CASE NUMBER: 475/95

In the matter between:

WUBBELING ENGINEERING (PTY) LTD 1st Appellant

APACHE MANUFACTURING CO (PTY) LTD 2nd Appellant

and

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA

Respondent

CORAM: SMALBERGER, F H GROSSKOPF, HOWIE, SCOTT et PLEWMAN JJA

HEARD ON: 5 MAY 1997

DELIVERED ON: 27 MAY 1997

J U D G M E N T

PLEWMAN JA

The appellants are two associated companies carrying on business in the engineering field as manufacturers. They operate from the same premises and share a common management. It is common cause that for the purposes of this appeal no distinction need be drawn between them and that they may be dealt with as if they were a single entity. (I will refer to them simply in the singular as "the appellant".) The respondent is the National Union of Metalworkers of South Africa ("Numsa") a trade union registered in terms of the Labour Relations Act No 28 of 1956 ("the Act"). The case concerns the fate of certain of the appellant's employees who were dismissed by appellant in September 1992. The role of the respondent will emerge presently. Before dealing with that certain other parties must be identified.

The appellant is a member of an employer federation, which federation is in turn a member of the Steel and Engineering Federation of South Africa ("Seifsa"), an employer federation registered in terms of the Act. Seifsa was engaged in industry-wide negotiations with Numsa

during the early months of 1992 but they were unable to arrive at an agreement. In May 1992 their differences were referred, in terms of Section 27A of the Act, to the appropriate Industrial Council but again could not be resolved. On 30 July 1992 Numsa called a national strike to commence on 3 August. The events crucial to this case then ensued. It is relevant to conclude this account of the underlying events by noting that Seifsa applied to the (then) Transvaal Provincial Division for the grant of an interdict restraining Numsa from "commencing, instigating, or participating in the strike" on the grounds that the strike ballot undertaken by Numsa had been irregularly conducted. The application got off to a false start but eventually Seifsa was granted an interim order on 25 August 1992 by Myburgh J - relief which led ultimately to Numsa calling off the strike. The details of all this are to be found in the reported decisions steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa (1) and (2) 1993 (4) SA 190 and 196 (T). What may be safely concluded is that the

strike was illegal for want of compliance with s. 65(2)(b) of the Act. That fact however has only a peripheral bearing on the case.

As far as the appellant was concerned the strike decision meant that its employees would participate in the national stay away and strike. What was planned by Numsa was that workers would participate in a stay away on 3 and 4 August 1992 (Monday and Tuesday); that on 5 August workers would report for duty for only half an hour and would then join a protest march; and that on 6 and 7 August (Thursday and Friday) workers would enter the workplace in order "to occupy the factory". This plan set in train the events more fully dealt with below and ultimately to the dismissal on 1 September 1992 of 50 of appellant's employees. The dismissals led to Numsa instituting the present proceedings to obtain an order reinstating these employees with supplementary orders on the grounds that the dismissal of the workers constituted an unfair labour practice. The dispute was determined by the Industrial Court after a hearing on 16 September 1994. The Industrial

Court held that the dismissal of the employees did not constitute an unfair labour practice. Numsa then appealed to the Labour Appeal Court (Transvaal Division). That court, per Nugent J (with whom the assessors concurred), set aside the Industrial Court's decision and made a reinstatement order. In addition appellant was ordered to pay compensation to certain of the employees it had dismissed. Appellant approaches this Court with leave of the court a quo.

The issue in the case is simply whether appellant acted fairly in dismissing the workers. The definition of "unfair labour practice" in s. 1 of the Act is as follows:

> " '(U)nfair labour practice' means any act or omission, other than a strike or 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 or work security is or may be prejudiced or jeopardized thereby; (ii) the business of 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 labour relationship between employer and employee is or may be detrimentally affected thereby."

In Media Workers Association of SA v Press Corporation of SA Ltd 1992 (4) SA 791 (A) at 798 H-I, E M Grosskopf JA said as follows (of the definition in an earlier form not differing materially from the present):

> "The position then is that the definition of an unfair practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions."

