IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO.57/90

In the matter between

NATIONAL UNION OF MINE WORKERS APPELLANT

VERSUS

EAST RAND GOLD AND URANIUM COMPANY LIMITED RESPONDENT

CORAM: BOTHA, SMALBERGER, MILNE, GOLDSTONE JJ.A. et

PREISS AJA.

DATE HEARD: 7 NOVEMBER 1991

DATE DELIVERED: 27 NOVEMBER 1991

J U D G M E N T

GOLDSTONE JA:

INTRODUCTION

This appeal concerns an alleged unfair labour practice on the part of an employer during the course of wage negotiations with a trade union. The employer is the respondent, East Rand Gold and Uranium Company Limited ("Ergo"). The complaint was made by the appellant, the National Union of Mineworkers ("NUM"). Ergo denied that its conduct constituted an unfair labour practice.

The dispute came before the Industrial Court in

terms of s 46(9)(d) of the Labour Relations Act, 28 of 1956 ("the Act") pursuant to the terms of a written agreement dated 9 September 1987 between Ergo and NUM. It was not in issue that the requirements for a proper reference of the dispute to the Industrial Court were satisfied.

The Industrial Court found in favour of NUM and it made a determination in the following terms:

"1. Respondent's conduct in failing to implement certain wage increases retrospective to 1 June 1987 to that portion of its employees who embarked upon a legal strike in furtherance of the 1987 wage dispute constitutes an unfair labour practice.

2. Respondent is ordered to pay to such employees an amount equivalent to the wages foregone over the period specified in para. 3 in relation to wages of the workers who did not embark on a strike and who received the wage increases from 1 June 1987.

3. In terms of s 49(9)(c) read with s 49(3) of the Act, this determination shall be binding retrospectively for a period of six months

from date of this determination."

The judgment of the Industrial Court is reported as National Union of Mineworkers v East Rand Gold and Uranium (1989) 10 ILJ 103. Ergo appealed to the Labour Appeal Court, Transvaal Division. The appeal succeeded with costs including the costs of two counsel. The determination of the Industrial Court was set aside and replaced with the following:

> "The practice of the [respondent] in refusing to implement agreed wage increases retrospectively to those employees who embarked upon a legal strike in furtherance of the 1987 wage dispute does not constitute an unfair labour practice."

In the Labour Appeal Court separate judgments were delivered by the presiding judge and jointly by the two assessors. Those judgments are reported as East Rand Gold and Uranium Co Ltd v National Union of Mineworkers (1989) 10 ILJ 683.

NUM now appeals to this Court in terms of

s 17C(1)(a) of the Act, the requisite leave having been granted by the Court a quo.

THE PRELIMINARY POINTS

In their heads of argument counsel for NUM raised two preliminary arguments concerning the appealability of the decision of the Industrial Court. However, at the outset of the hearing of the appeal in this Court, these arguments were abandoned. Counsel for Ergo did not seek any special costs order in relation to this issue. It follows that no further consideration need be given to this aspect of the case.

THE MERITS OF THE APPEAL

Introduction

The jurisdiction of this Court in an appeal from the Labour Appeal Court is to be found in s 17 C of the Act. In so far as now relevant, it is there provided as follows:

"(1)(a) Any party to any proceedings before a labour appeal court may appeal to the Appellate Division of the Supreme Court of South Africa against a decision or order of the labour appeal court (except a decision on a question of fact), providing (sic) that the labour appeal court grants leave for such an appeal or, where such leave has been refused, the Appellate Division grants leave thereto.

...

(2) After hearing an appeal, the Appellate Division may confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order, including an order as to costs, according to the requirements of the law and fairness."

This provision in so far as it excludes the jurisdiction of this Court in respect of a "decision on a question of fact" is not happily worded. It is not clear what is meant by the words. Do they refer to any factual

finding made by the Labour Appeal Court or do they refer to the whole of a judgment on a question which is one of fact? What of a decision, such as the present, which is one of mixed fact and law? The further difficulty I have with the principle of the exclusion is that the Labour Appeal Court does not hear evidence and has the same material before it as would be placed before this Court in an appeal. This Court is therefore in as good a position to determine questions of fact as the Labour Appeal Court. The restriction on the jurisdiction of this Court is therefore unnecessary. Furthermore, it has the effect of complicating the task of this Court in that, in a case such as the present one, it has to embark upon an enquiry, usually one of difficulty, in order to determine what decisions "on a question of fact" were made by the Labour Appeal Court. In my view this provision merits reconsideration by the Legislature.

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

It will be convenient therefore to determine the facts which were common cause or not in issue before the Court a quo and then to determine what relevant findings of fact were made by that Court. It is upon the basis of all those facts that the correctness or otherwise of the decision and order of the Court a quo must then be considered. The material relevant to this exercise consists of:

(a) the documents which were placed before the Industrial Court;

(b) the evidence of the only witness called in the Industrial Court, viz. Mr L.J. Gatherer, the Manager of Manpower at Ergo; and

(c) the findings of fact made by the Court a quo.

Facts Which were Common Cause or Not in Issue

The Recognition Agreement.

On 29 April 1984 NUM and Ergo entered into a recognition agreement. In terms thereof NUM was recognised by Ergo as the sole collective bargaining representative of its members within a defined bargaining unit, ie "the A and B Paterson job grades". On 10 July 1987 the agreement was revised and NUM's recognition was extended to embrace all the employees (whether its members or not) within the aforesaid bargaining units.

The preamble to the recognition agreement (clause 2) reads as follows:

"The parties to this agreement hereby:

2.1 recognise and acknowledge that sound employer/employee relations are essential for the mutual benefit of all concerned;

2.2 declare their joint commitment to the common objectives of the maintenance of industrial peace, maintenance of recognised work and safety standards, and the equitable treatment of employees;

2.3 declare their common commitment to the application of this agreement in good faith and in a spirit of mutual respect;

2.4 intend this agreement to be legally binding on them."

