

IN THE LABOUR COURT OF LESOTHO

LC/20/2004

HELD AT MASERU

IN THE MATTER BETWEEN

FACTORY WORKERS UNION

APPLICANT

AND

**TZICC CLOTHING MANUFACTURERS
(PTY) LTD**

RESPONDENT

JUDGMENT

*Strike - whether employees engaged in a strike -
Evidence point to occurrence of a strike. Procedure - Was
proper procedure followed in dismissing striking workers -
Employer issuing one group of employers with notices of
hearing but finally dismissing them without hearing -
dismissal procedurally unfair - Employer dismissing
another group without first issuing them with ultimatums -
Dismissals substantively unfair.*

INTRODUCTION

1. This case has a history of the longest trial that this court has dealt with to date. It was heard over a period of 11 days some of which the court would sit from 09.00 am until 17.30 pm in the evening. Two things need special mention. Firstly, when this case was first heard on 12th July 2005, it was before the President and learned panelists Messrs Paul Lerotholi and Cosmas Mothepu. Only one witness testified after which the case was postponed. Before the trial could be re-scheduled Mr. Lerotholi sadly passed away.

2. At the resumed hearing on the 2nd November 2005, Counsel for both parties were briefed about the developments. In the meantime, Mr. Cosmas Mothepu had since tendered his resignation due to pressing demands of his work. It was then agreed that the trial starts de novo with new panelists.
3. The second difficulty was the non-commitment of Counsel on both sides to help the court realize the speedy finalization of this trial. Thus on the 9th May 2006, the case had to proceed without Counsel for the respondent who had disappeared from the court grounds where he had earlier in the morning been spotted. This resulted in Counsel having to apply for the recall of PW3 who had testified and concluded his testimony in Counsel's absence. The application was granted but it must be said that it further contributed to the delay in the finalization of this matter.
4. On the 12th March 2008, when the respondent was supposed to lead their last witness or close their case, Mr. Mohaleroe for the respondent was again not before court without any explanation. The court waited until 12.00 noon. Counsel for the applicant informed the court that he has learned that Mr. Mohaleroe was at the grounds during the brief moment he (Mr. Thoahlane) had attended a short matter in the High Court. He had once again disappeared without explanation.
5. Mr. Thoahlane moved that the court should close leading of any further evidence and order that Counsel get to the stage of addresses. This was done and Counsel were given 14 days to file written submissions. This was to have been done by the 28th March 2008. Neither party submitted written submissions as directed until the court decided to proceed to make this judgment basing itself on the record of the evidence tendered during the trial. No such submissions were filed until the writing of this judgment was concluded.

HISTORICAL BACKGROUND OF THE DISPUTE

6. This case arises out of the events that happened on the 18th, 19th and 20th August 2003. There is a dispute exactly when the employees were terminated. It is however common cause that

- on the 18th there was a work stoppage by the employees of the respondent who are also members of the applicant union. The respondent says the stoppage amounted to an unlawful strike while the applicant union says the employees simply sought talks with the management.
7. It is further common cause that the union and the management struck a deal in terms of which workers were to resume work on the afternoon of the 19th August 2003. In terms of that agreement however, there were some employees who had engaged in unlawful acts of assaulting other employees, damaged the property of the factory and had aided and abetted the alleged unlawful strike. The employer and the union agreed that the culprits would be identified and disciplined.
8. The exercise of identifying the people who were suspected of engaging in acts of illegality was conducted in the afternoon of the 19th after all the workers had resumed their duties. A team made up of management, representatives of the union and the police went around the lines in the factory identifying suspects and taking their names down. In all 98 people were identified. On the 20th the affected workers were served with notices of hearing and suspended on full pay until the date of the hearing, which was scheduled for Thursday 21st August 2003. It is out of the attempt to disciplinarily deal with these workers that a misunderstanding arose which led in the mass dismissal of all the employees of the respondent. It is also out of those dismissals that these proceedings have been filed by the union on behalf of those dismissed employees.

STATEMENT OF CASE

9. The union issued the Originating Application out of the registry of this court on the 2nd April 2004. The applicant has made a lengthy inelegant Originating Application in which it has essentially pleaded evidence. In summary however, the applicant union avers that on the 18th August 2003 a supervisor named Ashang pushed a worker who was wearing a traditional attire. She also pushed another worker who saw her push the first mentioned lady and laughed at the incident. It is averred

that when this happened it was at 12.00 noon when workers were supposed to go for lunch break.

