**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN**

Reportable

Case no: CA02/2017

In the matter between:

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| **COUNTY FAIR FOODS (EPPING),** | |
| **A DIVISION OF ASTRAL OPERATIONS LTD** | **Appellant** |
| and | |
| **FOOD AND ALLIED WORKERS' UNION** | **First respondent** |
| **BONGIWE XUZA & 119 OTHERS** | **Second and further respondents** |

**Heard:** **02 November 2017**

**Delivered:** **11 May 2018**

**Coram: Coppin, Sutherland JJA and Savage AJA**

**Summary: County Fair informed staff that annual discretionary bonuses would not be paid due to its financial position. In response, on 15 December 2010, more than 200 employees embarked on an unprotected strike. Three ultimatums were issued to employees. 64 employees returned to work on 15 December 2010 and 58 employees returned on 17 December 2010. All signed a comeback document, which included an undertaking that they would desist from such action, and received a final written warning for their conduct. The second respondents failed to comply with the final ultimatum to return to work on 17 December 2010, despite it being extended**

**to provide additional time for them to do so. County Fair then instituted a lock out. The second respondents returned to work on Monday 20 December 2010, signed the comeback document but were suspended from duty pending disciplinary hearings at which they were found to have committed misconduct and were dismissed. The Labour Court found the dismissals unfair on the basis that the sanction was harsh since the respondents had only remained on strike for an extra 1½ days. County Fair was ordered to reinstate the respondents on a final warning with 6 months' back pay. On appeal: found that the respondent employees' failure to adhere to final ultimatum distinguished them from their fellow employees who had returned to work in response to the ultimatum. In such circumstances, the dismissal of the respondent employees was fair and the appeal succeeds with costs.**

**Coram: Coppin and Sutherland JJA and Savage AJA**

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**JUDGMENT**

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SAVAGE AJA:

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment of the Labour Court (Steenkamp J) in which the dismissal on 3 January 2011 of the second to further respondent employees (the respondent employees) for engaging in an unprotected strike action from 15 December 2010 until 20 December 2010 was found to be substantively unfair, with the respondent employees reinstated into their employment with six (6) months' back pay.

[2] The appellant County Fair Foods (Epping), a division of Astral Operations Limited, operates a chicken processing plant in Epping Industrial from which its supplies chicken for distribution and on-sale to consumers. On 20 August 2010, the appellant addressed a communiqué to all employees which it placed on notice boards, in which it cautioned that annual discretionary

bonuses may not be paid due to the appellant's profitability concerns. On 12 October 2010, employees were informed in a second communiqué, also placed on notice boards, that the decision had been taken that bonuses would not be paid due to the appellant's poor financial position caused by a downward pressure on poultry prices, reduced consumer spending and other factors.

[3] A third communiqué was addressed to staff on 19 October 2010. In it, the appellant noted employee discontent with the bonus decision but reiterated that the bonus would not be paid. On 19 November 2010, the appellant shared its key financial indicators with employees in writing, reiterating that the bonus decision had been taken to safeguard both the company and jobs given stagnant revenue, reduced sales, a downward pressure on the price of chicken, a 28% drop in operating profit and company returns of 42.9% below what had been budgeted.

[4] On Wednesday 15 December 2010, the appellant informed the first respondent, Food and Allied Workers' Union (FAWU), that FAWU was a minority union given its reduced membership levels and that the union was no longer a collective bargaining partner. The same day, a number of employees, including the respondents, demanded to be addressed by the appellant's managing director regarding the bonus issue. The appellant refused to accede to this demand. From 13h45, the majority of processing employees staged a sit-in in the canteen at the appellant's premises demanding to be addressed by management on the bonus issue and refused to resume work as they had not received their year-end bonuses.

[5] After the lunch break, at 14h45, the production manager, Ms Avril Arendse, a member of the appellant's management team, met with the striking employees who had congregated in the yard adjacent to the processing area. Four employees were chosen by those on strike to represent the strikers. Ms Arendse asked the representatives to explain to the striking employees that the strike was unlawful and to warn them of the consequences of their continued conduct, including that they faced the possibility of dismissal. Thereafter, the four representatives asked to speak to the fresh processing

and distribution executive, Mr Francois Oosthuizen. At 15h40 Mr Oosthuizen joined the meeting and the bonus issue was discussed. At the meeting, Ms Arendse and Mr Oosthuizen issued a verbal ultimatum informing employees, through their representatives, that the strike action embarked upon was unlawful and that should they not comply with this ultimatum to return to work by 07h30 on 16 December 2010 disciplinary action would follow. A written ultimatum was faxed to FAWU at 15h59, although the union claims that it has not received. Thereafter, 64 employees returned to work and signed a "comeback document" which contained an undertaking that they would refrain from participating in the unprotected strike action and accepted receipt of a final written warning for their conduct.

