

IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN**CASE NO: D241/07****NOT REPORTABLE**

In the matter between

NATIONAL UNION OF METAL WORKERS OF**SOUTH AFRICA**

First Applicant

G. KHUMALO & B. NYADI

Second and further Applicants

And

TOYOTA SOUTH AFRICA MOTORS (PTY) LTD

Respondent

Judgment

Cele J**Introduction**

- [1] This is a claim of unfair dismissal of the second and third applicants by the respondent after they had been subjected to an internal disciplinary hearing which was precipitated by an unprotected industrial action by some of the employees of the respondent. The applicants seek a reinstatement, failing which they ask for compensation. The claim is opposed by the respondent on the basis that the dismissal of the two employees was well supported by evidence and that a fair procedure was followed.

Background facts

- [2] The second applicant, Mr. Given Khumalo commenced his employment with the respondent, hereafter referred to either as the company or the employer, on 22 April 1994. He served in various capacities, and was on the date of his dismissal a full time Shop Steward of the first applicant, the union, looking after 7 departments. The Paint Plant was one the 7 departments. He had served in that capacity for about four years. He had been a departmental Shop Steward for another four years before that. His salary and the total allowances he received just before his dismissal were R12000.00 to R13000.00 per month. The third applicant, Mr. Bongani Nyadi commenced his employment with the company on 3 May 1991. He similarly served in various capacities within the company but on the date of his dismissal he was a part time Shop Steward, since 2004. He did not do any particular production work as he had to represent his constituency.

- [3] The employer is accompany duly incorporated in term of the company laws of the Republic of South Africa and it carried on business as a manufacturer of motor vehicles based in Prospecton, Durban.

- [4] Various collective agreements were in place at the times material to this matter so as to guide the parties in the event of them being faced with work related problems. The relationship between the company and the union has a long standing history which did not escape the influence of the country's politics and the development in industrial relations. The collective agreements were then reached between the parties as a means of, inter alia, developing trust and mutual respect between Management and the union. There is an understanding between them that the fate of the business and all employees will, to a significant extent, be determined by the ability of Management and the union leadership to jointly manage the challenges facing them. These agreements included the Masibambane Pact, the Rajah Naidoo settlement agreements and the Riverside Declaration.

- [5] In terms of the Masibambane Pact the company and the union understood and identified themselves with work related challenges and they jointly committed themselves to the following shared objectives as the cornerstone of the "Toyota way":

- Open and honest communication – no surprises
- Trust and mutual respect;
- Sharing of all relevant information timeously;
- Respect for each other's rights and obligations;
- Practicing shared values of openness and integrity.

[6] In terms of the Rajah Naidoo agreement of 24 November and 1 December 2000 a compromise was reached between the company and the union on TAC workers that had participated in an unprotected strike and the company agreed to pay them for the hours during which there was a work stoppage. It was further agreed that:

- Management and the union acknowledged that unprocedural industrial action was detrimental to the employer – employee relationship and such action was denounced in the strongest terms;
- In so far as reasonably possible Numsa pledged not to engage in unprotected industrial action and to discourage such action taken or to be taken by its members;
- Management was also to take precautionary measures to ensure that Managers did not indulge in conduct that could provoke conflict;
- Management also undertook not to embark on unprovoked unprocedural lockouts;
- Both parties committed themselves to a relationship that was based on a constructive engagement and a joint problem solving;
- The Toyota Governance document in existence then, relating to payment during work stoppages was to be jointly signed and approved by Numsa and Management, as part of the agreement.

[7] There are three interaction levels that the parties agreed to and they are the industry level, the company level and the plant/ divisional level. Various communication and interaction structures were agreed upon being:

- Auto Industry National Bargaining Forum (NBF);
- Toyota/Numsa Central Negotiation Committee (CNC);
- Manufacturing IR Committee (MIRC Dbn) and Parts Distribution Center IR Committee Meeting (PDCIRC Jhb);

- Divisional/ Plant Shop Steward/Management Meetings;
- Departmental/ Shop Steward/ Management Meetings;
- Green Area Meetings & Management Briefs;
- Quarterly General Meetings and
- Ad Hoc Management/ Labour General Meetings.

- [8] A full time Shop Steward was not attached to any operational functions and only did union work. The company supplied him or her with offices, a motor vehicle, computers and the necessary stationary. The Masibambane Pact outlines the roles of Management and of the Shop Stewards. Shop Stewards must, within the context of the union's constitution, at all times act in the interest of their members and the company. The Departmental Shop Steward reports directly to the nominated Line Manager and must, at all times be available to his/ her department in order to attend to matters of concern. Departmental Shop Stewards are primarily responsible for matters pertaining to their constituent areas, and should refrain from getting involved in other areas within the Plant unless authorized by the Chairman of the Shop Stewards Council.
- [9] On 2 August 2006 an expedited dispute resolution forum meeting was held at the communication centre of the company. Members of Management, the Shop Stewards and the union Organiser, Mr. Hlatshwayo were in attendance. A Senior Manager, Mr. Gazendam chaired the meeting. According to Mr. Gazendam the main issues for consideration had been dealt with at various company stages and had reached the ultimate forum. The issues were described as being about Mr. Emanuel Killian, the TAC environment and the TAC employees. The trigger to the issue was said to be a contractor who was employed incorrectly, where no due process was said to have been followed. When the Shop Stewards approached Management on the issue they said that they were told by Management that correct procedures were followed only to later concede to the contrary. Mr. Killian had taken responsibility for the mistake. He was subsequently charged with poor performance and was given counseling. The union was not satisfied with the manner in which Management handled the matter and believed it was a cover up.
- [10] The response by Mr. Gazendam was that he could not conclusively say whether the process followed was correct. He said that he had instructed the department to put all the information on the matter on his table so that he could make his decision on it. He pointed out though that the union had many options of finding a solution, such as lodging a grievance, to ask for an Expedited Resolution Forum and to utilize legal remedies. He pointed out that the clear intention to act illegally

was not acceptable. Referring to a suspected, looming and unprotected strike, he said that it would amount to a contemplated and premeditated unlawful action which the company would seriously challenge. He said that the Rajah Naidoo Governance did not apply to premeditated unlawful action and would not be applied in that case as there would be no protection against dismissal. The union held a caucus after which they suggested that Mr. Killian was to be suspended pending a finding by the chairperson or in the alternative, that he be put on leave. Management declined to put Mr. Killian on suspension or leave but said that the company would ensure that he did not provoke the situation while a remedy was being sought. The meeting was then ended.

