

NOT REPORTABLE. NOT OF INTEREST TO OTHER JUDGES

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN BRAAMFONTEIN)**

CASE NUMBER: JR953/2008

In the matter between

NUPSAW obo MANI AND 9 OTHERS

APPLICANT

V

NATIONAL LOTTERIES BOARD

RESPONDENT

JUDGMENT

AC BASSON, J

- [1] The ten applicants (represented by their union NUPSAW – hereinafter referred to as “NUPSAW” or “the union”) were dismissed following a disciplinary hearing chaired by Prof. A van Niekerk (as he then was – hereinafter referred to as “the chairperson”). The said 10 applicants

initially formed part of a much large group all of whom were charged with three acts of misconduct. (I will return to what happened to the other employees hereinbelow.) The respondent is the National Lotteries Board (hereinafter referred to as “the respondent or the NLB”). The CEO of the NLB is Professor Ram (hereinafter referred to as “Ram”).

- [2] The ten applicants were charged with the following three charges. They were found guilty on charges 1 and 2:

“Charge 1

Insubordination and disrespectful behaviour making the continued employment relationship intolerable by associating yourself with and supporting:

- *the contents of the union’s letter dated 23 May 2008 and the petition dated 3 June 2008 in which the CEO is grossly defamed by the false accusations of ineptitude, favouritism, racial bias, unlawful acts and mismanagement;*
- *the statement that you are not prepared to continue working with the CEO in the same building with him at the helm; and*
- *the call to the NLB to relieve the CEO of his duties.*

Charge 2

Bringing the name and integrity of the NLB and the CEO into disrepute and making the continued employment relationship intolerable by associating with and supporting:

- *the contents of the union's letter of 23 May 2008 in which the CEO is falsely accused of ineptitude, favouritism, racial bias, unlawful acts and mismanagement.*
- *the publication of the contents of that letter in the media; and*
- *the union's stated intention in its letter dated 5 June 2008 to make the contents of its correspondence with the NLB available to the media whenever it deems fit.*

Charge 3

A material breach of the general duty to act in good faith, to co-operate with and the refusal to work under the supervision and control of the duly appointed CEO."

- [3] The transcript of the disciplinary hearing was placed before the court and the parties agreed that it will form part of the evidence in these proceedings. Both parties also stood by the evidence that was led before the disciplinary hearing. It appears from the transcript of the disciplinary hearing that the individual applicants pleaded not guilty to the charges. In fact, the applicants maintained throughout the proceedings in this court that they are not guilty and that they do not acknowledge any wrongdoing on their part.

The case in the pleadings

- [4] The applicants claim that their dismissals were automatically unfair in that the respondent violated section 187 of the Labour Relations Act 66 of 1995 ("the LRA") and more in particular section 187(d) of the LRA. In the

alternative, the dismissals of the applicants were substantively and procedurally unfair and the dismissal sanction was inconsistent and unfair. They claim reinstatement.

- [5] The parties have requested this court to assume jurisdiction in so far as the alternative claim is concerned even though such claim may strictly fall within the jurisdiction of the CCMA.¹ I have indicated to the parties during the proceedings that this court is willing to assume jurisdiction in the event of a finding that the dismissals were not automatically unfair in order to bring this dispute to a finality. I have also in making this decision taken into account that many days' of evidence were led in this court. To refer the matter back to the CCMA will only result in a duplication of the proceedings and an even longer delay in bringing this saga to an end.

Background facts

- [6] The facts leading up to the dismissals are largely common cause. The respondent is established in terms of the Lotteries Act no 57 of 1997. Ram was appointed by the Board as the CEO in June 1999 and has held this position ever since. It is evident from Ram's *curriculum vitae* that he is a person with outstanding academic and management qualifications and credentials obtained here and abroad. Ram was the only witness on behalf of the respondent.

¹ In terms of section 158(2)(b) of the LRA, this Court may assume jurisdiction where the parties consent and it is expedient to do so.

- [7] It is common cause that, at the time of the dispute and the subsequent dismissals, NUPSAW was the recognised collective bargaining entity. It is also common cause that NUPSAW has lost its representivity and recognition since the events that led to the dismissal of the applicants. There is therefore no longer any relationship between NUPSAW and the respondent. At the time of the events a collective agreement existed between the respondent and NUPSAW which provided, *inter alia*, for the recognition of the trade union as being sufficiently representative in terms of Chapter III of the LRA (clause 6.1 of the agreement). NUPSAW was also recognised as the collective bargaining representative of its members (clause 6.2 of the agreement). In terms of clause 6.3 recognition was also afforded to the status and authority of the employer. This clause reads as follows:

"The Trade Union recognizes management's authority and responsibility to plan, organize and manage."

