REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 234/96

In the matter between:

W G DAVEY (PTY) LTD **Appellant**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA
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 - employer failing to take into account new facts arising after ultimatum - dismissals unfair.

JUDGMENT

MELUNSKY AJA/

MELUNSKY AJA:

[1] The appellant is a company carrying on business as a manufacturer in the engineering field. The respondent is the National Union of Metalworkers of South Africa ("NUMSA"), a trade union registered under the Labour Relations Act 28 of 1956 ("the LRA"). This appeal concerns the appellant's dismissal of nineteen employees during August 1992 following their participation in a national strike in the steel and engineering industry and their failure to comply strictly with the appellant's ultimatum that they return to work or face dismissal. All of the employees were members of NUMSA. In terms of s 46(9) of the LRA, NUMSA, on its own behalf and on behalf of the dismissed employees, applied to the industrial court for an order declaring that the dismissals constituted an unfair labour practice, payment of compensation to the employees and their reinstatement. The application was opposed by the appellant. After a lengthy hearing the court determined that the dismissals did not constitute an unfair labour practice. The determination was reversed on appeal to the Labour Appeal Court ("the LAC") on 6 December 1995. It was the unanimous view of the LAC (Nugent J and assessors) that the dismissals constituted an unfair labour practice. That court accordingly set aside the industrial court's determination, ordered the appellant to reinstate the dismissed employees with effect from 29 January 1996 (subject to certain conditions) and directed it to pay each dismissed worker as compensation an amount equivalent to his weekly wage at the date of his dismissal multiplied by twenty-six.

[2] This appeal is one of a number of cases to come before the courts as a result of the August 1992 national strike. The strike followed the collapse of annual wage negotiations which commenced at the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries, a national collective bargaining forum. The parties to the negotiations included NUMSA, other trade unions and the Steel and Engineering Industries Federation of South Africa ("SEIFSA"), a body representing various employers' organisations. The appellant is a member of an employers' organisation which in turn was represented by SEIFSA at the negotiations. On 14 May 1992 deadlock was arrived at between the trade union parties to the Industrial Council, including NUMSA, and the employer organisations, represented by SEIFSA, concerning the terms and conditions of employment in the industry. The dispute was referred to the Industrial Council but it remained unresolved.

[3] As a result NUMSA, through a committee known as the

National Strike Committee ("NSC"), called for a national strike of all of its members after holding a strike ballot. The strike commenced on 3 August 1992. Twenty-five of the appellant's hourly-paid employees, all members of NUMSA, joined the strike during the afternoon of 19 August. On 25 August, and pursuant to an application brought by SEIFSA and other applicants in the Supreme Court (Transvaal Provincial Division), Myburgh J held that it had been *prima facie* established that a number of irregularities had occurred in the holding of the strike ballot and that the provisions of ss 65(2)(b) and 8(6)(b) of the LRA had not been complied with. As a result he issued an interim interdict restraining NUMSA from calling for or taking part in the strike (*Steel and Engineering Industries Federation and Others v National Union of Metalworkers of South Africa (2)* 1993(4) SA 196 (T)).

[4] On 26 August the appellant distributed a memorandum to its striking workers calling upon them to return to work by 7 am on 28 August, failing which their services would be terminated. On the following day it fixed a notice headed "Final Ultimatum" to its main gate requiring the striking employees to return to "normal working by

7 am, Friday 28 August 1992". The employees were advised, in terms of the ultimatum, that those workers who failed to comply would be summarily dismissed. Only twelve striking workers arrived at work by the stipulated time on 28 August. The appellant considered that the remaining thirteen employees had been dismissed and one of those who arrived at about 8.30 or 9 am, Mr Amon Madi, was so informed by the appellant's factory manager, Mr Alastair Ian Wildman ("A I Wildman"). The employees who had returned to work asked A I Wildman whether two of their number would be permitted to attend a meeting that was due to be held later that day at Hunter's Field Stadium. The purpose of the meeting was to obtain advice and consider a recommendation of the NSC that the strike be called off and that all striking workers resume employment on Monday 31 August. Wildman refused permission for any of the employees to go to the meeting but six of them decided to attend and they did so. They, too, were regarded by the appellant as having been dismissed. On 31 August all of the employees reported for work but the nineteen who did not work on the previous Friday were informed that they had been dismissed. This resulted in the proceedings in the industrial

court and the subsequent appeal to the LAC. The main question for consideration in this appeal is whether the dismissals constituted an unfair labour practice. A secondary issue, raised in the appellant's heads of argument, was whether the order for reinstatement was appropriate and equitable.