[6] On Friday, 17 December 2010, the appellant's human resources facilitator, Mr Loyiso Mciteka, issued a final ultimatum to the remaining strikers in English and Xhosa, informing them verbally that if they did not sign the comeback document, the gates would be closed at 07h30 and they would be barred from entering the premises. This deadline was extended to 08h00 following discussions with the appellant's head office. In response to this ultimatum, a further 58 employees signed the comeback document, received a final written warning and returned to work.

[7] At 08h35 on 17 December 2010, a lockout notice which was dated 16 December 2010, was read to the remaining assembled striking employees. The notice was thereafter put up on the appellant's gates and the gates were locked. The lock-out demands, as set out in the notice, were the immediate and unconditional suspension of the unprotected strike action; that employees unconditionally accept the decision not to pay bonuses; and that they enter into a collective agreement recording these terms.

[8] On Monday 20 December 2010, the remaining striking employees indicated that they were willing to return to work and signed the comeback document, which included the undertaking and acceptance of a final written warning. They were told to return to the appellant's premises the following day. On their return the next day, the employees were suspended from duty. A disciplinary hearing was held on 23 and 28 December 2010, following which, on 3

January 2011, the 120 respondent employees were dismissed from their employment with the appellant.

[9] Aggrieved with their dismissal, the matter was referred to the Labour Court for adjudication. In the statement of case filed by the respondents, issue was taken with the substantive fairness of the dismissal of the employees on the basis of the employees' length of service, the limited gravity of their conduct, the underlying reason for their grievance, the limited duration of the strike, the fact that the appellant failed to adopt a more conciliatory approach to the matter and that less severe sanctions existed which would have achieved the desired result.

[10] The appellant opposed the matter and disputed that the dismissals were unfair. It stated this to be so given the economic consequences suffered by the company as a result of the strike, with 80120 chickens processed out of a scheduled production of 118 500 on 15 December 2010. By 16 December 2010, the appellant was required to employ replacement labour and with limited skilled labour available, only 97 895 chickens could be processed. However, by 17 December 2010, also using replacement labour, 104 495 of the scheduled 105 300 chickens were processed. Attempts to contact FAWU's organiser on 17 December 2010 to discuss the strike were unsuccessful. Furthermore, the appellant took issue with the conduct of the respondent employees at the disciplinary hearing at which they denied reading communiqués regarding the bonus issue; claimed that they were unaware that the strike was unprotected, when two managers had informed them of this; claimed no ultimatum had been given, when it had; and claimed that they would return to work on 17 December 2010 after the ultimatum given, when they did not. In the circumstances, given the failure to comply with the unprotected nature of the strike, the final ultimatum given, the economic harm suffered and the conduct of the respondent employees at the disciplinary hearings, the appellant contended that the dismissal of the remaining 120 employees was substantively fair.

Judgment of the Labour Court

[11] The Labour Court accepted that in participating in an unprotected strike, the employees had made no attempt to comply with the Labour Relations Act 66 of 1995 (the LRA). The Court took account of the short duration of the strike and its peaceful nature. It found there to be no arbitrary distinction between the striking employees who received a final warning and those who were dismissed. However, the dismissal of the respondent employees, who had continued to strike for 1½ days more than their fellow employees, was found to be too harsh and unfair when the company was satisfied it could continue working with those employees who had returned to work. The Court found that while some distinction between the different groups of striking employees was appropriate and although the ultimata given had been clear, the respondent employees' conduct was not so egregious that it warranted dismissal when after reconsidering their actions over the weekend they had returned to work. The respondent employees were therefore reinstated with a final written warning and, given their defiance of the ultimatum given and the five-year delay in the hearing of the matter, back pay was limited to six months. No order of costs was made.

