IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C156/03

In the matter between:

NUMSA AND 41 OTHERS Applicants

and

PRO ROOF CAPE (PTY) LTD Respondent

JUDGMENT

MURPHY, AJ

1. This case concerns the dismissal of the individual applicants for participation in an unprotected strike on 20 December 2002 at the respondent's factory in Atlantis.

2. The dispute has its origins in the failure by the respondent to honour its obligations to its workforce in respect of remuneration owing to them for services rendered.

3. The respondent falls within the jurisdiction of the Metal and Engineering Bargaining Council. In terms of the applicable collective agreement the respondent is obliged to make payments to the council in respect of pension benefits, sick pay fund, administration expenses and a dispute resolution levy. Because the respondent found itself in

financial difficulty, it fell into arrears and did not pay the monies owing to the council for a substantial period. It also consistently underpaid the employees and failed to pay them their annual leave bonus (leave enhancement) as required by the collective agreement. In short, over a significant period of time the respondent acted in disregard of the collective agreement and failed significantly to meet its statutory obligations to its employees.

4. The council accordingly issued various compliance orders against the respondent in an amount of approximately R850 000. The negative implications of the enforcement of such an order prompted the respondent to engage the first applicant ("NUMSA") to find a solution. On 16 October 2002 NUMSA addressed a letter to the respondent effectively agreeing to support an application to the council for a retrospective exemption with regard to some of the amounts owing. NUMSA's concurrence was conditional on the implementation of the minimal wage as from January 2000, an adjustment in working hours and an undertaking from the respondent that all employees would "receive their full bonuses and full holiday pay, calculated in terms of MEIBC on their actual rate".

5. On this basis the respondent applied to the council on 4 November 2002 for an exemption for the period of 1 December 2000 to 31 August 2002 in respect of the outstanding payments and attached proof of the employees consent to the arrangement. On 9 December 2002 the council addressed a letter to the respondent advising it that the delegates of the Cape Regional Council had decided that the arrear pension and provident fund contributions would be waived for the period for the employees who were still in employment on condition that each one signed an indemnity form, but that compliance was required in respect of the employees no longer employed by the

company. In effect, the waiver amounted to a retrospective exemption and a license of exemption was issued to that effect on 9 December 2002. It is not clear from the evidence what happened with regard to the other amounts owing to the council. Nevertheless, the employees who were still in employment at December 2002 forfeited 21 months of employer contributions to their pension fund. In addition they evidently had been paid below the minimum rate and had not received their leave enhancements for some unspecified time. It would seem therefore that they agreed also to forgo these amounts in the interests of the ongoing viability of the respondent. Subsequent events suggest that their willingness to do so was not without some measure of rankling legitimate grievance.

6. For reasons not entirely evident, neither party presented its case as fully as might ordinarily have been expected. From the limited evidence before me it is safe to say that industrial relations at the respondent were not happy and appear to have been poorly managed. Around about the same time that the issues of underpayment and the non-payment of pension benefits were under discussion, there were two work stoppages. Other than to say that the stoppages related to refusals to work overtime, no evidence was led regarding their nature, duration, cause or effects. The fact that no ultimatums were issued and that no immediate disciplinary action arose out of them suggests that they were of limited duration and of inconsequential effect.

7. On 13 December 2002 a dispute arose which related directly to the issue of the respondent's failure to pay leave enhancements. Again the details furnished in evidence are somewhat sketchy and incomplete. Dr Deon Jordaan, a human resources consultant employed by an employers organization, testified on behalf of the respondent that the stoppage occurred as a result of an employee taking leave on that date