- This clause is significant in that it confirms an undertaking by NUPSAW to respect the respondent. As will become clear later in this judgment, the union disregarded this undertaking and decided to defy the authority of the respondent.
- [8] On 20 March 2008 three of the respondent's shopstewards (Mr. Mokgatlha; Mr. Mani and Mr. Ramatseba) wrote a letter to Mr. Sikonela (Manger of HR and Administration) in terms of which they requested to meet with the HR Committee in respect of the following three matters:

Firstly they wanted to meet about the employment contract of the Chief Executive Officer of the Board (Ram). Secondly they wanted to discuss the nature of Ram's employment contract and particularly *"as to whether it is within the Generally Acceptably Practice where occupation of similar positions within the public sector and government agencies is governed by a set of rules and prerequisite"*. Thirdly the three shopstewards wanted to raise complaints *"on, inter alia, the leadership style and modus operandi of the current CEO and the bad causal effects this has had on staff and that we're no longer prepared to bear with his leadership style any longer"*.

- [9] On the same day, the same three shopstewards wrote another letter on the letterhead of NUPSAW (NLB Branch). In this letter the three shopstewards complained about the fact that they were not invited to the interview for the position of the COO of the respondent. The shopstewards demanded to be invited to the interview despite the fact that they had no right to attend such interview. In fact, when Mani (on behalf of the union) testified, he admitted that NUPSAW has not previously been invited to the interviews of senior management. The letter goes on to inform the respondent in no uncertain terms that should the shopstewards not be invited to the interview, they will make life extremely difficult for the new COO. In fact, they threatened to "isolate" the new appointment. The salient part of this letter reads as follows:

"We therefore question objectivity and fairness of the process. We further would like to inform you that we do not recognise the

interviews and the due appointment that would emanate from them.

We shall therefore not recognise the person appointed and further not give him or her any kind of cooperation and assistance in whatever way. We will isolate such a person and ensure that he or she does not feel welcome until due processes are followed with the Union involved."

- [10] It is clear from these two letters that, as early as 20 March 2008, the union consciously decided to embark on a path of confrontation. The message is clearly conveyed to the respondent that the shopstewards and the union do not accept the right of the employer to make senior appointments (without their input) nor do they accept the CEO and his leadership style (despite the fact that the CEO is accountable to the Board). Moreover, a clear message is conveyed to the respondent that should the shopstewards and the union not be given their way, they will isolate the COO and will refuse to cooperate with him.
- [11] The respondent replied on 1 April 2008 to the union's General Secretary regarding the request for copies of Ram's contract. The respondent states in this letter that the union and the shopstewards have no right to a copy of Ram's contract. The union is further expressly informed by the respondent that any aggrieved employee has the right to follow the grievance procedure if he or she has a grievance. Mani, in his evidence, admitted that he had seen this letter. This is important as the evidence on behalf of the union was that the shopstewards and the union were not

aware of the fact that there was a grievance procedure in place at the respondent. However, even if it is accepted that the shopstewards and the union were genuinely unaware of the existence of a grievance procedure, it is clear from the evidence of Mani that, at least as of 1 April 2008, the union and the shopstewards must have been aware of the existence of the procedure. I must also add that the grievance procedure formed part of the documents before this court. It is clear from this document that a detailed grievance procedure was in fact in place. However, despite the existence of a grievance procedure and despite the fact that the union and the shopstewards were aware of the procedure, the union and the individual applicants refused to use this procedure and rather opted to persist with a confrontational process.

- [12] On 1 April 2008 the respondent replied in a further letter to the request by the shopstewards to be allowed to attend the interview for the position of COO. In this letter the General Secretary of NUPSAW was informed that it is the prerogative of the Board to interview and employ personnel and that the union and its representatives have no right to be involved in the interviews. The letter further warned the union that the threats of non-recognition of the COO and non-cooperation with the COO will constitute insubordination and that any misconduct will result in disciplinary action which may include dismissal.
- [13] Instead of pursuing the grievance procedure to resolve the issues regarding the interviews and the contract of Ram (as requested by the

respondent in the letter dated 1 April 2008), the union sent a further letter dated 3 April 2008. In this letter the union accused the respondent of “snubbing” the union and of threatening the staff with dismissal on the basis of insubordination.

[14] NUPSAW then referred a dispute to the CCMA about its demand to obtain the contract of Ram. An interim agreement was reached at the CCMA and Commissioner Hofmeyer issued a ruling in terms of which the union was directed to draft a motivation and submit it to the Board setting out the reasons for wishing to obtain the contract of the CEO. On 23 May 2008 the union wrote a letter in which it motivated the request for the contract of the CEO. In this letter a number of complaints against the CEO was also listed. This letter was leaked to the Mail & Guardian a few days later. In the article that was published, the allegations as set out in the letter of 23 May 2008 were referred to. It was the leakage of this letter and the publication thereof that formed the basis of the second charge on which the applicants were found guilty.

