CASE NO. 622/97 & 623/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

THE BENICON GROUP APPELLANT

AND

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA AND 185 OTHERS RESPONDENTS

BEFORE: HEFER, OLIVIER, ZULMAN JJA, FARLAM AND MADLANGA AJJA

HEARD: 3 SEPTEMBER 1999

DELIVERED: 1 OCTOBER 1999

Labour law - unfair dismissal - reinstatement

FARLAM AJA

J U D G M E N T

FARLAM AJA:

[1] The appellant is a company involved in the mining industry, the civil engineering industry and in leasing out civil engineering and mining equipment.

[2] On 10 August 1992 the appellant dismissed those of its workers who had participated in a nationwide stay-away which took place on Monday 3 and 4 August 1992 and which was called by the ANC - COSATU - SA Communist Party Alliance to protest against the collapse

of the CODESA constitutional negotiations.

[3] The dismissed workers, together with their union, the National Union of Metalworkers of SA, sought reinstatement in unfair labour practice proceedings in the Industrial Court before Labuschagne AM.

All the workers who were dismissed, with the exception of those who worked at a site at Syferfontein, had participated in an earlier stay-away on 23 July 1992. The Industrial Court ordered the reinstatement of the workers who were employed at the Syferfontein site but the application failed in so far as it related to the other employees.

[4] The unsuccessful applicants appealed to the Labour Appeal Court (LAC) where the matter was heard by Cameron J and two assessors. The appeal was allowed and the determination of the Industrial Court (insofar as it related to the unsuccessful individual applicants) was set aside and in its place was substituted a determination to the effect that the dismissal of the individual applicants was an unfair labour practice and that they were to be reinstated in their employ on terms and conditions no less favourable than those which were operative at the date of their dismissal. It was further ordered that the reinstatement was to be effected from 20 February 1996, being the date of the Industrial Court determination but not from any preceding date. There was no order as to the costs of the appeal.

[5] The judgment of the Industrial Court has been reported: see [1996] 3 BLLR 330 (IC). The judgment of the LAC has also been reported: see (1997) 18 ILJ 123 (LAC).

[6] Counsel for the appellant attacked some of the findings made by the LAC

and submitted that this court is not bound thereby. On the other hand counsel who appeared for the respondents, relying on *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A) at 723 B - G, *Performing Arts Council of the Transvaal* v *Paper, Printing, Wood and Allied Workers' Union and Others* 1994 (2) SA 204 (A) at 214 E - F, *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A) at 593 H - I and 583 I - 584 C and the judgments of Smalberger JA and Scott JA in *Betha and Others v BTR Sarmcol, a Division of BTR Dunlop Ltd* 1998 (3) SA 349 (SCA) at 387 C - F and 405 C - 406 E, contended that this court is bound by such findings inasmuch as they related to the facts.

The main findings which counsel for the appellant attacked related to the question as to whether the workers in the appellant's employ could have been

confused about the appellant's policy regarding stay-aways immediately before they participated in the stay-away which took place on 3 and 4 August. The findings of the LAC which appellant's counsel attacked are contained in the LAC's reported judgment at 145 E - I. For the purposes of this judgment I am prepared to assume, without deciding the point, that this Court is entitled to overturn the findings in question. On the view I take of the matter these findings are not decisive on the question as to whether the appellant's action in dismissing the individual respondents was an unfair labour practice.

[7] This court's task is to pass what by its nature is a moral or value judgment on the question as to whether the appellant's action in dismissing the individual respondents amounted to an unfair labour practice. The ultimate determinant in such an enquiry is fairness, by which is meant fairness to both the employer and the employee.

[8] Obviously the inquiry whether the dismissals in this case were fair or unfair involves a consideration of all the relevant facts. As the judgments of both the Industrial Court and the LAC have been reported it will be sufficient to give a summary of the more significant facts.

[9] The first stay-away experienced by the appellant was on Soweto Day, 16 June 1992.

On 15 June 1992 the appellant had a meeting with representatives of the union, viz the union organizer from Witbank and the elected shop stewards. It was agreed at the meeting that the 16 June stay-away would be dealt with by the application of the principle "no work/no pay/no penalty".

[10] After the 16 June 1992 stay-away a meeting took place between the management of the appellant and the union organiser and three of the shop stewards. After this meeting management issued a memorandum to all staff members in which it was stated that in future disciplinary action would be taken against any person taking part in an illegal strike/stay-away action.

[11] On 21 July a further meeting took place between management and the union organiser and certain shop stewards. At this meeting the union organiser mentioned that the union

planned certain actions beginning on 22 July but not that a stay-away was anticipated for 23 July.

[12] On 22 July, after 4 pm, one of the shop stewards told the appellant's managing director and its plant director that a stay-away was planned for the next day. On 23 July the planned stay-away, which took the form of a march to the office of the local receiver of revenue, took place.

[13] On 24 July the workers returned to work and each was served with a notice to attend a disciplinary hearing on 25 July. The charges were:

1 failing to report for duty on 23 July 1992;

2 absence without permission from work; and

3 disobeying company rules and regulations.

[14] On 25 July disciplinary hearings were held. Those who had stayed away on 23 July were found guilty and dismissed. The dismissals were not implemented but instead, at the end of the proceedings on 25 July it was agreed that a meeting would be held on Tuesday 28 July. On 27 July the workers were given the day off to prepare themselves for the meeting the following day.

[15] On 28 July the meeting to which I have referred was held at the appellant's head office between the whole workforce and representatives of management. The shop stewards were present but no union officials. The meeting was held in a large marquee tent which was hired for the occasion. In evidence and argument this meeting was called the "tentberaad".

