

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO.: CA10/98

In the matter between:

SOUTH AFRICAN COMMERCIAL

CATERING & ALLIED WORKERS UNION

First Appellant

XOLILE NOMOYI AND 32 OTHERS

Second to
Thirty-fourth
Appellants

and

IRVIN & JOHNSON LIMITED

Respondent

JUDGMENT

CONRADIE JA:

[1] The appellants were applicants in the industrial court who brought an application

in terms of section 46(9) of The Labour Relations Act 28 of 1956 to have their dismissal declared an unfair labour practice and to secure their reinstatement. The application of appellants two to nineteen succeeded to the extent that they were reinstated from the date of the industrial court's judgment with a final warning valid for six months from 1 February 1998. They seek retrospective reinstatement on appeal and expungement of the final warning. The dismissal of appellants twenty to thirty-four was upheld by the industrial court. They appeal against this order. I shall call them the further appellants. The respondent, for its part, cross-appeals against the reinstatement order.

[2] The individual appellants formed part of a group of protestors who demonstrated outside the respondent's premises on 25, 29 and 31 August 1995. In order to understand why they were there, what they hoped to achieve by their protest and why the respondent dealt with them in the manner it did, it is necessary to go back to events which occurred earlier in the year.

[3] By the beginning of 1995 the first appellant ('Saccawu') had begun to establish a presence at the respondent's Woodstock factory. The only union at the factory up to that time had, for the last fifteen years, been the Food and Allied Workers' Union ('Fawu'). Saccawu's membership comprised mainly black males; Fawu's members were mainly coloured females. Apart from fierce inter-union

rivalry, the division of allegiances along these lines led to racial tension which exacerbated the ill effects of the events which were to come.

[4] During January and April 1995 two verification exercises were conducted at Saccawu=s request. These exercises established that Saccawu was a minority union. The respondent, true to its majoritarian approach, declined to recognise Saccawu although it agreed to afford it stop-order facilities. Despite the approach of the South African Confederation of Trade Unions (>Cosatu=) (of which both Saccawu and Fawu were and still are members) which endorses a policy of >one industry one union', Saccawu did not take kindly to the decision. A senior Cosatu official even proposed a commission to investigate solutions to the inter-union rivalry which had developed at the Woodstock factory, but ultimately nothing came of this initiative. The situation at the factory after April 1995 was characterised by Mr. Catto, the respondent's group personnel manager, as >a very, very aggressive, conflicting type of environment.= It was sufficiently alarming to bring Mr. John Gomomo, the president of Cosatu, to address a meeting of employees. In this tense atmosphere any spark would be enough to set the workplace alight.

[5] On 15 June 1995 a petition from Saccawu members was delivered to the respondent during a lunch time march for which permission had been given. The

petition demanded the re-instatement of a Mr. Samuel Petersen (a Saccawu member who had been dismissed) within three days, failing which 'action' would be taken, and also demanded access rights to the Woodstock factory for Saccawu=s officials. The respondent's answer to the petition was delivered to Saccawu on 20 June 1995 by Mr. Mark Anema, the factory manager. It did not accede to Saccawu=s demands. On 19 June a stay-away had been organised by Cosatu; the respondent indicated its intention to take disciplinary action against the absentees. These two events no doubt contributed to what happened the next day.

- [6] At about three o'clock in the afternoon on 21 June 1995, which was the fourth day after the petition had been presented, there was another march on the company premises by Saccawu members, for which this time no permission had been sought. The first time Anema heard of it was when a supervisor approached him to say that his female workers were leaving their workstations. He then received a telephone call from Patrick Nkatu, one of the leaders of the Saccawu faction at the factory, to say that if Petersen and another dismissed Saccawu member were not reinstated, and if access was not granted to Saccawu officials, and if a named Saccawu official was not telephoned by three o'clock that same afternoon, production would be brought to a stop. Anema immediately telephoned Catto at the head office in Cape Town. As he was

