IN THE LABOUR COURT OF SOUTH AFRICA

Held in Cape Town

Case No : C257/98

In the matter between :

SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION AND OTHERS 1st,andFurther Applicants

and

NOVEL SPINNERS (Pty) Ltd Respondent

JUDGEMENT

ZONDO J:

[1] The first applicant in this matter is the South African Clothing and Textile Workers Union, a registered trade union, (**"the Union"**). The second up to the eighth applicants (**"the individual applicants"**) are members of the union. The respondent is Novel Spinners (SA) (Pty) Ltd, a company that is duly registered and operates a business in Atlantis, Cape Town.

[2] The individual applicants were employed by the respondent until sometime in November 1997 when they were dismissed from the respondent's employment. They, together with the union, have brought a claim of unfair dismissal against the respondent and seek certain relief arising out of that

dismissal. The respondent defends the action and contends that the dismissal of the individual applicants was fair and justified and that they are not entitled to any relief.

[3] The matter went to trial. Each of the applicants gave evidence. The applicants also called as a witness Miss Rachel Visser, the union organiser who was responsible for looking after the interests of the union's members in the employ of the respondent. The respondent called among others Mr Pollard, the factory manager, and Mr Cedras, the personnel officer. It called other witnesses too. I will only refer to other witnesses if it becomes necessary to do so.

[4] In order to determine whether the dismissal of the individual applicants was or was not unfair, it is necessary to have regard to the evidence before the court. Although the parties led extensive oral evidence on numerous aspects of this case, because of the view I take of the matter, I do not intend dealing with every aspect of the evidence led by the parties. As far as it is practically possible, I intend basing this judgement on common cause facts or on facts which the respondent did not dispute. I now proceed to deal with the facts of the matter as they emerge from the evidence placed before the court. Where it is necessary to deal with disputed areas of evidence, I will do so as I proceed with the consideration of my judgement.

[5] On the 5th December 1996 the union and the respondent concluded a recognition and procedural agreement. Clause 1.1. of that agreement stated the objective of that agreement as being to **"enhance the spirit of co-operation and**

understanding and generally promote sound and fair Industrial Relations (sic)" Under the scope of the agreement, the agreement says it would regulate **"the relationship between the two parties as it pertains to procedural issues"**. It goes on to define procedural issues **"as issues such as discipline, grievances, retrenchments and union benefits"**.

[6] In terms of the agreement the parties also accepted the disciplinary and grievance procedures which were then **"in use"** within the respondent. Lastly at this stage, the agreement contained a strange clause 2.2. In that clause the parties said they agreed **"to implement the Labour Relations Act, 1995, No 66 of 1995 as a working document"**.

[7] The union and the respondent entered into wage negotiations during the early part of 1997. These negotiations were **"concluded"** around the middle of the year. The conclusion of the agreement was partial in the sense that on the issue of the payment of an annual bonus the parties did not reach agreement. All they agreed was **"to meet in September 1997 to explore the implementation of annual bonus"**. The parties did not sign an agreement in this regard at that stage but this was done at a later stage. I will return later in this judgement to the signing of a written agreement in this regard if it becomes necessary to do so. The wage agreement was to endure from the first pay week in May 1997 until the last pay week in June 1998.

[8] After the wage agreement had been concluded, albeit not signed, the respondent proceeded to implement it and effected the wage increase as agreed.

The meeting which the union and the respondent had agreed at the conclusion of the wage negotiations would be held in September **"to explore the implementation of [an] annual bonus"** did not take place.

[9] In a letter dated the 22nd October 1997 Miss Rachel Visser, the union organiser, addressed a letter to the respondent in which she requested a meeting with the respondent for the purpose of discussing **"the wage agreement and related matters"**. In her evidence Visser said the reference to **"related matters"** included the annual bonus which should have been the subject of a meeting between the parties the previous month already. She suggested two dates for the meeting, namely, 30 October 1997 at 12h00 and 31 October 1997 at 10h00. She asked for a reply by no later than the following day.

[10] By the 3rd November 1997 Visser had not received any reply in writing from the respondent to her letter of the 22nd October nor had the respondent conveyed to her any acceptance of her request for a meeting nor had it suggested alternative dates for the meeting she had requested. Accordingly she again sent another letter to the respondent dated the 3rd November. In that letter she referred to her letter of the 22nd October and expressed the union's deep concern about the fact that the respondent had chosen not to respond to her request for a meeting. She again requested a meeting with the respondent in **"an attempt to resolve the problems"**. This time she proposed that the meeting be held on the 5th November 1997 at 15h00. In fact she concluded the letter, probably as a way of putting pressure on the respondent, by saying, if the respondent did not

respond, the respondent would be taken to be agreeing to the meeting. She asked for a response not later than Tuesday the 4th November 1997.