Although there was a dispute in the evidence between Van Rooyen, the appellant's plant director, who was the only witness called on its behalf, and Maduna, one of the shop stewards, who testified on behalf of the respondents, as to the purpose of the "tentberaad" the LAC found that the determination of stay-away policy was pivotal to the meeting. A workers' committee, or liaison committee, was elected in the presence of management. The LAC found that the liaison committee idea originated with management and that its purpose was to liaise with management on future stay-aways. The LAC also found that the liaison committee replaced the shop stewards committee but that management in initiating the

liaison committee had not deliberately attempted to sideline the union. Nevertheless, so it was held, management had acted imprudently (albeit in good faith) in procuring the replacement of the union and elected union representatives by the workers themselves. The LAC in fact described management's action in initiating the liaison committee as a "gaffe".

[16] There was a dispute on the evidence as to whether those present at the "tentberaad" decided in principle, as management alleged, that the entire workforce would in future report for duty in the event of a stay-away but, if not, the hours to be lost would be worked in, in advance, so as to stockpile coal. In addition it was agreed, so the appellant averred, that a core of workers would in any event report for duty during stay-aways.

[17] The Industrial Court found that the workers did agree at the "tentberaad" as the appellant alleged: see its judgment at 337 E - F. This finding was overturned by the LAC which found that no final or binding agreement was reached at the "tentberaad": see the LAC judgment at 134 F. In my opinion there is no basis for not accepting this finding by the LAC, whichever of the approaches to factual findings of the LAC set out in the various judgments in *Betha and Others v BTR Sarmcol, a Division of BTR Dunlop Ltd*, *supra* is adopted.

[18] At the "tentberaad" the dismissals of the workers for participating in the 23 July stay-away were withdrawn. There was a dispute between the parties as to whether after the dismissals were withdrawn the workers were given an oral final warning. Although the LAC said that it was open to question whether or not a warning was given it held (at 136 F) that "the presence or absence of such a warning and its status as final or otherwise is . . . not decisive for the justice of the case".

[19] On Wednesday 29 July, after the union's Witbank organizer had warned one of the shop stewards that the election of the liaison committee meant "taking the union out", the workers had a meeting at which it was decided that those elected to the liaison committee would withdraw therefrom.

[20] During the morning of Thursday 30 July the two headquarters representatives on the committee met with management. After lunch the headquarters representatives did not return to the meeting: instead they sent a letter saying that they had decided to withdraw because "to be in the committee is too demanding". The LAC found that this reason was absurd and evasive and that the reason given later, that they perceived the liaison committee to be a

strategy of the appellant designed to bypass proper consultation with the duly elected shop stewards' committee and/or officials of the union, was "both more candid and more accurate" (at 135 G).

[21] Following on the collapse of the liaison committee neither the representatives of management nor the workers appear to have made any effort to re-establish lines of communication so that hours could be worked in, in advance, so as to stockpile coal before the impending two day stay-away planned for 3 and 4 August (for which a general nation-wide call had gone out some three weeks before) and arrangements could be made for a core of workers to work on 3 and 4 August. Instead management caused a memorandum to be put in each worker's pay packet on Friday, 31 August. This memorandum, which each worker received just before leaving on the "pay weekend" immediately before the stay-away planned for Monday 3 and Tuesday 4 August, read as follows:

> "VERY IMPORTANT NOTICE!!!
>
> The following steps will be taken against persons not at work on the 3rd of August 1992.
>
> NO WORK NO PAY
>
> NORMAL BONUS PENALIZATION PROCEDURE
>
> Persons not at work on 4 August 1992 or any other day in future on which a stay-away or mass action takes place, will run the risk of being
>
> DISCHARGED IMMEDIATELY !!!
>
> By order
>
> BENICON MANAGEMENT"

[22] On 3 and 4 August only 63 of the appellant's workforce reported for duty.

[23] On Wednesday 5 August the workers returned to work. Each received an "Advice to Attend disciplinary Hearing", which read in part as follows:

"Alleged misconduct: not at work on 3rd and 4th of August 1992. The charges against you are: Absent from work without permission."

[24] On Thursday 6 August, after a mass hearing, conducted at the insistence of the workers, they were found guilty of misconduct.

[25] Further discussions then took place on Friday 7 and Monday 10 August. The subject of the discussions was further stay-aways. Van Rooyen testified that these discussions were designed to ascertain whether satisfactory arrangements could be made with regard to future stay-away actions, which could then serve as mitigation in the determination of an appropriate sanction.

[26] No agreement on this topic was arrived at. The workers insisted that the principle "no work/no pay/no penalty" should apply in respect of future stay-aways and that if some personnel was to be provided during future stay-aways management had to furnish full security for it.

[27] Appellant was not prepared to agree thereto. Its response was to propose to the union that the workers who had been found guilty of misconduct for participating in the stay-away should not be dismissed provided every employee signed an agreement in the following terms:

"1 Hundred per cent attendance of all employees during any further stay-away, mass action, illegal strike and/or any planned or unplanned work boycotts or go-slow actions.

2 With reference to the actions mentioned in para 1 Benicon would not only expect employees to be present at their normal place of work, but also to perform their normal duties at the required production tempo.

3 Normal working hours must be adhered to during action referred to in para 1.

4 Should the employees not attend work and perform as stipulated in 1, 2 and 3, the employees' action will be viewed as breach of this agreement and will be dismissed immediately.

5 Benicon undertakes not to lock out any employee who wishes to attend work at such times referred to as in para 1.

6 All other Benicon rules and regulations must be adhered to."

This proposal having been rejected, the workers were dismissed, retrospectively from 4 August.

[28] Management was however, despite the dismissals, prepared to take the workers back, provided they accepted its terms. The re-employment terms included an absolute prohibition on future participation in stay-aways. A Memorandum of Agreement dated 12 August between the appellant and certain newly re-employed workers read:

"1 The employee undertakes not to take part in any future illegal industrial action, mass actions, or stay-aways, and to be present at his workplace and to perform his duties faithfully.