At 801 I -802 A Grosskopf JA continued:

> "The real problem in the present case is to decide whether particular acts or the consequences of acts are unfair. This

> is a matter of applying a general criterion to the facts. As Wilson classifies it, it is a 'description-question' - do the acts or their consequences fall within a particular description? This calls, not for a determination of what 'unfairly' means, but for a value judgment on the facts and their consequences."

In National Union of Metalworkers of South Africa v Vetsak Co-operative Limited 1996 (4) SA 577 (A), Nienaber JA in the majority judgment said at p 593 G-H as follows:

> "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."

For good measure it was said by Smalberger JA in the minority judgment, at p 589 A-D as follows:

> "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 State Cons at 446 I)."

What I have quoted defines the task of this Court. In an appeal the question simply is whether having regard to the facts found proved by it, and any other facts that may legitimately be taken into account, the reasoning of the court a quo can be supported or not.

In the judgments of both the Industrial Court and that of the court quo the evidence is reviewed and the relevant facts set out. At the risk of repetition I propose, however, again to set out the sequence of the events though possibly in a more perfunctory manner. 1) On 31 July 1992 a meeting was held between appellant's

management and the shop stewards representing the employees. The plan for the week 3-7 August that I have outlined above, was disclosed to management.

2) Management was disturbed by the proposal that its factory was to be "occupied" on 5 August and that the occupation thereof was to be followed by a protest march, but more particularly by the proposal that the workforce would "occupy" the factory on 6 and 7 August. Appellant accordingly prepared a written undertaking which it resolved would, for its protection, have to be signed by each employee who wished to enter the factory. The undertaking was in the following terms:

> "1 hereby declare that 1 enter the company's premises for the purpose of a full day's normal work and that I will refrain from any acts such as illegal occupation of the company premises, or a sit-in or disruption of production, protest marches or a gathering on the premises or any other action against the company rules."

3) On 3 and 4 August the employees stayed away from appellant's premises and therefore did not work.

4) On 5 August management refused entry to the factory to employees who would not sign the undertaking. Copies of the undertaking were available. This prompted Numsa to address a letter to appellant accusing appellant of having locked out "workers" and informing appellant that its employees would be tendering their services on 6 August. How a tender of the "services" of the employees is to be reconciled with the ongoing national protest and stay away is not clear.

Appellant immediately responded both by telephone and in terms of a letter dated 5 August. The body of the letter reads:

> "We have not illegally or unilaterally locked out any worker.
>
> After having been advised by the shop steward of the actions intended on instructions of Numsa all workers are required to sign an undertaking to refrain from such actions before entering the workplace.
>
> The same will apply on the 6th and 7th August and as long as necessary thereafter."

Appellant also held a meeting with the shop stewards and explained the terms of the undertaking and its object in seeking signature

thereof by employees entering the premises. This explanation included an open invitation to anyone who wished to work to exercise the freedom to do so. Copies of the undertaking were provided to the shop stewards.

5) Appellant's employees did not present themselves for work on 6 or 7 August.

6) On 7 August the employees did not enter the premises but at 09h30 appellant held a meeting with the shop stewards (at the shop stewards' request). Appellant was informed that the strike would end on 7 August. Appellant expressed the view to the shop stewards that the strike on 5, 6 and 7 August (as opposed to 3 and 4) had been illegal. It informed the stewards that a letter had been sent to Numsa asking it to inform "the workers" that if they did not return to work on 10 August they "may" face dismissal. Management welcomed the news that the strike would now end. The content, effect and purpose of the undertaking was again explained and it was stressed that such undertaking would apply only for the day upon which it was given.

7) On 10 August most of appellant's employees refused to sign the undertaking and appellant refused them access to the factory. A further meeting was held between management and the shop stewards. The undertaking was again explained and the shop stewards went to report to the employees on two occasions on the trend of the discussions. A Numsa official was eventually called to assist. One Mahlangeni representing Numsa arrived at appellant's premises. Far from assisting he contradicted the stewards by asserting that the strike was not over and that it would continue. Appellant's response to Mr Mahlangeni was to say that its employees would then be and were dismissed. Appellant (obviously) consulted Seifsa thereafter. Seifsa advised it to exercise patience.

8) On 11 August appellant informed Numsa that as it had been requested by Seifsa to exercise "constraint" it had reversed its decision to dismiss the employees who were then given a further opportunity to return to work. This concession appellant termed "a moratorium" which,

it said, would expire on Monday, 17 August.