[11] On the 5th November 1997 Visser went to the respondent's premises without making an appointment to try and have a meeting with the management. According to her the reason why she went to the premisses without making an appointment is that she had been told by Mr Quinton Alexander, a union shop-steward with the respondent, that when he had asked the management why they would not meet with the union, he had been told that Visser could come in for a meeting any time and did not have to make an appointment. The respondent denied having said Visser could come for a meeting without making an appointment. On the day in question, Visser was refused a meeting with the management.

[12] On the 5th November Visser sent another letter to the respondent once again requesting a meeting between the parties. In that letter the purpose of the meeting was stated as the discussion of the incident of that day involving Visser on the respondent's premisses, the wage agreement and related matters. Once again Visser testified that the reference to the **"related maters"** was a reference that included the annual bonus. Visser asked for a response not later than the 7th November. The date she proposed for a meeting this time was the 11th November 1997. Whereas the previous letters to the respondent were meant for the personnel officer, Mr Cedras, this letter was addressed to the director of the respondent, Mr Chan.

[13] On the 6th November Visser addressed to Mr Pollard, the general manager of the respondent, a letter the contents of which were identical to those of the one addressed to Mr Chan the previous day.

[14] By a letter dated the 6th November Mr Chan responded to Visser's letter of the 5th. He said that, as all the relevant authority had been delegated to Messrs Pollard and Cedras, he was not in a position to deal with a union matter unless the two gentlemen requested him to. He said he had handed Visser's letter over to them to deal with and asked Visser to contact Mr Pollard or Mr Cedras directly. He expressed the hope that the problem would be resolved.

[15] On the 7th November Mr Cedras sent a letter to Visser in reply to her letter of the 6th November. He said in the letter **".. Due to work constraints, we cannot accommodate your request for Tuesday, 11th November 1997".** He concluded the letter by saying **"We will, however, in due course, give notification on a date (sic) and time of availability"**.

[16] In each of the letters that Visser sent to the respondent referred to above, she requested the management to hand a copy thereof to the shop-stewards.

[17] On the 11th November 1997 the individual applicants in this case as well as certain other employees of the respondent did not perform their duties for the first two or so hours. Some were required to commence their work at 07h00 whereas others were required to commence at 08h00. The workers stood outside

the respondent's gate. Visser arrived at the respondent's gate and persuaded the workers to go back to work. This was about 09h00 or a little after that. The workers agreed to start work.

[18] Visser then sought to have a meeting with the respondent's management. Such a meeting took place only at about 10h00. The workers were represented by Visser and Mr Quinton Alexander whereas the respondent was represented by Mr Pollard who was later joined by another official of the respondent. At the meeting Visser informed Pollard that the workers were ready to start work. She acknowledged that it had been wrong for the workers to strike without following the requisite procedures. Pollard said the workers would be suspended without pay until the following day. In evidence the explanation given for this was that the respondent had already made alternative arrangements for the performance of the work of the workers involved.

[19] The union says at this meeting it was also agreed that a single disciplinary hearing would be held into the conduct of the affected workers and that Visser would represent all the workers. The respondent denies that a single hearing was agreed upon and says individual disciplinary inquiries were agreed to. With regard to Visser representing the workers, the respondent does not dispute that Mr Pollard agreed that Visser would represent the workers but says this was contrary to the internal procedures in the respondent and it was due to ignorance of such procedures and provisions of the Act that Pollard agreed to Visser representing the workers.

[20] In clause 11 of a document purporting to be a summary of what transpired

in that meeting, the following is recorded

"On the matter of the wage agreement it had already been agreed that the wage agreement would now be signed with the following amendments:-

(a) clause 15 would be amended to allow shop stewards access to equipment to facilitate their functions i.e fax and telephone.

(b) clause 17.1 would be amended to show a meeting concerning the bonus in September would now take place on 25th November 97 at 10:00 AM".

[21] Subsequently the respondent conducted disciplinary inquiries against the workers who did not perform their duties for the first two or three hours of their working day on the 11th November. They were charged with unauthorised absence from work for that period. They were all found guilty of that charge of misconduct. Those of the workers who already had final written warnings in their records were dismissed. Those who did not have final written warnings were not dismissed but were only given final written warnings. The individual applicants in this matter all had final written warnings and were, therefore, dismissed. It is that dismissal which is being challenged as unfair in this matter.

[22] In these proceedings the union and the respondent adopted differing approaches to the conduct of the workers in not performing their duties on the morning of the 11th November. The union regarded the conduct as a strike. In fact it and the individual applicants admitted that this was an unprocedural or unprotected strike. The respondent sought to deny throughout the trial that the conduct of the workers constituted a strike and insisted that it was not a strike but

unauthorised absence from work. It said that it had not been informed on the 11th November what the reason was for the conduct of the workers and that that is why, therefore, it did not regard the conduct of the workers as a strike. This, it said, was why it had charged the workers with unauthorised absence from work and not with participating in an unprocedural strike.

