IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 86/92

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA AND OTHERS APPELLANTS

VERSUS

HENRED FRUEHAUF TRAILERS (PTY) LTD RESPONDENT

CORAM: VAN HEERDEN, SMALBERGER, VIVIER, HOWIE

JJA et NICHOLAS AJA

DATE HEARD: 20 September 1994

DATE DELIVERED: 11 November 1994

NICHOLAS AJA

J U D G M E N T

NICHOLAS AJA:

This appeal arises out of the dismissal on 11 June 1989 by Henred Fruehauf Trailers (Pty) Ltd (which will be referred to as "the employer") of 44 employees at its Wadeville factory ("the 44 employees"). Alleging that the dismissal constituted an unfair labour practice, the National Union of Metalworkers of South Africa ("NUMSA") and the 44 employees, all of whom were members of the union, applied to the industrial court for a determination of the dispute in terms of s.46(9) of the Labour Relations Act 28 or 1956 ("the Act"). The industrial court decided that the dismissal was substantively and

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procedurally unfair and constituted an unfair labour practice. It ordered that the 44 employees be reinstated in their employment on terms and conditions no less favourable to them than those which governed their employment on the date of dismissal.

The employer appealed to the Labour Appeal Court ("the LAC) in terms of s. 17(21A) of the Act. The LAC upheld the appeal "in part, in regard to the relief granted", holding that the reinstatement of the 44 employees "was clearly not appropriate and should ... not have been granted." It made the following order:

> "1 The matter is referred back to the court a quo for consideration of the appropriate compensation payable to each of the second to forty-fifth respondents, with particular

reference to the personal circumstances of each of the said | respondents. 2 The appellant is ordered to pay the costs of the respondents, including the costs of two counsel." The judgment of the LAC has been reported (Henred Freuhauf Trailers (Pty) Ltd v National Union of Metalworkers of SA and Others | (1992) 13 ILJ 593 (LAC).

NUMSA and the 44 employees now appeal to this court with leave duly granted. The employer noted a cross-appeal in regard to the costs order, but as leave in that regard was not sought or granted the cross-appeal must be struck off the roll with costs. There was no cross-appeal in regard to the merits. In terms of Appellate Division Rule 5(4)(i) the

parties stated a special case, which set out the agreed facts which were extracted from the 1340 pages of the record of the proceedings in the industrial court, and the findings of fact made in the judgments of the industrial court and the LAC. This material is summarized in the judgment of Van Heerden JA.

There is a single question for decision. It was formulated by the parties as follows:

> "Whether or not the Labour Appeal Court was correct in rinding that reinstatement of the dismissed employees was inappropriate because they had engaged in an illegal strike."

In its judgment, the industrial court did not give reasons for ordering the reinstatement of the 44 employees. This was in line with the approach often adopted in cases of unfair dismissal by the industrial

court and the LAC. In Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204(A) ("the PACT case") Goldstone JA said at 218H-J that in a number of decisions those courts had regarded it as almost axiomatic that, in the absence of special circumstances, an unfair dismissal should have as its consequence an order for reinstatement. This approach was exemplified in the dictum of Goldstein J in Sentraal-Wes (Koöperatief) Bpk v Food Allied Workers Union and Others (1990) 11ILJ 977 (LAC) at 994 E:

> "Prima facie, if an unfair labour dismissal occurs the inference is that fairness demands reinstatement. And it is for the employer to raise the factors which displace such inference."

Goldstone JA considered this to be far too widely stated. He said (at 219

A-C)-

> "In every case the industrial court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. Each case must depend on its own facts. A rule of thumb, even if applied on a prima facie basis, will tend to fetter the wide discretion of the industrial court (or the Labour Appeal Court). That result is one to be avoided. In my opinion the correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief ..."

The LAC's view that reinstatement was not the appropriate remedy was based on what it conceived to be a matter of legal policy: reinstatement was not appropriate because the 44 employees had

participated in an illegal strike, albeit in the form of a partial or go-slow strike. It relied on Tshabalala and Others v Minister of Health and Welfare and Others 1987(1) SA 513(W), where Goldstone J said at 523 B-C:

> "As a matter of public policy I do not believe that a Court should order the reinstatement of an employee who admits or is found to have participated in an illegal strike. As I have already said, such conduct subverts the very purpose and being of the profession [sc. the nursing profession] which such person is seeking to join. In other words, the third applicant has not come to court with clean hands, as it were, and in my judgment I should not exercise my

discretion in favour of that applicant."

In his judgment in the PACT case however Goldstone JA distinguished the Tshabalala case. He pointed out at 219 C-H that Tshabalala was decided under the common law and not under the unfair labour practice procedure of the Act and that it was not apposite or relevant in the latter class of case.

Nevertheless, the fact that dismissed employees have engaged in illegal industrial action may be highly relevant to the question whether reinstatement should be ordered. See the judgment in the PACT case at 218 D-E, where Goldstone JA referred to a "glaring omission" in the reasons which in that case caused the industrial court to order reinstatement -

> "namely, an appreciation of the effects of the illegal, unreasonable and prejudicial conduct of the employees in embarking upon the wildcat strike."