On 17 August the "moratorium" was extended to Monday, 24 August, which was, so it was said, then to be regarded as the employees' "final" opportunity to return to work. Numsa was informed accordingly and requested to notify its members.

9) The employees did not present themselves for work on 24 August. Management regarded the workers then as having been dismissed.

10) On 31 August the employees presented themselves at appellant's premises and sought a meeting with management. Appellant accordingly met with the shop stewards. The shop stewards conveyed to appellant the desire of the workers to return to work "because the strike was over". This latter statement obviously resulted from Numsa's decision to call off the strike because of Myburgh J's order. Why it took from 25 August to 31 August for the employees to return is not explained. Appellant then resolved that it would be prepared to take the workers back the following day (1 September) but again stipulated that signature of the undertaking

would be a prerequisite. Appellant, in an effort to maintain production, had in the interim engaged temporary staff. These had to be discharged. 11) There was evidence that on 1 September a Numsa representative, a Mr Mabena, attended at appellant's premises and spoke to Mr Wubbeling. This evidence was disputed. The matter is dealt with in Nugent J's judgment. His conclusion was that it was improbable that this occurred. I should add that in argument respondent's counsel sought to rely on Mabena's evidence as incidental support for a proposition to be considered later. In my view Nugent J's finding in this regard is a finding of fact which is binding on this Court. But, in any event, nothing turns on this minor incident and it does not assist respondent. For the purpose of this recitation of the sequence of events Mabena's evidence on this aspect is ignored.

On the same day the employees presented themselves at the premises. Twelve of them (including the senior shop steward) signed the undertaking and were permitted to enter the premises and work. The

remainder (those whose reinstatement was sought in this case) refused to sign the undertaking and were dismissed.

These facts are essentially common cause and it is against this background that the reasoning of the court a quo must be considered.

The court's reasoning proceeded as follows.

It held that it was not clear why appellant had insisted on the undertaking being signed or why management had felt it had no option but to dismiss the employees who refused to do so. There was, so it was said, nothing to indicate that the relationship between appellant and its workers had broken down or that there were circumstances which called for an immediate resolution of the issue. It was further held that even if there had previously been good reason to require the undertaking to be signed the situation had changed by 1 September. The court also reasoned that any lasting suspicion about the workers' motives could "easily" have been clarified by referring to Numsa. The decision was thus, so the court concluded, "precipitate" and accordingly an unfair

labour practice.

In my view this reasoning cannot be supported. It is based on a partial analysis of the facts and seems to disregard, in its starting point, the evidence of appellant's witness as to why appellant continued to regard the undertaking as important.

Counsel for the appellant argued that the above bases of the judgment were unsound. Fundamental to that argument is the question of how the terms of the undertaking are to be regarded. Appellant's submission was that the undertaking added (or sought to add) nothing to the terms of the employees' contracts of employment and that it, indeed, was, as appellant's witness asserted, simply an assurance that nothing untoward would take place at the factory. For the respondent it was argued that appellant was seeking to introduce some further substantive provision into the contractual relationship.

On a fair reading of the undertaking I find it difficult to see what it could possibly add to the contractual relationship between the parties.

The phrases "a full day's normal work", "acts such as illegal occupation" and "action against the company rules" seem to me to focus clearly on a restoration of or adherence to the existing and normal duties of each employee. When there is added to this the explanation clearly given to the shop stewards on 7 August (and implicit in the letter of 5 August) that the undertaking was to relate only to the day upon which it was signed the entire force of respondent's argument is lost. The undertaking 1 conclude should be viewed as a request for an assurance and nothing more.

All that then arises in my view is the question of whether, in the circumstances, the insistence of management on signature was reasonable, logical and rational. I may start the examination of this question by stating that the burden of the evidence of Mr Wubbeling, appellant's witness, was that the threat to occupy the factory carried with it a risk of disruption.

Some passages from the evidence will demonstrate this. Mr

Wubbeling stated:

> "... [W]e were very concerned about a threat of occupation of the premises because all sorts of things can flow out of there, damage, sabotage, we wanted to protect ourselves that no damage would be done to our buildings or our equipment. Therefore we drew up this form and wanted every workers' written undertaking that he would come into the premises only for a normal days' work and no other activities."