[23] The applicants challenged the fairness of the dismissal on numerous grounds. One of these was that the workers' conduct on the morning of the 11th November was a collective action and in taking disciplinary action against the workers in regard to such conduct, the respondent should not have dismissed them while others were only given final written warnings. This contention implied that such final written warnings as the individual applicants may have had in relation to individual as opposed to collective misdemeanours should not have been taken into account in deciding on what penalty should be imposed on the individual applicants for the collective action on the 11th November.

[24] The respondent contends that there is no merit in the applicants' contention. It argues that it was entitled to convene disciplinary inquiries to deal with the conduct of the workers and, in deciding on the penalty, it was perfectly entitled to take into account existing final written warnings in respect of those employees who were on final written warnings. In those circumstances, contended the respondent, it could not be said that it had applied discipline inconsistently nor that it had failed to observe the parity principle because the case of the workers who had final written warnings was different from that of those who did not have final written warnings. In other words the two cases were

not **"like cases"**.

[25] Before I proceed further with this judgement, let me hasten to say that there can be no doubt that the conduct of the workers in not working on the morning of the 11th November 1997 constituted a strike. A strike is defined in sec 213 of the Act as meaning **"the partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work whether it is voluntary or compulsory"**. (my underlining). It is clear from the definition of strike that a concerted refusal to work would constitute a strike if it was resorted to by workers for the purpose of **"remedying a grievance".** (See also **South African Security Employers' Association v TGWU & Others (2) [1998] 4 BLLR 436 (LC)** at 440E-H).

[26] The respondent cannot dispute that the workers certainly had a grievance and that that is why they did not start work on the morning of the 11th November. In so far as the respondent relies on the failure of the workers at that time to inform it of the reason for their conduct or their demands, that did not render conduct which was clearly a strike into something other than a strike. It is not an essential element of a strike that the workers must have informed their employer of the reason for their action.

THE PARITY PRINCIPLE:

[28] The applicant's argument that it is unfair for the respondent to dismiss only the individual applicants for the strike because they were already on final warnings albeit in respect of individual misconduct and not to dismiss the other workers (who also participated in the strike) simply because the latter were not on final warning raises the so-called parity principle. That is that workers who commit the same offence must be treated equally; or put differently, that like cases must be treated alike. In terms of this principle if two employees are guilty of the same misconduct and the employer imposes a more severe penalty on the one and a less severe penalty on the other, that is unfair. (See Prof Brassey in: **"The Dismissal of Strikers" (1990) 11 ILJ 213** at 229; **NUMSA & Others v Henred Freuhauf Trailers (Pty) Ltd 15 ILJ 1257 (A)** at 1264A-D)

[29] Although the parity principle appears to be a simple and straight forward principle which should be easy to apply, its application to practical situations is not always easy. Proof of this is to found in the fact that our courts have given conflicting judgements in regard to its application in the context of collective action and the progressive system of discipline. (Mainly those judgements emanated from the industrial court as well as the Labour Appeal Court as previously constituted under the Labour Relations Act, 1956 (Act N0 28 of 1956, as amended)). (See **Cholota v Trek Engineering (Pty) Ltd (1992) 13 ILJ 219(IC); National Union of Mine Workers &others v Free State Consolidated Gold Mines (Operations) Ltd (President Steyn Mine, President Brand Mine and Freddies Mine) (1993) 14 ILJ 341 (LAC);** arbitration award of **Thompson A in FAWU v SA Breweries (1990) 11 ILJ 413 (ARB); Henred**

Freuhauf Trailers (Pty) Ltd v NUMSA & others (1992) 13 ILJ 593 (LAC); Amcoal Colliery & Industrial National Operations Ltd v National Union of MineWorkers & others (1992) 13 IJL 359 (LAC); National Union of MineWorkers & others v Amcoal Collieries & Industrial Operations Ltd (1992) 13 IJL 1449 (LAC); the dissenting judgement of Mr B. Jammy as an assessor in the **Freegold** case at **(1993) 13 ILJ 341 (LAC)** at 360F-362D**; National Union of Mine Workers & and others v Deelkraal Gold Mining Co Ltd (1993) 14 IJL 1346 (IC); Deelkraal Gold Mining Co Ltd v NUM & and others (1994) 15 IJL 573 (LAC);** the judgement of the industrial court in the **Freegold** matter mentioned second above in **(1992) 13 IJL 366 (IC)).**

[30] Subsequent to the above judgements, the Appellate Division (as the present Supreme Court of Appeal was then known as) has given judgement in **National Union of Mine workers and others v Free State Consolidated Gold Mine (Operations) Ltd (1995) 16 ILJ 1371(A).** In that matter the workers had heeded a call by **COSATU** (of which their union was an affiliate) not to go to work on certain days. In disciplining the workers who had stayed away from work, the employer distinguished between workers who had a clean record, those who had warnings but were not on final warnings and those on final warnings. The first category was given a warning, the second a final warning but the third (i.e. those already on final warnings) were dismissed. The previous warnings related to individual misconduct. The Appellate Division found the dismissals unfair.