The learned judge of appeal observed at 219 J -220 A that important considerations which should be taken into account in determining the appropriate relief include the illegal and unacceptable conduct of the dismissed employees which clearly constituted an unfair labour practice on their part, and also a breach of their employment contracts. He said at 220 G-H,

> "Employees and their trade unions must take into account the high risk which they run when the provisions of the law are flaunted and the whole purpose of collective bargaining is subverted - for that is the inevitable consequence of an illegal strike."

Thus, it may be relevant to the appropriateness of reinstatement that the conduct of dismissed employees has so impaired the employer/employee relationship that it would be unreasonable and unfair to order that they should be reinstated. Or it may be that in the view of the court reinstatement should be denied as a mark of disapproval of the i unlawful conduct, or in order to deter employees who might in future be minded to engage in unlawful industrial action. Or it may be felt that the case is one which calls for retributive justice - that the dismissed employees should be made to "pay" for the inconvenience, disruption and financial loss caused to the employer.

It was nevertheless submitted on behalf of the appellants that the fact that the 44 employees had taken part in the go-slow strike could not

in this case be used in determining the appropriate remedy. The submission was not that such participation did not have a logical bearing on the question, but was based on a narrow technical ground, namely -

> "The starting point of the enquiry in any dismissal case, is the reason given by the employer therefor at the time of dismissal. Once established, the employer is bound by that reason. An ex post facto attempt to justify a dismissal can never be fair . . .
>
> "The misconduct with which the workers were charged and found guilty was not their participation in the go-slow. It was for 'deliberately' failing what is referred to as the 'five hour test'. That test purported to measure each individual

> worker's productivity over a five-hour period taken on the morning of 15 June 1989 . . .
>
> "... Having disciplined the dismissed workers for alleged acts of individual misconduct, namely the failure of the five hour test, [the employer] now attempts to introduce a different reason to justify the dismissal, namely, participation in the go-slow. This equity will not permit.

"The [employer] cannot now rely on factors to ward off a reinstatement order which were never put to the dismissed workers in the charges they were called upon to meet." The argument is misconceived. It rests on a failure to distinguish

between the two stages of an enquiry into an alleged unfair labour practice under s.46(9) of the Act. The first stage is concerned with the question whether there was an unfair labour practice, and the second is concerned with the question of the appropriate remedy.

Here the industrial court decided the first question in favour of NUMSA and the 44 employees, holding that the dismissal was without a valid and fair reason and was not in compliance with a fair procedure. That conclusion was confirmed by the LAC and it has not been challenged by the employer, who does not now seek to justify the dismissal.

It cannot successfully be contended that in the decision of the second question the court is limited to the facts alleged in the original

charges against the employee. In terms of s 46(9)(c) of the Act the function of the industrial court is to

> "... determine the dispute on such terms as it may deem reasonable, including but not limited to the ordering of reinstatement or compensation."

The word "reasonable" imports that the determination should be reasonable from the point of view of both employee and employer. The industrial court must have regard to considerations of fairness and unfairness. See Media Workers Association of South Africa v Press Corporation of South Africa Ltd 1992(4) SA 791(A) at 798 D-H. It is required to apply both law and equity in the broad and general sense of that word. (Cf. National Union of Mineworkers v East Rand Gold and

Uranium Co Ltd 1992(1) SA 700(A) at 734 H.)

In order to perform its functions under s. 46(9) of the Act the industrial court must have regard to all relevant information which is properly before it. "The correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decade; upon the appropriate relief..." (per Goldstone JA in the PACT case at 219C). Justice is not served by the court putting on blinkers.

Where an employee is unfairly dismissed he suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise. The fullest redress obtainable is provided by the restoration of the status quo ante. It follows that it is incumbent on the court when

deciding what remedy is appropriate to consider whether in the light of all the proved circumstances there is reason to refuse reinstatement.

In the present case the only reason advanced in support of a denial of reinstatement was that the 44 employees participated in an illegal strike.

As appears from Van Heerden JA's summary of the facts, the question of the go-slow strike was canvassed fully and in detail in the industrial court, as a result of which it became common cause that

> "12. During the period 2 May to 16 June 1989, the [employer] experienced a drop in production at its operations countrywide. This was caused by illegal industrial action in the form of an overtime ban and a 'go-slow', participated in by all of the respondent's approximately 2000 employees during such period."

It is plain that the 44 employees participated in an illegal go-slow strike over the period 2 May to 14 June 1989 notwithstanding requests by the employer to the trade union to resolve the matter; an undertaking on behalf of the employees that they would not persist in their conduct; a court interdict; and ultimatums that if they continued with their action they would be dismissed,

It is manifest too that a go-slow strike is a most insidious form of industrial action. It causes continuing financial loss to the employer while the employees continue to draw their wages. It is difficult to bring home to specific employees. There can be no doubt the conduct of the workforce was reprehensible in the extreme. In the words of Goldstone JA in the PACT case, it was "illegal, unreasonable and prejudicial". But

the matter does not rest there. It must borne in mind that the 44 employees were not alone. They comprised only about 2% of the total workforce of some 2000 all of whom participated in the go-slow strike. They were engaged in one shop in one factory belonging to a company whose operations were country-wide. The 44 employees were the only employees dismissed: the others, whose conduct was equally reprehensible, were left undisturbed in their positions. The only thing which set the 44 employees apart from the remaining 98% of employees was the fact that they were the victims of an unfair labour practice. But they became the whipping boys.