[11] On 4 August 2006 workers within the company's paint shop department started their work normally and went out for their tea break, during which they held a meeting. They thereafter refused to resume work. Meetings took place between Management of the company and the Shop Stewards in an attempt to resolve the problem and to persuade the employees to return to normal work. The first was held at about 10h25. Messrs Khumalo and Nyadi attended it. It was recorded in the minutes that

- Mr. Steynmetz had requested employees to return to work but that they just sang;
- The refusal to return to work amounted to an unprocedural work stoppage
- Management needed to know the concerns of the employees;
- The Shop Stewards were to address the employees and to normalize the Plant;
- Employees were to follow the internal grievance procedures;
- Management would follow the Rajah Naidoo Document.
- Mr. Khumalo confirmed that the Shop Stewards were not aware of the problem as they had been attending to other commitments;
- Mr. Nyadi requested Management to address the workers so as to source out their concerns but that Management confirmed that they would not address the workers as they regarded it as being the responsibility of the Shop Stewards.

[12] The meeting was ended on the basis that the Shop Stewards would go to speak to the employees. At about 11h10 the meeting resumed. The Shop Stewards reported that the employees wanted the General Manager to address them and not the Shop Stewards. The Manager, Mr. Stephen Nel said that Management

needed to give a feedback to their seniors and that meeting was ended. The next meeting was held at 11h30. It was still noted that the stoppage was premeditated and unacceptable. The union was urged to get workers back to work as soon as possible as it was said that there was no way that the union could absolve itself from the consequences. The union delegation undertook to relay the message to the committee, saying that they did not know what was happening at the Paint's department as the Shop Stewards of that department had not reported the issue to them. The union was urged to display responsible leadership and the meeting was ended.

- [13] After 11h00 the Paint Shop employees that were gathered at their canteen, after refusing to resume work, began to march out of the canteen. Mr. Khumalo was with them. They were singing and dancing as they went passed the spray booth area to the air blow off booth. One of the marchers opened the roller up door and the group exited the colour preparation area. The group then moved to the dojo area where there was a dojo trainer, Mr. Christopher Burger. Mr. Burger asked Mr. Khumalo to close the roller up door. He did not. The marchers proceeded to the buy off area and finally returned to the canteen where they were addressed by various speakers. A video recording of some of the events of that day was captured.

- [14] The next meeting was held at 13h00 but it did not last that long as the Paint department Shop Stewards were yet to brief the committee of Shop Stewards. The meeting afforded the Shop Stewards an opportunity to normalize the situation and to return to the discussion. The next meeting resumed at 14h30. Mr. Hlatshwayo reported that the workers had returned to work even though their demands had not been met. Management complimented the union for normalizing the situation and urged them to use the available channels to process the existing grievance. Management however undertook to exercise its reserved rights on Monday regarding the unprocedural action. Management advised the union to process any grievance with the Paint Shop Management but the union felt that the issue was beyond the Paint Plant and that they would resort to a higher level structure once they would have studied the dispute resolution process.

- [15] One issue that had been of concern to the Paint Shop workers was the respondent's intention to introduce a change in its Management. An Engineering

Manager, Mr. Logan Naicker was to take over at the Paint Shop. Workers were not in agreement with that proposal as they felt uncomfortable in working with him due to the previous experience they had had with him. The issue pertaining to the change had been raised by an address that Mr. Steven Nell had made to the workers at the Paint Shop in what was known as the Soft Box meeting. Workers informed Mr. Nell that they did not want Mr. Naicker back as he was regarded as a strong or less accommodating Manager. Mr. Nell was then to report back to them on the issue. On 4 August 2006, Mr. Nell had not yet reverted to the workers on the issue. It had taken a position that the report back was to be given by the Shop Stewards but the Shop Stewards did not agree that they were the ones to make that report.

- [16] In Paint Plant 2 a shop was to be replaced in the old plant. Management had decided that another shop was to be demolished to make space for a warehouse. Plant 2 was to be maintained on contract on a fixed term basis and Messrs Andrew Muller and Martin Saunders were to maintain Plant 2 while a Mr. John Welsh who had been retired was to be retained on day shift. However, the union and workers did not agree with the retention of Mr. Welsh as they preferred a younger person to take over as a Manager.

- [17] The respondent reflected on the events of 4 August 2006. It then decided to issue a final written warning to each of the workers it deemed had taken part in an unprotected strike. It then charged the two applicant employees and a third employee for an act of misconduct which it described as:

“It is alleged that you incited/furthered, perpetuated or instigated and participated in an illegal work stoppage on 4 August 2006 and through your commission/omission failed to comply with your obligations as employees and employee representatives thereby resulting in a situation where the company incurred massive financial losses in lost production.”

- [18] The two applicants were found guilty and on 19 December 2006 a sanction of dismissal was imposed on them on the basis that they had rendered a continued employment relationship intolerable. The third employee, a Mr. S. A. Sikhosana who was also a Shop Steward, was given a final written warning on the basis that he had a limited involvement in all aspects of meetings with Management, discussions with workers and participation in the march through the Paint Shop. The applicants felt aggrieved by the dismissal and through the assistance of the

union referred an unfair dismissal dispute for conciliation. When the dispute could not be resolved they referred it to this court by means of a statement of claim.

The issue

- [19] The crisp issue is whether or not the employees planned and therefore premeditated the unprotected strike and whether Messrs Khumalo and Nyadi did as much as was expected of them, in terms of the existing collective agreements, to stop the unprotected strike from commencing and continuing.

The evidence.

- [20] It remained common cause between the parties that the respondent dismissed Messrs Khumalo and Nyadi. The company had subjected them to an internal disciplinary hearing together with a Mr. Sikhosana who was also a Shop Steward. He was also found guilty of the misconduct but was given a final written warning. The respondent had therefore to show that their dismissal was substantively and procedurally fair. Six witnesses testified for the respondent while three testified for the applicants.