I also quote from the transcript of Mr Wubbeling's meeting with the shop stewards on 7 August (which was canvassed in evidence). He said:

> "... [T]hat paper, when you sign that paper, all it says is that you undertake not to start any occupation, sit-ins or strikes, and nonsense for that particular day, that is all we ask of you"

and, later:

> "I can't see if you come with the intention to work and carry on with your work what's your objection, to signing the form then. If you don't want to sign the form to me its still an indication you want to stir up trouble ..."

and (still further):

> "They never had to sign a form before, we never before had a threat of occupation of the factory and these two things go hand in hand."

By 24 August appellant was, according to Wubbeling's evidence, running into serious problems with regard to meeting delivery dates to which it was committed, involving the risk of the imposition of penalties running to "hundreds of thousands of rands". Furthermore appellant had decided to employ and train other persons to carry on with the work. Wubbeling stated that "we virtually pleaded with them [that is the employees concerned] to return to work". On 31 August the return of the employees was delayed by appellant to 1 September only in order to enable appellant to dismiss temporary workers who had been engaged to help appellant maintain production.

One further quotation from the evidence is called for. Mr Wubbeling also said:

> "First of all because of the threat at the first meeting at the end of July where the shop stewards had told us that they were going to occupy the premises from which easily could

> flow further actions like sabotage of equipment and damage to premises and I must add that we had a similar experience some years before and the other reason is the more they refuse(d) to sign this form the more our suspicion was strengthened that they had ulterior motives by not signing, the form."

Because of the importance of the events on 31 August and 1 September I also quote certain of the discussions which took place. What is quoted was dealt with in the evidence of Wubbeling but is in fact taken from the contemporaneous tape recording. Wubbeling spoke for appellant and the senior shop steward for the employees. He is identified as "Joseph". I commence with 31 August.

> "[Wubbeling]: 'If the company is prepared to give you another chance and let the people return to their jobs will they be prepared to sign the form that they will refrain from any nonsense like sit-ins, occupation of building and so on?
>
> You are well aware what form I am referring to.
> [Joseph]: Yes.
> [Wubbeling]: That you undertake - you come in for a normal day's work without any nonsense.
> [Joseph]: Okay, Sir.

[Wubbeling]: People will be prepared to sign that?

[Joseph]: We don't know.

[Wubbeling]: You don't know?

[Joseph]: But I believe if the form says there shall be no nonsense it will be wise for them to sign it.

[Wubbeling]: I would agree with that. What we will do is we will have an attendance register, I want all the people who are here now to report for work to sign and write in their clock number.

And then we must have time to pay off the temporary workers and these people who are now here and sign the register they can come back to work tomorrow providing they sign that form and providing they will behave themselves and no more nonsense. [Joseph]: Okay, Sir.

[Wubbeling]: Tomorrow they must all sign the code of conduct at the gate.

[Joseph]: Is that that form?

[Wubbeling]: Yes.

[Joseph]: Okay, we will tell them."

On 1 September when the employees (that is some of them) refused to sign the respondent was immediately informed by fax. As a

result an official (Mr Mahlangeni - the person who had been responsible for the breakdown on 10 August) arrived at the premises. It was common cause in both lower courts that his conduct overall was to be deprecated. Management's response was to refuse to negotiate with him but Wubbeling's attitude is summed up in his own words - "management was happy to meet with any other official". Later a Mr Mabena came to the premises. This did not rescue the situation.

It is also instructive to see what happened on 2 September. Again Mr Wubbeling's evidence was based on the taperecording. The employees were demonstrating outside the factory. I quote a short passage from a discussion with respondent's officials:

> "...[W]e had a meeting on Monday with the shop stewards and I said that as a final gesture we would allow the workers to return to work the following day on the condition that they still sign the form the shop stewards agreed to that but apparently they have no control over their fellow members because despite the fact that they urged them to sign the form they refused to do that and they refused to return to the place of work. These are the true

facts."

Cross-examination failed to make any impact on his evidence and it has not been argued that his evidence should have been rejected and should (now) be disregarded.