Equity requires that the courts should have regard to the so-called "parity principle". This has been described as a basic tenet of fairness

which requires that like cases should be treated alike. (See Brassey, The Dismissal of Strikers, (1990) 11 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word "equity" as used in a United Kingdom statute dealing with the fairness of dismissals "comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment." (Post Office v Fennel (1981) IRLR 221 at 223.) The parity principle has been applied in numerous judgments in the industrial court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice. The application of the principle is not limited to labour disputes. Thus it was stated in S v Marx 1989(1) SA 222(A) at 225 B-C that - "ongelyke strawwe op gelyke misdadigers

ten opsigte van dieselfde misdryf druis teen die algemene gevoel van geregtigheid in."

In the circumstances of this case, a denial of reinstatement would not be in accordance with fairness and justice. I consider that the LAC erred in finding that reinstatement of the 44 employees was inappropriate.

I would therefore allow the appeal and make an order which will ! have the effect of restoring the decision of the industrial court. In this regard I must refer to a matter left open in the judgment of Van Heerden JA, namely, the position of the five appellants who could not be based, with the result that power of attorney from them could not be filed. It seems to me that there can be no legitimate objection to treating these five as falling within the ambit of the order to be made, since NUMSA

has brought the appeal both in its own name and on behalf of its members.

The parties were in agreement that whatever the result of the appeal there should be no order as to the costs in this court.

The appeal is allowed. The order of the Labour Appeal Court is set aside and there is substituted therefor an order dismissing the appeal with costs.

The cross-appeal is struck off the roll with costs including the

costs of two counsel.

HC NICHOLAS ACTING JUDGE
OF APPEAL

SMALBERGER JA)

CONCUR

HOWIE JA)

JUDGMENT

VAN HEERDEN JA:

The respondent is a manufacturer of inter alia trailers and tankers. During 1989 it employed some 2 000 employees of whom approximately 600 worked in its Wadeville factory. In June 1989 a number of the Wadeville employees were dismissed. They were all employees as defined in the Labour Relations Act 28 of 1956 ("the Act"). After the hearing of internal appeal proceedings the dismissals of 44 of those employees were upheld. Subject to what is said later in this judgment, they are the second to the forty-fifth appellants before us.

The first appellant is a trade union registered in terms of the Act. Following the confirmation of the individual appellants' dismissals they and the union brought an application to the industrial court in terms of s 46 of the Act. The main relief sought by them was the reinstatement of the individual appellants from the date of their dismissals. The application was opposed by the respondent but the industrial court found that the dismissals had been "substantively" and "procedurally" unfair and, subject to various qualifications, granted a reinstatement order. (For convenience I shall refer to the first appellant as the union and to the other appellants collectively as the appellants, though a reference to counsel for the appellants will be one to counsel for all

the appellants.)

The respondent then lodged an appeal to the Labour Appeal Court (Transvaal Provincial Division) against the whole of the industrial court's award. The former court upheld the finding that the dismissals constituted unfair labour practices but set aside the reinstatement order and referred the matter back to the industrial court for consideration of the appropriate compensation payable to the present appellants. It also ordered the respondent to pay the costs of the union and the appellants, including the costs of two counsel.

Having obtained the necessary leave, the union and the appellants then lodged an appeal to this court. According to the notice of appeal it is directed against the order granted by the Labour Appeal Court "in which ....[the court].... refused to order the reinstatement of the individual ....[appellants]." Without more the respondent filed a notice of cross-appeal against the costs order made by the Labour Appeal Court.

The parties proceeded to state a special case in terms of AD rule 5(4)(i). Before setting out the question of law formulated by the parties, it is convenient to summarise most of the salient facts set out in the special case read with the

decisions of the industrial court and the Labour Appeal Court.

1) The appellants were all members of the union and were employed in shop no 4 in the respondent's Wadeville factory. The function of this shop was to manufacture sub-assemblies ("sets") to be used in the assembly of containers at the respondent's plant at Isithebe, Natal. Each set manufactured in shop no 4 consisted of six components and the appellants (and others) were employed in those sections of the shop where three of the components were being manufactured. For reasons which are not material, the appellants were dependent upon one another's co-operation for achieving any production target.

2) During the period 2 May to 16 June 1989 the respondent experienced a countrywide drop in its manufacturing production. This was caused by illegal industrial action in the form of an overtime ban and a go-slow on the part of all the respondent's employees.