Respondent's version

Cyril Nkosinathi Khambule

- [21] He was the Group Human Resources Director of McCarthy Limited but was with the respondent as a Vice President in Human Resources Department in 2006 when the incidents in issue took place. He was taking part in a 10h25 Management and Shop Stewards meeting when the news of an unprotected strike by the Paint Shop workers came in. Messrs Khumalo and Nyadi were not attending that meeting. He confirmed the minutes of the meeting and those of the meeting held on 2 August 2006. He did not attend the 11h30 meeting but did attend the rest of the meetings which followed thereafter and he confirmed the minutes kept. It was the Shop Stewards who were to report to employees on the recent decision taken by Management and not Mr. Steven Nel as demanded by workers. Shop Stewards often complained about Management addressing workers, saying it was their job to do so. Messrs Khumalo and Nyadi had persuaded striking workers to return to work on that day.

- [22] On 8 August 2006 Management decided at an Expedited Dispute Resolution Forum that a misconduct charge be preferred against Messrs Khumalo, Nyadi and Sikhosana as a result of the unprotected strike of 4 August 2006. It was felt that the three employees had been participants in the Rajah Naidoo agreements and the Riverside Declaration and therefore that they had breached the agreements. Prior to the commencement of the strike, verbal warnings had been issued to the three Shop Stewards in the presence of Mr. Gazendam that if the unprotected strike started, there would be serious consequences. Management had formed the view that there was no transparency on the Shop Stewards and that a trust relationship had been broken down. He then drew the charge sheet and served it on the three.
- [23] In relation to the disciplinary code of the company, it was the policy of the company to ensure that formal corrective or disciplinary measures are applied by duly authorized supervisory and managerial employees, in a manner which was fair, just and consistent and in the best interest of the company and its employees. The disciplinary measure should be corrective and not punitive. The disciplinary code has a guide to fair and progressive discipline and is divided into four categories of transgressions. Within each category there are levels of transgressions, each with a corresponding sanction. An example is of an unprotected strike. It falls within category one. The first transgression is punishable by counseling, the second by a written warning 1; the third by a written warning 2; the fourth by a final written warning and the fifth by a dismissal. The sanction given to all Paint Shop workers was a final written warning and was a sanction for a fourth transgression. Management decided on that sanction on the basis that the unprotected strike was premeditated. In the meeting of 2 August 2006, Mr. Gazendam had warned that the clear intention to act unlawfully would not be acceptable. The warning was not just limited to Mr. Killian's issue but it was directed as well to the Paint Shop workers. Mr. Khambule had reported to Mr. Gazendam that there were tensions in the Paint Shop Department.
- [24] Not much could be said against the version that Mr. Nyadi was with his medical doctor at the time of the unprotected strike. To the version that Mr. Khumalo was not aware of the strike before its commencement, management had been told that he knew about it but there was no proof that the company could produce and

his ignorance of it was then acceptable. That is why he was charged for not stopping the strike in terms of the agreements. The video recording of the unprotected strike did not have a sound track with the result that whatever was said by Messrs Khumalo and Nyadi to workers could not be recorded. Messrs Zwane and Zuma appeared in the video addressing workers on strike but whatever they said could not be heard and that explained why they were not similarly disciplined. There was no evidence of Messrs Khumalo and Nyadi having incited the workers further, as alleged in the charge. At 13h00 they were given time to go and persuade workers to stop the strike and at 14h30 they reported back that the strike had ended.

Byron Hartze

- [25] He was the Human Resources Manager of the respondent but in 2006 he was the Human Resources Manager for the Paint Plant. There were bi-weekly meetings held between the Divisional Shop Stewards and the Departmental Managers where a number of issues would be discussed. Any issues that could not be resolved would be escalated to the monthly Shop Stewards and Management meetings. The minutes of the meeting of 25 July 2006, the personnel and the structural changes that were planned for Paint Plant 2 were confirmed. The personnel changes included Messrs Naicker and Welsh who were to support the operation in that plant.
- [26] On 3 August 2006 he attended a general meeting at the canteen with workers. The workers did not want the meeting to continue because of the problem they had with the return of Mr. Naicker to the Plant. The meeting did continue and Management presented their plan with Messrs Naicker and Welsh having to support the Plant operation. The issue was discussed and at the end Management undertook to call another meeting to give a feedback. Mr. Nel did not make an undertaking that the feedback would be given directly to the staff. In a previous meeting workers had been very vocal and so Management wanted the Shop Stewards to give that feedback so as to avoid an unprotected strike as the company had just launched a new Toyota Corolla. The company had therefore to avoid a strike during which low volumes of production are usually incurred.

- [27] On 4 August 2006 in the morning he met Mr. Khumalo outside the Shop Stewards' offices and he told Mr. Khumalo that, as he had heard that there was to be an unprotected strike, the workers had to comply with procedures. Mr. Khumalo told him that he was not aware that there would be such a strike. It was unlikely that Mr. Khumalo did not know about the strike as the information came from the shop floor. The company did not have any other information that Mr. Khumalo knew about the strike before it commenced. Tea time commenced at 09h30 and at 09h50 workers have to return to work. Mr. Hartze heard at about 09h50 that workers were not resuming work. Messrs Nel, Khambule, Zyman and himself met the workers at the canteen. Mr. Zyman requested the workers to return to work but workers continued with their singing and dancing (toy toying).
- [28] Mr. Hartze attended the meeting of 4 August 2006 held at 10h25. It was the first meeting held in terms of the Rajah Naidoo agreement to determine the concerns of the workers. While there was a rumour about the strike Management did not know what the concerns of the workers were. One the meeting ended senior Management were informed of the strike. It was the responsibility of the Shop Stewards to give a feedback and to file a grievance, if necessary. No grievance was filed and it was unusual for Management to address workers during the strike. Shop Stewards ought to have done so and to have encouraged workers to return to work while they escalated their grievances to Management. It was Mr. Nyadi's specific shift that was on strike and it was his responsibility with Mr. Khumalo to get workers back to work in terms of the existing agreements and because they were leaders. Management had been shouted at on the previous meeting. The e-mail issued by the Shop Stewards that it was not their responsibility to give a feedback but that of Management was not correct.
- [29] The company believed that the strike was premeditated and that the Shop Stewards furthered it by taking part in it. The strike ended because of the intervention of the members of the Regional office of the union, including Mr. Hlatshwayo. The dismissal of the two applicants was fair. They were told by senior management that they would be met with serious penalty if a strike took place. The chairperson of the enquiry had found that dismissal was proper. The company code was a guideline and therefore there was no departure from the prescribed disciplinary action when a dismissal sanction was imposed by the chairperson. Mr. Sikhosana received a lesser sanction because it was not his shift or constituency that was involved.