In clause 3.1 Ergo agreed to:

> "recognise the union as the sole collective bargaining representative of the union members, while the union is sufficiently representative."

"Sufficiently representative" is defined in clause 1 to mean "signed up union membership of 50% + 1 of the employees as defined". There is no issue in this case concerning NUM having been sufficently representative and it is unnecessary

to consider the terms of the agreement which would apply if it ceased to be sufficiently representative. Suffice it to say that Ergo undertook not to recognise any other union unless it is "sufficiently representative" (clause 5.2.7).

In clause 3.2 Ergo undertook to negotiate agreements with NUM, inter alia, on wages and "mutually agreed" conditions of employment. Clause 5.2.5 provides:

> "The company and the union reaffirm their mutual commitment that any failure to agree shall be resolved by dialogue in a climate free from extraneous pressures and stresses. Accordingly, should deadlock be reached on any negotiable issue, a cooling off period shall come into operation and thereafter the Negotiating Parties shall meet again within 72 hours after the last meeting for the purpose of resolving the disagreement."

Clause 5.3 provides for the resolution of disputes. In terms of 5.3.1 either party may declare a dispute by written notice to the other. Within 72 hours of

the declaration of the dispute the parties are required to meet in an attempt to resolve the dispute: 5.3.3. If they are unable to resolve the dispute they are then required to meet on not less than two further occasions over a period of 13 days, for the purpose of attempting to reach agreement: 5.3.4. In terms of 5.3.5, the parties may at any stage agree to mediation and arbitration in an attempt to settle the dispute. If the dispute is not referred to arbitration and should it remain unresolved after the third meeting, then NUM or Ergo becomes entitled to invoke the dispute-resolving mechanisms provided in the Act: 5.3.7.3.

In terms of clause 5.3.9 it was agreed that should NUM and its members exhaust the procedures contained in the agreement and then resort to lawful industrial action, Ergo would not dismiss such members unless the action persisted for more than three days. Clause 5.3.9.1 obliges Ergo, after the three days, to dismiss either all or none of

the members who engage in such action.

Clause 5.7 provides that the agreement would come into operation with effect from 29 May 1984 and remain in force until terminated in terms of the provisions of clause 7. Clause 7, in turn, provides for termination as follows:

"This agreement shall terminate:

7.1 upon expiry of 3 months written notice by either party to the other of its intention to withdraw from the agreement;

7.2 if, after 60 days of being notified by the company, the union cannot prove that it is sufficiently representative of the employees in the A and B job grades:

7.3 upon the failure to remedy a breach within a period of 14 days should either party act in material breach of this agreement or of the dispute resolving procedures set out in the Act or of the agreement entered into by the parties which sets out the dispute procedure."

The 1984, 1985 and 1986 Negotiations

During 1984, 1985 and 1986 NUM and Ergo entered into negotiations over wages and other conditions of employment. According to Gatherer, during the 1986 negotiations NUM and its members -

> "entered into illegal industrial action in the form of a sit-in for two days which created enormous difficulties and certainly quite significant damage to the Company."

That evidence was not placed in issue by NUM.

The 1987 Negotiations

NUM's intial demands in 1987 were for a 55% wage increase for certain job categories and a 40% increase for other job categories. According to Gatherer those increases together with the other demands made by NUM would have meant an increase in costs to Ergo of 116%-120%.

The first negotiation meeting was held on 27 May 1987. NUM raised two pre-conditions to commencing the annual negotiations, viz a response to the demand made in

1986 for June 16 to be a paid holiday and an undertaking from Ergo that any wage increase which might successfully be negotiated be implemented with effect from 1 June 1987, regardless of the date of settlement. It was stated on behalf of Ergo that the purpose of the meeting was to hear NUM's reasons for the demands made by it. The representative of NUM, Mr Marcel Golding, stated that if no offer was presented by Ergo then NUM would declare a dispute. He said that the following meeting would then be the first in terms of the dispute resolution procedure. Gatherer testified that he found NUM's attitude at the meeting to be "very threatening". He felt that the threat to declare a dispute was "very provocative".

A dispute was then declared by NUM. Dispute resolution meetings were held on 29 May and 2 June 1987. At the second meeting Ergo tabled its wage proposals. They provided for increases in some cases of 15% and in others of

17%. It would appear that Gatherer found Golding's attitude and language to be objectionable. He testified that:

> "We went in with what we felt was a very sincere and credible offer and we certainly felt that the tecniques and the tactics being used, certainly by Mr Golding, were very disparaging and did not in any way lean towards a very positive climate for negotiating."

At a further meeting held on 5 June 1987, NUM withdrew the dispute relating to the alleged failure by Ergo to present an offer for increased wages at the first meeting. It also lowered its wage demand for the one category from 55% to 35% and for the other category from 40% to 30%. According to the evidence of Gatherer that still left a very substantial gap between the parties.

At a meeting held on 9 June 1987 Ergo tabled a new offer in which the wage increases ranged from 15,5% and 18,5% respectively. In response, as it was described by Gatherer:

"Mr Golding then launched into those personal scathing attacks, as he is sometimes inclined to do, and certainly the actual negotiating climate started plumetting pretty sadly at that stage."

On 11 June 1987 a meeting was held and no progress was made. Then, on 12 June 1987, NUM addressed a letter to Ergo in which it declared a dispute on wages and conditions of employment. On the same day the first meeting of the dispute resolution procedure was held. One of the shop stewards, Mr Nkadimeng, said that he believed that NUM and Ergo were not far away from a wage settlement. With regard to wage increases, Nkadimeng said that NUM was prepared to move further - that for the one category of employees it would drop its demand from 35% to 30% and for the other from 30% to 27%. He stressed that whatever movement Ergo offered, the wage demands were still negotiable issues. He stressed that it was his firm belief that Ergo and NUM could still agree to settle on a wage increase at that meeting or

possibly at the next meeting.

