IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU **LAC/CIV/A/02/11**

In the matter between:

RETS'ELISITSOE RALIKHOMO &17 OTHERS APPELLANTS

AND

MATEKANE MINING AND INVESTMENT

COMPANY (PTY) LTD & ANOTHER RESPONDENTS

CORAM: THE HONOURABLE MR JUSTICE K.E. MOSITO AJ.

ASSESSORS: MRS. M. MOSEHLE

MR. L. MATELA

Heard on: 05TH JULY, 2013

Delivered on: 10TH July, 2013

SUMMARY

Appeal from the Labour Court to the Labour Appeal Court – whether the giving of an ultimatum precludes the need to give an employee a hearing as contemplated by section 66(4) of the Labour Code Order 1992. – Court finding that the giving of an ultimatum does not preclude the need to afford an employee a hearing once dismissal is contemplated.

The Labour Court having made an order that neither of the parties had asked for, and without having afforded the parties an opportunity to address the court on such contemplated order. Such a practice inappropriate.

Costs – The application before the Labour Court granted and no order as to costs. - Appeal upheld with costs.

JUDGEMENT

MOSITO AJ

A GENERAL BACKGROUND TO THE CASE

1. In **Mining and Construction Workers Union v Matekane Mining And Investments (Pty) Ltd LC/29/10**, the Mining and Construction Workers Union which was an applicant union filed an application alongside its members who were dismissed by the Respondent on the 15th April 2010 and the 16th April 2010. The Respondent was subcontracted by the Letseng Diamond Mine to execute mining operations at Letseng Mine in the Mokhotlong District. Sometime in 2006 the Letseng Diamond Mine applied for and was granted a two year exemption from the provisions of the **Labour Code Order** 1992, regulating the daily and weekly hours of work as well as rest days. In terms of the exemption all work departments except catering and housekeeping and Administration and Management were allowed to work a 12 hour shift for 14 straight days without rest. Thereafter the workers in those departments proceed on a 7 day rest period.
2. In May 2008 the Management of Letseng Diamond Mine applied for the extension of the period of exemption. It was duly granted and this time for an unlimited duration. Prior thereto a team of three Labour officers were sent to the Letseng Mine to consult with the workers who would be affected by the exemption. They consulted with all the employees working at Letseng Mine, who were employed by various companies

contracted by Letseng Diamond Mine. Among them were the representatives of the employees of the Respondent company.

3. The employees of all the companies had no objection to the granting of the exemption except the employees of the Respondent. The latter complained that they operate big machines which cause them accidents if they drive for long hours, especially at night. The Labour Officer Mamphathi Molapo testified that as part of the team that consulted with the workers they met the management of the Respondent about the concern of the workers and asked them to produce records so that they could assess the rate of accidents caused by the long working hours.
4. The management responded that they did not have record of accidents as none had been reported to them. Evidence further showed that management were surprised that their workers had complained about accidents when they had not reported any accident to management. Mrs. Molapo testified further that they enquired what measures are taken to prevent accidents that workers complained about. Management responded that they had standby workers who relieved those on duty such that the workers did not actually work all the 12 hours they were supposed to work in terms of their contracts.
5. On the 31st day of March 2010, the acting Secretary General of the union, Mr. Bale Malee, wrote to the Human Resources Manager of the Respondent requesting permission to visit Union's members at Respondent's Letseng site from the 7th April to the 15th April 2010. The purpose of the visit was said to be "to inculcate discipline, giving direction to stewards in relation to their work and others…." which the author said were not necessary to mention in a letter. According to the statement of case the Human Resources Manager wrote a letter refusing the General

Secretary permission to meet with the employees. She allegedly informed Mr. Malee to go and meet with Advocate Makeka of Association of Lesotho Employers regarding a Collective Bargaining Agreement. The letter refusing permission to meet with the workers was allegedly given to one Mr. Phamotse Ramarikhoane who divulged the contents of the letter to the rest of the workers. Upon being aware of the contents of the letter the workers decided to write to the Human Resources Manager and informed her that they would henceforth work for eight hours a day instead of the twelve hours because the Human Resources Manager was not willing to allow them to consult with the Union official.

6. Starting on the 15th day of April 2010, the 6.00am shift that would knock off at 6.00pm knocked off at 14.00 hours. The 2nd shift that would start at 6.00pm started at 2.00 pm. They were stopped and ordered to come back at 6.00pm. Before they could start work the Human Resources Manager sought an undertaking that they would work 12 hours as per their contracts. The workers insisted they were going to work only 8 hours. At 18.30 hours all the workers of shift 2 were dismissed.

