THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

NATIONAL UNION OF MINEWORKERS APPELLANT

and

BLACK MOUNTAIN MINERAL DEVELOPMENT COMPANY (PTY) LIMITED

RESPONDENT

CORAM: MAHOMED CJ, F H GROSSKOPF, NIENABER, MARAIS et SCOTT JJA

HEARD: 21 FEBRUARY 1997

DELIVERED: 25 MARCH 1997

J U D G M E N T

SCOTT JA/ ..

SCOTT JA:

The respondent is a mining company which operates a base metal mine in Namaqualand known as Black Mountain Mine. The mine produces lead, zinc and copper concentrates. In August 1991 the total work force employed by the respondent on the mine was of the order of 1300. On 20 September 1991 the respondent dismissed a number of workers who had been on strike since 24 August 1991. The strike was a sequel to annual wage negotiations which had commenced at the beginning of June 1991 but which had ended in deadlock. Of those dismissed all but a few declined the respondent's offer of re-employment on terms proposed by the respondent. In the end, some 396 workers were dismissed. They left the mine where they had been provided with food and accommodation and were transported back to their homes which were mainly in the Transkei and the Kuruman areas. The dismissed workers were all members of the

appellant, the National Union of Mine Workers ("the union") which in terms of a recognition agreement concluded with the respondent in 1989 was at the time of the negotiations the collective bargaining agent for the workers on the mine.

Subsequently in March 1992 the union, acting on its own behalf and on behalf of its members dismissed by the respondent, launched proceedings in terms of s 46(9) of the Labour Relations Act 28 of 1956 (as amended by the Labour Relations Amendment Act 9 of 1991 which commenced on 1 May 1991) for an order declaring the dismissal of the striking employees to have constituted an unfair labour practice, and an order for their reinstatement "on terms and conditions no less favourable than those governing their employment prior to their dismissal", together with certain alternative and ancillary relief. The Industrial Court dismissed the application on 1 February 1993. The decision has been reported as

National Union of Mine Workers v Black Mountain Mineral Development Co (Pty) Ltd (1993) 14 IIJ 1048.

The union noted an appeal to the Labour Appeal Court in terms of s 17 (21 A)(a) of the Labour Relations Act ("the Act"). The matter was heard by Foxcroft J and two assessors. By a majority the appeal was dismissed with costs. The dissenting assessor, Mr Murphy, delivered a separate judgment. Both judgments are reported sub nom National Union of Mine Workers v Black Mountain Mineral Development Co (Pty) Ltd (1994) 15 ILJ 1005 (LAC). The union now appeals with the leave of the court a quo.

On behalf of the union it was conceded that in the event of the dismissals being found to have been unfair, reinstatement would not be the appropriate remedy in the circumstances and that in such an event the appropriate course would be to remit the matter to the Industrial Court for

the determination of compensation. The sole question which this court was called upon to decide therefore was whether the dismissals amounted to an unfair labour practice in terms of the Act. In the pleadings before the Industrial Court, the. respondent denied that the strike was lawful and some evidence was adduced on its behalf which suggested that non-members may have participated in the strike ballot. However, counsel for the respondent in that court did not persist with the point and both in the court a quo and in this court it was accepted for the purpose of deciding the central issue referred to above that the strike was lawful.

Subsequent to the decision of the court a quo, this court in National Union of Metal

Workers of S A v Vetsak Co-operative Ltd and Others 1996 (4) SA 577 (A) was called upon, apparently for the first time, to consider whether the dismissal of employees engaged in a lawful strike amounted to an unfair labour practice. Although the finding in

favour of the employer was a majority decision there was no material

difference in principle between the majority and minority regarding the

approach to be adopted. That approach, as set out in the majority judgment

of Nienaber JA, can, I think, be summed up shortly as follows:

(i) Collective bargaining is the means preferred by the legislature for the resolution of labour disputes and the right or freedom to strike is fundamental to the system of collective bargaining.

(ii) Although, therefore, an employer may be entitled at common law to dismiss a striking worker for breach of contract, such a dismissal may nonetheless constitute an unfair labour practice in terms of the Act.

(iii) However, unless the dispute is resolved and the employees return to work, a point must be reached in every strike when the employer in fairness will be justified in dismissing his or her striking employees.