[31] A reading of the judgement of **Nestadt JA,** who wrote the unanimous judgement of the Appellate Division, does not reveal with certainty that in concluding that the dismissal was unfair, the Appellate Division settled the controversy over the application of the parity principle in factual situations such as those the conflicting judgements dealt with. However in so far as it can be argued that it did not, there can be no doubt that that principle played an important role in the decision that the dismissals were unfair.

[32] I was urged by the applicants to follow the approach which was adopted by the Supreme Court of Appeal in the **Freegold** matter referred to above. There are certain similarities between the facts in that matter and the facts in this case. In that matter certain workers did not work when they were supposed to work. That is the case in this matter as well. In that case the employer chose to charge workers with absenteeism and did not regard their conduct as collective action. In this case that is what the respondent did too.

[33] With regard to the penalty, in that case the employer distinguished between those workers who had no warnings, those with warnings but not final written warnings and those on final written warnings already. Those with no warnings at all were given warnings. Those with some warning but not final written warnings were given final written warnings. Those already on final written warnings were dismissed. In this case the respondent distinguished between those either on final written warnings or on probation and those not on final written warnings or probation. Those who were not on final written warnings or not on probation were given final written warnings and were not

dismissed. Those already on final written warnings were dismissed. The warnings relied upon by the employers in both these cases related to individual misconduct and not collective action. As in that case, in this case, too, the conduct of the workers during the collective action was peaceful.

[35] The duration of collective action in that case was two days. In this case at most the collective action lasted three hours in respect of those workers who were supposed to have started work at 07h00 and two hours in respect of those who were required to have commenced work at 08h00.

[36] When the Appellate Division dealt with the **Freegold** matter, it was called upon to decide first and foremost whether or not, as a matter of principle, the dismissal for collective action of workers already on final written warning for previous individual misconduct was unfair for its violation of the parity principle when their colleagues who participated with them in the same collective action but who were not already on final written warning for previous individual misconduct were not dismissed but were given final written warnings.

[37] When one reads the judgement of the Appellate Division it does not appear that the Learned Judges of Appeal decided the matter on the basis of the principle. Certain passages in the judgement tend to suggest that they decided the matter on principle. However, other passages give contrary signals. I will refer to a few examples in this regard.

[38] Nestadt JA said that the basis on which he had come to the firm conclusion

that the dismissal was an excessive and therefore an inappropriate response was the cumulative weight of various factors.(See **p1379C-E**). These factors included the duration as well as the peacefulness of the collective action. Those two factors would be irrelevant, in my view, if the Court decided the matter on principle. I say this because, even if the collective action was violent and had been of long duration, that would not make it fair for the employer to dismiss some of the workers involved in such violent and protracted action but not to dismiss others who had participated in exactly the same conduct. If, however, the challenge of the fairness of the dismissal was not in terms of the parity principle but in terms of some other ground, the peacefulness or otherwise of the collective action as well as its duration may well have been relevant.

[39] Furthermore the Appellate Division said dismissal was too harsh a sanction. If the matter was decided on principle, it should not have mattered, in my view, whether or not dismissal was too harsh a sanction. That is because even if dismissal would ordinarily have been an appropriate sanction, it would have become an inappropriate sanction once some workers were given a less severe penalty than others for engaging in the same unacceptable conduct.

[40] The other matter I wish to refer to which, I consider, tends to suggest that the Appellate Division did not intend to decide the matter on principle is that Nestadt JA referred to the circumstances of the collective action in that case as being exceptional. Lastly, there were numerous conflicting judgements of both the industrial court as well as the Labour Appeal Court on the applicability of the parity principle in this kind of situation which, one would have thought, the

Appellate Division would have referred to and dealt with in the course of its judgement before laying down the law for future guidance if it had intended to decide the matter on principle.

[41] There are also some areas of the judgement which tend to suggest that the Appellate Division decided the matter on principle. The one is Nestadt JA's statement that the preferable view is that of the dissenting assessor in the Labour Appeal Court. (See 1379D-E). A reading of the dissenting assessor's dissenting judgement in (1993) 14 ILJ 341 (LAC) at 360F-362D reveals that the Learned Assessor dealt with the matter on principle. He did not refer to the peacefulness and duration of the collective action as factors that influenced him. In fact at 361G-H the Learned Assessor said : **"I therefore consider the dismissal of all the individual appellants in this matter to have been unfair, not because dismissal was not an appropriate sanction in the circumstances but because no valid basis existed, for the reasons which I have stated, upon which the mines were entitled to apply such discipline on the differential basis"**. In the light of the statement by Nestadt JA that the preferable view is that of the assessor, one may be forgiven for thinking that he was referring to the principle because the assessor's judgement was based on the principle. At 1378B Nestadt JA said : **"And in the light of what has been stated in the previous paragraph, I do not consider that the individual appellants' previous offences for absenteeism were a sufficient basis for them being disciplined differently to the others"**.

