54/98

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 443/96

In the matter between:

Joseph Dube and 76 Others Appellant

and

Nasionale Sweisware (Pty) Ltd Respondent

CORAM: **Howie, Scott, Zulman, Streicher JJA et Melunsky AJA**

Date of Hearing: **14 May 1998**

Date of Judgment: **29 May 1998**

JUDGMENT

The seventy-seven appellants were all employed by the respondent. During September and October 1992 they were dismissed. They applied to the Industrial Court (IC) for relief in terms of s 46 (9) of the Labour Relations Act 28 of 1956 (the Act). The IC found that their dismissal was substantively and procedurally unfair and constituted an unfair labour practice. The IC ordered the reinstatement of certain of the appellants and awarded compensation of R3 000,00 each to the remaining appellants upon the basis that the conduct of those reinstated was of a less serious nature than those who were awarded compensation. The respondent appealed to the Labour Appeal Court (LAC). The appellants who had not been reinstated cross-appealed against the award which was made, submitting that all the appellants should have been reinstated. The matter was heard by Nugent J and two assessors. By a majority the LAC dismissed the cross-appeal, upheld the appeal and changed the order of the IC to one dismissing the application of all the appellants. The dissenting assessor delivered a separate judgment. The appellants now appeal to this Court in terms of s 17 C of the Act.

The appeal raises two broad issues. The first is whether the dismissals of the appellants constituted an unfair labour practice. Secondly, if it did, whether the reinstatement of all appellants is the appropriate remedy and if not what relief should be granted to them.

The appellants attack the finding of the LAC on two essential grounds, namely:-

1. On a proper assessment of the facts the method adopted by the respondent in imposing discipline, "in terms of its own logic", should not have resulted in dismissals. The "own logic" to which the appellants refer is an obvious reference to a disciplinary procedure laid down by the respondent itself. In essence this provides for a progressive series of warnings before dismissal takes place. In any event, so it is contended, the respondent ought to have shown a greater deal of sensitivity and circumspection and "a more constructive approach" with a view to resolving the difficulties which had arisen in the relationship with its workforce and in maintaining discipline, and that in the circumstances resorting to the disciplinary action that resulted in dismissal was not fair.

2. Notwithstanding the fact that some of the appellants had participated in political activities during working hours without the blessing of their employer, and some had engaged in "unprocedural strike action" there is no reason to refuse reinstatement to them. In this latter regard the appellants draw attention to the fact that employees who participated in similar conduct were not dismissed.

The appellants contend that the LAC should have allowed the cross-appeal and should have ordered that the order of the IC be amended so as to reinstate all the appellants. The appellants do not ask that the reinstatement order be effective before the date of the IC order.

The appellants' in their heads of argument point to the following well-settled principles of labour law concerning dismissal.

1. Dismissal being the "ultimate sanction" is "a course of last resort" *(National Union of Mine Workers v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine* 1996 (1) SA 422 (A) at 448 H - I and *Plaschem (Pty) Ltd v CWIU* (1993) 14 ILJ 1000 (LAC).)
2. The doctrine of election is of application in the employment context. This provides that a party to a contract cannot rely on a breach by the other party, after he has, with knowledge of the breach, elected to enforce the contract (*Administrator of the Orange Free State, and Others v Mokopanele and Another* 1990 (3) SA 780 (A).)
3. The "parity principle" requires that like cases should be treated alike, so that if two employees have committed much the same wrong, it would be unfair

to dismiss the one and not the other (*National Union of Metalworkers and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264 A - C).

Nevertheless, the following equally well established principles, should also, be borne in mind:

1. In considering an appeal from the LAC in terms of s 17 C (1) of the Act:
   1.1. this Court is bound by the court *a quo's* actual findings of fact and any factual findings of the IC which have either been expressly or tacitly approved by the LAC;
   1.2. however, this Court may also have regard to facts which were common cause and which were not alluded to in the judgment of the LAC;
   1.3. where the LAC has failed to make factual findings with regard to relevant issues this Court is at liberty to make such findings provided that they are not inconsistent with the findings, express or implied, of the LAC.

(*National Union of Metalworkers of SA v Vetsak Co-Operative Ltd and Others* 1996 (4) SA 577 (A) at 583 J - 584 C ("*Vetsak*"); *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2)

SA 204 (A) at 214 E - G).

