REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No. **JS220/02**

In the matter between :

COMMUNICATION WORKERS'UNION 1st Applicant

NKGAPELE, KJ & 42 OTHERS 2nd – 44th Applicants

And

SOUTH AFRICAN POST OFFICE LIMITED Respondent

JUDGMENT

PATTERSON AJ

Introduction

1. The dispute between the parties relates to the dismissal of the individual Applicants on 19 September 2001.

2. It is common cause between the parties that at the time that the individual Applicants were dismissed, they were engaged in an unprotected strike and that the requirements of Section 64 of the Labour Relations Act 66 of 1995 and the obligation contained in the Recognition Agreement were not followed.

3. The Applicants seek an order declaring that the dismissal of the individual Applicants by the Respondent on 19 September 2001 is unfair and that the individual Respondents be reinstated with effect from their date of dismissal without loss of earning or benefits, alternatively that they receive just and equitable compensation. In addition the Applicants seek costs. The Respondent denies that the Applicants are entitled to any relief arising out of the dismissal of the individual Respondents on 19 September 2001.

4. The Applicant's Counsel, Mr van der Riet, SC, submitted that the dismissal of the individual Applicants on 19 September 2004 was both substantively and procedurally unfair in that :

1 the Respondent contravened clause 9.3 of the Recognition Agreement by dismissing workers before the expiry of 24 hours after the commencement of the strike;

2 the Respondent failed to contact a Trade Union official at the earliest opportunity to discuss the course of action it intended to adopt and having contacted the Union, failed to allow the Union office bearer sufficient time to intervene. Moreover, the Respondent is alleged to have failed to allow the dismissed

individual Applicants sufficient time to reflect on ultimata issued by the Respondent and to return to work;

3 the conduct of the individual Applicants was not sufficiently serious to warrant dismissal;

4 the Respondent failed to conduct hearings prior to dismissing the individual Applicants.

5. The dispute has been the subject of lengthy and protracted proceedings between the parties. The trial took some 12 (twelve) days between the period 17 February 2003 and 1 August 2003. The schedule of information relating to the individual Applicants' subsequent employment was only delivered to the Court several months after argument.

6. Notwithstanding the fact that several witnesses were called both by the Applicant and the Respondent and certain issues placed in dispute, a significant number of material issues relating to the matter are not really in dispute.

Material Facts

7. On 14 June 1996, the Respondent and the 1st Applicant entered into a Recognition and Procedural Agreement ("the Recognition Agreement"). The parties agreed in the pre-trial minute (Exhibit "A") that the individual Applicants were members of the 1st Applicant and that the parties Recognition Agreement regulated industrial action.

8. Clause 9 of the Recognition Agreement provides as follows :

"*9.0* ***PEACE OBLIGATION***

9.1 Management and the Union-Association reaffirm their belief in consultation and negotiation as being the preferred method of conducting labour relations.

9.2 Accordingly, the company and the Association/Union undertakes not to organise, encourage, initiate or in any way support any form of industrial action before all procedures under this Agreement have been fully exhausted.

9.3 In the event of industrial action in contravention of this Agreement, the company undertakes not to take disciplinary action against any Association/Union member who participates in such industrial action, for a period of 24 hours from the commencement of such industrial action.

9.4 In the event of Industrial Action not in contravention of this Agreement, the company undertakes not to take disciplinary action against any Association/Union member who participates in such industrial action, for a period of 72 hours from commencement of such industrial action.

9.5 Management undertakes to make available an official telephone to the shop steward (only) for the purposes of informing the Association/Union in the case of such industrial action as soon as possible after occurrence. Equally management undertakes to inform the regional office of the Association/Union within 24 hours (in clause 9.3) of any such industrial action if no official shop steward has been appointed for that workplace, on condition that the name and reference number of the person to be contacted is made available to management in terms of clause 6.2.2."