[42] I have considered the matter of the application of progressive discipline

and its role in our labour law carefully in this matter. I have also considered the reality of collective action in our system of labour relations. There can be no doubt that our law already acknowledges the distinction between individual action and collective action. Rightly or wrongly our case law is pregnant with cases in which workers who sought to challenge their dismissal for collective action and sought to invoke the requirement for the holding of disciplinary enquiries before their dismissals have been told by our courts that, as they were involved in collective action, they were not entitled to such inquiries before they could be dismissed. (See **Plascon Ink & Packaging Coating (Pty) Ltd v Ngcobo & Others (1997) 18 ILJ 327 (LAC)** at 338F-339G; **Majola & Others v D & A Timber (Pty) Ltd (1997) 18 ILJ 432** at 353F-355D.

[43] In **NUMSA & Others v MacSteel (Pty) Ltd 1992 (3) SA 809 (A)** the Court held that it would be an unfair labour practice if workers collectively refused to work overtime in order to enforce their demands but that anyone of them could, as an individual, still refuse to work overtime for a personal and acceptable reason and this would not be an unfair labour practice nor would it violate the order of the industrial court against which the appeals were pursued. Argument by the workers that what an individual worker was entitled to do could not become impermissible simply because others joined in the conduct was rejected.

[44] It is not justified for an employer not to acknowledge the distinction between individual action and collective action in administering discipline to employees. An employee might not have much choice in participating in

collective action whereas in regard to individual misconduct, as a general rule, the decision is his and his alone. In the case of collective action it may well be that, if he abstained from participating in the collective action, he could lay himself open to victimisation. He may well be bound by the decision of the majority of his colleagues to go on collective action. It may well be that he is bound by the constitution of his union to participate in the collective action if such action has been called by his union. Failure by him to participate in the collective action may result in his union membership being cancelled which may well mean the loss of his job in certain situations e.g. in a closed shop arrangement.

[45] For the above and many other reasons which have been stated in some of the various judgements referred to above, I conclude that it is inappropriate for an employer to take into account warnings given for individual action when he considers an appropriate sanction in respect of collective action. Accordingly in this case the respondent acted unfairly in taking into account warnings given for individual misconduct as this ultimately resulted in workers who were guilty of exactly the same conduct being disciplined on a differential basis. In my view, the dismissals were, therefore, unfair.

[46] Unlike in the **Freegold** matter where, it appears to me, the Appellate Division reached the decision that the dismissal was unfair after including in its consideration factors other than simply the principle that like cases must be treated alike, my decision that the dismissals were unfair is, at this stage, based simply on the principle that the respondent failed to treat like cases alike.

[47] In case I am wrong that the dismissal of the individual applicants was unfair in that it offended against the parity principle, I proceed to consider whether the dismissals were unfair on any other grounds relied upon by the applicants. In this regard the fact that the strike was of very short duration and that it was peaceful must be taken into account in favour of the individual applicants. There are three other matters that need to be considered in this regard. The one is whether the respondent provoked the strike or contributed to the workers deciding to do what they did. In this regard the evidence of the individual applicants was to the effect that they were aggrieved by the respondent's failure to meet with the union to discuss the annual bonus as agreed at the conclusion of the wage negotiations. Some of the individual applicants testified that there was some dissatisfaction about the annual shut down. Others testified that the problem was the respondent's failure to sign the wage agreement that had been agreed. Indeed others said they were aggrieved by the way the respondent had treated Visser on the 5th November 1997 when she had come to the respondent's premisses to try and have a meeting with the management. There was an overlap in these reasons from witness to witness as the individual applicants testified.

[48] The respondent did not proffer any reason for the strike but was content to simply attack the evidence of the applicants on what the reason for the strike was. I am satisfied that the main reason why the workers went on strike was their dissatisfaction and, possibly, frustration, arising out of the respondent not honouring its agreement to meet with the union to explore the implementation of

the annual bonus. The respondent sought to justify its failure to meet with the union to explore the implementation of an annual bonus by saying that it was not in a position to pay an annual bonus as it had not made any profit yet and that, in telephone conversations with Visser it told her this. The respondent said, in the light of that, it saw no point in having a meeting with the union. This was not a defence to the union's complaint.