10. When workers returned from lunch at 13.00 hrs, they stopped work and demanded that the management come and address them in relation to the problems created by Ashang, because this was not the first time that Ashang had treated a worker in a similar manner. It is averred further that workers waited calmly for 30 minutes and when the Managing Director first came to them he was already armed with an ultimatum warning the workers that they were on an unlawful strike. The workers nonetheless pointed out that they were not on strike, "all they wanted was to enter into negotiations with their superior manager."
11. It is averred further that officials of the Department of Labour and the Lesotho National Development Corporation arrived and unsuccessfully attempted to settle the dispute. It is alleged that the employer refused to enter into any talks with the workers and that even the Regional Organiser Mr. Sam Mokhele who was also at the scene was not entertained by management. The police arrived led by Senior Inspector Masupha and sought to arrange a meeting between the workers and management. Workers appointed four representatives to go into talks but again the management declined to talk with them and said they had already dismissed all the workers.
12. The workers then decided that they were not going to leave the factory and that they "hold a night vigil until management comes to speak to them for they were obliged to be given a hearing inasmuch as the workers themselves also wanted to know why they had been dismissed." The police were allegedly informed of the decision and Senior Inspector Masupha is alleged to have sanctioned the vigil, but warned that there should be no threat to life or property.
13. The following day at 7.30 am, whilst those workers who had spent the night in the factory were still calmly sitting down, they were attacked with fire fighting powder by four Chinese supervisors, who had taken positions at each of the four corners of the

factory. Workers ran outside the factory and while standing outside, Senior Inspector Masupha came to address them and invited them for a meeting with management. Workers responded that they were waiting for the union official, Mr. Mokhele. On his arrival the official was allowed alone into the meeting accompanied only by Senior Inspector Masupha.

14. The meeting ended at around lunch time. Sam Mokhele reported to workers that they had agreed that all workers return to work. Furthermore, the management's concern about workers who assaulted Chinese personnel and damaged property will be recorded down in an agreement to be signed by the union and the management. He reported further that the perpetrators of the alleged acts of unlawfulness will be identified and dealt with disciplinarily. An agreement containing the aforesaid aspects was duly signed at 12.00 noon on the 19th August 2003 and at 13.00 hours workers duly resumed work.
15. At 14.00 hours the management accompanied by the Regional Organiser Mr. Mokhele and the Senior Inspector Masupha went into the factory and walked through the lines pointing at machines which were alleged to be damaged and photographing them. They also pointed at certain individual workers whose names were recorded down. It must be mentioned that the Originating Application disputes the truthfulness of the claim that there were some machines that had been broken.
16. In all some ninety eight (98) employees were identified as possible culprits who had to be charged. On the 20th August, those employees who had been identified were called to the office and served with notices of suspension pending disciplinary hearing that was to be held on the 21st August. It is alleged that the suspended employees complied and duly came back for hearings on the 21st August. It is further alleged that no hearings were conducted as promised and that Senior Inspector Masupha arrived and drove workers out of the factory. The workers duly went out and they were singing. It is further alleged that Mr. Masupha instructed those workers who had just been driven out of the factory to go home to avoid being caught

in the cross-fire. All workers including those who were there for a hearing decided to vacate the premises of the factory lest something sinister happened, the Originating Application avers. While they were standing outside the premises as alleged, the workers saw notices being put up informing them that they were all dismissed. The Regional Organiser Mr. Mokhele attempted to negotiate but the management was adamant that all the workers had been dismissed. The workers were paid their terminal benefits on the 25th August. On the 1st September the employer reemployed the dismissed employees albeit selectively.

17. It is against the backdrop of the foregoing allegations that the union filed these proceedings on behalf of those of its members who were dismissed and were not reemployed. The union averred that the termination of their contracts was unlawful and unfair for the following reasons:

- (a) No letter outlining charges was attached to the letter of suspension (annexure "D") as alleged in the letter.
- (b) No hearings were held prior to the dismissal.
- (c) The dismissals were a ploy to get rid of the employees to avoid paying severance pay as some of the employees like one Neo Majara were dismissed despite not being at work.
- (d) The employees who were served with the suspension letters cannot be accused of being on an illegal strike or committing any of the alleged offences that other employees are supposed to have committed, because they were excluded from the factory premises since the 19th August to the 21st when they were supposed to come for the hearings.

