Case No 189/92, 720/92
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SLAGMENT (PTY) LIMITED — APPELLANT

- and -

BUILDING CONSTRUCTION AND ALLIED

WORKERS UNION — FIRST RESPONDENT

FRANS NKADIMENG — SECOND RESPONDENT

PHILEMON MNQUTHENI — THIRD RESPONDENT

CORAM: HOEXTER, SMALBERGER, F H GROSSKOPF, NIENABER JJA et NICHOLAS AJA.

HEARD: 19 May 1994.

DELIVERED: 9 September 1994.

J U D G M E N T

NICHOLAS AJA.

NICHOLAS AJA:

Slagment (Pty) Ltd ("Slagment") manufactures at a number of factories, including one at Vanderbijlpark, a product which is variously described as a "cement extender" or "blended blast furnace cement". In 1989 the Vanderbijlpark factory was experiencing problems in connection with dust generated by its operations. Notwithstanding the use of dust filters, dust emission from the factory into the surrounding atmosphere was above acceptable levels. This was due in part to the fact that the two dust filter attendants did not perform their work satisfactorily, and that Mr Van Eeden, the production foreman to whom the attendants were immediately responsible, was unable to give sufficient attention to their supervision. In consequence there were complaints from the occupiers of neighbouring premises, and from the Department of Health and the Vanderbijlpark

Municipality. On 16 May 1989 Mr J H Hartzenberg, who was designated as "the works manager" and was attached to Slagment's head office with overall responsibility for the factories, addressed a memorandum to the company's general manager in which he set out the difficulties being experienced in the adequate control of dust emission. He recommended

> "... that we employ a dust filter/compressed air maintenance man (Grade 11). His duties will be complete dust filter maintenance as well as compressed air reticulation."

The recommendation was approved and Mr Koos Pieterse, a Slagment employee then working as a miller, was appointed to the new position by Mr G J Kinnear, the Vanderbijlpark factory manager. His functions were to supervise the two dust filter attendants and to perform all mechanical and electrical work necessary in connection with the dust filters.

Pieterse began work in his new position on the morning of Tuesday 13 June 1989. Problems arose immediately. Mr Frans Nkadimeng and Mr Philemon Mnqutheni, who had been employed as dust filter attendants for the previous two years, refused to work with Pieterse or to carry out his instructions. They persisted in this attitude on the following days until the matter culminated in their dismissal on Friday 16 June 1989 for gross insubordination and refusal to accept instructions given by their superiors.

Nkadimeng and Mnqutheni (who will be called "the employees" when jointly referred to) appealed against the dismissals. Separate appeals were heard by Hartzenberg on 28 and 29 June 1989. The appeals failed and the dismissals were confirmed.

A conciliation board having failed to resolve the dispute, the employees and their trade union (Building Construction and Allied Workers Union) ("the

applicants") referred it to the industrial court for determination under s 46(9)(b) of the Labour Relations Act 28 of 1956. In the applicants' statement of case there were set out what were said to be the "facts surrounding the dismissal". It stated that on 13 June 1989 Van Eeden informed the applicants that Pieterse was "the maintenance man" and instructed them that they were to work with him. On the following day Pieterse told Mnqutheni to make him a cup of tea. Mnqutheni informed him that he was employed as a dust filter operator and not as a maker of tea. The relationship between Mnqutheni and Pieterse then became strained. On the same day Pieterse entered the word "discharged" in the book which was kept in the office and related to the cleaning and operation of the dust filter room. This indicated that the dust filter room was ready for operation. The employees were working inside the dust filter room at the time, and if another

operator had switched on the machine, their lives would have been placed at risk. The employees reported this action of Pieterse to Van Eeden, the foreman, who told them that Pieterse would be reprimanded. There was a repetition by Pieterse on the afternoon of Thursday 15 June 1989. The employees complained again to Van Eeden. The statement of facts then continued:

> "20. The Individual Applicants were then summoned to the office of the General Manager, Mr Van der Merwe. Mr Van der Merwe requested the Individual Applicants to sign certain documents. As they were unaware of the contents thereof, and did not understand the implications thereof, they refused to sign the document. They requested Mr Van der Merwe to explain to them the contents of the said documents that they were required to sign. Instead, Mr Van der Merwe hurled abuse at them. He then instructed them to report for work the following day at 8.00 a.m.

21. On the following day, being the 16th June 1989, the Individual Applicants reported at the office of their Foreman, Mr Van Eeden. They were then requested to prepare a statement individually. The impression was created that they had contravened a rule at the workplace. The Individual Applicant's requested clarification and, in particular, stated to Mr Van Eeden as they were jointly involved, they wished to prepare a joint statement.

22. To their surprise, they were refused the request and were not explained the reason why they were required to complete a statement, but instead were summarily dismissed by the Manager, Mr G Kinner."

Under the heading "THE DISMISSAL IS UNFAIR" the statement of case continued:

"24. In the premises, the Individual

Applicants submit that there was no valid and fair reason for their dismissal.

25. The Individual Applicants further state that they were not afforded a proper opportunity to state their case, and that their dismissal was unwarranted, unfair and improper.

26. The Individual Applicants submit that the conduct of Pieterson was such that they

were required to file a complaint against Pieterson. Instead, the Respondent responded by dismissing the Individual Applicants.