(iv) Whether that point has been reached or not cannot be determined by reference to a fixed set of sub-rules; the answer will depend on a consideration of all the circumstances and facts of each particular case.

(v) The ultimate determinant is fairness, by which is meant

> fairness to both the employer and the employee. In deciding the question of fairness the Court must necessarily apply a moral or value judgment.

(vi) Once the facts are established an onus is not appropriate in the evaluation of issues of fairness.

The inquiry whether in the present case the dismissals were unfair or not accordingly involves in the first place a consideration of all the relevant facts. It is necessary therefore to sketch, as briefly as is appropriate, the circumstances which form the background to the dispute as well as the principal events leading up to the dismissals and the departure from the mine of the striking workers. As observed by Foxcroft J, these were largely common cause. (As to the categories of facts to which it is permissible for this court to have regard, see those enumerated by Smalberger JA in the Vetsak case at 583J - 584C and confirmed by the majority at 593 H - I.)

The respondent was established in 1977 and is a member of the

Gold Fields group of companies. The development of Black Mountain Mine began in 1977. It came into operation in 1981 at a total cost (in July 1992 money terms) of some R328 million. The capital investment in the mine will have little or no value once it becomes uneconomical to continue operations. In 1992 this was forecast to occur after a further 10 to 12 years. The work force on the mine was divided into 7 categories; A 1 to 3 and B 1 to 4. The lowest category was A 1. Workers in this category were totally unskilled. The highest category was B 4. Workers in categories B 3 and B 4 were those operating machines requiring a fair degree of skill. According to Ms Judy Paul of the personnel division at the Gold Fields' head office, the group's policy on remuneration was to bring in wholly unskilled and in many cases illiterate workers and train them up to the level of their ability. The wage curve was accordingly a steep one and had the advantage of providing an incentive for workers to undergo

training to improve their skills and move up to the higher categories. (At the time of the strike there were in fact no workers in the A 1 category.) As far as the group's policy on increases was concerned, this was generally to adopt what was described by Ms Paul as a "long term approach" (by which was meant a conservative approach) aimed at ensuring survival and the retention of jobs in difficult economic times rather than a short term approach resulting inevitably in retrenchments. She said that since 1989 there had been relatively few retrenchments in the Gold Fields' group while generally in the mining industry over 100 000 jobs had been lost during this period (1989 to 1992).

In addition to a basic wage, the workers were paid bonuses, service increments and shift allowances. They were also provided with accommodation, certain entertainment facilities, food and free medical treatment. As far as accommodation was concerned, those falling into

category B 3 and below were housed in single-sex hostels. Employees in category B 4 and above were provided with family housing. Prior to the commencement of negotiations in June 1991 the monthly basic wage in respect of each category was as follows; A 1, R317; A 2, R405; A 3, R504; B 1, R628; B 2, R754; B 3, R943 and B 4, Rl 120.

For various reasons, including a depressed economy both in South Africa and abroad, the mining industry was experiencing difficulties in 1991 and for some years previously wage increases had been kept to a minimum. At the Gold Fields' tin mine at Rooiberg a nil increase in wages had been negotiated with the union (appellant) for 1991. There had been similarly no increase in wages for that year at the group's mine at Tsumeb in Namibia. The fortunes of the respondent's mine in particular had declined sharply since 1989. This was due mainly to the drop in prices paid for the metals contained in the concentrates produced on the mine.

These prices are determined on the London Metal Exchange and largely reflect the state of the world economy. The respondent accordingly had no control over prices. Although production had been maintained, the respondent's gross profit dropped from R109,7 million in 1989 to R58,4 million in 1990. In 1991 it dropped to R6,9 million resulting in an operating margin of only 5,1 percent. No dividend was paid to shareholders in 1991 and at the time of the hearing before the Industrial Court the prognosis was that no dividend would be declared in 1992.