[49] Firstly the agreement was not that in September 1997 the respondent would start paying the annual bonus. If that had been the agreement and the respondent had not made any profit, I could understand if, when payment of the annual bonus was demanded, it thought the fact that it had not made profit was a defence. The agreement with the union was to meet in September and **"explore"** the implementation of an annual bonus. Accordingly the respondent should have met with the union and explained its situation in the meeting. That is what its agreement with the union contemplated. It is not good enough for the respondent to say it saw no purpose in going to a meeting only to say this. The respondent stood to lose nothing by going to the meeting but, by not going to the meeting, it created an environment which made the workers and Visser feel aggrieved and frustrated and perceived the respondent as an employer who did not honour agreements. All this might have been avoided if the respondent simply held a meeting with the union and explained its situation.

[50] The respondent also says it never refused to meet. I do not know how the respondent believes that anyone can accept this in the light of all the evidence in this case in regard to the union's various requests for meetings and the fact that

the respondent never responded by agreeing to meet. Quite clearly the respondent was not prepared to meet or it wanted to delay such a meeting so unreasonably that it amounted to refusing to meet. I find that this conduct on the respondent's part was a major, if not the sole, cause for the strike.

[51] The next issue is whether the respondent had not signed the wage agreement at the time the workers went on strike and whether that contributed in any way to the workers going on strike. The respondent's version was that as at the time of the strike it had not been provided with a typed agreement by Visser as previously agreed. For that reason, so the respondent implies, there was nothing for it to sign. Visser testified that she had previously furnished Mr Pollard with a typed copy of the wage agreement but that the respondent had not signed it. Under cross- examination Pollard was referred to the fact that clause 11 of the document which contained a summary of the points agreed at the meeting of the 11th November said the parties had agreed to amend clauses 15 and 17.1 of the wage agreement and that the **"wage agreement would now be signed"**. Pollard was asked how he could explain clause 11 if he had not been provided with a typed wage agreement before. Pollard was unable to explain this. I find in all the circumstances that the respondent had been provided with a typed agreement before the strike but that it had not signed it, hence the terms of clause 11. In this regard Visser's evidence is corroborated sufficiently by the documentary evidence. I think this also must have played a role when the workers decided to go on strike, albeit not as important a role as the respondent's failure to meet with the union to explore the implementation of an annual bonus.

[52] I accept that the union had itself not signed the wage agreement as at the

time of the strike. I accept, too, that the reason advanced by Visser for the union not having signed the wage agreement reflects badly on the union. It seems on her evidence that she had no authority to sign the agreement and that those who had the requisite authority to sign were not keen to do so because the union's official stance was not to negotiate at plant level but at industry level and for it to sign a plant agreement would have been embarrassing and would have contradicted its official policy. It is unacceptable that the union engaged in wage negotiations with the respondent in circumstances where it would be reluctant to sign the resultant agreement.

[53] With regard to the fact that the respondent reneged on the agreement that the workers could be represented by a union official, Rachel Visser, in the disciplinary inquiries, the respondent admitted that Mr Pollard had agreed to this at the meeting he had with the union on the 11th November 1997. It also admitted that it later on reneged on the agreement. The applicants contended that this also made the dismissal of the individual applicants unfair. The respondent sought to justify its decision not to honour its agreement in this regard on the basis that Mr Pollard was not familiar with the internal policy of the respondent nor was he familiar with the provisions of the Act in regard to the representation of workers in disciplinary inquiries. In effect the respondent's argument was that in terms of the internal policy and the Act there was no provision for a union official to represent employees other than shop stewards in internal disciplinary inquiries and that, had Mr Pollard been aware of this, he would not have agreed to Visser representing employees in the disciplinary inquiries.

[54] The defence raised by the respondent to justify its breach of the agreement that it (represented by its manager Mr Pollard) entered into with the union is untenable and bad in law. Firstly, if Mr Pollard was not aware of the internal policies of the respondent on representation of employees in disciplinary inquiries or if he was not familiar with such provisions of the Act as might have been thought relevant, he should have first sought advice before committing the respondent to any agreement with the union. Secondly, the issue is not whether or not the internal policy of the respondent or the Act contains provisions for a union official to represent union members in disciplinary inquiries. The issue is whether there is anything in the Act and in such internal policies that precludes the parties concluding such an agreement.

[55] Contrary to what Mr Cedras, the personnel officer of the respondent, seems to have believed, there is nothing both in the respondent's internal policy on representation of employees in disciplinary inquiries as well as in the Act which says an employer and a trade union may not enter into an agreement such as the one that Mr Pollard concluded with the union on representation of workers by Visser in disciplinary inquiries. Accordingly the respondent was not justified in reneging on that agreement and it should have allowed Visser to represent the workers at the disciplinary inquiries. Its failure to do so rendered the dismissals procedurally unfair. Subject to what I will say below I have therefore come to the conclusion that on this ground, too, the dismissal of the individual applicants by the respondent in November 1997 was unfair. Mr Quinton Alexander's dismissal would not be rendered unfair by the respondent's reneging on this agreement because in his case the respondent agreed to Visser representing him as he was a

shop steward. However, his dismissal remains unfair by reason of the respondent's violation of the parity principle as already indicated above.