EVIDENCE

18. The applicants led the evidence of six witnesses to substantiate their case. We will summarise their testimony seriatim.

PW1 MATHIBELI MELAO

19. She is a woman of Ha Makhoathi aged 28 years. Her testimony is that she started working for the respondent on the 30/01/01 and was dismissed together with other employees on the 25th August 2003. Asked to explain events of the 18th August 2005, she said that on the 14th or the 15th the workers wrote a letter to the management of the respondent requesting for a meeting on the 18th August to discuss grievances contained in the letter. She testified further that the Managing Director, one Mr. David Chen accepted the letter and promised to meet them at 13.00 hours.
20. She averred that on the 18th when they retired for lunch, a manager named Ashang stopped Supervisors from searching them as it was customary. She out of nowhere went for a lady who was wearing a traditional dress and pushed her saying that she no longer needed her. A sweeper who witnessed the incident and laughed was also pushed by Ashang. She testified that they were only searched at 12.20 hours and that the last person was only able to get out of the factory at 12.45 hours.
21. She averred that when they returned from lunch they sat down and waited for David Chen to come and talk to them as requested and duly promised. She averred further that David came at around 13.15 hours and asked why they were not working. The workers responded that they were waiting for him to come and address them as he had promised. She testified that David went back without saying anything. He came back at around 13.25 hours accompanied by the Personnel Manager and the office clerk. They were carrying a notice which informed them that they (the workers) were on an unlawful strike. The workers denied that they were on strike and said they only wanted to have a meeting to address their grievances. Five minutes later another notice was issued warning workers that they would be dismissed if they did not resume work within thirty (30) minutes. Workers ignored it and at around 13.45 hours David came with one Mr. Tsai whom workers refer to as the owner of the firm. She testified that Tsai told them that they

were all dismissed and that they should wait for their terminal benefits.

22. PW1 testified further that the workers continued to sit down. Officials of the Labour Department came and sought two representatives to go into the meeting with management. The workers did give names of two persons one Matanki Mokhantso and Moipone who later came back and said Tsai had refused to talk to them. The Labour Department officials left and the workers decided to sleep in the factory because they had still not been paid what they were told to wait for. However at 7.00 pm the supervisors cleared off the work material that was still at the work stations.
23. At 7.00 am the following day when the workers who came from home arrived Mr. Tsai refused them entry. Mr. Tsai and the three other Chinese supervisors took fire extinguishing tanks which were empty and went to refill them. When they returned they positioned themselves at each of the corners and sprayed the workers who had slept in the factory with the powder. Workers ran outside the factory and while standing outside the Regional Organiser arrived with the Police. The management refused him entry but with the help of the Police he finally got in. At around 12.00 noon the Regional Organiser came to report that they had reached agreement that workers should return to work. He further told them that management had said it intended to discipline those workers who attacked Chinese supervisors and who also damaged machines.
24. Work did resume in the afternoon and at 14.00 hours management accompanied by the Regional Organizer went through the lines pointing out workers who had allegedly assaulted Chinese supervisors and damaged machines. Workers knocked off at 5.00 pm as usual. On the 20th the workers who were identified the previous day were called to the office, one by one. They found the Personnel Officer Mr. Nkesi who read them a letter thereafter gave it to them and retained a copy. The letter informed them to go home and come back the following day for a hearing.

25. The witness testified that they complied and came back on the 21st for a hearing. They waited for the hearings to commence but nothing happened. Ashang drove out those workers who were inside the factory and working and told them that the factory was closed. Senior Inspector Masupha told those workers who were not served with suspension letter to go outside the factory and those with suspension letter to come inside because he did not want those who had not been suspended to be caught in the cross-fire.
26. The witness testified that they sat outside the factory until around 10.00 am when they enquired when the hearings would start and they were told that management was waiting for the Managing Director. Whilst still sitting outside, a poster was put up by one Tsitoe that informed them that they were dismissed and they should come on the 22nd August to collect their terminal benefits.
27. In cross-examination the witness was asked about the letter written by the employees who were not on suspension dated 20th August 2003, (Annexure "TZICC3") she said she did not know about it. She was referred to annexure "B" to the Originating Application where all the employees including herself have signed that they were dismissed on the 20th August 2003. She was asked which date of dismissal is correct between the 20th and the 25th which she initially testified was the date of her dismissal. She said the correct date of her dismissal is the 20th August. By her own admission therefore, PW1 was dismissed on the 20th and events she purported to testify about relating to the 21st cannot possibly be true as she was already dismissed.