[5] Before dealing with counsels' submissions it is desirable to have regard to certain factors that had a bearing on the LAC's judgment. The first concerns the strike. Counsel for the respondent did not question the correctness of the judgment of Myburgh J. For his part, counsel for the appellant did not challenge the LAC's finding that the striking workers *bona fide* believed the strike to be lawful until they were made aware of Myburgh J's decision on or shortly after 25August.

[6] A second matter that should be mentioned concerns two telephone calls that Mr Lucky Skosana, the local NUMSA branch chairman, made to A I Wildman. Two of the striking workers, Mr Jack Ngozo and Mr Paulus Mbango, consulted Skosana on the morning of 27 August in connection with the appellant's memorandum of the previous day. Skosana telephoned A I Wildman in the morning and again in the afternoon of 27 August with a view to obtaining an extension of the deadline for the employees' return to work until Monday 31 August. Skosana was not available to give evidence but Ngoza was in his presence when both telephone calls were made and he testified about Skosana's requests and Wildman's responses as conveyed to him by Skosana. There are disputes between Ngoza and Wildman as to what was said on each occasion. All of these were not resolved by the LAC but the industrial court dealt with the conflicting

versions on the basis that NUMSA had an "evidentiary burden" to establish its version of the disputed issues on a balance of probabilities. It is not necessary, in the circumstances of this case, to consider whether the industrial court's approach was the correct one. Nor is it necessary to attempt to resolve all of the matters in dispute. What is significant is the findings made by the LAC, which are generally binding on this Court - see *National Union of Metalworkers of South Africa v Vetsak Co-operative Limited and Others* 1996(4) SA 577 (A) at 583I-584A. One of these findings was that A I Wildman refused to extend the deadline to 31 August without asking the reason for the request. A further factual finding was that during the course of the second telephone conversation Skosana said that the workers would return to work the following morning (28 August) but asked that at least some of them be allowed to attend the meeting at Hunter's Field Stadium to consider the recommendation of the NSC. Wildman responded that Skosana's request would be discussed when they returned.

[7] NUMSA's response to the interdict issued by Myburgh J is not in dispute. A meeting of the NSC had previously been arranged for Thursday 27 August. After NUMSA received the news of the interdict during the afternoon of Tuesday 25 August, consideration was given to advancing the NSC meeting to the following day but it was decided that it was not practical to do so. At the meeting of 27 August the NSC decided to recommend to NUMSA members that they return to work on Monday 31 August. The recommendations of the NSC were debated and adopted by local NUMSA structures on Friday 28 August and subsequent days. This led to approximately 80 000 to a 100 000 workers returning to their employment on 31 August

and all, save for about 2 000, including the nineteen employees of the appellant, were accepted back by their employers.

[8] It is clear from the evidence of A I Wildman and his brother Mr Nigel Wildman (the appellant's managing director) that the appellant had decided to dismiss all workers who did not strictly comply with the ultimatum, a decision that was taken even before the ultimatum was issued. What is more the appellant was not prepared to accept any excuse for non-compliance on the part of its employees or to consider any extension of the deadline. Indeed, according to A I Wildman's evidence (which was accepted on this point by the LAC), he refused Skosana's request for an extension out of hand and without knowing why it was required.