being issued with a pay slip which did not reflect payment of the leave enhancement bonus. The respondent originally had intended to close down the factory for the year end on 13 December 2002, but an agreement was reached to work until 20 December 2002. This appears to have led to some confusion and disagreement about when the leave bonus would in fact be paid. When the bonuses were not paid on 13 December, the workers refused to work on Saturday 14 December. Nor did they work on Monday 16 December, a public holiday. When some of the workers returned to work on Tuesday 17 December, the union intervened constructively and brokered an agreement. In order to make up for lost production, the workers agreed to work day and night shifts through to the end of Friday 20 December 2002. As I have said, the details of these stoppages are somewhat incomplete, making it difficult to pronounce upon the exact nature of the stoppages, the duration of them on the days in question and the precise effects on the respondent's business. Mr Simon Arries, an organizer employed by NUMSA, testified that on 6 December 2002 the union had agreed with Mr. Ismael Bham, a senior manager of the respondent, that the leave enhancement would indeed be paid on 13 December 2002. Arries thus confirmed Jordaan's testimony that the respondent's failure to pay essentially led to the subsequent stoppages.

8. As I have said, on 17 December 2002 the union intervened and the workers went back to work some time on that day. On the same day Arries wrote a letter to Bham recording an agreement arising out of the union's intervention in the stoppage. Some doubt was cast upon this letter in cross-examination, due to the fact that it had not been discovered until the commencement of the trial and no corroboration exists of it ever having been sent. Arries nonetheless stood by his testimony that the letter reflected the agreement reached between the union and the respondent on 17 December 2002 regarding the stoppage

on that date and the way forward regarding the payment of the leave bonus. The body of the letter reads as follows:

> **RE: WORK STOPPAGE RESOLUTION.**
>
> The intervention of the Atlantis Local Office has resulted in the successful resolution of the work stoppage of even date. Workers have returned to work, by 12H30, based on the following commitments by management:-
>
> 1) Bonuses (Leave Enhancement Pay) and all other monies due will be paid on Friday, 20 December 2002.
> 2) A notice on a Pro Roof letterhead will be posted on the Notice Board with the content as per Point 1 above.
> 3) Management will consider knocking off early on Friday, 20 December 2002 based on progress made in production.
> 4) Workers will receive dummy pay slips, by close of business Wednesday, 18 December 2002, indicating the amount each individual will receive with regards to wages, leave pay and leave enhancement pay (bonus).
> 5) Management will consider dealing with the issue of Disciplinary Action in January 2003.
> 6) Management undertakes to deal with the Foreman, through its disciplinary procedure, who it is alleged has created the problem.
> 7) The union commits to educate its members with regards to the procedures to follow in the event of a grievance to avoid future unprocedural action.
>
> We deem the above as a basis for future sound industrial relations and urge that management adhere to its commitments as we commit to do likewise.

9. Arries justified the agreement regarding dummy pay slips as being the best means, in the light of the respondent's poor payment record, of assuring the workers that everything was on track concerning the payment of the leave bonuses. Mr Allie Chafeker, the respondent's accountant, testified that he would not have authorized the use of dummy pay slips as it was not good accounting practice and impractical most of all

because it would have involved 4 or 5 hours additional work. Arries, however, stuck by his testimony that Bham had given such a guarantee. Bham, unfortunately, because he has become indisposed, did not give testimony on behalf of the respondent. Chafeker, presumably because he was in no position to do so, did not deny that Bham had given the guarantee.

10. As it turns out, the dummy pay slips were not issued on 18 December 2002. Then, when they were not paid the bonus towards the end of their shift, the employees working the night shift of 19–20 December 2002 stopped work at 06H00 instead of 07H00 and demanded to be paid the bonus. When the morning shift employees (due to take over at 07H00) arrived they joined their colleagues in refusing to work until the bonuses were paid. It was this stoppage that ultimately led to the individual applicants' dismissal.

11. The key actors in managing the events surrounding the dispute that day were Mr. Mike Louw of NUMSA and Mr. Ismael Bham of the respondent. Neither gave evidence. Bham, as I have said, was indisposed. No reason was advanced for Louw's unavailability. Dr Deon Jordaan, the respondent's consultant, had some involvement, but being on holiday in Gauteng on the day in question was restricted at the time of the stoppage to advising the respondent and discussing matters with Louw telephonically. Arries attended the respondent's premises for a short period with Louw, on the day in question, but had no direct dealings with Jordaan. The only other witness to testify was Chafeker who had limited first hand knowledge of the events.