2 The employee undertakes to abide by all the rules and regulations of the company at all times.

3 The company undertakes not to lock out the employee during any action referred to in para 1, if he turns up to work.

4 The company undertakes to sanction [rescind?] the decision to dismiss the employee as a result of the disciplinary hearing held on 6 August 1992. Instead a final written warning will be placed on his file."

[39] The Industrial Court, as has been said, refused the application for re-instatement save in so far as it related to the workers at the Syferfontein site. A substantial part of its judgment is devoted to comparing the facts of this case with those in *National Union of Mineworkers & Others v Free State Consolidated Gold Mines (Operations) Ltd; President Steyn Mine; President Brand Mine; Freddies Mine*, 1996 (1) SA 422 (A) (the "*Freegold* case"): see the reported judgment of the Industrial Court at 349 F - 353 C.

[30] One of the factors strongly relied on by the Industrial Court in support of its finding that the dismissals were not an unfair labour practice was the fact that the workers had, as the Industrial Court put it, "reneged on their undertaking" given at the "tentberaad" to minimise the disruption of the appellant's operations: see the judgment at 351 E - F. As has previously been pointed out, the Industrial Court's finding that such an undertaking was given by workers at the "tentberaad" was overturned by the LAC.

[31] The Industrial Court also found that contracts the appellant had with its customers had been cancelled because of the August production standstill. The LAC found that the evidence did not warrant this finding and that it was never established that causally the cancellations which did take place thereafter were attributable to the standstill.

[32] The LAC held that the factual premises and reasoning on which the Industrial Court concluded that the dismissals in this case were fair could not be sustained. It summarised its views on the merits at 146 G - 147 C of the reported judgment.

[33] Among the points made by the LAC was that management was "in central measure responsible" for the breakdown in communication between management and the workers shortly before the pay weekend of 1 and 2 August, which preceded the stay-away. This was because "[i]ts liaison committee initiative was naive in its conception and misdirected in its execution. After this", so continued the LAC, "the formulation or finalisation of a mutually acceptable policy in time for the 3 - 4 August stay-away became impossible. To hold the workers solely liable, as the Industrial Court did, is most inequitable." (See the judgment at 146 H - I.)

[34] Mr *Rabie,* who appeared on behalf of the appellant, contended that the LAC fell into error in adopting this approach. He submitted that even if the appellant did make a mistake in initiating the election of the liaison committee this factor was irrelevant to a decision as to whether the dismissals were unfair. He said that this was so because it was clear that even if the "tentberaad" had not taken place the stay-away would still have occurred and the dismissed workers would have participated therein.

[35] He submitted further that the workers' subjective perception of their entitlement to join the stay-away was also irrelevant to the decision as to whether the dismissals were unfair and that the LAC erred in regarding it as a mitigating factor.

[36] He also argued that an important aggravating factor to which adequate weight had not been accorded by the LAC was the fact that the continued existence of the appellant had been put in danger by the workers' participation in the stay-away.

[37] In my view these contentions cannot be sustained. It is clear from what was said in the *Freegold* case (at 449 C) that even if the stay-away was not to be regarded as a legitimate form of protest in the particular circumstances of this case (a matter on which I, like the LAC, express no opinion), the fact that those who participated in the stay-away perceived it to be legitimate and regarded their absence as being for good reason constitutes a mitigating factor to be taken into account in any equitable assessment of the fairness of the dismissals.

[38] It was also not correct to say that the management's "tentberaad" initiative regarding the liaison committee was not causally related to what happened thereafter and was accordingly irrelevant. While it is true to say that the workers on all the probabilities would have participated in the stay-away even if the "tentberaad" had not taken place the matter does not end there. I say that because Mr *Rabie* contended that it was an aggravating factor, weighing against the workers, that their participation in the stay-away had put the future existence of the appellant at risk. This was due, in part at least, to the fact that extra hours had not been worked in, in advance, before the stay-away so that a stockpile of coal could be produced to tide the appellant over the stay-away period when production would cease. In my view the fact that a stockpile was not produced was due, again in part at least, to the breakdown in communication between management and the workers which followed on management's "gaffe", as the LAC called it, in initiating the formation of the liaison committee. That being so, there was a causal connection between the putting at risk of the continued existence of the company and the appellant's actions at the "tentberaad", which affected the weight to be given to this factor in deciding on the fairness of the dismissals. It follows that in assessing the fairness of the dismissals what one can call the "tentberaad" factor was relevant. It follows further that the factor which *Mr Rabie* submitted was an important aggravating factor weighing against the workers was not accorded insufficient weight by the LAC.

[39] When a moral judgment or value judgment has to be passed regarding the fairness or unfairness of the dismissals it is important to bear in mind, in my view, on the particular

circumstances of this case, that the appellant, even after the stay-away, was willing to keep the workers in its employ if they were prepared to agree not to participate in future illegal stay-aways. If they had breached such an agreement in the future it would have been difficult to contend that their dismissal for such breach would not be fair. But essentially the same result could have been achieved by keeping them in their employment but giving them a final written warning. Such an approach would have been more in keeping with the view, to which this court has given its approval (*Freegold* case at 448 H - I), that dismissal "is the ultimate sanction; a course of last resort".

[40] In my opinion the dismissals in this matter were unfair and the appeal against the LAC's judgment should be dismissed with costs including those of two counsel, there being in my view no reason that costs should not follow the result.

[41] Together with the appeal three applications for condonation were argued: two brought by the appellant (one for the late filing of the notice of appeal and the other for the late filing of the record) and one by the respondents (for the late filing of an affidavit opposing the appellant's application for condonation of the late filing of the record).

[42] In my opinion all three applications should be granted. The respondents' application was not opposed and nothing more need be said about it. The appellant's applications were opposed but it is clear that its failure to file its notice of appeal and the appeal record timeously was not due to any default on its part but to the negligence of its attorney. It cannot be said on the facts of this case that it must have been obvious to the appellant that there was a protracted delay and it is not disputed that it had left the matter entirely to its attorney, in whom it had full confidence, and that it had no reason to believe that the rules had not been complied with. As far as the costs of the appellant's applications for condonation are concerned *Mr Rabie* conceded that the respondents were entitled to the costs of the application including the costs of opposition.

