

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO : JA 24/98

In the matter between :

SOUTH AFRICAN CHEMICAL WORKERS UNION

& OTHERS

APPELLANTS

and

AFROX LIMITED

RESPONDENT

JUDGMENT

FRONEMAN DJP :

INTRODUCTION

[1] The dismissal of employees during a strike is an exercise fraught with difficulty. The stakes are usually high on all sides. On the one hand not only the work, but often the very livelihood of individual employees is endangered. On the other, the continued viability of a commercial enterprise may be placed at risk. Both these interests are obviously important to the well-being of society. Lawmakers attempt to lay down fixed rules to create certainty in these situations. Inevitably, however, the courts end up pronouncing upon the application of the law to

specific practical circumstances. It is only then that the holy grail of absolute certainty of the law is shown up for what it is.

- [2] This appeal concerns one of those practical situations. The Labour Relations Act 66 of 1995 (“the LRA”), a product of the new democratic order, seeks to protect striking employees from dismissal if they play the power game according to its rules. It also seeks to safeguard the continued commercial viability of enterprises, even in strike situations. This clash of interests lies at the heart of the dispute in this appeal.

THE FACTS

- [3] The respondent (“Afrox”) dismissed 48 of its drivers (“the dismissed employees”) during a strike by them in February 1997. The total workforce of the drivers at Afrox’s Germiston and Pretoria plants was 52. Only the dismissed employees were on strike at the time. The four non-striking drivers were also dismissed at a later stage.
- [4] The strike was a protected one in terms of the provisions of the LRA. It had started on 10 January 1997. A sympathy strike by other workers at Afrox was also in operation at the time of the dismissal. It was also protected in terms of the LRA’s provisions.

- [5] The dismissed employees contend that they were dismissed for their participation in the strike - something the LRA does not allow. Afrox denies this. It says that their dismissal was based on its operational needs - something the LRA does allow.
- [6] The operational need to change from the way in which the drivers worked in the past was not in dispute. This need stemmed from the fact that the drivers had worked hours in excess of statutory limits and of what was permitted in terms of safety practices by Afrox's parent company. The manner in which this problem had to be overcome gave rise to dispute.
- [7] By the end of 1995 Afrox had decided to bring the level of the drivers' work within legitimate and acceptable norms. It initiated consultations with shop stewards of the appellant ("the union") and other representatives of the drivers in April 1996, in a joint effort at finding a solution to the problem. Afrox's solution was a staggered shift system : a system of rotational shifts whereby one shift of drivers would do weekend work as normal time, not overtime. The employees proposed a continuation of the system of voluntary overtime, but that it be implemented more effectively so that overtime limits were not exceeded.
- [8] A number of meetings were held in April and May 1996, but no solution was forthcoming. Following upon industrial unrest, a relationship building exercise

involving outside facilitators was held during August. An undertaking was obtained from Afrox that the employee proposal would be given a month's trial in September.

[9] The progress of the trial was supposed to be monitored at weekly meetings. One such meeting was held on 6 September during which problems were discussed. There was no discussion about the discontinuance of the trial. On 11 September, three days before the next monitoring meeting, Afrox convened an unscheduled meeting with shop stewards and other worker representatives. At the meeting Afrox recorded that the trial had failed and gave notice of its intention to introduce a staggered shift system. Final notice to this effect was given on 26 September.

[10] The drivers refused to work the staggered shift system when it was sought to be implemented on 30 September. The union declared a dispute, but after negotiations agreed that, with effect from 2 October, its members would work in terms of a staggered shift system pending the resolution of the dispute. This system entailed that those members of the union who were contractually bound to do so would work staggered shifts whilst those who were not contractually so bound would continue with their normal shifts.

[11] Afrox was content with this system, as it appeared to deal satisfactorily with the excess overtime problem. The dismissed employees were not : they considered

it an unfair labour practice to impose two different sets of conditions of employment for people doing the same work. At a meeting held on 16 October they gave expression to their views, indicating that no drivers were prepared to work staggered shifts. It was at this meeting that the possibility of retrenchment was raised for the first time. On 28 October the union declared a dispute and applied for the establishment of a conciliation board to consider the dispute concerning the failure to reach a settlement on the implementation of a staggered shifts. The attempt at conciliation failed and the strike commenced on 10 January 1997, after due compliance with the statutory requirements for a protected strike in terms of the LRA. Afrox made alternative arrangements for the driving work which, after initial difficulty, worked reasonably satisfactorily.