On the same day the Confederation of South African Trade Unions ("Cosatu"), of which NUM is a member, sent a telex to Ergo in which it threatened to enter the fray on behalf of the workers at Ergo. This telex was viewed in a very serious light by Gatherer who regarded it as a third party intervention during the conduct of the dispute procedure. Gatherer raised the contents of the telex at a meeting held on 17 June 1987. Golding said that he did not know about the telex but that he saw nothing unusual about such a message being sent by Cosatu to:

"exploitative and aggressive managements."

He said that NUM saw management as trying to "pull everything in the book" to drag out the negotiations. He was prepared to report back to Cosatu, acknowledging their "solidarity with the workers' struggle", but would say that settlement with Ergo was close and that in future telexes

from Cosatu should be sent directly to NUM for communication to Ergo management. When Gatherer insisted on some formal response by NUM to the Cosatu telex Golding stated that management was pushing NUM "a bit too far" and that he was "sick and tired of this".

On 23 June 1987, a further meeting was held in terms of the dispute resolution procedure. Ergo presented what was described as its "final offer". Golding made no counter proposal. However, he stated that the teams were not far apart and that a further offer might well result in settlement. Gatherer indicated that:

"the Management Team was at the end of the line".

The meeting ended with Golding informing Gatherer that NUM was in dispute with Ergo.

The Conciliation Board Proceedings

On the following day, 24 June 1987, NUM requested the Divisional Inspector: Department of Manpower, to

establish a conciliation board in terms of s 35 of the Act. Ergo did not oppose the application.

Notwithstanding the application for the establishment of a conciliation board, Ergo called a further meeting with NUM on 3 July 1987. In response to Gatherer requesting NUM to reveal its final position on wages, Golding replied that management was asking the workers to give up the only weapon they had. Golding also stated that the parties were not too far apart and that any offer from management, providing it was not a foolish one, would be carefully considered. He said that NUM would present management with its "bottom line" at the conciliation board meeting.

On 23 July 1987 the Minister of Manpower approved of the establishment of a conciliation board. At the first conciliation board meeting, held on 31 July 1987, Ergo tabled a further offer which was expressed to be

conditional. The suggested increases were 19,45% and 16,05%. Golding's response was that NUM was disappointed with the 0,5% increase. He said that the offer came nowhere near settlement and was therefore unacceptable. He added that Ergo had been advised of what NUM considered as a settlement; it believed that settlement was close but not close enough, and unless Ergo had a fresh offer or wished to obtain a fresh mandate from its principals, the negotiations were at an end.

As was pointed out by counsel for Ergo, NUM, in breach of its undertaking at the meeting of 3 July 1987, failed to inform Ergo of its final demands. The last occasion on which NUM had tabled an offer was on 12 June 1987.

The second conciliation board meeting was held on 10 August 1987. NUM insisted that Ergo should make a further offer. At the same time it refused to table its

final demand. Golding stated that if there was no forthcoming offer deadlock had been reached. Gatherer then proposed mediation. That was rejected by NUM. Golding indicated that NUM was in favour of voluntary arbitration. That, however, was unacceptable to Ergo.

The Strike and Sit-In

A strike ballot was held by NUM on 11 and 12 August 1987. The ballot was overwhelmingly in favour of strike action. On 11 August 1987 Ergo addressed and delivered a letter to the general secretary of NUM, Mr C Ramaphosa, in which NUM was called upon to take all reasonable steps to ensure that in the event of members adopting strike action they would not enter or remain on Ergo's premises for the duration of that action. In response, on 12 August 1987 NUM suggested in a telex that Ergo discuss the matter with the local branch committee. On the same day the strike commenced.

On the night of 12 August a meeting was arranged by Ergo with the shop stewards' committee. According to the evidence of Gatherer the following occurred:

> "... at a meeting on the 12th, the evening of the 12th, they took rather a strange response, almost in a childishness type of description, where they said fine, you want to talk to Mr Ramaphosa directly, if that is the case and you want to actually omit to come through our body then be our guests then you go and speak to him. If you want to address letters to him then you go to him for an answer. We were then being put between two different facilities on two different bodies without a formal response to what we believed was a very ... very presssing, very important query."

Earlier on 12 August, members of NUM commenced a sit-in on the premises of Ergo. On 13 August, Ergo brought an application to the Witwatersrand Local Division in which it sought and was granted an order evicting the strikers and interdicting them from entering the premises. NUM was not cited as a party to that application. In

consequence of the court order and police intervention the employees vacated the premises of Ergo.

The Offer by Ergo to the Employees.

A further occurrence on 12 August was the distribution by Ergo of a "Letter of Acceptance and Undertaking" to all its employees in the bargaining units covered by the recognition agreement. The letter embodied an offer to employees to the effect that they would receive Ergo's final offer to NUM backdated to 1 June 1987 provided they undertook, inter alia -

> "not to embark upon or support any form of industrial action in respect of any issue which has been the subject matter of the 1987 wages and conditions of employment ..."

It was also stated that employees who did embark upon strike action would not be eligible to receive increases at that stage and in any event would not receive increases backdated to 1 June 1987.

According to Gatherer, some seventy employees of Ergo accepted the offer and did not strike. In his evidence he explained the decision to make the offer to employees as follows:

> "We went out to our workforce at that stage because all mechanisms and opportunities of trying to relate to the representative body, being the NUM team, had failed ... and we had been enormously frustrated at not arriving at a settlement and after the formal mechanisms of conciliation had been totally exhausted and we again had seen that we were not realizing our objective of reaching settlement, we actually did consider alternative measures of working directly with the employees."

Gatherer also referred to the decision to deal directly with employees in the context of the danger of a sit-in. He was asked by Ergo's counsel:

> "And how did you decide to defend yourself, Mr Gatherer?"