27. WHEREFORE the Individual Applicants aver that the Respondent committed an unfair labour practice and pray that they be reinstated in their employment on the same terms and conditions prior to their unfair dismissal, and that they be paid retrospective to the 16th of June 1989, or such other and further relief the above Honourable Court deems fit, inclusive of cost of this action."

Slagment filed a reply to the applicants'

statement of case which, as will appear from what follows, reflected a very different picture of the events leading up to the dismissals.

At the hearing the employees gave evidence-in-chief along the lines foreshadowed in the statement of case.

On behalf of Slagment evidence was given by Hartzenberg, the works manager; Kinnear, the Vanderbijlpark factory manager; Van der Merwe, the general foreman at the factory; Van Eeden, the production foreman; and Koos Pieterse. The following summary sets out the main features of that evidence.

Tuesday 13 June 1989.

When work began on the Tuesday, Van Eeden had Pieterse call the employees to his office. There Van Eeden explained to them that Pieterse would thenceforth be in charge of the dust filter section and

that they were to report to Pieterse who would in turn report to Van Eeden. The employees flatly refused to work with Pieterse, saying that this was not in their "job description". Although Van Eeden explained that the job description would be changed, the employees persisted. Taking up the story, Pieterse said that when the three of them left Van Eeden's office, the employees went their own way. When he asked them questions he was told "Jy moet jou bek hou. Jy moet loop." He reported to Van Eeden :

> "Ja, ek het na CHRIS - na MNR VAN EEDEN toe gegaan en vir horn gaan sê kyk, die mense weier net volstrek om saam met my te werk. Ek meen ons kan nie so aangaan nie. Dit is - dit is ' n heeltemal - dit krap 'n mens - se program om en jy kan nie - jy kan nie op 'n punt begin en aangaan met die werk nie, en hulle - hulle - hulle gaan hulle 'way' en ek moet my 'way' gaan, ek meen dit is nie hoe ons gevra is om te werk nie."

Van Eeden said that he discussed the matter with Van der Merwe:

> "Ek het dit met MNR VAN DER MERWE gaan bespreek, toe sê hy vir my ons moet kyk wat maak hulle vir die dag want hulle was geheel en al ontwrig en hulle was, hardekwas gewees, toe sê hy los hulle uit, ons kyk wat maak hulle as hulle vandag deurgaan, moontlik kom - kom hulle tot sinne, dan kan hulle aangaan en die werk doen."

He also said:

> "Koos het na my toe gekom twee, drie maal deur die dag en kom kla dat hulle nie vir horn luister nie. Toe sê ek vir horn KOOS, probeer net kalm met hulle saamwerk, probeer vir hulle verduidelik wat gaan aan. Moontlik kom hulle reg dat hulle saamwerk."

Wednesday 14 June 1989.

On the Wednesday the first thing to be done in the section was to clean the dust filter of Belt 6. Pieterse called on the employees to come with him.

> "Hulle het - hulle het daar gestaan en ek - as ek kan reg onthou het ek vir FRANS geroep, maar FRANS het nie, hy - hy - hy het my net gewys ek moet loop, hy gaan nie, en as ek kan reg onthou het ek ook later van - later die oggend het ek PHILEMON gesoek en toe kry ek horn wel in die werks - werkswinkel, toe loop hy uit, en dit is wat ek horn ook geroep het, en hy het ook vir my gewys ek moet loop. Hulle - hulle weier net eenvoudig om saam met my te gaan."

Later in the day he went to the dust filter of Mill No 3 where the employees were working. He said

> "... toe het ek ook daar gekom en ek het vir hulle gesê 'hoor hier, julle sal moet gou maak want hierdie meul moet vanaand loop', hulle -

hulle moet klaarmaak, toe het PHILEMON en FRANS vir my gesê: 'man, hou jou bek, ons werk nie saam met jou nie, ons wil niks met jou te doen he nie en jy moet ons nou uitlos'."

Van Eeden also gave evidence of an occurrence on the Wednesday.

"Net Woensdagoggend vroeg het FRANS na my toe gekom met die vorm wat hulle moet invul as hulle op die 'dust filters' werk as hulle uitsluit, toe vra hy vir my waar moet hulle werk? Toe staan KOOS PIETERSE by my in die kantoor, toe sG hy vir horn julle moet Belt 6 se 'dust filter' gaan skoonmaak. Toe het hy KOOS net so op en af gekyk en hy het horn nie geantwoord nie. Toe sê ek vir hom, julle het nou gehoor julle moet Dust Filter 6 se belt gaan skoonmaak, daardie man het mos vir julle gesê. Hy het my nie geantwoord nie, toe sê ek vir horn in elk geval, julle teken nie meer die vorms nie, dit is nou PIETERSE se verantwoordelikheid. En hy het net omgedraai en uitgestap."

Thursday 15 June 1989.

Pieterse said that on the Thursday morning he was again standing next to Belt 6 dust filter.

> "Altwee van hulle het daar laat aangekom, maar eerste was Philemon [Mngutheni] daar. ... ons was besig om skoon - ek het saam met horn ook gewerk en MNR VAN DER MERWE het daar ingekom na ons toe, hy het vir my kom vra 'waar is FRANS?'. En ek het toe vir PHILEMON gevra 'waar is FRANS', en hy begin toe in sy sakke rondkrap en hy - hy het gesê 'ek is nie - ek pas nie vir FRANS op nie'. Okay, FRANS het later daar aangekom, en toe is dit - toe - toe ons klaar is daar op Belt 6 toe loop hulle rond, toe - ek is na MNR KINNEAR toe en vir MR KINNEAR gesê ons kan nie so meer werk nie, ek meen hy moet asseblief kyk, met die mense praat. Ons kan nie meer so werk nie."

