REPUBLIC OF SOUTH AFRICA

REPORTABLE

evdw/ Case no: 631/95

IN THE SUPREME COURT OF APPEAL OF
SOUTH AFRICA

In the matter between:

EMMANUEL BETHA AND OTHERS Appellants

and

BTR SARMCOL a division of BTR Dunlop Ltd Respondent

Court: Smalberger, Olivier, Scott, Zulman and

Streicher JJA

Date of Hearing : 8 and 9 September 1997

Date of Judgment: 6 March 1998

JUDGMENT

OLIVIER JA

I have had the benefit of reading the judgment of my learned Brother, Smalberger JA. I have for the reasons set out herein reached a different conclusion, viz. that the dismissal of the employees by BTR and the failure to re-employ them amounted to an unfair labour practice.

Whilst conceding that the strike was unlawful, I am convinced that at the end of April 1985, BTR and MAWU had not reached deadlock over a recognition agreement and were still in the process of negotiating; that BTR was to a large extent to blame for the strike of 30 April 1985; that its real desire was to get rid of MAWU and its members; consequently, when the strike occurred, it snatched at the opportunity to dismiss the employees; that it did so in an unfair and over-hasty manner; and that it thereafter consistently pursued a pre-conceived policy of selective re-employment so as to ensure that MAWU and its members would not return to the factory

floor.

No deadlock existed at the end of April 1985

There is ample evidence to show that from June 1983 the parties negotiated fruitfully, and that the lines of communication between them remained open. On this evidence there was no deadlock at the end of April 1985, and BTR could (and should) have proceeded with good faith collective bargaining towards the conclusion of a recognition agreement.

Two particular details confirm that in the closing days of April 1985 both parties considered the negotiations viable. The first is that at this time Mr Giles, the attorney acting for BTR, advised Mr Sampson, BTR's representative in the negotiations with MAWU, that he should not be recalcitrant in negotiating a plenary recognition agreement. The second is that Mr Bird, the group chairman of BTR, specifically instructed Sampson to invite Mr Schreiner, MAWU's negotiator, to meet with him in an attempt

to negotiate the matter to finality. As a consequence of this instruction, Sampson telephoned Schreiner on 25 April 1985 to arrange a private meeting between them. For what may be described as technical reasons this meeting did not take place: Schreiner, quite correctly in terms of labour negotiation practice, required the presence of shop stewards at the meeting. He suggested in return that BTR should telex its proposals to MAWU, to which Sampson would not agree as he favoured a face-to-face meeting. But this obstacle was not considered insuperable, for Sampson and Schreiner eventually agreed to discuss the outstanding issues regarding the recognition agreement at a later, unspecified, date.

Before that could occur, the strike of 30 April 1985 took place.

To complete the picture, it should be borne in mind that Schreiner sent BTR a telex on 26 April arranging a meeting for 2 May for wage negotiations; and also that on 26 April BTR sent a notice to all its employees

advising them that the recognition agreement was still under consideration.

The improbability of negotiations being deadlocked receives incidental confirmation from the success with which they had been conducted. By this stage the areas of difference were very insignificant. On 1 May 1985, BTR itself identified four fundamental differences between the parties, but on analysis it appears that they were quite easily capable of solution, as was in each case acknowledged by Sampson.

The first of these differences concerned a proviso in clause 11 of the draft agreement relating to disciplinary procedures which MAWU wanted omitted. Sampson conceded under cross-examination that the clause in this form was a new one and had not been the subject of prior negotiation. In addition he was not aware of any precedent for the clause, and he conceded the possibility that the clause would have been altered had it been negotiated.

The second difference turned on clause 16.8 in which BTR wanted the

word "legal" and MAWU the word "lawful". This appeared to be a semantic quibble, particularly as Sampson conceded that if the clause entitled either party to any action that was legal in terms of the Labour Relations Act, BTR would have been satisfied with either expression.

The third difference concerned MAWU's right to challenge retrenchment, in the context of MAWU's proposal that BTR hold itself available to meet the MAWU negotiating committee before deciding on retrenchment. Sampson conceded that this was a matter which could usefully have been explored with MAWU in negotiation.

The fourth difference concerned the LIFO-principle ie "last in first out", in case of retrenchment. MAWU's attitude was that it was prepared to allow the question of retrenchment to stand over. Sampson conceded with hindsight that the question of retrenchment could have been dealt with separately, and that the difficult matter of retrenchment was not an obstacle

at all.

In summary: as at 29 April 1985, not only was there no deadlock between BTR and MAWU as regards the recognition agreement but, on the contrary, circumstances were propitious for the conclusion of the agreement.

Why, then, was no agreement reached? And why did BTR peremptorily dismiss its employees rather than finalise the recognition agreement?

For an answer to these questions, the actions and motives of both parties should be closely scrutinised. BTR to be blamed for the strike taking place

On a conspectus of all the evidence, I am of the view that BTR was to a large extent to blame for the strike of 30 April 1985, both by a history of insensitive treatment of its employees and by immediate provocation.

The general insensitivity of BTR towards its employees will be clearly

evidenced in subsequent sections when I deal with BTR's conflict with MAWU and where I quote from the evidence itself. The immediate provocation arises out of Sampson's attitude towards an agreement relating to May Day that had been reached in July 1984 and is reflected in a letter dated 30 July 1984. The relevant part of the letter reads as follows:

> Subject to the conditions in para 5 hereof and subject further to suitable prior arrangements being made in writing with your Union in respect of essential and continuous services, the Company undertakes not to prevent any of your members concerned from clocking-out early on the first day of May provided that it is not before the commencement of the normal lunch-break on that day and provided further that such person will only be paid for the hours worked on that day.

(Para 5 is not relevant to the issue.)

Sampson and Schreiner had a telephonic conversation on Monday 29 April 1985 about the May Day arrangements. Sampson, for the first time

ever, adamantly insisted that the nightshift would not be given leave of absence at all on 1 May 1985, not even up till 22h00, as suggested by Schreiner, obviously as a compromise offer. Not surprisingly, Schreiner considered this to be unreasonable. When Sampson refused to negotiate further on this aspect, Schreiner warned him that trouble would ensue. It is to be noted that Schreiner did not blackmail Sampson by threatening strike action, nor did he cancel the agreement that he and Sampson would meet to discuss the outstanding issues. Under cross-examination Sampson conceded that he understood this warning to mean that there was going to be trouble as regards his attitude in relation to May Day.

Nevertheless, Sampson persisted in his attitude, well knowing of the interpretation placed on the agreement by MAWU. The point is not whether MAWU's interpretation was the correct one; the crux of the matter is Sampson's attitude after he became aware of the dissensus. It was

Sampson's stance over the May Day arrangements that sparked the strike, and his attempts to justify his stance as regards the May Day matter carry little or no conviction. The assumption that May Day celebrations would only take place during the day is not borne out by any evidence to that effect. That the matter of the night-shift was not mentioned in the letter, is probably because the agreement was intended to include that shift. If Sampson adopted the uncompromising attitude because he was annoyed by the attitude of the employees in respect of overtime, it can hardly be justified as a mature, responsible or justifiable reaction. His refusal to allow the night-shift staff to clock-in three hours late, but rather to run the risk of escalating the existing tension and causing further trouble, of which he was warned by Schreiner, seems to be short-sighted and unreasonable.

I must also re-iterate that Sampson in taking up the attitude described, was not threatened by MAWU with a strike. BTR was not blackmailed over

the May Day issue. But Sampson was aware of the existing tension and was warned by Schreiner that his attitude would cause trouble. Nobody would deny Sampson the right to assume a firm attitude, as long as it was a fair and reasonable one. For the reasons stated above, I hold that his attitude was not fair and reasonable and that this attitude finally ignited the tinder-box.

In its judgment the court a quo found as a fact that the immediate cause of the strike was the dispute about May Day, but also accepted that MAWU "adopted" the strike (in the sense that it used the failure to reach agreement on the recognition agreement as justification for the strike).

I do not consider the conclusions reached herein as at variance with the finding of the court a quo. There is no indication in the record that the employees would have embarked on a strike merely because of BTR's attitude over the May Day matter, nor that they would have continued the strike for an indefinite time for that reason alone. The real cause of complaint was the

failure to finalise the recognition agreement; the May Day dispute merely set fire to the timber. This is how I understand the judgment of the Court a quo. To that extent I agree with its conclusions.

Where I differ from the court a quo, however, is that BTR was correct as regards its interpretation of the letter of 30 July 1984.

The interpretation to be given to a document such as a letter is not a question of fact but one of law. This Court is, therefore, not bound by the interpretation placed by the court a quo on the letter of 30 July 1984.

I consider, at best for BTR, that the letter was ambiguous, in that it did not specifically deal with the position of the night shift workers. But even accepting that to be the case, the point is that precisely because of such ambiguity, Sampson should not have adopted the attitude displayed by him on 29 April 1985, especially after Schreiner's offer that the night-shift would in fact commence, but three hours after the usual time. Such a finding is not

contrary to any finding of fact by the court a quo: I say that Sampson's interpretation may have been correct, but not so his attitude in the light of all the circumstances prevailing at the time. The question of the reasonableness or not of Sampson's attitude is not a question of fact by which this Court is bound, but a juristic evaluation, ie a matter of law.

Why, then, did Sampson adopt this unreasonable attitude? Why did he knowingly create a new source of contention and the risk of destroying all that had been achieved by negotiations?

BTR's desire to get rid of MAWU and its members

It was in my view correctly argued on behalf of the appellants that Sampson's stance in respect of the May Day agreement was simply a perpetuation of the attitude he consistently adopted on behalf of BTR towards MAWU. A dominant strain in this attitude was that employees could "take it or leave it"; and underlying that attitude was the intention of ridding the

factory floor of MAWU by dismissing the employees, a majority of whom were MAWU members. The point is amply illustrated by the evidence of what had already occurred during the strike of March 1985 and also by subsequent events.

On 12 March 1985 BTR was advised by its industrial consultant, Andrew Levy Associates ("ALA"), as follows: (I quote verbatim from Sampson's notes.)

> If failed by tomorrow morning, find worst offenders in worst depts, give him a final written warning, give him a couple of hours then fire him. If Giles unhappy, do it on a whole dept. basis and warn summarily dismissed if within ± 2 hours, back up with telex to dept.

Sampson said in his evidence in chief that a disciplinary enquiry would have been held, but conceded it was to be one with a preconceived determination to dismiss the workers.

Sampson recorded his discussion with ALA on 13 March 1985 in these terms:

> Great joy. Schreiner backing off. Don't now meet shop stewards. Remember Schreiner gave us deadlines and he is now moving. He's worried he won't maintain strike.
> He [Levy] says we're not panicking.
> They go back and we can't belt them, disadvantage.
> If they come back, Union will find it difficult to get them out again. (My emphasis)

The underlying attitude of BTR, as reflected in this note, speaks for itself.

On 15 March 1985, the day the workers went back, the strategy for selective re-employment after dismissal became manifest. This is reflected as follows in notes Sampson made before the workers returned:

> 1. Call SS (Schreiner) in we've done our part, 3 days are up and we're now warning can lead to termination you(r) that failure to return will be loss of your jobs. Tell

workers. Steve to leave pamphlets in canteen.

Likely to cause return to work.

2. Another pamphlet (close of plan) unless return work and work normally you'll be fired.

3. Fire Monday.

4. Start re-hiring (X old faces) (y new faces) each.

Union lads will be last back = no jobs.

Schreiner will shout to talk to us! If return to work Monday, will either work normally = meet Schreiner on Wednesday and either agree or break. If break = fire. If don't work normally, show section results or individual results, supervisors to watch stewards work performance, inciting, etc. to bounce them out.

Sampson conceded that this strategy meant dismissal of all the workers, re-hiring certain old employees, hiring certain new applicants for employment and, because MAWU members would be the last back, there would be no jobs for them. Sampson also testified that he would have been prepared to use this

strategy.

A damning piece of evidence, illustrating BTR's true motives, is contained in a note made by Sampson during the March strike:

> Schreiner might get them back (bad luck) before lunch.

Sampson conceded this meant that if Schreiner got the workers back at too early a stage. BTR would not be able to take punitive action against the workers and would not be able to fire the workforce and clean out the shop stewards. This would be the "bad luck" part of the note.

In my view, these contemporaneous notes made by Sampson speak louder than any protestations of regret at having to dismiss the employees later advanced by Sampson during his testimony.

As part of his underlying attitude, there is also ample evidence that Sampson imposed unreasonable deadlines on MAWU on more than one

occasion. I refer to some examples.

After the mediation of 20 March 1985, MAWU put up a set of proposals and asked BTR to respond the next day. BTR put up its package proposal the next morning. It was described in the covering letter as "a full, final and complete package offer'" and, subject to ratification, the proposal was stated to be "only open for acceptance in writing to be received by us not later than 14h30 today failing which it will automatically lapse without the need for any further notice to that effect." MAWU was, in effect, given two hours in which to consider and accept or reject BTR's proposals.

MAWU responded by pointing out that it did not have enough time to consider BTR's proposals in any detail but, importantly, it also stated:

> It would appear however that this offer may provide a realistic basis for settlement and we would suggest that a further meeting be held after we have been able to consider same in more detail.

BTR acceded to the request for more time and extended the deadline "for acceptance or rejection of our package until 12 noon, Monday 25 March 1985." (The Conciliation Board meeting had been postponed to 27 March).

BTR indicated on Monday 25 March 1985, in response to a MAWU request for further time, that its position was a final one to be accepted or rejected. MAWU considered this stance to be unreasonable and as undermining the enormous amount of effort put into securing agreement on certain fundamental issues. Significantly, Schreiner on behalf of MAWU offered to leave the retrenchment procedure out of the agreement entirely but Sampson, sadly, was unwilling to accept this rapprochement.

It appears that Sampson's initial attitude of accommodating MAWU's request for time changed following his consultation, inter alios, with ALA resulting in a refusal of the request for more time and an insistence that the

package offered was a final one, open for acceptance by noon on Monday 25 March 1985 after which it would be withdrawn. It emerged that this strategy had come from ALA who had advised Sampson not to meet with Schreiner. It was put to Sampson in cross-examination that this was not a suitable way of handling a dispute, a statement which Sampson could not refute. The suggestion that BTR/s refusal to afford MAWU more time on 25 March 1985 was no more than a tactic, is refuted both by the evidence relating to the advice given by ALA and followed by Sampson (which is not reconcilable with mere tactics) but also by Sampson's own concession, mentioned in my previous, underlined sentence.

Furthermore, Giles, on behalf of BTR, sent a telex to MAWU on 26 March 1985, ostensibly keeping its final offer open but "strictly" subject to certain conditions, inter alia, that "full details" of counter-suggestions be telexed before 15h00 that same day (the telex reflects that it was sent at

09h56), that counter-suggestions "will not involve matters of principle or substance," and that the retrenchment procedure, including severance pay "be treated as an inseparable part of the complete package and not left over." Subject to these pre-conditions, BTR was prepared to meet on 27 March at 10h00, with the additional proviso, however, that "such meeting will only last for a maximum period of 4 hours .. . whereupon (BTR's) final offer will lapse without further notice to that effect. . ."

While dealing with this matter, a matter of principle should be addressed. It is true that deadlines for the acceptance of offers, threats of industrial action and the like are typical "tactics" adopted in the bargaining process contemplated by the Act. But surely a court can not turn a blind eye if illegitimate, unreasonable or mala fide tactics are employed.

For a court to sit idly by when tactics of the latter kind are used, would be to make a mockery of the law, of justice and of the administration of

justice. We must guard against the apellant's right of appeal becoming illusory (Protea Assurance Co Ltd v Casey 1970(2) SA 643(A) at 648 E). Fortunately, our law does not require such an approach by any court. On the contrary, it was said in National Union of Metalworkers of Sa v Vetsak Co-operative Ltd and Others 1996(4) SA 577(A) at 593 F-G.

> 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.

(See also Media Workers Association of South Africa and Others

v

Press Corporation of South Africa Ltd(Perskor) 1992(4) SA 791(A) at

802

B -1; Performing Arts Council of the Transvaal v Paper Printing Wood and

Allied Workers Union and Others 1994(2) SA 204(A) at 214 G-H).

