REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 116/96

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **Appellant**

and

G M VINCENT METAL SECTIONS (PTY) LTD **Respondent**

Coram: SMALBERGER, HOWIE, OLIVIER, SCHUTZ JJA and MELUNSKY AJA
Heard: 1 MARCH 1999
Delivered: 26 MARCH 1999

Unfair labour practice - dismissal of striking employees after ultimatum - two-stage enquiry - whether dismissals fair - whether employer under a duty to reinstate or re-employ dismissed workers.

JUDGMENT

MELUNSKY AJA/

MELUNSKY AJA:

[1] On 25 August 1992 the respondent, a manufacturer of steel components, notified 225 hourly-paid employees of their dismissal, effectual from the previous day, following their participation in a national strike and their failure to return to work in compliance with the respondent's ultimatum dated 24 August. The ultimatum called upon the striking employees to return to work by the close of business on 24 August failing which they would "be considered as dismissed".

[2] The dismissed employees were members of a registered trade union, the National Union of Metalworkers of South Africa ("NUMSA"), the appellant. NUMSA, in its own name and on behalf of the dismissed employees, challenged the dismissals in the industrial court by means of an application in terms of s 46(9) of the Labour Relations Act, 28 of 1956 ("the LRA"). It sought relief consisting of a declaration that the dismissal of its members constituted an unfair labour practice, their reinstatement and compensation for the employees concerned. On 11 April 1995, and after a lengthy hearing, the industrial court determined that the dismissal of the individual

employees did not constitute an unfair labour practice. NUMSA appealed to the Labour Appeal Court ("the LAC") against the determination. The appeal was partially successful. The majority of the LAC - Joffe J and one assessor - held that while the dismissals amounted to an unfair labour practice, the employees were not entitled to any consequential relief, either in the form of reinstatement or compensation. The other assessor agreed that the dismissals were unfair but was of the view that the employees were entitled to compensation in an amount equal to twenty-four weeks' wages. The question of reinstatement did not arise as the respondent's business operations had been wound down to the extent that there was no activity in which it could reinstate the workers.

[3] With the leave of the LAC, NUMSA appeals to this Court against the LAC's refusal to grant compensation to the dismissed employees and the respondent cross-appeals against the decision that the dismissals constituted an unfair labour practice. Before referring to the reasoning behind the LAC's order and the arguments of counsel, it is appropriate to record some of the background facts. As this Court is generally bound by the LAC's

factual findings and the findings of the industrial court which were expressly or tacitly approved by the LAC - see *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) at 583I-584A - it is not necessary to analyse the mass of evidence that was before the industrial court in the s 46(9) proceedings. It will be sufficient, therefore, to give a summary of the more significant facts.

[4] During the first half of 1992 the respondent's employees who were members of NUMSA (including all the employees who were subsequently dismissed) engaged in a series of activities that were, in the words of Joffe J, illegal and unprocedural. In January they imposed a ban on overtime work. In February and May they took part in work stoppages which resulted in the respondent issuing them with written warnings. On 22 June the employees concerned participated in a stay-away from work which led to each employee being furnished with a final written warning, valid for twelve months and accompanied with the admonition that the next disciplinary step for similar action would be dismissal. On 3 July a notification reminded the NUMSA members that further work stoppages could

result in their dismissal as all NUMSA members were on final warning.

[5] The national strike to which I alluded earlier applied to employees in the steel and engineering industry. It resulted in considerable litigation, including an appeal to this Court in the matter of *W G Davey (Pty) Ltd v National Union of Metalworkers of South Africa*. The chronology of the events leading up to the strike are set out in the *Davey* judgment, which will be delivered simultaneously with this judgment and do not require repetition. The respondent's employees who were later dismissed participated in the strike from the day of its commencement, 3 August 1992, and their dismissals were effectual from 24 August, one day before Myburgh J's judgment in *Steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa* (2) 1993 (4) SA 196 (T).

