was up to it to choose which programme was

used or followed whereas on behalf of the individual appellants it was argued that the choice was that of the employee in each case. In the end the commissioner expressed the view that the content of the circular was such that it could support either party's argument in this regard. He then concluded his consideration of the content of the circular on the basis that he would be very reluctant to determine the dispute solely on the basis of an interpretation of the circular. He then considered what was said at the interviews of the three individual appellants who testified.

[57] The commissioner stated in his award that the appellants had led evidence to the effect that the first respondent's representatives stated at the time of the interviews that ex-naval officers employed by the first respondent would be afforded an opportunity to gain sea-time and that they would be able to obtain the STCW. He also stated that the first respondent had not challenged this. At that stage of the award, the commissioner asked whether this constituted an agreement to train ex-naval officers to obtain the STCW. The commissioner stated that the first respondent's representatives would have made the prospects of advancement as attractive as possible because the first respondent was desperate to get tug masters and it had particularly targeted naval officers. At this stage it is apposite to state that this statement by the commissioner was without any evidential basis and was mere speculation. He also stated that the employment of the individual appellants was subject to their obtaining the necessary commercial qualification. He further noted that at that time the STCW was the only available qualification.

[58] In the result on this point the commissioner concluded that it was a condition of service between the individual appellants and the first respondent that they would be allowed to undergo training to acquire the STCW. He said that the condition was **"imported into the employment contract by means of the marine circular no 10 (in addition to the consensus reached at the interviews)".** He said also that the first respondent had devised a qualification that was of a lower status or quality when it devised the Port Operations Certificate. In this regard he

held that the first respondent had acted in breach of **"the imported contractual term ..."**

[59] The commissioner also sought to deal with the dispute on the basis that the first respondent's conduct in refusing or failing to provide the individual appellants with training necessary to obtain the STCW constituted a unilateral change of their terms and conditions of employment or alternatively, that the individual appellants had a **"reasonable expectation"** to be provided with the necessary training to obtain the STCW. The commissioner proceeded to say : **"[The first respondent] acted in a manner which was in breach of its contractual obligations or in a manner which undermined the [individual appellants' reasonable expectation'. As such there was a change in conditions of service".** Immediately after saying this, the commissioner had this to say: **"However, such a change is not automatically 'unfair' (in the ordinary sense). Such a change is also not necessarily arbitrable and if it is, it is not necessarily 'unfair' for purposes of item 2(1)(b) of Schedule 7 to the LRA".**

[60] Later on in his award, the commissioner dealt with the issue of jurisdiction to arbitrate the dispute. In the course of his discussion of this issue he makes statements that reveal the basis of his finding that it was a condition or term of the contracts of employment between the individual appellants and the first respondent that the first respondent would provide them with training towards the STCW. At 221 of the record he says in his award: **"In the present matter I have already concluded that STCW training or equivalent training was a term of contract by means of the express agreement between the parties at the interviews, together with the importation of Marine Circular 10 of**

1997**'s provisions into the employment contract. It follows that [the first respondent] was not entitled to vary these provisions without the consent of Mitusa or the affected employee".** A few paragraphs later the following sentence appears: **"The only processes and issues which impacted on their contracts of employment were the advertisement, the content of what transpired at the interviews and their physical contracts of employment incorporating the provisions of Marine Circular 10 of 1997."**

The appeal

[61] A proper analysis of the commissioner's award reveals that the fundamental basis of the award is the commissioner's finding that an agreement had been reached between the first respondent and the individual appellants that the first respondent would provide the individual appellants with training for the STCW. The agreement that the commissioner found had been reached must, of necessity, be an agreement that is enforceable in law, otherwise it would not give rise to any rights in law. The commissioner must also have had that in mind because he said that that agreement was incorporated into the contracts of employment of the individual appellants. I do not think that it would be incorporated in to a contract of employment if it was not a legally enforceable agreement.

[62] The finding by the commissioner that an agreement had been reached which became part of the individual appellants' contracts of employment is fundamental to his award. Indeed, as already indicated above with reference to the appellants' heads of argument, the appellants claim to entitlement to the STCW training is based almost entirely on there having been an agreement that became part of their

contracts of employment. In saying this I do not lose sight of the fact that there were two issues that the commissioner identified at the commencement of the arbitration and that the first related to the existence of an agreement and the other was simply whether the first respondent's conduct in not allowing the individual appellants to undergo training for the STCW was unfair **"looking at the totality of the circumstances."** On a proper analysis of the award I think it is clear that negligible reliance was placed by the commissioner on any conduct on the part of the first respondent for any purpose other than to show the existence of an agreement and a breach thereof. I shall deal with this a little later. In the light of the above the commissioner's finding relating to the existence of an agreement needs to be considered carefully against the background of the grounds of review relied upon by the first respondent.