3) On 18 May 1989 the respondent advised the union of the industrial action and requested an urgent meeting to discuss the situation. The union's reply was that it had not called for any such action and therefore saw no purpose in the proposed meeting. After the respondent had declared a dispute

with the union it nevertheless agreed to attend a meeting with the respondent on

24 May.

4) Having met the entire Wadeville workforce, a union official and eight shop stewards gave an undertaking on 24 May that all the Wadeville employees would resume their normal duties and would work normal overtime, as also that production would be kept at normal output levels.

5) The undertaking was not honoured and no overtime was worked by any of the Wadeville employees on 24 and 25 May. In consequence the respondent on 26 May launched an application in terms of s 17(1l)(a) of the Act. The application was not opposed and on 30 May the industrial court inter alia granted an interim order directing the respondents in that application (including the present appellants') "to restore the status quo which existed prior to the introduction of ....industrial action."

6) Thereafter all the Wadeville employees resumed working overtime, but in breach of the order continued with the go-slow resulting in the respondent's production remaining below its pre-May levels. Correspondence sent by the respondent to the union in regard to this situation met with no

response.

7) On 9 June the respondent issued an ultimatum to its Wadeville employees working on that day in three sections of shop no 4, viz the front corner posts, rear corner posts and doors sections. The ultimatum called upon those employees to produce in each section 60 sets per 9.25 hour day by 16h45 on 12 June, They were also informed that if they failed to comply with the demand "action will be taken against you which could lead to the termination of your services."

8) Despite the fact that the targets set in the ultimatum were not met, the respondent did not take action against any of the employees concerned. The respondent's reason for its inaction was that it and the union were due to meet on 13 June and that it intended taking up the matter at that meeting.

9) The go-slow continued and on 14 June the respondent issued a further ultimatum to employees working on that day in the aforesaid three sections. The ultimatum read :

> "You are hereby given notice that if you do not achieve the production output required from you (measured at 12h00 on 15 June 1989) you will be dismissed."

10) The ultimatum went unheeded and immediately after the expiry thereof the respondent in writing directed the employees concerned to attend disciplinary hearings that same afternoon. (I will set out the contents of the written charge against them when dealing with one of the contentions of counsel for the appellants.)

11) At the conclusion of the disciplinary hearings which were conducted section by section, all the appellants were dismissed on the ground that they had deliberately failed to comply with the final ultimatum. Employees working in one of the sections were, however, acquitted since they were found to have achieved the stipulated target.

12) An internal appeal hearing was subsequently conducted under the chairmanship of Mr Clinton, the respondent's managing director. Further evidence was led on behalf of the appellants but their appeals did not succeed.

The industrial court found that the appellants' dismissals were unfair because :

(a) the final ultimatum was vague in that it did not disclose the volume of production required during the target period;

(b) that period was too limited to allow for a proper assessment of production levels, in particular because the production in the five hours from 7 p.m. to noon on 15 June could not realistically be compared with the output previously achieved during a full working day plus overtime, and

(c) the respondent had acted capriciously by selecting only the employees working in three sections of shop no 4 for disciplinary action whilst its whole workforce had been collectively engaged in the go-slow action.

The industrial court also found that the dismissals were "procedurally" unfair because of a number of flaws in the disciplinary hearings. It would seem, however, that the court was of the view that, save in one respect, the procedural irregularities had been cured by a complete rehearing before the appeal body under the chairmanship of Mr Clinton. The exception related to a failure of that body to take into account the service and disciplinary records of the appellants before confirming their dismissals.

Having made the above findings the industrial court, under the heading "Relief and Determination", proceeded to say : "The individual applicants [i.e. the appellants] are entitled to a reinstatement order." It gave no reasons for this

terse statement and therefore did not consider the alternative of compensation. It would seem that in the court's view an employee who has been unfairly dismissed is as a matter of course entitled to reinstatement.

For purposes of this appeal the relevant determinations of the industrial court on 31 October 1990 were as follows :

"2. Subject to paragraph 3 below, the individual applicants are hereby reinstated in the employ of the respondent on terms and conditions no less favourable to them than those which governed their employment on the relevant date of dismissal during June 1989.

3. (a) The order made in paragraph 2 shall run from Monday 19 November 1990 to enable the parties or their attorneys, to make the necessary arrangements to give effect thereto.

(b) Those individual applicants who may wish to resume their employment in terms of the Reinstatement Order shall inform the union by not later than Friday 12 November 1990 of their intention to do so.

(c) Any applicant who does not wish to resume his employment shall receive only compensation which shall be equivalent to six months wages;

(d) The reinstatement of the applicants who report for work shall operate retrospectively for a period of six months calculated from Monday, 19 November 1990;"

On appeal the Labour Appeal Court in effect upheld the findings of the

industrial court set out in (a), (b) and (c) above. It is, however, not clear whether it considered that the appeal body acted unfairly in not having regard to so-called mitigating factors in respect of each of the appellants.