[6] As a result of Myburgh J's judgment NUMSA called off the strike and recommended to its members that they resume work on 31 August. The vast majority of the strikers, numbering in all between 80 000 and 100 000, were accepted back by their employers. About 2 000 workers who had been dismissed during the strike were not

accepted back. Included in the latter group were the employees dismissed by the respondent. These employees returned to the respondent's premises and tendered to resume their employment on 31 August and on each subsequent day until 4 September 1992. The tenders were rejected.

[7] It becomes necessary now to mention four other factors which are of relevance in this appeal. The first concerns the respondent's financial position and the economic conditions which prevailed at the time. The respondent's main business consisted in the manufacture of steel components for the building industry. Due to a recession in the industry it sustained a significant reduction in profitability in 1990, a loss of more than R1 million in 1991 and further substantial losses in 1992, including a loss of approximately R1 million in August of that year alone. Even before the strike, the management of the respondent had expressed concern about the continued viability of the company. This was made known to shop stewards in the respondent's employ at a series of meetings between 1990 to 1992. In an effort to overcome its difficulties the respondent adopted various measures, particularly during 1992. These included

the introduction of short time in June and the retrenchment of certain salaried staff in July. On 30 July retrenchment negotiations commenced concerning hourly-paid employees and the respondent attempted, with very little success, to continue these discussions during the strike. There is, however, no evidence that the respondent engineered the dismissals in order to avoid undertaking retrenchment procedures.

[8] A second matter of some concern to the respondent was NUMSA's lack of response to numerous written communications issued by the respondent during the strike. In all, nine such communications, copies of which were faxed to NUMSA, were issued to the striking workers. These mainly dealt with the economic effect that the strike was having on the viability of the respondent's business, particularly because of the respondent's inability to fulfil orders to its customers. In addition a communication dated 20 August requested NUMSA to consider granting the respondent an exemption from the strike and to encourage its workers to return to work. Only one of these communications, concerning the question of retrenchment, elicited a response from NUMSA.

[9] The third factor, and one that was stressed more than the others by the respondent's counsel, related to the violence that occurred on two occasions - 17 and 21 August - towards casual workers who were employed by the respondent as temporary replacements for the strikers. Joffe J described the incidents of violence in the following terms:

> "On 17 August 1992 employees engaged in strike action attempted to prevent fifteen casual employees from entering respondent's premises. On 21 August 1992 a substantial body of strikers acting in a concerted fashion invaded respondent's premises. The purpose of the action was to intimidate and assault casual workers. The events of the day were testified to by Mr Baker, respondent's then director of human resources, and Mr Hall, respondent's rolling plant manager. What emerges from their evidence is that the strikers prevented casual workers from entering respondent's premises; the strikers threatened the casuals with violence and intimidated them; the strikers ran into the respondent's premises chanting and shouting and carrying sticks and other weapons; groups of strikers ran to particular parts of respondent's premises; the casual workers were flushed out of the working areas of the premises and escorted out of the premises by the strikers. Approximately 100 to 125 of the striking workers participated in this violence."

[10] There is little doubt that the violence of 21 August was both serious and planned. The weapons used by some of the employees included metal pipes, bars, heavy wooden sticks and other implements. The attack obviously filled the casual workers with terror.

At least one was violently assaulted. Mr Baker, the respondent's human resources director, too, was terrified and at one stage felt obliged to lock himself in a building.

[11] A final matter that warrants mention at this stage relates to the illegality of the strike. NUMSA's counsel conceded that the strike was illegal due to irregularities that had taken place in the holding of the strike ballot. The respondent's counsel, however, did not place much reliance on the illegality. He was, in my view, correct in this regard. The strike had been organised by a trade union, a ballot had been held and many workers in the industry had responded to NUMSA's call. It seems reasonable to assume that the vast majority of the dismissed employees probably believed that the strike was legal.

[12] It is appropriate to consider the respondent's cross-appeal before dealing with the appeal for, if the cross-appeal is upheld, it will dispose of the entire matter. In the cross-appeal there are two main issues - whether the dismissals constituted an unfair labour practice and, if they did not, whether the respondent, in fairness, was entitled to have rejected the tenders of all employees to resume working

during the week commencing on 31 August 1992. The LAC, having held that the dismissals were unfair, did not consider the second issue.