He replied

> "The best way we felt was to continue as we have a

> very open policy on communicating to employees, was to continue with those channels of contact with individual employees to try and give all the time almost a choice to the individual employee. ... And we felt it was very important to sketch out, as we saw it, the prospects of strike action, the implications of strike action but at the same time to still try and induce to both members and non-members ... a commitment to not engaging in industrial action."

Further Meeting Between Ergo and NUM

Notwithstanding the strike and the other actions taken by both sides, on 16 August 1987 the management of Ergo called a further meeting with NUM. It was held at the President Hotel in Johannesburg. Ergo's spokesman, Mr Kemble, said that the purpose of the meeting was:

> "to examine how the parties could be brought together again."

The meeting was in fact inconclusive. Allegations of

physical injuries to some of its members were made by Golding on behalf of Num. The following inter alia is recorded in the minutes of the meeting:

> "Mr Golding said that it was strange that the Company merely wanted the workers to accept the offer after beating up the employees. Mr Golding re-emphasised that the Union was interested in talking about wages. He went on to elaborate by saying that if the Company wished to settle they should bring in a new wage offer. Mr. Golding said that the position of the Union was negotiable and that it had not presented its final demand."

> "She [Mrs Nchwe, a NUM official] went on to say that the purpose of the strike was for workers to attempt to pressurize the Company into improving their wage offer. She said that if the workers were to come back and sign, accepting the final offer, then there would be no purpose to the strike. Mr Kemble replied by saying that he believed in the right of workers to strike. Mr Golding interrupted by saying that the Union was willing to resolve the dispute and keep the

negotiations open.

He emphasised the fact that workers were wanting to return to work but only a fresh offer from the Company would induce this."

"Mr Kemble said that there were no new issues to discuss at this stage, however, he emphasised that he saw the meeting as important. He said that the Management delegation would report back to their principals and re-affirm that the Company was also open to communicate with the Union."

In a circular letter to its employees on 18 August 1987, Ergo stated:

"Whilst it is Management's intention to maintain open channels of communication with the Union and Shop Stewards at all times, the Company is currently in the process of recruiting replacement labour on a temporary basis. Such recruitment is in accordance with clause 5.3.9 of the ERGO/NUM recognition agreement, which stipulates that during industrial action, the Company has the right to maintain production by any lawful means."

The Termination of the Strike and Post-Strike Agreement

On 24 August 1987 Ergo gave the strikers an ultimatum to return to work by 28 August 1987 or face dismissal. Virtually all the striking workers returned to work on the last-mentioned date. Thereafter further meetings were held between NUM and Ergo in order to resolve the issues still outstanding. A settlement was reached and an agreement signed on 9 September 1987. The terms of that settlement were substantially the same as those offered by Ergo to NUM at the conciliation board hearing. The agreement took effect on 28 August 1987, ie the date on which the strike ended. In terms of that agreement the parties agreed to refer the present dispute directly to the Industrial Court for determination.

The Findings of Fact Made by the Court a quo.

In the Court a quo it was submitted on behalf of

Ergo that NUM had not negotiated in good faith. In his judgment, the chairman of the Court, De Klerk J said the following concerning this issue (at 692 C - 693 C):

> "In his evidence Mr Gatherer expressed the opinion, and Mr Lazarus in argument submitted, that the Union did not negotiate in a bona fide manner. The union did not, as stated already, lead evidence to refute the allegation. The disposition of a man, like the state of his digestion, is patent only to himself. In the absence of evidence by witnesses on behalf of the union the court can only draw inferences from the union's conduct at the time in question, in an attempt to assess its disposition and its bona fides or lack thereof.
>
> ...
>
> I agree with Mr Lazarus that it is not necessary for present purposes to define good faith bargaining. It is clear however that good faith bargaining entails that the purpose of the negotiations must be to reach an agreement. If the purpose is to draw out matters or to avoid reaching an agreement at all, or to do so only at a later stage in the negotiations, there could be

a lack of good faith in the negotiations or bargaining under scrutiny.

...

Normally when bargaining in the market place, no holds are barred. However the moment the obligation to bargain in a bona fide manner is imposed, certain bargaining tactics which are allowed in the marketplace would be improper.

The conduct of the union during some of the meetings was confrontational and abrasive. On a number of occasions the representatives of Ergo were insulted. Remarks and accusations on a personal level aimed at the man and not at the work at hand were made.

I realise that there are many different styles of bargaining and that a certain measure of abrasiveness, robustness, or aggressiveness, should be tolerated. One should be very careful not to place unwarranted restrictions on the manner in which negotiations, also bona fide negotiations, are conducted. However, if a participant to the negotiations without any apparent justification descends to the level where personal insults are bandied about, in the

absence of an explanation or an apology, the inference may be justified that that party is not bargaining in good faith."

The learned judge went on to refer to the failure and refusal by NUM to indicate "what its bottom line was". He referred to its changes of stance between stating that settlement was close and rejecting Ergo's offers as being nowhere near the required amount. He continued (at 693 J - 694 A):

"This type of bargaining is likely to lead to the cessation of negotiations or an impasse or deadlock as it indeed did in the present matter. It is common cause that a deadlock arose although the reason for the impasse or deadlock is not common cause. ...

Unexplained conduct which may bring about the termination of negotiations unnecessarily cannot be reconciled with good faith bargaining."

It was also submitted on behalf of Ergo, in the Court a quo, that the motive for NUM failing to negotiate in

good faith was that it wished to align itself with the stance taken by NUM at its negotiations which were then also being conducted with the Chamber of Mines. De Klerk J said that it was not necessary for the purpose of his judgment to draw that inference and (at 694 H) added that:

> "The evidence is probably not sufficient to support such an inference."