Emmanuel Killian

- [30] He was the Senior Industrial Relation Manager of the company for the last two years and had been with the respondent for the last 20 years in different positions. He had not always been in the management. In 1995 or 1996 he was elected as a Shop Steward for Numsa. In 1998 he was elected as the chairperson of the Toyota SA Shop Stewards Council and in 2003 he became the Human Resources Manager at the respondent. Before he joined management he had been a full time Shop Steward in the company. A Shop Steward was a leader who represented the workers. There would be unprotected strikes when he was a Shop Steward, although not in his section. As a chairperson he would ascertain the reasons for it, tell them to the Management and then normalize the situation. To join the strike so as to normalize it was a view that came up lately and he did not know where that view came from. Since the August 2006 strike, there have been more other unprotected strikes in the company. To know the reason for the strike was very easy as one had just to go to that area where it came from and they would tell him the reasons.
- [31] The company did incur a loss due to the unprotected strike in question and it came to the total of R817 110.00. The cost of the Paint Shop losses came to R312 077. The associated costs came to R293 082.00 and the assembly hall cost of replacing units lost on overtime basis came to R211951.00. Mr. Killian did not witness the strike.
- [32] The main aim of the Masibambane Pact was to get stability in the industry. Toyota was getting to export its product to Europe which had very particular customers and Toyota was regarded as unreliable. A number of the provisions of the Rajah Naidoo of 15 November 2000 were confirmed. The code was a guideline. If there were justifiable reasons the provisions of it might be differed from. An example was of an offence that was not included in the code. In this case there was premeditation. The Human Resources Manager had spoken to them before the strike and they denied knowing about it.

- [33] While being a Shop Steward could be very difficult, Mr. Killian did not share that experience. One had to avoid going against one's mandate which entailed looking after the interests of the members and doing what was right. That would help to avoid being labeled as a sellout by members. The role of the Shop Stewards was contained in the Masibambane Pact and in the minutes of the meeting that had been held over years. It was important to be honest with members and tell them the truth. In relation to the fact that the Shop Stewards managed to get workers back to work, a loss of about R30m had been incurred. The loss of R817 110.00 was not the total cost of production lost. Mr. Killian had heard that Mr. Khumalo told the workers that if they did not return to work he would resign as a Shop Steward. Mr. Sikhosana's position was not comparable to that of the applicants in that it was not his shift that was on strike.

Bradley Feldt

- [34] He was the Acting General Manager of the company. In 2006 he was the Shift Manager of the Paint Plant. He was on duty on 4 August 2006 when the news reached him that workers of the Paint Plant were refusing to resume work after their tea break. He went out to the floor and confirmed that workers were not at work and then saw them singing and dancing as they went passed him. He saw the two applicants and Mr. Sikhosana in the group. The two applicants were raising their arms as they were singing as did the group but Mr. Sikhosana was just following from behind and he was not raising his hands and that was why he was not dismissed by the company.
- [35] He testified in the disciplinary hearing of the applicants. He could not remember if he did say in the enquiry that it was wrong for the company to act against the disciplinary code when imposing a sanction on the two applicants. Acting against the disciplinary code would indeed be wrong. Messrs Zwane and Zungu did address the meeting of striking workers but Mr. Hartze advised him not to take disciplinary hearing steps against them for addressing an unauthorised meeting. He therefore found it very strange that the company did not take any disciplinary steps against them when it decided to discipline the applicants. The Shop Stewards could not force workers to go back to work if they did not want to. He would not have any problems in working with the applicants if they were to be reinstated.

Robert Thomas Aldworth

- [36] He was the Senior Manager Maintenance of the Paint Plant but in 2006 he was the Maintenance Manager. He heard about the strike on 4 August 2006 and while he was at the buy off area, the place where vehicles were inspected before shipment, he saw the employees on strike singing and dancing and moving towards the Paint Plant. Messrs Nyadi and Sikhosana were in the group. Mr. Nyadi was actively involved with the group while Mr. Sikhosana was a lot more reserved. As they came back from the Paint Plant Mr. Khumalo was there walking through with the procession. He just walked in the same manner as did Mr. Sikhosana and was in the middle of the crowd. At the disciplinary hearing he had testified and he said that he had good relations with the applicants.

Christopher William John Burger

- [37] He was the Dojo Trainer at the company and was at work on 4 August 2006 when workers embarked on an unprotected strike. He first heard of the strike from workers who came to the Dojo for training that there would be a strike which, it was said would commence after lunch and it would be about a Manager who was to return to the Paint Plant. At about 11h00 there was a lot of noise and it came from the striking workers who were calling other workers to join them. In the spray area there were workers waiting for vehicles to come in. They refused to join the strike when they were invited to.
- [38] The two applicants and Mr. Sikhosana were among the group of strikers and they called other workers to join them but Mr. Sikhosana was standing on the side observing. The group came to the lower boot area and one of the strikers opened the big roller door using a chain. He could not remember that person and whether or not he was disciplined. That door would always be kept closed to prevent dirt from going to the preparation area to dirty cars. Opening it was a very serious offence under schedule three of the disciplinary code while the unprotected strike fell under schedule one. The group came through the Dojo area to the preparation area. Mr. Khumalo was the last to come in. Mr. Burger told him to close the door as he also knew it had to be closed but Mr. Khumalo told him to do it himself.

- [39] The procession went through to the preparation area. Workers who were in the Dojo joined the procession. Mr. Nyadi was then walking in front, Mr. Sikhosana on the side and Mr. Khumalo was at the back. There had been unprotected strikes before but Shop Stewards did not join them. In the years he had been at the company he had a good working relationship with Mr. Khumalo. In fact the three dismissed Shop Stewards had been very hard working employees. He had hoped that nobody would be dismissed.

Applicants' case.

