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CASE NUMBER: 351/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALFRED BUTHELEZI & OTHERS Appellant

and

ECLIPSE FOUNDRIES LIMITED Respondent

CORAM: **E M GROSSKOPF, SMALBERGER, EKSTEEN, VAN DEN HEEVER et SCHUTZ JJA**

HEARD ON: **6 NOVEMBER 1995**

DELIVERED ON: **24 NOVEMBER 1995**

J U D G M E N T

VAN DEN HEEVER JA

The appellants were formerly in the respondent's employ. They were dismissed on 15 February 1990. The National Industrial Council for the Iron and Steel Engineering and Metallurgical Industry failed to resolve the dispute between the parties referred to it. The appellants were unsuccessful in the ensuing proceedings in the Industrial Court ("IC"), in which they claimed reinstatement. Their appeal to the Labour Appeal Court ("LAC") was dismissed on a point *in limine*, that the appellants wished to advance a different case to that relied on in the IC. Leave to appeal to this Court was sought from and granted by the LAC on 4 June 1992. Few of the rules governing the prosecution of such an appeal were adhered to after the notice of appeal was filed in this Division on 23 June 1992. The consequent application for condonation is itself flawed in many respects. The dismissal of the employees, competent under the common law, had been held to be also fair in terms of labour practice. The respondent had difficulty in discovering who exactly were the persons wanting a third bite at the cherry. This Court,

faced with the same problem, had that settled only by agreement between counsel after the matter had been called in court, in terms of which they undertook to supply a list of the names of the respondent's ex-employees properly involved in the matter before us.

Both before and during the unlawful strike which led to their dismissal, the appellants disregarded basic rules of collective bargaining and labour relations. A similar disregard extended to both substantive and procedural rules of litigation throughout. I ignore their failure to abide by procedural rules in the LAC, as that court did. Delays there are now relevant mainly because, on the day that leave to appeal was granted, the respondent formally requested the appellants "to ensure that this appeal is processed timeously in terms of the requirements of the Labour Relations Act No 28 of 1956, as amended".

This letter was addressed to an attorney, Ms Khampepe, who was not initially involved in the matter. The notice required by IC Rule 29(1) had been signed by attorney Anand-Nepaul of Durban on 30 July 1990

as representing 215 named individuals. In that it was alleged that it had been the applicants themselves who had referred their dispute to the Industrial Council. It was never explained why they, who were referred to throughout the trial which followed as "the NUMSA members", were represented at the hearing by Mr Luthuli, who it subsequently transpired was the Secretary General of the United Peoples Union of South Africa ("UPUSA"). The respondent's denial that the applicants themselves had approached the Industrial Council and allegation that it had been UPUSA which had referred the dispute thither, was not investigated. The role of Mr Luthuli remained ambiguous throughout, in the sense that where NUMSA was not prepared to assist the appellants in their litigation, Mr Luthuli was. UPUSA does seem to have had a finger in the pie in some way, without ever either it or Mr Luthuli coming into the open and accepting responsibility towards the respondent for mundane matters such as a duty to comply with rules or perhaps accept responsibility for adverse costs orders, should any be made. In an affidavit filed in the

LAC to obtain condonation for late noting of the appeal in that forum, Mr Luthuli had said that the then prospective individual appellants, whose numbers had dwindled to 105 and whom he named, were not members of UPUSA which was accordingly not prepared to litigate on their behalf. He himself had called a meeting of appellants after which he on their behalf instructed Ms Khampepe to obtain counsel's opinion, and in due course to apply for the relevant condonation.

Coming back to events after leave was granted by the LAC to appeal against its adverse order: since the notice of appeal was filed on 23 June 1992 with the Registrar of this Court, powers of attorney should have been filed by 21 July 1992. They were not. When they were, almost two years too late, famine had turned to feast. After Mr Alexander, the member of the firm of attorneys handling the matter on behalf of the respondent, had already filed his affidavit opposing the present application for condonation, Ms Khampepe filed no less than 188 powers of attorney, although Mr Luthuli had listed only 105 litigants as

involved in the appeal before the LAC. In her application she had originally sought i.a. an order "condoning the failure of approximately 150 Appellants to furnish the Honourable Court with special Powers of Attorney and authorising their appeal to proceed notwithstanding such failure".