12. Arries saw the cause of the strike as fairly straightforward: the respondent had failed to pay the bonuses for the previous years, had a poor record with regard to paying benefits in general, had reneged on an agreement to pay bonuses on 13 December 2002, had failed to honour the agreement to issue dummy pay slips and ultimately appeared to be reneging on the agreement to pay the bonus on 20 December 2002.

13. Both Chafeker and Jordaan testified that the respondent had every intention to pay the bonus at the end of the day shift on 20 December 2002. Chafeker's evidence on the point, to my mind, was not entirely satisfactory. Initially he stated unequivocally that the bonuses were put into the pay envelopes in cash and were in fact paid at the end of the day shift on 20 December 2002. When asked whether he was aware of the physical payment of the bonuses, he replied that the envelopes were completed in his office and paid. He later acknowledged that the striking workers who left early in response to an ultimatum, advising them of the termination of their employment, were in fact only paid their bonuses some time in January. He also conceded that it would have been possible to prepare the bonus pay packets on the previous day, Thursday 19 December 2002, and tendered no convincing explanation for why he had not done so. Nor did he justify the necessity for the night shift employees to wait for payment until after completion of the day shift.

14. Jordaan also offered no plausible explanation for why the night shift employees were expected to wait. He claims to

have told Louw telephonically that payment would be made at 17H00. His evidence is at variance on this point with how Arries understood the situation. While accepting that the relationship between NUMSA and Jordaan was generally good, Arries could not confirm whether a telephone conversation between Louw and Jordaan had indeed taken place on the morning in question. He confirmed that he and Louw had attended a meeting with Bham on the respondent's premises, during which they advised Bham that in terms of the applicable collective agreement the bonus was required to be paid at the end of a shift. He and Louw then left the respondent's premises, after being there for about an hour or two, when Bham indicated to them that he was unable to guarantee that the bonuses would in fact be paid. Arries admitted that he had no knowledge of whether Jordaan had in fact given an assurance to Louw telephonically that the bonuses would indeed be paid at the end of the day shift.

15. Jordaan, on holiday at Hartebeespoort Dam, had the unenviable task of managing the events taking place at Atlantis. His version is that after speaking to the managing director and to Bham, he conveyed to Louw that the bonuses would in fact be paid. He claimed Louw told him that workers were not prepared to listen. He then drafted and sent by e-mail two separate ultimatums to be issued to the workers, which were distributed to them. The first ultimatum issued at 09H25 read as follows:

NOTICE

FIRST NOTICE

ULTIMATUM TO STRIKING EMPLOYEES OF

PRO ROOF CAPE (PTY) LTD

DATE: 20 DECEMBER 2002 TIME: 9:25

YOU ARE HEREBY ADVISED THAT YOU ARE ENGAGED IN UNPROTECTED INDUSTRIAL ACTION IN THAT YOU HAVE NOT FOLLOWED THE PROCEDURES LAID DOWN BY THE LABOUR RELATIONS ACT.

YOU HAVE ALREADY BEEN GIVEN A VERBAL ULTIMATUM TO RETURN TO WORK BY 8H00 TODAY, BUT YOU HAVE CHOSEN TO IGNORE THIS.

YOU ARE HEREBY ADVISED THAT YOU ARE TO RETURN TO WORK BY 10H30 ON 20 DECEMBER 2002.

THE COMPANY RESERVES ITS RIGHT TO TAKE DISCIPLINARY ACTION AGAINST YOU. SHOULD YOU FAIL OR REFUSE TO RETURN TO WORK BY THE ABOVE TIME, THEN SUCH DISCIPLINARY ACTION COULD RESULT IN YOUR DISMISSAL.