[63] One of the grounds on which the first respondent contended that the commissioner's award should be reviewed and set aside was that the award was unjustifiable and irrational. One basis which was advanced by first respondent for this contention is given in par 56.2.4 of the founding affidavit. It relates to clauses 18.1 and 18.2 of the contracts of employment between the individual appellants and the first respondent.

[64] Clauses 18.1 and 18.2 read thus:-

> "18.1 This agreement constitutes the entire service agreement between the parties and substitutes any previous agreements that may have been entered into between parties and **any such previous agreement shall have no further legal effects.**

18.2. No variation or amendment of this agreement shall have any legal effect unless reduced to writing and signed by the parties." (My underlining).

[65] In par 56.24 of the founding affidavit the first respondent states:

> **"By concluding that the representations made at the interviews, together with the contents of [Marine Circular No 10 proved an agreement for the provision of STCW training, [the commissioner] exceeded his powers in that [the] contracts of employment, annexures "J4" to "J9" are stated therein to be the entire agreement between the parties, expressly superceding all prior agreements."**

[66] The individual appellants did not in their answering affidavit respond to the allegations in par 56.2.4 of the first respondent's founding affidavit. Although the commissioner did not oppose the first respondent's review application and abided the Court a quo's decision, he, nevertheless, filed an affidavit in which he responded to some of the allegations made by the first respondent in its founding affidavit. His reply to the allegations in par 56.2 and thereafter of the founding affidavit is to be found in par 5.2 of his affidavit. In par 5.2.2.2 thereof he states that in considering the matter he had not considered the contracts of employment attached to the founding affidavit as **"J4"** to **"J9".** He then states that he did not recall that they had been **"introduced into evidence at the hearing."** Those contracts contained the same terms as the contracts of employment of the rest of the individual appellants. In fact Mr O'Brien conceded under cross - examination that they were

standard contracts for the rest of the individual appellants.

[67] The commissioner's affidavit was deposed to on the 6th September 2000. The individual appellants' answering affidavit was deposed to on the 19th October 2000. In their answering affidavit the individual appellants did not state that those contracts of employment were not part of the record before the commissioner despite the fact that they would have seen from the commissioner's affidavit that he was saying that he did not recall that the specific contracts had been admitted in the arbitration proceedings. When they read such statement by the commissioner the individual appellants would have been prompted to state that they also did not recall those contracts being admitted to evidence or to deny that they were admitted to evidence if that was their version. They did not do any of this. They simply did not give any reply to the particular allegations.

[68] It is interesting to note that, when the individual appellants sought to reply to the allegations in par 47 of the founding affidavit, which included a reference to annexure **"JH16"** they saw fit in par 17 of their answering affidavit to state that annexure **"JH16"** had not been placed before the commissioner in the arbitration proceedings as evidence. The deponent to the answering affidavit then says:**"I am advised that it will be argued at the hearing of this matter that, to the extent that its contents may be deemed relevant, it cannot accordingly be placed before Court for purposes of review".** It is, in my view, quite clear from this that the individual appellants would have said the same about annexures **"J4"** to **"J9"** if the position was that annexures **"J4 "** to **"J9"** had not formed part of the documentary evidence before the

commissioner. In the replying affidavit the first respondent states quite categorically that the contracts were admitted as evidence in the arbitration proceedings.

[69] It cannot be said that a dispute of fact has arisen about whether the contracts of employment were or were not admitted in the arbitration proceedings because the commissioner did not state that they were not. All he said was that he did not recall. Furthermore, the appellants have not said that the contracts were not admitted as evidence and yet they had an opportunity of saying so if that was their version. In any event a reading of the record reveals that at least in respect of Mr O'Brien, one of the individual appellants, evidence was led about his letter of appointment. At 100 of the record the commissioner read out the letter of appointment for Mr O'Brien. One of the paragraphs therein says: "**your transfer does not affect the validity of the management agreement entered into with you."** The commissioner then went on to ask what the management agreement was and was told that that referred to the contracts of employment of the individual appellants. The record reveals that the commissioner then said: **"Alright I will arrange for copies of that."** Thereafter the transcript reflects the commissioner asking that someone at the front desk be asked to make copies.

[70] The commissioner admitted in his affidavit that he had not considered annexures **"J4"** to **"J9"** in deciding the matter. He should have done so especially when he was contemplating making a specific finding that an agreement was reached which became part of the contracts of employment between each individual appellant and the first respondent. In this regard it needs to be borne in mind that he knew from the evidence that there were written contracts of

employment existing between the individual appellants and the first respondent. It should have occurred to him that in such a case he needed to read the contracts of employment first before he could conclude that another agreement was incorporated into them because there would always be a risk that each contract has a clause prescribing that only a written agreement could vary or amend it effectively.

[71] The commissioner's reliance on an oral agreement that, on his finding, was concluded between the parties prior to the conclusion of the written contracts of employment of the individual appellants flies in the face of the provisions of clause 18.1 and 18.2 of the contracts of employment. As stated above, those clauses are to the effect that; (a) no prior agreements would be effective, and (b) no agreement concluded after that to vary or amend such contracts of employment would be effective unless reduced to writing and signed by the parties. The commissioner did not give any reason in his award justifying his reliance on such prior agreement in the light of those clauses. In his affidavit he admitted that he did not consider the contracts of employment annexed to the first respondent's founding affidavit. The commissioner's finding in this regard is wholly unjustifiable.