7. On the 16th April 2010 the Human Resources Manager again sought the undertaking of the morning shift that they were going to work 12 hours. They too refused and insisted they were going to work 8 hours. The Human Resources Manager gave them two and a half hours which was broken into initial 30 minutes and two consecutive periods of 60 minutes. When the employees still did not agree to work 12 hours they were all dismissed.

PROCEEDINGS IN THE LABOUR COURT

8. The union together with its dismissed members filed an application in Court contending that:

    1) The respondent did not follow the rules of natural justice in that no form of disciplinary mechanism was engaged at all.
    2) The dismissal of the applicants is premised upon unfair labour practice that is being practiced continually and unlawfully.
    3) The dismissal of applicants is aimed at coercing them to succumb to an unlawful exemption which was granted contrary to labour laws of Lesotho.
    4) The exemption which is also part of the dispute herein was granted to Letseng Diamonds (Pty) Ltd and not the respondent herein. It is unlawfully being imposed on applicants by the respondent who has not been granted exemption.

9. The Labour Court held firstly, that the various ultimatums Appellants were issued with constituted an opportunity for them to make representations to the contrary regarding why they should not be dismissed. It also, secondly, held that since the second ground on which relief was sought was that the employees' dismissal was premised upon unfair labour practices, there no evidence adduced to substantiate what this. Thirdly, it held that the Appellants led no evidence to show why they claimed that the exemption was granted contrary to the labour laws of Lesotho. Fourthly, it held that Appellants' work stoppage was completely unjustified. They had sought to justify it on the basis that their General Secretary was refused permission to pay them a visit. Instead the General Secretary was asked to finalize negotiations on the recognition agreement

which would in turn provide guidance on how the issues he sought to raise with his members would be approached by the parties. The Court finally held that, it was not satisfied that the group that was dismissed on the evening of the 15th April was given sufficient time to reflect. This group was to report to work at 6.00pm. There was no attempt at persuading them to change their mind as happened to the other group. Right from 6.00 they were given a 30 minutes ultimatum. They were immediately dismissed when it expired at 6.30pm. They were given only 30 minutes to reflect. This was totally inadequate as such it rendered the dismissal of this group procedurally unfair. Accordingly, we order that this group be paid 3 months' salary as compensation for the procedural impropriety of giving them inadequate notice to reflect. There is no order as to costs.

PROCEEDINGS IN THE LABOUR APPEAL COURT

10. The Appellants then noted an appeal to this Court on the following grounds:

> " -1-
> The court a quo erred in holding that the time given as an ultimatum to the appellants failing within the first shift was enough and/or reasonable.
> -2-
> The court erred in awarding the appellants who fall into the second shift compensation equal to three (3) month's salary in that:
> (a) Both counsel had not addressed the court regarding compensation.

(b)The compensation equivalent to the three months was not sought by either of the parties.

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The court erred in refusing appellants' claim in the light of the weight of evidence against respondent."

11. The Respondent has also lodged a cross-appeal on the ground that the court a quo erred in holding that the ultimatums issued to the second shift were in adequate in the light of the evidence presented before her. It will be realised that both the first ground of appeal and the Respondents' cross-appeal revolve around the fairness of the ultimatums issued by the Respondent.

12. It is important to point out that as the court proceeded to consider the grounds mentioned above together with issues around them, both parties came up with a very important issue which we considered we have to determine and as per the request of the parties. It was contended for the Appellants that the employer was enjoined to give the Appellants a hearing if and once it contemplated dismissing them. Advocate Molati argued that a hearing and an ultimatum are two separate issues. He contended that the holding of the one does not necessarily exclude the necessity for the other. He contended that in the present case, although the ultimatum were given, it was clear that, and this was common cause, a hearing be it a post dismissal or pre-dismissal, was not given. He therefore contended that this vitiated the dismissal.

13. Advocate Ntene for the Respondent on the other hand, contended that her client had complied with the provisions of Code 18 of **the Labour Code (Codes of Good Practice) Notice G.N. NO. 4 OF 2003**. She in

particular drew the Court's attention to paragraph (d) of the Code. That paragraph provides as follows:

> "(d) Whether the employees have been given an ultimatum. Prior to dismissal the employer should at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue and ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, such as where the employees/their representatives have refused to meet with the employer, the employer may dispense with them;"