PW2 MOEKETSI NTITSANE

28. This witness testified that he was not at work on the 18th August as he had consulted a doctor. On the 19th when he reported for work he found the rest of the workers outside the factory premises. He attempted to go inside and was prevented by the security. He testified that they stood outside until around 12.00 hours when the Regional Organizer arrived and went inside to

- talk with the management. He testified that at around 14.00 hours they were allowed to resume work, but names of persons who were alleged to have broken equipment were taken down.
29. The witness testified that to his surprise his name was also taken down and yet the equipment was said to have been broken on the 18th when he was not at work. He produced what he termed a receipt of payment to prove that he had gone to the doctor. The exhibit which was marked "1D2" turned out to be an appointment card, which does not even show who the witness had to meet.
30. He testified further that on the 20th August he was one of those who were served with suspension letters; which also called them for a hearing on the 21st August. The witness further testified that the letter he got also contained charges which alleged that he assaulted Chinese supervisors and that he damaged machines on the 18th.
31. The witness testified further that they came to work on the 21st to attend the hearings. On arrival they found the Police already there. When they tried to go inside the factory the Police stopped them. He said they tried to explain the purpose of their being there, but the Police would not listen.
32. The witness was asked if there was any disturbance at the time, he said there was none. Asked what happened after Police prevented them from going inside, he said they remained outside until the evening when they went home. He testified that they came again on the 22nd and they were told that they were dismissed and that they should come back on the 23rd to collect their benefits.
33. Under cross-examination the witness was told that his founding papers say he was dismissed on the 20th and asked to reconcile the statement of case with his evidence that he was dismissed on the 22nd August. He was adamant that he was dismissed on the 22nd and that he knows nothing about workers being dismissed on the 25th August as PW1 had originally testified.

34. While we give allowance that given the length of time since the incident forming the subject of this trial occurred, this witness is particularly unreliable. They have all signed a list prepared by their union saying that they were dismissed on the 20th August. If they went to their place of work on the 21st, it might explain why the police chased them away because their presence there was no longer needed as they had been dismissed already.

PW3 SAMUEL MOKHELE

35. PW3 is the National Organiser of the applicant, who at the time of the happenings of August 2003 was a Regional Organiser. His evidence was that on the 18th August he hurried to the first respondent after he got a report that workers were being served with ultimatums. He averred that on arrival he was refused entry at the gate because it was said he had not made an appointment. It is significant to note that PW1 who was admittedly at work on the 18th August never said anything about PW3 coming to the factory on that day. Her evidence is that PW3 came to the factory on the 19th August after the workers had been dispersed with fire extinguishing powder.

36. PW3 testified further that he returned at the gate as he was not allowed in by the security. However before he went back he was able to speak to some workers through the gate, who were outside the factory. They informed him that they were already dismissed and that they were waiting for their terminal benefits. He stated that he only learned the following day when he came back that workers had slept inside the factory. He went further to state that management still refused him entry, until he asked Senior Inspector Masupha to broker a negotiation meeting between him and the management which he successfully did.

37. The witness testified that at the meeting he was informed that workers had been dismissed because they embarked on an unlawful strike. For their part the workers explained that they had submitted grievances to the management which the latter had agreed to address at 13.00 hours on the 18th August. The witness testified that he had also had a discussion with Mr. Chen, the Manager who had asked him to write the grievances

down to enable him to respond to them. He testified further the union's position was that workers were not on strike, they merely wanted to have their grievances addressed by the management. At the end it was agreed that there was no strike, but management raised a concern that some supervisors had been assaulted and there had been damage to property.