Van der Merwe referred to this incident, but said that it happened on the Friday. He testified that at about 8 am he saw Pieterse and Mnqutheni at a dust point where they were busy cleaning. He continued:

"Toe loop ek oor na MNR PIETERSE toe en ek vra toe vir MNR PIETERSE, sê vir my, waar is FRANS vanoggend?, waarop MNR PIETERSE vir PHILEMON gevra het: 'PHILEMON, waar is FRANS?'. Toe het FRANS horn net - ag, ek meen PHILEMON horn so in die oë gekyk en hy het in sy sakke begin krap, toe sê hy 'hy was nou hierso, en so hoe die hel moet ek weet waar is hy?'. Terwyl ek nog daar gestaan het toe het FRANS aangekom en ek het horn toe gevra 'FRANS, waar kom jy nou vandaan?' . Toe se hy vir my hy kom van die toilet af. Toe sê ek 'Nou het jy toestemming van MNR PIETERSE gekry?' . Toe sê hy 'wie is MNR PIETERSE, hy is 'n fokken 'operator', dit is wat hy is, ek vat nie instruksies van horn nie, hy bestaan nie'. Daarop het ek vir hulle gesê maar onthou nou net een ding, moet nou nie huil as julle seerkry nie. Toe vra ek eerste vir PHILEMON, 'PHILEMON, met ander woorde jy wil nie saam met MNR PIETERSE werk nie'. Toe se hy vir my 'nee, ek werk nie saam met horn nie, hy kan sy eie 'job' doen.' Ek het vir FRANS dieselfde vraag gevra en FRANS het weer vir my gesê dit is 'n 'operator' , hy bestaan nie, hy kan sy 'job' doen, ek sal my 'job' doen."

During the Thursday afternoon management presented the employees with an amended job description, which differed from the original only in respect of the person to whom they were to report. Van der Merwe described the reaction of the employees:

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> "Hulle het so 'n rukkie na die - na die dokument gekyk en PHILEMON het aan my gevra nou wie het hier geskryf? Toe sê ek dit is die - dit is die 'works manager', dit was my woorde gewees. Toe vat hy horn, toe sit hy horn voor my op die tafel neer, toe sê hy vir my dit is nie sy 'job description' nie. En die oomblik toe hy dit doen toe vat FRANS syne, toe sit hy dit ook neer. Toe sê ek met ander woorde julle weier om dit te teken. Toe sê hulle vir my ja, hulle teken niks... Ek het opgestaan, ek het na my direkte baas gegaan wat MNR KINNEAR op daardie stadium was en ek het horn gesê dit is steeds negatief, hulle weier om die 'job description' te aanvaar."

Kinnear said that during the Thursday morning he spoke

to Mr Duba, the shop steward:

> "Ek het ook toe in die voorportaal van die kantore vir MR DUBA uitdruklik gevra om asseblief vir my 'n antwoord te gee op die nuwe werksomskrywing wat hulle gehad het, of FRANS en PHILEMON dit sal aanvaar en of hulle dit nie aanvaar nie, en ek het hulle 'n tydsper gegee in daardie stadium van die Vrydagoggend."

Pieterse gave evidence that on the Thursday he complained to Van der Merwe and Van Eeden:

> "... ek het na MNR VAN DER MERWE toe gegaan en ek het na CHRIS, MNR VAN EEDEN toe ook gegaan, en ek het gaan kla, die mense wil glad nie saam met my werk nie en ek het MNR VAN EEDEN ook ingelig oor die taalgebruik van hulle, hoe hulle met my praat. Ek meen dit is - ek het hulle laat weet, kyk, die mense is besig om ons program om te krap, ons werk nie so nie. Hulle het ook vuil taal gebruik. Hulle het gesê 'fok jou', en 'fok off'."

Friday 16 June 1989.

Early on Friday morning, Hartzenberg had a meeting with Duba. Hartzenberg went through the memorandum of 16 May 1989. He explained again the motivation for the appointment of Pieterse, and urged Duba to persuade the employees to accept the amended job description and to resume work in the normal way.

Nevertheless the employees persisted in their stand. They still refused to accept the amendment to the job description. When informed of this. Van der Merwe reported their conduct to Kinnear. This led to a decision to conduct a disciplinary hearing. Kinnear issued an instruction that the employees should be heard separately. They, however, insisted that there be a joint hearing. In the face of this, they were summarily dismissed.

The industrial court determination.

It is the practice of the industrial court when called upon to make a determination in a case where the unfair labour practice alleged is the dismissal of an employee, to make a two-fold inquiry: (1) Was the dismissal "substantively" fair? (was it for a valid and fair reason?); and (2) Was it "procedurally" fair? (was it in compliance with a fair procedure?). That approach was approved by this Court in Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204(A) (hereinafter referred to as "the PACT case") where the principal issue debated in argument was whether the dismissal was in compliance with a fair procedure (see 215 A). And it was the approach adopted by the industrial court in this case.

In its determination the industrial court stated that it was not altogether happy with the

evidence of the employees and that it found the story told by Slagment's witnesses to be more probable. The court found that -

> "... the applicants, for some reason, simply did not accept that Mr Koos Pieterse was placed in a supervisory capacity over them. They refused to take orders from Pieterse on the 13th, 14th and 15th June... The evidence ... satisfied the court that the applicants, over the period from the 13th to the 15th June, deliberately refused to obey lawful and reasonable commands."

