IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) 52/2013

In the matter between

MATEKANE MINING & INVESTMENT COMPANY (PTY) LIMITED **APPELLANT**

and

RETS'ELISITSOE RALIKHOMO & 17 OTHERS **RESPONDENTS**

CORAM: HOWIE JA
THRING JA
LOUW AJA

HEARD: 14 OCTOBER 2014

DELIVERED: 24 OCTOBER 2014

SUMMARY

Labour – Whether opportunity afforded to be heard in relation to threatened dismissal where ultimatums given.

JUDGMENT

HOWIE JA:

[1] This is an appeal on questions of law pursuant to a certificate in terms of s 38 AA (2) of the Labour Code (Amendment) Act 2010 granting the necessary leave for an appeal against the decision of the Labour Appeal Court.

[2] Letseng Diamonds (Pty) Ltd. subcontracted Matekane Mining & Investment Company (Pty) Ltd. ("MMIC"), the appellant, to supply and operate heavy vehicles and machinery at Letseng mine. The respondents were MMIC employees and were required at all relevant times to work 12 hours per day for 14 consecutive days followed by a rest period of 7 weekdays. This was in terms of a ministerial exemption originally granted in 2006 and extended in July 2009. It was also in terms of the respondents' written employment contracts. The

work was performed by way of a dayshift from 6:00 to 18:00 and a night shift from 18:00 to 6:00.

[3] The monthly remuneration payable in terms of their contracts was based on their work time being designated 195 hours at basic salary, 48 hours at 1.25 of the overtime rate and 3 hours at double the overtime rate. (There were other ancillary provisions.)

[4] On 15 April 2010 the respondents notified the Human Resources Manager of MMIC in writing at or about the start of the day shift that they would work no more than 8 hours per day from that date. Shortly before 14:00, in line with that stated intention, those on the day shift ceased work and those on the night shift reported for work. Ultimatums were issued warning of disciplinary action if the 12 hour shifts were not adhered to. Following non-compliance with the ultimatums those on the night shift were dismissed at 18:30 the same day, and those on the day shift the following morning. The reasons for the dismissal were that

the respondents had taken part in an unlawful strike and failed to comply with lawful ultimatums.

[5] The dismissals led to applications by the respondents in the Labour Court for an order declaring the dismissals unlawful and an order for unconditional reinstatement.

[6] The Labour Court held that the respondents had participated in an unlawful strike and that the dismissal of the day shift had followed fair procedure. As to the night shift, it held that the ultimatum concerned was inadequate as to the time it afforded the employees involved to reflect and decide what to do. Their dismissal was accordingly procedurally unfair and they were awarded compensation.

[7] The Labour Appeal Court held that it is a requirement of fair procedure that a hearing precede dismissal and that MMIC was not, on the evidence, absolved from having allowed the respondents a hearing whether before or after the ultimatums and,

no such hearing having been afforded, all the dismissals were unfair. The abovementioned orders sought in the Labour Court were accordingly granted.

[8] The certificated grounds of appeal include the following:

> *"(i) In applying section 66(4) of the Labour Code, 1992 to the facts as found by the Labour Appeal Court, including those additional facts which appear from the record of the Labour Court proceedings insofar as they are not inconsistent with the facts found by the Labour Appeal Court, was the Labour Appeal Court correct in law, relying on* ***Modise & Others v Steve's Spar Blackheath*** *[2000] 21 ILJ 519 (LAC), in concluding, particularly in an unlawful strike context, that both an ultimatum and a hearing (in compliance with the section) were necessary?*

(ii) *If the above question is answered by the Court of Appeal in the affirmative, then was the Labour Appeal Court also correct in law in concluding, as it did, that* ***"the right time for the observance of the audi rule [in a strike context] is before an ultimatum [is] issued"?***

(iii) (a) *In applying Section 66(4) of the Labour Code, 1992 to the facts of the matter was the Labour Appeal Court correct in deciding that* ***"[t]here were no facts and evidence before the Court in the present case justifying the conclusion that the employer could not reasonably be expected to provide [an opportunity at the time of the dismissals for the employees to defend themselves against the allegations made]"?***

(b) In law should the Labour Appeal Court, on the facts that a reasonable Court would have arrived at and upon a proper

application of Section 66(4) thereto, not have concluded that a hearing could not reasonably be provided in the circumstances alternatively a hearing in the circumstances was not necessary at all because it would have served no purpose alternatively in the particular circumstances of the matter the ultimata that the applicant issued were sufficient to constitute compliance with section 66(4)?"