[15] I do not intend to go into the detail of these grievances for purposes of this judgment as it is not strictly necessary to do so. What is at issue in this case is the conduct of the applicants and the manner in which they pursued their concerns. Some of the complaints included the following: The CEO displays a lack of business leadership and has prompted staff to leave the employment of the NLB “in scores”; the CEO has opted to purchase flat screen televisions sets and a digital satellite television

decoder instead of upgrading the organisations ITC system; Staff does not have unhindered access to the only fax machine located on the first floor; Staff at registry cannot easily deliver mail at other sections of the building “without prior appointment to the relevant section”; The CEO has failed to ensure employment equity in the organisation.

The Petition

[16] On 3 June 2008 the NLB Branch of NUPSAW submitted the following petition, signed by 41 employees, to the respondent:

**“VOTE OF NO CONFIDENCE IN THE CEO OF THE NATIONAL
LOTTERIES BOARD, PROF VEVEK RAM**

*We, the undersigned employees of the National Lotteries Board and as citizens of the Republic of South Africa, hereby submit a **VOTE OF NO CONFIDENCE** in the CEO of the National Lotteries Board, Prof Vevek Ram.*

In addition to the letter dated 23 May 2008, attached herein as “Appendix A”, we the employees of the Board have lost confidence in him and his ability to run the organisation. We, the employees of the Board have suffered adversely under his bureaucratic leadership style and his inept management approaches. We, as the employees of the Board are no longer prepared to bear with him anymore.

In light of the above, we urge the Board to request Prof Vevek Ram to resign and further look at a suitable settlement for him as deemed fit by the Board, Failing which, Prof Vevek Ram must be relieved of his duties due to the reasons stated in "Appendix A".

We do not only submit this vote of no confidence on our behalf, but for fellow South Africans who are currently adversely affected by the bureaucratic leadership style of Prof Ram. The poor, victims of crime, the homeless, the future sporting stars and the future artists of this country are dependent on the public-centered service delivery which they are currently being denied.

We further urge the Board to take this matter seriously as we are no longer prepared to spend a day with Prof Ram in the same building with him at the helm of this organisation. We further urge the Board to ensure that June 30th, 2008 is the last day of his employment.

We the undersigned whole-heartedly support the vote of no confidence in Prof Vevek Ram. We further state that we were neither coerced or misled into signing this vote of no confidence.

We fully understand our actions."

- [17] It is clear from the last paragraph of this petition that the 41 applicants who signed this petition understood and accepted the consequences of signing this petition and that they supported the vote of no confidence in Ram. It is furthermore clear from this petition that the individual employees were no

longer prepared to “bear” with Ram and that he must be relieved of his duties. In fact, the employees demanded that 30 June 2008 should be his last day.

- [18] I am in agreement with Mr. Kennedy that this petition is grossly disrespectful, confrontational and insubordinate. This petition not only is a personal attack on the CEO, but clearly conveys to the respondent that the 41 workers who signed the petition will not respect Ram. In fact they were clearly no longer willing to even spend another day in the same building with him. I am of the view that in supporting this petition the union and the individual employees overstepped the boundaries in the campaign to have their grievances addressed (even if this court accepts that some of the grievances were legitimate).
- [19] On 5 June 2008 the union informed the Board that it had the right to communicate the contents of its correspondence to the public through the media without any fear from the board. The letter stated that the union would “*when it deems fit, publish information to the public for information and support.*”
- [20] On 6 June 2008 the attorneys of the Board wrote a letter to the union in which it noted, *inter alia*, the fact that the CEO was solely accountable to the Board for the performance of all financial, administrative and clerical function and that the union had no right to the CEO’s contract. The attorneys further informed the union that the delivery of the ultimatum was “*subversive to the integrity and authority of the Board and its capacity to*

perform its statutory functions” and that the threat that the employees would not work should Ram continue to serve as the CEO after 30 June 2008, constituted an act of insubordination. The attorneys further requested the union and each of the members who signed the petition to withdraw the petition unequivocally by 9 June 2008 failing which the Board will institute disciplinary action against the signatories. Notwithstanding the express invitation to withdraw the petition, only three of the 41 employees retracted their support for the petition at an early stage. These three employees were not subsequently charged.

