THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO.: 576/2012
Not Reportable

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE & ALLIED WORKERS UNION ('NUPSAWU') obo MANI AND NINE OTHERS **Appellant**

and

NATIONAL LOTTERIES BOARD **Respondent**

Neutral citation: ***National Union of Public Service and Allied Workers obo Mani & Others v National Lotteries Board*** **(576/12) [2013] ZASCA 63 (24 May 2013)**

Coram*:* **NUGENT, PONNAN, THERON and PILLAY JJA and WILLIS AJA**

Heard: **7 May 2013**

Delivered: **24 May 2013**

Summary: **Labour Law - Dismissal for insubordination – Whether dismissal of employees automatically unfair in terms of s 187(1)(*d*) of the Labour Relations Act 66 of 1995, as amended, alternatively whether it was otherwise unfair.**

ORDER

On appeal from: Labour Court, Johannesburg (Basson J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

WILLIS AJA (NUGENT, PONNAN and THERON and PILLAY JJA concurring):

Introduction

[1] This appeal concerns the dismissal of ten employees by the respondent on 25 August 2008. The ground for dismissal was misconduct in the form of insubordination. The decision to dismiss was taken after a disciplinary enquiry conducted by Professor André Van Niekerk, who is now a member of the Labour Court. Having been specifically appointed by the respondent to chair the disciplinary enquiry as an independent person, he found dismissal to be the appropriate sanction. The respondent is a juristic person established in terms of s 2 of the National Lotteries Act 57 of 1997('the Lotteries Act'). Professor van Niekerk's decision was reconsidered in an internal appeal. An attorney, Mr George Negota, dismissed that appeal on 19 September 2008.

[2] On 23 September 2008 the appellant, a trade union acting on behalf of the ten dismissed employees, referred a dispute relating to the alleged unfair dismissal of these employees to the Commission for Conciliation Mediation and Arbitration ('the CCMA'). The relief sought by the appellant was the reinstatement of the ten employees. The process of conciliation was unsuccessful. The appellant thereupon referred the dispute directly to the

Labour Court in terms of s 191 (5)(*b*)(*i*) of the Labour Relations Act 66 of 1995, as amended ('the LRA'). The appellants alleged that the dismissal had been 'automatically unfair' in terms of s 187 of the LRA. The appellants relied on the provisions of section 187(*1*)(*d*) of the LRA which provides that a dismissal is automatically unfair if the reason for the dismissal is that:

'the employee took action, or indicated an intention to take action, against the employer by-

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act.'

[3] The appellant has alleged that the dismissal was 'automatically unfair' in terms of s 187(1)(*d*) of the LRA because the employees were dismissed for participating in lawful union activities, viz. supported their trade union's petition for the removal from office of the respondent's chief executive officer ('CEO'), Professor Vevek Ram. In the alternative the appellant submitted that the dismissal of the employees was, in any event, unfair because it was inappropriately severe in all the circumstances and, moreover, there had been no irretrievable breakdown in the relationship between the employees and the respondent. The appellant claimed the reinstatement of the employees.

[4] The parties consented, in terms of s 158(2)(*b*) of the LRA, to the Labour Court having jurisdiction to determine whether the dismissal had been ordinarily (as opposed to automatically) unfair, even though that dispute had not been referred to arbitration in terms of s 115 (1)(*b*) of the LRA.

[5] On 3 February, 2011, the Labour Court (per Basson J) found that the dismissal of the employees had been both substantively and procedurally fair. The learned judge dismissed an application for leave to appeal on 31 May 2011. The appellant then petitioned the Labour Appeal Court ('the LAC'). The LAC dismissed the petition on 22 September 2011.This appeal, against the decision of the Labour Court[1]is before us with the leave of this court.