9. On 18 September 2001 a shop steward of the 1st Applicant, Ms Lerato Lemeke was issued with a letter of suspension. In addition, Mr Sam Sishange, another shop steward at the Johannesburg International Mailing Centre ("JIMC"), located at the Johannesburg International Airport at Kempton Park, was suspended pending a disciplinary hearing. It is common cause that the strike was at least partly in response to the suspension of Lemeke.

10. Mr Neshunzhi, the Respondent's Senior Manager at the JIMC gave evidence that after Ms Lemeke was

given her suspension letter, she was escorted to her locker to remove her belongings and thereafter escorted out of the premises. The remaining members of the shop steward's committee at the JIMC approached Mr Neshunzhi in his office and asked him to address the work force in the canteen.

11. A dispute exists between the parties as to the exact time that the individual Applicants and other striking employees at that time stopped working and proceeded to the canteen. It was suggested by Mr Neshunzhi in evidence that the individual Respondents and other striking employees commenced their work stoppage "*between 11h30 and 12h00, something to 12*". On another occasion Mr Neshunzhi indicated that he only arrived at the canteen after 12h00. A number of individuals were proceeding on their meal break at 12h00. It would appear, on a balance of probabilities, that the industrial action commenced after 12h00 and, insofar as certain individuals were engaged in a lawful meal break, possibly as late as 13h00. Whilst Mr Green, a Process Provider of the Respondent at the JIMC, suggested that it could have been much earlier than 12h00, he subsequently admitted that he was "confused" relating to the times.

12. Mr Neshunzhi gave evidence that at approximately 15h00 on 18 September 2004, having discussed the matter with head office, he issued an instruction to the striking employees in the canteen to resume their duties. The Respondent did not approach the Union on 18 September 2001.

13. Mr Nkesi, the General Manager, Employee Relations at that time, gave evidence that he had been told on 18 September 2001 that the strikers were seeking to have Mr Neshunzhi removed. Although Mr P Baloyi and Mr Neshunzhi deny this, it is clear from the evidence that there was considerable animosity and poor working relationships between Mr Neshunzhi and some of the striking employees. It accordingly appears probable on the evidence that such unhappiness contributed to the unlawful industrial action engaged in by the individual Applicants and that the individual Applicants sought the removal of certain members of management, including Mr Neshunzhi.

14. On 19 September 2001 a number of the individual Applicants did not report to their work stations. Initially it appeared that 4 or 5 employees persisted with the industrial action and that this later increased to approximately 50 employees, which included the individual Applicants herein.

15. Mr Neshunzhi testified that he contacted Mr Mervyn, the full time shop steward of the 1st Applicant, and informed him about the situation at the JIMC. Mr Mervyn denies that Mr Neshunzhi informed him of the nature of the strike action, but merely asked him what the fax number of the Regional Office was and did not provide any details relating to what was happening at the JIMC.

16. Mr Neshunzhi further testified that after he spoke to Mr Mervyn he spoke to the Regional Secretary of the Union, Mr Mphaphele. This was denied by Mr Mphaphele who testified that he only learnt about the industrial action taking place at the JIMC later that morning when his own Office Administrator contacted him.

17. Mr Neshunzhi testified at approximately 08h40 or 08h50 on 19 September 2001 that he sent a fax to the Union Regional Office. At approximately 09h00 Mr Neshunzhi testified that a brief was forwarded to striking employees requesting striking employees to return to work and advising the striking employees that the industrial action engaged in by them was unprotected.

18. Mr Neshunzhi testified that the workers response to the Notice that they return to work (Exhibit "B" – Page 65) was that they were no longer prepared to discuss this and that they were waiting for "*reinforcements from their leadership*". Mr Pat Baloyi gave similar evidence.

19. Mr Neshunzhi testified that Mr Pat Baloyi arrived at approximately 09h30 and that the Union office bearers not employed at the JIMC arrived after the first ultimatum was issued (Exhibit "B" – Page 66) at approximately 10h25.

20. Thereafter a final ultimatum was issued (Exhibit "B":- Page 68) at approximately 10h55. The ultimata requested that the individual Applicants' representative meet with management to explain why the company should not terminate their services.