- [21] On 9 June 2008 the union’s Provincial Organiser replied to the letter. He stated in the letter that the petition was lawful and that their actions were protected by the constitutional rights to freedom of expression, assembly, demonstration, picket and protest. (I will return to this aspect hereinunder.)

Disciplinary action

- [22] The remaining 38 employees (all of whom refused to retract their support for the petition) were subsequently charged. At the conclusion of the hearing the chairperson delivered his judgment and found the 38 employees guilty on charges one and two. In his finding the chairperson pointed out that he was of the view that it was not necessary to analyse each of the allegations made by the union in the letter dated 23 May 2008 and that it was not necessary to make a finding as to whether or not the allegations can be substantiated because it is not Ram’s conduct or his performance that was at issue but whether or not the individual employees

were guilty as charged. The chairperson however noted that the vast majority of the allegations made concerned archetypal workplace grievances that ought appropriately be addressed by the use of internal grievance procedures. The chairperson was further of the view that the individual employees have all identified themselves with the actions taken by the union and that they clearly had expressed their support for those actions. He further held that it was clear from the evidence that the individual employees had all assumed accountability for the actions of the union. The chairperson further concluded that the union never formally tabled the issues listed in the letter dated 23 May 2008 as grievances and further concluded that the union had consciously resolved to adopt a confrontational stance rather than seeking alternative ways to resolve the issues raised in the petition. The chairperson accordingly found that the employees had made themselves guilty of insubordination and disrespectful behaviour. In respect of the second charge, the chairperson was of the view that the union had leaked the letter to the Mail & Guardian.

- [23] After finding the 38 individual employees guilty as charged, the chairperson (persuaded by a remark by Ram that some of the individual employees were probably unwilling participants in the activities initiated by the union) instead of imposing a sanction, invited the employees to reconsider their actions and to sign a retraction. 28 of the 38 employees thereafter signed the document prepared by the chairperson and

apologised to Ram and disassociated themselves from the letter dated 23 May 2008 and the petition dated 3 June 2008. These employees were each given a written warning and were allowed to return to work. The remaining 10 employees, however, decided not to apologise or to disassociate themselves from the petition. They were thereafter afforded an opportunity to submit arguments in respect of mitigation in writing to the chairperson. The chairperson found that the belated statement of apology contained in the written submissions was “*too little, too late*” and that the apology was not sincere. The chairperson then considered what an appropriate sanction would be and concluded that dismissal was appropriate in circumstances where the conduct of the employees were both deliberate and serious.

Automatically unfair dismissal

[24] I have already pointed out that the main case of the union was that the dismissal was automatically unfair in that the applicants were dismissed for associating themselves with the legitimate activities of the union.

[25] It is accepted that it may sometimes be difficult to distinguish between misconduct committed in the context of lawful union activities and misconduct committed by an employee (as an individual or as part of a group). It is also accepted that a union has an important role to play in protecting the legitimate concerns and demands of its members. It is equally accepted that workers have the right to associate with a trade union of their choice and that they must be able to associate and

participate in the lawful activities of the union without any fear of reprisal from their employer. It is likewise accepted that a trade union has the right to petition as one of the means to pursue the legitimate demands of its members. It is equally accepted that no person should be dismissed or prejudice in employment by reason of trade union membership or legitimate trade union activities. In fact, the LRA expressly grants statutory protection to employees to associate and to participate in the lawful activities of a trade union.²

- [26] I am, however, not persuaded that the applicants in this particular case were dismissed for having participated in the activities of the trade union. Mr. Voyi for the union argued, *inter alia*, that, because the charge sheet stipulates that the applicants were charged for associating themselves with and supporting the contents of the union's letter dated 23 May 2008 and the petition dated 3 June 2008, it is clear that they were dismissed for having participated in the activities of the union. I accept that this is what is stated in the charge sheet. However, nowhere in the pleadings nor in the evidence presented on behalf of the union has any case been made out that the individuals were dismissed for having participated in the activities of the trade union. The employees themselves took a conscious decision to commit acts of insubordination. This much is clear from the petition and especially the declaration made by each person when signing the petition. The employees cannot now hide behind the confrontational path chosen

² Section 4 and 6 of the LRA.

by their union to justify their own conduct. The individual employees clearly and equivocally declared in the petition that they accepted the consequences of their conduct which was to defy the authority of the CEO and demand his dismissal. I do not accept that these acts of subordination were committed as part and parcel of the (legitimate) activities of the union. The employees themselves decided to repudiate the authority of their CEO. This is insubordination. The fact that the acts of insubordination emanated from the trade union or were instigated by the union does not, in my view, transform these acts of serious and deliberate insubordinate conduct into the legitimate activities of the trade union. As I will indicate in the paragraphs hereinbelow, what the trade union did can, in any event not, in my view, be classified as “*legitimate*” trade union activities. It is simply not acceptable for employees to behave themselves in such a manner and then try to hide behind the excuse that their actions constitute legitimate trade union activities. I have already stated that it is accepted that a trade union can strongly and even robustly pursue grievances on behalf of its members. However, what the union and the applicants did in this case went far beyond what is considered to be acceptable and legitimate trade union activities. In this regard I am in agreement with the following sentiments expressed by the chairperson in his findings:

“Secondly, the union failed to bring the subject matter of the accusations to the attention of an appropriate manager, or failing redress at that level, to the attention of a higher level of

management, through the grievance procedure. It also failed to utilize the statutory mechanisms at its disposal. Instead, as I have already noted, it chose a confrontational path, one that involved an attack on the personal integrity of Prof Ram. In sporting parlance, the union decided not to play the ball but rather to play the man. By associating themselves with these actions, and in particular by stating that Prof Ram should resign, failing which he should be dismissed, by stating that they "were not longer prepared to spend a day with Prof Ram in the same building with him" and that the Board is urged "to ensure that June 30th, 2008 is the last day of his employment". The individual employees made themselves guilty of insubordination and disrespectful behaviour."

- [27] In the event, the claim of automatically unfair dismissal is dismissed. I now turn to the alternative claim of unfair dismissal.

Alternative claim of unfair dismissal

- [28] I am in agreement with Mr. Kennedy that this is a sad case in the sense that this case involves the dismissal of ten workers who could easily have avoided their dismissal. As the evidence clearly illustrates, these individuals followed the lead of their union leadership (two of whom are amongst those who were dismissed) and that led to their dismissal. The ten applicants embarked on acts of gross insubordination and despite having been offered an olive branch by the chairperson, persisted with supporting and defending their actions in this court. They were afforded

various opportunities to redeem themselves and save their jobs in the exact same way the other 28 individuals did. However, they remained defiant throughout this case and refused to acknowledge any wrongdoing on their part. They should blame themselves for the fact that they are today without work.

- [29] The union's two witnesses Mr. Makatu and Mr. Mani tried to persuade this court that the threats (most notably those contained in the petition) were not serious and that it was merely a "*strategy*" to get the attention of the respondent. According to them they merely wanted a meeting to discuss the matter with management. I do not accept this explanation. There is no doubt in my view that the union (and the individuals who signed the petition) knew exactly what message they were conveying to their employer. To suggest that the employer should not have taken the words seriously is ridiculous. Moreover, the letter from the respondent's attorneys clearly conveyed to the union that the respondent regarded the petition in a serious light. If there was any truth in the averment that the petition was merely a "*cry for attention*", the union should have known after this letter that the respondent was taking the letter and the threats seriously. If the union and the shopstewards really was of the view that this was merely a cry for attention it would have conveyed this to the attorneys. In fact, the attorneys in no uncertain terms informed the union that the contents of the petition amounted to gross insubordination which would result in disciplinary action unless it was withdrawn. The union

responded to this letter without making any attempt to dispel the notion that the threats contained in the petition were not meant to be taken seriously.

[30] What makes matters worse is the startling confession by Makatu that they had made no attempt to inform the employees that the petition was merely “a cry for attention” (which I, in any event, do not accept) and that they did not really mean what was contained in the petition. I also do not accept that the employees individually did not mean what was stated in the petition. Not one of the other employees came forward to give evidence and refute this evidence. Moreover, it is clear from the petition that each employee confirmed that they “*were neither coerced nor misled into signing this vote of no confidence. We fully understand our actions*”. There can only be one explanation for the inclusion of these words and that is that the union sought to protect itself against any claim later by the members who might complain that they had been misled by the union.

[31] The union in my view was bent on pursuing a path of confrontation without any regard to the individual welfare of the initial 41 employees. If the union was concerned about the welfare of the individual employees it would have advised its members after the letter from the attorneys to withdraw their support for the petition and apologise to Ram. Also, the union should have then used the proper channels to pursue the grievances. The union made no attempt to do so and also no attempt to pursue the grievances

through the appropriate grievance procedures. I will return to this issue hereinbelow.