2. When applying the definition of an "unfair labour practice" in the Act, the LAC and this Court are expressly enjoined to have regard not only to law but also to fairness. Consequently, the enquiry involves a moral or value judgment on a combination of findings of fact and opinion (*Media Workers Association of SA and Others v Press Corporation of South Africa Ltd* ('Perskor') 1992 (4) SA 791 (A) at 798 H-I, 802 H and *Vetsak (supra)* at 592 B - D). The IC and the LAC and indeed this Court are required to "apply both law and equity in the broad and general sense of the word" (per Nicholas AJA in *National Union of Metalworkers and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1263).

3. The primary enquiry in each case is whether, on a consideration of all the relevant facts in the particular matter, it can be fairly said that the conduct of the employee has led to a breakdown in the relationship between employer and employee so that in all the circumstances, viewed objectively, the employer cannot reasonably be expected to continue employing the employee given the misconduct established. (*Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and Another* (1994) 15 ILJ 778 (LAC) at 781 A - B

4. In order that a balanced and equitable assessment may be made fairness

> requires the matter to be viewed both from the point view of the employer and from the point of view of the employee (*Vetsak (supra)* at p 589 C- D.)

The respondent's disciplinary provisions include a Disciplinary Code ("the Code"). The Code provides, *inter alia*, as follows:-

> "It is important that all employees are aware of what behaviour is not acceptable to the company. Poor performance and offences of a minor nature are dealt with in the terms of the standard disciplining procedure. However, certain offences are regarded as sufficiently serious to warrant immediate dismissal. Examples of these offences are given below. These examples are not exhaustive, and serve only as a guideline."

Then follows a list of offences which include "refusal to carry out lawful and reasonable instructions" and "participation in unlawful industrial action".

The "standard disciplining procedure" mentioned in the above-quoted extract constitutes a separate disciplinary process and provides for five progressive disciplinary steps which may be taken against workers, namely, counselling; a verbal warning; a written warning; a final written warning; and finally dismissal after a formal enquiry. I agree with the finding of Nugent J that the appellant was not always obliged to exhaust each of these steps before resorting to dismissal. This much seems to me to be clear from the quoted extract and also from another paragraph of the Code which provides as follows:-

> "The Disciplinary Code appended to this procedure serves as a guide to management and employees in the fair and consistent application of disciplinary action but does not remove the right and responsibility of management to use its discretion in applying disciplinary action, after considering all relevant facts relating to the employee's performance or behaviour."

In addition there is the following description of the circumstances in which the final step in the standard disciplining procedure may be resorted to-

> "A step 5 formal enquiry may be held if:
> 1.An employee again fails to meet the acceptable standards of performance or behaviour as specified in a final warning, and during the period in which the final written warning is valid, or
> 2.If an employee is alleged to have committed a serious offence as specified in the Disciplinary Code."

The aforegoing provisions support the view that the Code and the standard procedure contain discretionary and not obligatory provisions. (*Changula v Bell Equipment* 1992 (13) ILJ 101 (LAC) at 109 B.)

In terms of the Code an employee is entitled to appeal against any formal disciplinary action which is taken against him by the employer.

To arrive at a proper decision as to whether it can be said that the labour practice of dismissing the appellants was an unfair one it is necessary to examine the facts

which were common cause and the factual findings of the LAC which led to the ultimate dismissal of the appellants in the light of all of the aforementioned well established principles as also the respondent's disciplinary provisions. In this regard there were six incidents of collective action over a period of approximately four months. They were:-

1. Incident one - 30 April 1992.

   During April 1992 negotiations were taking place between the appellant and the trade union of which the appellants were members in relation to wages and conditions of employment. The senior shop steward (the first appellant), Mr Dube, arranged with Mr Kaljee, the respondent's technical manager, that certain demands would be conveyed to the respondent's management before the start of the working day on 30 April 1992. The morning shift normally commenced work at 07h00. By the time work was due to commence on that day, Dube had not arrived. Instead of commencing work, the workers staged a demonstration in front of the company's offices. Members of the respondents night shift were also present at the time. At about 07h10 Dube arrived and read out the workers demands to the assembled gathering. A memorandum containing the demands was then handed over to management. The workers thereafter

dispersed and commenced work at about 07h30.

On 6 May 1992 and as a result of the work stoppage on 30 April the respondent issued a general brief to all workers headed "Illegal Strike Action". The brief did not accuse any particular worker of misconduct. It referred to the memorandum presented to management on 30 April 1992 and the fact that workers had engaged in an "unauthorised work stoppage". Employees were reminded that management took a very serious view of their "unauthorised and illegal actions". Employees who participated in such behaviour were warned that should this happen again "management will have no option but to take formal disciplinary action against the participants and will also consider implementing steps against the Union".