[13] I turn to consider the LAC's reasoning which resulted in the decision that the respondent, in dismissing the employees, committed an unfair labour practice. In response to the argument that the violence on 21 August was dispositive of the whole appeal, the court held that there were three main reasons why this was not so: firstly, only half of the striking workers took part in the violence; secondly, despite the violence, the respondent, in terms of the ultimatum, required the striking employees to return to work; and thirdly, the respondent failed to hold disciplinary hearings in regard to the violence. The third reason, in the opinion of the LAC, justified a finding that the dismissal of all of the strikers was procedurally unfair. In regard to those employees who did not participate in the violence, the dismissals were, in addition, substantively unfair. The court *a quo* was not prepared to infer, on the facts before it, that all of the employees in some way or another associated themselves with the violence.

[14] Two further findings of the LAC require to be stated.

The first was that the strikers were dismissed some seventy-two hours after the events of 21 August; that the strikers had been effectively barred from the respondent's premises; and that no incidents of violence occurred on or in the immediate vicinity of the premises on 24 August. The second finding related to the respondent's deteriorating financial position and the losses that it had sustained in 1992. In this regard the judgment reads:

> "During the hearing in the court *a quo* it was never clearly demonstrated by respondent how much of the loss which it sustained in August 1992 and thereafter was caused by the strike and how the respondent's viability was or could possibly be secured through the dismissal of the strikers. No evidence whatsoever was led concerning these issues. Accordingly it would appear that the decision to dismiss the strikers was not economically rational in the circumstances, and that it was consequently also not fair."

[15] While the question of the payment of compensation to the striking workers is not immediately relevant, the reasoning of the majority of the LAC for its refusal to award such compensation should be noted. According to the judgment compensation was not awarded because of the

> "unhappy history in industrial relations .... and the violence which occurred at the respondent's premises."

The court went on to say:

> "To award compensation in the face hereof would be to reward this conduct. It is argued that not to award compensation would be unfair to those workers who had not participated in the violence. It goes without saying that a hardship will be done to those workers. On the other hand all the workers are tarnished by the industrial action which occurred prior to the strike. Furthermore none of the workers indicated in the industrial court that they were not involved in the violence. In our view the issue of violence was clearly placed in the forefront of the hearing in the court *a quo* and it was incumbent upon appellant to call as witnesses those members of the striking workers who did not participate in the violence to enable them to testify in regard thereto and to establish that they were not involved therewith. For these reasons, as indicated above, we decline to award any compensation at all."

[16] It seems clear that the events of 21 August played a significant part in the respondent's decision to issue the ultimatum. This led to some debate between counsel on whether there was a duty on the respondent to identify each participant in the violence or whether the individual employees were obliged to show that they had taken no part in the attack on the casual workers. On NUMSA's behalf it was argued that the respondent was not entitled to place the blame for the violence at the door of all of the strikers as, save in respect of one employee, it had failed to identify any of them. The respondent's counsel argued, in turn, that it was unnecessary for the

employer to identify each and every individual involved, even if it was able to do so, and that there was a duty on the part of the individual employees to provide credible evidence to show that they had disassociated themselves from the violence. This they had failed to do. Both counsel referred to an apparent inconsistency in the majority judgment of the LAC. They submitted that according to the finding on the unfair labour practice aspect the court had implied that the respondent had the obligation to identify the perpetrators of the violence; while on the issue of consequential relief the majority took a contrary view, namely, that the employees were not entitled to compensation as they had failed to establish that they had not involved themselves in the violence.

[17] Interesting as the arguments may be, it is not necessary to resolve the matter. It is quite clear that the workers were dismissed for failing to heed the ultimatum and not for misconduct. In the circumstances of the case, therefore, the identity of the individuals involved in the violence was of little consequence. The LAC's finding that not all the workers participated in the violence is likewise of no particular importance in this matter. The fact is that the workers were

not dismissed for causing violence but for not resuming work when called upon to do so. As Scott JA pointed out in *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA) at 61E-F:

> "Striking as such does not amount to misconduct. There is accordingly an important distinction between dismissal for misconduct and dismissal in consequence of strike action, and it follows that considerations relevant to the former are not necessarily relevant to the latter."