[43] Since writing paragraphs [1] to [42] above I have had the advantage of reading the judgment prepared in this matter by my learned brother Olivier in which the view is stated that the respondent workers were not unfairly dismissed by the appellant. I have carefully considered all the points made in my learned brother's judgment and have retraced in my

mind all the steps along the path which led me to the conclusion that the appeal should be dismissed. Having done so, I remain of the view that the dismissals in question were unfair.

[44] As appears from paragraph [6] of my learned brother's judgment the major point of disagreement between us is whether the decision of the LAC that management was "in central measure" responsible for the breakdown in communications and that "its liaison committee initiative was naive in its conception and misdirected in its execution" has to be accepted as correct and relevant. I agree with the LAC's finding on the point and am of the view that we are bound by it. Whichever of the differing approaches to factual findings of the LAC set out in the *BTR* case is adopted I am satisfied that no basis exists for overturning the LAC's finding on this point. I am not aware of any misdirection by the LAC nor do I think that it can be said that no reasonable court could have come to that finding.

Indeed the passages from Van Rooyen's evidence quoted by my brother in my respectful view, support the LAC's finding.

When asked the direct question who first came up with the idea of a new committee Van Rooyen's answer was hardly a model of clarity but he did say that the workers *agreed* that the problem at the various sites was different and he added that they, i e, management, said that if every site chose its representative to bring the site's problems to management then the problem would be so much easier. These answers go very far in my view in providing a basis for the LAC's finding on the point that the initiative for the setting up of the liaison committee came from management, as Maduna testified. Once one accepts this finding by the LAC then the impact of the other factors listed in paragraph [14] (a) to (h) of my brother's judgment becomes far less important.

[45] My learned brother then poses two questions which he says are the real important ones: (a) was the appellant's demand that the workers undertake not to participate in future illegal stay-aways reasonable? And (b) was the refusal of the workers to accede to this request reasonable?

I am not sure that these questions are the real important ones nor do I think that the converse of a finding in favour of management on the first is a finding against the workers on the second. As my learned brother fairly points out (in paragraph [13] of his judgment) the workers were in an invidious position.

[46] What may be called the bottom line of my learned brother's judgment is to be found, in my view, in his statement in paragraph [11] that the refusal of the employees to agree to a regime of non-participation in illegal stay-aways inexorably implies an intention to take part in illegal action against the employer and "the law cannot countenance such an attitude".

I agree that the law cannot countenance such an attitude and I also agree that the law will not inexorably uphold a dismissal in such a situation. I have tried to show in my judgment that there was something the employer could have done, falling short of dismissal, which would have been appropriate in this case.

[47] That does not mean that the workers were free from blame and not liable to disciplinary action. Indeed as counsel for the respondents pointed out, the order made by the LAC, that the workers were only to be re-instated with effect from the date of the Industrial Court's order, does involve disciplinary steps being taken against the workers. Though they were not solely responsible for the fact that steps were not taken to minimise the effects of the disruption (as the Industrial Court wrongly found) they were to a substantial degree responsible and disciplinary steps, falling short of dismissal, were appropriate.

[48] My learned brother seeks to make something of the fact, which I accept without hesitation, that the appellant adopted an accommodating and supportive attitude towards the workers and says (paragraph [14] (d)) that "this, surely is not the attitude of an employer bent on getting rid of its employees in an unfair manner". I do not understand that to be the test. The dismissals cannot only be set aside if the employer was "bent on getting rid of its employers in an unfair manner" (and to be fair to my learned brother I do not understand him to say that that is the test).

[49] What has been said over and over again in these cases is that one must be fair <u>to both sides</u>. If the only test to be applied is fairness to the employer then there is much to be said for a finding in the appellant's favour. But fairness to the workers, in my considered judgment, requires a disciplinary step falling short of the course of last resort.

[50] The following order is made:

1 (a) Appellant's applications for condonation for the late filing of the notice of appeal and the appeal record are granted.

(b) Appellant is ordered to pay the respondents' costs of the applications including the costs of opposition.

2 Respondents' application for condonation of the late filing of their affidavit opposing appellant's application for condonation for the late filing of the appeal record is granted.

3 The appeal is dismissed with costs including the costs of two counsel.

I G FARLAM

ACTING JUDGE OF APPEAL

CONCUR

ZULMAN JA

MADLANGA AJA

OLIVIER JA

[1] I do not share the view that the appeal falls to be dismissed.

[2] Cameron J summarized the reasons for his finding that the dismissal was unfair as follows:

1 There was confusion, both in reality and in the workers' minds, about the consistency and rigour of management's policy on stay-aways.

2 There was a breakdown in communication between Benicon and its employees, following on the disintegration of the liaison committee on 30 July, shortly before the weekend preceding the

stay-away. Management was in central measure responsible for that breakdown. Its liaison committee initiative was naïve in its conception and misdirected in execution. After this, the formulation or finalisation of a mutually acceptable policy in time for the 3 and 4 August stay-away became impossible. To hold the workers solely liable, as the industrial court did, is most inequitable.

3 Unlike some strike cases, the withdrawal of labour here did not involve a fight to the death. By admission of the perpetrators, and by recognition of management, the stay-away was designed to be incidental and limited.

4 Benicon seems to have dismissed the workers not for participation in the stay-away on 3 and 4 August, but for refusing to agree to work on future stay-aways.

In order to deal with these reasons a brief discussion of the events from June to August 1992 is required. I will refer to the appellant as Benicon.

[3] Although Benicon agreed on 15 June not to take disciplinary action against workers who did not report for duty on Soweto day (16 June), management issued a notice to all staff members on 19 June in the following terms:

"RE : ILLEGAL STRIKE ACTION/STAY-AWAY ACTION

Please take note of the following :

In future disciplinary action will be taken against any person taking part in an illegal strike/stay-away action.