[72] Quite apart from the basis given above for the conclusion that the commissioner's award was irrational and unjustifiable, I think there is another basis on which the same conclusion can be reached. In coming to the conclusion that it was a term or condition of the contracts of employment of the individual appellants that the first respondent would provide them with the STCW training, the commissioner stated in his affidavit that he based his finding on the content of the advertisement,

marine circular no 10 and the interviews of Messrs O'Brien, Purdon and Keller. In the last two sentences of his affidavit the commissioner stated that the evidence of the three individual appellants informed his "**interpretation of especially marine circular 10"** which he said, **"was central to the arbitration".**

[73] The commissioner said in his award that neither the advertisement nor marine circular no 10 contained enough to justify a finding that an agreement had been reached between the individual appellants and the first respondent that the latter would provide the former with the STCW training - I would add - on full pay and entirely at its cost alone. It follows that, had there not been the oral evidence of the three individual appellants, the commissioner would not have made the finding that he made. If that is so, then that evidence must have been central to his finding in this regard. I do not think that there was much in the evidence of those three to justify the weight that the commissioner obviously attached to it. I deal with that evidence as well as that of Captain Van der Krol below.

[74] Mr O'Brien did not at any stage testify that during his interview the first respondent's representatives ever told him that he would be afforded training to obtain the STCW. Mr Purdon's evidence did suggest that he was told that the first respondent would afford him the opportunity to undergo training for the STCW. However, he did not at any stage testify that he was told what the terms and conditions were going to be for undergoing that training. He did not, for example, say who it was said would bear the costs of the training or whether the first respondent's representatives ever told him that the first respondent would bear such costs all by itself. He also did not testify that he was told that during such training he would be granted leave on full-pay or on partial pay or whether it would be an unpaid leave. On the contrary he testified that at some stage the first respondent had told him that they would be released to go to sea for the training to acquire the STCW but were told that they would have to find their own boats. He did not testify that this surprised him and he viewed it as a breach by the first respondent of its agreement with him or as a breach of his conditions of service on the basis that he and the first respondent had an agreement in terms of which the first respondent was obliged, in giving him the opportunity for that training, to also provide him with a boat or to make the necessary arrangements for him to obtain a boat. That would have been the natural reaction of a

person who believed that the first respondent was contractually obliged to provide everything in connection with the training. On the contrary Mr Purdon proceeded to try and make arrangements to obtain the boat for himself which was completely inconsistent with a belief on his part that the first respondent was obliged to provide all of this.

[75] Furthermore, the appellants' representative was, to a very large extent, asking the appellants' witnesses leading questions on controversial issues which he should not have done. Of course, as he was not a lawyer, he might not have known that he should not do that. One of the leading questions was on the most important aspect of the dispute. He asked: **"So there was a considerable discussion, so you could say there was some sort of meeting of the minds?**" At this stage even the commissioner could not take it anymore. He warned the appellants' representative not to "**put words in the witness' mouth."** He told him that by doing that he was going to do his case a lot of harm because he, i.e the commissioner, would take this into account when making his award. Despite this undertaking, the commissioner does not seem to have taken this into account when he considered the issues. If he had done so, one would have expected him to say so because it would have seriously weakened the evidence of Mr Purdon about whether an agreement had been reached in his interview that the first respondent would provide him, on full pay and entirely at its costs, with the training for the STCW. I have already said that Mr O'Brien did not give any evidence of an agreement being reached at his interview. So, if the commissioner had kept his undertaking of taking into account the fact that Mr Purdon's evidence - whatever its quality and value - was obtained through leading questions by his representative, he probably would have concluded that Mr Purdon's evidence was not good enough on this important aspect of the dispute.

[76] Although Mr Keller did testify that at Richards' Bay they were told that **"(w)e should write that class 5 ticket but that is the STCW class 5 ticket so we can go to sea as a watchkeeper on a merchant ship so we can get the required seatime to get the class 3 tickets,"** he did not testify about what the full terms and conditions of such agreement as it may be suggested was reached in the interview were. He did testify that at some bargaining forum it was said that their salaries would be maintained when they went for training at sea. That was in a bargaining forum - not in the interview. Even in regard to what he testified was said in that bargaining forum, he did not say who it was that said this. It may well have been said by some person who was not employed by the first respondent; it may have been said by a union official who was giving his understanding of the position that may have been erroneous; it may have been said by an official of the bargaining forum giving a mistaken view of the true position.