Against this background I turn to the events leading up to the strike and ultimately the dismissals. Negotiations commenced at a meeting on 4 June 1991 between management and the representatives of the union. The respondent offered a wage increase of 3 percent for all categories. Mr Botes, the mine manager, who was the main spokesman on behalf of the respondent, emphasized that the increase would take effect on 1 July 1991

or from the date of the acceptance of the offer, whichever was the later. This was clearly a bargaining tactic to exert pressure on the union to accept the offer. The union's wage demand was for an increase which varied from 60 percent in the case of some categories to over 100 percent in the case of others. In addition, the union presented a number of other demands ("the ancillary demands") which were mainly aimed at ameliorating the unhappy lot of the migrant worker. Some of these were dropped. Those that remained were: (i) 14 days compassionate leave per year for each worker; (ii) certain additional paid holidays; (iii) free transport home over week-ends when required (as well as when going on annual leave) with workers being afforded the opportunity to work in days so as to be able to have long week-ends off; (iv) a five day week of 40 hours; (v) training for all workers, and (vi) family housing facilities for all workers and not only for those in the B 4 category. The respondent's attitude regarding

compassionate leave was that it was prepared to consider each case on its merits. As far as transport costs were concerned, it was prepared to pay these only when the workers went home on annua] leave, but not otherwise. The respondent was also prepared (in accordance with its policy) to provide training for its workers, but only such training as was consistent with operational requirements and the aptitude and dedication of the worker concerned. As far as family housing was concerned, the respondent's attitude was expressed to be one of sympathy but it contended that the provision of the accommodation demanded was financially out of the question at that stage, particularly after having spent millions of rands on hostel accommodation. The respondent was not prepared to accede to any of the remaining ancillary demands and throughout the negotiations no progress was made in this regard.

Another four meetings were held in the course of June 1991 at

which the respondent increased its wage offer to a 6 percent increase for all categories, while the union reduced its wage demand by certain specified amounts. At a meeting held on 9 July 1991 the respondent purported to make its final offer which was an increase varying from approximately 9 percent in the case of category A 1 to 7 percent in the case of category B 4. This was rejected outright by the union and the parties acknowledged that they were in deadlock. On 11 July 1991 the respondent issued a notice to all workers advising that those who accepted the offer would receive the increment with effect from 1 July 1991. On 12 July 1991 a meeting was held between the union and representatives of the respondent at directors' level, as required in terms of the recognition agreement. No progress was made. On 22 July 1991 a conciliation board meeting was held. The union reduced its demand to a 20 percent increase for all categories. The respondent increased its "final offer" to an increase varying from

approximately 11 percent for category A 1 to 7 percent for category B 4. After reporting to its members the union indicated to the respondent on 24 July 1991 that the offer had been rejected and that the deadlock remained unresolved.

Throughout the negotiations in this period the union officials pointed to the inadequacy of the basic wages paid by the respondent to the workers and particularly to those in the A categories. They stressed that as the rate of inflation was then approximately 15 percent per annum the workers were being asked in effect to accept a cut in their salary which was already inadequate. The respondent, on the other hand, pointed to what it regarded as the critical state of the mining industry in general and the parlous situation of Black Mountain Mine in particular. Mr Botes's attitude was that the mine was simply not able to afford inflation-related increases and that a poorly paid job was better than no job at all.

In an attempt no doubt to induce union members to accept the final offer, the respondent issued a notice on 23 July 1991 offering to implement its final offer as from 1 July 1991 if the offer were accepted by 24 July 1991. The offer was rejected by the union.

On 30 July 1991 the respondent called for a further meeting at management level for the purpose of attempting to persuade the union to accept the respondent's final offer. Botes again offered to implement the wage offer from 1 July 1991 but the union was not prepared to take the offer to its members. The following day, 31 July 1991, a further notice was issued to union members offering once again to implement the wage offer from 1 July 1991 if it were accepted before 4 pm on 1 August 1991. There was no response.

On 13 August 1991 a further notice was issued by the respondent advising that the company's offer would be implemented on the

day on which it was accepted. The notice also contained information concerning the plight of the mine and of the industry in general. In the meantime, steps were taken for the holding of a strike ballot on 19 August 1991 and in due course strike action commenced with the night shift on 24 August 1991.

Botes responded to the strike by calling for a meeting with the union on 26 August 1991 principally, it would seem from the minutes, to endeavour once again to convince the union of the reasonableness of his offer. A further meeting was held on 29 August 1991, this time at the instance of the union. In addition to raising a number of issues concerning strike-related incidents on the mine, the union lowered its demand to an increase of 18 percent for all wage categories. The respondent's reaction was that having reconsidered the matter it was not in a position to increase its wage offer.