This evidence allows an objective assessment of whether appellant's insistence on signature was reasonable. It is in my view incorrect to concentrate only on appellant's insistence on signature. Regard must be had to the employees' reason for their refusal to sign. One searches in vain in the recorded discussions with the shop stewards for an explanation for the continued refusal to sign, nor can one find therein any attempt to allay appellant's fears. In so far as argument is concerned, the only justification suggested was that the employees needed more time on 1 September to obtain Numsa's advice. This, in the light of all that had passed since 5 August, and Numsa's involvement at all stages, has no substance. Linked with that argument were suggestions by respondent's counsel that the intention to occupy the premises in the

first place was reconcilable with a wholly reasonable and peaceful desire on the part of the employees to negotiate with management and that management was not bona fide in imposing a requirement that the undertaking be signed. Neither contention bears examination. With regard to the first proposition it is enough to say that it was not based on evidence and was not suggested to Mr Wubbeling in cross-examination. The argument was wholly theoretical, speculative and illogical. No negotiation was taking place at plant level. As far as the suggestion of lack of bona fides is concerned, it is again enough to say that this was not pleaded, was not an issue before the Industrial Court and was not argued in the court a quo. It was furthermore never suggested to Mr Wubbeling in cross-examination. In all the circumstances I do not think it was open to counsel to advance the argument. It is in any event also an argument without merit.

I can then revert to the reasoning of the court a quo. To suggest that "the situation had entirely changed by 1 September" and that "the

workers had done nothing to indicate that on this occasion they intended entering the premises for some ulterior purpose" is, in my view, not supportable. An even-handed assessment must be made of the facts. There seem to me to have been quite logical and reasonable grounds for appellant to fear some disruption at its premises. When this is coupled with an ongoing and unexplained refusal by the employees to furnish appellant with a clear assurance that nothing untoward would occur, matters, so it would seem to me, had reached a point where appellant's differences with the employees had to be brought to a head. The strike had run for four weeks. Indeed it had continued for a week in the face of an interdict prohibiting it. In the course of that time management had on three occasions reversed its decision to dismiss the employees and re-opened discussions with the purpose of persuading the employees to return to work. The continued refusal to sign the undertaking could only have served to alarm appellant and to bring it (as the Industrial Court found) to a point where there was a breakdown of the kind of

relationship that would ensure the satisfactory running of its business. The history I have recounted shows that the strike which led to the employees not working had been called by and was being dictated by (from appellant's point of view) persons other than its own employees. On an earlier occasion, namely 10 August, while the shop stewards had claimed that the strike was over Numsa's official effectively reinstated it. The fact that Numsa had called the strike off would not have reassured appellant. It had been obliged to do so by a court order but this had not, for seven days, brought the employees back to work nor had the underlying disputes been settled. If one then considers the final proposition relied upon by the court a quo it seems to me that it too cannot be supported. Why, one may ask, should either appellant or the employees have believed that Numsa would at this late stage suddenly resolve the problem. The evidence shows that respondent's officials were on the scene. It further shows that it only belatedly (that is on 16 September) turned its mind to the problem and concluded that the

employees could and should sign the undertaking. This is, perhaps, a sad demonstration of the fact that mature advice was lacking at appropriate times. It was now too late. In the equation which has to be considered there are only two parties. The employees or workers are (sometimes perhaps unfortunately) visited, if not with the sins, then at least with the deeds and attitudes of their chosen representatives. On the last ground too I disagree with the approach of the court a quo.

I therefore hold that the decision of the court a gwo must be overruled and the order of the Industrial Court restored.

This is an unhappy result for the employees but is one brought about by their own lack of judgment or by want of balanced advice when this could have avoided causing the breakdown in the relationship between the employees and appellant.

The order I make is:

1) The appeal is upheld with costs.

2) The order of the court a quo is set aside and there is substituted

in its stead the following:

"The appeal is dismissed with costs."

C PLEWMAN J

A CONCUR:

SMALBERGER JA)
F H GROSSKOPF JA)
SCOTT JA)

# THE SUPREME COURT OF APPEAL

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APACHE MANUFACTURING

CO (PTY) LTD..... 2nd Appellant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA..... Respondent

CORAM: Smalberger, F H Grosskopf, Howie, Scott et Plewman JJA

Heard 5 May 1997

Judgment delivered: 27 May 1997

J U D G M E N T

/HOWIE JA .....