[1] See *Republican Press (Pty) Limited v Ceppawu* 2008 (1) SA 404 (SCA); (2007) *ILJ* 2503 (SCA) at para [14], read with *National Union of Metalworkers of South Africa v Fry's Metals (Pty) Limited* 2005 (5) SA 433; (2005) 26 *ILJ* 689; [2005] 5 BLLR 430 (SCA) at para [42] and *NUM & Another v Samancor Limited & Others* [2011] 11 BLLR 1041 (SCA) at para [14].

[6] The relief sought by the appellant is accordingly that the order of the Labour Court (the court a quo) be set aside and the following substituted therefore:

(1) the dismissal of the applicants was procedurally and substantively unfair;

(2) the respondent is ordered to retrospectively reinstate the applicants to the positions they occupied before their unfair dismissals, alternatively to similar or equivalent positions without any loss of remuneration and benefits.

(3) the respondent is ordered to pay the applicants' costs.

The appellant also seeks an order for costs in this appeal.

The relevant facts

[7] The relevant facts are largely common cause. Various employees were dissatisfied with the fact that Professor Ram held the position of CEO. On 20 March 2008 three of the appellant's shop stewards, Messrs Kelebogile Mokgatlha, Mzikayise Mani and Ms Zinzi Ramatseba, using the appellant's letterhead, wrote a letter to Mr Sikonela (then the respondent's Manager of Human Resources and Administration) in which they raised complaints about 'the leadership style and modus operandi' of Professor Ram and said they were 'no longer prepared to bear his style of leadership any longer'. In that letter the shop stewards expressed demanded sight of Professor Ram's contract of employment. On the same day these three shop stewards similarly addressed a letter to Mr Sikonela on the appellant's letterhead in which they expressed their discontent at not being invited by the respondent's board to attend interviews for the appointment of the Chief Operations Officer ('COO'). In that letter they said:

'We shall therefore not recognize 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.'

[8] Mr Sikonela replied on 1 April 2008 in a letter wherein he said that the shop stewards had 'no right to demand the contract' of the CEO and 'no right to determine the manner in which the CEO carries out his functions'. In that

letter Mr Sikonela drew attention to the fact that 'any employee has the right to follow the grievance procedure if such an employee has a grievance'. The respondent has a grievance procedure set out in its Staff Policy document which commenced on 1 May 1999, the stated purpose of which policy document is to implement the purposes for which the respondent had been established. The grievance procedure in this document recognizes the right of employees to avail themselves of the remedies provided for grievances in 'labour legislation'. On 1 April 2008, in a separate letter, Mr Sikonela advised the appellant that it had no right to attend the interview for the position of COO and warned it that it faced the risk of disciplinary action being taken against its members for insubordination, which disciplinary action could include dismissal.

[9] On 16 April 2008 the appellant thereupon referred a dispute to the CCMA over its claim that it had a right to obtain a copy of Professor Ram's contract of employment. The appellant categorized the nature of the dispute as one relating to the disclosure of information. Ultimately, the parties were unable to resolve this narrowly defined dispute through conciliation. This was referred in terms of s 135(5) of the LRA to arbitration under the auspices of the CCMA. After a hearing on 24 July 2008, CCMA commissioner Mr Khotjo Matji delivered an award on 1 August 2008 in which he dismissed the appellant's claim for information pertaining to the contract of employment of Professor Ram. During the conciliation first session held under the auspices of the CCMA on 9 May 2008 the parties reached an interim agreement in terms of which the union would send a letter to the board of the respondent in which it would attempt to justify its claim that it was entitled to a copy of this contract and 'to specify in writing the expectations of the staff in terms of overall organizational performance and delivery'. The parties formally extended the period for the conciliation process to 11 June 2008. This agreement was recorded by a commissioner of the CCMA, Ms Ann Hofmeyr.