The sorry story of the powers of attorney is merely a symptom of the confusion characteristic of this matter from its inception. We were urged to be tolerant with appellants because they are said to be unsophisticated and impecunious. No such tolerance can justifiably be sought for any attorney - by definition a trained lawyer and an officer of the court - who accepted a mandate to act on their behalf. It should of course be unnecessary to say that a power of attorney is not merely a bureaucratic formality. Had Ms Khampepe insisted on one in her favour when she originally accepted the mandate to act for - or in the interests of - the dismissed employees, she would not have found herself in the quandry in which she landed. The prayer quoted above from her present

application for condonation really says it all. The only affidavit in support of her notice launching the application, is hers. Her recitation of the customary preamble, "I am duly authorised to depose hereto and the facts contained herein are, unless the context otherwise indicates, within my personal knowledge" must be labelled irresponsible. Apart from laying claim to represent "Alfred Buthelezi and approximately 210 other persons", she initially says that Mr Luthuli offered to represent them on behalf of UPUSA, and that it was UPUSA who instructed her to appeal against the ruling of the IC. According to her "it later transpired that it was not UPUSA but the workers themselves who were funding the appeal", which may be relevant though hardly the sole criterion as to the identity of a litigant, as her own subsequent attempts to raise funds underline. In setting out her difficulties in getting money to continue with the matter, it becomes clear that she was an attorney unsure of the identity of her client(s), not one seeking help for identified, simple, impecunious clients barred from achieving rights in which they had faith

and which they were asking her to claim for them. She tells of speaking to "the Appellants"; "some of the Appellants"; and of meetings "with the Appellants and some officials of UPUSA". Not one of these is identified, not one filed an affidavit in support of her allegations, not a single individual has come forward to state under oath that now, more than five years after having been dismissed, he wants to resume his employee-employer relationship with the respondent; which is after all what the matter is all about. And she was in contact with Mr Luthuli, to whom she conveyed and with whom she discussed communications from Mr Alexander and from the Registrar. In return she seems to have received little bar unfulfilled promises and unwarranted assurances.

Understandably, the respondent wanted the uncertainty created by a pending appeal to come to an end, and was nagging Ms Khampepe to get on with that. The respondent wrote to her on 19 January 1993 asking (I paraphrase): are your clients continuing with the appeal? - if so when can we expect copies of the record, and what about the security you were

going to ask Mr Luthuli to let us have by 15 October 1992? Her reply was an ostensible surrender, but only on one front. On 29 January she served a notice on the respondent's attorneys of her withdrawal from the arena, notifying them that the appellants' last known address was care of UPUSA at that union's offices. Her options however remained open, because no notice of withdrawal was filed at that stage with the Registrar of this Court. She glosses over this omission and in doing so, for neither the first nor the last time, alleges as a fact something which proves to be incorrect: "It now transpires that although I prepared a Notice of Withdrawal and signed it, it was not served or filed". (My emphasis). There was no attempt in her supplementary affidavit to either retract or explain her error, which came to light because Mr Alexander attached a copy of her Notice of Withdrawal to his opposing affidavit. She does make it clear that although she succeeded in deflecting Mr Alexander's correspondence from herself to Mr Luthuli, she herself had not lost interest in the matter entirely. She had earlier tried to help Mr Luthuli

in his quest for funding. She suggested he approach the Kagiso Trust. This proved fruitless. So did an approach to the Legal Aid Board. She was told by an (unnamed) UPUSA official of its approach to NUMSA "with a request that NUMSA proceeds to act on behalf of the Appellants in the matter and furnish the necessary funds". She herself contacted Dr Fanarov of NUMSA. He wished to review the file. At the request of UPUSA she accordingly gave Fanarov all her files and thereafter, despite having withdrawn vis-à-vis the respondent, contacted NUMSA from time to time to enquire whether it had come to any decision. She blames NUMSA's indecisiveness for subsequent delays, but attaches no affidavit from Dr Fanarov nor indeed a single one of the individuals she names save one. His affidavit is a formality. He is the candidate attorney who was at that stage in her employ.