Given Themba Khumalo

- [40] He attended the meeting of 25 July 2006 between Management and the Shop Stewards where an announcement was made for the rotation of Managers which included Mr. John Welsh who was to assist in the Paint Plant 2 until December 2006 and Mr. Logan Naicker was to manage the Engineering Department in the Paint Plant 2 and 3. The General Manager apologised for having had a meeting with the work force in the absence of the Shop Stewards. Mr. Khumalo's response, although couched in a jest was that there was nothing wrong in having such meetings as the previous General Manager held them. Such meetings were called the "soft box meetings" and the practice prevailed nationally. There were also "Green Area meeting" and "Management Briefs" which were considered essential for the flow of information. At Green Area meetings employees received a uniform message from Senior Management and they had an opportunity to ask questions which would be answered immediately by the Group Leader or Supervisor if possible. If not possible, an answer would be obtained as soon as possible and the information would be relayed to the employees at the next Green Area meeting or before the next meeting. The Shop Stewards would not be involved in such meetings as it would be strange and they placed their trust on the Managers.
- [41] He did attend the meeting of 2 August 2006 with Management. The complaint was about the appointment of females by Mr. Killian. The meeting had nothing to do with the Paint Plant issues. When Mr. Gazendam gave a warning about a clear intention to act illegally being not acceptable, he was referring to a TAC matter. Mr. Khambule confused issues in his evidence in this regard.
- [42] On 4 August 2006 Mr. Khumalo arrived a little late and was in a hurry to go and cloak in at 07h00 and to attend a morning meeting when he met Messrs Hartze

and one Humphrey, who said there was a serious issue about the Paint Plant. It was a Friday and he had a series of meeting to attend. He responded by telling Mr. Hartze that he was skipping hierarchy as he should have first spoken to Mr. Nyadi about that issue. It was not true that Mr. Hartze asked him if he knew about the looming strike about which he bore no knowledge. He was at a meeting with senior officials when the report of a strike came through. He then suggested that the meeting was to stop so that he would go to address the situation. Mr. Hlatshwayo had been attending that meeting with him and he took him along.

- [43] Mr. Khumalo then telephoned Messrs. Nyadi and Mbuso Shezi to join him. Mr. Nyadi said that he was at the surgery but would come to join them, which he did and all proceeded to the Paint Plant to find out why there was a strike. Mr. Nyadi attempted to talk to the workers first but was not successful as workers were very angry. It appeared that they did not relate well to him. Mr. Khumalo then address them, again with no success as workers were saying they wanted to talk to Management and in particular to the General Manager. The Shop Stewards left the workers and proceeded to Management and reported the demand of workers. Management did not agree to go out to address workers and the Shop Stewards left the meeting and went to report back to workers. They were told that some of the workers had already left to the Department to take other employees out.
- [44] It was agreed that all workers would go out from the canteen to the Department to recall the workers who had gone out. It was agreed that Mr. Nyadi would lead workers so that they could negotiate with the ones that had left the canteen and to stop them from what they were doing. Mr. Zulu was to be in the middle and Mr. Khumalo was at the end of the procession. Later they returned to the canteen. Various people addressed the meeting. Mr. Khumalo also addressed the meeting. He urged the workers to listen to him as their Shop Steward, failing which they had to pass a vote of no confidence on him. He threatened to resign as a Shop Steward if workers refused to listen to his advice of returning to work and leave him to talk to Management. Workers agreed and they returned to work. He then attended the next meeting with Management which was at 14h30 where he reported that workers had returned to work.

- [45] Mr. Hlatshwayo was not the one who ended the strike. On the contrary he had been too scared to go to the work force to address it. There had been a Durban Shop Steward meeting on that day and a Mr. Ndaba attended it. The strike issue was discussed and Messrs Hlatshwayo and Ndaba had an argument when Mr. Hlatshwayo showed his reluctance to go with Mr. Khumalo to the work force. His presence at the meeting did not have any effect.
- [46] To the allegation that he associated himself with the strike, the situation was fairly tricky. He had to win the hearts and minds of the strikers and to do so, he had to join them in their procession. Workers had said that they did not want to talk to the Shop Stewards. He had not been aware of the strike. Had he known it was coming he would have investigated the rumour about the strike, speak to Mr. Nyadi and advise him to seek a meeting to clarify the position failing which he himself would intervene, well knowing that the union detested an unprotected strike. It was not improbable that he and Mr. Nyadi were the only two workers who did not know that the strike was looming, taking into account all that he had done hitherto in order to avoid unlawful thing happening in the company. The issue of workers had arisen in the soft box meeting. The Shop Stewards decided that Management had to address the problem as it was likely to cause problems for them. Their meeting of 3 August 2006 finished late. Where employees disregarded procedures, he would not be seen condoning it and that was why he fought to the end to stop the strike. An example was of an instance where an employee destroyed a "buy off" during an unprotected strike, Shop Stewards prevented that and they reported the incident to Management and that employee was dismissed.
- [47] Mr. Khumalo did try to keep the employees within the canteen to avoid those assaulting non striking workers or to force them to join the strike but it was not easy. While employees did leave the canteen, with other Shop Stewards they were able to bring them back to the canteen. While he was in the procession, he had to prevent damage from occurring. In doing so he could not just address them but had to be part of them. The remark by Mr. Burger that he refused to close the roller door was unfair as he was the closest to it as Mr. Khumalo was busy calming workers down.
- [48] Throughout all the years Mr. Khumalo worked as a Shop Steward, the company had used the disciplinary code as a bench mark. The code would also be used

as a tool in all grievances. It came to him as news that the code was only a guideline. There was no other incident where there was a deviation from the code. When Mr. Gazendam issued a warning he never said that there would be a deviation from the code, except for the TAC event. In terms of the code the work stoppage was not a serious transgression. It fell under category 1 with the sanction of counseling, if found guilty. The length of the strike and damage resulting from it did not make an unprotected strike more serious. In 1994/5 there was an unprotected strike which lasted for about 3 months. Mr. Khumalo was not yet a Shop Steward and he was counseled. In relation to this matter, Mr. Gazendam said that he would go all out to fight this case till the union gave up and he said that he would take our homes so that we would know who he was. Until the incident of the unprotected strike at issue, Mr. Khumalo had no record of wrong doing or any warning. He had done nothing to perpetrate the strike. He was merely trying to assist to end it and he succeeded. Since he was dismissed he never found any other employment although he tried. He asked to be reinstated.