(My emphasis.) In consequence, the industrial court was not persuaded that the dismissals were substantively unfair.

However, it did hold that they were procedurally unfair.

Lastly, the industrial court considered what remedy was appropriate in the circumstances. It concluded -

> "Evidence was led by Mr Koos Pieterse that the working relationship between him and the applicants had been unsatisfactory, if not openly hostile. In the light of this the court feels that reinstatement is not the appropriate order, but that three months' salary would be reasonable compensation."

(It should be mentioned that the industrial court stated that the testimony of Koos Pieterse was particularly convincing as he made a very good impression on the court.)

The employees and the trade union noted an appeal to the Labour Appeal Court ("LAC") on the grounds mainly

(a) that the industrial court erred in finding that there were adequate reasons for the dismissal of the employees;

(b) that, having regard to the conduct of Pieterse in signing off the dust filter machine, the court ought to have found

that the attitudes of the employees were not wholly unreasonable and that their conduct did not warrant the ultimate sanction of dismissal;

(c) that Slagment's refusal to grant a joint hearing was a fatal defect in the proceedings; and

(d) that the court should have ordered reinstatement.

Slagment noted a cross-appeal on the grounds mainly

(a) that the court erred in finding that Slagment's refusal to grant a joint disciplinary hearing was unreasonable, unjustifiable and unfair; and

(b) that the court erred in awarding compensation to the employees.

The Labour Appeal Court decision.

The appeal in the Labour Appeal Court was heard by GOLDSTEIN J and assessors. The judgment has

been reported sub nom Building Construction and Allied Workers Union and Others v Slagment (Pty) Ltd (1992) 13 ILJ 1168 (LAC) ("the reported judgment"). It concluded with an order upholding the appeal and dismissing the cross-appeal, both with costs; deciding that the dismissal of the employees was an unfair labour practice; and ordering reinstatement. In the judgment the LAC did not give separate consideration to the questions of substantive and procedural unfairness.

Leave having been granted, Slagment now appeals.

In an appeal from a Labour Appeal Court in an unfair labour practice case, this Court is required to determine whether, on the facts found by it, the Labour Appeal Court made the correct decision and order. If it did, the appeal must fail. If it did not, then this Court has power to amend or set aside that decision or order or make any other decision according to the

requirements of the law and fairness. (See National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992(1) SA 700(A) at 723 E-F.)

The many factual disputes on the record of the evidence in the industrial court were decided by that court in favour of Slagment. The LAC had no hesitation in agreeing with this view, which was not attacked in argument before it. GOLDSTEIN J said that in his discussion of the facts he would restrict himself to Slagment's version, save where the evidence of the employees was unchallenged (at 1169 G-H of the reported judgment).

In the course of the judgment, GOLDSTEIN J said (at 1172 D-G) that in answering the question whether the dismissal of 16 June 1989 constituted an unfair labour practice -

> "... a court [is] required to take account of all the relevant facts and to avoid falling

into the trap of narrowing the enquiry to those which led directly to the practice complained of. The second and third appellants had a record of service of about 15 and 10 years respectively. They had functioned well and had enjoyed a good relationship with management. They had exercised a large degree of autonomy and had done important work described in a not-unimpressive job description. Now management, with whom they had had a good relationship, chose without any consultation whatsoever, to introduce into their work situation a superior who would destroy their autonomy and whose expertise was to be greater than theirs. The insensitivity of this act was compounded by a number of self-evident factors. They were introduced to Pieterse and told about him in his presence on the morning of 13 June 1989. They were not afforded the courtesy of an aside beforehand. Their signing powers on important documentation were removed from them.

In my view it was incumbent on the respondent to prepare the ground sensitively and carefully for Pieterse's appointment by, for example, pointing out that a repairman was

> necessary to maximize the effectiveness of the work on the dust cleaners, that the volume of such work had increased and that such a man could lessen the burden previously carried by the second and third appellants. Respondent did nothing of the kind."

This passage, and in particular the parts which I have underlined, is pivotal to the LAC's decision that the dismissals constituted an unfair labour practice. Underlying it is the inarticulate premise that the conduct of the employees arose from their resentment at the appointment of Pieterse because it infringed their autonomy and impaired their status - resentment which could have been avoided if management had acted with sensitivity and courtesy.

For the reasons which follow I do not think that the judgment of the LAC can be sustained.

(a) In my view the point was not one which could

properly be considered by the LAC. It was not covered by the pleadings. It was never the case for the applicants that the behaviour of the employees arose out of the insensitive conduct of the Slagment management. In terms of Rule 5(d) of the Rules of the Industrial Court it was a requisite that the document initiating the proceedings should contain a clear statement of the material facts upon which the applicants relied. It was not averred in the statement of case that the dismissals were unfair because management "chose without any consultation whatever, to introduce into their work situation a superior who would destroy their autonomy and whose expertise was to be greater than theirs". The point was not foreshadowed in counsel's opening in the industrial court proceedings. It was not raised in the evidence of the employees - indeed, their account was inconsistent with it: in their evidence-in-chief, their complaint

against Pieterse was his conduct in noting the word "Discharged" in the book which might, they said, have resulted in their lives being put at risk; under cross-examination both said that they had been ready to work with Pieterse. Nkadimeng said that he had never refused to work with him; and that his only problem with him was that "he started the machines while we were working and he will kill us". Mnqutheni likewise said that he had worked with Pieterse and that he had never said that he did not want to work with Pieterse.