16. Prior to the stipulated time period expiring, another ultimatum was issued at 10H00 which read:

FINAL NOTICE

FINAL ULTIMATUM TO EMPLOYEES PARTICIPATING IN AN

UNPROTECTED STRIKE AT

PRO ROOF CAPE (PTY) LTD

DATE : 20 DECEMBER 2002 TIME : 10:00

DESPITE HAVING BEEN ISSUED WITH AN ULTIMATUM ON 17 AND 20 DECEMBER 2002 TO RETURN TO WORK AS PER NORMAL, YOU HAVE IGNORED THE ULTIMATUM AND HAVE PERSISTED IN CARRYING ON WITH YOUR UNPROTECTED ACTIONS. MANAGEMENT HAS EXPLAINED TO YOU THAT SHOULD YOU CONTINUE WITH THESE ACTIONS, YOU ARE PLACING

YOUR JOB IN JEOPARDY AND YOU COULD FACE DISMISSAL AS YOU HAVE ALREADY BEEN ADVISED THAT DISCIPLINARY ACTION MAY BE TAKEN AGAINST YOU.

YOU ARE HEREBY BEING GIVEN A FINAL ULTIMATUM TO RETURN TO WORK BY 11H00 ON 20 DECEMBER 2002 AND IF YOU FAIL TO DO SO YOU WILL BE DISMISSED.

DURING THIS PROCESS YOU WERE AT ALL TIMES ASSISTED BY THE UNION OFFICIALS, AND THEY INFORMED YOU THAT THESE ACTIONS ARE UNPROTECTED.

17. When the workers failed to comply by 11H20 they were issued with a notice terminating their employment which stated:

NOTICE

TO ALL EMPLOYEES

UNPROTECTED WORK STOPPAGE/STRIKE AT

PRO ROOF (PTY) LTD

DATE : 20 DECEMBER 2002 TIME : 11:20

ON 17TH AND 20TH DECEMBER 2002, THERE WAS AN UNPROTECTED WORK STOPPAGE/STRIKE BY EMPLOYEES OF THIS COMPANY. YOU WERE ALL ADVISED THAT SUCH ACTIONS ARE NOT ONLY A CONTRAVENTION OF THE LAW, BUT ALSO OF THE COMPANY'S DISCIPLINARY CODE. SUCH ACTIONS ALSO CAUSE CONSIDERABLE HARM TO THE RELATIONSHIP BETWEEN MANAGEMENT AND THE EMPLOYEES CONCERNED.

EMPLOYEES ARE HEREBY ADVISED THAT SUCH ACTIONS WILL NO LONGER BE TOLERATED. YOU ALSO CHOSE TO IGNORE THE FINAL ULTIMATUM TO RETURN TO WORK BY 11H15 OR FACE DISMISSAL.

SHOULD EMPLOYEES DECIDE TO TAKE THE LAW INTO THEIR OWN HANDS AND RESORT TO ILLEGAL ACTIONS, THEN MANAGEMENT WILL HAVE NO

OTHER OPTION BUT TO TAKE STRICT ACTION AGAINST THOSE OFFENDERS. **TAKE NOTE THAT YOUR SERVICES ARE HEREBY TERMINATED IN TERMS OF THE FINAL ULTIMATUM ISSUED TO YOU AT 10H30.**

18. What is noticeable in all three notices is the absence of any reference to the bonus issue. The tone in all of them is adversarial and no assurance is given that the bonuses would be paid at the end of the day, or at least that an attempt would be made to that end. Accepting Chafeker's evidence that the bonuses could in fact have been paid by late the previous day, the best means of diffusing the situation surely would have been to confirm the undertaking to pay in the written notices to the workers. Insofar as Jordaan suggested that the approval of the managing director was required in this regard, and that he was immediately unavailable, this is curiously at odds with the common cause fact that an undertaking had been given earlier in the week to pay the bonus on 20 December 2002. Unwittingly, therefore, it would seem, Jordaan in effect corroborated Arries' evidence that Bham could not give an assurance or guarantee of payment during the meeting on the morning of 20 December 2002, and possibly thereby fueled a perception among the workers that the employer did indeed intend to renege. Even allowing for the telephonic undertaking Jordaan made to Louw, given the employer's history of non-payment and underpayment, any conclusion by the employees that they were about to be short changed yet again was understandable, if not reasonable.