[18] The issue in this case, therefore, is whether the dismissal of the striking employees for failing to comply with the ultimatum was an unfair labour practice. To decide this issue it is necessary to have regard to what was fair in all the circumstances and to apply the concept of fairness in accordance with the rules and norms that have evolved in the field of labour jurisprudence. This is not to say that a decision on fairness is a decision on a question of law in the strict sense: it is the passing of a moral judgment on a combination of findings of facts and opinions (see *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor")* 1992 (4) SA 791 (A) at 798H-I).

[19] Recent decisions of this Court which are of particular

relevance in the case of dismissals following an ultimatum during a strike are the *Vetsak* and *Black Mountain* cases. In the later decision Scott JA (at 54F-I) summed up the approach adopted in the *Vetsak* case in the following words:

> "(i) Collective bargaining is the means preferred by the Legislature for the resolution of labour disputes and the right or freedom to strike is fundamental to the system of collective bargaining.
>
> (ii) Although, therefore, an employer may be entitled at common law to dismiss a striking worker for breach of contract, such a dismissal may nonetheless constitute an unfair labour practice in terms of the Act.
>
> (iii) However, unless the dispute is resolved and the employees return to work, a point must be reached in every strike when the employer in fairness will be justified in dismissing his or her striking employees.
>
> (iv) Whether that point has been reached or not cannot be determined by reference to a fixed set of subrules; the answer will depend on a consideration of all the circumstances and facts of each particular case.
>
> (v) The ultimate determinant is fairness, by which is meant fairness to both the employer and the employee. In deciding the question of fairness the Court must necessarily apply a moral or value judgment.
>
> (vi) Once the facts are established an *onus* is not appropriate in the evaluation of issues of fairness."

[20] The respective strikes in the *Vetsak* and *Black Mountain* cases were legal while the strike in this matter was not. I have already indicated that the illegality of the strike was not a matter upon which

great reliance was placed by the respondent's counsel and that, until Myburgh J delivered his judgment on the afternoon of 25 August, most strikers probably *bona fide* believed the strike to be lawful. The fact that the strike was illegal may largely be discounted in this case, notwithstanding the recognition that an illegal strike generally constitutes serious and unacceptable misconduct by employees (see *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2) SA 204 (A) at 216E).

[21] Whether an employer commits an unfair labour practice by dismissing employees following upon an ultimatum to return to work involves a two-stage enquiry. The first stage relates to the fairness of the ultimatum, having regard, *inter alia* to the background facts giving rise to the ultimatum, the terms thereof and the time allowed for compliance. The second stage is concerned with the fairness of the actual dismissal. Factors relevant at this stage might include the reaction of the employees to the ultimatum, their efforts to comply, the reasons for non-compliance and the emergence of new facts between the issue of the ultimatum and the dismissal. It should be added that a dismissal in terms of an unreasonable ultimatum

would almost inevitably be tarnished as unfair. In order to determine whether the ultimatum and the dismissals were fair, regard has to be had to the particular circumstances of each case. It is obviously not possible to provide an exhaustive list of all factors that could be relevant in determining whether fairness prevailed.

[22] In the application of the principles to the facts of this case it is necessary to note that on NUMSA's behalf it was accepted in this Court that the striking employees had been given an adequate opportunity to respond to the ultimatum. This concession was correctly made. The ultimatum was issued to the workers at about 1.15 p.m. on 24 August and they were directed to return to work by 4.00 on the same afternoon. There was no suggestion that more time was required for consultation with NUMSA officials or for further consideration of the ultimatum. In fact Mr Ngwenya, a shop steward and one of the strikers, said in evidence that the strikers had had no intention of going back to work unless their objectives were met. There is also nothing in the evidence which suggests that the terms of the ultimatum were unclear or that they were not understood by any of the employees. It is therefore not necessary to set out the full terms of

the ultimatum. A brief summary will suffice. It referred to the respondent's financial position and to the fact that the strike had seriously affected the respondent's economic viability; it drew specific attention to the "acts of violence and intimidation which, amongst other things, deny management their right and environment to carry on with its business"; it referred to the date of commencement of the strike; and it reserved the respondent's rights to proceed with the retrenchment programme and to hold disciplinary procedures as a result of the intimidation and violence.