Mr Alexander's attempts through Mr Luthuli to urge the appellants to do something about the appeal noted, one way or another, got nowhere. Mr Luthuli did not deny that it was appropriate for Mr

Alexander to channel such attempts through him. In fact, when Mr Alexander saw him at the Industrial Court during March, Mr Luthuli said that he was trying "to find someone to proceed with the appeal".

Then, *mirabile dictu*, eight months after Ms Khamepe had served her notice of withdrawal on the respondent's attorneys, on or about 20 September 1993 "about five Appellants" - unnamed, of course - came to see her. One of them told her of his windfall at the races. He was prepared to make R40 000 of the R100 000 he had won available to the appellants to use for purposes of the appeal. She handed over an appropriate printed form and asked that a power of attorney be obtained. The document was returned to her on 1 October 1993 with the names of "approximately 60 Appellants thereon". We are not told why this was not filed forthwith, why the number of names should be merely approximate, and whether it had been signed by any individual at all as a litigant or was merely a list of names and for that reason could not serve the purpose for which it had been intended.

Now armed with the sinews of war, Ms Khampepe still delayed the battle she had allegedly been unable to engage in earlier for lack of those. She did not immediately instruct the preparation of the record or try to agree its content with Mr Alexander. She first "wanted to satisfy myself, after consulting with Counsel, that the Appellant's application for condonation had a fair prospect of success". Having so satisfied herself, she gave the necessary instruction on 12 December, which in her later affidavit she had to correct to 29 December. I myself am more than curious about whom she consulted, what she told him, and what he in turn told her: whether he gave her any assistance in or even merely advice about the preparation of the petition, since it is beyond my comprehension how she could have been satisfied that the petition she has placed before us could have a fair prospect of success. Its flaws are manifest. It is crowded with incognito characters. It lacks information and direct evidence which should have been placed before the Court. Instead it contains her own argument and speculation about the

appellants' probable intentions should the appeal succeed. It perpetuates the ambivalence about who is behind the appeal - the most glaring omission being as already pointed out, the total lack of any evidence that any identified individual persists in seeking reinstatement in his former employment so that the appeal may serve some purpose. And omissions for which condonation was sought were not yet remedied when she launched the application.

The documentation before us indicates that Mr Luthuli fell out of, and Ms Khampepe returned to the active fray when the Registrar indicated that the appeal would be regarded as lapsed or withdrawn if the appellants did not indicate that they intended to prosecute it and submit the necessary application for condonation. That led to the assurance that the appellants indeed did intend to carry on, and to the preparation of the necessary condonation application. I have touched on the flaws in that. The story still does not end, though the litany of broken undertakings becomes tiresome. Even when security was at long last filed, it was

done without proof that the respondent was agreeable to its form; which form Ms Khampepe in her supplementary affidavit inevitably conceded had initially been unsatisfactory since it made no commercial sense. It originally consisted of a bank guarantee for an amount agreed upon between the parties but revocable on one month's notice by the bank.

The procedural rules governing the prosecution of appeals are there for the convenience of the court but also to ensure that one litigant does not prejudice his opposition by dragging out litigation unconscionably. The axiom that justice delayed is justice denied is of particular importance in a matter such as this. The respondent, who already had two verdicts and a costs order in its favour, stood to suffer ever-increasing inconvenience and ever-increasing expense with the passage of time should an appeal succeed, and the success of such a belated appeal would be manifestly unfair also to the employees engaged years ago in the place of those dismissed. Although the courts may condone an attorney's failings in the prosecution of an appeal up to a point, that

point depends in a measure on the merits of the proposed appeal. To allow a latitude as wide as is sought here, would make a mockery of the rules of litigation which were not merely bent but fractured consistently in the present instance, and be unfair to the respondent even were there a strong possibility of the appellants' success.