The conclusion reached by De Klerk J is the following (at 695 B):

> "In the result, in the absence of an explanation, the complaints touched on, cumulatively, lead to the conclusion that the union did not negotiate in a bona fide manner.
>
> The deadlock was therefore on the probabilities precipitated by the lack of good faith."

Counsel for NUM drew a distinction between "bad faith tactics" on the one hand, and "bad faith bargaining" on the other. The former may be consistent with a bona

fide intention to reach an agreement. "Bad faith bargaining", however, means the absence of a bona fide intention to reach an agreement. It means going through the motions, pretending to negotiate or, as it was put by counsel for Ergo:

> "It went through the outward motions knowing that they were a sham."

It was submitted on behalf of NUM that De Klerk J had held that NUM was guilty of having adopted bad faith tactics and not that it was guilty of bad faith bargaining in the sense I have just described. I do not agree. Although not clearly stated in so many words by the learned Judge I am of the opinion that he found as a fact that NUM did not bargain with a genuine intention of reaching an agreement with Ergo. He held further that such bad faith bargaining led to the deadlock, or as counsel described it, the impasse.

If those findings of fact were those of the Court

a quo then, it was common cause between counsel, this Court is bound thereby. However, the position is complicated by the fact that the majority of the Court a quo, the two assessors, delivered a separate judgment in which they concurred in the order upholding the appeal.

In terms of s 17A(3)(e) the decision or finding of the majority of the members of the court, save on a question of law or whether or not a matter is a question of law, shall be the decision or finding of the court. It becomes necessary, therefore, to ascertain what findings of fact were made by the assessors on the question of bad faith bargaining by NUM.

In their joint judgment the assessors said the following (at 698 A - B):

> "We agree with the finding that the union participated in the wage negotations, with Ergo, in bad faith. However, we do not find it necessary to decide the appeal on the basis that the impasse was caused, in part, by the Union's

> lack of good faith in the course of negotiations. Rather, we are of the opinion that the question whether the conduct which Ergo adopted in response to the impasse can be decided regardless of whether the impasse was preceded by or caused by bad faith or good faith bargaining."

The agreement by the assessors with the finding that NUM bargained in bad faith is unambiguous and on that factual aspect, therefore, the finding of De Klerk J must be accepted as being the finding of the Court a quo. The assessors did not say that they agreed with the further finding by De Klerk J that bad faith bargaining led to the impasse. They said no more than that the appeal need not be decided upon that basis. In my opinion they did not express a view on that issue. Indeed, they expressly held that they did not need to do so for the purpose of their decision. They then added that the question before them could be decided "regardless of whether the impasse was preceded by or caused by bad faith or good faith

bargaining". If they had agreed with the further finding by De Klerk J that bad faith bargaining did cause the impasse, it is unlikely that in this passage they would have referred in the alternative to bad faith bargaining having preceded or caused the impasse.

It follows that the majority of the Court a quo did not hold that the impasse was a direct result of bad faith bargaining and this Court is therefore not bound by the finding to that effect by De Klerk J.

The Decision of the Assessors.

In their judgment the assessors stated that an impasse is reached when it is no longer possible to reach a bilateral agreement. Where one of the parties then resorts to unilateral action, in this case the strike, it is not unfair for the other party to resort to unilateral action, in this case:

> "the implementation of an offer which has been put to the bargaining agent during the course of the

negotiations." (at 698 I).

They continued thus (at 698 J - 699 A):

> "The offer, which the employer may unilaterally implement, must be an offer which falls within the compass of its offer to the collective bargaining agent. The employer would not in our view be justified in offering any wages or terms and conditions which have not been placed on the bargaining table. If this were allowed it would mean that the employer is using the impasse to bypass the bargaining agent of his employees. It would not be fair or equitable for him to do this."

In the present case Ergo did not simply and unilaterally implement its offer falling "within the compass of its offer to the collective bargaining agent". In fact it offered to do so only to those employees who agreed in writing not to embark upon or support any industrial action in respect of any issue which had become the subject matter of the 1987 wages and conditions of employment. It was a conditional offer and amounted to a negotiation directly with its employees. Indeed, it is in

that context that it offered to backdate the implementation of its offer to 1 June 1987. And it was the acceptance of the offer on those terms that at the end of the day resulted in the non-strikers obtaining a better deal than those employees who went on strike. That is the complaint made by NUM and the basis upon which the Industrial Court held that Ergo was guilty of an unfair labour practice.

Later in their judgment the assessors again advert to the nature of the offer made by Ergo and state (at 700 F):

> "... it was the same offer that had been presented to the union as the representative of its members ..."

The assessors erred in regarding the terms of the offer made by Ergo directly to its employees as having been the same as those offered to NUM. Throughout the negotiations the question of backdating the agreement was a material issue. In the last offer made by Ergo it

undertook to backdate the agreement to 1 June 1987 only if a final agreement was reached by 31 July 1987. No agreement was reached by that date. The last offer made by Ergo to NUM was at the first conciliation board meeting held on 31 July 1987. In respect of that offer Golding asked Gatherer if he could give an undertaking in relation to the backdating of the implementation date. Gatherer replied that that was an issue open for negotiation.

The offer put by Ergo directly to the employees, therefore, contained a material term which had not been included in the last offer made to NUM. The materiality of the term concerning the backdating of the agreement can also be gauged by reference to the facts that:

(a) At the very first meeting held in the 1987 negotiations NUM attempted to raise it as one of the two pre-conditions to the negotiations; and

(b) Ergo strongly resisted that attempt and emphasized that it was a negotiating point

each year. The question of backdating is obviously a weapon in an employer's armoury which can be used as an inducement to obtain agreement on other issues.

Having regard to the fact that Ergo had earlier in its negotiations with NUM offered to backdate to 1 June 1987 any agreement reached by 31 July 1987, it may be that Ergo was entitled on impasse to regard that term as falling within the compass of offers already made to NUM. It is not necessary to decide in this case whether permissible unilateral action may include a term of that kind which was not contained in the last offer made to the union.