speaking to him, four or five women came screaming up the stairs, burst into his office and announced that >they're murdering Richard=. He made his way up a staircase to the canteen, but was impeded by panic-stricken employees who were crying and screaming. At the top of the stairs he encountered a closely-knit group of armed men singing very loudly. Anema retreated down the stairs. As he reached the foot of the stairs he heard people saying that Richard, a Fawu shop steward, had been hurt. He found a nurse attending to him in the supervisors= tearoom. He had been stabbed in the arm and the back. He was later hospitalised for a punctured lung. Anema then learnt that a group of about two hundred men, singing, toyi-toying and waving sticks about, had chased employees out of their departments, disrupting normal production. He decided to send the employees home early. When supervisors tried to pack fish into the chill rooms, they were also chased off the production lines. Eventually forklift drivers under police guard had to move product into the chill rooms.

- [7] Catto=s evidence confirms the scenes of disorder painted by Anema. On his arrival from head office he found a group of workers which he estimated to be two hundred strong, chanting, toyi-toying and waving about sticks and bin-hooks (long thin but heavy metal pieces). As he walked past the security gate he was met by 'a mass of hysterical females', workers who had run away from their work stations. Another group of female employees had sought refuge in the training

room in the administration building. Production had come to a stop. Catto=s first response was to alert Fawu=s and Saccawu=s officials by sending off a fax to both unions at about four o'clock that afternoon. Although the fax alerted the union to illegal action, threats to management, armed workers and assaults, there was no prompt response from Saccawu. However, at about half past six that evening, Fawu, Saccawu and Cosatu held a meeting with management at the respondent's premises. Catto told the meeting that the respondent would not condone the protesters= conduct. He repeated this assertion at a meeting between the same parties the next morning. Fawu, the respondent and Cosatu put their signatures to a peace agreement, but Saccawu refused to agree to its terms. Joe Williams, Cosatu=s regional secretary, afterwards reported to Catto that Saccawu had not been prepared to sign the agreement because its members >wanted management's blood=.

- [8] This so dismayed the respondent that, fearing another uprising on a similar scale, it decided to apply for an urgent interdict imposing a peace obligation on Saccawu. Before the matter reached court, however, Ms Zoë Holland for Saccawu signed an undertaking not to >engage in acts of intimidation which could give rise to unlawful conduct...= The interdict application was then withdrawn. I should say at this juncture that Holland=s excuse for not signing the agreement negotiated with Cosatu and Fawu rings hollow. She testified that

Saccawu would not sign the agreement because its members had been unfairly singled out for disciplinary action. The agreement concerned future industrial action. It had nothing to do with past disciplinary sanctions.

[9] The disruption caused by the uproar was enormous. Because of the fearfulness of the predominantly female workforce, aggravated by rumours, management decided to provide them with transport to and from work for the following Thursday evening and the Friday and Saturday morning. Employees fearing for their lives refused to venture onto the trains. Absenteeism leapt from between eight and ten percent to thirty-five percent. Fawu shop stewards were, at their insistence, transported to and from work for the next six months.

[10] The next day, 22 June, those employees who had misconducted themselves in this manner were suspended. One hundred and eighty of the suspended employees were then charged with misconduct. Of these, one hundred and thirty-four were, by agreement with Saccawu, suspended without pay for four months and issued with final written warnings. The remaining forty-six were tried, found guilty, and dismissed on 2 August 1995. The suspension of the one hundred and thirty-four employees was a compromise arrived at after a process of mediation and was agreed to by Cosatu and Saccawu, although Holland in her evidence maintained that the agreement had been >imposed= on Saccawu.

She presumably meant that Saccawu did not feel itself bound by the agreement and that, therefore, the one hundred and thirty-four suspended employees had reason to feel aggrieved at their treatment.