I am satisfied, however, that there are no prospects of the appeal succeeding on the merits, so that refusing condonation will cause no injustice to any of those dismissed on 15 February 1990.

Rule 29(1) of the Industrial Court rules requires both parties to deliver a notice setting forth a summary of the facts and grounds on which the relief is sought or its case based, respectively, and a list of books and documents in its possession or under its control, relevant to the application. Rule 29(8) prescribes:

> "Any hearing under this rule shall be in the nature of a civil trial and in every case evidence shall be adduced on oath unless the court dispenses with oral evidence, save that in determining the dispute the court in order to expedite proceedings or arrive at a just decision may make

> suggestions with regard to the calling of such witnesses as the court considers necessary or it may itself call witnesses and put to such witnesses such questions as it deems essential."

Although the procedure in the IC is informal, it requires as in any dispute to be settled by means of evidence, that the ambit of the dispute be first defined. The conclusion which the appellants asked the IC to draw from the facts they set out, is so vague as to be almost meaningless; namely "that no consideration of fairness, equity or compliance with generally accepted labour policies were adhered to by the Respondents in connection with the termination of services of the [appellants]".

The facts from which this conclusion is sought to be drawn become all the more important by reason of this vagueness, for purposes of alerting the opposition to what it should be prepared to counter, what are the sins it is alleged to have perpetrated - in short, what the employees' case is about. In the Rule 29(1) notice the appellants,

assisted at that time by attorney Anand-Nepaul, listed the facts they intended to establish as the foundation on which their conclusion rested, as follows (I paraphrase):

1. Before 8 February 1990, the [appellants] submitted certain demands to the management of the respondent. These included

   (a) long service allowances

   (b) attendance bonuses; and

   (c) job security. (The evidence indicated that this related to allowances sought for working in areas where conditions were allegedly unfavourable.)

2. In response, management unilaterally instituted a ten cent per hour long service allowance for those workers who had been in its employ for more than five years; but implemented this arbitrarily. Some who qualified did not receive the allowance whereas some who did not qualify, did.

3. On 8 February 1990

(a) the [appellants] sent their shop stewards to request a meeting with Mr Holton, the manager, "in order to clarify certain contentious issues, which included" those paraphrased above

(b) Mr Holton "refused to deliberate with the [appellants]." The [appellants] instructed their shop stewards to "send a letter to Mr Holton arranging another date for a meeting".

Mr Holton agreed to attend such a meeting at 08:30 on 13 February 1990.

4. On 13 February and again on the 14th and the 15th, the workers waited in vain for him. On the afternoon of the 15th he told them to clock out at 16:00 and return to work the following morning at 07:00.

5. When they did, they were summarily dismissed and told to leave the premises.

The facts set out in the respondent's reply to this, give a very different version of the events that occurred during that period:

1. The respondent is a member of the National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and negotiates wages at that level.

2. In 1989 the four NUMSA shop stewards presented the respondent with the abovementioned demands, which were dealt with at the time. The respondent instituted a service allowance, the details of which were made known to the employees during early December. The respondent undertook to consider and if possible attend to all suggestions put forward by the employees to meet complaints about working conditions.

3. The shop stewards in February 1990 repeated the demands which had already been dealt with.

4. On 8 February four named employees who said they now represented the NUMSA members, presented a petition to the respondent and asked for a meeting with management on 13 February at 09:00 to which the respondent agreed.

5. On 13 February the appellants and other employees started an

unlawful strike. Some started to intimidate, harass and assault non-strikers. Meetings between the four-man deputation and members of management did not resolve the strike. The employees, through this four-man committee, were insistent that their demands be acceded to, were unpersuaded by what management said, and insisted also that Mr Holton address them all.

6. That evening night-shift workers joined the illegal strike, most of the members of both groups spending the night on the premises.

7. The strike continued on the following day. Just before 13:00 the four were told that disciplinary action would be taken against strikers who did not return to work by 14:30. None did. The representatives were given a second ultimatum to convey: should the strikers not return to work by 16:00, they would be dismissed. Twenty-five minutes before the expiry of the deadline, the four told management that all the strikers had accepted that disciplinary action would be taken against them, and had undertaken to leave the premises immediately and to return and

resume work the following day for their respective day and night shifts.