[9] The Labour Court's finding that the respondents were engaged in an illegal strike is not inconsistent with the findings of the Labour Appeal Court. Indeed, it is clear from the judgment in the Labour Appeal Court when considering whether a hearing was required in addition to an ultimatum that the Court's discussion was based on the premise of an unlawful strike.

[10] As to the ultimatums that were given, it is a requirement of paragraph (d) of Code 18 of Labour Code (Codes of Good Practice) Government Notice 4 of 2003 that an ultimatum preceding dismissal

should state in clear and unambiguous terms what is required of the employees and what sanction will be imposed if they do not comply with it. They should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying or by rejecting it.

[11] As to the ultimatums in the present case the Labour Appeal Court said

> *"In our view, there can be no doubt that the employees were given the required ultimatum in this case."*

Moreover, the fairness of the ultimatums is not a certificated appeal issue.

[12] Coming now to the matter of a hearing before dismissal, s 66(4) of Labour Code Order, 1992 says this:

> *"Where an employee is dismissed (for a reason connected with the employee's conduct at the workplace) he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made,*

unless, in light of the circumstances and reason for dismissal, the employer cannot reasonably be expected to provide this opportunity…"

[13] A hearing thus means an opportunity to be heard. There are no requirements as to how such opportunity should be structured or when it should be afforded. Plainly, the words "at the time of dismissal" do not mean, literally, on dismissal or even immediately before dismissal. As the Labour Appeal Court points out, a hearing could be afforded even before the declaration of an ultimatum.

[14] The law's overriding requirement is that dismissal must be procedurally fair cf. **Commander of LDF v Mokoena** LAC 2000-2004 539 (CA) at 545 A-F. Assessment of whether due fairness was observed in any case depends on the facts and circumstances of that case. The norm is for the employer to afford the employees the opportunity to state their reasons opposing dismissal. However, as s 66(4) shows, there may be circumstances where it would not be reasonable to expect the grant of that opportunity.

[15] Where the circumstances allow for the opportunity for the employees to be heard the question is whether in fact that opportunity was given.

[16] The opportunity in question is for the employees to defend themselves "against the allegations made" (s 66(4)) and, as already mentioned, to advance reasons why dismissal should not ensue (**Modise v Steve's Spar Blackheath** (2000) 21 ILJ 519 (LAC) at 543G).

[17] Whether an ultimatum has been given and complied with or not is a separate matter but the facts and circumstances pertaining to the giving of, and non-compliance with, an ultimatum may at one and the same time show that the opportunity to answer the employer's allegations and to fend off dismissal was afforded.

[18] The evidence in this case establishes the following. Mr. B. Malee, Acting General Secretary of the Mining and Construction Workers Union ("MICOWU") wrote

to Mrs. M. Pelesa, MMIC's Human Resources Manager, on 31 March 2010. He requested the opportunity to "visit my members your employees as of the 07/04/10 up till the 15th of April." He went on

> *"The purpose of my visit is partly to inculcate discipline, giving direction to Stewards in relation to their work and others which is not necessary to mention in a letter lest I take more space unnecessarily."*

[19] Mrs. Pelesa wrote him a letter dated 13 April 2010 in which she said

> *"As per our telephonic conversation of 13.04.2010 at 9:10, you are kindly requested to first approach the office of the Association of Lesotho Employers and Business to discuss the finalization of the Recognition and Collective Bargaining Agreement.*
>
> *You are also advised to approach the same office on any burning issue brought to you as you have mentioned, that need urgent attention for discussion."*

[20] The contents of Mrs Pelesa's letter apparently came to the knowledge of the respondents.

[21] Mrs. Pelesa testified in the Labour Court that on the evening of 14 April she was told that the respondents were holding a meeting near the workshop. When she went there they dispersed. She asked one of the shop stewards to call all of the other shop stewards so that she could find out what was happening. He refused. She then asked the shop stewards of the shift on duty to call the other shop stewards for a meeting. They later returned saying they did not find them.

[22] The next day, at about the time the day shift was about to begin, she was given a letter reading as follows:

> *"Workers demand to work hours in terms of the law.*
>
> *After long standing problems that workers have encountered without resolution regarding the hours of work (Exemption) and wages which are*

not improving; workers elect to work legal (eight) 8 hours from the 15th April 2010.

The workers have elected their union to help them through their problems and complaints but after the letter of the 13th April 2010 you wrote to the General Secretary in which you denied him access to meet with the workers, we have learned that there is no use in working non-legal hours especially when our lawyer is denied access to come and guide us."