- [12] From 20 January to 22 January the parties participated in a mediation process, but the mediator could not resolve the dispute. On 24 January Afrox invited the union to commence consultations on the operational requirements of the company, also giving notice that non-compliance with its demands to work staggered shifts would lead to dismissal. The first meeting was proposed for 27 January, but due mainly to difficulties presented by the union the first meeting was only held on 12 February. By that time Afrox had already, on 31 January, given notice of a proposal that the work of the drivers be contracted out to independent operators. It had also given notice that retrenchment would follow upon the collapse of the consultative process.

[13] At the meeting of 12 February Afrox indicated at the outset that in order to run its business efficiently and safely it now had to consider contracting out the bulk driving. It invited the union and shop stewards to make proposals before it embarked on that process. The union made a number of proposals, the effect of which was that the employees would not work staggered shifts, but would return to the old overtime system. This was not acceptable to Afrox : it insisted on consultations about contracting out. No agreement could be reached on this aspect either. The meeting was adjourned after a union official suggested that the parties should declare a dispute about the failure to agree on contracting out; a suggestion rejected by Afrox.

[14] On 13 February the union went ahead and declared a dispute about a failure to reach agreement on the contracting out issue. On the same day other workers at Afrox went on strike in sympathy with the strike by the dismissed employees.

[15] Afrox responded to these events by informing the union on 14 February that it had confirmed its decision to proceed with contracting out. This meant that the work of all drivers would be performed by an external contractor. The result would be the retrenchment of all drivers, which would take effect on the date of the letter of retrenchment. Afrox also launched urgent proceedings to interdict the participation in the strike by other employees, but failed in its attempt to do

so. The actual contracting out of the driving work only occurred later, in April and May.

[16] The individual employees were finally dismissed on 17 February. A second application to interdict the continuing strike by other employees followed, this time successful. The reason for its success lay in the dismissal of the dismissed employees : there was no dispute left for the other employees to strike about.

[17] The union and individual employees sought redress for their alleged unfair dismissal in the Labour Court, before Landman, J. They failed : hence, finally, this appeal.

THE LAW

[18] The LRA requires that its provisions be interpreted to give effect to the statute's primary objects, and in conformity with the Constitution and South Africa's public international law obligations (section 3). One of its primary objects is to give effect to and regulate the fundamental labour rights in the Constitution (section 1 (a)). This Court has often emphasised the importance of interpreting and applying the provisions of the LRA in proper constitutional context (Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd [1998] 12 BLLR 1191 (LAC); (1999) 20 ILJ 321 (LAC) para [18]; Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union [1998] 12 BLLR 1209 (LAC); (1999) 20 ILJ 89 (LAC) para [22] and the cases cited there). The Constitution and the provisions

of the LRA are thus the starting points for any analysis of the law relating to the dismissal of employees during a strike.

[19] That is not to say the history of our law relating to the dismissal of striking employees is entirely irrelevant. A brief look at the evolution of that law and a comparison with the present position is instructive in a number of ways.

[20] The common law did not recognise an employee's right to strike. Strike action constituted a fundamental breach of contract which entitled an employer to dismiss employees who participated in the strike (compare R v Smit 1955 (1) SA 239 (C) at 244 A). The right to dismiss striking employees moved away from its contractual origins to one rooted in collective bargaining in terms of the previous Labour Relations Act's (Act 28 of 1956) unfair labour practice jurisdiction (National Union of Metalworkers of SA v Vetsak Co-operative Ltd 1996 (4) SA 577 (A); (1996) 17 ILJ 455 (A); National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd 1997 (4) SA 51 (A); (1997) 18 ILJ 439 (HC)). There remained nevertheless, a reluctance to accept that this was a development of law in the strict sense, as is evidenced by the refrain that determining the fairness or otherwise of a dismissal involved a "moral or value judgement" and not the application of law (Vetsak's case, above at 592 B - I; and also, more recently, National Union of Metalworkers of SA v GM Vincent Metal Sections (Pty) Ltd, unreported case no 116\96 (SCA), para [18]).

