Case No 295/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL UNION OF METAL WORKERS Appellant OF SOUTH AFRICA

and

VETSAK CO-OPERATIVE LIMITED 1st Respondent

ISANDO INDUSTRIES (PTY) LIMITED 2nd Respondent

TURIN PRESSING (PTY) LIMITED 3rd Respondent

CORAM: SMALBERGER, NIENABER, MARAIS,

SCOTT JJA et ZULMAN AJA

HEARD: 2 MAY 1996

DELIVERED: 31 MAY 1996

JUDGMENT

/NIENABER JA

NIENABER JA:

I have had the benefit of reading the judgment prepared by Smalberger JA. On much we agree, on the result we differ. The extent of our disagreement is discussed later in this judgment. I propose to follow my colleague in referring to the appellant as "the Union" and to the respondents collectively as "Vetsak".

This is the first occasion, according to counsel, that this court has been called upon to deliberate on the dismissals by an employer of employees engaged in a lawful and legitimate strike. The strike was lawful because all the statutory prerequisites for it had been complied with; and legitimate because it was instigated and pursued for a legitimate objective, the attainment, through a process of collective bargaining, of more favourable terms for a new statutory wage agreement for the metal industry.

We were invited by counsel to formulate guidelines as to the

circumstances in which the dismissal of workers participating in a lawful strike would constitute an unfair labour practice in terms of the Labour Relations Act 28 of 1956 ("the LRA"). In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances (cf Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor")1992 (4) SA 791 (A) at 798G, 802A; Atlantis Diesel Engines (Pty) Ltd v National Union of Metlworkers of South Africa 1995 (3) SA 22 (A) at 33A-B; National Union of Mineworkers and Others v Free State Consolidated Gold Mines (Operation) Ltd - President Steyn Mine; President Brand Mine;Freddies Mine ("NUM v Free Sate Cons") 1996 (1) SA 422 (A) at 4461). The test is too flexible to be reduced to a fixed set of sub-rules; which is why one is somewhat sceptical of recent attempts by the Labour Appeal Court ("the LAC") and

academic writers to typify and rank the considerations which are to be factored into a finding of fairness. (See, for example, Black Allied Worker Union and Others v Prestige Hotels CC t/a Blue Waters Hotel (1993) 14ILJ 963 (LAC) and the debate in cases such as NUM v Black Mountain Mineral Development Co (Pty) Ltd (1994) 15 ILJ 1005 (LAC and Cobra Watertech v National Union of Metalworker of SA (1995) 16 ILJ 607 (T); Le Roux and Van Niekerk, The South African Law of Unfair Dismissal 304-310).

The most one can do is to reiterate that there are two sides to the inquiry whether the dismissal of a striking employee is an unfair labour practice, the one legal, the other equitable. The fitst aspect is whether the employer was entitled, as a matter of common law, to terminate the contractual relationship between them - and that would depend, in the first place, on the seriousness of its breach by the employee. The second aspect is whether the dismissal was fair -

and that would depend on the facts of the case. There is no sure correspondence between lawfulness and fairness. While an unlawful dismissal would probably always be regarded as unfair (it is difficult to conceive of circumstances in which it would not), a lawful dismissal will not for that reason alone be fair (cf NUM v Free State Cons,supra, at 446F-G). Nor is there an exact correlation between the lawfulness of the strike and the unlawfulness and/or unfairness of the dismissal of a striking employee. Because a strike is lawful it does not follow that the dismissal of a striking employee will be unlawful or unfair; conversely, because the strike is not lawful or legitimate it does not follow as a matter of course that the employer is free to dismiss his striking workers (cf Marievale Consolidated Mines Ltd v President of the Industrial Court and Others 1986 (2) SA 485 (T); Sasol

(1990) 11ILJ 1010 (LAC) at 1021B-D, 1035G-H). Counsel for the appellant conceded, fairly, that a point is reached in every strike, lawful or unlawful, when an employer in fairness will be justified in dismissing his striking employees, not for striking as such, but for their prolonged absenteeism. When precisely that point is reached is ultimately a matter for the courts; and because the test is so broadly formulated it is no simple matter for parties to predict the decision of the court. How difficult that can prove to be is aptly illustrated by the outcome of these very proceedings. What one gains in flexibility, one loses in certainty.

The ultimate determinant is therefore fairness and not the lawfulness of either the dismissal or the strike. That does not mean that the lawfulness or otherwise of the conduct of either party or of the strike is irrelevant. These can be very real factors in the determination of what is fair in the circumstances (cf Natal Die

Casting Co (Pty) Ltd v President Industrial Court and Other (1987) 8 ILJ 245 (N) at 251A-C; Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others ("PACT") 1994 (2) SA 204 (A) at 216D-F; NUM v Free Sate Cons 447J-448B). More tolerance than otherwise may be required of an employer in the case of a lawful strike. Some employers can afford to be more tolerant than others; it depends upon their vulnerability. Paradoxically, the more effective the strike, the sooner the employer may have to consider replacing the striking employees if it feels unable to meet the demands or compromise seems unlikely. Because collective bargaining is "the means preferred by the Legislature for the maintenance of good labour relations and for the resolution of labour disputes" (South African Commercial, Catering and Allied Workers Union v OK Bazaars(1929) Ltd 1995 (3) SA 622 (A) at 628B) and because

"[t]he freedom to strike is integral to the system of collective bargaining", ibid, a dismissal for no other reason than that the employee participated in a lawful strike, with the objectives of which the employer is out of sympathy, will not be regarded as rational and fair. The rationality of the conduct of the respective parties will always be a factor; so too their flexibility and bona fides, the cause, purpose and continued "functionality" of the strike, the financial and economic repercussions for both sides of the strike and of the dismissals, the ability of the employer and his employees to absorb the harm done thereby and the duration of the strike, actual and anticipated. There are, I am sure, other considerations as well. The relevant factors cannot all be captured in a single formula or formulation.

The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.

Fairness to both means the absence of bias in favour of either. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs.

Thus far I am in substantial agreement with the views expressed by Smalberger JA. I agree in particular with his interpretation of s 17C(l)(a) of the LRA regarding the facts which this court may take into account in determining an appeal.

The central issue in this appeal is whether the issue of the ultimatum by Vetsak and the consequent dismissals of the workers who failed to respond thereto, constituted an unfair labour practice.