21. Mr P Baloyi gave evidence that whilst he was busy handing out the ultimata to the workers, Mr Mphaphele approached him and said that the workers should not talk to Mr Baloyi. Mr Mphaphele added that he and the shop stewards were busy caucusing and were still busy finalising their position in response to the Respondent's demands.

22. Mr Baloyi reiterated that the workers should return to work. Mr Baloyi was asked what it would mean if the workers now return to work? He explained that he had no authority to give any guarantees that they would not be disciplined. He then phoned his superior at Head Office and was told that no guarantees could be given to the Union representatives if the workers returned at that stage, they would not be disciplined. Mr Baloyi advised the Union representative of this.

23. Mr Baloyi then left the Training Room and returned to the office of Mr Neshunzhi. When he reached Mr Neshunzhi's office, Mr Neshunzhi received a call on his cellphone from Mr Mervyn, the full time shop steward. Mr Mervyn informed Mr Baloyi that he wanted to come to the JIMC but did not have transport available. Mr Baloyi advised Mr Mervyn that the final ultimatum would expire in the next 5 minutes and that it would be a futile exercise to come as the employees would be dismissed if they did not return to work prior to the expiry of the ultimatum.

24. Mr Baloyi gave evidence that he went back to the Training Room and advised the Union representatives that once the ultimatum had expired he intended to hand out a dismissal letter. Mr Mphaphele advised Mr Baloyi that they were still talking and requested more time.

25. Mr Neshunzhi testified that when Mr Baloyi returned at approximately 11h35, the letters of dismissal

were handed out. Mr Neshunzhi said that the decision to dismiss was taken by his superior at Head Office, Mr Bernard Magabe. At that time Mr Neshunzhi was reporting the situation to Head Office and was instructed by Mr Magabe to issue the letters of dismissal.

26. Mr Nkese testified that Mr Magabe took the decision in consultation with the Chief Operating Officer of the Respondent, Mr Peter Masemola. Mr Neshunzhi conceded, under cross-examination, that the dismissal may have been avoided if "*more time was given to the Union Officials*". Mr Green also conceded this under cross-examination.

27. After the dismissal had been distributed, Mr Mphahele came to the Training Room and asked Mr Baloyi if anything could be done about the situation. Mr Baloyi admitted, under cross-examination, that Mr Mphahele asked him whether the letters of dismissal could be withdrawn.

28. It is common cause between the parties that an Appeal hearing was held thereafter by Mr Peter Masamole, the Chief Operating Officer of the Respondent, who, in conjunction with Mr Bernard Magape took the decision that the strikers should be dismissed at 11h35 on 19 September 2001. Mr Peter Masamole confirmed his previous position.

Clause 9.3 of the Recognition Agreement

29. Clause 9.3 appears in an agreement entitled "Recognition and Procedural Agreement" concluded between the Communication Workers Union and the Respondent in June 1996 at a time when the Labour Relations Act 28 of 1956 applied and prior to the commencement of the new LRA.

30. Mr P Kennedy SC argued forcefully, on behalf of the Respondent, that a collective agreement such as a Recognition Agreement is a contract which is subject to interpretation in accordance with the ordinary principles of interpretation of agreements. He emphasised that a sensible approach must be followed,

and referred the Court to the decision of Kriegler J (as he then was) in the *court a quo* in Total South Africa (Pty) Limited v Bekker N.O 1990 (3) SA 159 (T) at 170 G – I where the Court said:

"*The interpretation of a written document is not an exercise in the arcane. It is a logical process in which the interpreter seeks to ascertain the intention of the draftsman as embodied in the instrument. The mutual intention of the parties to a bilateral contract is, of course, an abstraction. The primary method to find out what that abstraction was is to ask what do the parties say? That does not mean picking away at words like a guinea fowl down a row of maize seeds. One looks at the language used with common sense and perspective.*"

31. Mr Kennedy argued that in its proper context, the clause is part of a Recognition Agreement that has its objective in establishing, maintaining and regulating the Collective Relationship between the parties.