But even if the court is only to become involved in evaluating the reasonableness of the tactics used in extreme cases, the present one surely is such a case. I can hardly think of a more prolonged, frustrating endeavour of a worker's union to get an employer to agree to a standard recognition agreement. Certainly no more serious and extreme case has ever been reported in our law reports. The consequences of the dismissal under discussion by themselves mark this case as an extreme one. In my view, therefore, this Court is not only entitled but required closely to analyse the "tactics" of the parties in order to ascertain whether one or both acted unreasonably or in bad faith.

BTR's attitude can hardly be described as reasonable, or as one conducive to solving the labour dispute, or as one of sensitivity to the position of its employees, or as one consonant with the requirements of bona

fide labour negotiations.

I have come to the conclusion that prior to the strike of 30 April 1985, BTR's actions were influenced by a desire to get rid of MAWU and its members. Far be it from me to say that these actions directly caused the strike or that they justified the strike. The relevance of the conclusion is that it explains why the unfair labour practice, as alleged by MAWU, viz the over-hasty dismissal coupled with the refusal to re-employ the employees en bloc, was committed. As such, the rationality of the conduct of both parties, their flexibility and bona fides are always relevant factors (see Vetsak at 593 B-G).

Am I precluded by the provisions of s 17 C(l)(a) of the Act from reaching this conclusion?

The fact that I have reached a conclusion in this respect differing from that of my brother Smalberger JA is regrettable. However, the relevant

criterion against which the questions just posed should be answered is: what did the LAC hold on this point and how did it justify its decision?

The relevant full passage from the judgment of the LAC reads as follows at 93 D-J:

> As noted earlier in the judgement the appellants (MAWU) contended as their first main argument that the dismissals were unfair in that by negotiating over the recognition agreement in the manner in which the respondent (BTR) did it precipitated or contributed to the strike. In support of this contention Mr Brassey embarked on an exhaustive analysis of the negotiations between the parties from 1979. He dealt with the various aspects of the negotiation in phases over the years 1979 to 1985 and contended that the tardiness of the respondent in recognising the union and thereafter negotiating with it on a recognition agreement led to frustration, anger and irritation on the part of the workers which culminated in the strike. We do not intend dealing with the evidence of the events from 1979 leading up to the strike in April 1985. That the respondent initially was hostile towards the union and reluctant to recognise

and negotiate with it admits of no doubt. That it ultimately recognised the union and ultimately negotiated over a period of two years until an agreement had just about been reached is however also true. It is apparent that up until the strike commenced the respondent was anxious to reach finality on the agreement and was prepared to negotiate to that end. The fact that the respondent may have been guilty of unnecessarily prolonging the negotiations did not however justify the strike. As we have already said, the parties were very close to agreement and were still negotiating when the strike broke out. In any event, we have already found that the cause of the strike was not any delay on the part of the company in signing the recognition agreement. Once it is found that the strike was not justified, then it cannot be said that the respondent in any way contributed to the strike. If the appellant's argument were to hold water, then it would be applicable in every case where economic pressure has been exerted by way of a strike in collective bargaining because in each such case the other party by not acceding to the others demands could be said to have contributed to the strike. There is accordingly in our view no merit in this argument. (My emphasis.)

The court a quo expressly stated that it did not deal with the evidence of the events from 1979 leading up to the strike in April 1985. Ex confesso the LAC did not base its finding that"... the respondent (BTR) was anxious to reach finality on the agreement and was prepared to negotiate to that end" on an analysis and evaluation of the evidence. Consequently this Court is not bound by such finding - see Strathmore Holdings(Pty) Ltd v Commisioner for Inland Revenue 1959(1) SA 460(A) at 467 H - 468 C - and

is free to scrutinise the record and make its own findings (ibid at 468 C-D). In this respect, this Court is, in any event, in as good a position as the LAC, the latter also being only a court of appeal - see National Union of Mineworkers v East Rand Gold Ufanuim Co Ltd 1992(1) SA 700(A) at 723 C-D.

For the reasons set out above, I am of the view that BTR's true desire was to get rid of MAWU and its members, and that I am not precluded by s

17 C(l)(a) of the Act of reaching this conclusion.

One can now understand and properly evaluate, in line with the judgment in Vetsak, quoted above, why BTR acted as it did when the strike of 30 April 1985 occurred. Snatching at the opportunity to dismiss the employees

Consistent with BTR's true desire, described above, its dismissal of the employees took the form of a particularly rapid and unreasonable snatching at the opportunity of getting rid of MAWU by dismissing the employees.

At approximately 07h50 on 30 April 1985 Sampson saw workers pouring out of the factory buildings. Sampson then, according to his evidence, immediately recalled his conversation with Schreiner the previous day in connection with the May Day celebrations and the latter's warning of trouble. He also testified that within half an hour of the actual

commencement of the strike BTR's Industrial Relations Officer, Mr van Zyl, went to the canteen where the workers were sitting, spoke to the shop stewards, and was told quite emphatically that the strike had been caused by BTR's failure to sign the recognition agreement. This was also confirmed in a telex received from MAWU at approximately 13h30 that same day. The telex once again requested signature by BTR of MAWU's draft of the recognition agreement. In the event, there could have been no doubt that the strike, although precipitated by Sampson's attitude as regards the May Day arrangements, was now aimed at reaching agreement in respect of the recognition agreement.

But BTR had no intention of signing the MAWU draft. On the morning of 30 April, after the strike had commenced, Sampson had a telephone conversation with Mr Brown of ALA. I quote portions of Sampson's note reflecting ALA's advice:

> Be careful of threats at this sensitive stage. Do this post May Day situation. Sit out today, no threats. Don't get aggressive today (very tense, staff dragged out).... We could consider loct out, and only allow people in on basis that there will be no work stoppage on the question of recognition agreement.

BTR apparently accepted this advice. On the next day, 1 May 1985, BTR considered its options for dealing with the strike. These are recorded by Sampson as follows:

> Options on Strike/Agreement
>
> 1. Sign the agreement as presented by the Union (MAWU).
> 2. Meet with the Union and try to settle the five fundamental differences.
> 3. Meet us in (2) above under a mediator.
> 4. Stand fast on our ground, ie. the agreement as presented by us to the Union last month.
>
> The only option we see is 4 above. The fundamentals are such that there is no prospect of reaching agreement on them, nor can we accept the Union position on these

fundamentals. (My emphasis)

The view that "... the fundamentals are such that there is no prospect of reaching agreement on them" was a gross over-statement of the true position, not only objectively speaking, but also in the light of Sampson's concession under cross-examination that the four points of difference mentioned above were capable of being solved. A fifth difference related to the credit to be given to retrenchees for past service if re-employed. This difference was capable of solution and did really not relate to a fundamental matter. In fact MAWU had offered to withdraw the most difficult one, the retrenchment package, from the table.

The very justification of BTR's decision to adopt option 4, ie to "stand fast", was therefore clearly false especially when seen against the background of BTR's true motives as described earlier. It was the direct cause of the tragic consequences that followed.

Sampson's notes Continue:

> Having duly considered the above, it is our view that we should take the following steps :

1. Fire the entire weekly workforce either on Thursday or Friday - timing to be discussed.
2. Urgently meet with our legal and LR advisers and yourself to devise an appropriate plan for remanning the works. We suggest we try and set this up for tomorrow (Thurs 2 May), either in JHB, Durban or Howick.

At the same time Sampson recorded the following advice as emanating from ALA:

> He (ALA) goes along with no lockout. ... He agrees, dismiss - but it's the worst timing for us due to international implications on BTR in UK (United Kingdom). <u>This is total war mode</u>. Andrew (Levy) believes this is the route, but very bad for us. Gear up and go ahead for tomorrow ... (My emphasis)

A remarkable feature of this note is that on the one hand it states, after discussing the various options, that the only option was to "stand fast" on its

own proposals. This presupposes a continuation of the employee- employer relationship. But on the other hand and without any indication to negotiate further, it is then decided to fire the entire workforce.

The next day, 2 May 1985, BTR responded to MAWU's telex of 30 April mentioned previously. The response stated, inter alia, that BTR regarded "the striking of your members and refusal to return to work as a material breach of their employment contracts with the Company and they are being informed accordingly. The Company reserves its rights to take appropriate action." Sampson stated in evidence that he doubted very much if BTR would have been prepared to negotiate towards a compromise position. It had already taken a decision the previous day to "fire the entire weekly workforce". If the door was slammed on further negotiations, it was certainly done by BTR.

On 2 May 1985 BTR gave the strikers an ultimatum by a notice

4 delivered to shop stewards at 15h00 that if they did not return to work by

16h00 that day (or if the nightshift workers who received a copy of the notice when they came on shift did not start within an hour of the shift commencing) BTR reserved the right to terminate their services without further notice. That evening, it decided to implement the previous decision to terminate the services of the strikers the next morning.

On the morning of 3 May 1985 BTR dismissed the employees. MAWU immediately telexed BTR in the following terms:

> We note your unlawful termination of employees' contracts of employment yesterday. We fail entirely to see how such provocative action can possibly help to solve the current dispute and point out that same -
>
> 1. Will greatly increase the possibility of intimidation which we understood the Company was actually trying to prevent;
>
> 2. Will now encourage police involvement in

> the matter and this will unquestionably only exacerbate hostility and bitterness towards management.
>
> We emphasise that any attempt by the Company to employ scab labour will seriously undermine the possibility of settlement of this dispute with yourselves.

It is clear that MAWU still entertained hope of getting the employees back on the job and concluding a reasonable recognition agreement. It was never even hinted at that MAWU was not acting in good faith. On the other hand, BTR had no intention of allowing the dismissed employees back en bloc. Nor can any weight be attached to BTR's attempts to justify the dismissals.

Sampson did testify that the decision to dismiss was taken reluctantly because BTR had 'always enjoyed an exceptionally good working relationship with our workers'; and BTR was probably the only company

"who could claim to have a workforce whose average service was, we thought, 25 years." BTR's claim that the decision to dismiss was taken reluctantly, seems to me to be sanctimonious in the light of its real and consistent object, viz. to get rid of MAWU by dismissing its members, the employees, and also in the light of its unconvincing efforts to give reasons for the dismissal.

BTR, before deciding to issue an ultimatum, considered its options in responding to the strike. It chose the route of dismissal, giving as the reason, that it knew that the strike would last a considerable time and that it could not afford the financial loss of a prolonged loss of production.

But not much weight can be given to this excuse, as, firstly, the decision to dismiss the workers had already been taken, in principle, on 1 May 1985.

And secondly, the excuse that BTR could not afford a long strike is not

an acceptable reason for the hasty dismissal of the workers. Moreover this explanation fails to stand up to scrutiny in view of the fact that BTR and MAWU had previously agreed that in the event of a lawful strike, no action would be taken against the workers before the expiry of five days. It has not been explained why BTR could not have waited for a few more days before dismissing the strikers if the strike continued, even if it was an unlawful strike. The fact that the strike was an unlawful one, is of course no excuse for BTR acting unfairly towards its employees. (Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others,

supra, at 215 E et seq.)

I am likewise not impressed by the further argument that BTR would have lost heavily or even been broken financially by a prolonged strike. Had it reconsidered the matter maturely, it would have been clear to BTR that there was no impasse as regards the recognition agreement, that the parties

were in fact very close to an agreement and that with a little give and take and the elapse of a relatively short period, the strike could have been ended there and then, with little or no further financial loss to BTR.

Moreover the argument of loss of profits is also one that needs to be seen in context. It appears from the 1985 Annual Report of BTR (dealing with the period now under consideration) and more particularly from the Chairman's review that the industrial relations issue at Sarmcol was estimated to have reduced the group's profit before interest and tax by some R5 million. Nevertheless, the review also states that the group had made an operating profit of R10 968 000 and an after tax profit of R6 096 000.

Even if one concedes the loss of some R5 million as significant, BTR itself was, in my view, the author of its own loss. It dismissed 970 employees with an average of 25 years' experience and, obviously, invaluable expertise, in what I consider to be a totally unreasonable manner and for insubstantial

reasons. BTR should have realized that any disadvantage it may have suffered in coming to a compromise with MAWU and its trained work force was preferable to the huge expense of hiring and training new recruits.

Procedural unfairness

Even if one considers the dismissal of the employees in isolation, divorced from any covert motive to get rid of the employees and consequently also of MAWU, the procedure employed by BTR and the manner in which the employees were dismissed appears to be harsh and unreasonable. BTR knew that the dismissal of a work force of nearly 1 000 employees would cause unemployment in the area on a large scale. It knew that such dismissal would cause great misery and disappointment to the dismissed employees, their dependants and families. Many, if not most of them would be forced to vacate the homes which they were occupying. They would have to move to unfamiliar surroundings and relocate under difficult circumstances. Many of

the workers, having given their best years to BTR, would be unable to find any alternative employment; others would be forced to take less advantageous positions. The knowledge and expertise which they had gained at BTR would, in many cases, become useless.

No responsible employer, in such weighty circumstances would dismiss a workforce of nearly 1 000 employees with an average term of 25 years, after giving it an ultimatum of only one hour, nor would it dismiss the workers some hours later without at least trying to keep negotiations open. There is very little that the employees and MAWU could have achieved in one hour's time - except to bow to BTR.

BTR should also have known that the May Day dispute being the immediate cause of the strike, the emotions in respect of May Day would blow over in a few days and that it would be possible to resume negotiations in a more calm atmosphere.

BTR also knew that the obstacles in reaching a recognition agreement were not insurmountable and it knew that the ball was in its court. It was obliged to respond to the MAWU draft, which was the latest offer on the table.

In my view, the shortness of the ultimatum and the final dismissal of the employees within a few hours thereafter, constituted an unfair labour practice.

In this respect, there is a conspicuous similarity between the facts of the case now under consideration and those of Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Other 1994(2) SA 204(A) ('PACT'). In that case, PACT, through its attorney, issued an ultimatum to 299 of its employees engaged in a "wildcat" strike. The ultimatum was communicated to the employees at 14h20, requiring them to return to work at 14h30. They were dismissed 40 minutes later. Some of

the backgrounds facts in that case (summarised in the report at 215 G et seq.) are reminiscent of those in the present matter, ia that most of the dismissed employees had given many years (between 4 and 20 years) of service to PACT; the cause of the unhappiness related to a matter which was of legitimate concern to the employees in relation to the employment; the trade union was not associated with the strike; PACT should have realized that something had gone wrong in the communication between the trade union and the employees; the employees were in an emotional state; and they had been on strike for a relatively short time.

In the PACT case, it was said by Goldstone JA, delivering the majority judgment at 216 8-D:

> In all of those circumstances fairness and good sense dictated that the employees should have been given a reasonable ultimatum. As it was put by Van Rensburg J in Plaschem (Pty) Ltd v Chemical Workers Industrial Union (1993) 14ILJ 1000 (LAC) at 1006 H-I:

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

and again at 217 B et seq:

> In my judgment a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled:

(a) PACT to have ascertained what had gone wrong and caused the employees to behave as they did, either by direct enquiry from the employees, the shop stewards, Motau or some other representative of the trade union;

(b) the employees time to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union.

The ultimatum given by PACT to the employees

> was clearly insufficient. It was of too short a duration by far to have achieved either of the aforegoing objectives. It is not necessary to decide what a reasonable period would have been. I would suggest, however, that it should not have expired prior to the commencement of work on the following day.
>
> Having regard to the six factors referred to above, in my opinion there was a distinct probability that had a fair ultimatum been given to the employees the strike would have come to a speedy conclusion. It appears from the evidence that the trade union was certainly opposed to the continuation of the strike and that attitude would, as a probability, have weighed with the employees, at any rate after they had cooled down.

Having regard to the background circumstances in the present case, ia especially the number of workers involved, the socio-economic consequences of a dismissal to them and their dependants, and the distinct probability that had BTR changed its intransigent stance and had it given a fair ultimatum to the employees, the strike would have come to a speedy conclusion, I am of

the view that BTR should have approached the strike in a calm and mature manner, so as to apply its mind properly to the steps to be taken.

But the very short ultimatum (one hour) hardly gave themselves or the workers a chance to cool off and to take rational decisions. It would obviously not have enabled MAWU to take control of its members, nor to negotiate properly with BTR.