[23] Counsel for NUMSA stressed that the issuing of the ultimatum had to be viewed in the context of an industry-wide strike over a legitimate collective bargaining issue. The respondent, it was submitted, should have stayed its hand as most other employers had done, pending the outcome of negotiations between NUMSA and SEIFSA and, in particular, pending the decision on the court application concerning the validity of the strike. Furthermore the respondent's decision to issue the ultimatum when it did was not commercially rational: it should have realised that in the prevailing circumstances there was little likelihood that the employees would

return to work by the afternoon of 24 August. The result would be the mass dismissal of skilled and trained workers and their replacement with an inexperienced workforce, a consequence that would benefit neither the strikers nor the respondent. According to NUMSA's argument, not only was the ultimatum unfair in the light of the aforegoing, but the outright dismissal of the workers, without offers to reinstate or employ them when vacancies arose, was not the correct way to solve the problem.

[24] The arguments advanced on NUMSA's behalf have to be weighed against the position of the respondent. At the time when the ultimatum was issued the strike had already endured for three weeks and it showed no signs of coming to an end. Although the application concerning the validity of the strike was due to be heard on 25 August, there was no certainty that judgment would be delivered on that day. The financial position of the respondent, already on the decline when the strike commenced, had deteriorated significantly during August. It was unable to fulfil orders or to compete with other concerns whose workers were not on strike. What is more, the violence perpetrated against casual employees made it virtually impossible for the

respondent to carry on its business. It is of some significance that before the commencement of the strike a discussion took place between Baker and the shop stewards relating to procedures to be followed during the strike. These were embodied in a document which provided, *inter alia*, that no intimidation would be tolerated "against non-striking G Vincent employees or any other temporary employees". Baker made it clear to the shop stewards that the respondent would be obliged to engage temporary employees. To this the shop stewards raised no substantial objection. In the course of his evidence, however, Ngwenya denied that the shop stewards had ever accepted that the respondent would engage casual employees during the strike but his denial does not accord with the facts found by the industrial court. The strikers' resentment towards the casual workers did not abate and the respondent had no reason to assume that the violence and intimidation would cease. On the contrary, the shop stewards informed Baker on 17 August that the employment of casual workers would result in trouble.

[25] The LAC was not correct in regarding the lapse of 72 hours between the events of 21 August and the dismissals as

significant. The court *a quo* apparently overlooked that 21 August was a Friday, that the respondent's plant did not operate over the weekend and that the ultimatum was delivered on the following Monday, after the respondent's directors had considered its options. The LAC was also influenced by the fact that the strikers were barred from the respondent's premises after 21 August. This measure, however, was not effective. The striking workers were still able to intimidate the casual employees, which is precisely what they did on 25 August.

[26] In reaching the conclusion that the respondent's ultimatum and the dismissal of the employees was not economically rational, the LAC, moreover, had regard to the respondent's apparent inability to demonstrate how much of its loss in August and thereafter was due to the strike. It was not disputed by the respondent's counsel that if an employer bases its defence to unfair dismissal on the grounds of its operational requirements, it should normally be clear that the dismissal was rational on commercial grounds. This means nothing more than that there should be a rational connection between the employer's economic or financial position and the impugned

dismissal. In the absence of such a connection an inference of unfairness may arise; but this is far removed from placing a burden on the employer to establish the amount of its loss and a direct connection between such loss and the strike. On the facts of this case it is obvious that the respondent's ability to carry on its business in a reasonable manner had been seriously compromised by the ongoing strike and the intimidation of the replacement workers. The decision to call upon the strikers to return to work or face dismissal was, in the circumstances, a realistic attempt to end the *impasse* that had arisen. On a proper consideration of the facts it is reasonable to conclude that a point had arisen at which the respondent, in fairness, was entitled to issue the ultimatum .