32. Clause 9 deals specifically with "peace obligation" and it is in that context that clause 9.3 must be understood. It was further argued by Mr Kennedy that the obligations in clause 9 are reciprocal between the Respondent and the 1st Applicant and it was accordingly submitted that having regard to its proper context, clause 9.3 is to be construed as no more than an undertaking not to commence with disciplinary action before the expiry of the 24 hour period, with a view to allowing the reasonable period of 24 hours for contact to be made with the Union, which can then send representatives to try to defuse and resolve the situation. It did not, in Mr Kennedy's submission, constitute an abandonment or waiver of the rights of the employer in appropriate circumstances to take disciplinary action after the 24 hour period nor did it, Mr Kennedy argued, give "*carte blanche to the Union and its members to engage in unprotected strike action with impunity."*

33. In the alternative, Mr Kenney argued that exact and strict compliance with any particular clause is not necessary and substantial compliance would suffice. It was accordingly argued by Mr Kennedy that insofar as the strikers were dismissed at approximately 11h35, depending upon the factual

circumstances accepted by the Court a period of 30 minutes to 1½ hours at most were left to run in the 24 hour period and that there had been "sufficient compliance".

34. There is no doubt that a Collective Agreement entered into in terms of the Labour Relations Act 28 of 1956 (as amended) remains enforceable in terms of the LRA. Moreover, unlike the provisions of the previous LRA, the LRA provides for the primacy of Collective Agreements in a voluntarist collective bargaining process. The very fabric and structure of the LRA is such that it is reliant upon the Courts upholding the provisions of Collective Agreements. Indeed the provisions of Section 24 provides for a speedy and effective interpretation and application of collective agreements through the Commission for Conciliation, Mediation and Arbitration ("CCMA").

35. It is correct that the peace obligation contained in clause 9 of the Recognition Agreement must be interpreted in the context and cannot be viewed in isolation. A broad conspectus of the clause must accordingly be taken.

36. Clause 9.3 of the peace obligation, properly interpreted, constitutes an undertaking by the company "not to take disciplinary action" in the event of industrial action in contravention of the Recognition Agreement against Union members "*for a period of 24 hours from commencement of such industrial action*". Whilst it is not necessary for this Court to determine whether the words "*not to take disciplinary action*" simply constitute a bar against the Respondent from initiating disciplinary action for a period of 24 hours and accordingly not a waiver of rights to initiate disciplinary action thereafter, it is clear that any disciplinary action taken that results in the penalty of dismissal being imposed within a period of 24 hours is not only impermissible but contrary to the provisions of clause 9.3. If it is not possible to issue a final warning within a period of 24 hours in respect of employees engaged in industrial action, then, a *fortiori,* it would not be possible to take and conclude collective disciplinary action which results in the dismissal of such employees who are members of the Union within a period

of 24 hours.

37. The purpose of clause 9.3 and 9.4 is to ensure that in the event of unprotected and protected strike action there is a period of 24 hours and 72 hours respectively prior to any disciplinary action being taken in respect of such matter which may further exacerbate and compound the ability of the parties to restore industrial peace at the workplace. The effect is negated if the clause is not given meaningful effect to.

38. Insofar as the Respondent has agreed to such a provision in the Recognition Agreement (for whatever reason), and the Union and its members are entitled to rely upon such provision and have the comfort that they will not face disciplinary action, including but not limited to dismissal, within 24 hours of the commencement of the industrial action, it is important that the Collective Agreement be adhered to strictly if the terms of clause 9.3 are to achieve any purpose.

39. Whilst it may be possible to argue for substantial compliance were the issue to be that of a few seconds or perhaps even minutes, a period of ½ hour to 1½ hours with a period of 24 hours cannot be accepted as substantial compliance. Insofar as it was suggested by Mr Kennedy that the obligations contained in clause 9 of the peace obligation are of a reciprocal nature, and, as I understand the argument, that the Respondent is accordingly relieved from its obligations insofar as the Applicant has engaged in unprotected strike action, this would of course defeat the very purpose of clause 9.3, which is specifically intended to apply in the case of unprotected strike action. Such an argument cannot be accepted.