The Decision of the Judge.

De Klerk J found it unnecessary to decide whether an impasse simpliciter would justify the employer bypassing the trade union. He said the following (at 695 I - 696 A):

"The question in the present matter is whether bad faith bargaining coupled with an impasse, and added to that a possibility of illegal action, ie

a sit-in with the probability of disruption, sabotage and severe damage, together, constitute sufficient cause, in fairness and on equitable grounds, to bypass the acknowledged collective bargaining agent. In my view such circumstances did in the present matter justify such bypass."

He later added the following (at 696 B - E):

"The bad faith was displayed by the sole collective bargaining agent and clearly affected its position and also that of the employees it represented and of Ergo. Furthermore, it does not become the participant who breaks the rules to insist that the other party adhere to the rules unless the other party first formally terminates the status of the party who deviated from the rules. The conduct of Ergo in this matter was akin to self-defence and was justified and not unfair.

The bad faith of the union coupled with the impasse and the threat of disruption and damage, in fairness, released Ergo, if only temporarily, from its obligation to negotiate solely through the union. Ergo could at that stage do so without first terminating the status of the union in the hope that matters would revert to normal

> again even though it would mean that a temporary bypass of the collective bargaining agent would take place with the result that the union's image as recognized collective bargaining agent would suffer. The union has only itself to blame for that state of affairs, and the union is the employees' agent."

It follows that if it is held that impasse alone did not justify the conduct of Ergo, it will be necessary to decide, again as a question of law, whether in the face of the impasse together with the additional factors taken into account by De Klerk J the conduct of Ergo constituted an unfair labour practice.

The Industrial Court and the Relevant Principles of Collective Bargaining.

It must not be forgotten that this appeal is one in respect of a matter which came before the Industrial Court. In South African Technical Officials' Association v President of the Industrial Court and Others 1985(1) SA

597(A), it was held by this Court that the industrial court is not a court of law even if it exercises functions of a judicial nature. Since that decision there have been a number of important amendments of the Act. Those amendments, however, in my opinion, have in no way changed the juridical nature of the industrial court.

In exercising its functions the industrial court must have regard to the statutory context in which it operates. The fundamental philosophy of the Act is that collective bargaining is the means preferred by the Legislature for the maintenance of good labour relations and for the resolution of labour disputes. (That, too, is the clear if unexpressed basis upon which the parties entered into the recognition agreement.)

In Davies and Freedland, Labour Law: Text and Materials, one reads at 112/3:

> By collective bargaining we mean those social structures whereby employers (either alone or in

> coalition with other employers) bargain with the representatives of their employees about terms and conditions of employment, about rules governing the working environment (e.g. the ratio of apprentices to skilled men) and about the procedures that should govern the relations between union and employer. Such bargaining is called 'collective' bargaining because on the workers' side the representative acts on behalf of a group of workers."

It follows from the aforegoing that the integrity of the collective bargaining agents (in the sense of their wholeness and effectiveness not being violated) is a matter of primary importance. The maintenance of that integrity must therefore be given proper weight by an industrial court in proceedings before it. When an employer, in the face of a recognition agreement, treats directly with members of the recognised union that conduct will usually, if not invariably, have a detrimental effect upon the union and as a consequence upon its members. As counsel for NUM put it,

it would be subversive of collective bargaining and could, in the long run, be detrimental also to the employer itself.

It is obviously correct, and was so accepted by counsel on both sides, that the very stuff of collective bargaining is the duty to bargain in good faith.

As stated in Brassey et al, The New Labour Law at 151:

> "*There is nothing so subversive* of collective bargaining, however, as to refuse to bargain entirely or to pretend to bargain without doing so, going through the motions with no intention of reaching agreement."

It was also accepted by counsel on both sides that the strike is an essential and integral element of collective bargaining. See Barlows Manufacturing Co Ltd v Metal and Allied Workers' Union and Others 1990(2) SA 315(T) at 322 F-G.

In the exercise of its powers and the discretion given to it, the industrial court is obliged to have regard

not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of principles of fairness. I agree with the observation made in Brassey et al, supra, at 354/5 that:

> "... it is indeed peculiar to an unfair labour practice determination that it may have the effect of suspending the common-law and law of contract consequences."

See, too: Marievale Consolidated Mines Ltd v President of the Industrial Court and Others 1986(2) SA 485(T) at 498 I-499 I. In essence the industrial court is one in which both law and equity are to be applied.

Yet another principle upon which counsel were in agreement was that when an impasse is reached in the negotiations, either party is free to take unilateral action. It was put as follows in an instructive article by Professor Archibald Cox in (1958) 71 Harvard Law Review

1401, entitled "The Duty to Bargain in Good Faith" (at 1423):

> "When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great as, or possibly greater than, those the union can secure. Unilateral changes made while the employees' representative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position. Consequently, proof that an employer changed wage rates or other terms of employment in the midst of contract negotiations ordinarily gives rise to the inference that he had no intention of coming to an agreement; the factual inference can be negated by showing that there was a need for immediate action or by proving that the negotiations had reached an impasse."