HOWIE JA

I respectfully differ from my Colleague Plewman's conclusion despite the obvious force of much of his reasoning. I am firmly of the view that the dismissals here were largely due to two factors over which' the employees concerned had little, if any, control. One was inept and inefficient representation by respondent's relevant officials. The other was Albert Wubbeling's tendency, at crucial times, to intolerant and precipitate action. Was it fair that the employees in question should have suffered dismissal in these circumstances?

Wubbeling's requirement that the undertaking be signed was first intimated on 5 August but without prompting any worker reaction until 10 August.

On that day the employees arrived for work. It was their impression and that of Wubbeling that the strike was over. When he

reiterated his demand for signature it was plain that the workers were reluctant to comply. The only likely reason - and this ought to have been clear to Wubbeling - was that they thought it inappropriate now that the strike had supposedly ended and that they did not understand, or were suspicious about, the consequences of signing. It was in those circumstances that the shop stewards eventually prevailed on Wubbeling to summon a union representative so that the employees could take advice. Mahlangeni duly arrived but when he announced that the strike was continuing and adopted, moreover, an attitude which Wubbeling found inimical to further discussion, the question of the undertaking was left unresolved. Wubbeling declared without further ado that the workers were dismissed.

The next day he felt constrained, as a result of advice from SEIFSA, to retract that decision. It is to be noted, however, that in neither of two letters that he subsequently wrote to respondent did

he raise the issue of the undertaking or, more importantly, urge respondent to advise its members about signing it.

The subject of the undertaking only surfaced again on 31 August. On that occasion the shop stewards told Wubbeling that the employees wanted to return to work and were at the factory gate for that purpose. He soon expressed his irritation that three weeks before they had chosen to listen to respondent's official rather than to him but in due course he decided to consult his management colleagues. Having done so, he asked the shop stewards whether, if the workers were allowed back, they would sign the undertaking. They said they did not know. Wubbeling did not wait to ascertain the workers' views. Nor did he ask whether they had overcome their erstwhile opposition to signature. He simply proceeded to lay it down as a condition of admission that they sign the form and directed that they be told accordingly. He also omitted to find out whether they had been told.

On 1 September, when the majority of the employees did not sign the undertaking, Wubbeling sought no communication with them before deciding that "the end of the road" had been reached. The dismissals were effected forthwith. In recording the fact in a letter to respondent later that morning, Wubbeling said the dismissed employees had failed to return to work. He did not put it on the basis that they had refused to sign the undertaking.

In the Courts below no attack was directed at the terms of the undertaking and I assume, in appellants' favour, that Wubbeling's grounds for wanting it signed were, objectively speaking, justified. The question, however, is whether the refusal to sign should have resulted in dismissal in the proved circumstances.

Nothing that occurred on 31 August or 1 September could, in my view, reasonably have led to the conclusion that the dismissed workers had not come to do a normal day's work. The

termination of the strike had been widely publicised in the media and employees throughout the industry reported for duty on 31 August. There was nothing unsatisfactory in the employment history of any of the dismissed workers which could have aroused suspicion. All that Wubbeling could really rely on in this regard was the threat of a sit-in early in August. But that was in the throes of the strike and was clearly uttered in collective compliance with respondent's demonstration programme. It was not the malicious concept of appellants' own employees. Once respondent changed its stance and directed a return to work surely, by any objective yardstick, the possibility of disruption of appellants' business on 31 August was no more than fanciful.

Wubbeling also protested that his suspicions were heightened by the refusal to sign. But that really begs the question. The very issue is whether the refusal, viewed reasonably, was not

prompted by the same problem that, to his knowledge, had been left unanswered on 10 August.

Accordingly Wubbeling's professed fear of a hidden agenda had no objective foundation in my opinion. Nor did signature by some reasonably imply that the others were mala fide. On the day of dismissal, as on the previous day, Wubbeling did not stop to find out what the problem was. I did not understand appellants' counsel to query that what the dismissed workers wanted was respondent's assurance that they could sign with impunity. In all the circumstances appellants were not entitled to construe the refusal to sign as refusal to abide by their contracts. That might only have been a justified interpretation had the employees already received the desired advice. Indeed, it is not without significance that in the debate before us not even experienced counsel could reach unanimity on quite what all the implications of such an undertaking would have been. And

appellants' counsel himself conceded the possibility that the undertaking would have been held as an aggravating circumstance - rather like a warning - against any worker who subsequently transgressed. For the dismissed workers to have wanted advice was therefore both understandable and reasonable.

