

IN THE LABOUR COURT OF LESOTHO LC/98/05

HELD AT MASERU

IN THE MATTER BETWEEN

MPHO LESALE & 30 OTHERS

APPLICANT

AND

**INDEPENDENT CASH N CARRY GROUP
T/A FAHIDA CASH & CARRY (PTY) LTD**

RESPONDENT

JUDGMENT

DATES OF HEARING: 08/06/06, 27/07/06, 27/09/06, 07/11/06

Strike – Employer acting hastily in treating workers’ initial stoppage as a strike – To qualify as a strike, the workers initial stoppage or refusal to work must persist even after third party intervention – Deduction of wages without consultation – That act is arbitrary and contrary to rules of natural justice – Employees were entitled to stop work to report such act to the Labour Commissioner – such stoppage does not constitute valid reasons for dismissal – Dismissal unfair.

1. Applicants instituted the present proceedings following their dismissal by the respondent for allegedly participating in an illegal strike, on the 19th September 2005. They were at all stages of these proceedings assisted and represented by the Labour Commissioner acting pursuant to Section 16(b) of the Labour Code Order 1992 (the Code) which empowers the Labour Commissioner to:

“institute and carry on civil proceedings on behalf of any employee, or employee’s family or representative, against any employer in respect of any matter or thing or cause of action

arising in connection with the employment of such employee or the termination of such employment.”

2. The facts are brief. The respondent is a wholesale grocer. Sometime during the week of 14th September 2005, Mr. Emmanuel Teboho Mahone, who was responsible for internal security and internal investigations discovered empty tins which showed that tin stuffs had been opened and eaten inside the shop. The empty tins had been stuffed inside the pillars supporting the roofing and they could not easily be seen.
3. Mr. Mahone who testified as DW2 stated that he took the empty tins, which were mostly beef to the management. The latter instructed that he and the Human Resources Manager Mr. Mothepu must carry out investigations.
4. They obliged. DW2 says he only recalls an interview with one Victor Pillay who denied any knowledge of the consumption of tinned food inside the shop. He also questioned others whom he had forgotten, but they all denied any knowledge.
5. DW1, Mr. Mothepu recalled only three persons among those that they questioned. Those according to his evidence were Victor Pillay, Moeketsi Mapota and Mabetha. He did not recall others but again none admitted knowing anything about the eaten food.
6. On Saturday 17th September at 2.00 pm, the employees were to be paid their weekly wages as they are weekly paid. DW1 testified that he was instructed by the Managing Director of the respondent that he must divide the cost of the waste caused by the consumed foodstuffs among all the floor staff.
7. The cost of the eaten foodstuffs had been found to be M34,000.00. The floor staff were the shelf packers, and the rest of the staff who help customers on the floor. There were thirty five workers affected by the decision. The divided cost made each of the 35 workers liable to pay the employer M990.15, which was going to be paid in twenty weeks with M50.00 deducted from the wages of each one of them each week.

8. When the workers got paid on the 17th September 2005, they were each made to sign an “acknowledgement of debt” letter in which they “accepted” responsibility for the loss and “authorised” the employer to deduct M50.00 from their wages for the next twenty weeks.
9. Employees were unhappy with the decision. However, the Human Resources Manager told them to go home and promised that whatever grievance they had regarding the deduction made in their wages would be discussed on Monday 19th September 2005.
10. On the 19th September workers reported to work as usual. However, when the doors opened for the workers to start their day’s shift, the floor staff remained outside. According to their evidence they were waiting for the Human Resources Manager to grant them the meeting to discuss their wage deductions as promised on Saturday.
11. According to PW1 Litaba Mohatle, the Human Resources Manager failed to come and address them until they decided to call him. After about 5 minutes he came and instructed them to resume work. The workers made noise seeking to know why he was not going to address their grievances. Mr. Mothepu allegedly told them he would not talk to them. They then decided to go to the office of the District Labour Office to report.
12. This was also the evidence of PW2 and PW3 Motsamai Koeshe and Lebona Rathapeli respectively. Respondent through Mr. Mothepu however denies that Mr. Mothepu was called by the staff to come and talk to them.
13. Mr. Mothepu testified that when twenty minutes passed and the floor staff still remained standing outside, he wrote an ultimatum which he went to them with. He explained it in Sesotho and gave the complainants ten minutes to start working or risk being dismissed. He also told them to nominate two people to go and engage with him about any grievances they had. He testified that the workers chose to walk away and went where he did not know. Workers deny any knowledge of the ultimatum or request that they nominate two representatives to talk with management on their behalf.