[21] In contrast, the fundamental labour rights set out in the Constitution include a right to strike (section 23 (2) (c)), but no explicit right to dismiss striking workers. The Constitution, however, also enshrines a right to fair labour practices (section 23 (1)). These rights are given expression and regulated in the LRA. The right to strike is subjected to a number of significant limitations in the LRA (compare CWIU v Plascon Decorative (Inland) (Pty) Ltd above, para [21]), whilst an employer's fundamental right to fair labour practices is recognised in the employer's right to dismiss an employee for a fair reason based on operational requirements and in accordance with a fair procedure (sections 67(5), 188(1)(a) (ii) and (b), and 189 of the LRA; Johnson and Johnson v CWIU above, para [23]).

[22] The difference between the old and new, and the evolution of our law even under the old order, serve to illustrate a number of important truths. Amongst these is that the changing content of the law relating to, specifically, the dismissal of striking employees, was very often influenced by the prevailing views of not only the social, economic and political realities of the day, but also of the nature of the law itself. But the new constitutional dispensation changes much of that. Social, economic and political relations in a democratic state founded on the values set out in section 1 of the Constitution cannot be the same as under an undemocratic and racially exclusive order, as the old order was. Fairness has become the hallmark, or essence, of labour law and practice, not only a moral adjunct thereto. So-called 'moral' values have become constitutionalized rights.

[23] This means that the uncritical adoption of previous statements of the law relating to the dismissal of strikers under the previous Labour Relations Act must be avoided. But it also means that judges must guard against casting their own subjective views on the nature of the law and socio-economic or political realities in the misleading mould of value-free, objective 'law'. The best one can aspire to in interpreting and applying the law is to attempt to neutralise the effect of one's own subjective preconceptions by being aware of them.

[24] It is now necessary to return to specifics. Section 5 (1) of the LRA prohibits discrimination against an employee for exercising any right conferred by the LRA. Section 67 (4) states that an employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike. Section 187 (1) (a) makes a dismissal contrary to section 5, or for participating in or supporting a protected strike (or an intention to do so), automatically unfair.

[25] Balanced against these provisions is section 67 (5), which provides that section 67 (4) does not preclude a fair dismissal for reasons related to an employee's conduct during a protected strike, or for reasons based on the employer's operational requirements. 'Operational requirements' are defined in section 213 as those requirements 'based on the economic, technological, structural or

similar needs of an employer'. Section 192 (2) provides that once the existence of a dismissal is established (by the employee - section 192 (1)), an employer must prove the fairness of the dismissal. This would include proving, in the case of an alleged automatically unfair dismissal under section 187 (1), that the dismissal was not contrary to section 5, nor for any of the reasons set out in section 187 (1) (a) - (f).

[26] It is not immediately apparent why it was necessary in section 67 (5) to provide explicitly that section 67 (4) did not preclude a dismissal based upon operational requirements. Notionally such a dismissal would in any event not have been precluded by section 67 (4), because the definition of operational requirements in section 213 does not restrict those requirements to those not flowing from (or only flowing from) a strike or its consequences. (The other qualification in section 67 (5), however, relating to conduct during a strike (protected or not), is in the nature of a true exception or proviso to section 67 (4)).

[27] The purpose of the 'operational requirements dismissal' qualification in section 67 (5) seems to be to counter any possible argument to the effect that the strike protections in the LRA must be extensively interpreted as protecting an employee from dismissal for operational needs *if those needs were caused by the strike or the consequences of the strike*. This was a submission initially advanced in the written heads of argument by Mr Brassey who, together with Mr van der Riet,

appeared for the union and the dismissed employees on appeal. In his oral argument Mr Brassey retreated somewhat from the original submission, qualifying it in some important respects.

[28] The argument that a dismissal based on operational requirements flowing from a protected strike or its consequences should itself be proscribed is superficially attractive. It fits in with an approach that constitutional rights, given without express limitation in the Constitution, 'should not be cut down by reading implicit limitations into them' (per Kentridge AJ in S v Zuma & others 1995 (2) SA 462 (CC), para [15], quoted by Cameron JA in CWIU v Plascon Decorative (Inland) (Pty) Ltd above, para [20]). In addition it may be argued that normal contractual remedies have, in general, been abolished in relation to protected strikes (including dismissals and the continuing obligation to pay non-dismissed strikers during a strike - section 67 (3)) and that the outcome of a protected strike should be left entirely to a power play between the opposing parties. To allow dismissals, even for operational requirements, in these circumstances would undermine the power play when it becomes most effective in the hands of the striking employees (compare Du Toit & Others, The Labour Relations Act of 1995, 2nd ed, at 418).