[77] When Mr Keller was asked under cross examination what conditions of his employment he was claiming the first respondent to have changed, he answered that it was **"future aspects [maybe he meant prospects] for one that were have at least got a future path-career path (audible). The moment were have not got that."** If, as Mr Keller suggested, his complaint was that the first respondent had failed to provide him with a career path and it is that conduct on the first respondent's part which he contended constituted a change of his conditions of service, the commissioner should have had regard to Captain Van der Krol's undisputed evidence of the career path that the first respondent had started putting in place for, among others, all the employees holding the Port Operations Certificate. This included the individual appellants. If he had taken that evidence into account, it is

difficult to see on what basis he could have concluded that the first respondent had not ensured that Mr Keller, for example, would have a career path.

[78] Mr Keller's evidence can simply not be said to have been anywhere near to being enough to conclude that an agreement enforceable in law had been reached in his interview to the effect that he would be provided by the first respondent with training necessary to acquire the STCW on full pay and that the first respondent would foot the entire bill. On the contrary, just as is the case with Mr Purdon, Mr Keller's own evidence reveals conduct on his part that is inconsistent with an employee who believed that he had an agreement with his employer - the first respondent in this case - that obliged the first respondent to provide the required training on the basis that it was responsible for all costs and arrangements. He testified that at some stage Captain Davis had told him or him and others that the first respondent would release them to go to sea in order to get training for the STCW but had said that they had to organise their own berths. One would have expected that, when Captain Davis said this,

> Mr Keller would have asked why they were then being told to organise their own berths when they had an agreement with the first respondent in terms of which the first respondent was responsible for everything and they did not have to do anything other than to just present themselves at the training. No, that is not what Mr Keller did. On his own evidence, he then proceeded to try and make arrangements to obtain berths. That is conduct that is completely inconsistent with any case on his part that a contract had been reached between, among others, himself and the first respondent to the effect suggested on their behalf.

[79] There can be no doubt, in the light of the aforegoing, that the evidence of the three individual appellants provided no basis whatsoever for the conclusion by the commissioner that a legally enforceable agreement had been reached at the interviews of the individual

appellants that the first respondent would provide them with the STCW training. The commissioner's finding to the contrary is completely unjustifiable.

[80] The first respondent also attacked the commissioner's finding that the individual appellants and the first respondent had concluded an agreement obliging the first respondent to provide the individual appellants with the STCW training on the basis that he made such a finding in circumstances where the written contracts of employment were silent on the terms or basis on which such training would be provided and also on the basis that no evidence of such terms had been led in the arbitration proceedings. The first respondent alleged that the commissioner did not call for evidence on this and he made an order without any knowledge of what the first respondent's existing training policies were. The first respondent made this allegation in par 56.2.3 of its founding affidavit.

[81] The appellants did not in their answering affidavit deal separately with the allegations in par 56.2.3. In par 20.2 of their answering affidavit under the heading: **"AD SUB-PARAGRAPH 56.2"** they provided certain comments but did not say anything that contradicts the allegations by the first respondent in par 56.2.3. The commissioner also did not deny this allegation in his affidavit. He also did not deny the allegation that he made the finding that the individual appellants were entitled to training for the STCW without any knowledge of what the existing training policies of the first respondent were.

[82] I think it is true that there was no evidence before the commissioner of what the terms were that were agreed in respect of the provision of the STCW training that he held the individual appellants to have been contractually entitled to. The advertisement said nothing more than that there would be an opportunity for advancement. It did not specify any terms nor did it state the nature of such advancement. It also referred to advancement within the first respondent's group of companies. It did not refer to advancement outside the group. The part

of marine circular 10 that the commissioner referred to as the crux of the dispute and that he also relied upon, to some extent, for his finding of the existence of an agreement read thus: "**There will be a programme for certificates limited to port operations and another to enable the officer to obtain an STCW endorsement to his or her certificate of competency."** Nothing was said in the marine circular about the terms and conditions for such training or about the basis for the provision of such training. Furthermore none of the witnesses that were called by the appellants gave any evidence about what the terms and conditions were going to be for the provision of such training. One of the three individual appellants who testified said that in his interview he was told that **"we"** would be afforded an opportunity to train for the STCW. Even he did not testify about what the terms and conditions for the provision of that training were going to be.

[83] If it were accepted that the first respondent's representatives in one or two of the interviews did say to one or two of the individual appellants that they would be afforded an opportunity to go for training to obtain the STCW, that, on its own, would not have been enough to create a legally enforceable agreement or a condition of employment without there being an agreement on the terms and conditions under which that would be done. No witness testified to say at what stage of their employment the individual appellants would be sent for the training. It was also never stated how long such training would take nor who would pay for such training and whether, when an employee was on training, he would be paid his full salary or only part thereof or would not be paid at all. It was also not said who would bear the travelling, academic, and accommodation costs attendant upon such training. Those terms would obviously have been discussed at a later stage. It is when those were discussed and agreed at a later stage that one could begin to consider the possibility of the formation of a legally enforceable agreement between the parties. I am, therefore, of the view that, on this ground, too, the commissioner's finding that the parties concluded an agreement when there was no evidence about the terms and conditions under which the training would be provided is unjustifiable and renders the award

defective and susceptible to being reviewed and set aside.