[10] The appellant addressed its letter to the respondent on 23 May 2008. In that letter the appellant complained that Professor Ram had failed to ensure that the following Human Resource Policies were in place:

'Performance Appraisal, Promotions, HIV/AIDS, Skills Development, Staff Training, Relocation, Employment Equity, Health and Safety'. After remonstrating that he had failed to allocate study bursaries to staff, the appellant expressed its dissatisfaction about the fact that he had allegedly introduced restricted areas for staff in certain sections of the respondent's building and had given 'preferential treatment to certain departments by allowing them to appoint friends without advertising the vacancies and further not applying consistent contractual terms'. The *Mail and Guardian*, a news publication having a national circulation, received a copy of this letter. After inviting the respondent to respond, the *Mail and Guardian* published an article – *A whole Lotto nothing going on* – in which it described Professor Ram as having been 'hauled before the CCMA by his own staff'. The article said that Professor Ram had been accused of 'treating staff and board members autocratically and of routinely failing to meet delivery deadlines for the hand-over of more than R2-billion in annual grants to sports, arts and charities'.

[11] The facts upon which the case turns are that, on 3 June 2008, 41 employees of the respondent, including the shop stewards Mokgatlha, Mani and Ramatseba, addressed a letter to Mr Sikonela in which they said had submitted a 'vote of no confidence' in Professor Ram and urged the board of the respondent 'to ensure that June 30th, 2008 is the last day of his employment'. The employees said in that letter that 'we are no longer prepared to spend a day with Professor Ram in the same building with him at the helm of this organisation'. This letter of petition had been prepared for signature by 48 employees but seven of those whose names appeared thereon did not sign it. This petition was followed up by a letter of 5 June 2008 addressed by Mr Maurice Makatu, the provincial organizer of the appellant, to Mr Sikonela in which the appellant called upon the respondent to resolve 'the current impasse'. In the letter the appellant also asserted its right, as a trade union, to 'communicate the contents of its correspondence to the public through the media without any fear from the Board'.

[12] Acting through its attorneys, the respondent then sent a letter dated 6 June 2008 to the appellant in which it referred to the history of the matter

since 20 March 2008 and described the ultimatum concerning the employment of Professor Ram as constituting ‘an act of insubordination by all individuals who have signed the petition’. The letter went on to describe the ultimatum as being ‘subversive of the integrity and authority of the Board and its capacity to perform its statutory functions’. The letter further alludes to the fact that in terms of s 7(1)(*a*) of the Lotteries Act the CEO is ‘solely accountable to the board [of the respondent] for the performance of all financial, administrative and clerical functions of the board and any duties which may be delegated to him or her in terms of subsection (4)’. Subsection 4 provides that: ‘Any function of the board in terms of this Act may be delegated to the chief executive officer, and any such delegation shall be in writing’. The letter by the respondent’s attorneys described the conduct of the employees concerned as accordingly being unlawful and called upon all those who had signed the petition to withdraw it unequivocally by 9 June 2008. Three of the employees who had signed the petition then retracted their support for it.

[13] Acting on behalf of the appellant, Mr Makatu responded to the letter of the respondent’s attorneys by way of correspondence dated 9 June 2008. In that letter, he raised certain points upon which the appellant has continued to rely throughout the dispute. The appellant invoked the constitutional right of both it and its members to ‘freedom of expression, assembly, demonstration, picket and petition’, the ‘freedom of the press and other media’ and the ‘freedom to receive and impart information’. The letter asserted the right of everyone ‘peacefully and unarmed to assemble, to demonstrate, to picket and to present petitions’. In that letter Mr Makatu submited that the ‘collective agreement’ which was entered into between the parties on 17 September 2007- more commonly known as a ‘recognition agreement’ within the labour relations community - prohibited neither the appellant nor its members from ‘making reference to the performance of the CEO’. Subsequently, the appellant lost its representivity and, accordingly, its recognition by the respondent as the bargaining representative of the employees. Mr Makatu said that the letters sent to the respondent on behalf of the appellant’s members on 23 May and 3 June 2008 had not referred to any strike or work

stoppage after 30 June 2008. He also protested that the signing of the petition by employees of the respondent had not been unlawful.