In requiring that BTR should have given a fair ultimatum to the employees and not have dismissed them the next morning, but kept the channels of communication open, and in finding that BTR failed to do so - thereby making itself guilty of an unfair labour practice, I am not judging it unfairly. Any reasonable employer would and should have taken into consideration the factors to which I have made copious reference and in consequence have acted in a much more reasonable manner (see the remarks of Goldstone JA in the PACT-case at 217 G-I); see also the judgment of this

Court in Slagment (Pty) Ltd v Building Construction and Allied Worker's Union and Other 1995(1) SA 742(A) at 755 H and of Van Rensburg J in Plaschem(Pty) Ltd v Chemical Workers Industrial Union, supra, at 1006 HI).

The court a quo also dealt with the inadequacy of the ultimatum. It came to the conclusion that the ultimatum was not an unreasonable one, mainly on three grounds: (a) the workers must have known of BTR's warning during the strike of March 1985 that further illegal industrial action would result in their dismissal; (b) the employees had until the decision to terminate their employment was communicated to them the next morning the opportunity to indicate their willingness to return the work; (c) it is "abundantly clear" that BTR would have welcomed any decision by the employees to return to work up to the time of the actual dismissal.

As far as (a) is concerned, I am of the view that the reasoning of the

court a quo, with respect, is marred by a misdirection. One cannot ignore the terms of the ultimatum of 2 May 1985 and rely on a warning given in March 1985. BTR, by giving notice in the ultimatum of 2 May 1985 that it was reserving its rights, far from unambiguously threatening with dismissal, gave the impression that it had still to choose from among the range of options available to it. In fact, the court a quo should rather have taken into account that the decision to dismiss had already been taken when the ultimatum had been drafted and issued. The court a quo should have considered that BTR withheld this crucial fact from MAWU and the employees, and it should have considered the interesting question why this was done. In my view, the correct conclusion speaks for itself.

As far as (b) is concerned, I also consider this to be a factual misdirection in the sense that, although, of course, it is true that the employees had until their dismissal an opportunity to return to work, they

were neither informed that a decision to dismiss them had already been taken nor were they informed when they would be dismissed. The ultimatum, at best, was vague and ambiguous, particularly as to the intentions of BTR. Moreover, when the ultimatum was issued, BTR knew why the employees were striking; afterwards to expect them to return without more ado was tantamount to expecting them to capitulate as regards the recognition agreement.

The conclusion reached in (c) is, in my view, clearly based on a misdirection as regards the evidence. In the light of the long and persistent dispute, BTR had, as Sampson conceded, come to the end of its tether. It had already decided to dismiss the workers. This is hardly reconcilable with a desire to take them back. What is more, Sampson in his evidence in chief stated that it would not have been possible to take the strikers back without resolving the recognition agreement. No such offer was forthcoming from

BTR. If BTR was desirous of the employees returning to their jobs, why did it not resume negotiations as regards the recognition agreement? What BTR desired was not a return of the workers, but in Sampson's own words "capitulation on most issues."

That the postulated desire did not exist at all, is also proved by the subsequent persistent policy of BTR not to negotiate with the workers or with MAWU and not to take the workers back en bloc. As early as Tuesday 7 May 1985, two working days after the dismissals, Brand, MAWU's new attorney, indicated to Giles that the workers were prepared to return immediately to the negotiating table without preconditions. Also, on 13 May 1985, MAWU informed BTR that the dismissed workers had unanimously decided that they wished to be reinstated once the recognition dispute has been solved.

BTR's strategy, far from being one of desiring the return of the workers, was not to negotiate at all and to employ temporary workers as

quickly as possible. This is amply borne out by a note made by Sampson of his conversation with Brown of ALA on 8 May 1985, which reads as follows:

> Brown says don't talk unconditionally at this stage, it must be on the clear basis that they are prepared to make major changes. If they want to initiate talks, it is not just from the past position.
>
> Brand will say 'Let's get together', Giles should say as long as <u>you</u> come with major concessions prepared to make significant concessions, otherwise you are wasting your time. You must bring offers and proposals with you.
>
> He has trapped us before - <u>not this time</u>. Must get a quick and final settlement. <u>We are not reinstating so that talks can continue</u>. Hold him off.

BTR accepted ALA's advice, and refused to meet with MAWU or to re-open negotiations. This is also reflected in a telex from Giles to MAWU on 17 May 1985 viz. that BTR "was not seeking to initiate negotiations." On 30 May 1985 BTR even denied that a dispute existed; on 7 June it refused to

concede that MAWU represented the dismissed workers. Sampson's evidence in this regard is also remarkable. I quote from his cross-examination:

> MR BRASSEY: So can we accept that as at the strike and certainly as at the dismissal, the Company had abandoned the notion of negotiation over the recognition agreement?
>
> MR SAMPSON: Yes, I think that is correct to say, yes.
>
> MR BRASSEY: Yes. And had abandoned the notion of negotiation over the reinstatement or re-engagement of the dismissed employees?
>
> MR SAMPSON: Negotiation <u>per se</u>, yes.
>
> MR BRASSEY: It is right to say too that the Company had abandoned the notion of arbitration in respect of those matters?
>
> MR SAMPSON: Yes sir.

By 12 August 1985 when MAWU did capitulate, a new workforce was in place of whom 600 were permanent employees.

In my view no reasonable court, having regard to the totality of the evidence, could have come to the conclusion that BTR would have welcomed any decision of the workers to return to work up to the time of the actual dismissal.

Am I precluded by s 17 C(l)(a) of the Act from reaching the conclusions set out herein before? I think not.

First, the question of whether the ultimatum was unreasonable or not goes to the very heart of the question whether an unfair labour practice had been committed. Whether an unfair labour practice had been committed, is not a question of fact. In Media Workers Association of SA and Others v Press Corporation of SA Ltd (Perskor) 1992(4) SA 79(A) this Court held that the position 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 expressly enjoined to have regard not only to law but also to fairness. 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 (per EM Grosskopf JA at 798 H-I).

As explained, the same principle applies to the question whether the ultimatum was procedurally reasonable or not.

On this basis, this Court would be entitled to form its own view of what was fair and just on the basis of all the evidence. In doing so, it should take into account the arguments put forward by the court a quo and its factual findings, but is not confined to these arguments and findings. If there are other relevant considerations not dealt with by the court a quo, or if its factual

findings are based on misdirections, this Court is not bound to them. As to the equation between misdirections and the test that no reasonable court could have made a particular factual finding, the approach taken by Smalberger JA in Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa 1995(3) SA 22(A) is instructive. At 31 I he stated:

> The finding of the LAC that the company could simply have blocked out the details in the CAG report which it sought to keep secret is in my view flawed as it overlooks the realities of the situation.

In that case, the decision of the LAC was set aside, ia on the basis that the finding, quoted above, was flawed. If a mere flaw is justification for the rejection of a finding of the LAC, a fortiori a conclusion that a finding of that court was based on a misdirection.

The test to be applied on appeal to this Court, therefore, does not appear, in its practical application, to be as stringent as it is sometimes made

out to be. And for good reason. It would be unacceptable if this Court were bound by misdirections on questions of fact by the LAC. In this respect it should be remembered that the LAC is also a court of appeal, basing its judgment on the same record of the evidence that is before this Court. We are in as good a position as the LAC to decide questions of fact. (See National Union of Mineworkers v East Rand Gold and Uranium Co Ltd, supra, at 723 C-D; see further in respect of misdirections as reason for setting aside a judgment on the basis that no reasonable court could have come to the same conclusion as the one committing the misdirection, and for the practical application of the test, Performing Arts Council of the Tranvaal v Paper Printing Wood and Allied Workers Union and Others, supra. at 218 D et seq.;

Commissioner for Inland Revenue v Stratmore Consolidated Investments Ltd

1959(1) SA 469(A) at 476 E-F; 477 C; 479 D-G; 480 E-F. Cohen v

Commissioner for Inland Revenue 1962(2) SA 367(A) at 377 A.

Goodrick

v Commissioner for Inland Revenue 1959(3) SA 523(A) at 528 E-G).

BTR's persistent policy of selective re-employment

The unfair labour practice committed by BTR in dismissing the employees did not end there, however.

BTR persisted in pursuing a policy of selective re-employment and shutting out MAWU after the strike had occurred. This is borne out by the events subsequent to the strike.

On 6 May 1985, BTR began recruiting a new work force. In the notice to its dismissed employees, it expressed the wish that they would be 'amongst those applying to be employed', and similar messages were conveyed by other means. On 8 May 1985, BTR inserted an application for re-employment in the pay packets of each dismissed employee. In a telex of 10 May 1985, MAWU asked BTR to refrain from employing scab labour, to which the latter replied that labour was being employed with preference given to (previous)

retrenchees, who were not scab labour. No equivalent preference was offered to strikers. And on 28 May 1985 BTR told MAWU that its members were welcome to apply for the remaining vacancies.

New recruits were hired on temporary contracts. For the first six weeks their employment was terminable on short notice; thereafter the contract became a fixed term one of six weeks to expire early in August 1985. At the hearing BTR was unable satisfactorily to explain why the contracts had been structured in this way when in the normal course temporary employees were dismissible on notice. The explanation is relatively easy to infer. In principle, BTR wanted to set up the security of tenure of the new recruits as a means of resisting the return of the strikers; to give the new recruits this security from the outset would be inadvisable since it would commit BTR to people whose worth had yet to be tested.

From these facts it is clear that, in re-establishing its work force, BTR

expected to hire some non-strikers for the vacant positions created by the dismissals and to refuse re-employment to some of the strikers. In this sense, at the very least, the programme of re-employment was selective. This conclusion is borne out by the strategies employed by BTR at the time. Brown, one of BTR's advisers, was urging it to re-man quickly before MAWU presented it with demands. The more quickly it re-manned the weaker MAWU would become. In heeding these words, BTR could not have forgotten the advice it had received from the same firm of advisers six weeks before. It was that, by re-hiring 'Y new faces', it would deprive the 'Union lads' of their jobs, since they would be the last to come back when the strike collapsed.

From the outset, BTR also contemplated active selective re-employment - that is, a programme in which it would pick and choose from among the applicants for the vacancies. In the early days of the strike it was

advised by Levy to 'make a list of those you are not taking back including

those who misbehaved' (emphasis supplied). According to Sampson, a list was made, but only of those who misbehaved. Whether the list was in fact as circumscribed as this could not be verified because the document was not produced.

As the dispute progressed, active selective re-employment became a more prominent feature of BTR's strategy and as July 1985 drew to a close it had become a central feature of it. In response to an offer by MAWU to abandon the strike and return to work unconditionally, BTR's managing director formulated a strategy by which it would pick and choose from among the strikers and replace a third of its new work force with them. By the middle of August, the idea of laying off a third of the new work force had been dropped, and BTR was now willing to offer the remaining vacancies (numbering fewer than seventy) to such of the strikers as it was willing to

take back.

From the moment of dismissal BTR was set against taking back the dismissed workers en bloc. So much was conceded by Sampson in evidence on behalf of BTR. One explanation for this attitude was that BTR feared that the dispute would then simply continue from where it had left off and this fear is borne out by Sampson's contemporaneous notes. But this is a mere superficial gloss to an explanation that goes much deeper. What BTR truly feared was that the Union would retain its previous presence in the factory.

It is true that Sampson testified that BTR might have agreed to a collective return if MAWU had capitulated to BTR's proposals for the agreement. But in fact BTR continually set up obstacles to such an outcome by refusing to recognize any relationship with either MAWU or its members, denying the existence of a dispute, taking the stance that it would do no more than listen to proposals, and making a meeting dependent on major

concessions in writing by MAWU. In fact, as Sampson conceded, BTR had forsworn any notion of further negotiation (and arbitration, for that matter) over the recognition agreement or the dismissal of the strikers.

The truth of the aforegoing is apparent from the following note made by Sampson on 14 May 1985 after advice from Brown of ALA:

> The most important message is there is no relationship any more.. . . Giles (BTR's attorney) must get message to Brand (MAWU's attorney) and Schreiner that we are happy to listen to them, but one of the pre-conditions is no open-ended debate or discussions.... Every day that goes by, you are remanning the factory and his position is getting weaker. He must come with surrender terms.

In reality, BTR saw no reason to meet with MAWU. Its goal, I believe, was not to get a settlement: it was to eliminate MAWU from the factory. In evidence in chiefs Sampson came close to admitting as much, saying that the workers had become 'misled and fired up by the Union rhetoric [so that] they

failed to perceive that they were playing with jobs'; under cross-examination, he conceded that the purpose of the dismissal - and its effect - was to 'smash the Union as an influence in the factory'. Under re-examination, Sampson made it clear that he knew what the expression denoted: BTR wanted to 'break the dreadful hold and the fired-up striking work force ethic that had destroyed all operations in the factory.' In his testimony he made it clear that BTR viewed MAWU as responsible for this and that, since MAWU was intransigent and militant, destroying its influence in the factory was the only solution open to BTR.

My view, that BTR's true motive was not to protect its commercial interests but to get rid of MAWU, is also borne out by the fact that subsequent to the dismissals, BTR allowed a new Union, UWUSA, to represent the workers. This Union, more sympathetic to BTR, was allowed on BTR's premises without having to overcome the obstacles placed by BTR in

MAWU'spath.

The court a quo, on the other hand, came to the conclusion that BTR was justified in not re-employing the appellants. This conclusion is, in essence, based on the finding that "the one thing that the appellants never did ... was to drop their demands and tender their services."

I have earlier in this judgment dealt with the facts. The finding of the court a quo is, in my view, inconsistent with the facts, amounts to a misdirection and, for the reasons advanced earlier, does not preclude this Court from holding the opposite view.

In my view there is also another underlying basic misconception in the reasoning of the court a quo, namely: The court a quo discussed the power struggle between employers and employees in terms appropriate to battle and warfare. It perceived a correlation between a strike, which it characterized as the ultimate weapon of the union, and dismissal, which it saw as the

employer's ultimate weapon. The judgment suggests and seems to me to be based on the premise that recourse to the one automatically legitimizes recourse to the other.

It was argued by counsel for the appellants, correctly in my view, that this is neither our law, nor could it be. It is settled law, thus ran the argument, that to strike is a legitimate instrument in the process of collective bargaining that the Act so emphatically endorses: the threat of it makes collective bargaining realistic and its occurrence serves, by the attrition it entails, to break deadlocks in the process for which there would otherwise be no resolution. Dismissal, in contrast, destroys the relationships of employment upon which collective bargaining is premised and so damages and often wholly destroys the relationship. There is no equivalence between the two and the one that the court a quo set up is illusory. Dismissal is not one of the "weapons" that an employer might use unless the need to resort to this

sanction is compelling. It is, in other words, not a reciprocal right, but an extraordinary one. The court a quo, in my view, reached its decision that the workers were fairly dismissed because they did not capitulate completely and were consequently not entitled to reinstatement, on a faulty perspective of the true legal position.

If authority is needed for the view I take of the matter, reference may be had to the decision of this Court in National Automobile Allied Worker's Union now known as National Union of Metal Workers of South Africa v Borg-Warner (SA) Pty Ltd 1994(3) SA 15(A) at 25 H-J. The judge a quo referred to this case, but remarked that it was decided some nine years after the events giving rise to the present case had taken place. If the intention was to say that the decision in that case was not binding on the court a quo when it gave its judgment, I must disagree. The case quoted was based on the provisions of the Act, which existed in 1985 and when the judge a quo gave

his judgment, and was binding on the latter court. In not applying the principle mentioned in the quoted case, the judge a quo misdirected himself. The attitude of the court a quo is also not consistent with the perspective taken by the Constitutional Court in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (1996(4) SA 744 (CC) at paras. 63 - 69, esp para. 66).

Conclusion

In conclusion, and referring to the criteria laid down in the Act, I am satisfied that the dismissal by BTR of the appellants on 3 May 1985 coupled with its consistent refusal or failure to re-employ them thereafter, constituted an unfair labour practice. It unfairly affected the appellants' employment opportunities. There were in Howick and vicinity no other employment opportunities of a similar nature. It obviously affected, and unfairly so, the

appellants' work security, in that they lost their jobs so to speak overnight after having served BTR for very long periods, giving their best years to it.

It prejudiced and jeopardized the physical, economic and social welfare of the appellants and their families drastically. They not only lost their jobs but also their housing and other socio-economic benefits which they enjoyed as employees of BTR. The precipitate actions of BTR caused wide-spread labour and social unrest, resulting in riots and killings in Impophomeni, the residential area where the appellants lived. It certainly had a permanent detrimental effect on the relationship between the appellants and BTR.