2. Incident two - 3 July 1992.

An agreement was duly reached between the appellant and the union regarding wages and conditions of employment for the forthcoming year. The agreement was due to be implemented with effect from 1 July 1992. However, by 3 July 1992 it had not yet been signed by the union. On the night of 2 July 1992 the respondent issued a brief to night shift workers advising them that the agreement could not be implemented until the agreement was signed. This was conveyed to the day shift the following morning. A group of workers from both shifts then staged a demonstration

in the factory to voice their dissatisfaction with the state of affairs. An ultimatum was issued by management, calling upon the workers to return to work by 09h30. Arrangements were made for Dube to travel to Pretoria to have the agreement signed by the union. Shortly after 09h30 the workers returned to work.

In a pre-trial minute the appellants acknowledged that the conduct of the workers on 3 July 1992 constituted illegal strike action.

On 9 July 1992 the respondent issued written warnings to all workers who had participated in the first and second incidents. Unlike the brief addressed generally to all workers on 6 May 1992, specific accusations were made against specific persons.

In the warning individual employees were advised, *inter alia*, that;

1. he had been identified as "a participant" in an "unlawful strike and demonstrations on the company premises between approximately 07h00 and 10h00" on 3 July 1992;
2. the action was in breach of the employee's contract of employment;
3. he had been informed by management on 11 May that "management took a serious view of "such unlawful and unauthorised action" on his part and that if he "participated in such actions in the future" he

would "be subject to formal disciplinary steps";

4. should he engage in similar or related behaviour within 12 months from the date of this warning, more serious disciplinary action may be taken against him;

5. he had a right to appeal against the warning;

6. should he elect to appeal "a written appeal detailing your grounds of appeal" was to be submitted "to your manager within three working days".

3. Incident three - 5 August 1992.

On 23 July 1992 Dube handed Kaljee a memorandum from Cosatu, calling upon employers to take various steps aimed at contributing to the downfall of the then government and advising in addition that "Cosatu has decided to embark on various forms of action including a general strike to pressurise for the speedy transition to democracy and peace. If you take disciplinary action against members who participate in action, it will place you firmly in the camp of those opposed to democracy".

The form which the action was to take was subsequently publicised in advertisements issued in the name of Cosatu, the ANC and the SACP. The agenda for the week read as follows:-

"3/4 August - General strike.

5 August - Occupy the cities.
6/7 August - Hold factory demonstrations and occupations, marches, pickets, sit-ins, occupation of government buildings."

Shortly prior to the commencement of the proposed mass action, discussions were held between the shop stewards and the respondent. The respondent advised the shop stewards that it would adhere to its policy of not paying workers during the stay away which was planned for 3 and 4 August, but would take no disciplinary steps against them. It was agreed that the workers would resume work on 5 August at 07h00.

Certain of the appellants participated in a march on 5 August 1992. In doing so they defied management because they had been expressly denied permission by management to take part in the march. Other employees stopped work at 09h00 and joined the march and simply did not return to work that day. Final written warnings were issued to those who had participated in the first three incidents. Save for inclusion of the word "final", these warnings read the same as the warning referred to above.

4. Incident four - 21 August 1992.

On 6 August 1992, anticipating that factory demonstrations and occupations might occur in terms of the Cosatu programme described above, the appellant refused entry to its premises to workers who arrived for work that day unless they gave a written undertaking not to participate in mass action

on the premises. They were also warned that those who failed to attend work would be regarded as being absent without leave and would be disciplined.

Nugent J found that at least most of the union members refused to sign the undertaking and were refused entry to the respondent's premises. This was repeated the following day. All of this notwithstanding, the respondent took no disciplinary action in consequence of the refusal to work on 6 and 7 August, but on 10 August issued formal warnings to all workers who had deserted their posts on 5 August. Those who had already received written warnings were given final written warnings whilst the remainder were given written warnings. They were also all told that they were entitled to appeal against the warnings.

On 13 August 1992 the shop stewards noted an appeal on behalf of all workers who had received one or more warnings thus far. They alleged, *inter alia*, that the workers concerned had not been given a hearing before the warnings had been issued and they demanded that all the workers be given a joint hearing.