By order.

BENICON MANAGEMENT"

The company's policy could not have been expressed in clearer terms. Yet, on 23 July, another stay-away occurred when its workers joined a march to the office of the Receiver of Revenue. Not unexpectedly their conduct lead to disciplinary hearings and the dismissal of all the guilty ones. But the dismissals were not immediately implemented because the workers wanted to discuss matters and management was prepared to listen. For this purpose the *tentberaad* was arranged and held on 28 July. The so-called workers' committee was elected and the dismissals withdrawn. But the committee soon proved to be a failure and, because there was an imminent threat of another stay-away on 3 and 4 August, management on 31 July had the following notice inserted in every worker's pay-packet **:**

"VERY IMPORTANT NOTICE!!!

The following steps will be taken against persons not at work on the 3rd of August 1992.

- NO WORK NO PAY
- NORMAL BONUS PENALISATION PROCEDURE
- Persons not at work on the 4th of August 1992 or any other day in future on which a stay-away or mass action takes place, will run the risk of being DISCHARGED IMMEDIATELY!!!!

By order

BENICON MANAGEMENT"

With a few exceptions the entire workforce ignored this unambiguous ultimatum with the result that those who had not heeded it were again summoned to attend disciplinary hearings. They were found guilty but again further discussions were held to ascertain whether suitable arrangements with regard to future stay-aways could be made. When this proved to be

impossible because the workers were not prepared to commit themselves to "hundred percent attendance ... during any further stay-away, mass action, illegal strike and/or any planned or unplanned work boycotts or go-slow actions" they were dismissed.

Not one of the stay-aways had anything to do with working conditions or with anything that Benicon had done or not done. On 3 and 4 August the workers took part in action called for by the tripartite ANC/COSATU/SACP alliance to protest against the collapse of the CODESA constitutional negotiations. The evidence on this point is clear, coming as it does from the respondents' own witness, Van Castle. He testified that approximately 100% of the employees in the area supported the stay-away. Other strategies to exert political pressure on the then government were discussed, but the Alliance decided upon that particular stay-away. Frank Boshielo, a secretary of Numsa in the region, testifying on behalf of the respondents, confirmed that the stay-away of 3 and 4 August 1992 was organised from June 1992 onwards by the Alliance. The looming stay-away was discussed with the employers in the region, *inter alia* the Chamber of Commerce, Escom and Highveld Steel. He testified as follows :

> "The Chamber of Commerce requested us that are we able or could we be able to call off the matter at our region. We said that - our answer was that we can't say anything because it's a matter which is from the national level."

It is quite plain, therefore, that nothing that Benicon could do, could induce the workers to work on 3 and 4 August. At the *tentberaad* it proposed as a compromise that the workers work on Saturday, 1 August or Sunday, 2 August in order to build up a stockpile or that they provide a skeleton staff on 3 and 4 August. As will presently appear, this came to nought.

[4] With this in mind I proceed to deal with Cameron J's reasons *seriatim.*

[5] Ad 1

As appears from 129D of the Court *a quo*'s judgment, the possibility of confusion was mentioned in argument. But it did not form part of the respondents' statement of case that the

workers were confused at any stage, and not one of their witnesses testified that he or she was uncertain of Benicon's stance in respect of the stay-away of 3 and 4 August. Moreover, I fail to see how they could have been after receipt of the notices of 19 June and 31 July. As Cameron J himself said at 129G-H,

> "[t]he 19 June memorandum was placed in every worker's pay-packet. Whatever its provenance and purport, it contained a clear warning that management, whether consistently or inconsistently, and whether in justifiable response to the breach of an agreement or not, proposed in future to apply '*disciplinary action*' against workers who took part in an illegal strike or stay-away action."

The learned judge held (at 129E-G) that the impression of flux is accentuated by Benicon's willingness to negotiate about its stay-away policy. But he lost sight of the witness Van Rooyen's undisputed evidence (still to be cited) that it was at the workers' request that further discussions took place after the dismissals following upon the stay-away on 23 July. And there was in any event no causal relationship between the so-called confusion and the workers' ultimate dismissal. The evidence is clear that already two or three weeks prior to 3 and 4 August 1992 the die had been cast : there was going to be a stay-away during the week commencing on Monday, 3 August.

[6] Ad 2

In my view, the finding by Cameron J that management was in central measure responsible for the breakdown in communications and that ... its liaison committee ... initiative was naïve in its conception and misdirected in its execution, is one that no reasonable court could have come to. We are not bound by it. Because it plays a central and pivotal role in the decision of the court *a quo*, the misdirection on this point flaws the decision in its entirety.

Cameron J relied on the evidence of Maduna which was to the effect that Van der Merwe had said, in the course of the tentberaad, that the workers must form a liaison committee, and stated that at one point Van Rooyen virtually conceded that management had taken the initiative on this score. But, in fact, Van Rooyen was cross-examined extensively and repetitively on this

point. He explained over and over that after the workers had complained about a lack of communication, the problem of communication was addressed at length. For the sake of completeness, I quote from the record where Van Rooyen was cross-examined by the Appellant's counsel :