The strike was the sequel of negotiations at national level, a legitimate manoeuvre by the Unions to attempt to force SEIFSAs hand. Notwithstanding the strike the negotiations were not discontinued. Smalberger JA regards this as the most critical consideration in the case. Several consequences, so he holds, flow

from it.

First, because the strike was in support of negotiations at national level, it remained functional. When deadlock supervened at local level the situation simply reverted to what it was before and negotiations at national level took centre stage once again. What happened between Vetsak and its employees at local level thereupon became irrelevant. And because Vetsak and those of its employees who were members of the Union were indirectly parties to the negotiations at national level, the strike had never lost its functionality for them. That being so, it would be inimical to the process of collective bargaining to countenance the dismissal of workers participating in the strike. Secondly, because the strike was lawful it was unfair and hence impermissible to dismiss the workers unless there were compelling reasons to do so. None existed. Thirdly, because negotiations were still continuing at national level

Vetsak's ultimatum was precipitate and hence unfair.

I disagree with all three propositions. My first observation is that this was not the case pleaded or dealt with by the LAC or even argued in this court. The Union's complaints were formulated in the following terms in its amended "Statement of Case":

> "The Respondents have acted unfairly and/or unreasonably in all or some of the following ways:
>
> 6.1 By refusing to move from their predetermined position in negotiations before and during the strike;
>
> 6.2 By dismissing the striking employees under the circumstances aforesaid;
>
> 6.3 By selectively refusing to reinstate their employees at Isando whereas they did so at Bothaville;
>
> 6.4 By failing to negotiate in good faith as regards the reinstatement alternatively re-employment of the dismissed workers;
>
> 6.5 By acting out of vexatious, unreasonable and irrelevant motives in refusing to reinstate, alternatively re-employ the dismissed workers;
>
> 6.6 By relying on an alleged repudiation by the dismissed employees of their contracts of service in justifying their dismissals."

There is no mention in this statement of any of the points now made by my colleague. If the LAC overlooked any of them, it is because they had never been raised. I propose nevertheless to deal with each of them in the course of this judgment. To do so it becomes necessary to traverse, in somewhat greater detail, ground already covered by Smalberger JA in his judgment.

I commence with the significance of the shift in negotiations from national to local level.

Prior to the strike Vetsak's employees, through their shop stewards, handed the company a circular letter from the Union, addressed to "Managements in the metal industry" listing seven demands. Foremost amongst the demands was one for a wage increase. Vetsak responded on 29 July 1988, declining to negotiate at plant level because of the continued negotiations at national industrial council level. The meeting referred to by Smalberger JA

took place at 07:55 between Otto and Coetzee, representing Vetsak, and four shop stewards, amongst them Rivambo who appears from the minutes of the meeting to have acted as their spokesman. Vetsak, through Otto, reiterated its stance that the company did not consider it appropriate to negotiate about the demands at plant level because negotiations were being conducted at industrial council level. But Rivambo insisted. Otto, after some discussion had taken place, stated:

> "These are all conditions of service, which governed at the industrial council. How can we go here at the bottom and negotiate?
> Rivambo: Let me put it so. If Vetsak can agree they can implement or they can meet this demand, this company will be exempted from the strike."

Management relented. Rivambo then said:

> "If we are going to negotiate in good faith .... with an open mind, we must go issue by issue item by item."

Each demand was discussed at some length. Management was prepared, on the issue of public holidays, "to give the workers the 1st of May as a public holiday at Vetsak, but only if the workers call off the strike"; to make representations to SEIFSA on the issue of paternity leave; and to give an undertaking that any instances of racial discrimination at the plant would be dealt with without delay. But an increase in wages it insisted it could not afford. Such an increase would eventually lead to a closing of parts of the plant and to further retrenchments.

The meeting adjourned to enable the shop stewards to report back to the workers and a second round of negotiations commenced at 11:30 when Otto once again informed the shop stewards that Vetsak could not move on the question of a wage increase. Rivambo, according to the minutes, then stated:

> "Yes, I think then the strike is to continue. The name of the strike is a Why-Why strike.

Otto: A what?

Rivambo: A Why-Why strike, it is unlimited till you meet the demand,

Coetsee: Until we meet the demand?

Rivambo: Yes ...

Coetsee: So you don't want to negotiate?

Rivambo: We can negotiate as we are negotiating now but this means that you are rejecting all the demands at this stage."

The shop stewards then reverted to the Union and the workers and at 14:00 the meeting resumed. The following exchange took place:

Otto: Okay, now the workers, are they saying that we must negotiate here at Plant level, are you happy with that or what?

Rivambo: If we ... we can negotiate from the Plant level ...

Otto: Is that what they want to do or not?

Rivambo: They want to negotiate from the Plant level. That is why we are (?)

Otto: So you are telling me, that you are wanting to negotiate at Plant level rather than at Industrial Council?

Rivambo: Exactly.

Otto You don't want to negotiate at Industrial Council?
Rivambo: What we are doing is to negotiate from the Plant level. And if you agree to the demands in question, we will tell the striking committee that our management has agreed on this.
Rivambo: Then they can make an exception and we can be exempted from the strike."

The meeting concluded with Otto making the following plea:

"Rivambo: So we are still where we were with the second meeting?
Otto: That is right.
And I urge you to speak to the workers and help them to think this thing through what they are doing with the strike. They are causing a lot of damage to Vetsak. Vetsak is going to lose a lot of clients and if we lose clients that means there is no business, and if there is no business, there is no money to pay wages. So we want you to think this thing through tonight and to give us an answer tomorrow morning. Speak to the workers there, try to convince them it is not worth this problem that we have got here. It is not worth losing your job about. All right?"

The next day, 4 August 1988, Vetsak sent a telex to the

Union with an appeal to urge the workers to resume their duties. There was no reply. No further approaches were made by the workers, the shop stewards or the Union throughout this period. By Friday, 5 August, the workers had still not returned to work and the management thereupon issued the ultimatum advising the striking workers to return to work at 7 a.m. on the Monday or face dismissal. A copy of the ultimatum was telexed to the Union.

From the above exchanges it is plain: (a) that the shop stewards prevailed on Vetsak to negotiate at plant level; (b) that the workers were consulted throughout the proceedings; (c) that they were prepared to exempt Vetsak from the strike if Vetsak were prepared to meet their demands, irrespective of what happened at national industrial council level.