In Gorman, Basic Text on Labor Law at 445/6

the author says the following concerning the attitude of American Law to unilateral action on impasse:

> "The law is clear that an employer may, after bargaining with the union to a deadlock or impasse on an issue, make 'unilateral changes that are reasonably comprehended within his pre-impasse proposals.' Taft Broadcasting Co. (1967), enf'd (D.C.Cir. 1968). Another formulation is that after an impasse reached in good faith, 'the employer is free to institute by unilateral action changes which are in line with or which are no more favourable than' those it offered or approved prior to impasse. Bi-Rite Foods, Inc. (1964). A detailed rationale for the post-impasse change in working conditions was set forth by the Board in Bi-Rite Foods, Inc., ibid.:
>
> > This freedom of action which the employer has after, but not before, the impasse springs from the fact that having bargained in good faith to impasse, he has satisfied his statutory duty to determine working conditions, if possible, by agreement with his employees. Having fulfilled his obligation to fix working conditions by

joint action, he acquires a limited right to fix them unilaterally, that is, he is limited to the confines of his preimpasse offers or proposals. Any other changes he were to institute might, if offered before or after the impasse, have led or lead to progress or success in the collective negotiations; hence unilateral action of this different scope forecloses this possibility, just as would his refusal to consider a proposal, with a violation as apparent in the one instance as in the other. In explaining this result, it is sometimes said that the employer's postimpasse action 'breaks' the previous impasse, although it is perhaps more precise and less susceptible of misinterpretation to say that no impasse can be said to have been reached when the reference is to changes never introduced into the collective bargaining arena. Or, applying another familiar formulation, the employer may not be heard to say that had he offered his unilaterally-instituted changes to the employees' representative, the resulting negotiations (which could as a result have taken on new directions or scope)

would nevertheless have ended in deadlock.'

In effect, the employer's action is not 'unilateral', since at least that much of a concession was being demanded by the union when good-faith negotiations resulted in impasse. The employer ought not be forbidden to implement such an agreed-upon concession merely because the union remains fixed in its bargaining position. The announcement implementing the change is not viewed either as an avoidance of the duty to bargain or as a disparagement of the representative status of the union. The union can take credit for the granted benefit, the employer demonstrates that it has acknowledged its duty to deal with the union and not with employees directly, and good-faith negotiations can now proceed on the residual benefits which continue to separate the parties (the'unilateral' grant being deemed to 'break' the impasse). Such a grant of benefits thus differs sharply from that condemned by the Supreme Court in NLRB v Katz (U.S.1962), where the subject matter of the benefits was still under negotiation and the union had no notice of the employer's intention to implement its grant."

In my opinion the views expressed above with regard to American Law are the logical and necessary consequence of a collective bargaining regime whether under the United States' statutes or our own. They are also consistent with fairness in the labour law context. I would emphasize that unilateral action does not comprehend any negotiation with the employees. It means no more than that the employer may unilaterally implement changes in wages or conditions of employment no more favourable than those offered prior to impasse. If the employer wishes to negotiate further he remains bound to do that only with the collective bargaining agent, i.e. the union. I should add that this approach is consistent with the views expressed by the assessors.

In the passage quoted from Gorman, Basic Text on Labor Law, the author refers to the situation where the impasse is reached in good faith. In that case the

employer may not put a better offer to the employees than he put to their union. Where the impasse is reached because of bad faith bargaining the position may be different and it may be that direct negotiation would not be unfair, unjust or inequitable. The "requirements of fairness" to which reference is made in the Act may, in a proper case, entitle an employer to suspend the terms of the recognition agreement to the extent of dealing directly with its employees. In strict law it would be obliged to elect either to be bound by all the terms of the recognition agreement or to cancel it and be bound by none of them. In the field of the unfair labour practice, however, there would appear to be substantial grounds for holding that an employer would not be put to that election. Having regard to the conclusion I have reached on the facts of this case it is not necessary to express a final opinion on this question.

The Present Case.

As already stated Ergo's conditional offer to its employees constituted an attempt to negotiate directly with them. It amounted to more than the unilateral implementation of an offer previously made to NUM. It follows from the principles set out above that the impasse alone would not have justified that conduct.

The implementation of that offer resulted in the two groups of employees (the strikers and the non-strikers) being treated unequally. The non-strikers received wage increases retrospectively from 1 June 1987. The strikers received their wage increases only from the date on which they returned to work, ie 28 August 1987. That unequal treatment could have been avoided by Ergo backdating the increases of the strikers to 1 June 1987. It chose not to do so. It was the latter conduct which was stated in the order of the Industrial Court to constitute an unfair labour

practice. The consequential relief granted by the Industrial Court was directed at rectifying the unequal treatment of the two groups of employees.

In argument before this Court, counsel on both sides devoted most of their attention to the propriety of the direct approach made by Ergo to its employees. In my opinion counsels' approach was a proper one. If the earlier conduct (which, after all, was the real cause of the unequal treatment), was unjustified, then the subsequent failure by Ergo to avoid the inequality was equally unjustified. One must look at both cause and effect. That is what the Industrial Court did in its judgment and that is what led to the conclusion that Ergo committed an unfair labour practice. It was the effect of Ergo's conduct which, in essence, was held to constitute the unfair labour practice. That conduct and its effect clearly fell within the definition of "unfair labour practice" as it read

at the relevant time, ie prior to the 1988 amendments of the Act. It was conduct which may have had the effect that:

> "the relationship between employer and employee is or may be detrimentally effected thereby".

The assessors' reason for disagreeing with that conclusion by the Industrial Court was that the conditional offer made directly to the employees was justified and proper because of the impasse simpliciter. It follows from what I have said earlier in this judgment that I cannot support that decision.

It becomes necessary therefore to consider whether De Klerk J was correct in his conclusion that the impasse was a direct result of bad faith bargaining by NUM. The relevant evidence in this regard is the following:

(a) At all times and in particular during the proceedings before the conciliation board Ergo, by its conduct, appeared to accept that

NUM was negotiating seriously and that agreement might be reached with it.

(b) At the second conciliation board meeting NUM offered to go to arbitration and that offer was declined by Ergo. Gatherer conceded under cross-examination that an agreement to go to arbitration might have avoided the strike;

(c) During the strike action, on 16 August 1987, Ergo called a meeting with NUM at which both parties committed themselves to further negotiation;

(d) During the strike Ergo acted on the basis that it was still bound by the terms of the recognition agreement;

(e) After the strike the parties negotiated further and concluded a final agreement.