[9] What was the appellant's motivation in adopting such an uncompromising stand? The reasons given for the appellant's refusal to extend the date fixed for the return are similar to those given for its refusal to accept the employees back on 31 August, namely, that the workers went on strike without notice, that they defied the court's order which declared the strike to be illegal, that the employees were therefore unreliable and that the appellant wanted a "disciplined" and not an unreliable workforce. Nigel Wildman put it in the following terms:

> "I decided that I wanted to have a stable reliable workforce. These people had gone on strike without notifying anybody about it as to why. They had given us no forewarning. They defied the Supreme Court order. They defied our memorandums and ultimatums to them. A deadline to me is a deadline and I had given more than fair warning and I thought that in the event that they don't comply with this deadline, then I am going to seek out a reliable workforce. In the longer term, it will - it would be a better bet for the company."

When asked in what sense were the striking workers not a reliable and stable workforce, Nigel Wildman responded:

> "Well, they were on strike when they should have been back at work."

[10] There is no doubt that the appellant was severely affected by the strike. There was a recession in the industry at the time. Even before the strike the appellant was having difficulty in obtaining orders and it had been obliged to adopt various measures to ensure its continued viability. It was a comparatively small company and production came to a virtual standstill with the strike of twenty-six of its thirty-three hourly- paid workers. The manner in which it conducted business, which was not to retain large stocks on hand, rendered it particularly vulnerable to strikes. The result was that it lost orders and was unable to complete a large contract timeously which led to the loss of a valuable customer. In order to overcome the difficulties, it commenced employing casual workers to replace the strikers during the week commencing 24 August. In all it eventually engaged about ten other workers who, in due course, replaced the striking employees as a permanent work force. The replacement workers were, however, inexperienced and unskilled and it was only after about three weeks of training that they were able to perform work to the same standard as that previously performed by the dismissed employees.

[11] The approach to be adopted by this Court in dealing with an appeal from a labour appeal court is to determine whether, on the facts found by it, the court *a quo* made the correct decision and order (see *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union* 1995(1) SA 742 (A) at 751I-J). With that in mind I turn to consider the rationale behind the LAC's decision and order. That court held that the illegality of the strike was, in the circumstances of this case, not a factor of great significance as the employees concerned believed that all the correct procedures had been followed and that the strike was not prohibited. Although the position changed after Myburgh J's ruling, the LAC considered that "any reasonable employer in this country" would have appreciated that his employees would look to their union for guidance on the implications of the court order before returning to work and that this is precisely what occurred in the instant case. Therefore the appellant should not necessarily have expected an immediate return to work. The LAC assumed, however, that while the appellant might have been justified in issuing the ultimatum when it did, it was not justified in adopting an inflexible attitude thereafter; that it should have been aware that Skosana sought

to extend the deadline to enable employees to consider whether to heed the recommendation to return to work; and that the meeting at Hunter's Field Stadium on Friday 28 August had been called for that purpose. In the result, the LAC held that the appellant should have awaited the outcome of the meeting before implementing the ultimatum. On that ground the dismissals constituted an unfair labour practice.

[12] In this Court counsel for the appellant accepted that the fairness of the ultimatum and the fairness of the dismissal had to be judged separately. As far as the former was concerned, he argued that the appellant was justified in requiring the employees to return to work on 28 August having regard to the appellant's desperate financial plight, the sudden withdrawal of labour by the strikers and the fact that the strike had been declared illegal. On the facts of this case these arguments may not be as compelling as they appear to be, viewed in the light of a nation-wide strike, ongoing contact between NUMSA and SEIFSA and the prospect, after Myburgh J's judgment, that NUMSA might try to oversee an orderly return to work within a reasonable time. Nevertheless I will assume, as the LAC did, that the

ultimatum was fair at the time when it was issued. It should be added that there is no suggestion that the ultimatum was not understood or that it did not come to the attention of the employees concerned. Nor did NUMSA contend that the employees had insufficient time to consider the implications of the ultimatum or to comply with its terms.

[13] The crucial question is whether the dismissals pursuant to a fair ultimatum were also fair. In the *Vetsak* case, Smalberger JA observed at 589D:

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

Fairness is indeed an elusive concept in the context in which it is used in unfair dismissal cases: but conduct that is unfair can often be recognised when it is sought to apply the concept to the facts of the case. On the appellant's behalf it was submitted that the test of fairness had to be judged in relation to the employees' failure to comply with the ultimatum and that the LAC had erred in focussing the enquiry on whether the appellant should have extended the ultimatum to 31 August. This submission seems to lose sight of the need to consider fairness from the viewpoint of both parties to a

dispute, a matter which is fundamental in seeking to achieve one of the objectives of the LRA - the preservation of labour peace (see the *Vetsak* case at 593G-I).