Consideration of the point by the LAC involved unfairness to Slagment. The facts on which it depended were not common cause and were certainly not clear beyond doubt on the record, and if the point had been raised there can be no doubt that Slagment's witnesses would have dealt with it in their evidence.

(b) In any event, I do not think that the validity

of the inarticulate premise was established. There was no evidence to support it. It is clear that the employees resolved at the outset that they would not work under Pieterse, and that they obstinately and insolently persisted in that resolve. But there is nothing to show that this resolve was due to their feeling aggrieved because of an infringement of their autonomy or an impairment of their status. It was submitted that this was a legitimate inference. But an inference must be based on facts, and there were none to support what was no more than a theory, an hypothesis.

Moreover it seems to me that as a general rule a favourable inference as to a party's motivation for particular behaviour, will not be made where that is not his case and he himself has given false evidence in that regard. The remarks of MALAN JA in his dissenting judgment in R v Mlambo 1957(4) SA 727(A) at 738 C-D have frequently been approved and applied in this

Court. Although made in a different context, they are not inapposite to the present case.

> "Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

(c) GOLDSTEIN J said (at 1173 I of the reported judgment) that "... management acted here in good faith and at most was guilty of insensitivity and errors of judgment". It is therefore implicit in the LAC's pivotal finding that management should reasonably have foreseen that Pieterse's appointment would provoke the

reaction which it did. In my opinion there is no basis for so holding. One cannot apply wisdom which comes after the event. And the answer to the question requires some knowledge of the conditions prevailing in the workplace, and of the personalities of the persons concerned. The point was not put to Slagment's witnesses. And the LAC had no knowledge of the employees except what appears from the record to have been their lamentable performance as witnesses. On the face of it one would not, I think, expect a minor administrative change such as this to provoke a situation the handling of which would call for pre-operation preparation and careful nursing treatment.

(d) Even if one were to asume that management was guilty of insensitivity, its relevance to the fairness of the dismissals would be questionable.

The employees had been guilty of sustained

disobedience. They had deliberately set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of relationship of employer and employee impossible.

Counsel for the applicants did not contend that their resentment at Pieterse's appointment justified or excused their conduct. What he submitted was that it was mitigating, and that to dismiss the employees in the light of it was excessively harsh, unjustified and unfair.

I do not agree. The recognition agreement between Slagment and the Union included a section dealing with "Grievance Procedure", which provided a means for the communication and settlement of grievances speedily and without disruption of the work. If the employees had a grievance, this was the route which they should have followed.

(e) GOLDSTEIN J referred to other facts and factors which he regarded as important in deciding the question whether the dismissals constituted on unfair labour practice.

The first (see 1172 H of the reported judgment) was that the employees did not stop working. It is true that between 14 and 16 June 1986 they continued to go about their work after their own fashion. But they insolently refused to perform it in the way required by their employer. As a result, by the end of the Thursday the work situation was impossible. Because of the attitude of the employees, Pieterse was obliged simply to keep out of their way. He did not even know exactly what work they were doing. When he called them to clean the dust filter on belt 6 in order that the plant would be properly operational for the night shift, they refused outright and indicated

that he should go away. When he spoke to them about punctual attendance, they again reacted insolently, one of them saying:

> "Jy is nie my baas nie, ek werk nie vir jou nie, ek werk vir SLAGMENT en ek het dit vir die grootbase ook gese."

The second was that the employees were dismissed after only three days of recalcitrance. (See 1172 I of the reported judgment). During those three days, management showed exemplary patience in the face of severe provocation. But obviously matters could not be allowed to continue in this way. There was an impasse which had to be unblocked. There was no way out except the holding of a disciplinary inquiry, which might possibly result in dismissal.

GOLDSTEIN J referred to a number of other factors (the absence of a warning that the employees

faced dismissal; that the holding of a disciplinary inquiry on the Friday was premature; and that the management should first have sought to speak separately to each of the employees to try to understand their continued obstinacy). All these, however, relate to the aspect of procedural fairness which is dealt with below.

In my opinion the dismissals were not substantively unfair. They were fully justified.

I turn then to the question of procedural fairness.

The reason for the finding of the industrial court that Slagment's decision was procedurally unfair was that

> "The court feels that the company's refusal to grant a joint hearing was unreasonable in the circumstances of this case because the applicants were thereby not given the opportunity of stating their versions of the

dispute."

I do not agree. The employees were given an opportunity of stating their versions of the dispute, but they rejected it. It is within the province of the employer who holds a disciplinary enquiry to determine its form and the procedure to be adopted, provided always that they must be fair. Fairness requires inter alia that the employee should be given an opportunity of meeting the case against him: the employer must obey the injunction audi alteram partem. This the Slagment management was ready to do. Its refusal to allow a joint hearing was not arbitrary, capricious or unreasonable: it was anxious to discover the true cause of the employees' recalcitrance and suspected that Mnqutheni was exerting undue influence on Nkadimeng not to co-operate with management in disclosing it; and it believed that by interviewing them separately it

would have a better chance of discovering the real reason for their conduct. (Compare the observation of GOLDSTEIN J, referred to above, that the management should first have sought to speak separately to each of the employees to try to understand their continued obstinacy.) It was the employees who frustrated a hearing by seeking to impose an illegitimate condition for their participation in an enquiry. A joint hearing could not assist them in making their defence. It would seem rather that their insistance on a joint hearing was motivated by the thought that if they did not hang together they would assuredly hang separately. In consequence they deprived themselves of the opportunity of stating their case.