[56] In so far as it may be argued that the terms of the judgement of **Nestadt JA** did not make it clear that the Appellate Division decided the **Freegold** matter on principle, I have considered the possible argument that the Labour Appeal Court judgements in **Amcoal Colliery &Industrial Operations Ltd v NUM (1992) 13 ILJ 359 (LAC), NUM & others v Amcoal Collieries & Industrial Operations (Ltd)(1992) 13 IJL 1449 (LAC) and in Freegold (1993) 14 IJL 341 (LAC)** are binding on me and that, for that reason, I should follow them.

[57] I am of the opinion that those judgements are not binding because they are judgements of the old Labour Appeal Court in which a single judge sat with assessors. Those judgements are like judgements of another division. The old Labour Appeal Court, unlike the present one which is at the level of the Supreme Court of Appeal in respect of labour matters, was at the same level as the present Labour Court. Furthermore, I consider that the Appellate Division made a strong enough indication, in the **Freegold** matter, at least, that the unfairness of the dismissals in that case was due largely to the fact that they offended against the parity principle. In those circumstances I conclude that the decision I take in this matter is one which I am at liberty to take. At any rate this case is very similar to the **Freegold** one. I am satisfied that, were a higher court to deal with a matter such as this one, it would adopt the approach I have adopted.

[58] In so far as there may be some individual applicants who in their evidence

testified that they did not consider their dismissals to have been unfair, I exclude them from the finding that the dismissals of the individual applicants were unfair. It seems to me that the applicants who took the attitude that they did not regard their dismissals as unfair cannot be said to have a dispute with the respondent about the fairness or otherwise of their dismissals. In fact they agree with the respondent that their dismissals were fair. In those circumstances such applicants have no dispute with the respondent which this Court must adjudicate.

Relief

[59] With regard to relief, some of the individual applicants seek reinstatement with limited back pay while others do not seek reinstatement but only seek compensation. I will deal with each group separately hereunder.

Reinstatement

[60] The individual applicants who continue to seek reinstatement are:-

1. Q. Alexander, the second applicant;
2. J. Japhtha, the fourth applicant;
3. E. Jonkers, fifth applicant
4. C. Damon, sixth applicant.

[61] Sec 193(1)(a) of the Act makes reinstatement the primary remedy in the case of an unfair dismissal unless certain grounds exist to justify that reinstatement should not be granted in a particular case. It seems to me that the respondent has not advanced any valid reason why reinstatement should not be granted to those individual applicants who wish to be reinstated. Indeed, some of their colleagues who were guilty of the same conduct were never dismissed and were allowed by the respondent to continue working for it. Accordingly I consider it appropriate to order the reinstatement of these individual applicants.

[62] The next question that arises is from when the reinstatement order must run. Mr Steenkamp, who appeared for the applicants, submitted that it would be appropriate that such reinstatement order should run from the 1st June 1998. This, he said, would in effect impose a suspension without pay of six months on these individual applicants for engaging in an unprocedural strike. I intend giving effect to this suggestion because it is proposed by the applicants' attorney but I am not sure that it is not itself a further selective penalty which is yet again being visited upon workers who have already been subjected to an earlier act of selective discipline. I say this because those workers who were guilty of the same conduct but who were not dismissed were never made to forfeit any salary or were never subjected to any form of suspension without pay. To now impose some form of suspension without pay on these workers may well be a case of double punishment. I nevertheless will give effect to the applicants' wish in this regard.

Compensation

[63] Three of the applicants do not wish to be reinstated but seek compensation. They are :-

5. C. Cornelissen, the third applicant;
6. N. Balie, the seventh applicant, and
7. G. Groepies, the eighth applicant.

[64] I have found the dismissals to be both substantively and procedurally unfair - substantively unfair because like cases were not treated alike - procedurally unfair because the employees were not allowed to be represented by a union official in circumstances where the respondent had agreed that they could be represented by a union official, namely, Miss Rachel Visser. I have been asked to award them compensation equal to 12 months' remuneration. The applicants say an award of compensation amounting to twelve months' remuneration takes into account that there was a delay of about four months in the processing of this dismissal dispute for which they accept responsibility. These particular applicants were paid at a rate of R275,00 per week, R308,00 per week and R310,00 per week respectively. If their compensation is to be equivalent to 12 months' remuneration, they would get R14190,00, R15892,80 and R15996,00

respectively in compensation.

[65] In so far as the unfairness of the dismissal of the individual applicants in this case was based on the fact that they were treated unfairly differentially in relation to their colleagues who only got away with final written warnings for the same misconduct, this is a dismissal which is unfair because the employer has failed to prove that the reason for dismissal was a fair reason related to the employees' conduct. That brings this case under sec 194(2) of the Act. Sec 194(2) of the Act says compensation must in such a case be just and equitable but not less than the compensation that such employee would have obtained under sec 194(1) of the Act if his/her dismissal had been found to be unfair only because the employer did not follow a fair procedure. Sec 194(2) also says compensation in such a case must not exceed the equivalent of 12 months' remuneration.