In the result, the appeal should, in my view, be upheld.

Compensation

This brings me then to the matter of compensation.

The only evidence as regards the losses suffered by the dismissed employees, and the only suggested method of compensation are those of

Professor Asher, an eminently qualified actuary. He was furnished with a list of the names of the employees, their salaries and other employment benefits and other relevant information, e.g. the date of death of those who have in the meantime passed away, etc.

Neither the Industrial Court nor the Labour Appeal Court has given a judgment pertaining to the calculation of the compensation payable to the appellants, because both courts refused the appellants' claims. There is, therefore, no judgment pertaining to such compensation before us on appeal.

Counsel for the parties involved in this appeal were ad idem that this Court is not in a position to finalise an award in respect of any of the appellants. The precise salary of each appellant at the date of dismissal, his or her pension or other benefits, the details pertaining to their new employment (of those who have secured such employment), and the dates of death of those who have died, etc. are not available to us. There is also no

evidence as to the correct rate of capitalization of compensation, or evidence relating to the calculation of contingencies applicable to each appellant. In these circumstances this Court is simply not in a position to give judgment in respect of any of the appellants as regards the compensation payable.

But counsel for the appellants requested this Court to establish the general principles which would govern the calculation of the compensation payable, and to remit the matter to the Industrial Court for applying such principles to the facts in respect of each appellant. Counsel for BTR, however, indicated disagreement with the principles advanced by counsel for the appellants, such as they were.

I am not amenable to the request by the appellants to lay down a number of principles in adstracto. The dangers of such a course are self-evident. Any broad, abstract, formulation of principles of law by a court of law is inherently open to criticism, because a legal principle is qualified and

given precise content only by the facts to which it is applied. It is not the task of this Court to propound broad principles which may require, when applied to a number of different factual cases, reformulation and qualification.

The only equitable manner to deal with the question of compensation is to remit it to the Industrial Court for finalisation. I know full well that such a decision may cause a further delay to the proceedings which already have been inordinately protracted. One can only hope that better judgment than hitherto will prevail between the parties and that in the near future they will come to reasonable settlement, or decide on a procedure for such settlement.

As far as the costs of the appeal is concerned, I see no reason why the ordinary rule should not apply.

The following order is made:

1. The appeal succeeds with costs, including the costs of two counsel.

2. Paragraph (a) of the order of the court a quo is replaced with the

following order: The appeal is allowed. Paragraphs 1 and 2 of the order granted by the Industrial Court is replaced with the following order:

'The dismissal of the appellants from the employ of the respondent constituted an unfair labour practice'. 3. The matter is remitted to the Industrial Court for the determination of the compensation payable to each of the appellants.

I concur:

RH Zulman JA

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case No 631/95

In the matter between:

EMMANUEL BETHA AND OTHERS — APPELLANTS

and

RTR SARMCOL a division of
BTR DUNLOP LTD — RESPONDENT

BEFORE: SMALBERGER, OLIVIER, SCOTT, ZULMAN
and STREICHER JJA

HEARD: 8,9 SEPTEMBER 1997

DELIVERED: 6 March 1998

JUDGMENT

STRETCHER. JA:

I have read the judgments by Smalberger JA and Olivier JA. I agree with the conclusion reached by Olivier JA and shall briefly state my reasons for doing so.

As is stated by Smalberger JA the question to be determined is whether the loss by the appellants of their employment was the result of an unfair labour practice on the part of the respondent ("BTR"). In my view it was.

On 3 May 1985 BTR dismissed its entire weekly paid workforce consisting of some 970 workers. The average period of employment of these workers was approximately 25 years. It is common cause that up to relatively shortly before the dismissal they had loyally

served BTR and that BTR had enjoyed an exceptionally good relationship with them.

During the period 1981-1985 BTR retrenched 1154 workers and thereby reduced its weekly paid workforce from approximately 2000 to approximately 1000 workers. This reduction must have given rise to feelings of insecurity on the part of the remaining workers and was bound to put considerable strain on the relationship between employer and employee.

In these circumstances it is not surprising that the majority of the workers joined a trade union, Metal and Allied Workers' Union ("MAWU") and that the conclusion of a recognition agreement between BTR and MAWU became a matter of considerable importance to

them. In these circumstances it was also to be expected that the failure of BTR and MAWU to conclude a recognition agreement over a period of more than 20 months would exacerbate the workers' feelings of insecurity and frustration. That is so whether it was BTR's or MAWU's fault that an agreement had not been concluded.

It is against this background that the labour unrest during 1984 and 1985, amongst workers who had served BTR for so many years, should be seen.

In my view it is not necessary to attempt, what may well be an impossible task, to apportion blame for the failure of BTR and MAWU to reach agreement on the terms of the recognition agreement before April 1985. It is clear that by April 1985 the parties were very

close to reaching agreement. Smalberger JA found that MAWU closed the door to further negotiations, as a result of which a deadlock ensued, justifying the dismissal of the workers. However, the latest proposals came from MAWU and it was incumbent on BTR to properly respond to those proposals by conveying its attitude in regard to the proposals to MAWU. Had it done so a deadlock would in all probability have been averted and agreement may well have been reached. By dismissing the workers before having done so BTR acted precipitately, unreasonably and unfairly.

On 12 March 1985 the Minister of Manpower approved the establishment of a conciliation board to consider and determine a dispute between MAWU and BTR "concerning the failure of the company to

accept the proposals of the union regarding a written recognition agreement". The first meeting of the conciliation board took place on 20 March 1985. On 21 March 1985 BTR made certain further proposals concerning the terms of the proposed agreement. It described its proposals as a full, final and complete package offer and stated that it would remain open for acceptance until 16h30. MAWU thought that the proposals could provide a realistic basis for settlement and requested more time to consider them. BTR initially adopted the attitude that the proposals had to be accepted or rejected. Subsequently it indicated that it would be prepared to meet on 27 March 1985 for no longer than 4 hours to discuss counter suggestions not involving matters of principle or substance. On 27 March 1985 MAWU submitted its counter proposals

to BTR.

At the resumption of the conciliation board meeting on 10 April 1985 BTR presented MAWU with a new draft agreement which BTR was prepared to sign, highlighting additions and deletions from the previous draft agreement. The changes to the previous draft agreement were explained to MAWU by BTR's attorney, Mr Giles. MAWU made certain proposals which were quite reasonable. Some of the proposals related to new provisions introduced by BTR and some related to a rewording by BTR of wording that had previously been agreed. Some of the proposals were of very little consequence. For example, in a new clause introduced by BTR at this late stage MAWU wanted the word "warranted" to be substituted with the word "agreed". Giles

conveyed MAWU's proposals to BTR. Some of the proposals were acceptable to BTR but it wanted to see MAWU's proposals in respect of certain procedural matters before responding to the proposals. At the request of BTR MAWU formulated its proposals in respect of the procedural matters and handed them to Giles. After BTR had had what MAWU considered to be sufficient time to consider the proposals MAWU insisted on an answer within 15 minutes. BTR thereupon rejected all MAWU's proposals and refused to give any reasons for doing so notwithstanding a request by MAWU to indicate why the proposals were not acceptable. BTR went even further and withdrew the offer to conclude the recognition agreement with MAWU in accordance with the draft submitted to MAWU. BTR adopted this

attitude, not because it had not had sufficient time to consider the proposals, but because it was annoyed at having been put on terms by MAWU.

This attitude of BTR was bound to and did in fact result in a termination of the negotiations between the parties. In the light of the fact that some of the proposals were acceptable to BTR, the fact that it later transpired that MAWU's proposals in respect of the procedures were, with the exception of two clauses, acceptable to BTR and the fact that an agreement was within the grasp of the parties, this attitude of BTR was unreasonable. The response by BTR was not the response of a bona fide negotiator and therefore did not constitute a proper response. It is not suggested that BTR was under any obligation to accept any of

MAWU's proposals but merely that BTR should in the circumstances have responded properly to MAWU 's proposals. Had BTR done so a tragedy may well have been averted.

Predictably MAWU thereupon incorporated their proposals into BTR's draft agreement of 10 April 1997, submitted the amended draft agreement to BTR and insisted that that document be signed. MAWU also indicated in a telex to a newspaper that the draft agreement reflected its final position. Being a reaction to BTR's failure to respond to MAWU's latest proposals one cannot infer from MAWU's attitude that, had BTR changed its position by properly responding to MAWU's proposals, MAWU would have refused to further negotiate. Neither the Labour Appeal Court ("LAC") nor BTR drew such inference. Schreiner testified that the workers were trying to get BTR to the

negotiating table. That BTR understood MAWU's attitude to be no more than a tactic in order to elicit a response, is apparent from the fact that it notified MAWU that it had received their draft, that it would consider it and respond thereto. BTR was advised by Allen, an industrial relations consultant, that it should fairly promptly respond and that it should not be obstinate. It was also advised by Giles that there were ways of overcoming the differences.

BTR on 23 April 1985 reconsidered MAWU 's proposals. Some of MAWU's proposals were acceptable and in respect of some BTR was prepared to change the wording proposed by it. Of some 14 clauses or subclauses that had not been agreed, of a very comprehensive and lengthy document, BTR considered that its wording of only 5 clauses

should be retained. The other proposals were either acceptable or negotiable. In one of the 5 clauses the difference was of no consequence, in another the difference was of very little consequence and in the three others the difference was of some importance. They were:

1. In BTR's final draft it inserted a proviso into a clause previously agreed in terms of which it was required to follow a disciplinary procedure in such a way as to be as just and fair as possible. The proviso was that it would not be necessary to follow the procedure in respect of any employee participating in industrial action. MAWU proposed that this proviso be deleted.

2. In regard to retrenchments MAWU wanted the principle of last in first out to be applied across the factory whereas BTR wanted it to

be applicable within the various departments. 3. BTR was only prepared to credit retrenchees with past service if reemployed within 6 months whereas MAWU wanted them to be so credited whenever they were re-employed.

It should have been obvious to BTR that deadlock had not been reached and that after negotiations stretching over a period of some 20 months agreement was a distinct possibility. That it was obvious to BTR is apparent from the fact that Sampson was, on 22 April instructed by Bird, the group chairman, to finalise the agreement with MAWU. On 25 April Sampson spoke to Schreiner. He told Schreiner that he had received such an instruction and highlighted the fundamental differences. He wanted to meet with Schreiner on his own but Schreiner explained that

that could not be done as it was against the policy of MAWU to negotiate without the shop stewards being present. Schreiner requested Sampson to put BTR's proposals in a telex but Sampson was not prepared to do so. Schreiner eventually agreed to telephone Sampson on 29 April in respect of the recognition agreement.

In the meantime the workers were dissatisfied about the failure to reach agreement on the terms of the recognition agreement. Van Zyl, the industrial relations officer of BTR, reported that the factory was rife with rumours that strike action was going to take place the following week. BTR recognised the danger of the workers going on strike because of their dissatisfaction about the recognition agreement as is apparent from its circular to the workers dated 26 April 1985 which read:

"The factory is rife with rumours and propaganda concerning strikes and unrest and action is being contemplated by management and workers.

The recognition agreement between MAWU and BTR is still under consideration."

On 26 April 1985 MAWU, in a telex to BTR, confirmed that the factory would be closed on 1 May 1985 from 1 lh45 to 22h00 so as to enable the workers to attend the May Day celebrations. BTR responded that there was no agreement in respect of the night shift workers. Technically it may have been correct. The agreement concluded by the parties on 30 July 1984 reads as follows:

"8. . .subject further to suitable prior arrangements being made in writing with your Union in respect of essential and continuous services, the company undertakes not to prevent any of your members concerned from clocking-out early on the first day of May provided

> that it is not before the commencement of the normal lunch-break on that day and provided further that such person will only be paid for the hours worked on that day."

On 29 April 1985 the workers were advised as follows in respect of the arrangements for 1 May 1985:

> "Night shift will commence at the normal time and employees are expected to work the full shift."

Still on 29 April 1985 Schreiner had a telephone conversation with Sampson during which he pleaded with Sampson to allow the night shift workers to start their shift at 19h30 so as to allow them to attend the May Day celebrations together with the other workers. Schreiner could not persuade Sampson, got cross with him and stated that there would be trouble. This statement has been interpreted as a threat. It could also have been a prediction.

The next day the workers downed their tools, left the machines running and proceeded to the canteen. In the light of the existing dissatisfaction amongst the workers, the fact that a strike was brewing and the fact that May Day was an emotive issue at the time, the strike could hardly have come as a surprise to BTR.

I accept the correctness of the court a quo's finding that the immediate cause of the strike was the dispute about May Day. However, whatever the immediate cause of the strike may have been, it, within minutes, became a strike about the failure of BTR to conclude a recognition agreement with MAWU.

BTR adopted the attitude that the strike was unlawful, it placed on record that Schreiner undertook to telephone Sampson and

demanded that the workers return to work. MAWU on the other hand adopted the attitude that the strike was lawful and stated that the latest draft submitted to BTR reflected its final position. It stated in a telex to BTR:

> "You are in possession of a recognition agreement which has been approved by our national executive committee which constitutes Mawu's final position and our members wish this negotiated document to be signed by your company prior to their returning to work.
>
> Any minor semantic changes which the company may wish to suggest would accordingly be appropriately handled immediately prior to a meeting between our parties to sign the recognition agreement.
>
> The union is open to your suggestion of a suitable date for the above and believes that conclusion of this long overdue document will facilitate an end to the strike."

The LAC correctly found that the attitude adopted by MAWU from the outbreak of the strike to the time of dismissal was that

there was only one option open to BTR and that was to sign MAWU's draft agreement. As I have already indicated that attitude was provoked by BTR's failure to properly respond to MAWU's latest proposals. The attitude was therefore adopted on the basis of BTR having refused to so respond. It does not follow, and the LAC did not find, that had BTR even at that late stage responded properly and bona fide MAWU would have persisted in its attitude.

Notwithstanding Schreiner having reneged on his undertaking to telephone Sampson in respect of the recognition agreement the ball was still in BTR's court to respond to MAWU's proposals. The meeting suggested by MAWU afforded BTR an opportunity to do so. Again BTR did not interpret the position to

be that negotiations with MAWU could not be re-opened. On 1 May Blackstock met with BTR's negotiating committee. They considered the various options open to BTR. One of the options considered was to negotiate with MAWU. They decided against doing so and in favour of dismissing the weekly paid workforce on 2 or 3 May 1985 and conveyed their decision to Bird. They did so because they were ostensibly of the view that no agreement was possible and not because of a view that MAWU would not be prepared to re-open the negotiations once BTR had responded to its proposals. BTR could not bona fide have held the view that no agreement was possible as is apparent from the fact that immediately before the strike Sampson had received instructions to negotiate the agreement to finality. In any event not having responded to

MAWU's proposals, BTR was in no position to form that view. Schreiner testified that he believed that the dispute could have been resolved if BTR had a real intention of doing so.

At 15h00 on 2 May BTR issued an ultimatum to the workers to return to work by 16h00 or face dismissal. The night shift workers had to return to work within an hour of the start of the night shift. The workers failed to return to work and later that evening BTR decided to dismiss all of them. The next morning they were advised of their dismissal.

The workers were wrong to resort to strike action when they did so. It is not known precisely what the question was in respect of which the strike ballot was conducted some months before the strike took place.

It is unlikely that it encompassed the dispute between the parties as it was on 30 April. It follows that the strike was probably unlawful. Furthermore, MAWU had previously agreed to give BTR a reasonable time to respond to their latest draft and should at least have issued an ultimatum to BTR before embarking on a strike. In the light of the intimation by Sampson to Schreiner, the possibility of a resolution of the dispute without resorting to strike action should also have been explored first. However, it is at least understandable how it came about that the workers nevertheless went on strike and the mere fact that the strike was not justified did not entitle BTR to dismiss the workers. The question to be decided is whether the dismissal, after having given the workers an ultimatum to return to work within an hour, was fair. In judging whether it was the court has to apply

a moral or value judgment to established facts and circumstances and in so doing it must have due and proper regard to the objectives sought to be achieved by the Act (see National Union of Metalworkers of SA v Vetsak Ltd 1996 (4) SA 877 (A) at 589C-D and 593B-G).

Notwithstanding the aforementioned considerations, the previous unlawful industrial action by the workers and the warnings that they would be dismissed should it recur I am for the following reasons of the view that it was unfair of BTR to dismiss the workers.