[84] I now turn to deal with the first respondent's finding in the alternative that a **"reasonable expectation"** was created that the individual appellants would be provided with training for the STCW. I deal with this finding with reference to the first respondent's allegation in par 56.2.3 that the commissioner's finding that the individual appellants were entitled to STCW training was made despite the fact that no evidence existed about what the terms would be for the provision of such training and that the commissioner made that finding without any knowledge of the first respondent's training policies. As I have said above neither the commissioner nor the appellants have replied to this allegation by the first respondent. In dealing with this aspect of the matter I think it is important to examine the commissioner's finding that the individual appellants had a reasonable expectation that they would be provided with the STCW training, its basis as well as how it was said to affect the dispute between the parties.

[85] The finding by the commissioner in the alternative that the individual appellants had a **"reasonable expectation"** is made in his discussion under the heading: **"Conditions of Service: Unilateral Change and Reasonable Expectation"**. He said in his award: **"In the circumstances I accept that in the alternative to having had a contractual right, the [individual appellants] had a reasonable expectation' which created a right (interest?) worthy of protection, depending on the circumstances."** In the following paragraph, the commissioner went on to say that the manner in which the first respondent had acted **"was in breach of its contractual obligations or ... undermined the [individual appellants'] reasonable expectation.**

As such there was a change in conditions of service".

[86] From the above it appears that the commissioner took the view that, if the individual appellants had a reasonable expectation to be provided with the STCW training, then, by some unexplained and inexplicable process of legal metamorphosis, what they expected was transformed into being part of their conditions of service - without any agreement by the first respondent. The commissioner simply did not explain how this was legally possible.

[87] The commissioner's finding must be dealt with on the basis that what the individual appellants expected became a condition of the contract of employment because, as already stated above, he said that the first respondent acted in a manner that undermined the individual appellants' reasonable expectation and **"(a)s such there was a change in conditions of service".** It is, therefore, clear that the basis of the commissioner's award in this regard was that the requirement for the provision of training by the first respondent to the individual appellants was part of the individual appellants' conditions of service. That is why he regarded the failure by the first respondent to provide the training as not only undermining the individual appellants' reasonable expectation but also as constituting a change by the first respondent of the conditions of service of the individual appellants.

[88] The effect of the approach adopted by the commissioner is that, as far as he was concerned the first respondent was obliged to provide the STCW training either because of the existence of a reasonable expectation or because of an agreement. Accordingly, if that conclusion is shown to be completely without any basis and unjustifiable or irrational, his award cannot stand. That he used two separate routes, namely, the existence of an agreement or alternatively, the existence of a reasonable expectation, to reach that conclusion is of no consequence. The fact of the matter is that he saw the individual appellants as having, in effect, a condition of service that required the first respondent to provide them with the STCW training. In this regard I wish to make three points.

[89] First, the finding that the provision of training for the STCW was a right deriving from an agreement or was a condition of service was simply not open to the commissioner to make in the light of the provisions of clauses 18.1 and 18.2 of the contracts of employment between the parties which provided that no amendment of their contracts of employment would be effective unless it was reduced to writing and signed by both parties.

[90] Second, how what the individual appellants expected to happen found its way into being part of the individual appellants' conditions of service agreed to between the individual appellants and the first respondent is not only not explained by the commissioner but, is, in my view, inexplicable.

[91] Third, there is nothing in the commissioner's award and in the evidence that was before him that indicates that the individual appellants could have had any basis for an expectation of what the terms would be that would govern the provision of the STCW training. There is no evidence that anybody from the first respondent ever suggested that such training would be provided on the basis that the individual appellants would be on leave on full pay. There was also no suggestion by any one from the first respondent that the provision of such training, if it materialised, would be made outside of the first respondent's existing training policies and programmes. Captain Van der Krol's evidence revealed that the first respondent had capacity problems that would prevent it from releasing the individual appellants for training even if it wanted to. It also revealed that the first respondent did have training programmes and it was up to the individual appellants to make the necessary requests and these would be considered on an individual basis. The commissioner does not explain in his award why this cannot be said to have been good enough.

[92] Captain Van der Krol also testified that the first respondent had to also take into account the promotion of employment equity in terms of the Employment Equity Act in relation to training. He also testified about the **"horrendous"** costs that would be involved if the individual appellants were to be on paid leave for the duration of the training. In the light of this I am of the opinion that the finding by the commissioner that the individual appellants had a reasonable expectation is also wholly

without any basis, especially when there is no evidence suggesting what the terms are on which they expected the first respondent to provide them with the training.