Bongani Nyadi

- [49] On 4 August 2006 he arrived at work at about 07h00 and proceeded to the change room to change his clothing. He was alone in the change room as other workers had already checked in and would have been at the "Green Area" discussing problems of the previous day with their Supervisors. He had not spoken to any of them on that morning. He was also surprised by the strike and it was not part of his plan as a means of shedding responsibility. He was not feeling well and so took a medical card where after he proceeded to the surgery. He waited in the queue with other workers to be attended to. The surgery was used by all employees and not just those from the Paint Plant. None of the Paint Plant staff had telephoned him to inform him about the strike. That him more than anybody should have known about the emotions running in the Department, was partly true. After changing his clothing, he would walk to various sections checking if there were any problems. On that day he was not fine and had no one to tell him those problems.
- [50] A Human Resources Manager telephoned him saying that workers had not returned to work from their tea break. He went outside to make or receive a call from Mr. Khumalo who told him that he had also received a similar report. He went to meet with Mr. Khumalo and both proceeded to check the situation. They

found workers at the canteen and were surprised by their anger. When they asked for a reason for the work stoppage, they were hauled at and told it did not concern the Shop Stewards as workers needed the General Manager, Mr. Nel. Workers sent them to go and call Mr. Nel. Mr. Khumalo's attempt to settle the matter came to naught and they had to go and report to Management as the situation was beyond their control. They still did not know why workers wanted Mr. Nel. Management did not help the situation as they sent them back to go and find out the reason for the stoppage.

- [51] When they arrived back at the canteen they found that some of the workers had left to go and pull out other workers. The remaining workers stood up to go and join the group that went to the Department to pull out other workers. He discussed the unfolding events with Messrs Khumalo and Sikhosana within the short time span they had and they decided to escort the group to avoid any of them damaging one another and the company property. There was a unique Department in that it had flammable substances such as thinners and paint which they worked with and some of the workers were smokers who might use a match to cause damage.

- [52] As they were escorting workers they considered the union culture and decided to be part of the group so as to capture their attention. Otherwise he was not part of the activities of the group. He did not encourage the strike. To address the strikers, slogans were used to draw attention and to command them to sit down and listen when they had to be addressed. To a person who looked at a distance you could be seen as taking part in the strike. They escorted the group to and from the Plant.

- [53] There had been a Durban Shop Stewards' meeting which had been in progress on that day. They went to its venue to report what had happened and were told that Management had enquired about the situation. Therefore they proceeded back to Management for another meeting. They were told to go and normalize the situation. In the canteen Mr. Nyadi attempted to calm them down and told them to respect the full time Shop Steward and the union official. Mr. Khumalo took the stand and explained that the work stoppage was illegal. He reported that they had been to senior Management who requested that they calm down as the matter would be addressed. It was difficult. Mr. Khumalo went so far as to threaten to step down as a Shop Steward if workers were not respecting them.

Workers succumbed and returned to work although they were still very angry. The union officials stood behind and did nothing to persuade the strikers to return to work.

- [54] Since his dismissal he was never able to find another employment. He survived through the R66 000.00 that was paid out to him but his house bond had fallen into arrears. He asked to be reinstated.

Thembelihle Limo Mbhele

- [55] He commenced his employment with the company in 1993. From 1996 he worked at the Paint Shop. On 4 August 2006 he was at work and at about 09h50, after tea break, the work stoppage started at the canteen. Workers held a discussion among themselves about the structural change they had been told of and their reaction to it. Mr. Nel had promised to report back on their concerns. They did not want to work with Mr. Naicker because of his relations with workers. Mr. Nel knew that there had been problems with Mr. Naicker. They also had problems with Mr. Welsh who was old and near retirement and they preferred a younger person to take the job of a Manager. Mr. Nel undertook to discuss the matter with Senior Management and to revert to them. Workers discussed when there was likely to be such a report back as they would be working on the night shift on the following week and Mr. Nel would not be able to see them. They decided not to go back to work after tea break.
- [56] There could not have been any rumour about the strike as the decision was taken at the canteen. As such not all employees were at the canteen. Some were in the "Green Area" eating while others were at their work stations waiting to resume work because nothing had been planned. There was no leader in the discussion and Mr. Zwane, an employee volunteered to chair the meeting. As he was speaking, Mr Gary Steinitz and his team came in. They had to wait until Mr. Zwane finished what he was saying. Mr. Steinitz told them three times that the stoppage was illegal. Workers mumbled, demanding that Mr. Nel was to give them a feed back. They then left.

[57] After a short while the Shop Stewards came in and wanted to know what the problem was. They pleaded with workers to return to work. Tempers were high. The Shop Stewards then left to go to Management. Some of the workers in the canteen went down stairs to go and call those who were at the work stations. The Shop stewards returned to report back. It was decided to first go and call those that had left before the report could be given. The Shop Stewards offered to escort the group as the procession left and later returned to the canteen. Workers were angry because of:

- The pain that Mr. Naicker had caused them before;
- Promises that had been made but not fulfilled on their further education and on affirmative action implementation.

[58] Mr. Khumalo succeeded in calming the situation down and workers agreed to return to work. He did so by threatening to resign if workers would not listen to him. He was not aware that the Shop Stewards had discussed the issues of their concerns with Management on the previous day. To his knowledge, Shop Stewards were not involved in that matter as workers had raised it with Mr. Nel who undertook to revert to them. They knew that Shop Stewards would convince them to go back to work without getting Mr. Nel to address them. The issue was a “soft box matter” and Management owed them a response. There was no premeditation of the strike.

[59] Some time after the strike ended, the rest of the employees who had taken part in the unprotected strike were each given a final written warning for 24 months. They believed that the sanction was not provided for in the disciplinary code and asked the union to take the matter up with Management. It was realized that the sanction was a mistake and it was corrected by the reduction of 12 months period.

Submissions by the parties

Submissions by the respondent.

[60] Mr. Maeso appeared for the respondent and his submissions will henceforth be dealt with. Save on sanction, procedural fairness was not challenged. The conduct of the applicants was found unacceptable when seen against the various

applicable pacts. Through the Masibambane agreement certain obligations were created for the applicants being:

- Open and honest communication – no surprises
- Trust and mutual respect;
- Sharing of all relevant information timeously;
- Respect for each other's rights and obligations;
- Practicing shared values of openness and integrity.

[61] Similarly the pact also lists out the role of Shop Stewards. There are bilateral relations which however do not make Shop Stewards part of Management. They are paid by the respondent to be Shop Stewards. They therefore have to perform. There should be no surprise but instead a trust relationship should be practiced. In terms of their obligation, the applicants failed. They claim to be ignorant of the strike. The second applicant said that he came late and the third said that he was at the surgery. Respondent's witnesses were not shaken about knowing of the rumour. Mr. Burger said that people told him that there would be a work stoppage. The probability is that the applicants knew about the looming strike. They attended the meeting of 25 July 2006 where the proposed structural change in the Paint Plant was discussed as minutes of that day showed. There were subsequent meetings on the issues developing at the Paint Plant. These make the improbability of the applicants not knowing about the strike profound. The issue was escalated to a higher level of Management. Mr. Khumalo even said that there was a serious issue he was told of by Mr. Hartze. Mr. Hartze told him to make sure that they filed a grievance. Yet Mr. Khumalo made no attempt to handle the matter seriously. His walking away was reckless. That he had meeting to attend to was not disputed but he knew what was about to happen. He never communicated that to Mr. Nyadi who would have similarly known about the strike. The referral he said he made to Mr. Nyadi was rather mechanical, yet they attended the same meeting where this issue was discussed.