1. Although the strike was probably unlawful BTR knew that MAWU and the workers were under the impression that it was a lawful strike. Notwithstanding an invitation to do so BTR did not tell MAWU why it considered the strike to be unlawful.

2. BTR knew that it was at least partly to blame for the strike in that it failed to negotiate with MAWU in respect of MAWU's proposals on 10 April and failed to properly respond to MAWU's proposals for an inordinate long time thereafter thereby contributing to the dissatisfaction amongst the workers and to creating an atmosphere conducive to strike action.

3. BTR knew or should have known that it was the dissatisfaction about the May Day arrangements that was the last straw which precipitated the strike and that May Day was by 2 May something of the past.

4. BTR knew that there was a possibility that agreement could be reached on the terms of the recognition agreement if negotiations

were re-opened.

5. The latest proposals in respect of the recognition agreement were MAWU's proposals and the way to re-open the negotiations was for BTR to properly respond to those proposals.

6. MAWU had invited BTR to suggest a date for a meeting to finalise the recognition agreement and thereby afforded BTR an opportunity to respond to MAWU's latest proposals.

7. After the strike had commenced BTR was no longer prepared to negotiate with MAWU .

8. BTR in effect seized on a mistake on the part of MAWU to dismiss the striking workers. BTR did not offer to employ all the dismissed workers should they apply for their jobs as was submitted

to have been the case. BTR offered to consider applications by the dismissed workers for employment. That offer did not diminish the harshness of the decision to dismiss. BTR must have realised that the workers would not accept an offer to apply for their jobs without an assurance that each application would be accepted.

In my view a reasonable employer would in the circumstances not have dismissed workers who had served him loyally for 25 years, before having satisfied himself that it was in fact not possible to reach agreement on the terms of the recognition agreement. This could have been done expeditiously with substantial benefits to BTR and without exposing it to greater financial loss than it actually suffered.

My moral or value judgment, having regard to all the

aforesaid facts and circumstances, is therefore that the dismissal of the weekly paid workers was unfair.

It remains to deal with the question of compensation. The question of compensation was not considered by the Industrial Court or by the LAC. The parties are ad idem that the amount of compensation payable to the appellants cannot be determined by this court and that the matter should be referred back to the Industrial Court for determination. However, in order to assist in the determination the parties have requested this court to determine when litis contestatio occurred and also the basis upon which compensation should be calculated. I agree with Olivier JA that this is a matter which should be dealt with by the Industrial Court as the court of first instance.

28 I therefore

agree with the order proposed by Olivier JA.

P E STREICHER

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

CORAM: SMALBERGER, OLIVIER, SCOTT, ZULMAN

HEARD: 8, 9 SEPTEMBER 1997

DELIVERED, 5 MARCH 1998

SCOTT JA/...

I agree with both the reasoning and conclusion of Smalberger JA. Having read the judgments of Olivier JA and Streicher JA, with which I am in respectful disagreement, I consider it necessary to express my views on certain limited issues raised therein.

In his judgment my brother Olivier JA finds that the strike was provoked by Mr Sampson's uncompromising attitude on the issue of May Day notwithstanding differences in interpretation of the agreement, and that for this reason he was partly to blame for the strike. The agreement relating to May Day, as recorded in BTR's letter of 30 July 1984, is somewhat ambiguous as it contains no reference to the night-shift. But, as explained by Sampson in evidence, the object of allowing the workers leave of absence was to permit them to attend May Day celebrations which would presumably take place during the

day and not at night. The night-shift was therefore probably never in issue and for this reason was not mentioned in the letter recording the agreement. In this regard it is not without significance that Mr Schreiner wrote to Sampson on 26 April 1085 seeking confirmation that the factory would be shut from 11.45 am to 10 pm on 1 May 1985. It was never explained on what basis Schreiner contended that although there would be a night-shift it would only commence at 10 pm and not at the usual time. He did not suggest that this was a compromise. Nor could it have been, as on 26 April 1985 there was as yet no dispute between the parties with regard to the question of May Day. The Labour Appeal Court ('the LAC) found that Sampson's version of the agreement was the correct one. (See Ram and Others v BTR Sarmcol-A Division of BTR Dunlop Ltd (1996) 17 ILJ 72 ('the LAC judgment') at 90 D - F.) I am inclined to agree, but the criticism of Sampson is that regardless of whether he was right

or wrong he ought to have adopted a more conciliatory approach and by failing to do so he was partly to blame for the strike.

I agree that the stance adopted by Sampson in relation to the interpretation of the May Day agreement was uncompromising and that the issue arose at a time when there was much tension between the parties. In fairness to Sampson he considered that the attitude of MAWU to BTR in relation to hours worked had been no less uncompromising. Notwithstanding the financial difficulties of BTR the appellants steadfastly refused to work 'a minute of overtime' no matter what the circumstances. Sampson was understandably reluctant to give up several hours of production time; his attitude was one of concern and not annoyance. In 1985 May Day was not yet a public holiday. BTR was among the first of the larger employers to agree to its workers going off on May Day. There is to my mind, however, an important question of

principle involved. The issue of May Day was wholly unrelated to the issue of the recognition agreement. Any strike arising from the May Day issue at that stage would therefore have been in the nature of a wild cat strike. Workers have a right to strike and the threat of legitimate industrial action is a valid means of coercing management to accede to the demands of labour. But by the same token management has a right to take up an attitude on an issue between the parties without the fear of an illegitimate strike. If management were obliged to accede to demands lest there be an illegitimate strike the result would be akin to blackmail. Sampson was therefore perfectly entitled to take up a firm attitude on the May Day issue without the fear of a strike as that issue had nothing to do with the negotiations on the recognition agreement. In my view there was nothing unreasonable or unfair about his conduct. It follows that he cannot be held to blame for provoking the strike in relation to the recognition agreement

by reason of his failure to accede to MAWU's demands on the May Day issue.

A further finding of my brother Olivier JA on which I feel it necessary to comment is the finding that the unreasonable deadlines imposed on MAWU by BTR as part of a hard-line attitude adopted by the latter were in effect inconsonant with bona fide negotiations and evidenced an underlying intention to rid the factory of MAWU by dismissing its members.

By March 1985 the parties had been negotiating for more than 18 months. (There were various reasons for this but it is unnecessary for the purpose of this judgment to consider them.) During that time MAWU had itself adopted various tactics to put pressure on BTR, including what counsel for MAWU conceded was an aggressive approach and a constant readiness to declare a dispute and seek the establishment of a conciliation board. On 20 March 1985 MAWU telexed BTR saying:

> 'We advise that unless otherwise agreed we shall regard the matter as "unresolved" if no agreement has been reached today. In such an event (without wishing to threaten the company) we must merely point out that we reserve all our rights including that to take industrial action'.

Despite the disclaimer, the threat was clear. It was all part of the tactics adopted by MAWU to place pressure on BTR to accept the former's proposals at a meeting of the conciliation board that day. In response, BTR on 21 March 1985 submitted a proposal which was presented as a 'full, final and complete package offer'. It involved BTR making what it perceived to be major concessions. Indeed, the proposal was described by MAWU as a 'realistic basis for settlement'. The offer was stated to be open until 2.30 pm of the same day. This was clearly a negotiating tactic on the part of BTR in an attempt, in turn, to place pressure on MAWU to accept its offer. BTR thought that the concessions it had made were such that its offer ought to be accepted. It agreed to extend the

deadline for acceptance to noon on 25 March 1985 but then refused to afford a further extension. In doing so, it sought to maintain the pressure on MAWU to accept the offer. What is clear, however, is that notwithstanding the deadlines set by BTR, the parties continued to negotiate in an attempt to reduce the gap between them, right up until the strike. (As to the sequence of the events during this period, see the judgment of Smalberger JA.)

In these circumstances I cannot agree that BTR's refusal to afford MAWU more time on 25 March 1985 (which was clearly no more than a tactic) or its so-called hard-line attitude was inconsonant with the requirements of bona fide labour negotiations. Indeed, if BTR did not seek to reach consensus and was negotiating in bad faith, Sampson would hardly have attempted to meet with Schreiner in an endeavour finally to resolve the matter. That he attempted to do so, was common cause. In this respect too there is an important matter of

principle involved. Deadlines for the acceptance of offers (cf National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd 1997 (4) SA 51 (SCA) at 63 I - 64 A), threats of industrial action and the like are typical tactics adopted in the bargaining process contemplated by the Act. Save in extreme cases (which, in my view, this was not) it is not for the court to become involved in what has been described as 'the negotiating strategies of the parties'. (See Grogan Collective Labour Law at 33 and cited with approval in the Black Mountain case supra at 65 F.) No doubt the circumstances may be such as to justify the conclusion that a particular tactic adopted by one party is indicative of mala fides. But, by the very nature of things and for the reason just mentioned, this is a conclusion to which a court will not lightly come, particularly where both parties have resorted to similar hard-line tactics. In my view, such a conclusion is not justified in the present case.

A further aspect with which I wish to deal shortly is the extent to which this Court is entitled to depart from the findings of fact of the court a quo.

It is perhaps necessary at the outset to emphasize again that the powers of even a court exercising ordinary appellate jurisdiction in relation to findings of fact are limited. The approach to be adopted was recently restated by Marais JA in S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e - f as follows:

> "Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.'

In the present case, of course, this Court by reason of the provisions of

s 17C(l)(a) of the Labour Relations Act 28 of 1956 is bound by the findings of fact of the LAC. Accordingly, the extent to which it may interfere with such findings is far more limited than the test set out above. As has been frequently stated in other contexts, it is only when the finding of fact made by the lower court is one which no court could reasonably have made, that this Court would be entitled to interfere with what would otherwise be an unassailable finding. (See Commissioner for Inland Revenue v Strathmore Consolidated Investments Ltd 1959(1) SA 469 (A) at 475 et seq; Secretary for Inland Revenue v Trust Bank of Africa Ltd 1975(2) SA 652 (A) at 666 B - D.) The inquiry by its very nature is a stringent one. Its rationale is presumably that the finding in question is so vitiated by lack of reason as to be tantamount to no finding at all.

The limitation on this Court's ordinary appellate jurisdiction in cases of this nature applies not only to the LAC's findings in relation to primary

facts, ie those which are directly established by evidence; but also to secondary facts, ie those which are established by inference from the primary facts. The reason is that the drawing of an inference for the purpose of establishing a secondary fact is no less a finding of fact than a finding in relation to a primary fact. (See Magmoed v Janse van Rensburg and Others 1993(1) SA 777 (A) at 810H-811G.)

It follows that it is not open to this Court to depart from a finding of fact by the LAC merely on the grounds that this Court considers the finding to be wrong or that the LAC has misdirected itself in a material way or that it has based its finding on a misconception. It is only when there is no evidence which could reasonably support a finding of fact or where the evidence is such that a proper evaluation of that evidence leads inexorably to the conclusion that no reasonable court could have made the finding, that this Court will be entitled

to interfere.

I do not understand the decision in Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of South Africa 1995 (3) SA 22 (A) to be inconsistent with the above proposition. The 'finding' of the LAC referred to at 31 I with which this Court disagreed was not a finding of fact in the true sense but a finding involving a value judgment. (Cf Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd 1992 (4) SA 791 (A)at795 C-797 J.)

The provision in s 17 C (l)(a) limiting the Court's jurisdiction in relation to findings of fact is somewhat anomalous inasmuch as the LAC does not hear evidence and has before it the same material which is before this Court. It does not therefore have the advantages of a court of first instance and is in no better position than this Court to make findings of fact. However, Parliament in

its wisdom decided to make the LAC the final arbiter on issues of fact. It may well be that its reason for doing so is related to the composition of the LAC or simply to limit the number of appeals coming to this Court. But whatever the reason, this Court is not entitled, because it disapproves of the wisdom of the provision, simply to ignore it or apply some test different from the well established test which is to be applied when there is no appeal on questions of fact.

Applying the above test I am of the view that this Court is not entitled to interfere with any of the factual findings of the LAC. Those findings include the important findings made in the face of submissions by counsel to the contrary that BTR was not actuated by an improper motive to avoid a settlement or to rid itself of MAWU by dismissing the employees, whether before or after the strike. (See the LAC judgment in particular at 95 H - 96 H. See also 93 C -

J.) Merely because the LAC elected not to deal in its judgment with the evidence of events in relation to the negotiations between the parties from 1979 leading up to the strike in April 1985 but to confine itself to general observations in regard thereto, does not mean that it did not have regard to those events when making the findings referred to above; nor does it mean that those findings are not findings of fact. Smalberger JA similarly found that the attempt by counsel for the appellants to ascribe such an improper motive to BTR was not justified on the evidence. It follows from the aforegoing that a conclusion that this Court is free to substitute its own findings of fact for these findings necessarily involves, in my view, the conclusion that the findings of not only the LAC but also of Smalberger JA are findings which no court could reasonably have made. As I am in full agreement with the conclusion of Smalberger JA I can perhaps be forgiven for baulking at such a result.

Turning to the judgment of my brother Streicher JA, it appears that the ultimate conclusion to which he came was largely founded upon a finding that even after the commencement of the strike and before the dismissals MAWU was, despite its attitude that there was only one option open to BTR and that was to sign MAWU's draft agreement, still prepared to negotiate with BTR and that accordingly a state of deadlock had not been reached. In my view, that finding, for the purpose of s 17 C(l)(a) of the Act, is a finding of fact. It is apparent from the judgment of the LAC that the Court was fully aware of the fact that BTR had considered one of its options to be the continuation of negotiations but had decided against that course in the face of the attitude adopted by MAWU immediately following the strike. That attitude, as found by the court a quo, was that there was only one course open to BTR, viz to sign MAWU's draft agreement and that the strike would continue until it did. (See the LAC

judgment in particular at 96H - 97A; 97H -I; 100C - D and 100H - 101H.) Such a stance by its very nature amounted to a refusal to negotiate further. In the absence of some qualification in the judgment suggesting the contrary (and there was no such qualification) it is implicit in the finding of the court a quo, therefore, that MAWU was at that stage not prepared to negotiate with BTR. There can be no basis for suggesting that this finding of the LAC falls to be set aside on the ground that no reasonable court could have made it; nor was such a contention raised in argument before us. It follows that in my view the finding made by Streicher JA is one which this Court was precluded from making in terms of s 17 C(l)(a) of the Act.

D G SCOTT

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO 631/95

In the matter between:

EMMANUEL BETHA AND OTHERS APPELLANTS

and

BTR SARMCOL A Division of BTR
DUNLOP LTD RESPONDENT

CORAM: SMALBERGER, OLIVIER, SCOTT, ZULMAN et STREICHER JJA

HEARD: 8, 9 SEPTEMBER 1997

DELIVERED: 6 March 1998

JUDGMENT

SMALBERGER JA ...

SMALBERGER JA:

Introduction

This appeal is a further chapter in what has been the most protracted industrial litigation this country has yet known. The appellants are all former employees of the respondent ("BTR"). BTR (which, before it underwent a change of ownership and name, was known as BTR Industries SA (Pty) Ltd) is a company which manufactures rubber products at its factory in Howick, KwaZulu-Natal. On 30 April 1985 some 970 weekly paid employees of BTR, including the appellants, went on strike. On 3 May 1985 BTR dismissed all the striking workers with immediate effect. At the time of their dismissal most of the appellants were members of the Metal and Allied Workers' Union ("MAWU").

In July 1986 MAWU, on behalf of the dismissed workers, brought an

application for their reinstatement in terms of sec 46(9) of the Labour Relations Act 28 of 1956 ("the Act"). The matter came before the industrial court ("the IC") in 1987. After a protracted hearing which lasted 39 days the IC, in September 1987, dismissed MAWU's application. The judgment of the IC has been reported: Metal and Allied Workers' Union and Others v BTR Sarmcol (1987) 8 ILJ 815 (IC).