The shop steward meeting had thus, at the insistence of the shop stewards, become the chosen forum of negotiations between

these employees and this employer. Their focal point had shifted from national level and national issues to local level and local issues. They were no longer merely represented as minor constituents amongst many at a distant level by remote negotiators bargaining on matters of common concern for the whole industry. For them it had become a matter of immediacy and a direct confrontation, man to man, about Vetsak's ability to afford an increase in wages and local issues such as racial discrimination at the workplace. It was the workers, not the Union or the trade union organisation to which the Union belonged, who had taken command of the negotiations. This was not simply a token demonstration by the workers in support of negotiations at national level: they regarded themselves as free to break ranks and to enter into a separate deal with Vetsak, exempting it from the strike if their demands were met.

Although the demands were the same as the demands being debated at national level the crucial issue, it is clear from the minutes, was the increase of wages. The shop stewards were in constant communication with the workers, who were thus directly involved in the negotiations at every stage of the proceedings. Time and again Vetsak's representatives assured the workers that the company could not afford an increase and that it would mean the closing of sections of the plant and a further retrenchment of workers. Time and again the workers insisted that the current wages were inadequate. It was essentially about wages that the deadlock developed.

It is, with respect, quite unrealistic to suggest that when this happened the spotlight simply returned to the national forum, that the status ante quo was simply restored, as if the contretemps at plant level was a local aberration, an irrelevant interlude, and that

the strike remained fully functional because negotiations at national level had never been interrupted. The truth is that the impasse was no less real for being localised. The employees were adamant that they were not going to budge. The employer knew that it could not afford to meet the demand. There was no prospect of either side moving towards the other. Negotiations, having been explored and exhausted, could serve no further purpose. Whatever the position for other negotiating parties at national level, for these parties, in the light of what had occurred between them, the strike was no longer functional.

My colleague takes the view that it would generally speaking be unfair "to dismiss workers participating in a lawful strike unless there were compelling considerations for doing so." If this dictum implies that there is an onus of justification on the employer, I have difficulty in supporting it. Once the facts are established an onus

is not appropriate in the evaluation of issues of fairness. While the lawfulness of a strike is a factor, it is not an overriding factor. In any event, the use of the epithet "compelling" burdens an employer with an arbitrary and to my mind unjustifiably high and demanding standard of justification.

My colleague, dealing with the strike at national level, can find no "compelling" reasons for the dismissals of the workers in this case which would render them fair. But it is a question of fairness to both sides. That question, especially the fairness of the issue of the ultimatum, cannot be divorced from the events preceding it.

The minutes reveal: (a) that the shop stewards insisted that all their demands be met; that they were not prepared to compromise; and that the strike would continue indefinitely until Vetsak had capitulated; (b) that management from its side was

prepared to meet the shop stewards on all the demands except the wage increase; and (c) that the shop stewards were not prepared to accept or discuss Vetsak's assurance that it was unable to afford the required increase in wages; and that management would have to close down certain sections of the plant and increase retrenchments if it were forced to pay it.

Whatever the situation at national council level, at plant level there was clearly deadlock. Vetsak, knowing that it was unable to compromise on the demand for an increase in wages, was thus faced with the prospect of being without its labour force for an indefinite period.

It is in that sense that the "bad faith" findings of the Labour Appeal Court must be viewed. Smalberger JA has already quoted the passage at 573F-J of the reported judgment (National Union Metalworkers of SA v Vetsak Co-operrative Ltd and Others (1991)

12 ILJ 564 (LAC))

> "... that it was the attitude of the shop stewards, led by Rivambo, that the strike would continue until the demands were met. The industrial court found that this proved that the workers were not negotiating in good faith. One can hardly criticize the court in arriving at this conclusion."

Other relevant passages are:

> "The stated intention merely confirms and underlines the uncompromising stance adopted and almost irresponsible approach of the shop stewards." (at 575A-B)

And again:

> "The negotiations then proved, in our view and in the view of the industrial court, not to have been bona fide." (at 575F)

And again:

> "The appellants were paying lip-service to the requirement of bona fide negotiations." (at 576C)

Referring to Vetsak the Labour Appeal Court found:

> "Notwithstanding the fact that the stance adopted by the respondents [Vetsak] was properly motivated, the response elicited was the statement that the strike would continue indefinitely." (at 574C-D)

And again:

> "The respondents, on the evidence before us, at all times acted rationally and reasonably. Where concessions could be made, whether on the basis of the SEIFSA offer or otherwise, those were made. It explained that higher wages would result in retrenchment, which they wanted to avoid. The shop stewards' attention was drawn to the fact that some nine members of the security force were to be retrenched on 15 August. The union knew about this but notwithstanding the fact that it ought to have been common cause the shop stewards seemed not to know about this or in any event could not be bothered thereby." (at 574E-F)

These findings show that the shop stewards remained adamant in their demands, were not open to reason and persuasion, insisted on complete capitulation by Vetsak; and hence that the negotiations at plant level became "a sham" and an exercise in futility.

In that sense the bad faith of the shop stewards was causally relevant. In the light of the posture adopted by them Vetsak cannot be blamed for believing that there were no prospects of an early solution an that it would be without its workforce for an indefinite period. Had it not been for the attitude adopted by the shop stewards it is conceivable that Vetsak might have delayed the issue of the ultimatum, depending on what advice it received from SEIFSA. But in the light of what had happened between management and the shop stewards, management knew that irrespective of SEIFS A's recommendations there was no hope for an early settlement with its workforce. As it happens the industrial action was only called off by the unions on 18 August 1988. It was never intended to be a short-lived strike and that had been made very clear to Vetsak by Rivambo. On 5 August 1988, when the ultimatum was issued, it was impossible for anyone on either side

to predict its ultimate duration.

To expect of Vetsak simply to stoically await the outcome of what to all appearances would be protracted negotiations between SEIFSA and the unions at national level, would not be reasonable. Vetsak's attitude on 5 August 1988 was that "we have had enough", that matters had to be brought to a head, one way or other, so that production could be resumed. The issue of the ultimatum at that point was the only reasonable means available to Vetsak to break the immediate deadlock. And it was not unfair to the workers: it afforded them a further opportunity to reflect or to make fresh representations or to return to work or to face the consequences. Their spontaneous response was to crumple up copies of the ultimatum and throw them away. On the facts found by the LAC it cannot in my opinion be said that Vetsak acted unfairly towards the workers in issuing the ultimatum.