8. The first undertaking was breached immediately: the strikers remained on the premises that night.

9. Nor was the second undertaking honoured the next day. Instead of the employees resuming work, a written demand was handed to the respondent's managing director in which the employees altered their former demand: they would return to work provided that he addressed the entire group about their demands. The day shift workers were dismissed at 08:15. The night shift staff were notified that the deadline in their case was 17:30 and since they did not resume working, they were dismissed at 22:00.

10. Thereafter an eviction order was sought and obtained against the strikers in the Supreme Court on 17 February 1990.

In a final paragraph, the appellants' version of the events during the relevant period was denied, as well as the conclusion they asked the IC to draw. More, the respondent invited the appellants to give "full

details concerning the manner in which the termination of the [appellants'] services was unfair or failed to comply with generally accepted labour policies". Since the appellants' version of their being kept waiting for days for a promised appointment and then sacked without cause and without warning would clearly constitute not merely unfairness but rather stubborn intransigence on the part of management, this request for details was a clear invitation to the appellants to amend or increase the ambit of their factual allegations. It was not accepted.

The dispute which the IC was therefore asked to resolve, was a purely factual one: who was telling the truth? Had the respondent acted as alleged, which would have constituted a breach of contract by the employer at common law, let alone an unfair practice according to labour policy?

After hearing a good deal of evidence, the IC rejected the appellants' version, commented adversely on the credibility of all the appellants' witnesses, accepted the respondent's testimony, and dismissed

the application.

The notice of appeal in the LAC by necessary implication accepted that the appellants' witnesses, who had strenuously denied both that they had indulged in strike action at all and that there had been any intimidation, had lied. The alleged unfair practice(s) now sought to be winkled out of the respondent's own testimony, may be tabulated as follows:

1. Since the respondent's own evidence was that a number of the employees had joined the strike as a result of intimidation by others, the respondent should have afforded each of the appellants an individual hearing before dismissing him.

2. There were sins of both commission and omission on the respondent's part, and circumstances mitigating the appellants' conduct, which cumulatively made dismissal unfair.

Respondent's conduct:

a(i) The respondent had earlier unilaterally decided on what long

service wage increases it would grant

(ii) The respondent did not convey its decision to the workers through the appellants' shop stewards

b The respondent was intransigent in refusing to accede to the workers' demands, particularly

- to discuss their claims

- to address the workers *en masse*

c The deadlines given were too short

d The respondent should have notified "the relevant union, NUMSA, of the strike or tried to get its assistance in resolving it"

Mitigating circumstances:

a The issues in respect of which the appellants were striking were "largely acceptable and/or legitimate"

b The appellants' failure to follow the conciliatory procedures provided for by the Labour Relations Act was partially excusable "as a result of the elected shop stewards having been relieved of their duties

(as a direct result of the Respondent bypassing them)"

c The appellants could not wait to use such procedures because the respondent was already implementing its wage increases

d The unlawful strike was of relatively short duration.

As stated earlier, the LAC dismissed the appeal with costs. It accepted, correctly, that neither the notice of appeal nor counsel's heads of argument attacked the findings of fact made by the IC. After referring to case law on the question, when a court of appeal will deal with an issue not raised on the pleadings, it held that the appeal before it failed all the tests suggested in the decisions. Those were based on considerations of fairness allied to a disinclination on the part of the courts to be hamstrung by formalities.

Mr Pauw, for the appellants, argued before us that the LAC had erred in this regard; that on this issue as in other respects, the norms of the courts functioning in the labour dispensation differ from those applicable in the other courts of the country, and are more tolerant

towards employees because of their lack of sophistication and experience of court procedures.