The reason why the Labour Appeal Court set aside that part of the determination of the industrial court relating to reinstatement, appears from the following passage :

> "In the present matter I believe that the doctrine of clean hands is applicable because the respondents in question were engaged in an illegal strike, albeit in the form of a partial or 'go slow' strike. This was not considered by the court a quo in coming to its finding on the relief which should be granted. In my view reinstatement of the said respondents was clearly not appropriate and should, with respect, not have been granted. I have no quarrel with their being awarded compensation. This, however, can only be considered with reference to the personal circumstances of each individual respondent. Such personal circumstances include factors such as length of service, seniority, employment record and the like."

I revert to the special case. The question of law formulated by the parties reads as follows :

> "Whether or not the Labour Appeal Court was correct in finding that reinstatement of the dismissed employees [i.e. the appellants] was inappropriate because they had engaged in an illegal strike".

The parties' contentions on this question are set out in some detail in the special case. They were, however, elaborated upon in counsels' heads of argument and during argument before us and therefore need not be separately enumerated. I should, however, mention that the final contention of the respondent in the special case was that, having regard to the conduct of the appellants the Labour Appeal Court, erred in ordering the respondent to pay their costs.

It is convenient at this stage to deal with an application for condonation lodged by the union. For reasons which need not be set out, the powers of attorney of eight of the appellants were not filed within the period prescribed by AD rule 5(3)(b). The union, on behalf of those appellants, accordingly sought condonation of the late filing of those powers of attorney. This application was not opposed and was granted at the hearing of the appeal with the rider that wasted costs be paid by the union and those appellants, i.e. appellants 9, 10, 11, 14, 17, 33, 38 and 39.

It appears from the application, however, that five other appellants could not be traced and that consequently no powers of attorney could be procured

from them. In the result the union asked that those five be included within the ambit of any order made on appeal in favour of the union and the other appellants. In view of my ultimate conclusion and the parties' agreement regarding the costs of this appeal, to which I shall revert, it is unnecessary to comment on that prayer.

I must dispose of two further matters before dealing with the merits of the appeal. In Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) SA 791 (A) 802 H - I and 803F, this court held that a decision on the remedy to be granted pursuant to a finding that an unfair labour practice has been committed, does not involve the determination of a question of either law or fact within the meaning of s 17A(3)(e)(ii) or s 17C(l)(a) of the Act. AD rule 5(4)(i), however, provides for the submission of a special case only if the decision of a matter on appeal is likely to turn exclusively on a question of law. Now, the purpose of rule 5(4)(i) is clearly to enable the parties to submit a special case - in lieu of lodging copies of the record - when this court is not called upon to decide any factual dispute. I therefore have little doubt that a question of law is used in rule 5(4)(i) in

contradistinction to a question of fact. It follows that the phrase "a question of law" should be construed as including the third category of questions discussed in Perskor. For this reason the special case was properly submitted.

A final preliminary question is whether an award made as a result of the perpetration of an unfair labour practice involves the exercise of a discretion in the narrow sense of the word as outlined in Perskor at p 800 E - F. If it does, the relief granted by the industrial court (or, on appeal, by the Labour Appeal Court) cannot be assailed in this court unless the court's discretion was unjudicially exercised. As will appear, however, in casu both the industrial court and the Labour Appeal Court failed to exercise a proper discretion. It is therefore unnecessary to answer the above question. (In passing I may mention that both parties accepted that the discretion in question is one in the wide sense of the word.)

After this rather lengthy prelude I turn to the merits of the appeal. At the outset I have to deal with an issue which was debated at some length in argument before us; i.e., whether the appellants were still participating in the go-slow during the five hour period covered by the final ultimatum of

14 June 1989 (para 9 above). In submitting that they were, counsel for the respondent relied upon para 12 of the special case. It reads thus :

> "During the period 2 May to 16 June 1989, the respondent experienced a drop in production at its operations countrywide. This was caused by illegal industrial action in the form of an overtime ban and a 'go-slow', participated in by all of the respondent's approximately 2 000 employees during such period." (My emphasis.)

In so far as material this paragraph in my view permits of one construction only; viz, that during the period mentioned all the respondent's employees, including the appellants, participated in the go-slow. And the test was, of course, conducted on 15 June. Counsel for the respondent countered by arguing that on this construction the relevant findings of the industrial court (and also the Labour Appeal Court) as to the unfairness of the final ultimatum would be meaningless. I do not agree. As stated, those findings were that the ultimatum was vague and that the five hour period was too limited for a proper assessment of production levels. Neither court made a positive rinding that the appellants were at the critical time no longer participating in the go-slow.

I am mindful of the fact that during the proceedings in the industrial court

the appellants did not admit that they were engaged in a go-slow during the test period. Nor, however, did they admit that prior thereto they had taken part in (illegal) industrial action.

I now turn to the main submissions put forward by counsel for the appellants. They may conveniently be summarised as follows :

(1) In the employment context dismissal is the most drastic sanction, having severe consequences. Hence, if employees were unfairly dismissed the only remedy that can "properly and fully" alleviate those consequences, is reinstatement.

(2) This is all the more true of an unjustified selective dismissal.