MAWU took the IC's decision on review to the Natal Provincial Division of the then Supreme Court. During the IC hearing an unsuccessful application was made for the recusal of the presiding officer because of his attendance, while the matter was in progress, at a conference organised and hosted by BTR's industrial relations adviser. The basis for the review application was that the presiding officer had by his conduct exhibited a degree of bias sufficient to vitiate the IC's decision. The Natal Provincial

Division (Didcott J) granted the application and set aside the IC's decision. Its judgment is also reported: Metal and Allied Workers' Union and Another v BTR Industries SA (Pty) Ltd and Others (1989) 10 ILJ 615 (N). The ensuing appeal to this Court was dismissed - see BTR Industries South Africa (Pty) Ltd and Other v Metal and Allied Workers' Union and Another 1992(3) SA 673 (A) - and the matter was consequently remitted for hearing de novo before a newly constituted industrial court. (The judgment of this Court sets out in detail the relevant factual events up to that point.) The parties filed amended papers, and the matter was heard afresh by the reconstituted IC in May 1994. By that time MAWU had ceased to exist and its role had been taken over by the National Union of Metal Workers of South Africa ("NUMSA") which became the first applicant with the appellants as further applicants. Because of altered circumstances the

appellants' claims for reinstatement were abandoned and they sought a determination declaring their dismissals an unfair labour practice, and an appropriate order of compensation. It was agreed by the parties that the record of the proceedings in the original IC hearing would stand as evidence in the new hearing. The only additional evidence led was that of an actuary, Prof Asher, who testified with regard to the computation of the appellants' claims for compensation.

On 17 October 1994 the IC held against NUMSA and the appellants. It found that the appellants' loss of employment "did not represent an unfair labour practice on the part of the respondent [BTR]". It accordingly dismissed the application and made no order as to costs. Its judgment is also reported: Metal and Allied Workers' Union and Others v Btr Sramcol - A Division of BTR Dunlop Ltd (1995) 16 ILJ 83 (IC). The appellants appealed

against the IC's decision to the Labour Appeal Court ("the LAC"). NUMSA did not prosecute the appeal and ceased to be a party to the further proceedings. The LAC (Combrinck J and assessors S Ngcobo - now Mr Justice Ngcobo - and M Cowling) dismissed the appeal, made no order as to costs and granted the appellants leave to appeal to this Court. The judgment of the LAC is reported as Ram and Others v BTR Sarmcol - A Division of BTR Dunlop Ltd (1996) 17 ILJ 72 (LAC) ("the LAC judgment"). (The appellant Mr B Ram did not prosecute the present appeal, and the first appellant is now Mr E Betha.) The background facts

The relevant background facts appear from the evidence of the witnesses who testified at the original IC hearing as well as the many contemporaneous documents which form part of the record. The principal

witnesses were Mr W G Schreiner, a MAWU official, and Mr R J Sampson, a BTR employee. They were the main negotiators on behalf of the respective parties. The relevant facts were succinctly but adequately summarized by the IC in its 1994 judgment ((1995) 16ILJ at 86G - 90F),

which summary was quoted in the LAC judgment at (1996) 17 ILJ at 76G - 80A. For the convenience of the reader I repeat the summary (with certain minor alterations):

> "The Howick factory has been in operation since 1919. In 1974 some 2160 workers were employed. In the years thereafter, due both to a downturn in the national economy and a necessary process of rationalization of its production plants at the factory, the respondent was obliged to retrench many of its workers. 300 workers lost their jobs in 1981; 752 in 1984 and 102 in 1985. This massive retrenchment gave rise to dissatisfaction and uneasiness on the part of the workers.
>
> Labour relations between the respondent's [BTR's] management and MAWU were characterized by a prolonged and bitter struggle. The

Industrial Court (refer (1987) HJ at 822H) described it 'as a protracted power play' and we agree with that comment.

During the 1970's and the early 1980's MAWU recruited members at BTR and consistently claimed that it had recruited a majority amongst that workforce. In May 1983 a verification exercise reflected that MAWU members constituted 36,8% of the weekly paid workforce. BTR also refused to negotiate unless the union was registered and was put off by the fact that MAWU was not an 'industry related union'.

During early 1983 BTR proceeded with a retrenchment exercise and because MAWU claimed that there had been no consultation it declared a dispute with regard to the retrenchment and to the failure of die company to recognise it. That dispute was settled. BTR paid a lump sum of R7500 for the benefit of the persons retrenched and on 27 June a preliminary recognition agreement was entered into. That agreement afforded MAWU stop order facilities and access to the plant. It provided a basic retrenchment procedure and gave paid leave to two members of the union for union business. BTR also undertook to negotiate a procedural and substantive agreement once the union represented 51% of the weekly paid employees [within a period of three months of that occurring].

On 11 August 1983 MAWU, having become representative of a

majority of the company's weekly paid employees at Howick, submitted a draft recognition agreement to the company and between August 1983 and April 1985 protracted negotiations took place between the parties.

The negotiations involved many meetings at which draft recognition agreements and other proposals were considered and debated.

After a meeting on 22 May 1984 it was agreed that no agreement could be concluded and that everything that had been decided up to then would accordingly fall away. MAWU stated that it would operate on the basis of the preliminary agreement and in terms of current fair labour practices. MAWU declared a dispute and applied for a conciliation board on 24 May 1984 on wage negotiations, long service and leave bonus, the recognition agreement and the recognition of May Day. Those disputes were settled by the acceptance by the workers of the company's offer embodied in a letter dated 30 July 1984 which offer embodied a provision for employees to clock out early on May Day and required the union to'.... suggest a date as soon as possible but before the end of August 1984 to resume negotiations to conclude a procedural agreement'. This settlement was hailed by the union as a significant breakthrough and negotiations on the recognition agreement accordingly resumed.

Negotiations on the recognition agreement had been stalled after the

May meeting and the company following on the acceptance that there was then no agreement at all had taken the step of declining to recognise the shop stewards as shop stewards at all. This had adversely affected relations.

Thereafter negotiations took place at a meeting on 22 August 1984 between the negotiating teams followed by a further meeting on 28 November 1984 to deal with the agreement in the light of certain documents put up for discussion in the interim.

In the course of this second meeting the union representative, Schreiner, again expressed the view that if no agreement could be reached at the meeting the union would simply operate without one.

On 7 December 1984 MAWU advised the respondent that it could see no point in further discussions concerning the draft agreement. On 21 December 1984 MAWU applied for the establishment of a conciliation board:

to endeavour to resolve the dispute which has prevented the conclusion of a written procedural recognition agreement'.

On the same day it applied for the establishment of a conciliation board:

'to endeavour to resolve the dispute concerning severance pay on retrenchment'.

A reference to press statements issued by the parties at the time makes it clear that the dispute related to the company's unwillingness to sign a recognition agreement on the terms being demanded by MAWU. The company:-

(a) invited die union to resume negotiations on 5 December 1984;

(b) did not oppose the establishment of a conciliation board;

(c) again invited the union to resume negotiations on 30 January 1985;

(d) issued a circular to all employees on 8 February 1985 advising that it was willing to continue discussion and negotiation and was preparing new proposals to be forwarded to MAWU;

Thereafter:

(a) the company sent a proposed agreement to the union on 15 February 1985;

(b) the union rejected this draft on 16 February 1985;

(c) the union submitted proposals for mediation on 27 February 1985;

(d) the company considered those proposals.

Further negotiations took place using Professor le Roux as mediator as follows:

(a) a meeting with the mediator took place on 7 March 1985;

(b) the mediation continued on 8 March 1985;

(c) a conciliation board met on 20 March 1985.

On 21 March 1985 the company wrote to the union with certain further proposals concerning the terms of the agreement. The union replied mat this provided a realistic basis for settlement.

The last meeting between the parties took place on 10 April 1985 at a resumption of the conciliation board meeting. In respect of this meeting there are two documents: one containing the company's proposals with the union's telexed comments thereon interpolated into the document and the other being the agreement the company was prepared to sign highlighting additions and deletions from the previous agreement.

During the period encompassed by these negotiations a variety of steps were taken by the workers to put pressure on the company to accede to union demands. Particulars of these activities and the company's responses thereto are the following.

There was a canteen boycott early in July 1984 and during the same month a go-slow and an overtime ban were introduced, causing considerable disruption. Thereafter go-slows and sporadic work stoppages occurred and there was a sit-in in the canteen. An overtime ban was introduced from 1 November 1984. The output of the factory had declined and the workforce was warned on an individual

basis that that type of behaviour put their jobs on the line and that a failure to work would be regarded as a breach of contract.

On 11 December 1984 there was a complete stoppage which the union accepted constituted an illegal strike. The workers were warned that this constituted a breach of their contracts and that a similar occurrence in the future would expose them to the risk of the loss of their employment.

Shortly thereafter 111 MAWU members refused to attend to refurbishing in the engineering division during the year end shut-down, an established practice in that factory, common in the industry and essential to the normal operation of Sarmcol. The factory re-opened in mid-January 1985 but was immediately subjected to a total ban on overtime.

A go-slow occurred from 7 March 1985 and culminated in a strike from 12 to 15 March 1985 which seriously affected production. Notices were issued to employees and telexes sent to MAWU making it clear that management reserved the right to take action including dismissal arising out of the conduct of the employees.

The disruption of working operations after the factory re-opened in January 1985 had serious consequences. Production had been badly affected and a cumulative loss of the order of Rim was recorded.

The business was furthermore operating in a poor economic environment, business was slack, orders were down and there is evidence that bankruptcy was a threat.

It is against that background of:

(a) protracted negotiations which had failed to arrive at an agreement acceptable to both the union and the company;
(b) various forms of disruptive action being taken by the workers in order to put pressure on the company to submit to the union's demands;
(c) the company being in a parlous financial situation;

that the critical events occurred.

On 30 April 1985 all the weekly paid workers at the factory downed tools leaving the machinery in the factory running. The respondent immediately sent a telex to MAWU placing on record the work stoppage and stating that it regarded this as constituting both illegal industrial action and a breach of contract. MAWU responded by:

(1) confirming that its members were on strike;
(2) denying that the strike was illegal;
(3) linking the strike to the respondent's failure to conclude a recognition agreement with it; and

(4) stating that its members required its final draft for a recognition agreement to be signed before they would return to work.

On 2 May 1985 the respondent issued an ultimatum to the striking workers to return to work or to face the possibility of the termination of their contracts of employment.

The ultunatum was ignored and on 3 May the striking workers were dismissed. On 4 May 1985 the respondent offered re-employment to all workers. This offer was rejected.

Thereafter the respondent maintained its offer of re-employment to all dismissed workers, but at the same time it invited applications for employment at the factory from other job-seekers. Few of the dismissed workers accepted re-employment, and the remaining vacancies were filled on a temporary basis until 2 August 1985.

On 22 My MAWU informed the respondent's managing director that the workers were willing to return to work unconditionally. Written confirmation therefore was sought by the respondent. This was done by way of a telex received by the respondent only on 12 August 1985, by which time the temporary workforce at the factory had already (on 2 August) been engaged on a permanent basis.

The remaining of the factory was only complete at the end of 1985.

No more than some 66 of the dismissed workers accepted re-employment.

In August 1985 the respondent broke off negotiations with MAWU and intimated to the latter that it would be prepared to consider only such specific proposals for the settlement of the dispute between the parties as MAWU might wish to make.

On 24 October 1985 MAWU applied for the appointment of a conciliation board in connection with two issues: a recognition agreement between the parties and the respondent's dismissal of the striking workers. Despite opposition by die respondent a conciliation board was established and it convened on 26 February 1986. On 7 May 1986 the Minister referred the disputes between the parties to the Industrial Court for a determination in terms of s46(9) of the Act."

The Issue

The issue in this matter, as formulated by counsel, is: was the loss by the appellants of their employment the result of an unfair labour practice on behalf of BTR? This formulation, which encompasses the relevant events leading up to, contemporaneous with and subsequent to the appellants'

dismissals, would appear to be the correct one.

The definition of "unfair labour practice" in sec 1 of the Act which was applicable at the time was:

"(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, moral or social welfare is or may be prejudiced or jeopardised 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 relationship between employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour

practice which has or may have an affect which is similar or related to any effect mentioned in paragraph (a)."

This is the same definition which governed the cases of National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others 1996(4) SA 577 (A) ("Vetsak") and National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd 1997 (4) SA 51 (SCA) ("Black Mountain").

The overriding consideration in a matter such as the present is one of fairness. In judging fairness, a court applies a moral or value judgment to the established facts and circumstances that bear on the issue under consideration (National Union of Mineworkers and Others v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine President Brand Mine; Freddies Mine 1996(1) SA 422 (A) at 4461). The

established facts and circumstances include the factual findings of the LAC by which this Court is bound in terms of sec 17C(l)(a) of the Act (National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992(1) SA 700 (A) at 731 B). Those findings comprise: (1) actual findings of fact made by the LAC and (2) any factual findings of the IC which have either expressly or tacitly been approved by the LAC and consequently been incorporated in its judgment (Vetsak(minority judgment) at 583 I - 584 A). As to what other facts regard may be had to see the same judgment at 584 A - C. (The approach in the minority judgment in this regard was approved in the majority judgment in Vetsak at 593 H-I.) Once the facts have been established an onus is not appropriate in the evaluation of issues of fairness (Versak(majority judgment) at 597 D - E).

The proper approach is set out in the majority judgment in Vetsak at

593 B - G as follows: (I quote to the extent relevant):

> "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 .... 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. . .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."

See also Black Mountain at 54 E-J and 60 I - 61 A. In the latter passage

Scott JA stated:

> "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 powerplay 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."

The events leading up to the strike on 30 April 1995

It is not, in my view, necessary to traverse the pre-1985 negotiations in detail. They were characterised by aggressive and (initially) extensive and excessive demands by MAWU which evoked a cautious and hesitant response from BTR which at times bordered on the obdurate or the intransigent. BTR had not had dealings with a union before the advent of MAWU. It was concerned about the unionization of its workers and the

effect this might have on the good relations that had hitherto existed between management and its loyal and long-serving work-force. It was anxious to secure a binding, lasting agreement. The blame for the unduly protracted negotiations cannot be attributed to BTR alone; MAWU must shoulder an equal share of the blame. Whatever legitimate criticism there may be of BTR's conduct, it cannot be said that it bargained in bad faith, or was not prepared to recognise MAWU, or to afford the workers basic union rights. Whatever obstacles it sought initially to place in MAWU's way, the fact remains that it was prepared to grant recognition to MAWU before it was representative of the majority of the workers at BTR, an attitude in advance of the norms prevailing at the time. It was also prepared to extend numerous basic union rights to the workers, as Schreiner conceded under cross-examination. What was essentially in dispute all along was the precise

extent and content of such rights, matters in regard to which the parties moved closer to each other as time progressed. The fact that they were not able to close the final gap in negotiations was not attributable to a lack of good faith on the part of either.

A major breakthrough occurred on 21 March 1985 when, in response to certain further proposals put forward by BTR concerning the terms of a final recognition agreement, MAWU indicated in a telex that the proposals "may provide a realistic basis for settlement". However, as found by the LAC (at 84 B - C), "[u]nfbrtunately the respondent [BTR] at this stage adopted a hard line and advised the union that the proposed changes to the draft recognition agreement had to be accepted or rejected as it was not open to further negotiations". The LAC went on (at 84 F): "Despite the hard line taken by the respondent, negotiations did continue with the union telexing

its counter-proposals to the draft recognition agreement and the matter being pursued in telephone calls and a meeting." Adopting a "hard line" does not per se amount to unreasonable or improper conduct within the context of management-union negotiations. In this regard it is apposite, at this point, to draw attention to, and to emphasize, what was stated in Black Mountain at 61 J - 62 A, viz:

> "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."

In the bargaining process the autonomy of the parties to bargain should be recognised and not interfered with. Where parties bargain in good faith they must be taken to have had reason to make the proposals they have. It is not for a court to substitute its views for theirs.