On 18 August 1992 the shop stewards presented a further memorandum to management demanding that the warnings which had been issued thus far either be withdrawn, or discussed at a meeting which had been scheduled to take place on 20 August to deal with other matters. By then another march was being planned by the Brits local branch of Cosatu, to be held on 21 August 1992.

On 18 August 1992 management prepared what it described as a "Summary Of Management's Thinking In Relation To Mass Action and Absence from Work as at 18 August 1992". Amongst other matters, the document raises the following issues:-

1. the company's repeated policy not to participate in "any form of political activity";
2. the practice of regarding formal publicised stayaways on a "no work no pay" basis and the right of the company to take disciplinary action "in cases of unauthorised absence from work";
3. a "recent development involving employees reporting for work and then absenting themselves without permission in order to support political activities and/or unlawful industrial action";
4. the view of the company that their aforementioned conduct

constituted "a work stoppage and as such is unprocedural, unlawful or could possibly constitute an unfair labour practice" and that the company "sees this in a serious light and will therefore exercise its right to take action against participants in any such situation";

5. the fact that employees who have requested the company to grant them time off to allow them to participate in activities outside the company will be allowed to apply for individual leave for any personal reason and such leave may be granted "at the discretion of the line manager at a time other than the shut down only if the work load permits the absence of the individual concerned"; that the aforegoing will not apply to "a general stayaway situation as it is the management's responsibility to keep the factory running at all times";

6. the fact that during "these difficult, political and economic times we all need to do all we can to ensure the survival of our business".

The memorandum was conveyed to and discussed with Dube. The view contained therein was also conveyed to the shop stewards at a meeting which took place on 20 August 1992. At this meeting a march was planned for the following day.

On 21 August 1992 there was another march. After the employees clocked

in on the day they then clocked out at 09h30 to join the march which was in obvious defiance of the respondents clear instructions.

5. Incident five - 24 August 1992.

On 24 August 1992 the respondent again issued "written warnings" and "final warnings", where appropriate, to workers who had left the premises on 21 August 1992 (incident four). Those workers who had already received "final warnings" for earlier transgressions were given notice to attend disciplinary enquiries. Two of them were suspended on full pay pending the outcome of the enquiries. This prompted the remaining workers to stop work. They gathered in the canteen. An ultimatum was issued by the respondent calling upon them to return to work by 09h00. This was ignored. Instead it was countered by the presentation of a demand that all warnings which had been issued should be withdrawn; that workers should be paid for the 6 and 7 August 1992 when they had been refused entry to the premises and that the two suspended workers should be permitted to return to work. The respondent's response was that further disciplinary action would follow as a result of the stoppage on that day. During the course of the day the union sent a telefax to the respondent, alleging that it was acting unfairly and demanding a right to represent the workers at any disciplinary enquiry. A meeting between management and the union was

held at 16h00. This brought the stoppage to an end, which had lasted for the whole day and constituted an illegal work stoppage. It was agreed that workers would all sign a document reading as follows:-

> "I undertake not to participate in any industrial action with regard to the following issues until the company disciplinary procedures are exhausted:
> Disciplinary warnings in respect of 5 August 1992.
> Any appeals against such warnings.
> A shutout/lockout of 6 and 7 August 1992.
> Union representation in these disciplinary enquiries.
>
> I understand that by signing this document I do not forfeit any of my rights as set out in the Labour Relations Act or the National Industrial Council for the Iron Steel Engineering Metallurgical Industry."

The respondent again issued warnings, or notices to attend disciplinary enquiries, as the case may be, in consequence of the stoppage which had taken place that day.

6. Incident six - 9 September 1992.

The respondent thereafter commenced holding the relevant enquiries. On 8 September 1992 two workers were dismissed. On the following day employees again refused to work and gathered in the canteen. Again an ultimatum was issued by the respondent which went unheeded. The workers demanded that the two employees referred to above be reinstated; that all enquiries be suspended; that a certain member of management be dismissed;

and that foremen be disciplined. The response of the respondent was to issue a further ultimatum. This provoked the issuing of two more demands which were followed by a further ultimatum. The union organiser was called in but he left again after talking to some of the employees. In the course of the afternoon Dube was handed a memorandum from management reading as follows:-

> "We wish to inform striking employees that the disciplinary enquiries will continue in relation to alleged past misconduct and disciplinary action will be instituted in respect of this morning's illegal strike action and the occupation of the canteen.
> We refer to past ultimatums and repeat that the illegally striking employees are required to return to work immediately.
>
> Should any striking employee not have returned to work by the start of their next shift on 10 September 1992, the company will dismiss the employees."