[29] Mr Gauntlett, who appeared with Mr Franklin for Afrox, suggested that there was both a textual and a substantive answer to this argument. Section 67(5) provides

for an explicit limitation on the protection of striking employees. The limitation itself is not textually limited by either the language of section 67 (4) or the definition of 'operational requirements' in section 213. The substantive answer, he submitted, lay in the functional limits of the right to strike, a factor alluded to by Landman, J in the court below, where he spoke of the dependence of the right to work 'on the existence in economic terms of the enterprise'. A right to strike is predicated on the very existence of an enterprise providing employment for the employees who wish to exercise that right. The employer's right to fair labour practices in the form of a right to a fair dismissal based on operational requirements (section 188 (1); Johnson & Johnson v CWIU, above, para [23]) must come into play when the exercise of the right to strike threatens the continued operation of the employer's enterprise.

[30] In my view these submissions are sound. The conclusion is thus that operational requirements, even those caused by the protected strike or its consequences, may justify a dismissal, for operational reasons, of employees participating in or conducting, a protected strike, provided that the requirements of the LRA in this regard are met.

[31] The first enquiry in such a case would be to determine the reason for the dismissal of the striking employees. If that reason is for participation or support (or intended participation or support) of a protected strike, and not for operational

requirements, the dismissal will be automatically unfair (section 187 (1) (a)).

[32] The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilised here (Compare S v Mokgethi and others 1990 (1) SA 32 (A) at 39D - 41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34). The first step is to determine factual causation : was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare S v Mokgethi, above, at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from

circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of section 187 (1) (a). If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.

[33] Section 188 (1) provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is a fair reason based on (amongst others) the employer's operational requirements and that the dismissal was effected in accordance with a fair procedure (section 188 (1) (a) (ii) and (b)). It is only at this stage that fairness of the dismissal comes into the picture.

[34] As has already been seen, section 213 defines 'operational requirements' as those based on economic, technological, structural or similar needs of an employer.

[35] Section 189 sets out the requirements for a fair procedure for dismissals based on operational requirements. The requirements are aimed at a joint consensus seeking approach and compliance with the formal requirements of the section

depends on the achievement of this purpose (Johnson & Johnson v CWIU, above, paras [26] to [30]).

[36] It is implicit in the terms of section 189 (2) that an employer, apart from taking part in the formal consultations on the aspects set out in the section, should also take substantive steps on his or her own initiative to take *appropriate* measures to avoid the dismissals; to minimise the number of dismissals; to change the timing of the dismissals; to mitigate the adverse effects of the dismissals; to select a fair and objective method for the dismissals (see also section 189 (7)) and to provide appropriate severance pay for dismissed employees (see also section 196). What is appropriate will depend on the facts of each case, and on the evidence presented about the steps taken, if the matter proceeds to court (compare para [43] below).

[37] The onus is on the employer to prove all the requirements for a fair dismissal set out in paras [31] - [36] above (sections 192 (2) and 188 (1)). The standard of proof is that of a balance or preponderance of probabilities, as in ordinary civil cases.

[38] It follows that it can no longer be said that the court's function in scrutinising the consultation process in dismissals for operational requirements is merely to determine the good faith of the employer (compare SACTWU and Others v Discreto (a division of Trump & Springbok Holdings) [1998] 12 BLLR 228 (LAC),

para [8]; (1998) 19 ILJ 1451 (LAC)). The matter is now one of proof by the employer, on a balance of probabilities of :-

- the cause or reason for the dismissal (paras [31] and [32] above);
- the defined 'operational requirements' that the dismissal was based on (para [34] above);
- a fair procedure in accordance with section 189 (para [35] above);
- the facts upon which a finding of a substantively fair reason for the dismissal can be made (para [36] above).

[39] Except for proving that the reason for dismissal is not an employee's actual or intended participation in, or support of, a protected strike, proof of the further requirements for a fair dismissal based on operational requirements in cases involving the dismissal of striking employees is notionally no different from dismissals where there is no strike in operation. There are, nevertheless, important considerations in protected strike dismissal cases which warrant special scrutiny in the assessment of the fairness of these dismissals.

[40] Mr Gauntlett urged us not to lapse back into the test of functional necessity (or dismissal as a last resort) for determining the fairness of the dismissal, as expounded in cases like BAWU v Prestige Hotels CC t/a Blue Waters Hotel(1993) 14 ILJ 963 (LAC) 973 A -C and Cobra Watertech v NUMSA (1995) 16 ILJ 582 (LAC) 616F, but rather to adopt the approach set out in the Vetsak

and Black Mountain cases, referred to above (para [20]). For the reasons set out in paras [19] - [23] above, I think it is better to adopt neither approach, but to seek a solution from the provisions of the LRA and its impact on the collective bargaining process itself.