19. After receiving the third notice, the striking employees left the premises. It is common cause that the striker's conduct was not characterized by violent or unruly behaviour. They

proceeded with the action calmly and with a measure of restraint. The effect of the industrial action was the loss of production for the entire day shift and an hour of the night shift. As appears from the union's letter of 17 December, there was a possibility that the day shift, being the last shift of the year, had it been worked might have been a shortened one.

20. Some time later on 20 December 2002, Jordaan, presumably having had time to reflect upon the possibly precipitous nature of the dismissal, addressed a letter to Louw at NUMSA's offices. In it he said:

Met verwysing na die onbeskermde optrede deur u lede by Pro Roof Cape word 'n vergadering voorgehou op die 7de Januarie 2003 on 09H00 te Pro Roof Cape ten einde die aangeleentheid te bespreek. Ten opsigte hiervan word u versoek om te bevestig dat u die vergadering sal bywoon.

Tydens die vergadering sal u 'n geleentheid gegun word om aan te voer waarom die ontslag van u lede nie gefinaliseer moet word nie.

21. The letter is somewhat ambiguous. Consistent with the final notice it assumes that dismissals had in fact occurred, but leaves open the opportunity for the finalization of those dismissals. The union's position is that the dismissals in fact and law were effected abruptly on 20 December 2002. The respondent, however, asserts that they were only finalized after disciplinary hearings held on 13 and 14 January 2003. The union's interpretation seems to me to be the more accurate version. The final notice issued at 11H20 on 20 December 2002 was unequivocal in the final sentence where it stated clearly and in bold: "take note that your services are hereby terminated in terms of the final ultimatum issued to you at 10H30". The letter of later that day, as I have said, refers to the dismissals as a *fait accompli* that needed to be finalized.

22. Despite this, hearings were indeed held in mid January, which resulted in the selective reinstatement of some of the workers on justifiable grounds. In as far as I am able to ascertain from the limited evidence presented, none of the striking workers returned to work prior to the hearings of 13 and 14 January 2003.

23. The hearing was chaired by Jordaan. The charge sheets and his decision reflect that the workers were charged with participating in unprotected strike action, perceived as intermittent from 14 December to 20 December 2002. As already explained, the year-end had originally been scheduled for Friday 13 December 2002 and when the bonuses were not paid on that date the workers engaged in a stoppage. As part of the agreement to recommence on Tuesday 17 December, after the constructive intervention of the union, and in order to make up for lost production, the workers agreed to work day and night shifts through to Friday 20 December 2002, which as seen ended prematurely when the bonus was not paid to the night shift workers.

24. In his decision Jordaan states that the losses from the industrial action amount to R350 000 for the period. Neither he nor Chafeker was able to substantiate that loss convincingly or in any meaningful way during their testimony. Considering that total production time lost amounted to one short shift, the figure of R350 000 appears to be exaggerated. Without proper substantiation and accounting it cannot be accepted as correct.

25. Despite a somewhat confusing line of reasoning, Jordaan for all intents and purposes (taking into account the nature of the dispute, the timing of the action of 20 December 2002, the failure to heed the ultimatums and the degree of individual participation) upheld the dismissals of some of the employees and reinstated others. Some weeks later, 9 of the dismissed employees who had not been reinstated at the hearing, were selectively re-employed pursuant to no clear

objective selection criteria. The number of employees who lost their employment was reflected in an annexure to the statement of case as being the 44 individual applicants, admitted to be such by the respondent in its response. In Annexure A to his supplementary heads of argument, submitted after the close of the trial, the applicants' legal representative however reduced this number and has identified 22 applicants, who I presume to be those in respect of whom relief is still sought.

26. As far as I can ascertain from Jordaan's reasoning, the dismissals were in response to the unprotected action of 20 December 2002 though the other actions forming part of the history of the dispute were an important consideration in reaching his decision.