[66] Subject to such reduction on the amount of compensation as would have to be effected under sec 194(1) of the Act owing to the delay in processing the dispute, if the unfairness was due only to the employer's failure to follow a fair procedure, the applicants would have got compensation from the date of dismissal to the last date of the hearing. In **Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC)** at 1220E-G the Labour Appeal Court held that the last day of hearing as contemplated in sec 194(1) is the last day of the hearing when the parties appeared in court and not the day when judgement is handed down. In deciding this the LAC failed to deal with the reasons given in the judgement of the Labour Court on why the last day of hearing should be accepted as the day when judgement is handed down. The reason the LAC gave for its decision in this regard was that it would amount to penalising the employer for the judge's delay in handing down his judgement. In my view that would not amount to penalising the employer.

[67] A delay (in the finalisation of a matter) which is caused by the fact that the judge has reserved judgement is not, in my view, any different from a delay caused by the unavailability of, for example, a court room or a Judge. If there is no court room available, a matter which is otherwise ready to be tried cannot be tried. This may cause postponements. Also a matter

which is ripe for trial may have to wait for a long time to reach trial if there are many other cases before it which have to be tried whereas, if there are only a few cases in that court, such a case may reach trial much sooner. In the case of a Judge who has reserved a judgement for a long time, such delay may have nothing to do with fault on his part for example where such delay is due to long illness.

[68] All delays such as those mentioned above are part of the ordinary litigation process and they form part of the risks which are inherent in any litigation system. All those who get involved in litigation take the risk that such delays may occur in their cases. In the light of this I do not see how it can be said that to interpret the words **"the last day of hearing"** so as to mean the day when judgement is handed down amounts to penalising the employer. The LAC may well have to reconsider the correctness of its decision in this regard. However, as for now I must follow that decision. In this case the last day of the hearing was, therefore, the 29th April 1999. Under sec 194(1) that would mean compensation equal to 17 months' remuneration.

[69] If, from 17 months, a period of four months was deducted for the delay which was caused by the applicants, that leaves 13 months. Compensation under sec 194(2) is required not to exceed 12 months compensation. The respondent has not argued that, if compensation is to be granted, there is any particular reason why it should be less that 12 months remuneration. In those circumstances it seems appropriate, just and equitable to award compensation in an amount equal to 12 months remuneration.

[70] In the premises the order I make is the following :-

8. Subject to 2 below, the dismissal of the individual applicants by the respondent in November 1997 was unfair both substantively and procedurally.
9. The order in 1 above does not apply to any individual applicant whose evidence may have been to the effect that he/she did not regard his/her dismissal as unfair or words to that effect.

10. The respondent is ordered to reinstate those of the individual applicants who still seek reinstatement (and who are not excluded from the operation of par 1 above by virtue of par 2 above) in its employment on terms and conditions no less favourable to them than those which governed their employment immediately before their dismissal.
11. Subject to the order in par 7 below, the order in 3 above is to operate with retrospective effect from 1 June 1998.
12. The individual applicants referred to in 3 above shall be paid compensation which is equivalent to the remuneration they would have earned for a period of 13 months calculated at their respective rates of pay applicable immediately before their dismissals.
13. The respondent is ordered to pay to each one of those individual applicants who no longer seek reinstatement but only seek compensation an amount which is the equivalent of each such applicant's 12 months' remuneration calculated at the rate of pay which was applicable to such individual applicant at the time of his/her dismissal.
14. The amount of compensation due to each applicant who is not excluded from the order in 1 above by virtue of the order in 2 above (including those individual applicants who seek compensation only) is limited to the amount appearing against such individual applicant's name in annexure **"A"** to this judgement.
15. There is to be no order as to costs.

R. M. M. ZONDO

Judge of the Labour Court of SA

Date of Trial	:	08 -12 March and 26-29 April 1999
Date of Judgement	:	20 July 1999
For the Applicants	:	Mr A. Steenkamp
Instructed by	:	Cheadle Thompson & Haysom
For the Respondent	:	Mr Krige
Instructed by	:	K. G. Druker & Associates

Annexure "A"

Second Applicant	= R16 800	[R350 per week times 48 weeks]
Fourth Applicant	= R14 850	[R310 per week times 48 weeks]
Fifth Applicant	= R14 850	[R310 per week times 48 weeks]
Sixth Applicant	= R14 784	[R308 per week times 48 weeks]

The amounts for the three applicants seeking only compensation amounts to:

Third Applicant	= R14 190	[R275 per week times 12 months]
Seventh Applicant	= R15 892.80	[R308 per week times 12 months]
Eighth Applicant	= R15 996	[R310 per week times 12 months]