[27] Two other matters may be disposed of briefly. The first is that the pre-strike disciplinary record of the NUMSA employees was correctly not relied upon by the respondent in relation to the dismissals. The second concerns the LAC's reliance on the fact that, despite the violence, the ultimatum called upon the workers to return to work. This, however, has no bearing on the question of the fairness of the ultimatum or the dismissals. The respondent, having given the

ultimatum, was prepared to comply with its terms and to accept the workers back. It did not, however, condone the violence for it intended to pursue possible charges of misconduct by means of disciplinary enquiries had the employees complied with the ultimatum.

[28] It is now necessary to consider whether the dismissals which followed the ultimatum were unfair. In this regard NUMSA's counsel relied upon the respondent's failure to afford the workers a hearing before implementing the ultimatum. This, in the view of the LAC, was also a factor that operated decisively against the respondent. That court, however, was under the misconception that the employees had been dismissed on the grounds of their misconduct during the course of a strike. The question that has to be considered, however, is whether it was unfair to dismiss the workers for their failure to comply with the ultimatum. Assuming, without deciding, that there may be situations where fairness demands that an employee should be given a hearing before dismissal pursuant to an ultimatum, this was not such a case. The employees *in casu* made no effort to comply with the ultimatum and, in fact, collectively decided to ignore

it. Under these circumstances the holding of separate hearings, or even a collective hearing, would have been a pointless and unnecessary exercise (cf. the *Vetsak* case at 600J-601C). Moreover, and apart from the practical difficulties involved in holding such hearings, disciplinary enquiries would have resulted in a substantial further delay in bringing matters to a head, thus rendering the ultimatum largely ineffective. NUMSA's contentions on this issue cannot, therefore, succeed.

[29] The question that remains is whether the respondent should nevertheless have agreed to reinstate or re-employ the workers concerned in terms of their tenders during the week commencing 31 August. On behalf of NUMSA it was argued that the respondent acted unfairly in terminating the relationship with the strikers by refusing to accept their tenders to return or, in the alternative, by failing to restore the relationship when the tender was made. In support of the contention that the employer-employee relationship still existed, NUMSA relied upon the following remarks of Van den Heever JA in *National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA*

(Pty) Ltd 1994 (3) SA 15 (A) at 25I- 26B:

> "It is therefore sufficient that the Legislature clearly had in mind that, once a particular employment relationship is established, the parties to it remain 'employee' and 'employer' as defined beyond the point of time at which the relationship would have terminated under the common law. Where it includes also former employees seeking re-employment or re-instatement, it has placed no limitation suggesting when - or why - a former employee no longer falls within the definition. What is clear is that when both parties so agree, or when equity permits, the relationship does come to an end."

[30] It will be assumed for present purposes that the relationship between the respondent and the striking employees did not come to an end in terms of the LRA despite the lawful termination of the contracts of employment at common law. What has to be decided, however, is whether, in the circumstances of this case, the respondent was obliged to reinstate or re-employ the dismissed workers. This issue seems to have been treated in a somewhat cursory fashion in the industrial court proceedings. Although in NUMSA's statement of case it was alleged that the refusal to re-employ or reinstate the employees was unfair and constituted an unfair labour practice, the only ground advanced in support of the alleged unfairness was that the respondent

> "adopted an intractable attitude after knowing that the strike had

> been called off, (within three days of the dismissal of the striking employees) in refusing to negotiate their return to work under any conditions."

The industrial court hardly touched upon this aspect in its judgment and, although the respondent's failure to reinstate or re-employ was raised in the notice of appeal to the LAC, that court did not refer to the matter at all.

[31] In this Court NUMSA's main argument was directed towards the respondent's alleged adherence to a fixed decision not to re-engage the dismissed employees, notwithstanding the end of the strike and despite the fact that the respondent was still in need of an experienced workforce. It seems to be clear that the respondent had indeed decided to abide by its previous decision to dismiss the employees but it does not follow that the respondent acted unfairly in not re-employing or reinstating them. The question of unfairness would arise only if the facts established that the adherence to its decision was irrational or was not based on reasonable grounds.