On 10 April 1985 what turned out to be the last meeting between the

parties took place at the resumption of the conciliation board proceedings. Two documents were tabled by BTR, one containing its proposals with MAWU's telexed comments interpolated into the document, and the other being the draft recognition agreement BTR was prepared to sign highlighting additions to and deletions from its earlier proposed agreement. This followed upon proposals put forward by MAWU on 27 March which had been discussed by BTR and its advisers. On the morning of 10 April Mr Giles, BTR's attorney, held discussions lasting approximately 1¼ hours with Schreiner and some of the shop stewards with regard to BTR's proposed agreement, which included certain annexures. Giles made notes of Schreiner's response (on behalf of MAWU) to the body of the agreement and returned to discuss them with Sampson. MAWU was still to furnish its response with regard to the annexures. Schreiner had indicated that some

of the responses were final, others were still negotiable. BTR proceded to consider those responses. At a certain stage Giles was sent to enquire of Schreiner what MAWU's response was to the procedures that had been put forward, as BTR wanted to know what MAWU's attitude was before deciding whether or not to modify its final offer. Giles returned with certain written proposals relating to the procedures. Sampson was of the view that there had in effect been no movement on MAWU's part. Sampson sought advice from BTR's labour relations adviser in Johannesburg. At 15:00 BTR, according to Sampson, was still contemplating putting up further amendments for MAWU's consideration. It would seem that the parties at that stage were very close to reaching agreement. The conciliation board was due to reconvene at that time. Giles requested Schreiner to allow BTR a further half an hour to consider its position. Schreiner, who was of the

view that BTR had had more than sufficient time to consider MAWU's counter proposals, was only prepared to agree to a further fifteen minutes. This led to a breakdown in negotiations, and the parties reported to the conciliation board their inability to reach agreement. An extract from the minutes of the resumed hearing of the conciliation board appear at 84 G - 85 A of the LAC's judgment. There is no need to repeat it. What is significant is that there was no suggestion by either party that serious attempts were not being made to negotiate a final agreement, and no allegations of wasting time or bad-faith bargaining were made against BTR. There would be no justification for blaming one party more than the other for the break-down in negotiations at that stage.

Counsel for the appellant was critical of BTR's failure to propose arbitration at the reconciliation board meeting. I do not think the criticism

is justified. Apart from the fact that it is doubtful whether arbitration is appropriate to resolve disputes relating to terms of an agreement such as the one in question, it was equally open to MAWU to propose arbitration if it so wished. The failure or refusal of either party to propose arbitration, for what it might have been worth, is therefore a neutral consideration.

On 12 April BTR issued a notice to all weekly paid employees in the following terms:

> "1. Every effort has been made by the company to reach agreement with MAWU and many more concessions have been made by the company at recent meetings in order to reach a settlement.
> 2. An agreement which the company regarded as being fair to the company, the union and all our employees was presented to the union on Wednesday 10 April. The company was prepared to sign this agreement but it was rejected by the union and the Shop Stewards."

The workers could have been left in no doubt that BTR was serious about

signing a recognition agreement.

The failure to reach agreement on 10 April did not bring about an end to negotiations. On 17 April MAWU submitted what it termed its final draft agreement to BTR calling upon it to sign and return the agreement. At that stage there were two agreements up for signature, the other being the agreement which BTR had submitted on 10 April. BTR intimated that it would respond in due course. At a meeting of workers held on the night of 17 April it was decided to give BTR a "reasonable period" to go through MAWU's agreement and thereafter sign it. Earlier that day MAWU had issued a notice to its members at BTR advising them, inter alia:

> "The changes that MAWU proposed are not difficult for the Company to accept - they do not involve any big matters of principle. These are some examples:
>
> i) MAWU said the senior Shop Steward should have 5 hours a week to do Union business (the Company had already agreed

to 1 hour a day). ii) MAWU said the Company must agree to deduct subscriptions

for our members who are on staff, iii) MAWU said the shop stewards should be able to report back

to members in the canteen for 30 minutes after meetings with management (the Company had already agreed to this before). iv) MAWU said there must be a proper means for members to

appeal against unfair warnings and unfair dismissals. v) MAWU said the Company must agree to meet with the Union

Negotiating Committee before retrenching any employees."

Whatever legitimate accusations of foot-dragging might have been made against BTR in the past, there can in my view be no doubt that at that stage it was serious about reaching finality with regard to an agreement. It was advised by its labour relations consultants not to be obstinate. As it was rather colourfully and colloquially put, "we have bust a gut over this agreement, it would be a pity to blow it now". Giles advised that the parties should get together and have a further meeting to iron out the remaining

differences. Mr Bird, BTR's group chairman, instructed Sampson to invite Schreiner to meet with him in an attempt to negotiate the matter to finality. Pursuant thereto Sampson contacted Schreiner telephonically on 25 April to arrange a personal meeting between them with a view to resolving the outstanding differences. Schreiner was not amenable to a meeting in the absence of the shop stewards. Schreiner suggested that BTR send any further proposals it had to make by telex. Sampson was not agreeable to this as he favoured a face-to-face meeting. Eventually it was decided that they would discuss the unresolved matters telephonically at a later date. In the event, because of subsequent developments, no such discussion ever took place.

Arising from this conversation MAWU was fully aware that BTR was still prepared to negotiate over unresolved issues and that the stage of final

deadlock in the negotiation proceedings had not yet been reached. There was no suggestion by Schreiner that the reasonable time which BTR had been offered within which to sign MAWU's agreement had expired, nor, understandably in view of what had transpired, was BTR put to terms with regard to signature. Despite the workers legitimate concerns, and the looming threat of strike action if a recognition agreement was not finalised, there was no imminent danger of a strike given the situation that existed at that stage. That relationships, although perhaps strained, were not at breaking point, is further indicated by the fact that Schreiner sent BTR a telex on 26 April suggesting that the parties meet on 2 May for wage negotiations. In confirmation of the fact that negotiations were still in prospect BTR sent a notice to all its employees on 26 April advising them, inter alia, that "(t)he recognition agreement between the union and the

company is still under consideration".

On the afternoon of 29 April there was a telephone conversation between Schreiner and Sampson concerning the May Day (1 May) arrangements. The relevant facts are dealt with in the LAC judgment at 89 A-I. In brief, an agreement had been entered into in July 1984 concerning future May Day arrangements. A dispute arose with regard to whether those arrangements applied to night shift employees, MAWU contending that it did, and BTR contending to the contrary. When, despite Schreiner's requests to do so, Sampson declined to agree to short time working arrangements also being extended to the night shift, Schreiner, as recorded in Sampson's contemporaneous note (which was not disputed) "got very angry and said there would be trouble and rang off." The strike commenced the following day.

The events of 30 April

On the morning of 30 April workers reported for duty as usual. At 7:50 all the weekly paid workers downed tools and abandoned their work stations leaving the machinery in the factory running. As Sampson put it, "I looked out of the window and there all these people were pouring out of their departments". They thereafter congregated in the canteen. The manner in which these events occurred refutes any suggestion that their conduct might have been individual and spontaneous. Their behaviour was clearly indicative of concerted, pre-determined strike action. Later the workers marched through the factory premises, some of them carrying sticks. They behaved in a generally aggressive manner, and intimidated other members of staff, resulting in a tense situation at the factory.

With regard to the strike the LAC held (at 87 F -I):

"It is significant to note the following:

(a) the strike was not called by the union and according to the evidence led on behalf of the appellants, the union officials were unaware of the fact that the strike was going to take place;

(b) Schreiner, who had all along been conducting the collective bargaining on behalf of the union and the workers, was unaware that the strike was going to take place and was only advised telephonically during the course of the morning that the workers were on strike;

(c) the Shop Stewards certain of whom gave evidence, (Zondi, Makhathini and Dladla), were unaware that the strike was going to take place;

(d) no demand was made and no notice was given to Sampson or any other officer in the employ of the respondent that the workers were about to go on strike."

Shortly after the strike broke out Sampson was told by one of his officers that he had received information that the strike was over the recognition agreement. In a telex sent by MAWU to BTR at 13:21 it was stated that: "We confirm our members are on strike. The strike is not illegal

and concerns the company's refusal/failure to conclude a recognition agreement with MAWU." This notwithstanding, after a review of the relevant facts and circumstances the LAC concluded (at 89 J - 90 A):

> "In our view the inference is inescapable that it was the disagreement about May Day which caused the workers to go out on strike and not the fact that the respondent had not yet signed the recognition agreement. It was too much of a coincidence that right after Schreiner promised that there would be trouble, the strike broke out."

This amounted to a factual finding as to the initial cause of the strike.

It was contended on appeal that this Court was not bound by such finding, notwithstanding the provisions of sec 17C (1) (a) of the Act, as (1) the LAC was precluded from making such a finding as it was not an issue before the IC, on either what may loosely be referred to as the pleadings, or the evidence, mat the cause of the strike was anything other than the dispute over the recognition agreement, and (2) that in any event the finding was one

to which no reasonable court could have come.

As to (1). In broad terms the appellants' case, as set out in their Statement of Claim in the IC proceedings, was that the strike arose from the failure to conclude a recognition agreement. In its carefully worded reply BTR stated that the strike action was

> "characterised by both the employees and MAWU as arising from a refusal by the respondent to recognise MAWU."

BTR did not, either expressly or by necessary implication, concede that the strike had commenced over the recognition agreement. Its attitude was that it did not know what had precipitated the strike. This was the position taken up by its senior counsel during his opening address before the IC. The question of whether the disagreement over May Day played a role in the strike was raised, although not strenuously pursued, in evidence. The cause

of the strike was therefore a live issue during the hearing. The LAC was accordingly not obliged to accept or to hold that the strike commenced over the recognition agreement. It was free to come to a decision over the cause of the strike, and was consequently not precluded from making the finding winch it did.

As to (2). The issue is not whether the LAC was right or wrong in coming to its conclusion. Its finding is unassailable unless there was a lack of evidence on which it could reasonably have been made, or its conclusion was one which could not reasonably have been reached (Secretary for Inland Revenue v Trust Bank of Africa Ltd 1975(2) SA 652 (A) at 666 C-D). This is a very stringent test. Having regard to,inter alia, the fact that impasse had not yet been reached in the recognition agreement negotiations; MAWU's prior lack of knowledge about the strike; the (somewhat

suspicious) inability on the part of Schreiner and the shop stewards to provide an explanation for the strike; the disagreement between Sampson and Schreiner about the May Day arrangements and the resultant threat of trouble by Schreiner, it is impossible to say that the LAC could not reasonably have come to the conclusion that the initial cause of the strike was the disagreement over May Day. If that is so, it is common cause that the strike at its inception was unlawful. The events prior to the dismissals

In the context of its judgment, the LAC's finding as to the cause of the strike must be limited to the initial cause thereof It goes without saying that once the strike went beyond May Day it could no longer have been over the May Day arrangements. The continuation of the strike must needs be attributable to some other cause. The logical conclusion is that what started

as a strike over the May Day arrangements was transformed into a strike over the recognition agreement. This metamorphosis would appear to have occurred at the latest at the May Day rally attended by the workers. From what was reported as having been said at the rally the strike at that stage was concerned only with the recognition agreement. This change was presumably brought about by MAWU in order to give a cloak of legitimacy to an unlawful strike.

For the purposes of the present appeal I shall accept, without deciding, that there may be circumstances where what commenced as an unlawful strike can be converted into a lawful one; and what was originally an illegitimate or unjustified strike (which the strike on 30 April at its commencement clearly was) can become a legitimate or justified one. This, however, did not occur in the present instance. For, in my view, the strike,

insofar as it related to the recognition agreement was neither lawful nor legitimate or justified.

The relevant portion of sec 65 (2) (b) of the Act provides:

> "No registered trade union .... shall call or take part in any strike . ... by members of the union . . . unless the majority of the members of the union . . . have voted by ballot in favour of such action."

The ballot held in February 1985 was overwhelmingly in favour of strike action. In order to satisfy the provisions of sec 65 (2) (b) (as read with sec 65 (1) (d) (i)) the ballot must be held "over the matter giving occasion for the strike". As, contrary to the provisions of sec 8(6)(b) of the Act, the ballot papers were not retained by Schreiner (as secretary of MAWU) in safe custody for the required period of three years, it is not known on what precise issue or issues the ballot was held. At the IC hearing certain ballot papers were produced which (falsely, as it transpired)

purported to be those used at the ballot. The question posed in them was:

> "Are you in favour of strike action in terms of the Labour Relations Act of 1956 because of the refusal/failure of BTR Sarmcol management to conclude a recognition agreement with MAWU."

According to Mr Makhatini, who was in charge of organizing the strike ballot, he explained to the workers that BTR refused to sign a recognition agreement. This would have been in keeping with what appears to have been MAWU's propaganda at the time, that BTR was refusing to sign a recognition agreement and to afford the workers basic union rights. This was of course misleading, for at no time had BTR refused to do so. There was never a dispute as to the signing of a recognition agreement; the dispute related to its precise terms. No effort appears to have been made at that stage to advise the workers (even in the most general terms, which may have sufficed) as to the extent or ambit of such dispute. Bearing in mind the

serious consequences strike action may have for workers and employers alike, it seems to me that the concept of a ballot requires, before workers commit themselves to a decision which could lead to strike action, that they be reasonably apprised of the key issue or issues on which they are being asked to vote. Were it otherwise, a ballot would serve no real purpose. The ballot in February 1985 therefore, in my view, fell short of the requirements for a valid ballot in terms of sec 65(2)(b) of the Act, and could accordingly not have given rise to lawful strike action. This is irrespective of the numerous technical deficiencies in relation to the ballot which appear from the evidence such as the absence of:

(a) a voters roll;

(b) control to ensure that only those who were entitled to vote did so;

(c) control to ensure that no one voted more than once;

(d) clarity or certainty with regard to whether the ballot boxes were sealed;

(e) control over unused ballot papers; and

(f) retention of the ballot papers either at all or for the prescribed period of three years.

(cf Sfeel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa (1) 1993(4) SA 190 (T) at 200 H -201 A.)

There is a further important consideration. The ballot was held almost three months before strike action was taken. In that period there had been significant developments. The parties had moved much closer to each other in the resolution of their disputes and towards the conclusion of a final

recognition agreement. In the six weeks immediately preceding the strike the parties had made greater progress in this regard than in the previous eighteen months. The issues were no longer what they had been in February. The altered circumstances were sufficiently material to have required a fresh ballot in terms of sec 65(2)(b) of the Act. At the very least fairness, both to the workers (who were being asked to put their wages and, as it later turned out, their jobs, on the line) and BTR, required a fresh ballot. This is so notwithstanding the notice referred to earlier sent by MAWU on 17 April 1985 to its members at BTR in which it highlighted certain of the outstanding differences between MAWU and BTR.

In the result the strike was never lawful, neither in respect of its commencement nor its continuation. But of even greater significance is the fact that it was not legitimate. It was not legitimate because the

circumstances at the time, objectively viewed, did not justify it. I say so for the following reasons:

1) The parties had come close to settlement during April 1985; there were prospects of further negotiation and room for further consensus; negotiations had not yet reached such a state of impasse that resort to industrial action was fair or reasonable.

2) The workers had agreed to BTR being given a reasonable time to sign MAWU's recognition agreement; BTR was given no indication that such time had elapsed; no demand had been made upon it to sign nor had it been put to terms in that regard; no notice was given of the strike.

3) The strike commenced without MAWU's knowledge or concurrence. As MAWU did not call or organize the strike it is reasonable to infer that it did not consider that strike action was appropriate at that stage.

4) The fact that the workers did not initially strike over the recognition agreement is indicative of the fact that they too did not consider that the time was ripe to strike on that ground. They were obliged to shift their stance because they must have appreciated that they were on wholly unsafe ground in striking over the May Day arrangements.

From what I have said above it is apparent that the strike was not precipitated by a stage of final deadlock having been reached. It was the strike itself that converted the delicate negotiations into impasse and brought about an end to the prospect of further negotiations and ultimate consensus between the parties, neither thereafter being prepared to move from their respective positions. In his telex to BTR on 30 April Schreiner had stated:

> "You are in possession of a recognition agreement which has been approved by our National Executive Committee which constitutes MAWU's final position and our members wish this negotiated

> document to be signed by your company prior to their returning to work.
>
> Any minor semantic changes which the company may wish to suggest would accordingly be appropriately handled immediately prior to a meeting between our parties to sign the recognition agreement."

Faced with this situation BTR considered the options open to it and ultimately decided upon the dismissal of its entire weekly work-force. The fact that there may conceivably have been other options available to BTR does not per se mean that the route that it took was unfair. The fairness of its conduct must be judged in the light of all the relevant circumstances then prevailing. It is unhelpful to speculate on what might have happened had BTR followed a different course.

The dismissals

At 15:00 on 2 May BTR issued an ultimatum to the striking workers in the following terms:

"IMPORTANT AND URGENT NOTICE TO ALL WEEKLY PAID EMPLOYEES

MAWU states that you will continue striking until the Company signs the document handed to the Company by MAWU and your Shop Stewards have confirmed this. The Company will only sign a document agreed by both parties.