38. PW3 testified further that the union agreed that the culprits be disciplined. An agreement to that effect was drawn and signed by both sides. Thereafter the workers returned to work. He conceded that he was involved that afternoon when those responsible were being identified. Workers worked as normal that afternoon until knock off. According to PW3 that was the last time that he was at respondent. Asked what transpired on the 20th August he said he did not know apart from what he was told because he was no longer there.
39. The witness was asked in chief when he had the telephonic discussion with David that he said they had. He said it was some date before the 18th August. He was asked how he came to be aware of the complaints. He said the shop steward had come to report the problems they were facing at work. He stated that the union office advised them (the shop stewards) of the steps they should follow to communicate their problems. He stated further that after they were advised of the steps to follow the shop stewards came to report that they still had problems. He averred that they had come to report during lunch. He telephoned Mr. Chen who said the union should write the complaints down and the letter of the 18th August Annexure "TZICC2" was then written.
40. I deliberately single out this story to show how good this witness is at creating stories. The elaborate consultation he is supposed to have had with the shop stewards prior to the events of the 18th August are not alluded to in the slightest in the statement of case. PW1 who by the look of things is a person who knows or ought to be knowing the happenings leading to the 18th and the events of that day itself, makes no mention of the story that PW3 is testifying to. Furthermore, the witness alleges that the

union's position was that the workers were not on strike. It is surprising how the union could adopt such a position when it was not there when the incidents complained of happened. "TZICC1" which was authored by PW3 does not say that it was agreed that there was no strike as this witness would want us to believe.

41. The letter which the union says it wrote following discussions with the Managing Director is "TZICC2" to the Answer. When PW1 was asked about it, she said she did not know it. This is understandable because it is only dated 18th August 2003 and it is minuted to have been received by the respondent at 4.30 pm on the same day. It therefore cannot possibly be true when PW3 says that he had a discussion that led to the writing of the letter some date before the 18th August 2003.

PW4 MASARIELE NKU

42. This witness repeated the story of a manager who pushed an employee. She said the employee who was pushed was wearing "Seshoeshoe" dress. She also repeated that a worker who witnessed that and laughed was also pushed. This led to the manager in question instructing supervisors to stop searching them. The workers were only able to go out for lunch at 12.35 hours.
43. The witness testified further that at 13.00 hours the workers sat down and waited for David to come and address them, they were issued with three ultimatums; to resume work. They ignored the first two and the third informed them that they were fired and that they should wait for their pay. She testified further that the workers slept in the factory because they were waiting for their terminal benefits.
44. On the 19th, the witness says they were still in the factory when she saw Tsai give fire extinguishing tanks to Chinese supervisors with which they sprayed the workers with. Workers ran outside the factory and while they were standing outside PW3 arrived and negotiations with management resumed. The workers got a report back at around lunch. They were told to

return to work. The workers resumed their work and remained at their work until knocking off.

45. The witness stated further that on the 20th they continued with work without any incident. They again came to work on the 21st August, but when they were about to clock in a manager called Ashang took away their clock cards. Workers proceeded to their machines without clocking in and proceeded to work. Ashang again came to them and said they should go out. Ashang was assisted by a policeman who advised them to go out to avoid being caught in the cross-fire. She testified that they obliged and went out and from there they went home. On the 22nd they came back and found that the gates were locked. The witness concluded her evidence by saying she no longer recalls what happened thereafter.
46. Like that of PW1, the evidence of this witness does not connect the Ashang incident with the events that followed the afternoon of the 18th August 2003. In short she tells the incident as part of the series of events that took place as they were about to proceed for lunch. She does not as the Originating Application seeks to do, connect the work stoppage of the 18th to that incident. Even though the witness says they sat down that afternoon waiting for David to come and address them as he had allegedly promised, she does not say when such a promise was made or how they got to know about the promised meeting.

PW5 MALIPUO MACHABA

47. This witness also said on the 18th August 2003, they did not resume work after lunch because they were waiting for the Managing Director to come and address them, as he had promised. Instead of the Managing Director coming to address them they saw notices being put up to the effect that they were on strike. She testified that afterwards, the Managing Director came to find out the reason for the failure to resume work.

48. She testified further that ultimatums continued to be issued that they were on strike and that they ignored them. The third notice informed them that they were dismissed. She confirmed that workers slept in the factory that evening. She repeated the story about the attack with fire extinguishing powder by Chinese supervisors and that they were later charged with assaulting Chinese supervisors and destroying equipment. She was one of those who were charged.
49. She testified again that on the day of the hearing they attended hearing as directed but no hearing took place. Later the police arrived. They saw the workers who were inside the factory going out. Inspector Masupha allegedly told them to go home to avoid being caught in the cross fire. She testified further that they also decided to go outside to escape injury or getting caught in cross-fire. While they sat outside, notices were put up informing them that they were dismissed.
50. This testimony contradicts that of PW1 and PW2. The former said, when Masupha drove out those workers who had been taken out of the factory by Ashang, he said those who had been given notices of hearing must come in; suggesting that they were outside the gate at the time. PW2 said something of its own and that was that when they arrived the Police prevented them from going inside. In her testimony PW4 makes no mention of anyone being refused entry or being commandeered inside the factory.