[14] The appellant's counsel placed particular stress on Skosana's statement to A I Wildman that the employees would return to work on 28 August in compliance with the ultimatum. This, it was argued, amounted to an undertaking on which the appellant was entitled to rely. It was therefore reasonable for the employer to expect that the workers would resume employment on the morning of 28 August and their failure to do so entitled the appellant to dismiss them. Consequently, and according to the argument, there was no need for the appellant to have allowed the employees an extension until 31 August for their return to work. In any event there was, at the time, no certainty that the employees would return on 31 August. The appellant, it was submitted, was justified in deciding to tolerate no further disruption to its business.

[15] Before considering the validity of these arguments, some of the matters raised require clarification. The first is that A I Wildman testified that not only did Skosana tell him that the workers would be returning on the Friday but that he (Skosana) had already contacted them in that regard. Ngoza denied this. He said that he made contact with some of the workers only later that evening, an account which seems to accord with the probabilities, as it is unlikely that Skosana would have told the workers to resume employment on the following day while he was still attempting to obtain an extension of the deadline. Although the LAC made no specific finding on which version was to be preferred, it referred to Ngoza's account with apparent approval and it is reasonable to assume that his account was accepted by the court *a quo*.

[16] A second aspect, and perhaps a more important one, is that Skosana did not give A I Wildman an unqualified assurance that all of the workers would report for duty in terms of the ultimatum as he asked Wildman to release some of them to attend the meeting.

Wildman's response, that the matter would be discussed on the following morning, confirms that there remained a matter which still required some negotiation. There is a dispute between Ngoza and Wildman on precisely what occurred on the morning of 28 August. What is clear, however, is that Wildman refused permission for any employees to attend the meeting without, it seems, any further negotiation or even discussion.

[17] On Thursday evening, Dr Fanaroff, who was then NUMSA's national secretary, appeared on the national television on the 8 pm news and relayed the NSC's recommendation that all employees should return to work on 31 August. This recommendation was also widely reported in the print media on the following morning. A I Wildman conceded that he was aware of the NSC's recommendation on the evening of 27 August. Moreover the LAC held that on the Friday morning "he must ... have been aware" that the purpose of the meeting at Hunter's Field Stadium was to consider the recommendation and that that was the reason why Skosana asked him, on the previous day, to extend the deadline. It should have been obvious to the appellant on Thursday 27 August that there was a reasonable likelihood that the striking employees would return to work on the following Monday. In fact nineteen did return on that day and it was then that at least twelve of them were told of their dismissals for the first time.

[18] The appellant's factory was closed over the weekend and what has to be decided, therefore, is whether, on the facts of this case, the appellant should have stayed its hand for one day. It must be emphasized that a dismissal will not necessarily be fair merely because a fair ultimatum is not complied with. Dismissal is a drastic

step and, as has so often been said, a "course of last resort" (see *National Union of Mineworkers and Others v Free State Consolidated Gold Mine (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine* 1996(1) SA 422 (A) at 448H-I). It is for this reason that an employer, before implementing an ultimatum, should give careful consideration, *inter alia*, to new facts that may have arisen or circumstances that may have developed since the issue of the ultimatum. It should also consider how the employees responded to the call to return to work. The need for an employer to act with a measure of restraint may even be more important in the case of mass dismissals where the job security of a large number of workers may be at stake.

[19] The appellant's attitude in this case was inflexible and intransigent. It did not even consider extending the deadline, despite significant facts that had occurred since the ultimatum was issued, namely, that NUMSA (through the NSC) had recommended a return to work on 31 August, that local structures were to consider this and that the meeting at Hunter's Field Stadium on 28 August was called to discuss this very recommendation. The appellant had decided, when

the ultimatum was issued, that the deadline was "cast in stone", to employ the expression used by both A I and Nigel Wildman and that any employee who failed to comply with it would be dismissed. This rigid approach was exemplified in the summary dismissal of Amon Madi on 28 August. It would seem that the appellant did not even ask the reason for Madi's late arrival at work before dismissing him.