As regards the issue in question, I do not agree, and imagine that the industrial courts share my view rather than his. The fact that the proceedings in the industrial courts are informal; that the presiding officer may play a far more active role in the proceedings than a judge or magistrate would do in a civil matter; that he would do so to assist the impecunious and inept to present the case they wish to make out; do not imply that equity flies out of the window. The IC rules make it clear that in adjudicating between opposing parties, it is not trial by ambush that is envisaged for either of them. Whatever the norm may be when circumstances oblige one party to a relationship to take a decision affecting the rights of the other without time for consultation, whenever an objective and disinterested third party is called upon to assess the conduct and determine the rights of opposing parties at leisure, the dictates of fairness require that both parties be heard. When a court is

willing to determine on appeal an issue not formally raised in the initial proceedings, it does so because it is satisfied that neither party was caught unawares, that both had a proper opportunity, of which advantage was taken, to deal with the issue in question. In other words, that there had been substantial compliance with the injunction which lies at the heart of fair adjudication; *audi alteram partem.* There is nothing in labour practice that I know of that suggests that industrial tribunals when refereeing are not obliged to apply the Queensberry rules.

Since the case presented on behalf of the appellants in the IC was rooted in falsehood, it is not surprising that, of the issues sought to be raised in the LAC, some had perhaps been mentioned in passing but not canvassed at the hearing. That was so despite Mr Luthuli's having been given every latitude to range beyond the appellants' statement of case and indeed invited to particularize what their grievances were, other than the unilateral implementation of the long service increment and the unmotivated summary dismissal recorded in their statement of claim.

(There was not an iota of evidence tendered to support the further allegation of arbitrary implementation of that decision.) There was the invitation contained in the last paragraph of the respondent's statement of case, referred to earlier. Mr Myburgh who appeared on respondent's behalf in the IC repeated the invitation verbally. For example, when Mr Luthuli put a bald statement to Mr Holton that shop stewards had been chased out of a meeting with management - which he denied - Mr Luthuli turned down the invitation to put a more detailed version so that it could be properly dealt with.

Similarly, the procedural unfairness alleged in paragraph 1 of the notice of appeal in the LAC, was not touched on in the IC. Since the appellants' witnesses denied that there had been a strike at all, let alone any intimidation, it would be an unfair labour practice, in my view, were an employer to be expected to confer on employees a procedure or right which they insist was unnecessary. No individual has come forward to suggest that he did not participate voluntarily in the collective action

during the relevant period. "(A)s a general rule a favourable inference as to a party's motivation for particular behaviour will not be made where that is not his case and he himself has given" - I interpolate, 'or tendered' - "false evidence in that regard." (SLAGMENT (PTY) LTD v BUILDING, CONSTRUCTION AND ALLIED WORKERS' UNION, 1995 (1) SA 742 (A) at 753E.) Recognition of any such obligation would render an employer unarmed in the face of an illegal strike. See NATIONAL UNION OF MINEWORKERS OF SA v HAGGIE RAND LTD (1991) 12 ILJ 1022, (LAC) at 1028G-1029B. And to now order reinstatement on this ground in these circumstances would be to benefit intimidators and intimidatees indiscriminately.

Before us Mr Pauw took a new tack. He relied on a fresh set of alleged failings on the part of the respondent. I summarize from his heads of argument:

1. NUMSA was recognised for the purposes of discussing local issues and workers' grievances, for which purposes monthly meetings were held

with shop stewards, although no formal recognition agreement had been concluded with the union. On 3 October 1989 the demands of the NUMSA members for wage increases in the form of a variety of allowances, were discussed. In a series of meetings thereafter, all except one of the monetary demands were rejected. The shop stewards were told in early November that management was considering a service allowance. On 30 November a notice was placed on the notice board, that management agreed that loyal service deserved recognition, and that management had therefore decided to adjust the wage rates by adding respectively 10, 20 and 30 cents per hour to the pay packet of workers with more than 5, 10 and 15 years' service. The shop stewards reported dissatisfaction with the amount of the increase; and with the facts that it had been unilaterally determined, and that the decision had been conveyed by means of a notice on the board instead of through the shop stewards. Management should, it was argued, have tried to negotiate on these issues.