On 2 September 1991, and in an obvious attempt to place pressure on the striking workers, the respondent cut off the hot water and electricity supply to the hostel which housed them. Their meat supply was also cut off. At a meeting called by the union to discuss the matter, Botes explained his conduct by pointing out that the provision of board and lodging was part of the remuneration package of the striking workers and that they were not entitled to be paid while on strike. Although initially disputed, it is clear from the evidence that the strikers were provided with basic, but adequate, food rations throughout the duration of the strike and that the kitchen which served them continued to operate until the end.

On 5 September 1991 Botes called for yet another meeting with the union in an attempt to persuade the strikers to accept the offer and return to work. He also distributed a notice stating that the respondent would implement its final offer to all those who individually accepted it.

A further notice was issued on 12 September 1991. It contained a warning that unless the strike came to an end soon the strikers would seriously jeopardise their jobs with the respondent and their continued occupation of mine accommodation. Botes explained in evidence that the reason for this notice was that the impact of the strike on the mine was such that a stage had been reached that unless something drastic was done he would be unable to maintain production. At the commencement of the strike he had re-allocated his available labour to the maintenance of production in the short term. But this meant cutting back on activities aimed at maintaining production in the long term. This included the excavation of tunnels to provide access to unmined areas, the backfilling of mined areas to provide support so that intervening pillars of ore could be mined and the boring of vertical holes connecting different levels. He said he had used artisans to perform the tasks of workers in the B 3 and B 4 categories with the result

that the maintenance of machinery and other tasks performed by artisans were being neglected. He had also been obliged to re-deploy workers otherwise engaged in ensuring the safety of others. Temporary workers were engaged but the number that could be taken on was limited by the absence of available accommodation and generally this measure did not prove to be very successful. In the result, those who remained on the job were under considerable stress, working 12 hour shifts which involved excessive overtime. In Botes's view they could not hold out and something had to give.

The following day, that is to say 13 September 1991, a notice was issued warning that unless the strike came to an end soon the respondent would be obliged to give the strikers an ultimatum to return to work or face dismissal. There was no response. The ultimatum was given on 17 September 1991. It called on all striking workers to return to work

for their next shift which commenced after 5 pm on 19 September 1991, failing which their employment would be terminated. They were not obliged to accept the respondent's wage offer. The notice also indicated that in the event of their employment being terminated they could be re-employed if they so applied within a limited period thereafter.

A meeting was held between management and representatives of the union on 19 September 1991. In this court there was much debate regarding what was said at the meeting and in particular the stance adopted by Botes. It appears from the minutes that on the previous day, 18 September 1991, Mr Maluleke from the union's head office had telephoned Botes to ask him if he was prepared to backdate the respondent's wage offer to 1 July 1991. Botes indicated that he was not keen to do so but that in any event he was not prepared to discuss the matter over the telephone and that Maluleke should rather send someone to the mine. The meeting

commenced at 11 am on 20 September 1991 and was attended by a union official, Mr Mapela, who had come from Cape Town for that purpose. When asked what his attitude was to backdating the respondent's wage offer to 1 July 1991, Botes's immediate reaction was to inquire whether the offer would be accepted if it were backdated. Mapela answered that they were unable to say yes or no but that they wanted to know if there was flexibility on the part of the respondent. Botes responded by pointing out that the respondent's offer to backdate had been rejected on two occasions some 7 weeks previously and added that he was not prepared to repeat the offer. In the course of the discussion that followed, Mapela indicated that he was prepared to "make some recommendations" to the strikers to return to work but required "some undertakings from management" to take back to the strikers at a meeting to be held at 2 pm that afternoon. Botes's response was that he was prepared immediately to restore the supply of electricity

and meat with meals (as requested) but, having given the matter thought, was not prepared to backdate the respondent's wage offer.