[11] Anema was asked in cross-examination what the situation at the factory was after the suspensions on 22 June. The reliability of his answer was not challenged. He said:

>I did explain a little bit earlier on, where it was, there was still that state of fear, that state of uncertainty, the high absenteeism rate, the threats, the rumours, it was an extremely difficult time to be able to manage, and extremely tough, extremely difficult for the people that were in the factory. Our productivity just went right down, and the example I explained earlier on.=

It was in this atmosphere of alarm and despondency that the next mass demonstration occurred.

[12] The forty-six dismissed Saccawu members, joined by others who brought the total number of demonstrators to between eighty and one hundred, staged what was often in evidence referred to as a picket. I doubt whether it was a picket properly so called since there was no strike at the time for which the picketers could attempt to elicit support. It makes no difference to the case that it was a

demonstration rather than a picket.

[13] On 25 August 1995 there was a brief, and orderly, demonstration by the further appellants at the respondent=s head office in Cape Town. The demonstrators then moved to the respondent=s Woodstock premises where they sang, toyi-toyed, displayed banners and moved from one gate of the premises to the other, pausing in front of each gate from where they were visible to workers inside the factory premises. According to Anema the intensity of the singing and toyi-toying increased every time they reached a gate. They advanced towards the gate and then retreated again in a motion that Anema likened to the advancing and receding of a wave. In cross-examination he elaborated by saying that the rush at the gates was ‘not as severe as a mock attack to break it down, but it was certainly a sign of aggression, a sign that there was intent to intimidate.’ Catto thought that ‘it could be called a sort of like rush on the gates and then they would recede again.’ To him this behaviour was ‘fairly intimidatory and very provocative.’

[14] The demonstration on 25 August was renewed on 29 and 30 August. The pattern was the same; so was the number of demonstrators on each occasion. Obstruction of vehicular traffic, according to Catto and Anema, occurred on each of the three days. The respondent complained to Saccawu on 29 August about

the conduct of the demonstrators but the former was not prepared to meet with the company. The inevitable happened. The demonstrations renewed the old fears which had been aroused two months earlier. Anema described the workforce as being >extremely worried= from the first day. The uncertainty as to what was going on was unnerving. The demonstration on 25 August started having an effect on production. Anema described it in these words:

‘As I mentioned earlier, our absenteeism shot up sky high again, around about 20, 25%, where we normally operate on about an 8 to 10% absenteeism. Our productivity went down, I remember the one day specifically in the flow-lines, I can=t remember which day it was, where we, our normal production is around about 60 to 65 tons of headed and gutted fish, it dropped right down to about 30 tons, and because we have regular production meetings, there was no explanation for it, other than that the people were worried, they were concerned, they were fearful.’

- [15] The night of the second demonstration Richard Antoni, the shop steward who had earlier been injured, was attacked by seven men at the Heideveld train station and stabbed to death. According to reports received by Anema, some of the staff at Woodstock were with him at the time of his murder and identified his assailants as members of the group that had caused chaos in the factory on 21

June. These reports were elicited from Anema in cross-examination, so that what would otherwise have been hearsay, became admissible. Naturally enough rumours, fuelled by a newspaper report that Antoni had been killed by members of a rival union, rapidly spread through the factory. So great was the alarm created by the news of Antoni=s death, and the rumours concerning the perpetrators thereof, aggravated by reports of threats on the lives of the Fawu shop stewards, that some thirty workers had on 30 August to be seen for stress disorders by Dr Rabinowitz who daily attended at the company clinic. Most of them were treated by the nursing staff.

[16] The case for the appellants was that the further appellants' actions during the demonstrations in August were not intimidatory. However, the evidence of fear and despondency caused by the demonstrations was not challenged in cross-examination. Anema, at one point in his cross-examination, explained:

‘... I was in their factory, Mr. Grobler, they were fearful of their lives, they didn=t want to go home on trains, goodness me that surely is proof enough that there is intimidation, that you got guys, ladies, crying in my office because they don=t want to go home on the train. You=ve got Ivan Jeremiah saying ‘I want to have, I want to be escorted home, because I am going to die tonight, I=m not going to come back the next day’ and

that was real physical tangible fear coming out of these people.'