- [32] I must however, stress, that although I am of the view that the union dismally failed the individual employees, the 10 remaining employees can hardly blame the union for the fact that they were eventually dismissed. Three employees and later 28 employees realised that they were on a path of self-destruction and as a result of accepting the olive branch extended to them by the chairperson (when the very person the workers had wanted to get rid of indicated to the chairperson that certain employees may not have been willing participants in this whole saga), retained their employment. In other words, although this court may have been sympathetic up until the guilty finding, this sympathy cannot extend to the 10 remaining applicants who took a conscious decision not to apologise to Ram after having been found guilty and after they have been afforded an opportunity by the chairperson to withdraw their petition. To make matters worse, they sat in court and listened to the evidence of Mani and Makatu who tried to convince the court that the petition was merely a “cry for help”. Yet not one of them took the stand to distance themselves from the union. There is therefore no evidence before this Court that any of the ten individuals who were ultimately dismissed were in fact misled throughout by the union nor is there any evidence that they did not understand what was offered to them by the chairperson when he offered them an opportunity to save their jobs. The ten applicants must therefore

stand and fall by their own decision to support the petition and to remain steadfast in associating themselves with the union's confrontational stance.

- [33] The actions of the individual workers constituted gross insubordination. Not only were they insolent by repudiating their duty to show respect to the CEO of the respondent, they were also grossly insubordinate in refusing to obey the instructions of their employer. See in this regard: *CCAWUSA v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC);³ *Acrylic Products (Pty) Ltd v CWIU & Another* [1997] 4 BLLR 370 (LAC); *Slagment (Pty) Ltd v Building Construction and Allied Workers Union* (1994) 15 ILJ 979 (A); *Johannes v Polyoak Industries* [1998] 1 BLLR 18 (LAC); *Air Products (Pty) Ltd v CWIU* [1998] BLLR 1 (LAC).
- [34] As far as the first charge is concerned, I find the applicants guilty.

³ The Industrial Court distinguished between insubordination and insolence: "It is clear that (even though he can be both at the same time) an employee can be insolent (impudent, cheeky, disrespectful or rude) without necessarily being insubordinate (disobedient or challenging authority). Mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot by itself constitute insubordination which by its very nature requires disobedience or an outright challenge to authority. As has been fully explained above, insubordination can manifest itself in the refusal to obey a reasonable and lawful command or in the challenge (or resistance) to or defiance of (see especially *The Shorter Oxford English Dictionary* above) the authority of the employer. It is, of course, required that the insubordination must be deliberate (wilful) and serious (above). This is not to say that contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) cannot constitute a ground for dismissal (provided, of course, that it is wilful and serious). One should, however, always distinguish between insubordination on the one hand and insolence on the other hand because they are definitely not the same kind of offence.

In line with the principle that the insubordination should be serious enough to justify or warrant dismissal, prior warnings should be issued for insubordination before resorting to the final act of dismissal (see *Brassey et al The New Labour Law* at 432 where the case of *Metal & Allied Workers Union v SA Traction Manufacturers* case no NH 13/2/225 of 26/11/1984, (1984) ICD (1) 31 (IC) is referred to). Prior warnings relate to the question of substantive fairness because (unless the gross insubordination is so serious that dismissal without warning is justified) the employee should be put on his guard that a further act of insubordination might lead to his dismissal before insubordination becomes a fair and valid reason to dismiss. "

Grievance procedure

[35] I have pointed out that the chairperson was of the view that it was not necessary to consider the merits of the demands made by the union in the letter dated 23 May 2008. I am in agreement with this finding. Ram's performance is not the issue. The issue is the conduct of the individual employees. I am, however, prepared to accept for the sake of argument that the union had legitimate demands and grievances. Furthermore, I have already pointed out that the union should have followed the grievance procedure. It is simply not acceptable to submit a petition containing the allegations that it did. I have already indicated that I do not accept the union's averment that there was no grievance procedure in place. Even if the union was genuinely unaware of the existence of the grievance procedure, the union could not have been unaware of the existence of the grievance procedure after having received the letter from the respondent dated 1 April 2008. I also do not accept the allegation that the grievance procedure would not have been suitable for a collective dispute. This averment also refutes the assertion that the union was unaware of the grievance procedure. The letter from the attorneys also informed the union that it could use the grievance procedure. Moreover, on their own evidence the union had been told by the chairperson of the Board's Human Resources Committee (a sub-committee of the Board of Directors), Ms Nora Fakude that her door was always open for discussion about grievances and complaints. Despite all of these invitations and

opportunities, the union decided not to process a proper grievance procedure but rather to follow a confrontational route – a route that was supported by these 10 applicants until the bitter end. Lastly, the union's witnesses tried to persuade this court that all attempts to meet with the Board fell on deaf ears. This is patently false. The chairperson of the Board, Mr. Jo Foster who himself was for many years a trade unionist, called the representatives to a meeting where he expressed his concerns about the strategy that was adopted by the union. On the union's own version, they walked out of the meeting.

[36] I also cannot lose sight of the fact that Commissioner Matje of the CCMA concluded subsequent to the ruling by Commissioner Hofmeyer that the union did not make out any case for their claim that the respondent discloses the contract of Ram. The union also subsequently did not pursue the matter any further.