(3) The so-called unclean hands doctrine is largely irrelevant to the determination of the appropriate relief to be granted to an unfairly dismissed employee.

(4) As a result of the formulation of the charge and the way in which the disciplinary proceedings were conducted, the appellants' previous participation in the go-slow was in any event irrelevant. This is so because that conduct did not constitute the reason for the dismissals.

(5) Whilst the respondent's treatment of the appellants - as distinguished from its other employees - was inconsistent and arbitrary, the appellants' blameworthy conduct was not reprehensible.

(6) The respondent failed to take into account the personal circumstances of each appellant.

Save as indicated below, I shall deal with these submissions consecutively.

Submission (1) :

Counsel for the appellants argued that because of the effect of a dismissal upon the livelihood of an employee and his family there can never be a fair reason for dismissal if something less will suffice. I must confess to having difficulty in grasping what "something less" is. It is, of course, possible that an employment agreement may make provision for, say, the suspension of, or the levying of a fine on, an employee who misconducts himself. As a rule, however, the only effective remedy available to an employer is the dismissal of an employee taking part in an illegal strike. Provided that he acts fairly before actually dismissing the employee, the dismissal as such cannot be stigmatised as an unfair labour practice.

7 Be that as it may, the main thrust of the submission of counsel for the

appellants appears to have been that, having regard to the deleterious consequences which an unfair dismissal may have, the employee(s) concerned should as a rule be granted reinstatement. This submission is fatally flawed. In Sentraal-Wes (Koöperatief) Bpk v Food and Allied Workers Union (1990) 11 ILJ 977 (LAC) 994 E, Goldstein J said :

> "Prima facie, if an unfair labour dismissal occurs the inference is that fairness demands reinstatement. And it is for the employer to raise the factors which displace such inference."

Having quoted this passage in Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union 1994(2) SA 204(A), Goldstone JA went on to say (at p 219 A - C) :

> "No reasons are furnished for those conclusions and, in my opinion, they are far too widely stated. In every case the industrial court must make a reasonable determination. In some cases fairness and justice may dictate that reinstatement is the proper relief. In others compensation or some other form of relief may be more appropriate. Each case must depend on its own facts... In my opinion the correct approach is to give due consideration to the relevant conduct of the parties and, in the light thereof, to decide upon the appropriate relief..."

The fact that reinstatement may be the only remedy which can fully alleviate the consequences of an unfair dismissal, is therefore only a factor, albeit often an important one, to be taken into account in deciding what consequential relief should be granted.

Rather belatedly counsel also argued that, unless there has been an irretrievable breakdown in the employment relationship, an unfairly dismissed employee is as a rule entitled to reinstatement. This submission also runs counter to the dictum in Pact quoted above. If there has been such a breakdown, it is hardly conceivable that reinstatement will nevertheless be granted. Non constat, however, that in the absence thereof reinstatement is the appropriate remedy. In almost every case where an ultimatum is issued, it is implicit that the employees will not be dismissed if they comply therewith and, therefore, that the employment relationship is not beyond salvage. Yet, in Pact where there was non-compliance with an ultimatum but no other misconduct of the employees during the period thereof, it was held that in deciding upon appropriate relief due consideration must be given to the relevant conduct of the parties. In my view such conduct clearly includes behaviour which may not

9 have brought about a total collapse of the employment relationship.

It is convenient to deal, under the present heading, also with submission (3). The The of the contention is this. The sole reason why the Labour Appeal Court refused to uphold the reinstatement order was that the appellant's hands were not clean in that they had engaged in illegal industrial action. However, in Pact this court held that the doctrine of unclean hands is largely irrelevant to the exercise of a discretion as to whether or not reinstatement is the appropriate relief.

It is true that the Labour Appeal Court seems to have been under the mistaken impression that as a matter of policy reinstatement should not be granted if an unfairly dismissed employee was himself guilty of illegal or unfair conduct which led to his dismissal. For the rest, however, counsel's submission is based on a misconception of the relevant reasoning in Pact. In Tshabalala v Minister of Health 1987 (1) SA 513 (W) 523 B - C Goldstone J had said (at p 523 B - C) :

> "As a matter of public policy I do not believe that a Court should order the reinstatement of an employee who admits or is found to have participated in an illegal strike."

In Pact (at p 219 E) Goldstone JA explained that Tshabalala had been decided under the common law and not under the unfair labour procedure of the Act, and that the quoted passage does not apply to such procedure. He also said that the concept of unclean hands is relevant only to the extent that the conduct of the parties must be considered when deciding upon appropriate relief. It is clear, therefore, that the "unclean hands" of a dismissed employee who, e.g., took part in an illegal strike does not by itself prevent reinstatement. At the risk of repetition it must, however, again be emphasised that such conduct is a relevant, and in some cases, a highly relevant factor to be taken into account when deciding whether reinstatement or compensation is the suitable remedy.