When cross-examined on the stance he had taken at the meeting, Botes said at one stage that it was not his policy to increase an offer after an ultimatum had been given as it created a bad precedent and that it was important that workers should realise that if he said an offer was final he meant it. Nonetheless, he testified that had he known that the offer would be accepted if backdated, he would have given the matter further consideration. He expressed the view that in any event he did not at the time think that backdating would make any difference having regard to the extent of the demands and the fact that the offer had been rejected twice before.

The meeting with management on the morning of 19 September 1991 was adjourned to enable the representatives of the union

to consult with the striking workers at 2 pm. When it resumed that afternoon Mapela reported that the wage demand remained an increase of 18 percent but that if the respondent was prepared to negotiate, the strikers were willing to look at something above the rate of inflation and in the region of 16 percent. Botes's response was that they had been through these discussions many times previously and that he was not prepared to increase his offer even if the strikers were prepared to come down below an increase of 18 percent. Mr Qithi, the regional chairperson of the union and a shop steward at the mine, subsequently testified that at the 2 pm meeting with the striking workers the representatives of the union had been unable to persuade them to reduce their demand to an increase at the rate of inflation and below 16 percent.

A notice dismissing the striking workers was issued the following day, ie 20 September 1991. It contained an offer to reinstate

each dismissed worker provided he, or the union on his behalf, accepted the respondent's wage offer before 5 pm on 24 September 1991. It provided further that even if the offer of reinstatement was not accepted, the respondent would still be prepared to re-employ the worker at some future date if he was prepared to accept the offer and if a suitable job was available at the time.

On 21 September 1991 the vice-president of the union came to the mine to address the dismissed workers in an attempt to persuade them to accept the respondent's offer of reinstatement and return to work. All but a few declined to do so.

On 23 September 1991 the union, on behalf of the dismissed workers who did not wish to take up the offer, requested that they be taken home immediately without having to wait for the expiry of the offer. Each dismissed worker was interviewed. In the course of the interview a final

attempt was made to persuade each such worker to accept the offer, but to no avail. By 24 September 1991 all those who had not accepted the respondent's offer of reinstatement had left the mine.

Ironically, the terms on which reinstatement was sought in these proceedings were no more favourable than those contained in the offer of reinstatement which the dismissed workers had themselves rejected. The acceptance of the respondent's offer of reinstatement would presumably also have avoided the need for any compensation for loss of employment. So much for the facts.

In this court Mr Brassey, who appeared together with Mr van der Riet for the union, did not suggest that the dismissals were procedurally unfair. They were clearly not. The issue is whether they were unfair in substance. On the facts this involves a twofold inquiry: first, whether the ultimatum of 17 September amounted in all the circumstances to an unfair

labour practice and if not, second, whether the conduct of the respondent at the meeting on 19 September 1991 in the context of what had gone before amounted to an unfair labour practice. It is necessary to deal with each in turn. I begin with the ultimatum.

As was emphasized in the majority judgment in the Vetsak case (593 A - F) a striking worker may not be dismissed merely for striking. This was also the approach of the minority (588 E - I). If the position were otherwise, the right to strike would have no content and collective bargaining as an instrument of industrial peace would be largely undermined. This is particularly so in times of unemployment when dismissed workers can be readily replaced. Nonetheless, even where the parties negotiate in good faith and their conduct cannot be faulted, there comes a time when the process of negotiation and power-play which is the essence of strike action must be acknowledged as having failed to resolve

the negotiating impasse between the two sides. The delivery of an ultimatum and, in the absence of compliance, termination of the employer-employee relationship will then be justified. Whether that stage has been reached or not, as pointed out by Nienaber JA in the Vetsak case at 593 A - H, depends upon a consideration of the facts of the particular case with the ultimate determinant being fairness to both the employer and employee. (See also the comments of Smalberger JA at 588 J - 589 B.)