[23] In response, Mrs Pelesa called all the shop stewards to attend a meeting at 10:00. The meeting having assembled, she tried unsuccessfully to contact Mr. Malee by telephone. The meeting proceeded. She told the shop stewards that working only 8 hours a day was a breach of their employment contracts. They said she had refused to allow Mr. Malee on site. She explained the need for there first to be a recognition agreement in place. They discussed meeting with the respondents at 14:00 when there would be a shift change so that she could tell them to work the stipulated hours while MMIC held discussions with MICOWU. However, the shop

stewards warned her that the respondents would not listen to her and would not speak to anyone on site except representatives of the union.

[24] Mrs. Pelesa then telephoned Mr. B. Macaefa. He was a committee member of a federation to which MICOWU was affiliated and was involved in the drafting of the recognition agreement. He advised her to tell the respondents that she and the shop stewards could meet with the union on 16 April in Maseru and that the respondents should continue to work as normal in the interim. She and the shop stewards parted on the basis that she would meet the respondents at 14:00 when the usual change of shifts occurred.

[25] However, at 13:45 Mrs Pelesa received information that some of the respondents were acting in conflict with their duties and had, in addition, already changed shifts. The intended opportunity to address the respondents had therefore been evaded. She complained about this to the shop stewards and Mr. Macaefa.

[26] At 15:00, on instructions of management, she addressed those on the night shift. She asked why they were prematurely on duty. They gave her no answer. When she added that their union said they must continue to work 12 hour shifts until any changes to their employment conditions were agreed upon they again kept quiet. She ordered them to go to their quarters and return at 18:00 for work.

[27] Shortly afterwards written orders to all the respondents to work usual hours were put on the doors of their houses. The order addressed to the day shift required their immediate return to work and the order in respect of the night shift required their starting work at 18:00 and working 12 hours as usual. Disobedience, said all the notices, would result in disciplinary action.

[28] At 18:00 when the night shift reported for work Mrs Pelesa asked for a meeting with them before they started. At their request she spoke to their representatives and said that the employees should

work 12 hour shifts while discussions with the union took place. The representatives went back to their colleagues and later returned saying that the workers would not work for 12 hours but only seven hours to "top-up" the five worked that afternoon. Their attitude was that if management insisted that they work 12 hours they would rather not work.

[29] Mrs Pelesa then telephoned Mr Macaefa who asked her to let him speak to the shop stewards. Subsequently when she again spoke to Mr Macaefa he told her the workers were adamant that if the company insisted on 12 hours they would rather not work.

[30] She informed the employees that they would be embarking on an unlawful strike and that she was giving them an ultimatum that if they did not work as normal they would be dismissed. She also spoke to the shop stewards warning them of dismissal and asked them to ask the employees to resume normal work but when they reported back they said they could not convince the workers. She then issued a

written ultimatum requiring resumption of work at 18:30 but nobody showed any intention to comply and indeed nobody did comply. Those on the night shift were then dismissed.

[31] As far as the respondents who were on the day shift on 16 April are concerned, Mrs Pelesa met with them and reminded them of the written orders issued to them the previous afternoon requiring them to resume work, which they had refused to do. She said the orders still stood and that they were expected to work 12 hours while the issues between them and the company were being addressed. They refused to resume work. She contacted Mr Macaefa and he asked for a chance to speak to the shop stewards. He subsequently informed her that they said they would work 8 hours or not at all. She asked him to come and discuss matters with the employees but he said he could not do so as he was going to the opening of Parliament.

[32] Accordingly, at 8:00 Mrs Pelesa issued the day shift with an ultimatum requiring their resumption of

work within the ensuing hour. Two further ultimatums were issued which extended the deadline first to 10:00 and finally to 11:00. None were complied with and none elicited any representations from the employees on that shift.

[33] Analysis of the evidence summarised above shows that the respondents adopted a united approach. It was that they refused to work the hours which the exemption permitted and their contracts stipulated. They gave three reasons in the letter they gave Mrs Pelesa at about 6:00 on 15 April. The first was they objected to the requirement to work 12 hours. The appellant's answer was that this was lawful and that if they defied the requirement they would be breaching that contracts and therefore striking illegally. The second was that "wages were not improving", and the third was that their union representative had been denied access to the premises. The appellant's answer was that discussions with the union were contemplated but that usual work hours had to be worked in the interim.

[34] A variation on the payment complaint was provided by one of the respondents, Mr. Aki Mafika, in evidence in the Labour Court. He described it as dissatisfaction "in the way they were initially paid". Asked about this, Mrs Pelesa said payments to every employee were reflected in payslips showing hours worked broken down into basic, overtime and night shift allowance and that payments were in conformity with the exemption.