[14] On 17 June 2008 Mr Sikonela sent a notice of the disciplinary enquiry to each of the thirty-eight employees who had signed the petition but not retracted his or her support. This was the disciplinary enquiry which was chaired by the Professor Van Niekerk. The enquiry commenced on 23 June 2008. The notice of enquiry referred to the history of the matter since 20 March 2008. The charges in the notice read as follows:

'Charge 1: Insubordination and disrespectful behavior making the continued employment relationship intolerable by associating yourself with and supporting-

1) the contents of the union's letter dated 23 May 2008 and the petition dated 2008 in which the CEO is grossly defamed by the false accusations of ineptitude, favoritism, racial bias, unlawful acts and mismanagement;

2) the statement that you are not prepared to continue working with the CEO in the same building with him at the helm;

3) the call to the NLB[2] 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 relationship intolerable by associating with and supporting-

1. the contents of the union's letter dated 23 May 2008 and the petition dated 2008 in which the CEO is grossly defamed by the false accusations of ineptitude, favoritism, racial bias, unlawful acts and mismanagement;

2. the publication of that letter in the media;

3. 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: The material breach of the general duty to act in good faith, to cooperate with and the refusal to work under the supervision and control of the duly appointed CEO.'

The notice of the disciplinary enquiry informed the affected employees that if found guilty they could be dismissed from employment with the respondent.

[2] ie the National Lotteries Board.

The findings of the disciplinary enquiry

[15] The disciplinary enquiry before Professor Van Niekerk as the chairperson lasted several days. In his written reasons for making his findings in the disciplinary enquiry, he considered the provisions of s 7(1)(*a*) of the Lotteries Act, which made the CEO 'solely accountable' to the board of the respondent to be a relevant consideration. The chairperson relied on the fact that the so-called 'collective agreement' entered into between the parties contained a clause in which the appellant 'recognizes management's authority and responsibility to plan organize and manage'. He also found that 'the vast majority of the allegations made concern archetypal workplace grievances, which ought appropriately to be addressed and if possible resolved by the use of internal procedures'. The chairperson noted that the affected employees had failed to use the grievance procedures provided for in both the LRA and the Staff Policy document – even if the structures which were provided for the in the latter were amenable to criticism.

[16] The chairperson emphasised that neither Professor Ram's conduct nor his performance was a relevant issue in the disciplinary proceedings in question. The chairperson was mindful of the fact that the issue he had to consider was whether the continued employment relationship between the respondent and the affected employees had been rendered intolerable by reason, inter alia, of their insubordination. He found that he could make a finding on the issues in question regardless of the merits of any of the accusations levelled against Professor Ram. Professor Ram resigned as CEO of the respondent on 20 January 2012.

[17] The chairperson referred with approval to John Grogan's definition of 'insubordination' in *Dismissal, Discrimination and Unfair Labour Practices*[3] as occurring 'when an employee refuses to accept the authority of his or her employer or of a person in a position of authority over an employee'.

[3] Grogan, J. *Dismissal, Discrimination and Unfair Labour Practices,* (2007), 2nd Edition, Juta's: Cape Town. The same definition appears in his more recent *Dismissal* (2010), Juta's: Cape Town at p196.

Professor Van Niekerk found that 'by stating that they "were no longer prepared to spend a day with Professor 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'.

[18] The chairperson also found that by associating themselves with the making public of their grievances concerning Professor Ram, more particularly in the manner to which they resorted, 'the individual employees associated themselves with a campaign clearly designed to bring the Board and its CEO into disrepute'. Accordingly, a finding of guilt with respect to the misconduct alleged in count 2 was made against each of the affected employees. They were found not guilty on count three.