The stumbling block in Mr Pauw's path is that he is again advancing factors which were not dealt with in the IC, through no fault of the respondent. Mr Holton explained in the IC that it was the respondent's policy, as a member of SEIFSA, to negotiate wages at Industrial Council level. He was not challenged as to the reason for this policy. It would seem a sensible one when an enterprise as large as that of the respondent, has, as the respondent does have, many unions represented on its premises. Whether there is any duty on an employer to negotiate at plant level must depend on many factors, none of which were even mentioned, let alone investigated. So too the evidence was that management had recognised that it had perhaps been insensitive in announcing the increments decided on without first informing the shop stewards; had apologized for this "discourtesy"; but had also pointed out that the NUMSA shop stewards did not constitute the only channel of communication between the respondent and its workers. In the IC that is as far as these issues received any attention from Mr Luthuli.

2. When the committee of four representatives who were not shop stewards called on Holton on 8 January, a document was handed to him which contained the following:

> "We are requesting to see the management concerning our demands which were submitted by our shop stewards. We also need an explanation from the management. Furthermore management must clarify to us whether the company recognized our shop stewards or not."

A meeting was arranged between him and them for 13 February. On 12 February the respondent sent a telex to NUMSA in which it expressed concern that an alternative group seemed to be representing NUMSA members. NUMSA replied that the respondent was not taking the shop stewards seriously, i.a. because it had bypassed them in making its decision regarding the service allowance known. Management, according to Mr Pauw, should have perceived that the employees saw the relationship between management and their elected shop stewards as "problematic".

However, according to the respondent's testimony the troubled relationship appeared to be that between NUMSA and its members - a dispute not the respondent's concern - since the four-man committee told management that the workers had got rid of the shop stewards because the employees could not understand what the shop stewards told them.

3. Management was at fault in not conceding to the demand repeatedly conveyed by the committee, to address the workers *en masse*. It may have served some purpose.

The respondent thought otherwise. Its view was not shown to be wrong, and the election of representatives to negotiate on behalf of their colleagues lies at the heart of collective bargaining which in turn is of the essence of labour relations.

4. The erratic, vaccilating behaviour of the workers once the strike started - who undertook to return to work as soon as their demands were met; then undertook to return and accept disciplinary action; undertook

to leave the premises; then breached those undertakings; objected to being called strikers; added new demands; and so on - should have made it clear to management that the workers were confused, harboured unresolved grievances or demands. The respondent was at fault in not taking any constructive steps to deal with those grievances or find out what the motivation for the strike was.

On this contention, the more progressively capricious and unpredictable the conduct of its employees becomes, the greater the obligation on an employer to take steps to avoid having to sever a relationship which must become ever less attractive in its eyes. The illogicality and inequity of any such proposition is manifest.

5. The respondent should have called in NUMSA to help end the strike.

This is untenable in view of the soured relationship between the

workers and their union referred to in par 2 above, according to what the committee told management. Management had contacted NUMSA by fax on 12 February, expressing concern that NUMSA members were making demands through representatives who were not elected shop stewards. NUMSA's response was accusatory and unco-operative. It threatened to declare a dispute against the respondent should the elected shop stewards be suspended to enable the workers to choose other representatives in a fresh election.

To sum up. Appellants challenged the respondent with repeated demands over a period of some months. Instead of using the negotiating procedures provided for by the statute, they misguidedly undertook an illegal strike. In the course of this some workers intimidated others, and there was an apparent attempt at sabotage: gas valves were opened which could have caused a terrible explosion. Ultimatums were disregarded. When the appellants challenged their consequent dismissals in the IC they misguidedly put forward a false version of events. In the

process they deprived themselves of the opportunity of making out any valid case they might have had. And to pile Pelion on Ossa, there has been inexcusable delay in the prosecution of this matter.

The application for condonation is dismissed with costs including the costs of the appeal and the costs of two counsel.

L VAN DEN HEEVER JA

CONCUR:

E M GROSSKOPF JA)

SMALBERGER JA)

EKSTEEN JA)

SCHUTZ AJA)