In conclusion, under this heading, I should say that the industrial court also misdirected itself by not taking into account the conduct of the appellants, and by proceeding from the premise that an unfair dismissal calls for reinstatement. Submission (2) :

Counsel for the appellants laid great stress on the so-called parity principle in terms of which an unjustified selective dismissal of striking

employees constitute an unfair labour practice. He went on to argue that when a dismissal is unfair precisely because the employer acted inconsistently by dismissing only some of his employees, whilst all were guilty of the same misconduct, fairness demands that the inconsistency be redressed by the granting of reinstatement.

In the absence of a cross-appeal on the merits it must, of course, be accepted that the appellants' dismissals were unfair because, inter alia, the final ultimatum was issued only to those employees against whom disciplinary action was taken. It seems to me, however, that the extent of the arbitrariness, and the motives which led to the issuing of that ultimatum, are factors to be taken into account when assessing the degree of the respondent's blameworthiness. They are hence factors to be considered in deciding what consequential relief is appropriate.

This was not a case in which an employer was bent on victimising a particular employee or a group of employees whilst others were guilty of the same misconduct. It is true that the respondent had little doubt that all of its employees were engaged in the go-slow, but proof of that was another matter.

The Labour Appeal Court held that the unreasonableness of the ultimatum was compounded by the fact that the employees concerned were dependent on one another's co-operation in achieving any production target. The same could probably have been said of ultimatums relating to employees in the other Wadeville shops. In any event, the respondent gave reasons for confining the final ultimatum to employees working in three sections of shop no 4. They were that that shop was a critical part of the respondent's operation and that production levels in it could be monitored more easily than in other shops. Counsel for the appellants rightly conceded that, whatever else may be said about these reasons, they represented the subjective view of the respondent. It is clear, therefore, that the respondent was not actuated by an ulterior motive.

Unlike the industrial court, the Labour Appeal Court found that the second reason was the one that really carried weight from the respondent's point of view. That court went on to say :

> "It was hence convenient for the appellant to select shop no 4 for its disciplinary purposes and unfortunate for the respondents that they happened to be employed there,
> I have little doubt that this is a totally arbitrary and patently unfair reason for selecting a small number of miscreants from a collective whole. It

cannot be said that the basis of the selection is justified. On the contrary, it is clearly indicative of inconsistent and unequal treatment of an arbitrarily selected group of individuals who were, at all relevant times, part of a larger group of persons, all of whom were allegedly engaged in the same form of misconduct."

I rather doubt whether in the circumstances of this case the reason under consideration was a "totally arbitrary and patently unfair" one. On the reasoning of the Labour Appeal Court the ultimatum would have been unfair even if it was impossible or very difficult to monitor production levels in other shops or, for that matter, in other factories. Be that as it may, as already stated 1 must accept that the ultimatum was unfair because of its selective nature. That does not mean, however, that overriding weight must be attached to that unfairness when weighing up the blameworthy conduct of the parties.

It has not been suggested that the respondent could have dealt with the go-slow in any other manner which would have resulted in a fair dismissal of its entire workforce or part thereof. As submitted by counsel for the respondent, a go-slow is in a very real sense the most insidious form of a strike precisely because it may be impossible, or difficult, to establish that a particular employee

is a participant. This may result in employees enjoying the best of two worlds; they continue to draw full wages whilst with impunity causing serious loss to their employer. The fact that the respondent was morally certain that all its employees were taking part in the go-slow therefore does not render the unfairness of its unequal treatment of the appellants of a high order.

Submission (4) :

The charge against the appellants read as follows :

> "The charge against you. . will be that in spite of the Industrial Court
> order served on you on 1 June 1989, an ultimatum issued to you on 9 June 1989 which expired at 16h45 on 12 June 1989 and a further ultimatum issued to you on 14 June 1989 which expired at 12h00 on 15 June 1989 you have deliberately not achieved the required output production level in your section."

The evidence of the respondent's general manager was that the disciplinary inquiry was confined to the alleged deliberate failure of the employees concerned to comply with the final ultimatum. He said that the reference in the written charge to the court order and the ultimatums of 9 June 1989 was merely to give the employees "a precis of the events which

had happened until then."

Because of the formulation of the charge and the general manager's evidence, counsel for the appellants submitted that their previous participation in the go-slow was irrelevant. He argued that an employer is bound by the reasons for a dismissal, or a contemplated dismissal, given by him at the relevant time, and that unless an employee knows the precise allegations against him he cannot properly defend himself. In casu. so the argument continued, the only charge against the employees concerned was one of failing the five hour test, which failure was also the only reason for the appellants' dismissals. Hence the respondent could not later be heard to rely on the appellants' previous participation in the go-slow.

I shall assume, without deciding, that when considering the fairness or not of a dismissal a court may not have regard to a reason which did not actuate the employer at the relevant time. On this assumption the position is in my view different when the relief to be granted to an unfairly dismissed employee falls to be considered.