[17] It was elicited from Anema in cross-examination that he had been told by the Fawu shop stewards that >Saccawu men=, whose names they mentioned, had after the June upheaval but before the August demonstrations made threats against them like >jy is volgende= or >ons gaan julle opblaas.= In response to a question he confirmed that he had received complaints of threats from Fawu shop stewards after 25 August 1995 as well. The explosiveness of the situation is illustrated by the fact that during the course of the August demonstrations, a bomb threat was made to the police who felt obliged to comb the factory with a sniffer dog.

[18] Judging by the measures taken by the respondent, Anema, did not in my view exaggerate the effect of the demonstrations on the morale of the workforce and on their productivity. For example, the respondent took Jeremiah=s concerns sufficiently seriously to at first put him up in a safe house and thereafter to relocate him and his family to its plant in Mossel Bay. What is more, transport to and from home was provided for all the factory workers at first, and thereafter for the Fawu shop stewards for as long as six months. Anema described how the respondent vainly tried to persuade witnesses to the street demonstrations to come forward to testify at the disciplinary enquiries. No employee was prepared

to take the risk. Members of management felt so threatened that the police were requested to specially patrol their homes. Catto was given permanent security surveillance.

- [19] It was contended on behalf of the appellants that the protestors had no intention of disrupting the respondent's business and that they in fact took care to avoid disruption by letting all delivery vehicles through the protesting throng. A good deal of time was expended in the court *a quo* on the question of whether or not delivery and other vehicles were detained by the protestors. The time spent on this issue was quite out of proportion to its importance. Firstly, the stopping of vehicles would be only one, relatively minor, facet of the overall disruption. Secondly, the more important, and unchallenged, evidence of Anema was that delivery vehicle drivers refused to leave the premises while the demonstrators were present. The pervading fearfulness took hold of them as well. Those who had to deliver packed product to Atlantic Cold Storage refused to drive their trucks out of the premises. Their apprehension was heightened by the photographing of vehicles by one of the protestors' leaders; they feared reprisals against them. Apart from a job applicant and a piping contractor who refused to enter the premises while the protestors were present, there was, for about twenty minutes, a line of delivery vehicles backed up in Beach Road. He explained that there were two factors hindering the in and out movement of

trucks. One was the physical obstruction; the other was the threat or perceived threat of danger posed by the demonstrators.

[20] The drivers who were too fearful to go out voiced their concerns to Anema=s subordinates who reported to him, but he was also able, through his own observations, to establish the unusual occurrence that 'the fish receiving area was chock-a-block full of trucks, the bin truck hadn=t gone out, the offal truck was in its, it had been parked there the whole day, and ..., there was four or five of the bin tippers full of offal, indicating that they hadn=t been moving.' The re-delivery of the bins in which fish are brought to the factory from the trawlers was delayed to the extent that there was a telephone call from a trawler enquiring about the return of the empty bins without which it could not put to sea. The trawler captain was told that he would have to put off his departure. At the request of the cross-examiner, Anema produced his diary for the period in question, the contemporary notes in which show clearly that his recollection that vehicles had - by physical or psychological pressure - been prevented from freely coming and going, was reliable.

[21] Despite the small importance which I attach to the observed physical stopping of vehicles and pedestrians by the demonstrators I should perhaps observe that, on the probabilities, I prefer the version of Catto and Anema that vehicles were

indeed brought to a halt. The demonstrators had shown that they were not concerned about legalities. They breached just about every condition of the >picketing= permission given to them by the Cape Town City Council. They did not picket in the street in which they had permission to do so; they were many more than the forty-six demonstrators for whom permission had been requested; they did not remain on the pedestrian walkways; they did not stand five metres apart (in fact, they did not stand still at all, but surged from one gate of the factory to another). I therefore find it difficult to unreservedly accept the evidence of Mr. Luus, a policeman who was assigned to observe the demonstration. If, as he testified, he did not see vehicles being stopped, he probably did not follow the demonstrating group around as they moved down Porter Street (which is more than 800 metres long) or around the corner into Southgate Street.