40. I accordingly find that the Respondent is in breach of its obligations in terms of the provisions of clause 9.3 of the Recognition Agreement.

Respondent's Contact with the Trade Union

41. Item 6(2) of Schedule 8 of the LRA provides :

"*Prior to dismissal the employer should, at the earliest opportunity, contact a Trade Union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and to respond to it, either by complying with it or rejecting it. If the employee cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them.*"

42. In relation to the requirements of Item 6 of Schedule 8, clause 9.5 of the Recognition Agreement provides that management must make available a telephone to the shop stewards (for the purpose of informing the Union in case of such industrial action as soon as possible after occurrence). Management of the Respondent in addition undertakes to inform the Regional Officer of the Union within 24 hours (in clause 9.3) of any industrial action. It is common cause that the Respondent's management contacted the Union officials during the course of 19 September 2001. Whilst it would obviously have been desirable that the Respondent contacted the Union official, Mr Mphaphele during the course of 18 September 2001, the Respondent has complied with its obligations in terms of the Collective Agreement. It is a pity that the shop stewards, having been provided with a telephone by the Respondent for the purpose of contacting the Union, did not contact the Union and seek their involvement on 18 September 2001. They clearly should have in such circumstances.

43. I accordingly find that the Respondent complied with its obligations in respect of the contacting of the Union.

44. Insofar as the issuing of the ultimata are concerned, the conduct of the Respondent was mechanistic. It

is clear that the decision to dismiss was not taken by Mr Neshunzhi but by that of Mr Magabe together with Mr Masemola. The dissemination of the ultimata between the period of 10h25 to 11h35 in such a mechanistic manner prior to the Union having a proper opportunity to address the matter is insufficient and must by necessity lead to a denial of the application of *audi alteram partem* and the ability of the Union, had it chosen to do so (to which I will also refer later) to make a meaningful contribution.

45. Whilst every matter will have to be determined upon its own circumstances and it is impossible to be prescriptive in respect of the required period between issuing ultimata a rigid and mechanistic approach will not suffice. What is required is for the employees to be advised in writing that their conduct is unprotected and the Union to be given a proper opportunity in all the circumstances to meaningfully address their members for the purposes of persuading them to return to work and to address management on the reasons, if any, why their members should not have their contracts of employment terminated in accordance with Modise v Steve's Spar Blackheath (2000) 21 ILJ 519 (LAC) and Karras v SASTAWU (2001) 22 ILJ 2612 (LAC) and Ximwa v Volkswagen SA (2003) 24 ILJ 1077.

46. Whilst a full hearing may not be required a proper opportunity for the Union to bring its influence to bear and to make representations most certainly is. It was accepted by both Mr Neshunzhi and Mr Green that the dismissals could have been avoided if the Union was given more time. It is clear that the Respondent had taken the view, as it is entitled to do, that a firm approach in respect of unprotected industrial action should be adopted. This does not, however, entitle the Respondent to breach the provisions of clause 9.3 of the Recognition Agreement and adopted a mechanistic truncated approach to ultimata which significantly contributed to the risk of dismissal rather than the resolution of the matter. The fact that the shop stewards and the Union also did not act as expeditiously as they should in achieving a solution to the matter does not derogate from the company's responsibility to create a climate which permitted a resolution to the unprotected strike action without the need for recourse to

dismissal in the event that the shop stewards and the Union wish to avail themselves of such opportunity.

The Seriousness of the Applicant's Conduct

47. It was submitted by Mr van der Riet SC that the conduct of the individual Applicants in engaging in unprotected strike action was not sufficiently serious to warrant dismissal.