[35] Another variation referred to in argument before us was that the respondents wanted less hours to be allocated to normal time and more to overtime. However these variations were not matters raised at any time between 6:00 on 15 April and 11:00 on 16 April despite the opportunity in that interval to have raised them.

[36] Reverting to the provisions of s 66(4) of the Labour Order 1992, it is abundantly clear from all the evidence that the respondents were aware that the allegations against them were that they were breaching their contracts and that their refusal to

work constituted an unlawful strike which would end in dismissal unless they relented. They had the opportunity to answer those allegations at any time after 15:00 on 15 April. In effect, they had already answered them in advance in their letter given to Mrs Pelesa early on 15 April. Moreover, the meeting on the evening of 14 April was, by necessary inference, the occasion on which the decision was made to work fewer hours than their contracts required and to adhere to that decision regardless.

[37] In addition, the shop stewards had had various opportunities to speak with Mr Macaefa at Mrs Pelesa's instigation but the respondents remained undeterred despite his view being that they should resume work.

[38] The respondents had opportunities to ask for more time to consider their position but never made use of them.

[39] Each respondent had the opportunity to advance reasons why dismissal should not ensue in his particular case. None took it.

[40] It is instructive to compare this case with that of **Mzeku v Volkswagen SA (Pty) Ltd** (2001) 22 ILJ 1575 (LAC). In paras 41-43 of the judgment one finds the following said in relation to whether the requirement of a hearing had been met:

> *"When the (employer) said that, if the employees continued with their strike, they would face disciplinary action which would include dismissal, the employee delegation had an opportunity to tell the (employer) that it could not dismiss the employees if they continued with the strike for whatever reason. The employee delegation did not do so but instead they said that they would communicate the (employer's) position to the employees. If they wanted to ask the (employer) to give them another opportunity at a later stage, they could have asked for such an opportunity but they did not. This suggests that they themselves had nothing further to say to the (employer) about, among others, its*

> *statement that the strike was illegal and unprocedural and that, if the employees continued with it, disciplinary action, which would include dismissal, would be taken against them."* (1589 F-I).

The employer's position as described in that extract was conveyed to the striking employees in a letter warning of dismissal of employees persisting in refusal to resume "normal work immediately."

The judgment continues

> *"After learning of the employer's position, the employees could have conveyed to the (employer) whatever representations they wished to make to say that the (employer) had no right to, or should not, dismiss them for their conduct even if they were not prepared to resume work. Instead of the employees sending the employee delegation back to the (employer) if they had anything further to say to the (employer) about its contemplated action, they dissolved this delegation. They failed to utilize that opportunity and can, therefore, not be heard to complain that they were not afforded such an opportunity."*(1590 C-E)

And finally-

> *"In our view … the dealings which the (employer) had with the employee delegation so sufficiently shows that the (employer) afforded the employees an opportunity to state their case through the delegation before it could dismiss them that we find the … finding to the contrary inexplicable."* (1590 G-H)

[41] In the case before us the employees, having stated their stance in the letter to Mrs Pelesa, had the opportunity on several occasions after that to state, by themselves and through the shop stewards, their opposition to dismissal. They failed to do so. They simply adhered to the attitude reflected in their letter, declined to say anything new and steadfastly refused to resume work.

[42] This is not a case in which the circumstances did not permit of the opportunity to be heard. On the contrary, such opportunity was afforded. Required fairness was therefore observed by the appellant.

[43] It follows that the Labour Appeal Court was not justified in concluding that the appellant was required to do more. The appeal must accordingly succeed. In the Court below costs were awarded, and in this Court the respondents' counsel asked for costs in their heads. No sound reason suggests itself why costs should not follow the result in this Court and the Court below.

[44] This Court's order is as follows:

1. The appeal succeeds, with costs.
2. The order of the Court below is set aside and in its stead the following is substituted-

> *"The appeal is dismissed, with costs. The cross-appeal is allowed, with costs and the order of the Labour Court is set aside and replaced by the following-*
>
> *'The application is dismissed.'"*

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C. T. HOWIE
JUSTICE OF APPEAL

I agree:

_____

W.G. THRING
JUSTICE OF APPEAL

I agree:

_____

W.J. LOUW
ACTING JUSTICE OF APPEAL

For the Appellant:	H.H.T. Woker
For the Respondents:	L.A. Molati (the heads having been drawn by H.J. Benade and L.A. Molati)