[20] As a result of the intractable attitude adopted by the appellant, the failure to comply with the ultimatum inexorably led to dismissals. The appellant had closed its mind to the developments that had taken place since the ultimatum was issued. It was not prepared, under any circumstances, to postpone the time for the return to work. As Nigel Wildman put it: "come what may, we wouldn't extend the deadline". In the circumstances of this matter there were no compelling reasons why the appellant could not have held back for one working day and its refusal to do so was not based on rational grounds. On the contrary it insisted on the deadline with the apparent purpose of ensuring that it would have a pliant workforce in the future. This was not a fair way of dealing with a labour dispute. It therefore follows that the LAC's decision on this point should be upheld.

[21] Although it was contended in the appellant's heads of argument that the court *a quo* should not have ordered a reinstatement of the dismissed employees, this aspect, quite correctly, was not seriously pursued at the hearing of the appeal. There is no reason, therefore, for us to interfere with any part of the order of the LAC save to add a paragraph to make provision for a deduction from the amounts payable to the employees of remuneration earned by them

through employment from the date of their dismissal until the date on which they might recommence employment with the appellant. This provision was agreed upon and formulated by both counsel and we are grateful to them for doing so.

[22] The question of costs remains. In the appeal of *National Union of Metalworkers of South Africa v G M Vincent Metals Sections (Pty) Ltd* (case 116/96), I drew attention to the fact that many irrelevant documents had been included in the record on appeal. In this matter, too, the record was unnecessarily burdened with a great deal of material that was entirely unnecessary. The explanation given by counsel for the inclusion of these documents was the same as that put forward in the *Vincent* case, namely that the parties had made a *bona fide* attempt to reach agreement on the record but had been unsuccessful in doing so. Although this explanation will be accepted for the purposes of the present appeal, it is necessary to emphasize that it is not sufficient for the attorneys for the parties merely to attempt to reach agreement on what parts of the record should be excluded. It is likely that instances similar to this will, in the future, be viewed in a more serious light and the offending parties, or their attorneys, will be subjected to punitive costs awards.

[23] Counsel for NUMSA requested the costs of two counsel to the extent that two counsel had been employed for the purposes of the appeal. NUMSA decided, reasonably enough, that one counsel would suffice for the purpose of arguing the appeal and there seems to be no reason why two counsel were required for any preliminary stages.

[24] In the result it is ordered:

(1) The appeal is dismissed with costs;
(2) The date 12 April 1999 will be substituted for the date 12

January 1996 in paragraph 3 of the order of the LAC and the date 3 May 1999 will be substituted for the date 29 January 1996 in paragraphs 3, 5 and 7 of the said order.

(3) The order of the LAC is amended by the inclusion of the following paragraph:

"10.1 Any amounts owing by the respondent to the individual workers pursuant to this order of retrospective reinstatement will be subject to deduction therefrom of all remuneration that has been earned by such worker through employment from the date of dismissal until the date of recommencement of employment with the respondent in terms of this order.

10.2 In the event of a dispute arising between the parties concerning whether, and if so what amount of remuneration has been earned by any worker during the applicable period, such dispute shall be referred to arbitration under the auspices of the Independent Mediation Service of South Africa ('IMMSA') in terms of the Arbitration Act 42 of 1965 for a determination of the amount of remuneration earned during the period in question by the worker concerned.

10.3 In the event of submission of the aforesaid dispute to arbitration, the parties will attempt to agree upon the arbitrator and the formulation of the arbitrator's terms of reference.

10.4 Should the parties fail to reach agreement upon the arbitrator then the director of IMMSA shall appoint an arbitrator on the parties' behalf."

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L S MELUNSKY
ACTING JUDGE OF APPEAL

Concur:

Smalberger JA
Howie JA

Olivier JA
Schutz JA