48. As I understand the argument, Mr van der Riet SC suggested that Mr Neshunzhi had adopted a "*militaristic*" approach and together with the suspension of Lemke, this had significantly contributed to the individual Applicants engaging in unprotected strike action. It is not necessary for reasons which will appear later in this judgment for this Court to determine whether in the absence of a breach of clause 9.3 of the Collective Agreement, the conduct of the 2nd Respondents would be sufficient to warrant dismissal. The individual Applicants were members of a registered Trade Union and were employed by a company which has a well established grievance procure. There can accordingly be no justification for the individual Applicants engaging in unprotected strike action in such circumstances. In addition, the Union was under an obligation to act expeditiously and comply with its obligations in terms of the peace obligation and to take reasonable and necessary steps to persuade their members to desist from such unlawful and unprotected strike action. This Court cannot condone unlawful and unprotected strike action and accordingly it is not accepted that in the absence of a breach by the Respondent of the provisions of clause 9.3 of the Recognition Agreement that this Court could not conclude that the conduct of the individual Applicants was sufficiently serious to warrant dismissal. Insofar, however, as it is held that there has been a breach of clause 9.3 of the Recognition Agreement, it is not necessary for the purposes of judgment to decide such matter.

The Failure to Hold Hearings prior to Dismissal

49. Mr van der Riet argued that there is a right for an employee to have a hearing prior to dismissal. Whilst it may not be necessary in each and every circumstances to hold a hearing, it is clear that an employee will ordinarily be entitled to be heard and to submit representations either on his own behalf or through his or her Union prior to the employer deciding to dismiss. The right to be heard in this case was largely negated by the Respondent due to the mechanistic truncated process adopted by the Respondent.

The Fairness of the Dismissals

50. It was submitted by Mr Kennedy that the dismissal of the individual Respondents was both substantively and procedurally fair. He argued that the strike was unprotected and was accordingly in breach of the provisions of the LRA as well as the Recognition Agreement. He argued that the strike was characterised by a lack of co-operation by the shop stewards and Union representatives and that the demand made by the strikers for the removal of Mr Neshunzhi and other senior members of management was entirely unacceptable. There is, on the evidence presented at this trial, substance in such allegations.

51. In addition, it was argued that the strike had a disruptive effect on the operations of the JIMC and international mail. It was argued that this was particularly so shortly after the events in the United States on September 11 2001. Accordingly, it was so argued that the dismissals were substantively fair.

52. Mr van der Riet conceded, in my view correctly, that the failure to comply with clause 9.3 of the Recognition Agreement does not *per se* render the dismissals substantively unfair, but is a very important factor in assessing the substantive fairness or otherwise of the dismissal.

53. Section 188(1) of the LRA requires the employer to prove that the reason for the dismissal is a fair reason and affected in accordance with fair procedure. Whilst the Respondent's failure to comply with clause 9.3 of the Recognition Agreement may not be determinative of the matter, it is nevertheless the

case that the Respondent initiated ultimata and effected a dismissal at a time that disciplinary action should not have been initiated let alone given effect to. It is hard to conceive of a more fundamental breach of the Respondent's obligations during industrial action than breach of clause 9.3 of the Recognition Agreement. The Respondent's failure to comply with clause 9.3 of the Recognition Agreement coupled with its denial of *audi alteram partem* having regard to the other factors mentioned earlier in respect of such matter, renders the dismissal both substantively and procedurally unfair. The individual Applicants were entitled not to be dismissed or have any other disciplinary action taken against them prior to the expiry of the 24 hours period, and the failure by this Court to give effect to the collective agreement cannot be countenance in these circumstances.

54. I accordingly find the dismissal of the individual Applicants to be substantively and procedurally unfair in all the circumstances.

Relief

55. Section 193(2) of the LRA provides as follows :

"(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless -

(a) the *employee* does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or

(d) the *dismissal* is unfair only because the employer did not follow a fair procedure.

56. The Respondent did not establish any of the grounds specified in Section 193(2). Insofar as the dismissal is not only procedurally unfair but substantively unfair in all the circumstances, reinstatement is the appropriate remedy.