It is apparent that notwithstanding any misconduct

by NUM, Ergo continued at all times to regard it as the bargaining unit of its employees. There is no evidence which indicates that it intended to suspend that recognition even temporarily. The evidence, indeed, points in the opposite direction. There is no suggestion that prior bad faith bargaining by NUM caused Ergo to consider that further negotiations would serve no purpose. The relationship continued, negotiation continued and that resulted in agreement.

In addition to the aforegoing there is the further important consideration that Gatherer, in his evidence in the Industrial Court, made no allegation that the impasse was the direct result of bad faith bargaining by NUM. The allegation to that effect was made by Ergo's counsel. In my opinion it was unsupported by the evidence led on behalf of Ergo.

I do not leave out of account that even at the

post-strike meeting with Ergo, NUM still failed to put forward any counter-offer. However, that was clearly not regarded by Gatherer as a block to the continuation of the relationship with NUM and negotiations continued between the parties.

I have come to the conclusion that, on a balance of probabilities, the impasse was not the direct result of bad faith bargaining by NUM. Whatever bad faith bargaining NUM was guilty of, the evidence does not establish that it was present or relevant at the point of impasse. In that regard the offer by Num to go to arbitration and the aforementioned concession made by Gatherer in relation thereto are crucial. The conclusion to the opposite effect reached by De Klerk J, therefore cannot be upheld. It follows that his reasons for setting aside the determination by the Industrial Court also cannot be supported.

Counsel for Ergo submitted that their client's conduct was in no way destructive of collective bargaining since that had ceased upon impasse. It had not. The strike was part of that process and no less the meeting of 16 August 1987 which was called by Ergo. And then there were the further successful negotiations at the beginning of September 1987 which led to the agreement of 9 September 1987. It was also submitted that NUM had ceased to fulfil its role as bargaining agent. The evidence to which I have referred does not support such a conclusion.

In the result, I agree with the decision of the Industrial Court that the conduct of Ergo constituted an unfair labour practice. That the Industrial Court granted appropriate consequential relief was correctly not placed in issue on behalf of Ergo.

In finding that Ergo committed an unfair labour

practice by negotiating directly with its employees I do not wish to be understood as condoning the conduct of NUM during the negotiations. On the evidence led in the Industrial Court the representatives of Ergo had every reason to have felt frustrated and aggrieved. They were also entitled to feel concern and anxiety over the feared sit-in and imminent strike. However, all of those factors and occurrences are not unusual when the collective bargaining process does not result in agreement for whatever reason.

In the result, the appeal must be upheld.

Costs

In terms of s 17(12)(a) of the Act:

> "The industrial court may in the performance of any of its functions under paragraph (a) or (f) of subsection (11), make an order as to costs according to the requirements of the law and fairness."

And, in terms of s 17(21A)(c), the Labour Appeal Court may:

> "On appeal ... confirm, vary or set aside the order or decision appealed against or make any other order or decision, including an order as to costs according to the requirements of the law and fairness."

Similar powers are conferred upon this Court by s 17C(2) of the Act.

It follows that in respect of any costs order in a matter which comes before, or on appeal from, the industrial court, the legislature has decreed that both the law and fairness shall be taken into account in exercising a discretion with regard thereto.

Where matters of judicial discretion are concerned, an appeal court should be slow to lay down general rules. However, in recent judgments of the

industrial court one sees that an attempt is being made to establish the correct approach to the exercise of the discretion conferred upon it and more particularly to determine the general considerations which properly may be taken into account. I refer in particular to the helpful judgment of D A Basson AM in Chamber of Mines of SA v Council of Mining Unions (1990) 11 ILJ 52 (IC) at 73 E-80J. In my opinion, this Court should assist this process by enunciating the following considerations which may be relevant in relation to costs:

1. The provision that "the requirements of the law and fairness" are to be taken into account is consistent with the role of the industrial court as one in which both law and fairness are to be applied.

2. The general rule of our law that in the absence of special circumstances costs follow the event is a relevant consideration. However, it will yield where considerations of fairness require it.

3. Proceedings in the industrial court may not infrequently be a part of the conciliation process. That is a role which is designedly given to it. Parties, and particularly individual employees, should not be discouraged from approaching the industrial court in such circumstances. Orders for costs may have such a result and consideration should be given to avoiding it especially where there is a genuine dispute and the approach to the court was not unreasonable. With regard to unfair labour practices, the following passage from the judgment in the Chamber of Mines case (supra) at 77G-I commends itself to me:

> "In this regard public policy demands that the industrial court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The industrial court should be easily accessible to litigants who

suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalized unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is bona fide ..."

4. Frequently the parties before the industrial court will have an on-going relationship that will survive after the dispute has been resolved by the court. A costs order, especially where the dispute has been a bona fide one, may damage that relationship and thereby detrimentally effect industrial peace and the conciliation process.

5. The conduct of the respective parties is obviously relevant especially when considerations of fairness are concerned.

The aforegoing considerations are in no way intended to be a numerus clausus. A very wide discretion

is given by the Act to the three courts with regard to the exercise of their powers and no less in respect of orders for costs. Such a discretion must be exercised with proper regard to all of the facts and circumstances of each case.

In the present case the following considerations appear to be relevant:

1. NUM is the successful party;

2. NUM's conduct in the negotiation process led to justifiable unhappiness and frustration on the part of Ergo;

3. There was and presumably still is an on-going relationship between the parties;

4. The issues raised are of fundamental

importance not only to the parties but to all the players in the important arena of industrial conciliation.

In all of those circumstances I am in agreement with counsel for NUM that no award of costs should be made in respect of this appeal. None was made in the industrial court and none should have been made in the Labour Appeal Court.

The following order is made:

1. The appeal is upheld.

2. The order of the Court a quo is set aside and the following order is substituted therefor:

"The appeal is dismissed."

R J GOLDSTONE

BOTHA JA)
SMALBERGER JA)
MILNE JA) CONCUR
PREISS AJA)