[41] The general approach of the LRA is to immunise employees participating in a protected strike from normal delictual and contractual consequences (section 67 (2)). In return an employer is not obliged to remunerate employees during a protected strike (section 67 (3)) and it may employ replacement labour during a protected strike, except for designated maintenance services and during offensive lock-outs (section 76). The outcome, or resolution, of a strike is thus normally left to the respective positions of power of the opposing parties. Dismissal only becomes a weapon in exceptional circumstances, when operational requirements dictate its use (section 67 (5)). Even in non-strike dismissals based on operational requirements an employer must seek appropriate measures to avoid dismissals, minimise their number, change their timing and mitigate their adverse effects (section 189 (2) (a)). These are all indications that dismissal should at least not be the first resort, even though the LRA does not expressly state that dismissal should only be used as a last resort when dismissing for operational reasons.

[42] What this suggests is that, in protected strike dismissals based on operational

needs, an employer needs to prove that, in addition to other options considered to avoid the dismissals, it also paid proper attention to the possibility of allowing the outcome of the protected strike to be dictated by the normal power play involved in those situations. It must also be kept in mind that in such situations employees may have the subjective belief that they are protected from dismissal because the strike complies with the formal requirements laid down in the LRA. Their possibly defiant rhetoric during the strike must therefore be assessed with this in mind; a particular instance of what Mr Brassey called the 'cathartic' or 'therapeutic' function of strikes.

- [43] This does not necessarily mean that dismissal will only be fair if used as a means of last resort. By making fairness of the dismissal a matter of proof (sections 188 (1) (a) and 192 (2)), the LRA has made the assessment of fairness dependent on the factors proved and canvassed in evidence in court. This imposes a discipline upon the parties to the dispute and the person hearing the case. If an employer wishes to show that it considered appropriate options other than dismissal it must present evidence to that effect and explain why it chose a particular course and not another. If an employee wishes to challenge that evidence it must do so by proper cross-examination on the relevant issues and, if considered necessary, by leading rebutting evidence. If this shows up the untenability of the employer's position, it will have a material effect in the final assessment of fairness. The presiding officer's assessment of the fairness or otherwise of the dismissal will

also be dependent on the evidence presented before him or her. An assessment on 'moral' considerations not based on the evidence led at the trial will be impermissible. (All this is not new. It happens every day in all courts, in relation to all sorts of different kind of issues. It is the very stuff of litigation and adjudication.)

- [44] The requirements that must be proved to show substantive fairness are those set out on section 189 (2), read with sections 189 (7) and 196 (para [36] above). The employer bears the onus of proving substantive fairness and the other requirements set out above (in para [37]), and must do so on a balance or preponderance of probabilities (the civil standard of proof). If a presiding officer is unable to conclude, on the basis of the evidence presented to her or him, that a dismissal was fair, it follows (because of the incidence of the onus) that the employer will fail in its defence to a claim by an employee for unfair dismissal.

APPLICATION OF THE LAW TO THE FACTS

The reason or cause for the dismissals (compare paras [31] and [32] above)

- [45] The origin for the need to change Afrox's old driving system of overtime lay in the fact that this system contravened statutory limits on working hours and company policy on safety. This was not disputed, nor was it disputed that the need to change predated the strike embarked upon in January 1997.

[46] To determine whether the employees' participation or conduct in the protected strikes was the reason for their dismissal, and thus made the dismissal automatically unfair, one first has to ascertain whether such participation or conduct was a factual cause for the decision to dismiss. To do this one must ask whether the dismissal would have taken place had there been no participation in the strike (or had there been no strike). In my view the answer to this must be no. On the available evidence Afrox was quite happy with the modified staggered shift system which was in operation from the beginning of October 1996 until the strike started in January 1997. It does not seem probable that Afrox would have implemented a contracting out system when it was happy with the results of the modified staggered shift system. What must also, however, be kept in mind is that no dismissals would have occurred had there been no need to modify the old overtime system. This need was the original factual cause of all that followed.