14. At the instruction of management he wrote a letter to Labour Commissioner and the DDPR explaining to them why they as the management considered the workers to have dismissed themselves as they had engaged in an illegal strike.
15. He went to the DDPR and to the Labour Office to deliver the letters and he found the workers at the District Labour Office. A few hours after he returned to his office he was given a letter which came from the District Labour Officer Mr. Mako. The letter instructed him to reinstate the workers and to stop deducting their wages.
16. The workers confirm that the District Labour Officer wrote such a letter. They aver further that the letter was taken by them to the employer. However, when they got to the gate they were refused entry by the security guards. They (the security) took the letter to Mr. Mothepu and came back to tell them that Mr. Mothepu said he would only talk to them at Labour.
17. Mr. Mothepu denies saying that. He infact says that he never even knew that the workers were the ones who delivered the letter. The workers aver that upon being refused access they went back to Labour to report what transpired.
18. The applicants then filed the present application challenging the procedural and substantive fairness of their dismissal of the applicants. Procedurally it was averred that the applicants were dismissed without being afforded a hearing. Substantively it was pointed out that the applicants refused to work because their wages were being illegally deducted and they wanted that issue clarified by the employer.
19. Strike is defined by the Code in part as an,

*“act of any number of employees who are or have been in the employment of the same employer...done in contemplation or furtherance of a trade dispute;
(a) in discontinuing that employment whether wholly or partially*

(b) *in refusing or failing after any such discontinuance to resume or return to their employment”*.

20. It is common cause that the complainants in this matter did fail to start work as expected on the morning of the 19th September 2005. Thus they satisfied paragraph (a) of the definition of a strike.
21. Evidence of DW1 is that after the workers failed to start work, he was instructed to write a letter to the Labour Commissioner and the DDPR to inform them that the staff who had not started work had dismissed themselves. Evidence of the complainants on the other hand is that they went to report to the Labour Office and after they were written a letter by the District Labour Officer they went back to the employer with it. They however were stopped at the gate by the security.
22. Paragraph (b) of the definition says the stoppage of work shall constitute a strike if after the discontinuance, the concerned workers continue to refuse or to fail to “resume or return to their employment.” In other words the stoppage must continue even after a third party such as the Labour Commissioner intervened.
23. If the respondent is to succeed in their contention that the workers engaged in an illegal strike they must prove that after that initial stoppage the workers continued to refuse or to fail to resume their work. Evidence of the complainants is that after the intervention of the District Labour Officer they returned to work but were refused entry.
24. This evidence has not been denied save that Mr. Mothepu said he did not know that they were the ones who brought the letter. All that he saw was the letter from the District Labour Officer. It is clear to us that, even if he had known about their presence that would have made no difference because, he and his management had long decided that the workers had engaged in an illegal strike and therefore had dismissed themselves.
25. It is further clear to us that by returning to the workplace with the letter from the Labour Officer and showing their desire to enter the premises of the employer; the workers were showing that they

were not intending to continue to refuse to resume or to return to their employment. That act on their part broke the link necessary to constitute their conduct as a strike.

26. Unfortunately for the respondent, it acted precipitately in regarding the employees' act as a strike and deciding that it had dismissed them. This was most unfortunate because the state of affairs had been provoked by the employer's unjustified deduction of their wages. The decision to dismiss was so haste that even the so-called ultimatum was itself no more than going through motions.
27. During evidence in chief and under cross-examination, it emerged that not all the workers who worked in the division where the consumption of stock occurred were questioned. DW1 recalled three such people while DW2 recalled only one. They both admitted however, that only a group, but not all were questioned.
28. Before us only one person PW2 admitted being asked about the incident. Both DW1 and DW2 admitted that their investigation drew a blank. Under the instruction of the Managing Director, they did the most callous act of arbitrarily dividing the cost of the pillage among all employees of the shop floor whether they had been questioned about the incident or not.
29. This act on the part of the employer was clearly contrary to the principles of natural justice and as such unlawful. It equally infringed section 85(3) of the Code in as much as that section only permits deduction to be made if the loss or damage caused by an employee is proved against such an employee. (see also Labour Commissioner (OBO Matsoanelo Thene & 2 Others .v. Mathabo McCloy And Associates (Pty) Ltd LC01/06 (unreported)).
30. To the extent that the act of the employer in deducting the wages of the complainants without proof of their liability was unlawful; the applicants were legally entitled to report that unlawful act to the Labour Commissioner.
31. In terms of section 66(3) of the Code, the following shall not constitute valid reason for termination of employment:

“(a)

“(b)

“(c) *the filing in good faith of a complaint or grievance, or the participation in a proceeding against an employer involving the alleged violation of the Code, other laws or regulations or the terms of a collective agreement or award.*”

It follows therefore that the dismissal of the complainants was contrary to the law in this respect as well.

32. The application accordingly succeeds and the dismissal of the applicants is declared procedurally and substantively unfair and contrary to the provisions of the Code.
33. The applicant had sought the reinstatement of all the dismissed employees or twelve months compensation and other terminal benefits. The court was however not addressed on these aspects. For this reason, we defer the question whether to reinstate the complainants or order payment of compensation to a date after Counsels would have addressed the court on the issue. The legal representatives shall therefore approach the Registrar for allocation of a date when they can address us on the suitable relief in this matter. There is no order as to costs.

THUS DONE AT MASERU THIS 28TH DAY OF NOVEMBER 2006

L. A. LETHOBANE
PRESIDENT

**J. M. TAU
MEMBER**

I CONCUR

**D. TWALA
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MR. MOCHOKO
MR. CHOBOKOANE**