I consider nevertheless that the dismissal was procedurally unfair, but for different reasons.

Management must have had possible dismissal in contemplation. Dismissal would be drastic and far-

reaching with immeasurable consequences for employees who had records of service with Slagment of about 15 years and 10 years respectively. The refusal of the employees to attend the inquiry except on their own conditions was the last straw on a pile of provocative incidents. One readily understands that with this final provocation Kinnear's patience was exhausted. I agree with the judgment of the industrial court that it "is clear from Mr Kinnear's evidence that when he heard that the applicants insisted on a joint disciplinary hearing, he had lost his patience and decided to summarily dismiss them." That action, though understandable, was nevertheless precipitate. In the PACT case (supra), GOLDSTONE JA quoted with approval (at 216 C-D) a statement by VAN RENSBURG J in Plaschem (Pty) Ltd v Chemical Workers Industrial Union (1993) 14 ILJ 1000 (LAC) at 1006 H-I:

> "When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited."

Kinnear's precipitate action had the result that the employees were called upon to face a "drum-head" enquiry on 45 minutes' notice, and even before the charges against them had been formulated. They were denied the opportunity of taking counsel, of reflecting on their conduct, and possibly of having second thoughts. Furthermore they were not informed that dismissal was an option which might be exercised.

It was argued on behalf of Slagment however that any procedural defects connected with the dismissal

of the employees were cured by the appeal hearing before Hartzenberg. Counsel for the applicants on the other hand submitted that the fact that there was an appeal before Hartzenberg in which the employees participated fully and at which evidence was led could not -

> "... overcome the absence of an initial hearing. The code of disciplinary procedure the Appellant adopted and which was applicable to its workforce gave the Respondents a contractual entitlement to an appeal after the initial enquiry ..."

The question whether it is possible for an appellate tribunal to correct an administrative decision which is impeachable on the grounds of unfairness, is discussed by Baxter, Administrative Law, at 588-9. The learned author states that in the first place, a complainant is entitled to fairness at all stages of the

decision-making process, and he quotes from the judgment of Megarry J in the English case of Leary v National Union of Vehicle Builders [1971] Ch 34 at 49:

> "If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"

Baxter adds that the complainant has a vested interest in a fair primary decision irrespective of the existence of a right of appeal. See Turner v Jockey Club of South Africa 1973(3) SA 633(A) at 658 G. Cf Council of Review, SADF v Monnig 1992(3) SA 482 at 494 B-G.

It is not possible to lay down a general rule in this connection. In delivering the opinion of the Privy Council in Calvin v Carr [1980] AC 574 (PC) Lord Wilberforce said at 592:

> "... their Lordships recognize and indeed

> assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so."

See also Lloyd v McMahon [1987] AC 625(HL) at 697, 716.

The above-quoted observation by Megarry J in Leary's case (supra) was made in the context of "domestic and administrative two-tier adjudicatory systems" (cf the remarks of Lord Bridge of Harwich in Lloyd v McMahon (supra) at 708 H.) The present is not such a case. Here there was no adjudication prior to the dismissals. The employees were summarily dismissed without a hearing, the absence of which was not due to any fault on the part of the employers. It was the result of the intransigent attitude of the

employees. There is no reason in principle why any unfairness at the stage of the dismissal should not have been cured by a full and fair hearing on appeal.

The recognition agreement between Slagment and the trade union provided in clause 15.8:

> "<u>Avenues of Appeal</u>
>
> Dissatisfaction with the outcome of disciplinary action may not be declared a formal grievance.
>
> Appeals against Summary Dismissal, Dismissal or Final Warning decisions only may however be made to the Factory Manager. Said appeals must be lodged with the Foreman to whom the employee normally reports, within one working day of the disciplinary notification ...
>
> The Factory Manager will review all the evidence and facts pertaining to the matter and interview all or any parties who in his discretion may be involved. The Factory Manager must however allow the employee, assisted by a maximum of two representatives

> (refer clause 15.3 above) should the employee so wish, to present his appeal. In the event of the employee being a Union member, the representatives referred to will be the Senior Shop Steward and the Shop Steward for the constituency in question.
>
> The Factory Manager will inform the employee of his final decision within five working days of the original disciplinary notification. This period may be extended by mutual consent."

The appeals were heard on 28 and 29 June 1989 by Hartzenberg. He was the works manager of Slagment, not the Vanderbiljpark factory manager, who was Kinnear. The latter however had taken the decision to summarily dismiss the employees and it would have been irregular for him to hear the appeals. No objection was raised at any time to the hearing of the appeals by Hartzenberg. Hartzenberg described the proceedings in his evidence in the industrial court.

Nkadimeng was called in first with the two shop stewards and an interpreter. The Slagment officials who were concerned were called in successively. Their statements were read out and Nkadimeng was given, and used, the opportunity of questioning the officials and commenting on their testimony. The questions and answers were recorded. Nkadimeng then made a detailed statement which was recorded. The same procedure was then followed in the case of Mngutheni.

The employees were aware on 16 June 1989 of the reason why they had been dismissed, namely,

> "Gross insubordination - refuses point blank to accept any instruction given to him by any senior personnel."