> "Is dit korrek, Meneer, dat die idee om die *liaison committee* te stig, dit was Benicon bestuur se idee gewees, is dit korrek? --- Nie in die minste nie, mnr die President.
>
> Goed. Wie se idee was dit gewees? --- Dit was ons almal se idee.
>
> Wie almal? --- Al die mense wat by Benicon gewerk het.
>
> Nou beskryf net asseblief 'n bietjie hoe dit gekom het, hoe julle almal by daardie idee uitgekom het? --- Mnr die President, ek verwys spesifiek na een van die dissiplinêre verhore wat gehou is by ons hoofkantoor op Saterdag, die 25ste. Ons het aan die mense voorgehou dat hulle afbetaal is as gevolg van wegblyaksies, toe sê hulle, 'Nee, nee, nee, nee, daar moet 'n manier wees om hierdie saak uit te sorteer'. Toe sê ons, 'Okay, wat is die - wat gaan ons doen?' en op daardie dissiplinêre verhoor is daar toe besluit dat ons bymekaar moet kom en hierdie probleem wat ons het uit te sorteer en ek het getuie daaroor gelewer dat ons het gesê ons maak die deure van die ou Benicon toe en hierdie is die nuwe Benicon en dit het toe gelei tot by die tentberaad. Daar het ons bymekaar gekom. Elkeen het sy geleentheid gehad om sy sê te sê. As hy wou praat, kon hy praat. Wit, swart, almal en toe is daar voorstelle op die tafel gesit en gesê daar is 'n kommunikasie probleem, ons kan nie mooi met mekaar praat nie. Wat gaan ons doen? Toe is daar besluit om op elke *site* mense te verkies. Hulle is ook verkies deur die mense. Nie een van bestuur het daar gestaan en gesê, 'Jy moet gekies word' of, 'Jy moet nie gekies word nie'. Inteendeel, die werkvloerverteenwoordigers van NUMSA was betrokke van die begin af met hierdie ding. Hulle het die stemme getel en vertaal, getolk. Dis wat gebeur het.

Maar wie het nou vorendag gekom met die idee met nou ‘n nuwe komitee? Wie was die eerste wat met daardie idee vorendag gekom het? --- Mnr die President, die mense het vir ons gesê dat hulle het ‘n probleem om te kommunikeer met bestuur. Toe sê ek , ‘Nou maar hoe gaan ons met bestuur praat?’. ‘n Voorstel was dat verteenwoordigers van die *site* met bestuur kom praat en hierdie hele komitee idee was verfyn met die bespreking wat ons met die mense gehad het. Hulle het saamgestem dat die verskillende *sites* se probleme is anderste. Jy het die padmakers, jy het die ouens wat die klippe grou. Jy het ouens wat met *bulldozers* by Landau werk, so elkeen se situasie was anderste en op daardie vergadering het ons gesê, ‘Nou, maar as elke *site* sy mense - sy verteenwoordigers verkies om daardie *site* se probleme na bestuur toe te bring, dan gaan dit die probleem soveel makliker maak’, want hulle probleme is nie almal dieselfde nie en dit is op die tafel gesit en almal het saamgestem en toe is die persone verkies.

Mnr Van Rooyen, dit is waar, nie waar nie, dat die idee van ‘n afsonderlike komitee wat gekies moet word, dit het van bestuur se kant af gekom, korrek? --- Mnr die President, dit was nie ‘n bestuur gedrewe ding nie. Hierdie was ‘n ding wat ons saam besluit het. Die enigste ding wat bestuur gedoen het was om hierdie goed op ‘n stuk papier neer te skryf, maar wat gesê is in daardie - in daardie tent op die 28ste, die mense is nie aan hulle neuse rondgelei nie. Glad nie. Daardie dinge is saam besluit en dinge waaroor ons saamgestem het, het hulle hulle hande in die lug ingesteek, die teken gegee, hande geklap. Dit was die gemoed in daardie tent. ‘n Gemoed van samewerking, van die ou deure toegemaak het van die verlede. Dis wat die gemoed in daardie tent was en dit is hoe die ding vorentoe gesien het.

Ek vra nie oor die besluit nie, Meneer, ek vra u nog steeds wie het aanvanklik met die idee vorendag gekom en dit moes bestuur gewees het, nie waar nie? --- Daar was ‘n probleem met kommunikasie, wat die mense vir ons gesê het van die *sites* af. Daar was ‘n probleem, hulle kon nie met ons praat nie en al wat ons gedoen het op in die tent daardie dag, is om die struktuur en die manier van kommunikasie op ‘n stukkie papier te skryf. Dit het uit die werkers uitgekom, nie uit bestuur uit nie. .....

Wel, u het alreeds ‘n komitee gehad, die werksvloerverteenwoordigende komitee. Hoekom benodig u ‘n nuwe komitee? --- Mnr die President, ek het reeds gesê dis nie - die bestuur het ‘n nuwe komitee benodig het nie. Die werkers het vir ons gesê daar is ‘n probleem om met ons te praat. Ons het nie gesê, ‘Stig ‘n nuwe komitee’ nie of, ‘Moenie met die unie praat nie’. Nooit nie. Inteendeel al die mense, ek dink die meeste van die mense wat verkies was op daardie werkerskomitee of - was mense wat *shop stewards* was. Die enigste verskil was dat die mense wat verkies was, kom uit die *site* uit. Dis die mense saam met wie hulle werk en wie hulle ken. Nou ek sou geen rede sien hoekom, as die *shop stewards* verkies was voor die tyd - ek dink daar is getuienis gelewer dat daar in 1991 al *shop stewards* was, dat hulle nie weer sou verkies nie, want dis mense wat tog saam met hulle werk. Bestuur vat nie krediet vir daardie besluit nie, omdat dit nie bestuur se besluit was nie. Dit was ‘n besluit van die mense.”

On the probabilities, Van Rooyen’s evidence is clearly preferable to that of Maduna : the shop stewards were present throughout the proceedings and would surely not have accepted any proposal by management inimical to the interests of the Union, but they would have bowed to a proposal coming from the workers themselves. Moreover, the letter handed to management by the two head office representatives, Mapanga and Thabethe, after their visit to the Union and after consultation with the workers reads as follows :

"To Benicon Management

We have now decided to withdraw from the position of representing the workers. We

feel that to be in the committee is too demanding.

We have informed the people and they are still going to decide on that issue of the new names but they are happy with the withdrawal.