Submissions on appeal

[12] The appellant takes issue on appeal with the judgment of the Labour Court on the basis that having regard to the seriousness of the misconduct committed, the Court erred in failing to find that valid reason existed for differentiating between the conduct of the employees who acted in accordance with the terms of the final ultimatum and those who had not. The fact that the unprotected strike was embarked upon in bad faith during a critical business production cycle indicated that it was a form of economic sabotage aimed to "wreak havoc" on the appellant's ability to meet its festive season orders.[1] No reason was advanced by the respondents as to why the law had not been complied with given that two months' notice had been to employees of the bonus decision, which gave employees ample opportunity to pursue a grievance or take any other lawful collective action. Since there was no reason why the provisions of sections 64 and 65 were not complied with,

[1] With reference to *TGWU and others v De la Rey's Transport (Pty) Ltd* (1999) 20 ILJ 2731(LC); *STEMCWU and Others v Brano Industries (Pty) Ltd* (2000) 21 ILJ 666 (LC).

employees lost the protection with which they could have clothed themselves and opened them up to the sanction of dismissal.

[13] Furthermore, it was argued that the untruthful contentions advanced by employees at the disciplinary enquiry undermined the trust relationship with the appellant as an employer. These included that employees seldom read company notices, when this was not so; that there was uncertainty regarding the payment of the bonus on 15 December 2010, when there was not; that they were unaware that the strike was unprotected or illegal, when two managers had informed them of this; the claim that no ultimatum had been given, when it had; and that in response to the 17 December 2010 ultimatum, they had indicated that they would return to work that day, when they did not and instead elected to remain on strike. With reference to cases such as *Mndebele and Others v Xstrata SA (Pty) Ltd t/a Xstrata Alloys (Mndebele)*[2] and *NUMSA and Others v WG Davey (Pty) Ltd,*[3] it was argued that there was no *bona fide* reason advanced as to why the final ultimatum was ignored. As a result, given the nature and seriousness of the employees' misconduct, the sanction of dismissal for the respondent employees who did not comply with the final ultimatum was fair. Even if their dismissals were unfair, a reinstatement order, it was argued, was inappropriate in that it was reasonably impracticable given the unchallenged evidence of deteriorating conditions in the industry.

[14] The respondents oppose the appeal on the basis that the appellant offers no compelling reason as to why the judgment of the Labour Court was wrong. In *WG Davey (Pty) Ltd v NUMSA and Others,*[4] the Supreme Court of Appeal found that it was incumbent on the Court to determine whether in the circumstances of that matter the dismissals pursuant to a fair ultimatum were fair. Although the appellant's case was that even though they were not able to obtain enough temporary workers on 15 December 2010 and 16 December 2010, production was virtually unaffected by the absence of the remaining strikers on 17 December 2010. The facts are therefore similar to those in

[2] (2016) 37 ILJ 2610 (LAC) at paras 27-28.
[3] (1995) 3 BLLR 121 (IC) at 157D.
[4] (1999) 20 ILJ 217 (SCA) at para 13.

*NUMSA v Boart MSA (Pty) Ltd,*[5] in which this Court found that since no irreparable harm was proved given the employment of temporary workers, the dismissals were unfair and the employees reinstated.

[15] The sanction of dismissal was not fair on the facts of this matter, it was argued, further when the delay in the return of the respondent employees could be given effect by not making the reinstatement order retrospective to the date of dismissal. Furthermore, regard should be had to the fact that the lock-out became effective after 08h00 on 17 December 2010 when the ultimatum expired and the gates were locked. Since in terms of s193(2) of the LRA reinstatement was appropriate, any changing circumstances at the appellant's business after the dismissal of the respondent employees does not justify it being found to be reasonably impractical to reinstate the employees. For these reasons, it was contended that the order of the Labour Court should remain in place with the appeal to be dismissed.

Evaluation

[16] Section 68(5) of the LRA requires that the Code of Good Practice[6] be considered in determining whether a fair reason for dismissal exists for participation in an unprotected strike.[7] Both item 6 and item 7 of the Code are to be considered in making such determination.[8] Item 6(1) recognises that participation in an unprotected strike constitutes misconduct but that -

> '…*like any other act of misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including –*
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> (a) *the seriousness of the contravention of this Act;*
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> (b) *attempts made to comply with this Act; and*

[5] (1996) 1 BLLR 13 (LAC) at 18H0J, 21F and 21I-J.
[6] Code of Good Practice: Dismissal (Schedule 8 to the LRA).
[7] Section 68(5) states as follows: '*(5) Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'*
[8] *NUMSA v CBI Electric African Cables* [2014] 1 BLLR 31 (LAC).

(c) *whether or not the strike was in response to unjustified conduct by the employer.'*

[17] Item 7 provides guidelines which should be considered when determining whether a dismissal for misconduct is unfair, being –

'(*a*) *whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and*

*(b) if a rule or standard was contravened, whether or not –*

*(i) the rule was a valid or reasonable rule or standard;*

*(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*

*(iii) the rule or standard has been consistently applied by the employer; and*

*(iv) dismissal with an appropriate sanction for the contravention of the rule or standard*.'