[22] After the upheaval of 21 June 1995, the mediation agreement to which I referred earlier was concluded between the first appellant, the respondent and Cosatu. It imposed a >moratorium on behaviour= which reads as follows:

‘In the interests of sound industrial relations the parties agreed that a moratorium on group conduct such as toyi-toying, mass marches and the like, will be imposed on the company=s premises at Woodstock for a period of 12 (twelve) months commencing 25 July 1995.’

Holland=s argument was that the agreement was not breached by the first appellant because the demonstration was not held on the respondent=s premises. This is sophistry. The clause, inelegantly, speaks of a >moratorium posed on the company=s premises...’ It obviously included areas adjacent to the premises. On the probabilities the first appellant=s officials knowingly disregarded the agreement and embarked upon action which they must have known would impact adversely on the respondent=s business operations. That the protestors in this atmosphere would have scrupulously avoided one form of disruption - the stopping of vehicles - is to my mind not in the least probable. As for inhibiting the movement of the respondent=s personnel, Anema made a contemporaneous note in his diary for 25 August reading >people too afraid to go to shops.= There is no reason to think that the note is not accurate. Even though the protestors may not have physically prevented co-employees from reaching the >shops= (which refers to the café where many workers habitually bought lunch) the psychological obstacles were as great as any physical constraint may have been. All this fortifies the strong impression I have that compliance with proper procedures and a regard for legal requirements was not sufficiently high on Saccawu=s agenda to have prevented it from resorting to, or at least tolerating, a little additional pressure in the way of stopping vehicles to and from the respondent=s premises.

[23] After Antoni=s murder, the respondent felt obliged to approach the supreme court for an interdict against unlawful behaviour by the protestors. Ms Zoë Holland, a para-legal in the employ of Saccawu, represented it at court. It was hoped to brief counsel but it seems that none could be found at such short notice. An order was granted on the evening of 30 August. A copy was given to Holland. She made no attempt to timeously communicate the terms of the order to the protestors. She declared, lamely, I thought, that the next day, 31 August, was her day off and that she did not arrive at Saccawu=s offices until much later that morning. I find it disturbing that, despite being entitled to the day off, she made no attempt to communicate the terms of the order to any responsible official of Saccawu. At the very best for Holland, she was guilty of gross dereliction of duty. A high court interdict is not a trifle. A body like a trade union which, through an official, has knowledge of such an interdict is not entitled to take up the stance that it will do nothing to obey the order until it has been served. That seems to have been the Saccawu attitude. Moreover, the interdict was served at Saccawu=s offices at 08:50 the day after it had been granted. Despite that, the demonstrations at the Woodstock factory were allowed to continue in the same manner as before. Saccawu had sought permission for and organised the demonstrations. It was in this sense responsible for how they were being conducted. It behaved irresponsibly in not immediately dispatching an official to Woodstock to ensure that the terms of the interdict were meticulously

observed. On 31 August the demonstrators only arrived at the factory between 10:00 and 10:30. There had been ample time to make proper arrangements to ensure adherence to the order.

[24] There is another informative piece of evidence from which the defiance of Saccawu and the mood of its followers may be gauged. Practically none of the employees said a word in his or her defense at the disciplinary enquiries. It is improbable that this could have been by chance. It is more likely to have been a strategy agreed upon beforehand. What the purpose of it was is not easy to say; but it is easy to say that it manifested an attitude of a confrontational sullenness. This confrontational attitude is really not out of keeping with that displayed throughout by the demonstrators, by their leaders and by Saccawu=s officials.