This final ultimatum must be read in the light of earlier ultimatums given on the same day. Nugent J, in my view, correctly dealt with this aspect of the final ultimatum in these terms:-

> "Furthermore the ultimatum which was issued to workers on 9 September did not imply that if they returned to work the appellant would refrain from dismissing them. On the contrary, the workers were expressly told that disciplinary action was to be instituted in respect of that morning's illegal strike and the occupation of the canteen. The appellant clearly reserved its right to take whatever action was appropriate even

> if the workers adhered to the ultimatum. The principle which was applied in *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A) (see esp. At 787 E - F) seems to me to have no application in the present case."

The work stoppage on 9 September 1992 in which certain of the appellants again participated was an admittedly illegal strike which lasted the entire day. This strike was again in direct breach of the undertaking which had been given at the conclusion of the previous strike on 24 August 1992. Work resumed on 10 September 1992, and the respondent proceeded to hold enquiries in respect of each of the appellants.

The approach taken by the respondent in these enquiries was that any worker who had received a final warning and who had thereafter participated in one or other of the incidents described above was summoned to an enquiry to determine whether he should be dismissed for his participation in that subsequent event. Final warnings had only been issued by the respondent if the worker concerned had already received a written warning; and written warnings in turn were only issued if the worker concerned had already received the warning of 6 May 1992. That was the general warning which had been issued in relation to the work stoppage on 30 April 1992 (incident one) and was treated by the respondent as a "verbal warning". Accordingly, participation in the event for which each of the appellants

were summoned to a disciplinary enquiry was regarded by the respondent as the particular appellant's fourth transgression. Some in fact participated in more than four incidents.

The outcome of the enquiries was that thirty-seven of the appellants were dismissed for participating in the strike which occurred on 9 September 1992 (incident six); six were dismissed for participating in the strike which occurred on 24 August 1992 (incident five) and thirty-four were dismissed for abandoning their duties to participate in the march on 21 August 1992 (incident four). The total of those dismissed being seventy-seven which is the number of appellants now on appeal.

It is common cause that it was only employees who were on "final warning" who were dismissed. It is also common cause that a formal enquiry was held in respect of each employee who was dismissed. Each of them was also afforded a right of appeal and most exercised it. No point is taken as to the procedural regularity of these final stages. The argument advanced by the appellants' counsel was that none of the appellants qualified for a "final warning". This was so, it was contended, because there were procedural irregularities in regard to certain of the earlier steps provided for in the standard disciplining procedure. It was contended

in this regard that none of the appellants was given a hearing or afforded a right of appeal in regard to the first incident. That is so. As regards the second incident it is common cause that there were no hearings before the formal warnings were given. Those involved were given a right of appeal. However, none of the appellants appealed against the warning given on 9 July 1992 within the three day working period specified in the warning.

Applying the progressive "logic" which was adopted by the respondent, so it was argued for the appellants', if none of the appellants had been subjected to procedurally correct verbal warnings and first written warnings then none of them would have qualified for final written warnings and dismissal. This echoes the reasoning of the IC. The IC held that the first incident did not warrant a "verbal warning", but only "counselling" in accordance with the standard disciplining procedure. The IC reasoned from this basis that none of the appellants ought to have been dismissed as none of them ought to have been on "final warning" at the time the event occurred which resulted in the employees' dismissal.

The IC justified this approach upon the basis of an "election" which it believed the respondent had made and to which it should be held. The majority of the LAC regarded this approach as being "artificial". I agree. Nugent J put the matter as

follows:-

> "The enquiry is whether the appellant acted unfairly in dismissing the respondents. If the effect of what the appellant did was to afford the respondents more opportunity to avoid the consequences of their conduct than they may fairly have been entitled to, in my view that does not detract from the fairness of its conduct."

What is clear to me from analysis of the facts is that it must have been subjectively clear to all of the appellants who received notices and warnings from the respondent, including the general notice given in regard to the first incident, which, if viewed in isolation, might be regarded as being of relatively minor importance, that the respondent certainly regarded their conduct in "a very serious light"; that the respondent regarded a work stoppage, even of short duration, as constituting "an illegal strike", and reserved to itself the right to take formal disciplinary action against the participants should this happen again and that this could well result in dismissal. Similarly, and even if one were to regard the second incident, as being of relatively minor importance, viewed in isolation, it is plain that the respondent again made it clear to the appellants in no uncertain terms that that incident constituted illegal strike action and was viewed in a most serious light by it, warranting a written warning.