[93] The commissioner seems to have also thought that the failure by the first respondent to provide the individual appellants with the STCW training left the individual appellants with no career path. That is not so. The evidence given by Captain Van der Krol was to the effect that the first respondent had prepared a career path for the individual appellants to progress to the position of pilot. In regard to this he testified that the qualifications that the first respondent had provided the individual appellants with could be submitted to relevant authorities in other countries for accreditation if any employee, including any individual appellant, left Portnet's employ and wanted employment in other countries. The effect of the first respondent giving the individual appellants the training that they wanted on the basis that they would be on paid leave would be to force the first respondent in effect to spend millions of rands - which is public money -- to enable the individual appellants to obtain training which they did not require for purposes of their employment with the first respondent. Once they had such training they stood a good chance of leaving the first respondent to work elsewhere. This point was repeatedly made by Captain Van der Krol in his evidence and was totally ignored by the commissioner in reaching the conclusion that the individual appellants had a reasonable expectation or that the first respondent acted arbitrarily, irrationally and unfairly. In those circumstances I am of the view that the commissioner's finding of the existence of a reasonable expectation was wholly without any basis, was completely unjustifiable and renders the award defective and liable to be reviewed and set aside.

[94] The basis on which the Court a quo came to the conclusion that the commissioner's award fell to be reviewed and set aside was that, on the evidence presented to the commissioner, there was no basis for the conclusion **"that, [the first respondent's] conduct constituted an unfair labour practice arbitrable in terms of schedule 7".** The Court a quo then went on to say in the next sentence: **"That being the case, the dispute could not be the subject of arbitration under the Act".** It further said,: **"In purporting to determine a dispute in the absence of statutory jurisdiction to have done so, a commissioner will manifestly have exceeded his powers. For the cumulative reasons which I have stated, I find that to have been the case in the present instance".** This, read together with the entire judgement of the Court a quo, suggests that the Court a quo found that the dispute was one of interest, was not arbitrable and was required to be the subject of a strike if it was not resolved by agreement and that, because of this, the CCMA lacked jurisdiction to arbitrate it. Before I can consider this issue of jurisdiction, I think it necessary to first have regard to the exact basis on which the first respondent contended in the founding affidavit of the review application that the CCMA had no jurisdiction to arbitrate the dispute. This is necessary because it is that ground of review that the Court a quo was called upon to examine.

[95] The first respondent's contention that the CCMA did not have jurisdiction to entertain the dispute is contained in par 56.1.1 - 56.1.4 of the founding affidavit. Those paragraphs read thus:-

> **"56.1.1 The [commissioner] concluded, on the one hand, that the provision of STCW training was a condition of employment, that failure to provide such training**

constituted a unilateral amendment to terms and conditions of employment and that the [first respondent] was required to negotiate with the [individual appellants] over such change as [opposed] to consulting with them;

56.1.2 the [commissioner] believed that dispute could possibly be one *"pertaining to the unilateral change to conditions of service"* but concluded, without substantiation, that there was *"no doubt"* that the dispute is about training;

56.1.3 in the light of [the commissioner's] conclusion that the attainment of STCW was a condition of service, the dispute arising [out] of the alleged unilateral change to conditions of service is one of mutual interest, is not an unfair labour practice and is not arbitrable by the CCMA.

56.1.4 it is accordingly submitted that the CCMA lacked jurisdiction and the [commissioner] was not entitled to arbitrate the dispute and his arbitration award is accordingly a nullity and should be [set] aside."

[96] It is clear from the allegations in these paragraphs that the first respondent's true complaint in relation to jurisdiction was that, while, on the one hand, the commissioner had held that the dispute was one about a unilateral change of terms and conditions of service, he held, on the other, that it was a dispute about training. The first respondent then proceeded to state in par 56.1.3 that, since the commissioner had concluded that the provision of STCW training was a condition of service, the alleged resultant dispute about an alleged unilateral change of

conditions of service was a dispute of mutual interest, was not an unfair labour practice and was not arbitrable. In par 56.1.4 the first respondent then submitted that the CCMA lacked jurisdiction to arbitrate the dispute and its award was a nullity and should be set aside.

[97] In examining the first respondent's contention that the CCMA lacked jurisdiction to arbitrate the dispute, it must be borne in mind, therefore, that that contention was premised on the dispute being, on the commissioner's findings, one about a unilateral change of conditions of employment. I have already said above that this conclusion by the commissioner was made in respect of both the finding of the existence of an agreement as well as the alternative finding that the individual appellants had a **"reasonable expectation"**. The first respondent's contention that the CCMA lacked jurisdiction has as its basis the assertion that a dispute about a unilateral change of terms and conditions of employment is a dispute of interest. The Court a quo dealt with the contention on the basis that that assertion is correct. If the assertion is erroneous, then the first respondent's contention about the CCMA lacking jurisdiction must fail.

[98] In the founding affidavit the first respondent did not substantiate its contention that a dispute about a unilateral change of conditions of employment is a dispute of interest. In his heads of argument Counsel for the first respondent referred to the fact that in his award the commissioner had made far reaching orders including requiring the first respondent to pay each individual appellant his full remuneration and benefits during any resultant absence from work. He submitted that the award necessitated a considerable diversion of funds and resources by the first respondent in favour of the individual appellants at the expense of the first respondent and the other employees of the first respondent. This was said as support for the contention that the dispute is a dispute of interest.