It was not disputed that the conduct of the workers amounted to a breach of their contracts of employment justifying the cancellation thereof in terms of the common law. By withholding their labour, by intimating that they would continue to do so for an indefinite period and by failing to respond to the ultimatum which provided them with the opportunity of curing their breach, the employees repudiated their contracts of employment.

It was neither pleaded nor argued on behalf of the appellant that the ultimatum issued to the Isando workers was premature, unreasonable of defective. (Cf the PACT judgment at 216B-F). The view that the ultimatum was precipitate is advanced for the first time in the judgment of my colleague. I must record my respectful disagreement. The judgment poses the rhetorical question: if an ultimatum on the first day of the strike would have been unreasonable, why would one on the third day be reasonable? The

answer of course is: because of what happened in the interim, because of the intransigence of the workers (as found by the LAC), because of their failure to consider the implications for Vetsak and their co-workers if production was to come to a prolonged standstill, because of their expressed determination to persist indefinitely with the strike until all their demands were met. How long is an

employer to wait before it would be fair to issue an ultimatum? That question has to be answered by the employer in the light of circumstances then prevailing, without the insight of hindsight. In this case Vetsak was faced with the prospect of an indefinite standstill. In my opinion it was entitled to take the workers at their word that they were not going to return to work until Vetsak was defeated on the wage issue. It would have served no purpose to delay the ultimatum. The ultimatum was not premature.

Much was made of the situation in Bothaville. Vetsak itself

realised that the ultimatum which had been issued to the Bothaville workers was defective. To have proceeded to dismiss the workers on the basis thereof would have exposed Vetsak to a charge of having committed an unfair labour practice. In those circumstances Vetsak itself substituted a new ultimatum which complied with all formal requirements.

It was argued on behalf of the appellant that since Vetsak was prepared to issue a fresh ultimatum to the Bothaville workers it should have done the same at Isando and that its failure to do so offended against the imperative of parity, which requires that an employer should be consistent in his behaviour towards all his employees (cf National Union of Metalworkers of South Africa and Others v Henred Fruhauf Trailers (Pty) Ltd 1995 (4) SA 456 (A) at 463G-I; NUM v Free Sate Cons at450G-I).

I am unable to agree. The circumstances at Isando and

Bothaville were not identical. There were separate plants, separate workforces and separate ultimatums. A bad ultimatum at one plant does not necessarily contaminate a good ultimatum at another plant. The fresh ultimatums were issued as a matter of necessity, not caprice. In the result the Bothaville workers were given an additional opportunity to reflect on whether they should return to work. A concession to one group does not ipso facto translate into prejudice to another group. The failure to issue a fresh ultimatum to the Isando workers cannot therefore be held against Vetsak as an unfair labour practice.

There was a further difference between the situations at Isando and Bothaville respectively. After the new ultimatum was issued at Bothaville, Vetsak was persuaded to grant the Bothaville workers further extensions of time. The reason was that Vetsak received representations form the Town Council of Gotsong, the

local township from whose inhabitants the workforce at Bothaville was and would mostly be recruited, to give the workers a further opportunity to resume their duties, for fear of the disruptions and harm which could result from the dismissals of some and the employment of others from the area. The Bothaville workers were eventually reinstated. That is not proof of inconsistency. The special circumstances prevailing at Bothaville were absent at Isando. The two situations not being directly comparable, Vetsak's failure to grant similar extensions to the Isando workers does not, in my opinion, transform the ultimatum issued at Isando, otherwise good, into an unfair labour practice.

The situation at Bothaville is also used by Smalberger JA in his judgment to demonstrate that Vetsak could "tolerate the strike without ultimately resorting to dismissal". At the meeting between Otto and the shop stewards, and according to its minutes, Vetsak

explained that if it remained without a workforce it would be compelled to close down sections of the plant and retrench further workers. This averment was not contradicted, either at the meeting or before the industrial court. One does not know from the evidence or the findings of the LAC, what the situation was at Bothaville. Nor does one know what steps Vetsak took to absorb the temporary loss of its labour force at Bothaville. This was never explored in evidence and neither the industrial court nor the LAC made any findings in that regard. That being so, it is unsafe to regard Bothaville as the exact parallel of Isando and to draw inferences form a comparison between the two outlets. Non constat that if Vetsak could absorb the loss it was suffering at Bothaville it could also do so at Isando.

To sum up thus far. In my opinion it was not unfair to both sides for Vetsak to issue the ultimatum on 5 August 1988 and, when

the workers failed to avail themselves of the opportunity given to them to return to work, to dismiss them; consequently Vetsak did not commit an unfair labour practice in doing so.

There were a number of other arguments advanced by counsel for the appellant with which I now propose to deal.

One such argument was that Vetsak committed an unfair labour practice by failing to give each worker a hearing before the decision was finally taken to dismiss him. Otto's unchallenged evidence was that he appealed to the workers once again on the Monday morning to resume their duties. He extended the deadline to 09:30. It was only when they failed to make further representations or return to work that he commenced with the dismissals.

The workers acted collectively. Vetsak responded collectively. On the Saturday, the day after the ultimatum was issued, the

workers met to discuss their response. That response was to refuse to heed Otto's appeal on the Monday morning urging them to return to work. To insist on a separate hearing for each worker in those circumstances would be to require Vetsak simply to go through the motions. On the facts of this case there was no duty upon Vetsak to accord each worker a further separate hearing before the dismissals were put into effect.

A further argument advanced on behalf of the Union was that it should have been consulted before the final decision was taken to dismiss the workers. There may be circumstances where it might be unfair for an employer not to do so. But this was not such a case. The Union had earlier been invited by telex to become involved at plant level but it failed to reply. The workers had consulted it before and after the ultimatum was issued. The shop stewards had intimated during numerous and lengthy meetings with

management that the workers were not going to return to work for the foreseeable future. The Union was itself committed to that stance in its negotiations at national council level. It is true that the Union's lawyer sent Vetsak a telex late on the Friday afternoon and again on the Monday morning suggesting further consultations, but these recommendations only reached Otto after the dismissals had already taken effect and contained nothing new to indicate that the deadlock on wages was capable of resolution. No trade union representative were present to make representations on behalf of the workers on the Monday morning. The matter was moreover one of considerable urgency for Vetsak. It had to make immediate arrangements to engage and train an alternative work force so that production could be resumed. The fact that circumstances compelled it to endure the situation at Bothaville did not oblige it to do likewise at Isando and to refrain from making any effort to

contain the damage at Isando. In the circumstances of this case it was not, in my view, an unfair labour practice to implement the dismissals without first consulting the Union.