[37] I am therefore of the view that the union could have used other means of dealing with their grievances and that it was certainly not warranted to have opted the confrontation route that resulted in the dismissal of ten of its members.

Did the union engage in lawful union activities?

[38] I have already pointed out that I am not persuaded that the union engaged in lawful union activities. In this regard the union argued that they were entitled to use the petition as a means of pursuing their grievances and

that they were justified in expressing their concerns in the manner that they did.

- [39] Although I do accept that a union may vigorously and in somewhat strong terms pursue the rights of its members, I do not accept that the constitutionally guaranteed right of freedom of expression affords a union and its members the right to engage in acts of grossly disrespectful insubordination without consequences. To suggest that the Constitution grants a union and its members the license to commit acts of gross insubordination is simply ridiculous. I am in agreement with Mr. Kennedy that just as, under the Constitution, a person who exercises his or her right to freedom of expression may still be held liable for defamation, so too can an employee be found guilty of insubordination if, through his or her statement (whether in a petition or otherwise), he or she acts in a grossly disrespectful manner, rejecting the authority of management, and manifesting gross insubordination. Moreover, this court acknowledges that an employee must accord a reasonable degree of respect towards his or her employer and that the failure to do so may destroy the employment relationship. Although it is not expected that an employee be subservient it is at the very least expected that an employee show respect for the authority of the employer and behave in a respectable and responsible manner towards the employer. The conduct of the applicants in this case was anything but respectful. In fact, they calculatedly decided to defy the authority of their employer. The fact that they were frustrated with their

working conditions (assuming that their grievances had merit) does not entitle them to act in the defiant manner that they did.⁴ The majority of the employees, however, came to their senses and apologized for their behaviour. The ten applicants have decided not to do so and continue to defend their insolent and insubordinate behaviour. I am in agreement with the following comments by Grogan⁵:

"Disrespect to an employer justifies termination of the employment relationship only when it is either so gross (ie insulting and abusive) or so frequent as to suggest that the employee has repudiated the employer's lawful authority, or, in more modern terminology, if it has rendered the continuation of the employment relationship 'intolerable'. Each case must be considered on its own merits to establish whether these inferences can be drawn."

Inconsistency

⁴ *Slagment (Pty) Ltd v Building Construction & Allied Workers Union & Others* 1994 (15) ILJ 979 (A): "(4) Even if one were to assume that management was guilty of insensitivity, its relevance to the fairness of the dismissals was questionable. The employees had been guilty of sustained disobedience. They had deliberately set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of the relationship of employer and employee impossible. The court did not agree with the employees' contention that their resentment at the manager's appointment, although it did not justify or excuse their conduct, was a mitigating factor - if the employees had a grievance, the grievance procedure in the recognition agreement between the appellant and the union provided the route that they should have followed. (5) Although the employees did not stop working, they insolently refused to perform in the way required by their employer. (6) It mattered not that the employees were dismissed after only three days of recalcitrance, during those three days management showed exemplary patience in the face of severe provocation. Obviously matters could not be allowed to continue in this way. There was an impasse that had to be unblocked and there was no way out except the holding of a disciplinary inquiry, which might possibly result in dismissal. The court therefore found that the dismissals were not substantively unfair and that they were fully justified." Quoted from the headnote.

⁵ "Workplace Law" 10th edition at 51 – 52.

[40] I need to deal with one last aspect and that is the allegation of inconsistency. I accept that consistency is an element of disciplinary fairness and that all other things being equal it is unfair to dismiss only some of a number of employees who are guilty of the same offence. (See *SACCAWU v Irvin and Johnson Ltd*⁶ and *NUMSA v Henred Fruehauf Trailers*⁷.)

[41] The union's argument was that the ten employees who were dismissed committed the exact same offence as the 31 others (three of whom were not charged as they had distanced themselves from the union and the petition at a very early stage and the 28 employees who were found guilty of the same offence but were punished simply with a warning). I do not agree with this submission as it loses sight of the fact that there is a clear factual distinction between the fate of the 10 applicants before court and

⁶ (1999) 20 ILJ 2392 (LAC). The following appears from the headnote: "The appellants argued that the company had applied discipline inconsistently by not dismissing four employees who had also participated in the demonstration. The court was of the view that too great an emphasis is frequently placed on the 'parity principle'. There is really no separate 'principle' involved; consistency is simply an element of disciplinary fairness. Where one is faced with a large number of offending employees, the best 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 does not mean that there has been unfairness towards the other employees. It means 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. Even then, 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 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. "

⁷ (1994) 15 ILJ 1257 (A).

the 28 others who, although having been found guilty, voluntarily decided to acknowledge their wrongdoing and tendered an apology. The remaining ten employees were all given the exact same opportunity but they had elected, of their own accord, not to sign the acknowledgement and the undertaking. In these circumstances it can hardly be said that the chairperson treated these ten applicants inconsistently and unfairly.