[99] The first respondent's assertion that a dispute about a unilateral change of conditions of employment is necessarily a dispute of interest is not correct. A clear case of a dispute about a unilateral change of terms

and conditions of employment is a case where an employer changes existing terms and conditions of employment of an employee embodied in a contract of employment to the detriment of the employee without the employee's consent. The following is a good example. A contract of employment between an employer and an employee provides that the employer will provide the employee with a car which the employee can use for both the employer's purposes as well as the employee's purposes, that the employer will pay the employee a certain salary per month and that the employer will provide the employee with accommodation at the employer's cost for the duration of his employment. One morning the employee

> arrives at work to find a letter from the employer stating that with effect from a certain date he must find his own accommodation, his own means of transport for both official and personal trips and that his salary will be reduced. If the employee challenges this action on the employer's part, that is a clear case of a dispute about a unilateral change of terms and conditions of employment of the employee. This type of dispute entails that the employer takes away an employee's existing rights or benefits. At common law such conduct by the employer would constitute a repudiation of the contract of employment. Such repudiation would give the employee an election either to accept the repudiation and claim damages or to reject the repudiation and hold the employer to the contract. In the latter case the employee may seek specific performance.

[100] There is another dispute which some may argue is also a dispute about a unilateral change of terms and conditions of employment. That is a case where an employer does not take away any rights that the employee already has in terms of his contract of employment but adds more rights to the employee's contract of employment or improves or further enhances the employees' existing rights or benefits. This would be a case where the employer implemented a certain wage increase to his employees' wages without their consent. In such a case I am not sure whether it would be correct to describe as a dispute about a unilateral change of terms and conditions of employment a dispute that might arise when the employees or their union contend that the employer

should not have unilaterally implemented such an increase. It is, however, unnecessary to express a definitive view on this as, in this matter, there cannot be any doubt that, when the commissioner labelled the dispute as a dispute about a unilateral change of conditions of employment, he had a dispute falling within the ambit of my first example in mind. This must be so because he said that the provision of training to the individual appellants to obtain the STCW was a condition of service and the first respondent took such condition of service away from them and gave them training for an inferior qualification. This demonstrates that a dispute about a unilateral change of terms and conditions of employment either is or can be a dispute of right as shown in my first example above but is not necessarily a dispute of interest. In the light of the above there can, therefore, be no doubt that the assertion that a dispute about a unilateral change of terms and conditions of employment is a dispute of interest is, as shown above, not correct.

[101] The dispute between the parties is manifestly a dispute that relates to training. The first respondent's attempt in the founding affidavit to suggest that the dispute between the parties is not a dispute relating to training is so lacking in merit that it does not deserve any consideration. A dispute of right is not excluded from the ambit of an unfair labour practice dispute under item 2(1)(b) of schedule 7. There can be no doubt that, where there is a dispute of right that relates to training, it is possible to have conduct by an employer that can be described as unfair conduct or as an unfair labour practice as contemplated by item 2(1)(b). Such a dispute would be arbitrable in terms of item 3(4) of schedule 7 and the CCMA would have jurisdiction to arbitrate it if there was no council with jurisdiction to arbitrate it. It was on the basis that this was a dispute of right that the commissioner held that he had jurisdiction to arbitrate the dispute. On that basis the first respondent's contention, and the Court a quo's conclusion, that the CCMA had no jurisdiction to arbitrate the dispute cannot be upheld.

[102] It is also to be noted that, when the commissioner had to determine whether the conduct of the first respondent constituted an unfair labour practice, he said that the first respondent had **"elected to present its case on the basis of simply disputing that the employees had an entitlement to STCW or equivalent training."** He continued thus: **"As such, and in the context of having decided against the employer, very little evidence has been presented explaining the employer's**

underlying reasons for changing conditions of service. In the circumstances it is difficult to understand the rationality of its actions and as such it appears to have been done arbitrarily".

[103] I find the commissioner's statement that the first respondent presented very little evidence giving reasons for its stance very surprising. Captain Van der Krol gave extensive evidence to justify the first respondent's stance. None of that evidence was challenged by the appellants. The commissioner himself did not at any stage suggest that there was any part of Capt. Van der Krol's evidence that he had difficulty in accepting as true nor does he in his award say why that evidence cannot be said to prove valid reasons justifying the first respondent's stance. Captain Van der Krol's evidence, quite clearly, established that the first respondent had legitimate and valid reasons for the stance that it took. It is not necessary to repeat those reasons here. How the commissioner could then suggest that the first respondent presented very little evidence explaining its reasons for its stance when he had before him Captain Van der Kroll's unchallenged evidence is difficult to understand. This demonstrates that, although the commissioner did set out in his award all of the relevant evidence, he did not take it into account at the time when it mattered most to take it into account. He simply did not properly consider the first respondent's defence to the appellants' claim.