[62] The bubbling issue was alluded to by Mr. Gazendam in a meeting he had with the applicants. The Numsa delegated were to give a feed back to the employees at lunch time on Friday on the issue. People in the Dojo said that the stoppage would commence at lunch time. This is surely not a co-incidence. The strike had been thought about and planned. That is why the respondent said that it was premeditated.

- [63] The Rajah Naidoo agreement of 24 November and 1 December 2000 was binding on Numsa and Management. Reference to Numsa on clause 3.2 of the agreement was a reference to the Shop Stewards as well and they conceded that they had to avoid the unprotected strike as stipulated in clause 3.1. At the 10h25 meeting Mr. Khumalo said that he did not know what the issues were. Given the knowledge of issues he had by then, he did not make a full disclosure to Management which was a breach of the Masibambane Pact.
- [64] Mr. Mbhele never dealt with the reason why Mr. Nel had to address the employees. The issue would have been escalated to a higher level. No logic or any principle justified a demand to have Mr. Nel address the workers. It was never clear why workers refused to get a report back and to get back to work. If Shop Stewards would report back at lunch time on 4 August 2006, why not report back at tea time. At 11h30 and at 13h00 they were still saying that the issue was unknown which means that they had not reported back to the workers. Yet they had joined the toy – toy by then to win the hearts. If they had control of the workers, they would have by then ascertained the reason for the strike. The joining was contrary to the Rajah Naidoo agreement.
- [65] Mr. Nyadi said that he was ill and had to attend to the Doctor and yet he took part in the toy – toy. The three witnesses of the respondent who watched the toy – toy gave evidence in a forthright manner. They had no axe to grind with the applicants. When dealing with challenges of being a Shop Steward, Mr. Killian said that he never lost control of his members. Mr. Khumalo listed his challenges but did not include one of losing control. There was no attempt to get workers back to work when all the time there was control of the situation. According to Mr. Mbhele when workers returned to the canteen, they were angrier and yet Mr. Khumalo said that he was able to control them. At 14h30 workers had returned to work. It was because of the intervention of Mr. Hlatshwayo and not the applicant.
- [66] The code provides a set of guidelines. It indeed provides for different levels of sanctions. Deviation from it may occur if it can be justified. The final written warning for 24 months to other employees was indeed out of kilter with the code provisions. It was reduced to 12 months. The claim of the applicants ought to be dismissed. If not, the time when dismissal took place is to be considered. It has been along time. An appropriate relief should be compensation.

Submissions by the applicants

[67] Mr. Purdon appeared for the applicants. His submissions will follow hereafter. The second and third applicants did not commit the misconduct with which they were charged, any misconduct which justified the sanction of dismissal. The respondent's actions towards them were inconsistent and unfair. Essentially the version of the respondent was that:

- Messrs Khumalo and Nyadi played a measure role in the unprotected strike and actively encouraged employees to down tools and join a march through the Paint Shop.
- During the march they refused to comply with an instruction to close the roll up doors of the Paint Shop in an attempt to limit the unprotected strike.
- Normal work only resumed once officials of Numsa arrived at the respondent and addressed the striking employees.

[68] The respondent has failed to prove fairness on the substantive level when the facts placed in dispute are considered. The misconduct was to be proved and whether it was of sufficient gravity to justify a dismissal which is reserved for the most serious of the misconduct. While there was loss incurred, the respondent failed to prove the amount thereof.

[69] The applicants were extremely reliable and honest witnesses. Mr. Mbhele was not broken down. It was conceded that if the applicants tried but failed to stop the strike that would not be misconduct. The case of the respondent is based on hearsay evidence. Yet the minutes of 4 August 2006 at 13h00 indicate that the applicants requested and were granted an opportunity to normalise the situation and to return to the meeting. They did just that. There is overwhelming evidence that they stopped the strike. It is trite that an ultimatum was never issued against the striking employees. Mr. Killian conceded that the applicants normalised the situation but he said it should have been sooner in that he should have told workers at 10h25 to stop the strike or he would resign. A Shop steward was an employee and deserved to be disciplined as such and not as a Shop steward.

- [70] According to Messrs Khambule, Killian and Hartze the respondent was entitled to deviate from the code. They only placed their reliance on the warning issued by Mr. Gazendam. There must be a compelling reason for a deviation and none was put forward by the respondent. The code is part of a contract of employment. The employee can insist on the employer to abide by the code. In this case the code is a collective agreement. Court is asked to find on a balance of probabilities that the strike was premeditated and to rely on hearsay evidence. It is difficult to rely on a rumour which cannot even be tested by cross-examination. For instance Mr. Burger said that the strike was to start at lunch time. It did not. Mr. Mbhele's evidence on the other side was direct. He said that there was no premeditation otherwise there would ever employee at the canteen. Therefore court should find that there was no premeditation.
- [71] Mr. Sikhosana was not on duty on the day of the strike and that was not in dispute. He might have had prior knowledge of the strike. He was present during the strike. Anybody could have told the strikers the outcome of the meeting of the previous day. It could have been one of the members of Management. There should have been no distinction in their treatment.
- [72] The dismissal of the applicants was unfair. They are entitled to the primary remedy of reinstatement with an increase in the benefits they would have received but for the dismissal. A final written warning would be appropriate. Costs should follow the results.

Evaluation.

- [73] The dismissal of the two applicants has always remained common cause in this matter. The respondent had then to prove that it had a fair reason as a basis for their dismissal, see section 192 (2) of the Act. Through this trial the respondent had to prove that the applicants:
- incited/furthered, perpetuated or instigated and participated in an illegal work stoppage on 4 August 2006 and
 - through their commission/omission failed to comply with their obligations as employees and employee representatives;
 - thereby resulting in a situation where the company incurred massive financial losses in lost production.