14. There can be no doubt in our view that the employees were given the ultimatum. Whether the ultimatum were reasonable or not is a different issue from the question whether the employees were given a hearing. In our view, there can be no doubt that the employees were given the required ultimatum in this case. However, there is nothing in Code 18 1 (d) that excludes the requirement for a hearing either before or after an ultimatum that may have been given.
15. As a general rule an employer is not relieved of his obligation to observe the *audi* rule when contemplating the dismissal of strikers even if he gives or has given the strikers a fair ultimatum. We are in respectful agreement with the remarks in **Modise and others v Steve's Spar Blackheath [2000]21 ILJ 519 (LAC)** that:

> [73]A hearing and an ultimatum are two different things. They serve separate and distinct purposes. They occur, or, at least ought to occur, at different times in the course of a dispute. The purpose of a hearing is to hear what explanation the other side has for its conduct and to hear such representations as it may make about what action, if any, can or should be taken against it. The purpose of an ultimatum is not to elicit any information or explanations from the workers but to give the workers an opportunity to reflect on their conduct, digest issues and, if need be, seek advice before making the decision whether to heed the ultimatum or not. The consequence of a failure to make use of the opportunity of a hearing need not be dismissal whereas the consequence of a failure to comply with an ultimatum is usually, and, is meant to be, a dismissal. In the case of a hearing the employee is expected to use the opportunity to seek to persuade the employer that he/she is not guilty, and why he/she should not be dismissed. In the case of an ultimatum the employee is expected to use the opportunity provided by an ultimatum to reflect on the situation, before deciding whether or not he will comply with the ultimatum. In the light of all these differences between the *audi* rule and the rule requiring the giving of an ultimatum, there can be no proper basis, in my judgement, for the proposition that the giving of a fair ultimatum is or can be a substitute for the observance of the *audi* rule.

16. Another question that may arise is whether, once it is accepted that a hearing and an ultimatum are two separate requirements and that the

one cannot be a substitute for the other is: which of the two requirements must be complied with first? In other words must an employer first observe the *audi* rule and only later issue an ultimatum or must he first issue an ultimatum and then observe the *audi* rule? It is however, not necessary to decide this issue in this case because it was common course that no hearing was given in this case either before or after the ultimatum. It is significant to point out that in almost all the cases referred to above where the Courts upheld the requirement for a hearing in strike dismissals, ultimatum had been given before the strikers were dismissed. That did not deter the Courts from insisting on the requirement for a hearing nor did the Courts have to decide which side of an ultimatum a hearing had to be or should be. (See

17. I may point out *en passant* that, as Zondo AJP pointed out in ***Modise's*** case *(supra),* may be the right time for the observance of the *audi* rule is before an ultimatum can be issued because, at that stage, unlike when the ultimatum has been issued, the employer may be more amenable to persuasion. If the observance of the *audi* rule must take place before an ultimatum is issued, the way it could work may well be the following: the employer would invite the strikers or their union or their representatives to make representations by a given time why they cannot be said to be participating in an illegal or illegitimate strike and, if that is so, why they should not be issued with an ultimatum calling upon them to resume work by a certain time or be dismissed. The dismissal would only result from a failure to comply with such ultimatum. If, after hearing or reading their representations, the employer is satisfied that the strike is illegal or illegitimate and that it would not be unfair to issue an ultimatum at that stage, he could then issue an ultimatum calling upon them to resume

work by a certain time or face dismissal. If they complied with the ultimatum, he would not dismiss them. If they failed to comply with the ultimatum, he would then be entitled to dismiss. In that case there would have been an observance of the audi rule and the employer will have been able to dismiss those who defy his ultimatum. In that case there can be no complaint by the strikers that they were not given an opportunity to state their case before they could be dismissed. It may well be that this is how the *audi* rule can be observed in the context of a strike and an ultimatum but, as I have already said, it is not necessary to decide the point.

18. As was the case in ***Modise's*** case *(supra),* and also in argument before us in this case as well, the issue is whether, because strikers act collectively when they go on strike, an employer is not entitled to respond collectively. This has been said in order to make the point that an employer in such a situation is justified in not affording strikers a hearing when he contemplates dismissing them. (See **Vetsak at (1996) 17 ILJ 455(A) at 468E-G**). In our view, and as was the view of the Court in ***Modise's*** case *(supra),* the employer's right to respond collectively to employees' collective action is not mutually exclusive with the strikers' right to be heard before they can be dismissed. That an employer is entitled to respond collectively means nothing more than that he can deal with the strikers as a group and not as individuals. The employees' collective action does not give the employer a licence to disregard the *audi* rule altogether. There is no reason why the employer cannot comply with the *audi* rule by calling for collective representations why the strikers should not be dismissed.