27. The respondent has attempted to make something of the union's failure to participate in the hearings (conducted in groups of 5 with each employee being afforded an opportunity to address the employer individually). The employees were however represented by shop stewards. For that reason, in my view, not much turns on the union's non-participation, which I understand it justified, rightly or wrongly, on the basis of its reluctance to legitimize a process it considered illegitimate.

28. The union, on behalf of its members, contends that the dismissal of the individual applicants was both procedurally and substantively unfair.

29. Because the employees' action constituted a concerted

refusal to work for the purpose of remedying a grievance or resolving a dispute in respect of their leave enhancements, I am persuaded that their conduct indeed amounted to “a strike” as contemplated in the definition of that term in section 213 of the Labour Relations Act. Moreover, it is obvious that the strike was not in accordance with section 64 of the LRA in that the issue in dispute was not referred to the bargaining council, nor had a certificate been issued stating that the dispute remained unresolved. In addition, the employees did not give 48 hours notice of the commencement of the strike to the employer. Accordingly, the action was indeed an unprotected strike and to that extent is deserving of censure.

30. Section 68(5) of the LRA provides that participation in a strike that does not comply with the provisions of section 64, or conduct in contemplation or in furtherance of it, may constitute a fair reason for dismissal. In determining whether or not such a dismissal is fair, this court is enjoined to have regard to the Code of Good Conduct in Schedule 8. Item 6(1) of the Code provides that the determination of the substantive fairness of a dismissal in the circumstances should be done in the light of the facts of the case, including the seriousness of the contravention of the Act, attempts made to comply with the Act and whether or not the strike was in response to unjustified conduct by the employer. Item 6(2) deals with the procedural requirements of a fair dismissal for striking workers and provides that prior to the 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 also issue ultimatums

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. It is generally accepted that the Code is not exhaustive and ought not to be applied mechanistically. Other relevant considerations include the duration of the strike, the harm caused by the strike, the legitimacy of the strikers' demands, the conduct of the strikers and the timing of the strike.

31. Although the issue of the leave enhancements strictly speaking is a rights issue, one cannot get away from the fact that in this instance the employer's conduct regarding the payment of remuneration to its employees fell below what might reasonably be expected and this contributed significantly to a loss of trust in its industrial relations with its workforce. The failure to pay the employees significant amounts due to them contractually and statutorily would naturally have led to a loss of trust and hostile perceptions towards the employer. Even accepting that the employees were not entitled to assume that the leave enhancement would be paid on 13 December 2002, once the issue had reared its head in the way it did, it was incumbent on the respondent to ensure that bonuses were paid appropriately and timeously on 20 December 2002, in accordance with the agreement previously reached with the union. It was common cause that there was no intention to pay the night shift of 19-20 December 2002 at the end of the shift. The employer's inability to see the unreasonableness of expecting the night shift employees to wait until the end of

the day shift for their bonuses is an indication of the inexpert manner in which it conducted its industrial relations. Given what had gone before, its actions were nothing less than provocative. Moreover, I accept Arries' version that Bham was unable to give the guarantee that the bonuses would be paid at the end of the day shift. This, as I have indicated, was unwittingly corroborated by Jordaan in his evidence and is further supported by the fact the nothing in the three notices distributed to the workers gave any such guarantee. In the light of the respondent's prior reprehensible conduct, the entire situation could have been avoided had the respondent simply given a written guarantee and distributed it to the workforce immediately in response to the stoppage in the early morning. Jordaan claimed that he gave a guarantee telephonically to Louw, However, this is at odds with his testimony that he needed the authorization of the managing director, despite an earlier agreement having been reached. Had he indeed given that guarantee, the question has to be asked why that was also not communicated in the written notices. In the premises, I am persuaded that the employer's provocative conduct contributed significantly to the strike action and mitigates its unprocedural nature.

32. The employees' conduct on the other hand, though not in compliance with the LRA, was not violent or unruly. They exercised restraint and limited their action to downing tools and refusing to work the shift, which they had agreed to in order to make up for lost production. It is evident that they were aggrieved that their *bona fides* and cooperative approach to the employer was not being reciprocated.