- [74] It was never disputed by the applicants that the unprotected strike of 4 August 2006 caused the respondent or the company massive financial losses in the production. What the applicants challenged though was the amount of such financial losses. Reference to a failure to comply with their obligations as employees and employee representatives in the context of the evidence led, is reference to a failure to stop the unprotected strike, where the respondent averred that it was Mr. Hlatshwayo whose intervention led to the end of the strike. None of the witnesses called by the respondent were able to produce a shred of evidence of Mr. Hlatshwayo stopping the strike. On the contrary, the applicants' version that they were responsible for the end of the strike not only stood uncontested, some of the respondent's own witnesses accepted the proposition when it was put to them. Accordingly, I accept the applicants' version that the unprotected strike of 4 August 2006 at respondent's company was stopped by the intervention of both applicants. In so doing the two applicants were acting in compliance with their obligations as employees and employee representatives. Their obligations flew from the Masibambane Pact, the Rajah Naidoo settlement agreements and the Riverside Declaration.
- [75] The minutes of the meetings held by Management and the Shop Stewards on 4 August 2006, suggest that Management accepted the *bona fides* of the two applicants in not knowing that there was to be an unprotected strike on that day and that the strike was ended by their intervention. The minutes do show, however that Management did reserve its right to later take disciplinary actions. Reports of those members of Management who witnessed the procession of striking workers marching from the canteen through the Paint Plant and back to the canteen, probably account for the change of heart of the respondent. The respondent must thereafter have entertained doubt about the *bona fides* of the applicants' role in the strike and decided to charge them. In his evidence Mr. Killian went so far as to suggest that the applicants should have stopped the strike as early as 10h50. He took issue with the applicants stopping it some three hours later. The minutes of the meetings and the subsequent charging of the applicants must therefore not be seen as a contradiction on the part of the respondent. The next probe must therefore be whether or not the applicants incited, furthered, perpetuated, or instigated and participated in an illegal work stoppage of 4 August 2006.

- [76] It was common cause that the two applicants were part of the procession of the employees who left the canteen, marched through to the Paint Plant and back to the canteen. To those that were watching this march, the applicants were willingly participating in an unprotected strike they had an obligation to stop. They well knew that the work stoppage was illegal as no attempts had been prior made to comply with the provisions of the Act to make the strike protected. It therefore behoved the applicants to explain their conduct. Their explanation was that it lay in the culture of addressing union members to shout slogans when addressing meetings. This they said was of help to the speaker who would be identifying himself or herself with the group so that he or she could then win the hearts and minds of the group having to be spoken to. I indicated to the parties during their closing submissions that I was aware of that practice and gave them a chance to address me on why I was not to take judicial notice of the practice. Mr. Maeso agreed with the approach but expressed his concern when it came to Mr. Khumalo leaving the roller door opened after being asked to close it. In my view the two are separate issues.
- [77] Judicial notice is accordingly taken that when addressing union members in their meeting, slogans are often shouted with a view to identifying one's self with the group so as to win their heart and minds. In so doing one could be seen as championing the course of that group. The applicants said that they did the same with a view to taking control of the group that was becoming too dangerous to the company property and to other employees. There was no evidence of any workers who were assaulted by this group or any property that was vandalized in the cause of the strike, except the opening of the roller door with the possibility of causing damage to the vehicles that were to be inspected. The costs associated with the plant stoppage related to the costs incurred because of lost production only.
- [78] After the workers had returned to the canteen they were addressed and thereafter the unprotected strike ended. There was no evidence that the march was protracted. Part of the delay in bringing the strike to the end was due to the various meetings that the applicants were involved in about the strike. It remained beyond dispute that Mr. Khumalo went so far as to put his own job of being a Shop Steward on the line, due to a tense atmosphere that was prevailing in the meeting. Mr. Nyadi had just been hauled at. The evidence of the applicants stood unchallenged in this regard. It was always open to the respondent to produce that evidence which it sought to rely on to prove the misconduct complained of.

[79] The two applicants must have clearly understood the pressure they were in, of ensuring that the unprotected strike ended without delays, in line with their obligations as employee representatives. There is thus overwhelming evidence that the applicants succeeded in controlling what otherwise might have been an explosive situation. The criticism of their approach by Mr. Killian was unwarranted and was more theoretical than real in the circumstances. The purported incitement, furtherance, perpetuation or instigation and participation in an illegal work stoppage on 4 August 2006 was a means to an end. It lacked the necessary turpitude for it to amount to an act of misconduct. In my view the respondent did not have sufficient evidence on which it had to convict the two applicants of the misconduct they were charged with. If they were not guilty of the misconduct, they would not have premeditated it. In any event the evidence of the respondent on the premeditation of the strike was based on hearsay evidence that lacked reliability. The hearsay evidence led to speculation in this regard.

[80] The applicants have asked for the primary remedy, in the event of being successful. Witnesses of the respondent who were asked about re-instatement were not averse to it. Section 193 of the Act provides for remedies where a dismissal of an employee has been found to have been unfair and it reads:

“193 Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may-

- (a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal* ;
- (b) order the employer to re-employ the *employee* , either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal* ; or
- (c) order the employer to pay compensation to the *employee* .

(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.”

[81] None of the provisions of section 193 (2) (a) to (d) find application in this matter. It will be fair in the circumstances if the two applicant employees were reinstated.

I was asked by the respondent's counsel to consider the length of period that has endured since the dismissal of applicants and to lean in favour of compensation. I entertain no doubt that such a remedy would be unfair to the applicants who have for so long been unfairly deprived of their jobs. I am alive to the fact that the applicants were posted as Shop Stewards, positions that are dependent on the decisions of the union members and that the respondent may not be able to put them in such positions now. I have also considered the issue of costs.

[82] The following order will therefore issue:

1. The respondent is ordered to reinstate Messrs Khumalo and Nyadi into its employment and into positions favourably similar to those they held on the date of their dismissal, with no loss of earnings or benefits that would have accrued to them but for their dismissal.
2. The two applicants are to report for duty on 28 May 2010 at 07h00.
3. The respondent is ordered to pay the costs of this application.

Cele J.

DATE OF HEARING : 03 December 2009

DATE OF JUDGMENT : 21 May 2010

APPEARANCES

FOR APPLICANT : Brett Purdon of BRETT PURDON
ATTORNEYS

FOR RESPONDENT : M G Maeso of SHEPSTONE &
WYLIE ATTORNEYS