- [42] I am therefore of the view that the dismissals of the ten applicants were fair and that no case has been made out that the dismissal was inconsistent. The dismissal of the ten applicants are therefore upheld

Re charge 2

- [43] The individual applicants were also found guilty on the second charge in that they had brought the employer into disrepute by associating themselves with the allegations against the Board and the CEO which were leaked to the Mail and Guardian.

- [44] It is, in my view, not strictly necessary to deal with this charge in light of my finding that dismissal was warranted in respect of the first charge standing on its own. However, for completeness sake I intend to deal with the second charge briefly.

- [45] I am in agreement with the finding of the chairperson that the applicants were also guilty of the second charge. The test is the balance of probabilities. The fact is that within days after the union had sent its letter of 23 May 2008, the Mail and Guardian had the letter in its possession. I do not accept that it is probable that the respondent would have leaked

the letter. The letter contains highly damaging accusation against management (and especially the CEO) and to suggest that management would have leaked such a letter to the press is, in my view, highly improbable. Furthermore, the union, in a letter dated 5 June 2008 – merely a few days after the publication of the article in the Mail and Guardian on 30 May 2008 - stated the following:

“The Union has a right to communicate the contents of its correspondence to the public through the media without any fear from the board”.

Why would the union write such a letter merely 5 days after the letter was leaked? Furthermore, when the respondent's attorneys in the letter of 6 June 2006 complained that the union was involved in making information to the media, the union in its reply dated 9 June 2008 made no attempt whatsoever to deny the allegation.

[46] I am therefore satisfied that the applicants are also guilty on the second charge.

Procedural fairness

[47] Although the statement of claim pleads that the dismissals were also procedurally unfair, I could find no basis for finding that the dismissals were procedurally unfair.

[48] The union attempted to persuade the court that the chairperson ought to have recused himself from the proceedings because he received the bundle of documents from the respondent's attorneys prior to the

disciplinary hearing formally convening. The test for recusal is whether a reasonable person might justifiably in the circumstances have had the reasonable perception that the chairperson was or may have been biased. See *President of the Republic of South Africa v SA Rugby Football Union* 2000 (a) SA 1 (CC). There is in my view nothing improper in having received the bundle of documents prior to the commencement of the hearing. There is no justification for the argument that by furnishing the chairperson with the bundle of documents the chairperson displayed bias. In fact, if the record of the hearing is perused it is clear that the chairperson conducted the hearing fairly and evenhandedly. In fact, the chairperson by extending an olive branch to the individual employees showed that he had approached the whole process fairly and with an open mind. There is also no indication that the chairperson did not apply his mind to the evidence. In fact, the chairperson submitted a comprehensive and well-reasoned finding. I can also not find fault with the manner in which the chairperson offered the individual employees the opportunity to sign the acknowledgment. To suggest that there was “duress” is baseless. It is clear from the chairperson’s findings why he offered the employees an opportunity to disassociate themselves from the petition. As a result of this opportunity 28 employees are today in employment.

- [49] Lastly, a concern was also raised that the ten employees who did not accept the olive branch were not given an opportunity to present their submissions in respect of sanction orally. There is no merit in this

argument. Fairness does not require an oral hearing. Moreover, the union utilised the opportunity to present the submissions in respect of mitigation in writing in the form of “collective submissions”. There is no suggestion in this document that the union was dissatisfied nor did the union convey to the chairperson that it wished an opportunity to present the submissions orally. In the event I find that the dismissals were procedurally fair.

[50] In respect of costs, I am of the view that the applicants should be ordered to pay the costs jointly and severally. The applicants misguidedly approached this court with a claim without any merit. There is also, as already pointed out, no longer any relationship between NUPSAW and the respondent.

[51] In the even the following order is made:

1. The dismissals of the applicants were substantively and procedurally fair.
2. The applicants are ordered to pay the costs jointly and severally.

AC BASSON, J

DATE OF PROCEEDINGS:

19, 20 and 21 November 2009

6, 7 and 17 December 2010

DATE OF JUDGMENT: 3 February 2011

FOR THE APPLICANT:

Mr. Voyi of Ndumiso Voyi Incorporated

FOR THE RESPONDENT:

Paul Kennedy SC: Instructed by Cheadle, Thompson and Haysom

Labour Court Judgment