The proffered answer on appellants' behalf in this regard was that the workers had had sufficient time between 5 August and 1 September to obtain such advice. However, for almost that entire period the strike was in progress and the relevance and impact of the undertaking in a normal, or non-strike, situation would probably not have assumed either urgency or prominence in the employees' minds. The events of 10 August illustrate this. It was only because they contemplated returning on that day to normal working conditions that the matter of the undertaking came, or was brought, to the fore. Significantly, it was questioned why the undertaking was needed in a

non-strike situation. But then the strike continued and the importance of resolving the question of the undertaking no doubt paled.

Apart from those considerations it would seem that respondent would in any event not have been in a position before 26 August to advise its members. It was no earlier than on that day that respondent's national office informed regional and local officials to intervene urgently if employees were required to sign anything when returning to work. And even at that stage respondent had no particular view on the subject for its only advice was to try to obviate the need for signature.

Therefore, accepting, as I think one must, that the dismissed workers were at fault in not pursuing the matter of union advice expeditiously, their dilatoriness endured for no more than the period from when they were directed to return to work (whenever that was) until 1 September. Nonetheless their supine attitude is

inescapably a factor in the current equation.

What, then, of appellants' position? According to their counsel it is a common industrial relations measure to make a striker's return to work conditional on signature of a document such as the present undertaking. Respondent's counsel queried that proposition and the evidence does not point to there having been existing clarity on this score at any relevant time as between SEIFSA and respondent. At all events, Wubbeling clearly felt strongly about the imposition of the undertaking all along. Resolution of labour problems being notoriously a two-way process, however, I do not think that it was constructive or reasonable for him to have left it solely to employees of the ordinary labouring level to obtain the requisite clarification. He knew of their misgivings on 10 August. No objective evaluation shows their response to have been a pretence . He had the occasion, and indeed the incentive, from early on in the strike to have SEIFSA

take up the question of such undertakings with respondent as a matter pertaining to the industry as a whole. Alternatively he could himself have taken it up directly with respondent on a local level.

The subject came to the forefront again on 31 August. Wubbeling said that when he told the shop stewards to convey his requirement to the workers he expected compliance. Seen in the light of the relevant history that expectation was unreasonable. In my view Wubbeling could and should have determined there and then what the worker response was to his demand. In all probability he would have encountered the same reluctance as was evident on 10 August. The question that, to his knowledge, was raised but unanswered on that day could then have been raised again and finalised. Of course fairness did not require of him to wait indefinitely while respondent dragged its heels. But virtually the whole of 31 August could have been used for this purpose. Mabena was readily available on 1 September to

come to the factory without delay. Nothing in the evidence suggests that he or a substitute could not have done so the previous day. And manifestly Wubbeling could have stressed to Mabena on 31 August that the workers were returning next morning and that he would brook no procrastination beyond then. He could also have impressed upon Mabena and the workers that the consequence of respondent's silence, and any resultant non-signature after that, would be dismissal. In evidence Mabena said that after he did become involved in the matter he succeeded in obtaining respondent's clearance for signature of the undertaking. Appellants' only counter in this respect was that in the event it was only on 17 September that respondent gave such clearance. I do not think this really helps appellants. Wubbeling emphasized to Mabena on 2 September that the dismissals were, to all intents and purposes, irreversible and Wubbeling confirmed in evidence that that was his view even on 1 September. That being so,

neither Mabena nor any other official of respondent would in the nature of things have regarded the clearance as a matter of urgency. Without in any way underplaying the understandable stresses and frustrations which Wubbeling referred to in evidence, I nevertheless consider, for the reasons I have given, that he should, fairly and reasonably viewed, have gone "the extra mile" on 31 August to engage respondent, and on that date to put the above-mentioned ultimatum to respondent and the workers. Had this occurred and had the workers still refused to sign, I would think that the dismissals would then have been fair. Such measures having been omitted, the dismissals were in my view unfair.

I would accordingly dismiss the appeal.

C T Howie