The next argument was that dismissal is a course of last resort (cf NUM v Free State Cons supra, at 448H, 450G) and that fairness required that Vetsak should have considered certain other options in preference to dismissal. The options said to be open to the company were (a) to sit out the strike; (b) to engage temporary workers pending the outcome of the strike at national council level; or (c) to combine the dismissals with offers to re-employ the dismissed workers when and if the strike should eventually end. A solution along any of these lines would no doubt have suited the workers, but would it also have been fair to the employer? I think not. One of the major considerations for concluding that it was not unfair of Vetsak to issue the ultimatum was that it did not know for

how long it would be forced to labour without a labour force. This consideration affects all three of the suggested courses of action. Vetsak could not know, at the time of making the decisions to issue and implement the ultimatum, for how long it would find itself either without any labour or with only "scab" labour. Such labour can generate its own peculiar set of disruptive problems. It seems to me that if the initial decision to issue an ultimatum was fair in all the circumstances, as I think it was in this case, an employer cannot be criticised, if his employees remain recalcitrant, from implementing it. And that, unpalatable as it may be to them, is a consequence of their own conduct which employees must be prepared to face. That in turn implies that it is prima facie not unreasonable or unfair for an employer to refuse to re-employ workers who had been dismissed properly and fairly. Depending on the circumstances, there may be situations where it would be unfair

for an employer to refuse to re-employ his dismissed workers. But no case has been made out in these proceedings that Vetsak, given the history of the matter, acted unfairly in refusing to negotiate about the reinstatement of its dismissed employees.

None of the grounds advanced by counsel for the appellant can in my opinion serve as an adequate reason for coming to a conclusion contrary to that of the industrial court or the LAC. And since the dismissals must stand, the question of re-instatement does not arise.

As to costs no cogent reason has been advanced why costs should not follow the result. There was some argument that Vetsak, even if successful, should be penalised by a special order for costs. There is no basis for such a submission. The LAC found that the workers were to blame for the debacle, not the employer. This court is bound by that finding. Both sides employed two counsel

in the appeal. They were justified in doing so. The appeal is dismissed with costs, including the costs of two counsel.

P M Nienaber
Judge of Appeal

Concur

Marais JA
Zulman AJA

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JUDGMENT

SMALBERGER, JA:

The first respondent is the holding company of the

second and third respondents. At all material times and for all practical purposes they jointly conducted business at, inter alia, Isando and Bothaville. On 8 August 1988, following strike action and an ultimatum to return to work that went unheeded, the respondents dismissed their entire work-force, comprising some 200 employees, at their Isando outlet. The present appeal concerns 86 of the dismissed employees ("the employees"). They are members of the appellant, the National Union of Metalworkers of South Africa ("the Union").

The Union claimed that the dismissal of the employees, alternatively, the respondents' subsequent refusal to reinstate or re-employ them, constituted on unfair labour practice within the meaning of that term as then defined in s 1(1) of the Labour Relations Act 28 of 1956 ("the Act"). The Union, with the consent of the employees,

commenced proceedings under the Act to have the dismissals set aside. The application was ultimately referred to the Industrial Court for determination under s 46(9) of the Act. After a protracted hearing the application was refused on 9 October 1989. The Industrial Court held that the dismissals, in the prevailing circumstances, did not amount to an unfair labour practice.

The Union noted an appeal to the Labour Appeal Court ("the LAC") in terms of s 17 (21 A) (a) of the Act. The matter came before Daniels J and two assessors. The appeal was dismissed with costs by order dated 22 November 1990. In the course of his judgment Daniels J concluded that the correct approach was

> "for the majority of the court comprised of the chairman and the two assessors to decide and determine the material facts, and for the chairman to decide the question of law as to whether those facts are such as to bring the respondents' conduct within the

definition of 'unfair labour practice' in s 1(1) of the Act." Leave to appeal was refused by the LAC, but was subsequently granted by this Court on 10 May 1991.

On 17 September 1992 this Court delivered judgment in the matter of Media Workers Association of South Africa and Other v Press Coporation of South Africa Ltd("Perskor") 1992(4) SA 791 (A). In the judgment the approach adopted by Daniels J referred to above was specifically rejected. It was held that a decision by the LAC as to whether the facts found constituted an unfair labour practice required the participation of the assessors appointed to assist the presiding judge.

In consequence of the Perskor judgment, this Court granted an order by consent on 26 November 1992 in terms of which the appeal was allowed. The matter was remitted to the LAC to enable all three

members of the Court to consider the question of whether there had been an unfair labour practice. The costs of the appeal, including the costs of two counsel, were made costs in the cause.

The matter came before the LAC again on 17 May 1993. Judgment was delivered on that day. The assessors indicated their concurrence with the views previously expressed by Daniels J, and the appeal was dismissed, with costs. Leave to appeal was thereafter granted to this Court in terms of s 17 C(l)(a) of the Act.

The original judgment of the LAC (which was subsequently confirmed without addition or alteration on 17 May 1993) has been reported - see National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others (1991) 12 ILJ 564 (LAC) ("the LAC judgment"). (The quotation above is to be found at 566 A - C.) The

LAC's factual findings appear from the judgment. In terms of s 17 C (1) (a) of the Act this Court is bound by those findings (National Union of Mineworker v East Rand Gold and Uraniumo Co Ltd 1992(1) SA 700(A) at 731 B) ("Num v Ergo"). They comprise: (1) actual findings of fact made by the LAC and (2) any factual findings of the Industrial Court which have either expressly or tacitly been approved by the LAC and consequently been incorporated in its judgment. In addition, this Court may also have regard to facts which were common cause and undisputed facts not alluded to in the LAC judgment. Undisputed facts would include averments made in evidence by one side which the other side could and should have disputed if not in agreement with them, but failed to do so. Furthermore, where the LAC has failed to make factual findings with regard to relevant issues, this Court would be at liberty to

do so provided any such findings are not inconsistent with the findings, express or implicit, of the LAC (Preforming Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others 1994(2) SA 204 (A) at 214 E-G) ("the focf case").