[104] Both the first respondent, in its heads of argument, and, the Court a quo, in its judgement, referred to the provisions of sec 64(4) of the Act. The context in which this was done was that, if the dispute was a dispute about a unilateral change of conditions of employment, as the commissioner had found, the provisions of sec 64(4) were applicable. The provisions of sec 64(4) read with sec 64(1) and sec 64(3)(e) contemplate that a strike may be resorted to in relation to a dispute about

a unilateral change of terms and conditions of employment. The first respondent's Counsel and the Court a quo referred to this as an indication that the dispute was a dispute of interest. I think they had in mind that, since the dispute was one in respect of which a strike is competent, it could not also be arbitrable.

[105] Section 64(4) must be read with sec 64(5). The provisions of sec 64(4) and (5) read thus:.

> **"(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) -**
>
> > **(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or**
> > **(b) if the employer had already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.**
>
> **(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."**

[106] It is clear that sec 64(4) relates to a dispute about a unilateral change to terms and conditions of employment. It is also clear that it affirms that such a dispute can be the subject of a referral in terms of sec 64(1) which is a referral of a dispute that can be the subject of a strike. Accordingly, it can be accepted that a strike is competent in respect of a

dispute about a unilateral change to terms and conditions of employment. However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of item 2(1)(b) of schedule 7, it will nevertheless be arbitrable "**Strikeable**" and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through adjudication and those that are resolved through power play, there are disputes in respect of which the Act provides a choice between power play, on the one hand, and, arbitration, on the other, as a means for their resolution. This is the case, for example, with disputes about organisational rights. (See sec 65 (2)(a) and (b) read with sec 65(1)(c) and sec 12 -15 and sec 21 and sec 22).

[107] A dispute about a unilateral change to terms and conditions of employment, which, as already stated above, is a dispute in respect of which a strike is competent, may, arguably also be said to fall within the ambit of an unfair labour practice as defined in item 2(1)(b), especially in relation to training, demotion and the provision of benefits to an employee. A dispute falling under item 2(1)(b) is, of course, subject to arbitration in terms of item 3(4)(b). The idea of giving such a choice is also to be found in the Labour Relations Amendments Act, 2002 (Act No 12 of 2002). In sec 189(7) a registered trade union is given a choice, when an employer has given a notice to terminate employees' contracts of employment for operational requirements to either refer the dispute about such a termination to the Labour Court for adjudication or to resort to a strike.

[108] It is therefore clear from the above that the fact that a strike is competent in respect of a dispute does not mean necessarily that it is not arbitrable in terms of the Act. What needs to be done in each case is to examine the provisions of the Act to determine whether such a dispute is, indeed, not arbitrable. Where the Court a quo seems to have gone wrong, in my view, is that it adopted the attitude that, because the Act had provisions which made a strike competent in respect of a dispute about a unilateral change of conditions of employment, such a dispute

could not be arbitrable. That, as I have shown above, does not follow under the Act.

[109] The Court a quo also stated in its judgement that a dispute about an unfair labour practice as contemplated by item 2(1)(b) refers to cases where, for example, the employer has acted inconsistently or arbitrarily or irrationally. The commissioner had categorically found that the conduct of the first respondent was arbitrary and was without **"rationality".** Therefore, if the commissioner accepted that the conduct of the first respondent was irrational or arbitrary, the dispute before him was one that, on the Court a quo's own reasoning, could fall within the ambit of an unfair labour practice. Accordingly the Court a quo ought not to have concluded on the facts of this matter that the dispute could not be arbitrated in terms of item 3(4) of schedule 7.

[110] Of course, as stated elsewhere in this judgement, this does not mean that the findings made by the commissioner that there was an agreement between the parties for the provision of the STCW training or that the individual appellants had a reasonable expectation or that the expectation became a condition of service which the first respondent undermined are correct nor does it mean that they are justifiable and rational. As stated elsewhere in this judgement they are simply unsustainable. In any event, given all of the above and the evidence by Captain Van der Krol before the commissioner, there simply was no basis whatsoever upon which any person could justifiably have come to the conclusion that the first respondent had acted unfairly and had, therefore, committed an unfair labour practice against the individual appellants in this matter. The finding by the commissioner that the first respondent had acted unfairly and, had therefore, committed an unfair labour practice was completely unjustifiable and fell to be reviewed and set aside.

[111] In the light of the above the appeal falls to be dismissed but for reasons different to those given by the Court a quo for its order reviewing and setting aside the award.

[112] In the result the appeal is dismissed and the appellants are ordered to pay the first respondent's costs jointly and severally, the one paying the others to be absolved.

_____
Zondo JP

I agree.

_____
Willis JA

I agree.

_____
Van Reenen AJA

Appearance:

For the respondent	:	N.A. Cassim SC
Instructed by	:	Mafika Sihlali Attorneys
For the Applicant	:	J.G. Grogan
Instructed by	:	Schoeman Oosthuizen
Date of judgement	:	20 September 2002