Mr Brassey argued that the respondent was obliged to have been more stoical; that it had not yet suffered any loss of production and that it could have held out for longer before issuing the ultimatum. Accordingly, so the argument went, the ultimatum was premature. He also criticised Mr Botes's negotiating technique which involved simply increasing the respondent's wage offer from time to time before announcing that an offer was his "final offer" and thereafter not increasing or varying

it at all. It was contended that Mr Botes ought to have adopted a more "constructive and creative approach"; that for example he could have attempted to formulate the increase which was offered differently or even attempted mediation as a means of resolving the dispute. The basis for these contentions was the more fundamental submission made by Mr Brassey that dismissal was a last resort and that accordingly it could not be justified if there were any other reasonable courses open to the employer. Dismissal in the context of misconduct was described in National Union of Mine Workers and Others v Free State Consolidated Mines (Operations) Ltd 1996(1) SA 422 (A) at 448 H as "the ultimate sanction" and "a course of last resort". Similar expressions in this context have been used in judgments of the Labour Appeal Court. Striking as such does not amount to misconduct. There is accordingly an important distinction between dismissal for misconduct and dismissal in consequence

of strike action, and it follows that considerations relevant to the former are not necessarily relevant to the latter. Nonetheless, it is undoubtedly so that in a sense the dismissal of striking workers can be said to be a last resort. Unlike a strike which in effect suspends the employer-employee relationship, dismissal results in its termination. But this does not mean that a dismissal cannot be justified whenever it is possible to point to one or other course which the employer (or both parties) might have taken, but failed to take. A stage is reached when fairness dictates that dismissal is justifiable. In the course of the negotiations and power-play leading up to that stage the options and alternatives open to both parties are no doubt numerous and varied. The inquiry is not whether one or other course may have been more successful in resolving the dispute or whether the employer could have endured the strike for longer; the inquiry is whether in all the circumstances (including, for example, the duration of the strike and the

extent of the measures actually taken by the parties to resolve the dispute) the dismissal can be said to have been unfair.

What must be considered therefore is whether the circumstances were such as to justify categorizing the ultimatum as premature and hence unfair. It was not contended that either side had negotiated in bad faith; nor was it contended that prior to the ultimatum the stance adopted by either party was such that it could be regarded as unreasonable or improper. Save in extreme cases it is not for the court to adjudicate upon the reasonableness or otherwise of the offer and the demands of the respective parties; nor would it be qualified to do so. (See for instance Brassey et al, The New Labour Law at 140, cited in the majority judgment of the court a quo at 1011 C - D; Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory) 1991 (2) SA 527 (C) at 530 I - 531 E and Buthelezi and Others

v Labour for Africa (Pty) Ltd (1991) 12 ILJ 588 (IC) at 592 G.)

The situation which existed on the mine on 17 September 1991 when the ultimatum was issued can be summed up as follows.

(1) More than 4 months had elapsed since the commencement of negotiations. Although initially there had been some progress, by 17 September 1991 the parties were still far apart. Some 10 meetings between the parties had been held. The respondent's wage offer was an increase which varied from approximately 11 percent in the case of category Al (in which there were no workers) to 7 percent in the case of category B 4. The union's demand was an increase of 18 percent across the board. In addition, the ancillary demands remained unresolved. They were categorized by the court a quo as "bargaining chips to be discarded in exchange for movement on the part of the company", a finding that is perhaps a little surprising in the light of what was said about them by

members of the union's delegation at the meetings. But what is clear is that these demands remained in issue and had not been discarded.

(2) The strike had endured for 25 days. Frequent meetings had been held between the union and management during this period, but no progress of any consequence had been made. The respondent's final offer dated back to 22 July 1991. The union had reduced its demand from 20 percent to 18 percent on 29 August 1991. There had been no movement since,

(3) The prospect of closing the gap was made more difficult by the situation in which each side found itself. On the face of it, the wages paid to those in the A categories, in particular, were extremely low; yet the workers were asked to accept an increase well below the rate of inflation. As far as the ancillary demands were concerned, the workers could understandably have thought that the time had come for employers

to initiate steps to ameliorate the harsh effect which the migrant labour system had on their family life. On the other hand, it was equally clear that the mine was financially in a parlous situation brought about by the extent of the drop in metal prices. The forecast was that prices would drop further in the future. In these circumstances, the inflexibility on both sides was perhaps understandable and a stalemate seemingly inevitable.

(4) Neither side had given any indication of making any meaningful concession to close the gap between them. The respondent had gone out of its way, both at the meetings and by way of notices, to persuade the workers that it could or would not increase its offer. The union had, likewise, fully presented the case of the workers.