The chronology of relevant events preceding and following upon the dismissals on 8 August 1988 are set out in detail in the LAC judgment at 568 B to 573 F. For the purposes of this judgment I shall content myself with a summary of those events. If greater particularity is required, reference may be had to the LAC judgment. I proceed then, applying the approach enunciated above, to outline the facts on which the issues in this appeal fall to be determined. I shall refer to the three respondents jointly as "Vetsak", except where the context makes it necessary to do otherwise.

At all relevant times, and more particularly in 1988, Vetsak was (through its membership of an organisation with the acronym SAAMA) a member of this Steel and Engineering Industries Federation of South Africa ("SEIFSA"). SEIFSA represented the employers' organizations in the metal industry. It was a member of the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries ("the Council"). It was at this level that the annual wages and conditions of employment for the metal industry were negotiated. The Union was a member of the International Metal Federation which, together with certain other unions, represented the interests of workers in the metal industry ("the IMF unions"). The Union was recognised by Vetsak as the collective bargaining agent of its members employed by Vetsak.

Early in 1988 the IMF unions tabled proposals in the Council for a new statutory wage agreement for the metal industry to take effect on 1 July 1988. Despite protracted negotiations in the Council between SEIFSA and the IMF unions, agreement could not be reached on the proposals. A proposal by the IMF unions that the matter be referred to arbitration in terms of s 45 of the Act was opposed by SEIFSA. Eventually the current wage agreement lapsed on 30 June 1988 without a new agreement having been concluded. Because of the deadlock a national strike ballot was conducted by the IMF unions amongst its members. An overwhelming majority voted in favour of strike action. The date for its commencement was set for 3 August 1988. In the meantime, despite the apparent impasse, SEIFSA and the IMF unions continued negotiations behind the scene at national level. A national

strike duly commenced on 3 August 1988. The Union's members employed by Vetsak, including the employees whose dismissals are in issue in the present appeal, participated in the strike from that date. It is common cause that the strike was a lawful one as all the statutory prerequisites for lawful strike action had been complied with.

Prior to the strike, on 22 July 1988, the shop stewards representing the Union' s members employed by Vetsak handed a copy of the IMF unions' demands to the management of Vetsak. The document contained seven demands under the headings (1) wages; (2) date of implementation of increase; (3) public holidays; (4) increases to unscheduled workers; (5) the Labour Relations Amendment Bill; (6) paternity leave and (7) racial discrimination. (See the LAC judgment at 568 G to 569 B for the full text of the document.) The Union requested

an answer in writing to the demands. Vetsak replied by letter dated 29 July 1988. It explained that it was not prepared to negotiate on wages and related matters at plant level. It confirmed that its policy was that collective bargaining on such matters should only take place in the Council. On the same day it informed the Union that due to economic reasons beyond its control it would be forced to retrench nine security guards with effect from 15 August 1988. It is apposite to mention here that Vetsak's business was related to the agricultural sector which had been adversely affected by drought conditions. Vetsak was vulnerable to strike action as the immediately preceding years had been poor ones economically and financially.

Early on the morning of 3 August 1988 four of the Union's shop stewards at Isando, under the apparent leadership of Mr Rivambo, met

with Messrs Otto and Coetzee, representing Vetsak, to discuss the strike. The reason given for the strike by the shop stewards was that SEIFSA had not met the IMF unions' (or* differently put, the workers') demands. Otto reiterated that Vetsak was unwilling to negotiate at plant level; Rivambo in turn indicated that the shop stewards wished to do so. The demands were discussed. The emphasis was on the wage increase sought. Rivambo pointed out that if Vetsak agreed to the demands it could be exempted from the strike. The discussions were adjourned at a certain stage so as to enable the shop stewards to consult with the workers and obtain their instructions.

Negotiations resumed at approximately 11:30. Otto indicated that due to financial restraints Vetsak was not in a position to meet the wage demand. He made a counter-proposal to the effect that if the workers

at Isando returned to work and called off the strike, Vetsak would be prepared to allow them 1 May as a public holiday. Rivambo's response to this was (according to the minutes of the discussions):

> "Yes, I think then the strike is to continue. The name of the strike is a 'why-why' strike .... A 'why-why' strike is unlimited until you meet the demand[s]."

It was apparent from the attitude of the shop stewards that all their demands would have to be met before the strike could be discontinued. Further discussions revealed that there was no real dispute in regard to the following: increases to unscheduled workers; that Vetsak had no control over the Labour Relations Amendment Bill; that Vetsak would request SEIFSA to agree to the establishment of a sub-committee to investigate and report on paternity leave; and that no racial discrimination was practised at Vetsak. It was also common cause that

Vetsak had implemented SEIFSA's final wage offer to the IMF unions from 1 July 1988. The remaining issues related to wages and public holidays. It is apparent that wages remained the main bone of contention.

Negotiations were again interrupted to enable the shop stewards to report back to the workers. They recommenced at 14:00. Rivambo again indicated that the workers wanted to negotiate at plant level in order to exempt Vetsak from the strike. The shop stewards still persisted in their original wage and public holiday demands. Vetsak's offer of 1 May as a paid public holiday to end the strike was rejected. The meeting finally terminated at 16:15 without agreement having been reached. In regard to these events the LAC held that

> "the respondents] [were] not averse to entering into negotiations at shop steward level, although they previously indicated that they were committed to negotiations on national level through the relevant representative bodies. They were prepared to reconsider their position in order to avert the strike. Having decided to do so, they afforded the shop stewards sufficient time and opportunity to revert to the Union and to obtain instructions from the work-force. The latter was readily available, and telephone facilities were made available to the shop stewards which enabled them to keep the Union informed of developments.... The minutes reveal that it was the attitude of the shop stewards, led by Rivambo, that the strike would continue until the demands were met. The industrial court found that this proved that the workers were not negotiating in good faith. One can hardly criticize the court in arriving at this conclusion." (LAC judgment at 573 F-J.)

On 4 August 1988 Otto, on behalf of Vetsak, sent a telex to the Union requesting it to tell its members at Vetsak that they were in breach of their contracts of employment and should return to work. The telex went unanswered.

On the morning of 5 August 1988 a meeting of Vetsak

management was held. Between 3 August and then no counter-proposals had been forthcoming from the shop stewards or the Union. No attempts had been made by them to modify their demands or to avail themselves further of the opportunity of plant level bargaining to resolve the dispute. A situation of deadlock persisted. There was no indication as to the likely duration of the strike. Vetsak accordingly decided to issue a written ultimatum to the striking workers. The ultimatum recorded, inter alia, that:

> "Vetsak kan geen verdere verhoging toestaan nie as gevolg van die huidige finansiële posisie van Vetsak asook die algemene landbou ekonomiese situasie."