[18] The three ultimata given to employees cautioned them to halt the unprotected strike they had embarked upon and return to work, failing which they would risk dismissal. There is no dispute that these ultimata complied with item 6(2) of Schedule 8 of the LRA in that in clear language the striking employees were informed of the consequences of their failure to heed the warning and given an appropriate opportunity to reflect on their conduct and to desist from it.[9] Following the first ultimatum, 64 employees returned to work. Thereafter, in response to the final ultimatum issued, a further 58 employees resumed their work. All of these employees undertook in writing not to engage in further unprotected strike action and accepted receipt of a final written warning for their conduct.

[19] There is no dispute that the final ultimatum on 17 December 2010 was extended for a further 30 minutes so as to provide still a further opportunity for the respondent employees to comply with its terms; and that the respondent

[9] Code of Good Practice: Dismissal (Schedule 8); *Mndebele* (*supra* at note 2) at para 28.

employees did not adhere to the terms of the extended final ultimatum. After the expiry of the final ultimatum, at 08h35 on 17 December 2010, the appellant instituted a lock-out, the demands of which were that:

> '1 All County Fair Foods employees currently partaking in any industrial action immediately and unconditionally cease its strike action;
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> 2 All County Fair Foods employees unconditionally accept the company's decision not to make payable any discretionary performance bonuses during this financial year and as accordingly communicated to all affected County Fair Foods employees;
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> 3 The parties mutually agree to a collective agreement clearly stipulating such mutually agreed terms as referred herein above prior to such employees returning to normal duty.'

[20] The lock-out notice stated further that:

> 'For the duration of the lockout no person who refuses to submit to the above-mentioned terms and conditions will be permitted to tender their services nor will they receive any remuneration for the full duration of such industrial action from the company…'

[21] There is no suggestion made by the respondents that the lock-out prevented the return of the respondent employees to work. When the respondent employees did return to work on Monday 20 December 2010, the first working day following 17 December 2010, they undertook in writing to cease any further unprotected industrial action and agreed to receive a final written warning for their conduct. Although by doing so, the impasse between the appellant and the respondents was resolved, the issue of a lock-out notice and even the partial compliance by the respondent employees with certain of the lock-out demands, did not prevent the appellant from taking disciplinary action against those employees who had breached workplace discipline by embarking on the unprotected strike and failing to comply with a final ultimatum to return to work.

[22] It has repeatedly been stated by our courts that engaging in an illegal strike constitutes serious and unacceptable misconduct by workers in respect of

which an employer is entitled to take disciplinary action.[10] Dismissal has been found to be an appropriate sanction where an unprotected strike was planned to create maximum pressure and undermine the authority of the employer;[11] and where there has not been compliance with an ultimatum given to return to work, even when the ultimatum was not one in a conventional sense and where the strike has been of a short duration.[12]

[23] In this matter the unprotected strike was embarked upon deliberately during the peak end of the year production season with no attempt made to comply with the LRA. It was not in response to unjustified conduct by the appellant and less disruptive methods were clearly available to the employees to resolve their dissatisfaction with the bonus issue.

[24] The conduct of the respondent employees in failing to adhere to the terms of the final ultimatum given to them, distinguished them from their fellow employees who returned to work. Consequently, their conduct could on the facts clearly be differentiated from that of other striking employees, in the same manner as it was in *NUMSA and Others v CBI Electric Cables.*[13]

[25] Our courts have repeatedly stated that fairness generally requires that like cases should be treated alike[14] and that disciplinary consistency is the hallmark of progressive labour relations.[15] While discipline should be neither capricious nor selective,[16] this applies within reasonable bounds and subject to the proper and diligent exercise of discretion in each individual case with

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[10] *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited* [2016] 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC) at para 50; *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* [1993] 1994 (2) SA 204 (A) at 216E.

[11] *Ibid.* See too *SA Clothing and Textile Workers Union and Others v Berg River Textiles – A Division of Seardel Group Trading (Pty) Ltd* (2012) 33 *ILJ* 972 (LC) at para 30 and *Triple Anchor Motors (Pty) Ltd and Another v Buthelezi and Others* (1999) 20 ILJ 1527 (LAC).

[12] *Mndebele op cit.* (see note 2) at para 34.

[13] (2014) 35 ILJ 642 (LAC).

[14] *Cape Town City Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) at para 12.

[15] *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at para 36. See too *Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at para 29.