Each appealed on the same day. Between 16 June and 28 June 1989 the employees had full opportunity for taking advice, of reflecting on their conduct, and of

appraising their position. They were afforded a full opportunity of meeting the case against them. They were informed that they would be re-employed if they accepted the amended job description. On this point Hartzenberg's evidence-in-chief at the industrial court hearing was not ideally clear. This is the relevant extract from the record:

> "MR PRETORIUS: And why did you then decide to uphold the decision to dismiss them?
>
> MR HARTZENBERG: I would have considered - I would have considered a final warning subject to these two gentlemen - said that they are now prepared to - to accept and start work. Even on the final day I was quite prepared to waive the dismissal of MR KINNEAR's and give them a final warning and re-employ them.
>
> MR PRETORIUS: Provided that they at that stage ...
>
> MR HARTZENBERG: Accept ...
>
> MR PRETORIUS: ... submitted to the discipline.
>
> MR HARTZENBERG: Submitted to the discipline.
>
> MR PRETORIUS: And they did not do so.

> MR HARTZENBERG: No, they refused.
> MR PRETORIUS: And that is the reason why...
> MR HARTZENBERG: No, they never requested it.
> MR PRETORIUS: And that is the reason why you dismissed them.
> MR HARTZENBERG: That is why the dismissal stayed."

The following appears however from his cross-examination by Mr Cassim who was counsel for the employees:

> "MR CASSIM: Now you have also said that had they told you that look, MR HARTZENBERG, we are terribly sorry, our attitude is not a proper attitude, we are prepared to work under MR PIETERSE, you would have been prepared to reinstate them ... MR HARTZENBERG: Yes.
> MR CASSIM: ... with a final written warning.
> MR HARTZENBERG: with a final warning ... I asked them ... is that your final decision now, do you refuse to work with MR PIETERSE and they said yes ... I asked them do they still refuse, and they said yes, right up to the very last minute as well."

This evidence was not challenged by Cassim nor denied by either of the employees.

At no time was there any question as to the fairness of the appeal proceedings. It was only on the merits that Hartzenberg's decision was challenged. In my opinion, the initial procedural unfairness was overtaken by the Hartzenberg hearing and it had no influence on the course of that hearing or its eventual outcome.

In my view therefore any prejudice which resulted from the procedural deficiencies which attended their dismissals was cured.

My conclusion is that the LAC erred in finding that the dismissals were an unfair labour practice and in making the order which it did.

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

Appeal Court is set aside and there is substituted therefor the following:

"(a) The appeal is dismissed with costs.

(b) The cross-appeal is allowed with costs.

(c) The determination and order of the industrial court are set aside and the following is substituted:

'It is determined that the dismissal of Frans Nkadimeng and Philemon Mnqutheni was not an unfair labour practice.'"

H C NICHOLAS AJA.

HOEXTER JA)
F H GROSSKOPF JA)
NIENABER JA) CONCUR.

JUDGMENT

SMALBERGER, JA:

I have had the benefit of reading the judgment of my learned brother Nicholas ("the main judgment"). I agree, for the reasons

given by him, that the dismissals of the employees (Nkadimeng and Mnqutheni) were not substantively unfair. I also agree that they were procedurally unfair, for the reasons in the main judgment, and for additional reasons that centre on Kinnear's refusal to conduct a joint disciplinary enquiry. The nature and form of any disciplinary enquiry will, apart from any contractual requirements, depend upon the exigencies of the situation (cf. Administrator, Transvaal and Others v Zenzile and Others 1991(1) SA 21(A) at 40 C-G). In the circumstances that pertained at the time Kinnear's decision was, in my view, unreasonable and, in the result, unfair, thereby depriving the employees of a hearing to which they were entitled. This failure to afford them a hearing was, in my view, not cured by the later appeal hearing before Hartzenberg.

At the time of their dismissals Nkadimeng and Mnqutheni had worked for Slagment for 15 and 10 years respectively. Both had unblemished records with no previous disciplinary infringements or

warnings. By all accounts they had been good and satisfactory workers. According to Van Eeden "[het] hulle goed gewerk en [daar was] 'n baie goeie verstandhouding met hulle gewees ook". The evidence, in my view, does not establish that the dust emission problems experienced at Slagment's factory were due in part to the fact that the employees did not perform their work satisfactorily. To the extent that they were unable to cope, their failure to do so was not shown to have been due to indolence, inefficiency or unwillingness on their part.

The advent of Pieteise brought about a marked change in the employees' attitude and conduct. Their insolence, insubordination and recalcitrance were uncharacteristic having regard to their past behaviour. The true reason for this change on their part has never emerged, for both employees clearly lied (indeed, persistently so) about the reason for their inexcusable conduct. Management was acutely aware of this change in behaviour and attitude, and was

seemingly anxious to discover the true cause of the employees' recalcitrance. The envisaged disciplinary hearing was, at least in part, intended to get to the bottom of the problem.

Clause 15.1 of the Recognition Agreement provides:

> "The main objective of the Disciplinary Procedure is to provide a formal vehicle for the systematic, uniform and fair exercise of discipline by Management."

Clause 15.2.1 states that "[disciplinary action should aim to be educational and corrective". The Recognition Agreement is silent as to the precise form disciplinary proceedings should take. I accept that it was management's prerogative to determine that form. But any decision by management in this respect had to be taken with due and proper regard to all relevant circumstances, always bearing in mind the need to act reasonably and fairly. Thus in certain circumstances a collective rather than an individual hearing might be called for.