[19] In his concluding remarks before the chairperson, Professor Ram had said that not all of the affected employees may have realised the seriousness of their actions. With this in mind, Professor Van Niekerk afforded all 38 of those whom he found guilty of misconduct the opportunity to sign a formal acknowledgement and undertaking, on or before 13 August 2008, in which they (i) dissociated themselves from the letters addressed by the appellant to the respondent on 23 May and 3 June 2008; (ii) accepted their wrongdoing, (iii) apologised to Professor Ram, (iv) undertook in future to use the grievance procedures provided for in both the Staff Policy document and the LRA and (v) agreed to receive a final written warning, valid for 12 months for a similar offence. At the request of the appellant the deadline was extended to 20 August 2008. Of the 38 affected employees, 28 signed the acknowledgement and received the warnings accordingly.

[20] The ten employees with whom this appeal is concerned did not sign this undertaking. Instead, they relied on a 'collective submission' recorded in writing which was handed to the chairperson at the hearing on 20 August 2008. In that collective submission, signed by each of the ten employees and their union representative, they recorded that 'in the light of your findings on charge 1 and 2 we sincerely apologise insofar as our actions constituted

misconduct of insubordination and brought the name of the Board and its CEO into disrepute'.

[21] In his written reasons for the sanction of dismissal imposed on the ten employees on 25 August 2008, the chairperson referred to the fact that three of the original 41 petitioners had recanted very soon afterwards and that 28 of the remaining 38 had responded positively to the opportunity to make amends. He said that:

'In these circumstances, the belated statement of apology proferred in the submissions, qualified as it is, is too little, too late and the question of sanction must necessarily be addressed in the absence of a sincere and timeous apology.'

The chairperson went on to say that:

'(t)he fact that the employees in this instance have been offered the opportunity to recant on terms that the majority of their colleagues considered reasonable must weigh against any salutary effect of a warning, and seriously calls into question the prospects of a continued employment relationship on the necessary terms of mutual trust and confidence.'

The judgment of the Labour Court (the court a quo)

[22] The learned judge in the court a quo was unimpressed with the submission that the threats contained in the petition were not serious and were merely strategic in order to catch the attention of the respondent. She described the notion that the respondent should not have taken the words in the petition seriously as 'ridiculous'.

[23] The court a quo agreed with Professor Van Niekerk's findings of misconduct in respect of counts 1 and 2. The learned judge held that the employees' acts of insubordination and bringing into disrepute the reputation of both the respondent and its CEO were not 'legitimate' activities. She found that these activities were neither constitutionally protected nor protected under the LRA. She found that no constitutionally enshrined right had been infringed by finding the employees guilty of misconduct and dismissing them. The

learned judge found that there had been no 'automatically unfair' dismissal in terms of s 187 (d) of the LRA.

[24] The court a quo found that, against the background of events, more especially the 'olive branch' extended to them by both Professor Ram and the chairperson of the disciplinary enquiry, the dismissals could not otherwise be found to have been unfair. She found that there was no inconsistency in the fact the chairperson had dealt differently with those who had signed the undertaking and those who had not. Different facts call for different measures. The learned judge also found that there was nothing procedurally unfair in coming to the conclusion to dismiss. On the contrary, she found that the chairperson of the disciplinary enquiry had acted with exemplary fairness.

The appellant's banner as unfurled in this Court

[25] Mr *Ngalwana* SC, who appeared for the appellant, summoned from his artillery the judgment of Froneman DJP who delivered the judgment of the LAC in *South African Chemical Workers Union v Afrox Ltd*.[4] In *SACWU v Afrox* the learned judge emphasised the constitutionally enshrined character of rights and freedoms enjoyed by trade unions and their members in contemporary South Africa. Mr *Ngalwana* also referred to *Kroukam v SA Airlink (Pty) Ltd*[5] where the appellant had been dismissed primarily as a result of activities which had been undertaken by him on behalf of the union. The LAC held that it therefore followed, as a matter of law, that in terms of s 187(1)(*d*), read together with ss 4(2)(a) of the LRA, his dismissal had been 'automatically unfair' and he was entitled to reinstatement. Mr *Ngalwana* submitted, correctly, that trade unions and their members are entitled to engage in robust exchanges with management. The decorum of a bourgeois tea party is not expected of angry employees. He contended that, in the present case, this is all that had occurred and that the dismissed employees had been doing no more than exercise their constitutionally enshrined right to

[4] *South African Chemical Workers Union v Afrox Limited* (1999) 20 ILJ 89; [1998] 12 BLLR 1209 (LAC).
[5] *Kroukam v SA Airlink (Pty) Limited* 2005 26 ILJ 2153; [2005] 12 BLLR 1172 (LAC).

petition their employer. Accordingly, so he submitted, the dismissals had been automatically unfair in terms of the LRA.