[32] It emerges quite clearly from Baker's evidence that the time had come for the respondent to make a firm decision about the re-employment of the NUMSA employees who had been on strike.

They were all on a final warning as a result of unprocedural industrial action that had occurred even before the commencement of the strike. They had taken part in the lengthy strike knowing that the respondent was in a poor financial position and that retrenchments appeared to be inevitable. They had been repeatedly warned of the consequences of the strike, they paid no attention to the ultimatum and did not request an extension of the time limit which was fixed for their return to work. (Baker, it may be observed, testified that reasonable requests for an extension would have been seriously considered by the respondent.) According to the respondent the attitude adopted by the striking employees demonstrated that they were not interested in the company's viability or even their own jobs, despite the fact that they were receiving wages well in excess of the minimum demanded by NUMSA..

[33] The respondent might perhaps have adopted a more flexible stance. When the dismissed employees tendered their services on 31 August and thereafter the respondent's workforce was still considerably depleted. It had engaged only a handful of workers to replace those who had been dismissed. However the test in these

circumstances is not whether the respondent chose the better option but whether the choice it made was irrational or unreasonable. Given the facts mentioned earlier, the respondent's approach to the matter was both rational and reasonable.

[34] NUMSA put forward the further argument that the respondent should not have taken into account the pre-strike disciplinary record of the striking workers. It was argued that their previous misconduct could be relevant only within a context in which disciplinary action for misconduct was contemplated. As indicated earlier, past misconduct is indeed irrelevant in deciding upon the fairness of the dismissals of the respondent's employees for failing to comply with the ultimatum. Different considerations apply when the re-employment of a dismissed employee is in issue: in this situation, there is no reason why an employer should be obliged to disregard an employee's disciplinary record.

[35] The result is that the respondent's refusal to reinstate or re-employ the dismissed workers was not unfair. Nor was the respondent's failure to offer the workers re-employment when vacancies arose an unfair labour practice. The question of

consequential relief to the employees, therefore, does not arise and does not have to be considered.

[36] It only remains to consider the question of costs. The record on appeal was excessively voluminous. It contained, *inter alia*, the entire record of the proceedings in terms of s 43 of the LRA, extensive portions of the records of evidence in related cases and many other documents which were either wholly or partially irrelevant to the issues on appeal. It has all too frequently been necessary to emphasize that an appeal record should not contain irrelevant and unnecessary documents (see *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk* 1984 (1) SA 680 (A) at 692F-693A; *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) at 685C-E). We were informed from the bar by both counsel that the attorneys for the parties in this matter, commendably enough, attempted to reach agreement on those parts of the record that were not necessary for the purposes of the appeal but they were unable to arrive at a consensus. It is only because of this and the fact that both counsel submitted that no special order as to costs was warranted, that the usual costs order will follow the result. Future parties may not be

as fortunate.

[37] It is appropriate that the respondent should be entitled to the costs of two counsel in respect of this appeal. The industrial court, in accordance with its usual practice, made no order in relation to the costs of the hearing before that tribunal. In the LAC each party was directed to pay its own costs on the grounds that the appeal was only partially successful. The notice of cross-appeal limited the cross-appeal to the "that part of the judgment ... which finds that the dismissal of the employees constituted an unfair labour practice". There was no cross-appeal against the costs order in the court *a quo* and no argument was addressed to us on this question. Accordingly there is no need to consider whether the costs order in the court *a quo* should be altered (see rule 5(3)(a) of the rules of this Court).

[38] In the result it is ordered:

(a) The appeal is dismissed with costs and the cross-appeal is allowed with costs;

(b) The costs in both the appeal and cross-appeal will include the costs consequent upon the employment of two counsel;

(c) The order of the LAC is substituted with the following:

"The appeal is dismissed."

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L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur:

Smalberger JA
Howie JA
Olivier JA
Schutz JA