[47] Once it is accepted that participation in the strike was also a factual cause for the dismissal of the employees, the next question is whether participation in the strike was, as a matter of probable inference from the facts, the only real or proximate cause of the dismissal (in other words, whether such participation was the legal cause of the dismissals). I do not think that the question must necessarily be answered positively. The need to change the old system predated the strike. The possibility of retrenchment was first mentioned in

October 1996, before the strike; consultations about the implementation of the contracting out took place during the strike; and the union was warned that dismissal would follow on the lapse of these consultations. Although it is probably true to say that the continued participation in the strike contributed to, or accelerated the decision to dismiss, it seems to me that it cannot be said to be the main, or proximate, or dominant cause for the dismissal. The need to get the business going again on a permanent and more stable basis was as pressing a consideration, if not more so. Whether the timing of the dismissals was appropriate belongs more properly to the enquiry whether the dismissals were fair.

[48] It follows that Afrox discharged the onus of proving that the reason for the dismissals was not for the employees' participation in the strike.

'Operational requirements" - section 213 (compare para [34] above).

[49] It is not disputed that the change to the old system was necessary by reason of the needs mentioned in section 213.

Fair procedure in accordance with section 189 (compare para [35] above).

[50] Afrox started the consultation process to change the old system in April 1996. It restarted the process again during the strike when the need to contract out the bulk driving became more acute. Its proposals prior to consultation dealt with the

issues required by section 189 of the LRA. Landman J's finding that it complied with fair procedural requirements was not seriously challenged on appeal.

Substantive fairness - section 189 (2), read with sections 189 (7) and 196 (compare paras [36] and [38] - [43] above).

[51] The submissions relating to the unfairness of the dismissals for operational reasons rested, broadly speaking, on two foundations, namely that (1) the timing of the dismissals was premature, and (2), that there was an equally effective, but less harmful way in which Afrox could have ensured that the work was done - by implementing the staggered shift system unilaterally.

[52] The premature dismissal argument relied, essentially, on three factors. These were (1) that at the time of the dismissal the implementation of the contracting out system was not yet in place; (2) that the dismissal of the non-striking drivers only took place at a later stage; and (3) that the dismissal of the striking drivers was necessary to end the sympathy strike by other employees.

[53] I must confess that because of these factors I had serious doubts about the fairness of the timing of the dismissals. Two considerations have convinced me that these doubts are insufficient reasons for interference on appeal. The first is that Afrox made it clear, prior to entering into renewed consultations about contracting out during the strike and before the strike by other employees

commenced, that dismissal would follow immediately upon the collapse of the consultation process. It was the union, not Afrox, that brought that consultation process to an end by declaring a dispute. The union did this whilst being fully aware of the consequences of such a step. This had nothing to do with defiant rhetoric on the issue which led to the strike, namely the refusal to work staggered shifts. The second arises from the nature of an appeal itself. Landman, J, in the trial court, accepted the credibility of the witnesses called on behalf of Affrox, particularly that of the witness Campher. This witness had given explanations in answer to questions directed to him on these issues. No reasons were advanced on appeal why Landman J's credibility findings in this regard should be upset or interfered with on appeal. In their absence any interference on appeal is unwarranted.

[54] The second leg of the argument on fairness - that Afrox could, instead of dismissal, unilaterally have implemented a staggered shift system - was not one squarely, or even obliquely, raised in cross-examination of Afrox's witnesses, or by the leading of evidence on behalf of the union and the dismissed employees. The closest mention to managerial prerogatives in this regard was in relation to implementation of the modified staggered shift system in October 1996, but the witnesses were not taxed on this option in relation to alternatives available in January or February 1997 when the strike was in operation. There is thus no foundation in the evidence on record to justify a finding of unfairness in the

dismissal of the employees on this ground.

CONCLUSION

[55] On the facts established by the evidence on record Afrox discharged the onus of showing that it dismissed the dismissed employees for a fair reason based on its operational requirements, and not for the reason that they participated in, or supported, the protected strike then in operation.

CONDONATION

[56] Both parties applied for condonation of defects in their respective procedures. The explanations offered were not entirely convincing, but not so deficient in nature to justify refusal of condonation. As a mark of disapproval no costs orders are made in relation to these condonation applications.

ORDER

[57] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel.

J C FRONEMAN
Deputy Judge President
I agree.

S NGCOBO
Acting Judge President

I agree.

F KROON
Judge of Appeal

Date of hearing : 30 March
1999

Date of judgment :

Appellant's representative : M S M Brassey SC & J G
van der Riet

Instructed by : Routledge -
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Respondent's representative : J J Gauntlett SC & A E
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