The proposal of the people is that if you wish to see us, we will have the following names (1) David (2) Leonard (3) Obed (4) Adries

Regards"

The point is that the proposal of the four new names, coming now from the workers acting on their own, sidelines the Union and in fact proposes a new liaison committee. It is ironic that the Leonard referred to is, according to Van Rooyen's uncontested evidence, Leonard Mapanga and the David referred to is David Thabethe, the two former members of the "liaison committee"at head office who stated in the very same letter that they were finding the work on the committee too demanding!

Had the court *a quo* taken a balanced view of the evidence as a whole, it should clearly have found that the probabilities favour Van Rooyen's evidence; or, at the very least, that it could not decide the issue either way.

Two further points emerge from this analysis. The first is that whoever took the initiative in the formation of the committee, it was the workers who terminated the communication established by the committee. Secondly, after the breakdown, the representatives of the workers communicated with Van Rooyen. The latter's undisputed evidence is that subsequent to the dissolution of the workers' committee, **the shop stewards informed Benicon that the workers**

were not prepared to make up for loss of production, either before or after 3 and 4 August, nor were they prepared to constitute a skeleton staff on these two days to maintain essential services. This evidence is not mentioned in Cameron J's judgment. Its importance is evident: whether or not the Union was present and involved, the stay-way would have gone ahead and no accommodation, such as sought by Benicon, would have been forthcoming.. The whole furore about whose idea the formation of the liaison committee was, is thus causally irrelevant.

[7] Ad 3

To say that the withdrawal of the workers did not involve a fight to the death because the stay-away was designed to be incidental and limited, misses the central point of the dispute. Between 16 June 1992 and 4 August 1992 Benicon had suffered three **illegal** stay-aways. The proposals for a compromise - stockpiling before a stay-away, a skeleton staff on the day of the stay-away - were not accepted. There was deadlock on a matter vital to Benicon. It then sought from the workers an undertaking not to participate in **illegal** stay-aways. The workers' refusal to commit themselves was the immediate, direct and effective cause of the dismissal.

The crux of this case is thus, simply, whether the demand by Benicon that the workers undertake not to participate in future **illegal** stay-aways, was reasonable or not. If not, that is the end of the matter. If the demand was reasonable, was the refusal to give the undertaking reasonable and did it justify dismissal?

[8] Ad 4

To say that Benicon seems to have dismissed the workers not for participation in the stay away but for refusing to agree to work on future stay-aways again misses the point. The uncontested fact is that the workers were found guilty of illegally staying-away from work on 3 and 4 August. Negotiations then took place regarding the proper sanction. When Benicon's demand, discussed in the previous paragraph, was not met, the workers were dismissed. This is not unusual or unknown in labour disputes, nor is it unreasonable.

[9] I turn to consider the two questions which I regard to be the real important ones.

[10] Was the demand by Benicon that the workers undertake not to participate in future illegal stay-aways reasonable?

In my view, no court of law can find that such a demand was unreasonable. To do so would be to undermine the very ethos which a court is required to uphold and to protect. It would undermine the very conception of a state built on the idea of justice and would play havoc with the whole field of labour law and of the sanctity of contracts lawfully entered into. I need say no more than to emphasise that during the later negotiations Numsa conceded that Benicon's demand was reasonable.

[11] Was the refusal of the employees of Benicon to accede to Benicon's request reasonable?

The converse of the finding that Benicon's request was reasonable is that a refusal by the other contracting parties to agree to it, was unreasonable. To state the obvious : the refusal of the employees to agree to a regime of non-participation in **illegal** stay-aways, inexorably implies an intention to take part in illegal action against the employer. The law cannot countenance such an attitude.

[12] However, the conclusions reached in the two preceding paragraphs do not inevitably mean that the employer was entitled to dismiss the employees who stayed away on 3 and 4 August 1992 and who refused to give the above-mentioned undertaking. The ultimate question is one of fairness to both sides.

[13] It must be said in favour of the workers that they found themselves in an invidious position. At that time in our history - 1992 - membership of one of the Alliance parties exacted a high degree of solidarity with and obedience to Alliance orders. Even if the workers knew that their actions were illegal and could lead to disciplinary action - as they did in this case - there was very little they could do about it. It is not even necessary to count in their favour a subjective belief in the legitimacy of their actions - sympathy for their plight speaks objectively from the facts. On the other hand Benicon had valid and enforceable contracts with the workers which the latter had unlawfully breached. The company had pressing obligations towards its clients and the workers were informed on more than one occasion of its plight and of the consequences of a stay-away. They chose to be loyal to a political alliance, rather than to their employer.

[14] In favour of Benicon it must be said that it is difficult to point to any unreasonable

or unfair act or omission leading up to the eventual dismissal. On the contrary, one gets the impression of an employer leaning over backwards to accommodate the interests of its employees. I mention some of these facts :

(a) The first important relevant fact, not dealt with by Cameron J and my brother Farlam, is that Benicon throughout the events culminating in the dismissal of the Respondents, never refused to co-operate with Numsa, despite the fact that it always queried Numsa's authority to act on behalf of employees outside the metal industry. Not one of the respondents' witnesses gave an inkling of a negative attitude on the part of Benicon towards Numsa and Van Rooyen's evidence of the positive attitude of Benicon was never disputed. This factor is relevant, not only as regards Benicon's attitude and fairness in respect of the dismissal of its employees, but also in respect of the events at the tentberaad and the succeeding days.

(b) Another vital fact not considered in their judgments by Cameron J or my brother Farlam, is that Benicon differentiated between the stay-away on 16 June 1992 (Soweto Day) and the stay-aways on 23 July and 3 and 4 August 1992. Van Rooyen's uncontradicted evidence, was that Benicon understood the importance of Soweto Day and agreed to a " ... no work, no pay, no discipline ... " regime for that day. But the latter stay-aways were of a different kind altogether. The stay-away of 23 July took the form of a mass march to the office of the Receiver of Revenue at Witbank and to this day no explanation has been given or even suggested for this action. The stay-away on 3 and 4 August was manifestly politically inspired. In my view, it was quite proper and reasonable for Benicon to differentiate between the events of 16 June and those of 23 July and 3 and 4 August.