[25] In the light of all these factors, the appellants= argument that the conduct of the demonstrators was not, and could not have been seen to be, intimidatory, cannot be accepted. I agree with Anema that the protestors were demonstrating in order to get their jobs back, something which they thought to do by putting pressure on management through the disruption of the respondent=s business. The demonstration at the respondent=s head office was a far more visible expression of protest. Yet the protestors chose to demonstrate at the factory, where the roads are not used much by the general public. Mr. Rose Innes who appeared for

the respondent submitted that the site chosen for the demonstrations shows that it was chosen in order to make an impact on the workforce. I agree. By disrupting the respondent=s business, Saccawu could reveal itself as the more powerful and militant union whose demands could only be rejected at the respondent=s peril. It was, it seems to me, determined to build upon the image of the defiant union it had begun to establish in June of that year.

[26] The additional member in the industrial court came to the conclusion that in the case of those of the demonstrators who had committed a first disciplinary offence >of this nature= (by which I suppose was meant an offence involving intimidatory or unruly conduct) a final written warning would have been a more suitable penalty. This applied to appellants two to nineteen, Appellants twenty to thirty-four (with the exception of appellant twenty-seven who was dismissed for aggravating features associated with her participation in the demonstration) had already been given final written warnings for their participation in the protest action of 21 June 1995 . In their case dismissal was judged to be an appropriate penalty.

[27] One searches in vain in the judgement *a quo* for any indication that the additional member appreciated the severity of the damage done to the respondent=s business by the protest action, coming, as it did, so soon after the

frightening eruption on 21 June and the alarm which it, and the rumours and threats associated with it, created for a long time thereafter. These circumstances must have been well known to the demonstrators and to Saccawu officials like Holland. The actions were carried out with a disquieting disregard for the economic rights of the employer and the right to security and tranquility of its employees. It must give any observer cause for concern that, even after Antoni=s murder, Saccawu did not see fit to call off the demonstration scheduled for 31 August. No one on Saccawu=s side could have had any doubt as to the devastating impact that rumours (whether true or not) as to the cause of his death would have had on the work-force, and especially on the Fawu shopstewards.

[28] Anema gave uncontested evidence that it took a year for production at the factory to return to normal. Though he did not quantify the loss, one can assume that it was great. It does not seem to me to be fair under these circumstances to say that a first offence would not warrant dismissal. Anema said in evidence that the employer-employee relationship had been totally destroyed and added, significantly, that in his view the relationship between co-employees had also been seriously impaired. That, on the facts on this case, was not an unimportant consideration in dismissing those who - as Anema expressed it - >had put the fear of God into= their co-employees.

[29] It was argued before us by Mr. Grobler for the appellant that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. In my view too great an emphasis is quite frequently sought to be placed on to the 'principle' of disciplinary consistency, also called the 'parity principle'. (as to which see e.g. Grogan, *Workplace Law*, fourth ed. p.145 and Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, p.110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (The Dismissal of Strikers, MSM Brassey (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers' Industrial Union & Others (1991) 12 ILJ 806 (LAC) at 813 H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the

disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy. (As was the case in Henred Fruehauf Trailers v National Union of Metalworkers of SA & Others, (1992) 13 ILJ 593 (LAC) at 599 H - 601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd, 1994 15 ILJ 1257 (A) at 1264). Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.

[30] Even if it could be shown that Mr. Hosken, the disciplinary chairman, in one or more of the cases where final warnings were given, was excessively lenient, it would be unfair to allow the other demonstrators to escape what I consider to be their proper punishment simply because Hosken's discretion in some cases failed him. The respondent was distressed at the outcome of these hearings. It would have preferred all the demonstrators to have been dismissed and that was, in each case, the sanction that was demanded. I make these remarks by

the way because I am not, on the evidence appearing from the transcript of the disciplinary enquiries, satisfied that Hosken was wrong. Of course, if the challenge is raised, it is the duty of an employer to demonstrate, as part of the proof that a dismissal was fair, that there was no inconsistent disciplining of employees. (See Early Bird Farms (Pty) Ltd v Mlambo [1997] 5 BLLR 541 (LAC) at 545 J). That onus has in this case been discharged.