(5) Unless the strike ended soon the mine would have been unable to maintain production, resulting in the predicament in which it found itself being aggravated yet further. The respondent had taken all

practicable measures to ameliorate the impact of the strike upon production. It had re-allocated its existing labour force and taken on temporary workers. The number of temporary workers was, however, limited by the lack of accommodation. Excessive overtime was being worked and normal safety precautions were being compromised. The court a quo found that the respondent "had reached a stage where it was suffering real economic hardship".

(6) On the probabilities there appeared to be no prospect of the strike coming to an end within the foreseeable future. The ultimatum did not call on the striking workers to accept the respondent's offer, but merely to return to work.

(7) The power-play inherent in strike action was to some extent affected by the striking workers being afforded accommodation and food. Although inconvenienced by the absence of electricity and meat in

their diet, they were accordingly in a position to hold out for much longer. This was an inevitable consequence of the circumstances of their employment and despite some criticism of Botes for not having taken even further steps, in my view his conduct in this regard cannot be faulted.

Weighing up the factors listed above, I am unpersuaded that the ultimatum delivered on 17 September 1991 can be said to be unfair. Once the right to strike is accepted, as it is, so that the employer is in effect precluded from resorting to dismissal as a purely retaliatory or punitive measure (cf the Vetsak case at 593 A - F), the position of the employer would be untenable unless it were acknowledged that in circumstances such as the present a stage is reached when the power-play inherent in strike action has failed to bring about a solution. To protect strike action beyond that point would be detrimental not only to the interests of both sides but also to those of the community at large. In my view the delivery

of the ultimatum did not amount to an unfair labour practice within the meaning of the Act.

I turn to the events of 19 September 1991 and the further ground advanced by Mr Brassey in support of his submission that the dismissals were unfair. It can be summed up as follows: collective bargaining contemplates a duty on the part of the employer to bargain not only in good faith but also in a manner which is rational in relation to its own interests and to the objectives of the Act; that by refusing to backdate the wage offer to 1 July 1991, Botes was motivated not by commercial considerations (which would be rational) but by a desire (i) in effect to "punish" the workers for striking by ensuring that they were worse off than the non-strikers, and (it) to establish his authority in the employer-employee relationship, this being apparent from expressions he used such as "when I say final I mean final" and his stated desire not to create a precedent for

the future.

It goes without saying that it is impermissible to "punish" for striking. It is undoubtedly also impermissible to adopt a stance in negotiations which is motivated by some ulterior or improper motive.

The tactic adopted by the respondent of offering to implement its wage offer as from the date on which it was accepted or to backdate the wage offer provided it was accepted within a specified time, is a legitimate bargaining ploy. (Cf National Union of Mine Workers v Henry Gould (Pty) Ltd & Another (1988) 9 ILJ 1149 (IC) at 1156 H- 1157D.) Where, in such circumstances, the offer is accepted by some workers but not by others, the latter may well end up by being worse off than those who accepted the offer to backdate. To that extent, therefore, they may be prejudiced by having persisted in a strike or having subsequently resorted to strike action. Provided, however, the offer to backdate is procedurally

fair and made through the proper channels, there can be no objection to this strategy. (Cf National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992 (1) SA 700 (A) at 732 B - I.) The employer is under no obligation subsequently to repeat its offer to backdate merely to prevent strikers from being worse off than non-strikers.

Mr Brassey did not contend that the position was otherwise. He argued that it was apparent both from the remarks made by Botes at the meeting and from his evidence that his real motive for refusing to backdate was as set out above and was improper. As far as the desire to punish is concerned, he relied on a remark made by Botes in the course of responding to the union's request to backdate, viz: "Now that you have entered into strike action, I am not prepared to backdate the implementation date at all". The remark was preceded by Botes recording at some length that the offer to backdate had been rejected twice before, the last time being

almost 7 weeks previously. (For the full passage, see Foxcroft J'S judgment in the court a quo at 1008 I - 1009 B.) This and other statements made by Botes at the meeting must of course be viewed in the context in which they were made and against the background of the events which preceded the meeting. On this counsel were agreed.