33. There is no cogent evidence as to the loss caused by the stoppage and it accordingly may be assumed to be fairly minimal in the circumstances. The strike was of limited duration and there was no damage to the respondent's premises or equipment.

34. In sum, the employees showed some forbearance and accommodation in relation to the employer's illegal conduct. What they assumed to be the employer's reneging on 20 December was probably the final straw. Unquestionably, the demand of the strike was legitimate, albeit that it related to a rights dispute. Nor was the timing of the strike calculated to maximize harm. It was a responsive strike embarked upon in reaction to the employer's unsatisfactory conduct. It endured for a mere few hours before the employees left the premises peacefully in response to the ultimatums and the notice of termination issued to them.

35. Considering that the employees did not engage in any unacceptable behaviour, there does not seem to have been any justifiable reason for the employer to have proceeded to the dismissals at the pace it did. More time should have been allowed to reflect on the ultimatums once an undertaking had been given that the bonuses would be paid. The whole sorry affair could have been avoided by the provision of more time and information by the employer.

36. Although the respondent can be commended for holding hearings sometime after the dismissals, such hearings essentially amounted to an exercise in selective re-instatement (or possibly an appeal – in which event it was

inadvisable for Jordaan to have chaired them). However, the later selective re-employment of 9 of the dismissed employees who were not selectively re-instated, on the limited evidence available, seems to have been done without any ascertainable objective or fair criteria. This leads to the inference that the employer did not view the employees' conduct around the strike as sufficiently serious to justify the permanent non re-employment of all the strikers.

37. In the premises, I am persuaded that the dismissal of the strikers was indeed both procedurally and substantively unfair. In terms of section 193 of the LRA the primary remedy in such instances is re-instatement. The respondent presented no evidence or argument to the effect that the remedy in the event of a finding of unfair dismissal should be re-employment or compensation. There is no evidence to suggest that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable. Nor is there any evidence that it is not reasonably practicable for the employer to re-instate the employees. Accordingly, the remedy of re-instatement normally should apply. However, in his supplementary heads of argument, filed in writing some days after the conclusion of the trial, the applicants' legal representative cryptically identified that certain individual applicants would prefer compensation rather than reinstatement. In terms of section 193(2)(a) of the LRA it is not obligatory to order re-instatement in respect of these employees. On account of the manner in which this has been done, there is no evidence and no submissions have been made regarding the amount of compensation such applicants should receive.

The order that follows takes account of this difficulty.

38. Considering the continuation of an industrial relationship between the parties, I am disinclined to make a costs order.

39. In the light of the foregoing, I make the following orders:

i. The dismissal of the individual applicants is declared to have been procedurally and substantively unfair.

ii. The respondent is directed to re-instate the following individual applicants on the same terms and conditions of employment that prevailed at the time of their dismissal on 20 December 2002: W Nete, D Ngadlela, P Mofekeng, S Dyantyi, P Ngqubeka, I Dyanti, J Magijima, J Mofokeng, L Rigala, S Pheko, E Jankie, E Magawulana, and M Mxaba.

iii. The individual applicants in paragraph (ii) above are directed to report for duty on 10 August 2005.

iv. The respondent is directed to pay the applicants named in paragraph (ii) all back pay due to them for the period 21 December 2002 until 10 August 2005 on or before 31 August 2005 together with interest at the prescribed rate.

v. The matter is postponed to a date to be determined by the Registrar for the purpose of determining the amount of compensation payable to the individual applicants seeking compensation as identified in

Annexure A of the Applicants' Supplementary Heads of Argument filed on 6 May 2005.

vi. There is no order as to costs.

MURPHY, AJ

Date of hearing: May 2005

Date of Judgement: 2 August 2005

Applicants' legal representative: Mr. J Vuso of Nalane Manaka Inc

Respondent's legal representative: Mr. W Jacobs of Jacobs and Associates