Your striking and refusal to work is a material breach of your contract of employment with the Company. If you do not return to work by 4.00 p.m. today 2 May 1985 (or if you are on night shift within one hour of the commencement of your shift) the Company reserves the right to terminate your employment without further notice to you."

Notices containing the ultimatum were handed to the shop stewards

for distribution to the workers. It is common cause that the ultimatum was communicated to the workers who were gathered in the canteen at the time. The ultimatum was treated with apparent contempt by the workers who took a decision to bum the notices because they were unsigned. None of the workers complied with the ultimatum. At 20:43 BTR sent a telex to MAWU advising that it "has now taken the decision to terminate the contracts of employment as indicated in the notice and this fact will be communicated shortly to those concerned". The telex was repeated at 22:58. On the morning of 3 May the workers were advised in writing that in view of their failure to return to work, their employment with BTR was terminated with immediate effect.

Was it reasonable and fair for BTR to have dismissed the workers when it did? One can accept that the workers were genuinely concerned

about the substantial retrenchments that had taken place over the years, and were anxious to secure a recognition agreement which would best protect their interests. According to Sampson, the decision to dismiss was taken reluctantly. Asked why that was so he responded as follows:

> "Sir this was a decision with enormous implications for the Company. But quite apart from that we had always enjoyed an exceptionally good relationship with our workers of all races Sir. And to contemplate severing a work relationship with people that had loyally served you for many, many years, where in fact Sir we were probably the only company in South Africa who could claim to have a work force whose average service we thought was 25 years - it was certainly approaching that Sir - a step like this could not be taken lightly. And indeed it was not Sir. We considered our position very, very carefully. And in fact you will see from the date of the ... the time of the telex that this was well on into the night before the decision was finally taken - about 9 o'clock at night Sir."

The question arises, should BTR not have attempted to re-open negotiations before resorting to dismissal? And did not its good relationship

with its employees and their long periods of service with the company call for a less vigorous and more understanding response?

It will be recalled that Sampson's approach to Schreiner on 25 April that they meet personally to discuss outstanding differences had been rejected. However, it had been agreed that they would discuss matters telephonically. Further negotiation was therefore in the offing immediately prior to 30 April. BTR had been given a reasonable time in which to sign MAWUs draft agreement. When the strike broke out BTR was told that it was over the recognition agreement. Coming as it did without warning and without regard to the fact that deadlock had not yet been reached, the strike effectively slammed the door to further negotiations in BTR's face. And MAWU, through Schreiner, despite what had been agreed upon, somewhat opportunistically seized upon the occasion to also turn its back on further

negotiations. From BTR's perspective Schreiner had reneged on his undertaking to speak to Sampson telephonically. BTR must inevitably have been left with the impression that MAWU did not wish to negotiate further. This in fact is what was conveyed in MAWU's telex of 30 April to which I have referred. Schreiner must have appreciated that. Yet he did nothing to dispel that impression. At no stage over the critical period of 30 April to 3 May did Schreiner disclose that MAWU had not called for the strike, or what the initial cause of the strike was. Nor did he offer to revert to the position between the parties before the strike commenced. He simply left BTR under the impression that MAWU considered negotiations to be at an end. And this impression would have been fortified when at 14:42 on 2 May, before the ultimatum was given, Schreiner sent BTR a telex in which it was stated:

> "As far as the recognition agreement is concerned we regard this matter as being entirely in your hands now. We have made certain proposals in regard to same which you may choose to ignore or accept".

Having effectively discontinued negotiations, far from seeking to revive discussion MAWU simply adopted a "take it or leave it" attitude. It is apparent that MAWU was not interested in further negotiations at that stage. The purpose of the continued strike was not to drive the parties back to the negotiating table. There was no need for that - negotiations were, after all, still in prospect when the strike commenced. The obvious purpose was to put economic pressure on BTR to sign MAWU's recognition agreement. The content and tone of the telex did not provide scope for further negotiations. It signalled a clear intention on MAWU's part to force BTR to capitulate. The battle lines had been finally drawn, and power play had

reached its zenith.

In die circumstances then prevailing (and here one must consciously guard against adopting a detached, arm-chair approach divorced from the reality of what was taking place) I do not believe that it could reasonably and fairly have been expected of BTR to seek out MAWU for further negotiations. Indeed, it would have been futile for it to do so given the attitude of MAWU. At the very least BTRs decision not to do so cannot be criticised for being unrealistic and unreasonable. Nor do I think it could realistically have been expected of BTR to engage the workers directly in further negotiation or discussion over the recognition agreement. In the first place it would probably have been improper for it to have done so (cf National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992(1) SA 700 (A) at 736 A - B). Second, it would have been impractical

to negotiate with a large body of workers over the technicalities of certain provisions of a recognition agreement. And third, the mood displayed by the workers on 30 April and 2 May was clearly not conducive to any such approach.

At the May Day rally the attitude of the workers, that they would not go back to work until BTR signed the recognition agreement put forward by MAWU, was made perfectly clear. According to a newspaper report, the correctness of which was never challenged, it was said that the workers would not go back to work "even if it takes six months to convince management that they must sign the agreement". These sentiments would have been known to BTR's management at the latest on the morning of 2 May. It must have been apparent to them, as indeed it was, that BTR was faced with a potentially protracted and crippling strike with concomitant

severe monetary loss. According to Sampson's unchallenged evidence in this regard, BTR was in a parlous financial position, a situation that was being exacerbated by the strike (see the extract from his evidence quoted in the LAC judgment at 96 D - H). Competition was fierce and delays in production could have resulted in the erosion or loss of BTRs customer base. BTR was simply in no position financially to sit out what had the makings of an extended strike.

Sampson's evidence that the decision to dismiss the workers was finally taken during the evening of 2 May was never challenged. During argument we were referred to a hand-written note by Sampson dated 1 May. It was contended that it showed that the decision to dismiss had already been taken on the morning of 1 May, before it became known that the workers contemplated a prolonged strike, if necessary, an obviously

important consideration in any decision to dismiss. While the note clearly foreshadows the possibility of the dismissal of the entire workforce, it cannot in my view be construed as indicative of a final decision to dismiss having been taken at that early stage. I therefore find no reason to doubt Sampson's evidence in this regard.

Despite Sampson's evidence of the good relationship that existed between BTR. and its long-serving employees, there can be little doubt that the relationship had become bedevilled over the past two years, and particularly over the six months or so preceding 30 April. Those events are very relevant to BTR's decision to dismiss. An overtime ban was introduced from 1 November 1984, following on sporadic go-slows and work stoppages. The workers were warned that such behaviour could jeopardize their jobs because of declining output. On 11 December the workers

embarked upon an admittedly illegal strike, but returned to work after intervention by MAWU. They were specifically warned that their conduct constituted a breach of their contracts and that a similar occurrence in future would expose them to the risk of losing their employment. Shortly thereafter 111 MAWU members refused to attend to the normal refurbishing in the Engineering Division, which had been an established practice for many years. When the factory re-opened in mid-January 1985 it was immediately subjected to a total ban on overtime. On 7 March 1985 there was a go-slow which culminated in a strike from 12-15 March, because of what turned out to be a misunderstanding on the part of the workers. On 14 March BTR informed the striking workers that "should this illegal stoppage continue, we will hold the same to be a material breach of contract and therefore reserve our rights to take whatever legal action we deem appropriate". This was

followed by a notice on 15 March to the effect that "your continuing to refuse to work and to maintain normal working practices, may well result in dismissal of all employees who refuse to return to work". The workers were thus fully aware, and had received ample warning, of the possible consequences of future unlawful strike action on their part. Added to that, the workers on 30 April embarked upon a course of action which amounted to, or at the very least bordered on, industrial sabotage, while at the same time evincing a total disregard of the rights of certain other employees and of management. The workers' long service, important as it may be in relation to the issue of fairness, must be balanced against BTR's pressing need to continue its commercial activities in its interests and those of its employees generally. For without industrial success there would have been no, or fewer, job opportunities.

It is of interest to note that in the recognition agreements put forward by both MAWU and BTR there was provision that BTR would not terminate the employment of any member of MAWU for participating in unlawful industrial action for a period of 24 hours from the time of MAWU being notified of that fact. A considerably longer period than that had elapsed when the ultimatum was given to the workers on 2 May.

The ultimatum gave them an hour within which to return to work or face dismissal. Viewed in isolation the period of one hour might, and probably would, be considered inadequate. But it cannot be so viewed. It must be seen in the broader context of the previous warnings given to the workers, the events leading up to the ultimatum and the inevitable realization on the part of the workers that they were putting their jobs at risk by acting as they did. In general, the purpose of a fair ultimatum is to allow

employees sufficient time "to cool down, reflect and take a rational decision with regard to their continued employment, and for that purpose to seek advice from their trade union" (Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Other 1994(2) SA 204 (A) at 217 C- D). What is needed for a fair ultimatum will obviously vary according to the circumstances. The workers had had adequate time within which to reflect and take a rational decision concerning their future. They had firmly decided upon a deliberate, concerted course of action. They had unequivocally expressed their determination to continue with the strike until BTR signed MAWLTs recognition agreement. Their proposed conduct had the unqualified backing of MAWU. The ultimatum could not have came as a surprise to them. In my view they were given sufficient time in which finally to assess their situation. Their response was a revealing one - an

open act of defiance by burning the notices given to them. The truth of the matter is that on an objective assessment it would have made absolutely no difference from the workers' point of view had the ultimatum been given later than it was, or had they been allowed a longer period within which to return to work. The result would have been the same. Seen from BTR's prospective there was a definite need to bring matters to a head as soon as possible to enable production to proceed. Significantly, at no time contemporaneously with these events, did MAWU or the workers complain that they had been given insufficient time to respond to the ultimatum. Moreover, the ultimatum could have left the workers in no doubt as to BTR's intention; it contained a clear intimation that their employment would be terminated if they refused to return to work. And so it happened that when there was no appropriate response from either MAWU or the workers,

neither of whom made any attempt to forestall the imminent dismissals, they were dismissed.

It cannot be said that BTR unfairly sought to capitalize on the strike by seizing upon it as an opportunity and an excuse to rid itself of its workforce. This would be seeking to ascribe an improper motive to BTR, something not justified by the evidence. If that was its motive why would it have offered the workers re-employment, something it was not obliged to do? Any such suggestion is tantamount to saying that the dismissals were activated by a wish to destroy MAWU's presence in the factory and thus smacked of victimization. This notion was rejected by the LAC.

It was argued that there were other, less drastic, alternatives open to BTR; that dismissal was only justified as a last resort. I am unpersuaded that there were any satisfactory alternatives which would have met the

situation with which BTR was confronted, bearing in mind, inter alia, the need for it to resume production as soon as possible if it was to remain competitive in the prevailing poor economic climate. In any event, the fact that it is possible to point to one or other course which the employer (or both parties) might have taken, but failed to take, does not mean that a dismissal cannot be justified. The ultimate enquiry, as previously noted, is whether in all the circumstances the dismissals can be said to be unfair (Black Mountain at 449 F-G). In my view they were not. Subsequent events

There is a further factor which enters the equation when determining fairness. The dismissals were not initially intended to irrevocably terminate the employer-employee relationship. Each dismissed worker was invited to re-apply for his employment. As it subsequently turned out, those who re-

applied were re-appointed. Sadly there were relatively few who did so.

It was argued that the offer to re-employ was not genuine; that BTR was bent on selective rather than collective re-employment, itself an unfair labour practice; that BTR's real motive was to smash MAWU and expel it from the factory (a matter already alluded to). In my view these arguments are without substance. BTR's advisers had warned against selective re-employment. Sampson testified that BTR would have been prepared to take back all the workers had they re-applied. There is no evidence to gainsay that. It would seem mat Sampson had a list of "those who had misbehaved with violence or intimidation" who BTR were no doubt not anxious to re-employ. Non constat that BTR would not have been prepared to re-employ them (or have been prevailed upon by its advisers to re-employ them), and to then have taken such disciplinary action against them as may have been

called for. The proof of the pudding is in the eating, and the genuineness of BTR's intentions was never put to the test by the dismissed workers all applying for re-employment. Instead they obstinately persisted in their refusal to return to work (or re-apply for employment) until BTR signed MAWU's recognition agreement. Similar arguments advanced to the LAC were rejected by it. To the extent that this resulted in factual findings adverse to the appellants, we are bound by them.

Immediately after the dismissal of the workers BTR commenced remanning its factory. It engaged workers temporarily for a period extending over three months. Their employment was so structured as to enable BTR to accommodate the return of its dismissed workers, should that have occurred. In the event they did not return, apart from the handful who applied for re-employment, and in early August 1985 the hitherto temporary

work force was engaged permanently. Until then the workers were not precluded from returning en bloc. It was open to them to do so. They did not avail themselves of the opportunity because there was no intention on their part to do so until BTR signed MAWU's recognition agreement.

Over this period MAWU endeavoured to meet with BTR to resume negotiations over a recognition agreement, but without any tender to return to work by its dismissed members. Had MAWU been prepared to sign the draft agreement put forward by BTR (which fell within the norms for the industry at the time), and had the workers offered to return to work, the matter could have been resolved. But this never happened. As a pre-condition to further negotiations BTR required specific proposals from MAWU. None were forthcoming. As found by the LAC (at 102 A - B) "[t]he exchange of telexes demonstrated an increasing desperation on the

part of the union to meet and negotiate on the disputed items in the recognition agreement and a progressive disinterest on the part of the respondent to resume negotiations". BTR was in my view entitled to persist in its stance. In the absence of further proposals by MAWU, or the dropping of its demand that BTR sign its recognition agreement, it was a case of either it or BTR capitulating. In the end it was MAWU that capitulated, but by then it was too late for the appellants to save their jobs.

Conclusion

I have hitherto only concerned myself with matters relevant to whether the dismissal of the appellants and their resultant loss of employment was substantively fair. On a conspectus of all the evidence I am of the view that it was. At a delicate stage of prolonged negotiations, when the parties were very close to agreement, and the stage of final

deadlock had not yet been reached, the workers embarked upon an unlawful and illegitimate strike which was not justified in the circumstances. This resulted in deadlock over the recognition agreement. The prevailing circumstances were not conducive to a resolution of that deadlock. The parties became locked in an economic power struggle. BTR's response was to dismiss the striking workers. In the light of inter alia, previous industrial action (some of it unlawful) on the part of the workers, warnings of dismissal, the circumstances surrounding the strike and the manner in which the workers conducted themselves, the likely duration of the strike, economic considerations adversely affecting BTR and the lack of any response to the ultimatum, the dismissal of the workers (including the appellants) was in my view both justified and fair, notwithstanding the workers' long period of service. In regard to fairness, it was all the more

so because all the workers were invited to re-apply for their jobs. That they failed to do so was no fault of BTR. The power struggle intensified, with each party intent an compelling capitulation by the other. This was a legitimate exercise of their respective rights. Ultimately MAWU lost the battle and the appellants their employment.

In this regard the LAC said of MAWU (at 104 E - F):

> "It refused to do what was obviously in its members' interest and is therefore solely to blame that they were not re-employed. In our view it must shoulder the responsibility for the tragic consequences of its stubborn refusal to succumb to the inevitable."

While I have considerable sympathy for the appellants, for the predicament in which they found themselves and the suffering they and their families have probably had to endure, their loss of employment was in my view essentially of MAWUs and their own making and not due to an unfair

labour practice on the part of BTR.

There remains the question of whether the appellants' dismissal was procedurally unfair as it was not preceded by any form of enquiry. In my view it was not. In this regard I would associate myself with what was said by the LAC (at 100 F-H):

> "[I]t would have been pointless to hold a hearing or attempt to hold a hearing in this case. This was a concerted action on the part of over 900 employees backed by the union. They had made their demand and stated that even if it took them six months they would continue to strike until their demand was met. There was evidence of bands of armed workers roaming through the factory intimidating other workers and threatening violence. To have attempted to comply with pre-dismissal procedure by having hearings would have been futile." (Cf Vetsak at 600 J - 601 C.)

In view of the conclusion to which I have come the issue of compensation does not arise.

In the result I would dismiss the appeal and make no order as to costs,

none having been sought by the respondent.

Since preparing my judgment I have had the benefit of reading and considering the judgments of my learned brethren Olivier, Streicher and Scott (in that order). I wish to record my full agreement with the views expressed by my brother Scott.

J W SMALBERGER