[26] In the alternative to his submissions that the dismissals had been automatically unfair, Mr *Ngalwana* referred to the fact that the employer's disciplinary code lists 'deliberate rudeness to a divisional manager or general manager' as examples of 'minor offences'. While accepting that the code is, as it expressly mentions, merely a guide, he advanced the proposition that, as the code did not make insubordination a first order act of misconduct, it was accordingly unfair to dismiss the employees on this account. Mr *Ngalwana* also contended that in dismissing the ten employees and not the others who had committed a similar offence, the respondent had been inconsistent and that this, too, had been unfair.

[27] Mr *Maenetje* SC, who appeared for respondent, agreed that the pivotal issue in this case is whether the conduct of the dismissed employees on 3 June 2008 when they petitioned Mr Sikonela, expressed a 'vote of no confidence' in Professor Ram, urged the board of the respondent 'to ensure that June 30th, 2008 is the last day of his employment' and said in that letter that 'we are no longer prepared to spend a day with Professor Ram in the same building with him at the helm of this organisation' amounted to unlawful conduct or, put differently, was protected activity in terms of the employees' constitutionally enshrined right to petition. Mr *Maenetje* agreed that the issue of whether the appellant had, in fact, communicated the contents of its petition to the media and, if so, what the implications of this may be, was essentially ancillary to the main issue of the insubordination alleged to have been inherent in the petition and the circumstances surrounding it.

[28] Mr *Maenetje* also agreed that, if the dismissal was not found to have been automatically unfair in terms of the LRA, the next questions that need to be considered were whether the dismissals had been unfair on the basis that:

(i) the acts of misconduct were insufficiently serious to justify dismissal; and

(ii) the respondent had been inconsistent in dismissing the ten affected employees and not others.

Mr *Maenetje* supported the judgment of the court a quo.

Conclusions

[29] Mr *Ngalwana's* initial submission was that the employees had been dismissed because they had joined in petitioning the respondent, which was a legitimate trade union activity. That submission is not factually correct. That the affected employees supported a petition was not, by reason of this fact alone, the cause of their dismissal. As correctly found by the disciplinary enquiry, and the court a quo, the cause of their dismissal was what they said in the petition, which is a different matter. No doubt it is correct, as was submitted by Mr *Ngalwana*, that they would not have been dismissed had the petition not been sent, but that is because the offensive material therein would not have been conveyed. It was the communication of the offensive material that caused their dismissal, not the act of petitioning in itself.

[30] As far as this submission, advanced on their behalf of the affected employees is concerned, murder and arson, would, for example, remain unlawful even if the conspiracy hatched to commit them had been formed during a meeting of a trade union, scrupulously convened in terms of the formal organisational rights conferred upon trade unions by the provisions of the LRA and affirmed in the Constitution. When these vivid hypothetical illustrations were presented to Mr *Ngalwana* by the court, he was compelled to concede that it could never have been intended by the legislature that the rights to petition and to organise in terms of the LRA and the Constitution were unqualified. A meeting of trade union officials and shop stewards cannot, for example, be convened to plot and plan the murder of a disagreeable employee at the work place or to burn down the buildings of the employer, no matter how justified the participants may believe such action to be. So too, pickets, protests, meetings, pamphleteering cannot, as the court a quo also mentioned by way of illustration, be organized contrary to our law of defamation. Trade union activities which constitute unlawful acts of

insubordination are not protected. The law does not dissemble unlawful acts through the invocation of a constitutional banner.