57. In terms of the provisions of Section 193(1), the Court is entitled to reinstate the employee from any date not earlier than the date of dismissal or to pay compensation to the employees. The Court is entitled to take into account the full circumstances relating to the matter insofar as determining the retrospectivity of such reinstatement order and/or compensation in relation to the matter. I have taken into account *inter alia* the following factors in respect of this matter :

1 the strike engaged in by the individual Applicants was unprotected, in breach of the LRA as well as the Recognition Agreement and illegitimate;

2 the demand made by the individual Applicants for the removal of Mr Neshunzhi and other members of management was entirely unacceptable and cannot be condoned;

3 the failure of the individual Applicants, the shop stewards and their Union to return to normal work when called upon by management to do so was unacceptable and cannot be condoned.

58. Insofar as I have a discretion to exercise in terms of the provisions of Section 193(1) read with Section 194, I determine that the individual Applicants reinstatement should, having regard to all the circumstances, be limited for a period of 3 months retrospective to the date of such individual Applicant reporting for duty or, in the event that such individual Applicant fails to report for duty, limited to compensation for a period of 3 months calculated at the individual Applicants' remuneration at the date of dismissal.

Costs

59. Both the Applicant and the Respondent have requested costs in this matter. Section 162(1) of the LRA provides :

"(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness."

60. Obviously the requirements of the law dictated that costs follows results and the Applicant in such circumstances would therefore be entitled to costs. I also have to consider the requirements of fairness. In National Union of Mine Workers v East Rand Gold and Uranium Company Limited (1991) 12 ILJ 1221 9A), Goldstone, J held that "*Where the relationship between the litigants was ongoing and the issues raised in litigation were of fundamental importance not only to the parties but to the wider industrial relations community, no costs should be awarded in the Labour Court of appeal or either of the Courts below*"

61. Clearly there remains a working relationship between the 1st Applicant and the Respondent.

62. In addition, neither the conduct of the 1st Respondent nor that of the Applicant has been in accord with the requirements of the LRA. Accordingly, I am of the view that fairness requires that no order for costs be granted to either party in respect of this matter and I exercise my discretion not to grant such an order for costs in favour of either party in such circumstances.

63. In the premises I make the following order :

1 declaring that the dismissal of the individual Applicants on 19 September 2001 by the Respondent is both substantively and procedurally unfair;

2 ordering that the Respondent reinstate the individual Applicants upon the same terms and conditions of

employment that prevailed at the time of such individual Applicant's dismissal together with any increases in remuneration and improvement of benefits associated with such position subsequent thereto and subject to any of the individual Applicants who wish to avail themselves of such reinstatement, reporting personally at the Respondent's JIMC premises (or any other location nominated by the Respondent in the Gauteng Province and in respect of which the 1st Applicant has been advised by the Respondent in writing) within 30 days of the handing down of judgment in this matter;

3 ordering that subject to compliance with 2 above, that the reinstatement of any of the Applicants operate retrospectively for a period of 3 months from the date that such Applicant tenders his or her services in terms of 2 above to the Respondent, *alternatively*,

4 in the event that any of the individual Applicants do not tender his or her services to the Respondent in terms of 2 and 3, that such individual Applicant receives compensation equivalent to 3 months remuneration calculated in accordance with the remuneration received by the Applicant at the date of his or her dismissal;

5 that there be no order as to costs.

SIGNED AND DATED AT BRAAMFONTEIN ON THIS 18TH DAY OF AUGUST 2004.

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BG PATTERSON

ACTING JUDGE OF THE LABOUR COURT

17 February 2003

18 February 2003

19 February 2003

20 February 2003

21 February 2003

14 April 2003

15 April 2003

16 April 2003

28 July 2003

29 July 2003

30 July 2003 ;and

1 August 2003.

Date of Judgment 18 August 2004

For the Applicant Advocate : Mr van der Riet SC

Instructed by Attorneys : Cheadle Thompson & Haysom Inc.

Advocate : Mr P Kennedy SC

Instructed by Attorneys : Pienaar Swart Nkaiseng Inc.