[31] In all sixty-nine persons were charged with misconduct. At the end of the enquiries thirty-four were dismissed. Those who were found not guilty could not be adequately identified from photographs taken of the demonstrations. The photographs were the only evidence that the respondent could produce at the enquiries. No employee, apart from management employees, was prepared to testify. According to Catto they feared for their lives if they were to be seen to be involved. If this, uncontroverted, evidence is accepted, it furnishes one more cogent reason for holding that the conduct of the demonstrators was intimidatory to a really disturbing extent.

[32] It follows from what I have said above that the court *a quo* correctly came to the conclusion that all the further appellants had properly been found guilty of unruly conduct which interrupted the normal course of the respondent=s business. I

also agree that the court *a quo* was correct in upholding the sanction of dismissal in the case of appellants twenty to thirty-four. I disagree, however, that the dismissal of the reinstated appellants two to nineteen was unfair. The only basis for distinguishing between them and the other appellants was that they had previously received final written warnings for having taken part in the industrial unrest of 21 June 1995. In coming to this conclusion I believe that the industrial court seriously misjudged the gravity of their misdemeanour. As I said earlier they caused the respondent extensive and long lasting damage. They deserved to be dismissed. That the other individual appellants doubly deserved to be dismissed did not mean that they should have escaped the same fate. The conclusion betrays too little regard for the respondent=s legitimate protection of its commercial interests, paramount among which is the security and productive tranquility of its workers.

- [33] In the case of a dismissal, the value judgment which a court is asked to exercise, involves an enquiry as to whether the dismissal was lawful and fair. Fairness, of course, means fairness to both parties to the dismissal dispute, the employer and the employee.

1996 (4) SA 577 (A) at 592 B – 593 I, (1996) 17 ILJ 455 (A) at 459 E – 461 C, Dube and Others v Nasionale Sweisware (Pty) Ltd 1998 (3) SA 956 (SCA) at 960 E-F.)

In order to determine whether a dismissal is fair, one asks oneself whether an employer could reasonably be expected to continue employing the offending employee. It seems to me that in the present case the answer must be an emphatic no. The offending employees *in casu*, by what they were (with the connivance of Saccawu) prepared to do to their employer, demonstrated a lack of that loyalty to, and reasonable co-operation with, the respondent which is essential to a continuing employment relationship.

[34] In my view this court is justified in interfering with the discretion exercised by the court *a quo* in altering, in the case of appellants two to nineteen, the sanction of dismissal to one of a final warning. It seems to me that the industrial court exercised its discretion improperly. (see: Chemical Workers= Industrial Union and Others v Sopedlog CC (1994) 15 ILJ 90 (LAC)) The improper exercise of the discretion arose from the court=s failure to appreciate the enormity of the impact which the demonstration had on the respondent=s business, and the contempt shown by Saccawu and its members for correct industrial procedures, for agreements solemnly concluded, and for a respect for the law. It was not simply

a matter of a few delivery vehicles having been impeded, as the additional member seems to have thought. In the prevailing climate the demonstration was calculated to excite fear and so cause disruption. The country expects the courts to say very clearly that industrial relations are not to be conducted in this way. (Dube=s case (supra) at 960 G-H, Mondi Paper Co Ltd v Paper Printing Wood and Allied Workers Union and Another (1994) 15 ILJ 778 (LAC) at 781 A-B). Anyone who bedevils industrial relations in this way can expect no sympathy from the courts. (See: National Union of Metalworkers of SA and others v Wayne Rubber (Pty) Ltd (1996) 17 ILJ 333 (IC) at 357H - 358A)

[34] The appeal is dismissed with costs. The cross appeal succeeds with costs. The order of the industrial court is set aside and replaced by the following order –

AThe application is dismissed with no order as to costs.@

CONRADIE JA
agree

I

FRONEMAN DJP

I agree

NICHOLSON JA

Date of hearing:	6 May 1999
Date of Judgment:	
Appearance for Appellant:	ADV. Grobler
Appearance for Respondent:	ADV. Rose-Innes