(c) Another relevant factor in judging the fairness of the dismissal, and not mentioned in the judgments of Cameron J and my brother Farlam, is the remarkably accommodating and supportive attitude and actions of Benicon towards its employees even in a conflict situation.Time and again - on Monday, 27 July and on Wednesday, 5 August - the employees were excused from work to enable them to go home to prepare for the disciplinary hearing the next day. This, surely, is not the attitude of an employer bent on getting rid of its employees in an unfair manner.

(d) On 3 and 4 August 63 workers turned up for work. They had experienced no intimidation, and, because Benicon had made provision for transport for all workers, they did not experience transport problems. Proper weight should be given to this uncontradicted evidence.

(e) A meeting took place on 7 August. Mr Mashego from Numsa was present, as were the shop stewards and representatives of management. The workers and Mr Mashego did not come forward with any proposals, but requested Benicon to send its proposals to the Union for discussion. After the meeting ended, Mr van Rooyen faxed a letter to Numsa (still on 7 August), containing a draft proposed agreement regarding stay-aways/mass action. The Union was requested to meet urgently with Benicon who proposed a meeting for the next day, Saturday, 8 August. The reason for the urgency was that all Benicon operations had come to a standstill. The draft agreement contained proposals aimed at getting discussions started. The demand by the union that Benicon must undertake to guarantee 100% safety for

workers coming to work on stay-away days was not acceptable to Benicon, because it could not guarantee the safety of the workers living in the townships. The demand was also seen by Benicon as irrelevant, because there had been no violence or intimidation on 3 and 4 August. Nevertheless, the Union resolutely persisted in its demand for 100% security. It also flatly refused to permit any workers to turn up for work on stay-away days.

(f) A further meeting took place on 10 August. Two union representatives, Mashego and Ntleko, and all the shop stewards were present. The company's proposal was to be the starting point of the negotiations, *viz* an undertaking by the employees never to participate in **illegal** strikes or stay-aways. Maduna testified that the employees required 100% security if that was to be the case. They also insisted on " ... no work, no pay, no discipline... " Maduna conceded that it was possible that the Union's representative, Mr Mashijo, threatened that Numsa would see to it that Benicon becomes isolated, locally, nationally and internationally. He doesn't remember but does not deny Mr Mashijo threat to get his Frelimo friends to subvert Benicon's contacts in Mozambique. Neither can he remember Mr van Rooyen almost begging them to come to some sort of an agreement. This was in fact Van Rooyen's evidence. Maduna agreed that it is possible that at that meeting the workers were shown letters by Amcoal and Optimum Colliery addressed to Benicon to show the seriousness of the situation. He remembers the Amcoal letter. He reiterated that there was no proposal by the Union to work in before or after a stay-away; they proposed 100% work security. **Absolute deadlock was reached.**

(g) At the same time an offer was made to all workers to re-apply for employment; those who did apply were appointed. They signed the company's contract containing an undertaking not to participate in **illegal** strikes and stay-aways. Mr van Rooyen's evidence that this condition, discussed before and after 10 August 1992 with Numsa representatives, and that it was never described by the latter as unacceptable was not challenged.

(h) Benicon was under great pressure from its clients to secure a continuous flow of coal. Failure to do so could have dire consequences for the continued existence of Benicon - and the continued employment of its workers.

[15] It was argued for the respondents and is accepted by my learned brother Farlam that Benicon should have given the employees a further chance by placing them on final warning. But it must be remembered that since 16 June 1992 three stay-aways had occurred; that Benicon could not continue on this basis with its mining operations; that a deadlock on the issue of stay-aways had occurred; and that there were no practical or feasible proposals coming from the union or the employees.

[16] It has been aptly said that it

> " ... does not mean that a dismissal cannot be justified whenever it is possible to point to one or other course which the employer (or both parties) might have taken, but failed to take. A stage is reached when fairness dictates that dismissal is justifiable. In the course of the negotiations and power-play leading up to that stage the options and alternatives open to both parties are no doubt numerous and varied. The inquiry is not whether one or other course may have been more successful in resolving the dispute or whether the employer could have endured the strike for longer; the inquiry is whether in all the circumstances (including, for example, the duration of the strike and the extent of the measures actually taken

> by the parties to resolve the dispute) the dismissal can be said to have been unfair."

(Scott JA in *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* 1997 (4) SA 51 (SCA) at 61 G - I.) In my view, such a time had arrived in the present case. Even if a further written ultimatum had been given, the employees would, under the same circumstances that prevailed on 23 July 1992 or 3 and 4 August 1992, again have stayed away without a prior stockpiling. No evidence was offered that a further warning would have changed the attitude of the employees. The evidence suggests the contrary. The parties had clearly reached the end of the line. In this respect, the findings made by my brother Zulman in *Duke and Others v Nasionale Sweiswerke (Pty) Ltd* 1998 (3) SA 956 (SCA) at 969 C - I are particularly apt and applicable to the present appeal. Dealing with a comparable matter, he concluded at 969 H - I

> "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."

A similar approach was followed by this Court in the judgment of my Nienaber JA (concurred in by Marais JA and Zulman JA) in *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 562 (A) at 602 A - B

> "Vetsak could not know, at the time of making the decisions to issue and implement the ultimatum, for how long it would find itself either without any labour or with only 'scab' labour. Such labour can generate its own peculiar set of disruptive problems. It seems to me that if the initial decision to issue an ultimatum was fair in all the circumstances, as I think was in this case, an employer cannot be criticised, if his employees remain recalcitrant, from

implementing it. And that, unpalatable as it may be to them, is a consequence of their own conduct which employees must be prepared to face. "

In my view the appeal should succeed with costs. The court *a quo*'s order should be amended to read "Appeal dismissed with costs".

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PJJ OLIVIER JA

Concurred:

Hefer JA