I have attempted earlier in this judgment to give a brief summary of what transpired at the meeting on 19 September 1991. What is apparent, and ought not to be overlooked, is that when making the statements he did, Botes was not responding to a new offer of settlement made by the union; he was responding to a request by representatives of the union to indicate in advance, ie without knowing what the workers' response would be, whether he would increase his own offer which he had previously made clear was his final offer and which by then had been embodied in an ultimatum. The subject matter of the concession sought

was of course the backdating of the wage offer. The repeated reference throughout the earlier negotiations to the date on which the increases would be implemented and the offers to backdate, kept open for a limited period only, were obvious and legitimate tactics employed by the respondent to exert pressure on the union. Botes, himself, did not believe at the time that backdating would make any difference; the amount of the increase from 1 July to 24 August 1991 for each individual worker would have been a relatively small amount and would hardly have been of consequence given the extent to which the parties were still apart. In effect, therefore, Botes was being asked to back down on an issue which he had used as a bargaining tactic (and no doubt would do so again in future) at a stage when he believed that the concession would not result in the resolution of the dispute. By contrast, he was not being asked to respond to an offer of settlement on the terms of the respondent's wage offer subject to

backdating, or for that matter to any offer at all. While opinions may differ as to Botes's style or technique of bargaining he did appear to adopt an unnecessarily hard-line attitude on 19 September 1991 -, his refusal at that stage to repeat his offer to backdate without knowing what the workers' response would be, is readily explicable as a tactical decision in the process of bargaining. It would also be unrealistic, I think, to ignore the ongoing relationship between the parties and the fact that wage increases were negotiated annually. Notwithstanding his apparent intransigence, Botes explained in evidence that had it been indicated to him that his wage offer would be accepted if he agreed to backdating, he would have given the matter due consideration. In these circumstances, I do not think the refusal can be said to have been unfair or an unfair tactic. His remark that he was not prepared to backdate the offer "now that you have entered into strike action" was both unfortunate and misplaced. It must be stressed that any

negotiating stance adopted merely to "punish" for striking would be inconsistent with the bargaining that is contemplated in the Act. Nonetheless, in the context in which the remark was made, and viewed against the background of Botes's evidence as a whole, I am unpersuaded that an inference of an intention to "punish" is justified. To infer such an intention from what in reality was no more than an unfortunately formulated remark or, on the basis of similar statements, to categorize Botes's motive for refusing to increase his offer at that stage as improper or irrational, I think, would amount to the court becoming involved in what was described in both the majority and the minority judgments of the court a quo as "the negotiating strategies of the parties". (See Grogan, Collective Labour Law at 33.) Save in clear cases of unfairness, that is something a court will not do.

There is, in any event, a more fundamental objection to this leg

of Mr Brassey's argument. On the evidence placed before the Industrial Court there can be no proper basis for suggesting that had Botes agreed to backdate his wage offer it would have been accepted by the strikers. On the contrary, the probabilities go the other way. Having regard to the relatively small amount which backdating would have given each worker, it is clear that this expedient would have done little to improve the respondent's offer. The strikers were in no mood to accept an offer of this nature. After the meeting held at 2 pm with the strikers, the representatives of the union indicated to management that the strikers were prepared to "look at" a wage increase in the region of 16 percent. In the light of what had gone before and the fact that the ultimatum was about to expire, this was hardly a proposal that was calculated to result in the gap between the parties being closed; yet this was the best the union could do. Its officials were anxious to end the strike; if needs be on the terms of the respondent's

wage offer. But by then it would seem that the strikers were no longer prepared to heed the union's advice. According to Mr Qithi, they could not even be persuaded to reduce their demand to an increase below 16 percent. In these circumstances, the probabilites would seem overwhelming that it would have made no difference whether the respondent agreed to backdate its wage offer or not.

I have already found that the ultimatum delivered on 17 September 1991 was not an unfair labour practice. In my view nothing has been shown to have occurred between the delivery of the ultimatum and its expiry that would have rendered the consequent dismissals unfair. The appeal must accordingly fail.

As far as the question of costs is concerned, there would seem in the circumstances of the case to be no reason for not applying the ordinary rule that the successful party should be paid its costs.

The appeal is accordingly dismissed with costs, such costs to include those occasioned by the employment of two counsel.

DG SCOTT

MAHOMED CJ)
FH GROSSKOPF JA)-Concur
NIENABER JA)
MARAIS JA)