It called upon the striking workers to return to work at 07:00 on Monday, 8 August 1988, failing which Vetsak would assume that they did not wish to continue with their contracts of employment, and would

be obliged to terminate their contracts. When issuing the ultimatum Otto was aware of the fact that striking workers were to meet over the weekend to discuss the strike. The workers' response, when copies of the ultimatum were handed to them, was to throw them on the ground.

A copy of the ultimatum was sent to the Union at 15:45 on the afternoon of 5 August 1988 and referred by it to its attorneys. They in turn sent a telex to Vetsak in which they recorded, inter alia, that the workers were striking lawfully in order to improve and not to terminate their contracts of employment. They requested Vetsak to enter into negotiations to resolve the dispute. (It was common cause that this telex only came to the attention of Otto on Monday 8 August after the ultimatum had already been executed.)

On 6 August 1988 Vetsak workers attended a general meeting of

striking workers held at the Shareworld Centre at which the national strike was discussed. There was no evidence with regard to what transpired at the meeting. It is apparent from their failure to return to work on Monday, 8 August that the workers decided to ignore the ultimatum. Last ditch attempts by Otto on that morning to persuade the shop stewards to end the strike failed and the workers were ultimately dismissed. The underlying reason for their dismissal was that they had on account of their absenteeism breached their contracts of employment, and it was necessary for Vetsak to resume production in order to avoid further losses as a result of strike action.

On 18 August 1988 the strike was settled at national level. SEIFSA's final wage offer (which had been made in June 1988 and had been implemented by Vetsak with effect from 1 July 1988) was

accepted. The agreement reached with regard to public holidays was that 1 May could be exchanged for another public holiday. It therefore did not go as far as Vetsak's proposal to the shop stewards. After the settlement SEIFSA undertook to encourage its members to reverse dismissals effected during the course of the strike. Vetsak was, however, not prepared to reinstate or re-employ its dismissed Isando workers. According to available statistics only 1200 of the approximately 31 000 strikers throughout the industry were dismissed. To complete the factual picture the events at Isando should be contrasted with those at Vetsak's Bothaville outlet. The strike there also commenced on 3 August 1988. There is no suggestion that any attempt was made by the shop stewards there to bargain at plant level. On the morning of 5 August the some 400 striking workers were given an

ultimatum to return to work by noon that day. They failed to meet the deadline, but the ultimatum was never enforced as it had not been properly communicated to the workers. Following on discussions Vetsak agreed to "reinstate" all Bothaville employees provided they reported for work on 15 August 1988. This was extended to 16 August and later to 19 August, by which time all the workers had returned.

In the event none of the Bothaville workers was dismissed. As mentioned, Vetsak regarded its initial ultimatum as inadequate and consequently incapable of being acted upon. It was also influenced in its attitude towards the Bothaville workers by representations made to it by the Town Council of Gotsong. The Bothaville workers apparently comprised a large segment of the local population of Gotsong, and the Town Council feared that their dismissal might lead to crime and serious

unrest within the community.

The primary issue to be determined on appeal is whether, on the facts outlined above, Vetsak's dismissal of the employees constituted on unfair labour practice. It is common cause that the definition of "unfair labour practice" which governs the present matter is that which appeared in s 1 of the Act prior to its amendment by Act 83 of 1988 and subsequently Act 9 of 1991. It read:

> "(a) Any labour practice or any change in any labour practice, other than a strike or a lock-out, which has or may have the effect that -
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic or social welfare is or may be prejudiced or jeopardised thereby;
>
> (ii) the business or any employer or class of employers is or may be unfairly affected or disrupted thereby;
>
> (iii) labour unrest is or may be created or promoted thereby;

(iv) the relationship between employer and employee is or may be detrimentally affected thereby; or (b) Any other labour practice or any change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a)."

The underlying concept of the definition is that of fairness. In terms of the unfair labour practice dispensation it is now generally accepted that for a dismissal to be fair, it must be both substantively justified and procedurally proper.

The fundamental philosophy of the Act is that collective bargaining is the means preferred by the Legislature for the maintenance of good labour relations and for the resolution of labour disputes (NUM v Ergo at 7331; South African Commercial, Catering and Allied Workers Union v OK Bazaars (1929)Ltd 1995(3) SA 622 (A) at 628 B ("SACCAWU v OK Bazaars")). The primary object of the Act is to

promote collective bargaining in order to foster industrial peace (SACCAWU v OK Bazaars at 628 D-E). The freedom to strike is integral to the system of collective bargaining - the withholding of their labour is a legitimate weapon available to workers seeking to achieve rational demands through lawful means. If workers were not free to strike, their bargaining power would lack substance and credibility (SACCAWU v OK Bazaars at 628 B-C). It follows that care should be taken not to disparage or undermine the freedom to strike lawfully. The ultimate counter-weapon available to an employer confronted with a strike is dismissal. At common law an employer would be entitled to dismiss a striking worker whose deliberate absenteeism or abstention from work amounted to a material breach or repudiation of his contract of employment. But a dismissal lawful in contractual terms may none

the less constitute an unfair labour practice (National Union of Mine 1996(1) SA 422 (A) at 446 F-G) ("NUM v Free State Cons"). To suggest otherwise would undermine the whole concept of collective bargaining because it would effectively preclude lawful strike action. To that extent, at least, the unfair labour practice dispensation detracts from an employer's common law right to dismiss a striking worker. But it does not altogether negate such right.

The fact that a worker is engaged upon a lawful strike does not per se render any consequent dismissal unfair. Within the context of lawful strike action an infinite variety of situations can arise, and one must needs have regard to the relevant circumstances of each particular

case in order ultimately to determine whether any resultant dismissal was fair or not. In NUM v Ergo(at 446 H) this Court quoted with apparent approval a passage from Cameron, Cheadle and Thompson: The New Labour Relations Act:The Law after the 1988 Amendments at 144 - 5 where there was said, inter alia:

> "Fairness is a broad concept in any context.... It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case - including the action with which the employee is charged - are considered."

Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness a court applies a moral or value judgment to established facts and circumstances (NUM v Free Sate Cons at 446 I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act.