[16] *Chemical Energy Paper Printing Wood & Allied Workers Union and Others v Metrofile (Pty) Limited* (2004) 25 ILJ 231 (LAC) at paras 36-37; *National Union Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) 1029G-H.

fairness remaining a value judgment.[17] There may exist valid grounds in a particular case to distinguish the conduct of one employee from another, albeit that they have engaged in the similar conduct, having regard to the material facts applicable.

[26] The appellant was neither capricious nor selective in its approach to the misconduct committed by the respondent employees. The collective activity of the respondents could, unlike in *CEPPWAWU v Metrofile*,[18] be legitimately differentiated from the employees who complied with the final and earlier ultimata. The striking workers were, therefore, not all on the same footing given the respondent employees' failure to comply with the final ultimatum given to them. As much was not in dispute. This constituted a material distinguishing feature between the different groups of strikers which provided a legitimate factual basis which permitted the appellant to differentiate between the conduct of the respondent employees and that of those striking workers who had complied with the ultimata issued.[19]

[27] As was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[20] in determining whether a dismissal is fair or not does the decision-maker is "*…not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair".* Deciding this does not require the decision-maker "…*to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."*

[28] In determining the appropriateness of a dismissal as a sanction, consideration must be given to the applicable circumstances and whether a less severe form of discipline would have been more appropriate, since dismissal is the

[17] *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) at 1264A-D; *SACCAWU and Others v Irvin & Johnson (Pty) Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Cape Town Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) at para 14.
[18] *Op cit* (see note 16).
[19] *Metrofile (ibid)* at para 38 quoting *Cape Town City Council v Masitho and Others op cit.* (see note 17) at 1961A.
[20] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79.

most severe sanction available.[21] In *National Education, Health and Allied Workers Union ("NEHAWU") v University of Cape Town and Others,*[22] the Constitutional Court recognised that –

> *'…the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.'*[23]

[29] While the appellant suffered economic harm as a result of the strike, the evidence showed that this harm was chiefly experienced for the first 1½ days after commencement of the strike and was therefore attributable to the conduct of all striking employees and not the respondent employees alone. However, in concluding that dismissal was too harsh a sanction to be imposed on the respondent employees, in my view the Labour Court did not have appropriate regard to the fact that the unprotected strike action was embarked upon in a critical business period; the final ultimatum had been issued calling on the respondent employees to return to work; the final ultimatum had been extended to provide the respondent employees with additional time within which to comply with it; the final ultimatum was ignored by the respondent employees with no *bona fide* reason put up to explain why this was so; that no remorse was shown for this conduct by the respondent employees; and to the conduct of the respondent employees at the disciplinary hearing.

[30] The facts showed that the respondents displayed a blatant disregard for the authority of the appellant as employer without regard to the consequences of their actions on either the business of the employer or the employment

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[21] *TAWUSA (op cit)* at para 50. See too *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964; *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd* (1997) 18 *ILJ* 439 (SCA); *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 1996 (4) SA 577 (A); (1996) 17 *ILJ* 455 (A); *Triple Anchor Motors (Pty) Ltd v Buthelezi* (1999) 20 ILJ 1527 (LAC); *Mzeku and others v Volkswagen SA (Pty) Ltd* (2001) 22 ILJ 1575 (LAC).
[22] 2003 (3) SA 1 (CC) at 589 C–D.
[23] At para 40.

relationship. The fact that the strike had continued for a further 1½ days was not a sufficiently material fact to warrant weighing considerations of fairness in favour of the respondents or to justify a finding that the dismissal of the second respondents was unfair when regard was had to the totality of factors placed before the Labour Court. Having regard to all such factors, the sanction of dismissal imposed on the respondent employees by the appellant was, in my mind, fair given their decision to embark on unprotected strike action at a critical business period and their persistent refusal, without *bona fide* reason provided, to comply with the repeated ultimata given to them to return to work.

[31] It follows for these reasons that the appeal must succeed. There is no reason in law or fairness why costs should not follow the result.

Order

[32] In the result, the following order is made:

1. The appeal succeeds with costs.

2. The order of the Labour Court is set aside and substituted as follows:

‘1. The dismissal of the applicants was fair.’

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SAVAGE AJA

Coppin JA and Sutherland JA agree.

APPEARANCES:

FOR APPELLANT: Mr A C Oosthuizen SC

Instructed by Werksmans Attorneys

FOR RESPONDENTS: Mr P Benjamin (heads prepared by Mr J G van der Riet SC)

Instructed by Cheadle Thompson & Haysom