[31] The court a quo referred to *Acrylic Products (Pty) Ltd v CWIU and Another*;[6] *Slagment (Pty) Ltd v Building Construction and Allied Workers Union*;[7] *Johannes v Polyoak Industries*[8] and *Air Products (Pty) Ltd v CWIU*[9] to consider the meaning of 'insubordination' and the consequences that may flow therefrom. The conclusions of the learned judge cannot be faulted. No reasonable person could come to any other conclusion from the conduct of the employees than that they were serious in their threat willfully to defy their employer and its CEO. This constitutes insubordination. There would be no logic in requiring an employer first to wait to see whether the threat was acted upon before it can invoke disciplinary proceedings against the employee concerned. Provided the threat is credible an employer may act upon it forthwith.

[32] Correctly construed, the affected employees were dismissed not for petitioning their employer but for their acts of insubordination. Neither the Constitution nor the LRA protects employees from dismissal for insubordination. The affected employees were not dismissed in contravention of s 187(1)(d) of the LRA. There was no automatically unfair dismissal.

[33] As Grogan notes in his *Dismissal*,[10] the LRA's Code of Good Practice encourages employers to adopt disciplinary measures other than dismissal and, in the case of less serious offences to follow a system of 'graduated' discipline.[11] This principle was applied when Professor Ram recognised that not all of the affected employees may have realised the seriousness of their actions and Professor Van Niekerk, against this background gave all of those whom he found guilty of misconduct the opportunity to dissociate themselves

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[6] *Acrylic Products (Pty) Limited v CWIU and Another* [1997] 4 BLLR 370 (LAC).
[7] *Slagment (Pty) Limited v Building Construction and Allied Workers Union* 1995 (1) SA 742; (1994) 15 ILJ 979 (A).
[8] *Johannes v Polyoak Industries* [1998] 1 BLLR 18 (LAC).
[9] *Air Products (Pty) Limited v CWIU* [1998] 1 BLLR 1 (LAC).
[10] *Op.cit*.
[11] At p168.

from the petitions, accept their wrongdoing, apologise to Professor Ram and to undertake that they would, in future, use the grievance procedures provided for in both the Staff Policy document and the LRA. This opportunity was extended at the request of the appellant. Professor Van Niekerk acted in a procedurally fair manner.

[34] There is no inconsistency in giving, on the one hand, written warnings to those who acknowledged their wrongdoing and, on the other, dismissing those who did not. The dismissed employees persisted, right to the end, in protesting that they had done nothing wrong in seeking to hound Professor Ram out of his office. On the contrary, they insisted that they were merely exercising their rights in terms of the LRA and the Constitution. This unrepentant intransigence rendered the continued employment relationship between the parties intolerable. The relationship between them had irretrievably broken down.

[35] Section 185 of the LRA gives employees the right not to be subject to unfair labour practices. These include 'unfair conduct relating to the promotion, demotion, probation or training or the provision of benefits to an employee'.[12] Section 191 of the LRA provides mechanisms for the resolution of such disputes. Section 193 provides remedies for such disputes. Sections 133 to 135 provide for the resolution of disputes of mutual interest. Whatever criticism may have been leveled at the respondent's own internally provided grievance procedures, the LRA provides avenues down which the affected employees could have walked and even marched. They failed to use these at their peril.

[37] It is irrelevant to the determination of this appeal that, subsequent to the events that gave rise to the dismissals, the appellant lost its recognition by the respondent and Professor Ram resigned. The appeal must be decided on the facts that were germane at the time of the dismissals.

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[12] s186(2)(*a*)of the LRA.

[38] The appeal is dismissed with costs.

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N.P. Willis
Acting Judge of Appeal

APPEARANCES:

For the Appellant:	N. V. Ngalwana SC (with him N. Mbelle)
	Instructed by:
	Ndumiso Voyi Incorporated, Johannesburg
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For the Respondent:	N.A. Maenetje SC
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