Assume that in perceived furtherance of a strike one of the strikers (X)

moderately assaulted two non-striking fellow employees (A and B). Assume also that in a separate incident on the same day a third non-striking employee (C) was assaulted by an unidentified mob as a result of which he became crippled for life. Assume, finally, that X was dismissed because of his assault on A and B, but that prior to a hearing of an application in the industrial court it was established that X had been the leader of the mob. On my initial assumption that court may not have regard to the assault on C in determining whether the dismissal of X constituted an unfair labour practice. It would, however, be wholly artificial to go a step further by holding that the assault on C should therefore also be ignored when the question of possible reinstatement of X arises. Clearly at that stage all relevant factors relating to the conduct of the parties must be taken into account.

In any event, the charge could have left the appellants in no doubt b'ut that their failure to meet the target set out in the final ultimatum was seen by management as a deliberate continuation of the go-slow which had been in progress for some time. In its reply filed in the industrial court the respondent pertinently raised the appellants' prior conduct and they consequently had an

opportunity, if so minded, to deny the relevant allegations. They failed to do so and, as we have seen, in the special case indeed admitted their prior participation in the go-slow. The fact that the inquiry was confined to the appellants' failure to meet the above target is therefore irrelevant in the present context.

Counsel for the appellants also relied upon the doctrine of election. He argued that since the respondent failed to take action when the targets set in the first ultimatum were not met, it could not for any purpose later rely on that failure or indeed on any conduct of the appellants prior to the date of that ultimatum. The submission has little merit. We are concerned with the question whether, and to what extent, the appellants' participation in the go-slow may be taken into account in relation to appropriate relief, and not with the question whether the respondent elected to abandon reliance on non-compliance with the first ultimatum as justification for the dismissal of the appellants.

In the result the appellants continued participation in the go-slow was, and is, a highly relevant factor to be considered when deciding upon appropriate relief.

Submission (5) :

I have already set out the reasons for the findings, of both the industrial court and the Labour Appeal Court, that the dismissals were unfair. By contrast, submitted counsel for the appellants, even assuming that they deliberately failed the five hour test their conduct can hardly be categorised as reprehensible or intolerable behaviour.

It follows from what has been said above that this submission takes too narrow a view of the relevant conduct of the appellants. They formed part of a workforce which had been engaged in an illegal go-slow from 2 May 1989. On 24 May an undertaking was given on behalf of the entire Wadeville workforce that they would resume their normal duties and that production would be kept at the normal output levels. This was not honoured. In breach of an interim order granted by the industrial court on 1 June 1989 the respondent's employees continued with the go-slow. Thereafter the ultimatums went unheeded. Attempts by the respondent to enlist the intervention of the union mostly met with no response. Finally, at least until the conclusion of the present proceedings in the industrial court, the appellants did not admit the existence of

a go-slow and their participation therein. It seems to me, therefore, that the appellants' conduct over a considerable period was indeed reprehensible.

Submission (6) :

The industrial court did not decide that because of their personal circumstances some of the appellants should be reinstated. Nor did counsel for the appellants submit that twelve of the appellants who had had more than ten years of service with the respondent should, as regards reinstatement, be treated differently from the other appellants. His contention was that all of them were entitled to reinstatement.

In any event, all the appellants participated in a collective go-slow. What is more, during the disciplinary proceedings the appellants elected to be dealt with collectively. A decision to dismiss only those appellants who had not been employed for a period of more than, say, five years, would therefore probably have been assailed on the basis that the respondent had unfairly discriminated between two groups of employees who had been guilty of the same, collective, misconduct. Therefore, assuming that the respondent should have taken personal circumstances into account, its failure to do so can carry but little weight in the

context under consideration. (In passing I may mention that the Labour Appeal Court referred the matter back to the industrial court for the specific purpose of a consideration of the appellants' personal circumstances in regard to the extent of compensation payable to each.)

Having considered the submissions of counsel for the appellant I should stress a further relevant factor. It is this. Because no evidence was led by the appellants in the industrial court, we do not know why they and the respondent's other employees engaged in illegal industrial action. It must therefore be accepted, in favour of the respondent, that such action was not actuated by a legitimate grievance; in other words, that the respondent was not guilty of prior unfair conduct.

In the light of all the circumstances and considerations set out above, I am firmly of the view that the order of the Labour Appeal Court as to consequential relief cannot be faulted. Put differently, the appellants in fairness were not entitled to reinstatement.

Little need be said about the cross-appeal. In terms of s 17 C (l)(a) of the Act a party to proceedings before the Labour Appeal Court may appeal to

this court against a decision or an order of the former court (except a decision or an order on a question of fact), provided that the prescribed leave to appeal has been granted. In casu the respondent failed to apply for, and consequently did not obtain, leave to cross-appeal. That failure is fatal, because a cross-appeal under s 17 C (l)(a) is "simply an appeal which is tacked on to another appeal" : Goodrich v Botha 1954(2) SA 540 (A) 544, and see also Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) 607 - 8. As was conceded by counsel for the respondent at the hearing of this appeal, the cross-appeal noted by the respondent must therefore be struck off the roll with costs.

Finally, I must record that in terms of an agreement between the parties no order as to the costs of the appeal falls to be made.

I would therefore dismiss the appeal and strike the cross-appeal off the roll with costs.

VAN HEERDEN JA

Agree : VIVIER JA