In my view it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.

To revert to the facts. The national strike commenced on 3 August 1988. It was a lawful strike. Its purpose was to bring pressure to bear on SEIFSA and its affiliates to compromise with regard to a national wage agreement. It was functional to collective bargaining in the sense that, at that stage, it served to promote it. Despite the initial deadlock which preceded strike action, some form of bargaining continued between the IMF unions and SEIFSA at national level, and was still in progress on 8 August 1988 when the employees were dismissed. It was never suggested that those negotiations were conducted by the parties other than in good faith in order to achieve

mutual compromise. Vetsak, through its affiliation to SE1FSA via SAAMA, was indirectly a party to the continuing negotiations; so was the Union as a member of the IMF. The strike was accordingly of a kind deserving of the law's protection; not to afford it, and those participating in it, the degree of protection dictated by the circumstances, would be to undermine the principles of collective bargaining.

Although it was initially not prepared to negotiate at plant level, Vetsak agreed to do so during the course of discussions on 3 August 1988. This resulted in coinciding parallel negotiations at plant and national level. Vetsak and the Union were directly involved in the former, and indirectly in the latter. According to the shop stewards, the avowed purpose of negotiating at plant level was to reach a settlement

which would have, as one of its consequences, Vetsak's exemption from further strike action. If that stage had been reached, Vetsak and the Union would no longer have been concerned with the negotiations at national level, and their involvement in them would have ceased pro tanto. But until that stage was reached they remained parties to the national negotiations being conducted by umbrella organizations representing them, inter alia.

As matters turned out, negotiations at plant level failed due to the shop stewards' intransigence. Vetsak was prepared to make concessions in respect of the workers' demands save in respect of wages; the shop stewards were not prepared to accept anything less than total capitulation, insisting that all the workers' demands should be met in full. This resulted in an irresoluble deadlock. It was this

uncompromising attitude on the part of the shop stewards (on behalf of the workers) that lead the LAG to hold that they had negotiated in bad faith.

At the stage that Vetsak issued its ultimatum to the workers at Isando the position that existed was as follows:

(1) Due to adverse conditions in the agricultural sector, Vetsak was vulnerable to strike action;

(2) The duration of the strike was uncertain. It could have continued indefinitely;

(3) Vetsak could ill afford an indefinite loss of production through strike action with consequent economic loss;

(4) It had made its economic predicament clear to the workers;

(5) The parties had reached a situation of total deadlock at plant level.

According to the LAC's findings this was essentially due to bad faith bargaining on the part of the shop stewards which had rendered the negotiations a sham;

(6) There was no reasonable prospect of a change in the respective attitudes of the parties. Prima facie,the strike was no longer an instrument that might bring about mutual compromise. It had ceased to be functional to collective bargaining;

(7) The ultimatum given to the workers to return to work or face dismissal allowed them sufficient time to consider their positions. As such it was reasonable.

The LAC held that Vetsak's conduct throughout was both reasonable and rational (see the LAC judgment at 574 E). It appears to have taken the same view of Vetsak's decision to dismiss the striking

workers. Although it was contended in argument that the real reason for the dismissals was that Vetsak wanted to get rid of the workers concerned, there was no evidence to support the suggestion that Vetsak acted from an improper or ulterior motive. In coming to its conclusion that Vetsak had not committed an unfair labour practice in dismissing its workers, the LAC set great store by the fact that the shop stewards had not negotiated in good faith. It is largely on that account that the strike had ceased to promote the interests of collective bargaining at plant level. If one were to have regard only to the events at that level it would be difficult to fault the LAC's conclusion.

The matter, however, does not end there. The LAC appears to have lost sight of the fact that at the time of the dismissals negotiations were still taking place at national level. Once the negotiations at plant

level, into which Vetsak allowed itself to be drawn, failed, the situation reverted to what it was before. There remained a lawful strike pursuant to collective bargaining at national level. The strike could still have helped to bring about a negotiated agreement. It had not lost its "functionality". The stage of final, irrevocable deadlock, beyond which collective bargaining ceases to fulfil any useful function, and a state of blatant economic warfare exists, had not yet been reached. The bad faith that had tainted negotiations at plant level was irrelevant to what was happening at national level, as similar considerations did not apply there. The bargaining at national level was being done by parties representative of both Vetsak and the Union. Neither had terminated the mandates of those parties to bargain on their behalf. What were the striking Vetsak workers to do in response to the ultimatum given to

them? For them to have capitulated at that stage (when the strike was only three days old) would have damaged union solidarity and have undermined the collective bargaining process still in operation.

To have confronted the workers with an ultimatum and threatened dismissal on the first day of the strike would have been premature and consequently neither rational nor fair. It would have been tantamount to dismissing them for striking per se. Precipitate action by an employer adverse to the interests of an employee is a threat to industrial peace. Was the position any different in substance on the third day (5 August)? The longer a strike lasts, the more the financial stress on those concerned, the greater the incentive for continued bargaining with a view to compromise and settlement. Parties' relative bargaining strengths and weaknesses ultimately determine the lengths to which they

are prepared to go. To resort to dismissal is a drastic step. It would, generally speaking, be unfair to dismiss workers participating in a lawful strike unless there were compelling considerations for doing so. No such considerations suggest themselves in the present instance. Furthermore, to terminate an employment relationship while negotiations are still taking place is inimical to collective bargaining. In my view Vetsak could and should have exercised greater patience than it did. It is true that Vetsak's financial position was such that it was particularly vulnerable to strike action. There can be no doubt that generally speaking such a state of affairs is a very material consideration when determining the fairness or otherwise of the dismissal of strikers. But Vetsak's financial position was not such that it was unable to endure the strike for a longer period. This is shown by the fact that at Bothaville,

where it had twice as many workers as at Isando, it was able to tolerate the strike without ultimately resorting to dismissal.

Applying a moral or value judgment to the relevant circumstances it was in my view unfair for Vetsak to have issued its ultimatum when it did. It follows that the resultant dismissals were not substantively fair and amounted to an unfair labour practice in terms of the unfair labour \ practice dispensation. I would accordingly have allowed the appeal and made an appropriate order in favour of the employees. As this, however, represents a minority view no purpose would be served by considering what form such order should have taken. Nor is it necessary to express a view on the other issues raised by the appellant in argument.

J W SMALBERGER JUDGE OF APPEAL

SCOTT, JA: CONCURS