I accept that the employees had a duty to participate in

disciplinary proceedings. Neither of them declined to participate outright. Their only objection was to being tried separately. They were prepared to participate on the basis of being heard together. Both had been involved to a more or less equal degree in the events that had given rise to the need for an enquiry; both had basically displayed the same attitude and behaviour; the source of their discontent was common to both of them; and they had acted in concert throughout. In the circumstances their attitude was understandable and not entirely unreasonable. They were not being deliberately obstructive. Moreover, as pointed out in the main judgment, they were called upon to face an enquiry at 45 minutes notice and before any charges against them had been formulated. They were denied a proper opportunity of seeking advice and were not given sufficient time to reflect upon their conduct. This may have contributed to, or strengthened, their resolve to be heard together. Most important, they were never advised that their

refusal to attend individual hearings could, or would, result in their summary dismissal. Had they been so told, or given more time to reflect, they may conceivably have been prepared to accept individual hearings. Significantly, at the later appeal proceedings they no longer insisted upon a joint hearing.

From management's perspective there was no sound reason for insisting upon separate hearings in the face of opposition thereto by the employees. One of the reasons advanced for management's attitude was an apparent belief that Mnqutheni was unduly influencing Nkadimeng and that separate hearings were more likely to lead to the discovery of the root cause of the problem, while at the same time affording protection to Nkadimeng. However sincere management's belief was in this regard, there was no objective factual basis for it. Nor were Nkadimeng's interests served by no hearing at all. Management appreciated, or should have appreciated, that a hearing was especially important where the

reason for the employees' conduct was not apparent. A joint hearing would not in any way have prejudiced or inconvenienced management; on the contrary, it would have been a more expeditious way of dealing with the matter. By refusing a joint hearing management effectively denied the employees a hearing. It may be said that this was the inevitable consequence of the employees' conduct and that they frustrated a hearing. But if management had a genuine desire to establish the reason for the employees' recalcitrance (as they should have had) a joint hearing was indicated rather than no hearing at all.

In the circumstances it was, in my view, unreasonable for Kin near to have refused the employees a joint hearing. His refusal in this regard, coupled with his otherwise precipitate action, resulted in the employees being denied a hearing and their consequent dismissal being procedurally unfair. Kinnear would have done well to have heeded the admonition of Van Rensburg, J, in Plaschem

(Pty) Ltd v Chemical Workers Industrial Union quoted in the main judgment. The denial of a hearing constituted a breach of clause 15.2.2 of the Recognition Agreement which provides that "[t]he offender must be given an opportunity to explain and if necessary defend his conduct.".

The procedural unfairness in relation to the employees' dismissal extends even further. Not only was their dismissal not preceeded by any warning, but the decision to dismiss was reached without any regard to the employees' length of service and clean record. This was conceded by Kinnear. One of the important ingredients of a fair disciplinary hearing is the right to have previous service (which, in this case, was lengthy and unblemished) considered. Clause 15.7.2 of the Recognition Agreement in fact required Kinnear to check the employees' records before any disciplinary hearing, something he manifestly failed to do.

The main judgment addresses the question whether any

procedural unfairness was overtaken and cured by the subsequent appeal hearing before Hartzenberg, and deals with the relevant legal principles. The position is well summarized in Wade: Administrative Law: 6th Edition: p 550 as follows:-

> "Whether a hearing given on appeal is an acceptable substitute for a hearing not given, or not properly given, before the initial decision is in some cases an arguable question. In principle there ought to be an observance of natural justice equally at both stages; and accordingly natural justice is violated if the true charge is put forward only at the appeal stage. If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of a fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

The main judgment proceeds on the premise that despite procedural unfairness it was the fault of the employees, not management, that no initial hearing took place. On the view I take of the matter, the employees were deprived of a hearing (which the Recognition Agreement entitled them to) through Kinnear's unfair

conduct in unreasonably denying them a joint hearing. It may well be that on the approach adopted in the main judgment the earlier procedural irregularities were cured by the appeal hearing. It seems to me that a necessary distinction has be to drawn between, on the one hand, a defective hearing or no hearing through the fault of the person whose conduct is the subject of such hearing and, on the other hand, the unreasonable denial of a hearing by a person in authority (as in the present instance), more particularly where such denial is in effective breach of a contractual obligation. The procedural unfairness flowing from the latter situation cannot, in my view, be cured by a later appeal, save perhaps in very exceptional circumstances (which is not the case here). The appeal hearing becomes the only one. The right to both an initial hearing (whether free from defects or not) and an appeal are denied. Moreover, a person in the position of the employees is placed in the situation where he bears the burden of displacing an adverse

decision (his summary dismissal) which for lack of natural justice (procedural unfairness) ought never to have been reached (Empangeni Transport Pty) Ltd v Zulu (1992) 13 ILJ 352 (LAC) at 358 D-F).

The conclusion to which I therefore come is that the procedural unfairness surrounding the employees' summary dismissal constituted an unfair labour practice entitling them to some form of relief. The nature of that relief falls to be determined applying the approach enunciated by GOLDSTONE, JA, in Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204(A) at 219 A-C In the present case the employees' conduct was so flagrant and their lack of repentance so manifest that it would place an intolerable burden on Slagment to order their reinstatement. I

would therefore have restored the order of the industrial court and have made an appropriate order as to costs.

J W SMALBERGER
JUDGE OF APPEAL