19. On the issue whether the employees were entitled to be heard before a dismissal, the starting point should be section 66 of the **Labour Code Order, No.24 of 1992** which provides that:

> (1) An employee shall not be dismissed, whether adequate notice is given or not, unless there is a valid reason for termination of employment, which reason is
>
> (a) ...
>
> (b) connected with the conduct of the employee at the workplace; or
>
> (c) ....

20. The next section that follows is section 66(4) of the **Labour Code Order** which provides that, '[w]here an employee is dismissed under subsection (1)(a) or (b) of this section, 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. The exercise or non-exercise of this right shall not act as any bar to an employee challenging the dismissal pursuant to the terms of a collective agreement or contract of employment, or under the provisions of the Code.' The answer to the question whether the employees were entitled to be heard at the time of dismissal is answered in the affirmative.

21. The related question is whether, at the time of dismissal as well as in light of the circumstances and reason for dismissal, the employer cannot reasonably be expected to provide this opportunity. This is a factual enquiry that must be determined in light of the facts and evidence before Court. The reason for dismissal was misconduct in the nature of an illegal strike. There were no facts and evidence before Court in the present case

justifying the conclusion that the employer could not reasonably be expected to provide this opportunity. There is therefore, no reason why the employer could have not complied with the *audi* rule by calling for collective representations why the strikers should not be dismissed.

22. The second ground is that, the Court erred in awarding the Appellants who fall into the second shift compensation equal to three (3) month's salary in that: Both counsel had not addressed the Court regarding compensation. The compensation equivalent to the three months was not sought by either of the parties. It was common cause between the parties that both counsel had not addressed the Court regarding compensation and that, the compensation equivalent to the three months was not sought by either of the parties.

23. This Court and the Court of Appeal have on various occasions pointed out that a Court cannot grant an order that none of the parties has asked for. In several of its decisions the Court of Appeal of Lesotho has deprecated the practice of granting orders which are not sought for by the litigants. (See for example **The Presiding Officer N.S.S.(L. Makakole) v Malebanye Malebanye C of A (CIV) 05/07 at par 9; Nkuebe v. Attorney General and Others 2000 – 2004 LAC 295 at 301 B – D; Mophato oa Morija v. Lesotho Evangelical Church 2000 – 2004 LAC 354**). Similarly, the Court of Appeal has more than once deplored the practice of relying on issues which are not raised or pleaded by the parties to litigation.(See for example **Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at 373;**

Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449).

24. It is clear from the aforegoing authorities that the practice of granting orders sought by neither party and, that of making decisions on issues in respect of which the parties were never invited to address the Court on has been deprecated by our Courts as being unacceptable in the practice of the law in this country. It is clear from the concessions by both counsel that the presiding Deputy President in the Court a quo did not give the parties an opportunity to address her on the order that she intended to make in respect of compensation.

25. The need for the parties to address the Court on issues in respect of which the Court intends to make a decision is one that cannot be over emphasised. When the parties were invited by this Court to indicate what their attitude would be should the Court find that there was a problem with the approach by the Labour Court regarding making decisions on issues on which neither party had been invited to address the Court nor had anyone pleaded such issues, the parties, correctly so in our view, indicated that they would prefer that the case be remitted to the Labour Court for consideration of the compensation issues.

26. The problem however that we have found is that this would be the best approach if the Labour Court had correctly found that the dismissals were fair and the only issue that had to be addressed was whether it was impracticable or not to reinstate the employees, in which case then the Court would have to consider the question of compensation as contemplated by section 73(2) of the Labour Code Order 1992. In our view, it would not serve the purpose to remit the matter to the Labour Court for addressing issues of compensation for two main reasons. First,

it is clear that the employees were dismissed without a hearing relating to the dismissal and contrary to section 66 (4) of the Labour Code Order 1992. Once that is accepted as it has in this case, then their dismissals were unfair. Once the dismissals were unfair the second issue would have been whether reinstatement was impracticable in the circumstances of the case. There is no basis for holding that it was.

27. There were also no facts pleaded on the issue of the impracticability of reinstatement. There were again no facts upon which the Court could determine and assess the quantum of compensation in this matter. All these issues wanting and not satisfied before the Labour Court, we have no other alternative but to interfere with the decision of the Labour Court in the matter.

CONCLUSION

28. In all the circumstances of this case as discussed above, the following order is made:
    1. The appeal succeeds with costs.
    2. The order of the Labour Court is altered to read that: "The application is granted in terms of prayers (a) and (b) of the originating application. This being an unfair dismissal application, there shall be no order as to costs."
29. This is a unanimous decision of the Court.

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K.E. MOSITO AJ.
Judge of the Labour Appeal Court

For the Appellants Adv. L.A. Molati

For the Respondent Adv. R. Ntene