I do not believe that any technical procedural irregularity which might have

resulted from a failure to have offered a hearing and appeal in respect of the first incident was of any material consequence insofar as the subjective state of mind of each of the appellants was concerned. It must have been obvious to them that if they were guilty of further transgressions serious consequences could follow which might well eventually end in their dismissal. As regards the second incident one also cannot in fairness simply ignore the fact that none of the appellants availed themselves of the right to appeal within three working days which was offered to them in clear terms. Such appeals as were noted were heard some weeks and not days after the incident.

As indicated previously, it is common cause that it was only the workers who were on "final warning" who were ultimately dismissed. The events which resulted directly in their dismissal were those which occurred on either 21 August (incident four), 24 August (incident five), or 9 September 1992 (incident six). Each of these incidents justified "immediate dismissal" in accordance with the Code. Furthermore it is significant that at the inquiries preceding the dismissals no objection was made by the appellants to the purely procedural aspects of the way in which the respondent dealt with the earlier incidents. I agree with the conclusion of Nugent J to the effect that even apart from the various disciplinary provisions it was in all of the circumstances not unfair for the respondent to have

resorted to the dismissal of each of the appellants for participating in the occurrences for which they were dismissed, given their past behaviour. Moreover, as was conceded in the heads of argument on behalf of the appellants, the seriousness of the conduct of those who participated in the last three incidents "warranted immediate dismissal".

Counsel for the parties argued the matter before this Court on the basis of a general approach applicable to all of the appellants and did not seek to differentiate between the position of individual appellants. The court however, during the course of argument raised with counsel the question whether the position of appellants twenty-nine and sixty was perhaps different from the position of the other appellants. This was so since it seemed, *prima facie*, at least, that neither of these appellants could be regarded, objectively speaking, as being in the category of persons being on "final warning" at the time of the incidents in respect of which they were dismissed. In the case of appellant twenty-nine it appears that he in fact received a final warning for the third incident, that his appeal against the warning failed and that he was dismissed for his participation in the fourth incident. As regards appellant sixty, he also, in fact, received a final warning for the third incident, his appeal against it failed and he was dismissed for his participation in the fifth incident. Their respective positions therefore do not differ from those of

the other appellants.

I turn finally to the argument that the respondent should have displayed a greater degree of sensitivity and circumspection and a more constructive approach with a view to resolving the difficulties which had arisen in the relationship with its workforce and maintaining discipline and that resorting to dismissal was unfair. This was the basis of the dissenting opinion of one of the assessors in the LAC. The dissenting view was expressly rejected by the majority of the LAC in these terms:-

> "While it is true that each of the incidents in due course resolved itself with a return to work, I do not think the appellant [respondent] should be expected to have continued tolerating major disruptions each time its wishes and those of its employees were in conflict. In my view each of the occurrences was a further step in the course of conduct which showed that the respondents concerned had no intention of adhering to the instructions of the appellant, and in my view the employment relationship could not be expected to have continued under those circumstances."

Viewing the matter objectively in the light of the facts which I have described above, I believe that a stage had been reached when fairness dictated that dismissal was justified. In the words of Nicholas AJA in *Slagment (Pty) Ltd v Building Construction and Allied Workers Union an Others* 1994 (15) ILJ 979 (A) at 989 H - I, the appellants had been guilty of "sustained disobedience", they had

deliberately "set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of the relationship of employer and employee impossible."

One must, of course, not lose sight of the important fact that the relevant events occurred in difficult political times. However, respondent was not insensitive to this. It agreed to absence on 3 and 4 August and took no disciplinary steps in regard to absence on 6 and 7 August. Bearing in mind that the required value judgment in such cases seeks to achieve fairness to both sides, it could hardly have been expected of respondent to continue indefinitely accepting the burden of mass absence or mass demonstration whenever political motives came to the fore.

In my view there is no sound basis for departing from the value judgment of the majority of the LAC to the effect that the respondent had perpetrated no unfair labour practice in dismissing all of the appellants in the circumstances in which it did so. (C/f *Media Workers Association of SA and Others v The Press Corporation of South Africa Ltd (supra)* at 798 H - I and *Vetsak (supra)* at 592 B - F.)

Neither of the parties sought any order for costs on appeal.

The appeal is accordingly dismissed.

RH ZULMAN JA

Howie JA	}	**Concur**
Scott JA	}	
Streicher JA	}	
Melunsky AJA	}	