PW6 MANOTSI KHEREHLOA

51. She testified that she worked at C2 section. On the afternoon of the 18th August 2003 they resumed work as usual. Despite working as usual, the employer issued them with ultimatums warning them to resume work, failing which they would be dismissed. She like her colleagues testified that two ultimatums were issued and that the third informed them that they were dismissed.
52. Unlike those who came before her she said nothing about sleeping in the factory. She said the following day they

proceeded with work that they had been assigned, but were later told to stop working. They were brought together with workers from B2 section and were served with notices of disciplinary action.

53. She was asked when exactly they were served with letters of disciplinary action. She said on the 20th August. She was then asked what transpired on the 19th. She said they had written grievances to the Managing Director and he had said that they should sit down in the afternoon, because he would come and furnish them with answers. She then sought to tell the story as previously told by those who came before her but working backwards. This is clear indication that this witness is only seeking to walk the footsteps of those who testified before her. This is not proving that she is testifying to what she knows. At best she is only repeating what she was told to tell the court albeit in a very confused manner.

CASE OF THE RESPONDENT

54. The respondent led the evidence of only three witnesses. The first one (DW1) was 'Matoka Mabusela who was part of the events of the 18th August 2003. She testified that during lunch they had a meeting where they resolved that they must call the Managing Director to come and talk to them. They agreed that a letter to this effect would be written and sent to the MD. In the meantime they also agreed that no work would resume at 1.00 pm when they returned from lunch.
55. DW1 testified that she advised her colleagues that if they sat down before MD got their letter they would be accused of embarking on an unlawful strike. This advice was not heeded and at 1.00 pm workers switched off their machines and sent one of them to deliver a letter to the MD requesting a meeting. She testified that the MD came and asked that they continue to work and further said he would talk to them. She averred that they still refused to commence work. After a while an office clerk by the name of Lucy came with a notice saying they must resume work and that David would come and talk to them. She was not heeded. She came three times still displaying notices

calling on them to resume work but they refused. She stated further that the workers decided that they were not going to go home until the MD talked to them. They telephoned the union (applicant herein) and informed it of their decision. The officials of the union promised to bring them food even though that never materialized.

56. At around 6.30 pm the following day, the non-striking workers who had gone home started to arrive. The strikers started singing. When the non-strikers started their machines to start their day's shift the striking workers attacked them by hurling cotton thread cones at them. The Chinese supervisors intervened by spraying the attackers with fire extinguishing powder. However, doors were opened wide so that they could run out. She denied that anyone was hurt while they ran out. When they got out they met with a policeman whom she later learned was Inspector Masupha. He told them that they as police were there to safeguard lives and property. However, the striking workers were singing songs abusing the Police and non-striking workers.
57. She testified further that later FAWU's Sam Mokhele arrived and went into talks with management. They struck a deal in terms of which striking employees returned to work that afternoon. She testified that some workers were served with notices of disciplinary hearing, but she was not part of them. As a consequence she was still at work on the 20th August. She averred that as workers who had not been issued with notices of hearing, they sent a message to the MD enquiring why the rest of their colleagues were not at work. The MD said he was going to charge them in accordance with the agreement struck with FAWU.
58. DW1 testified further that when they returned from lunch they found that those workers who had been served with notices of disciplinary hearing were gathered outside the gate and singing. She testified that they decided to join them. Mr. Mokhele of FAWU joined them and advised them that if they wanted the MD to listen to them, they must not agree to return to work while some of them were being kept outside work. As a result when

they returned from lunch they decided not to start their machines. The MD again came to enquire and they told him that they were unhappy with some of them not being allowed to resume work.

59. The witness testified that the MD told them that those people were not yet dismissed and that they were yet to be charged as agreed with FAWU. He even gave them the copy of the agreement to read for themselves. She testified that they still refused to resume work and that they also started singing. The Managing Director then decided to dismiss them and gave them a day when they would come and get their terminal benefits.
60. DW2 was Inspector Sepinare Masupha. He testified that he got a call from the Managing Director at around 10.00 am saying that there was disturbance at the factory caused by misunderstanding between two groups of workers. There was a clash between striking workers and non-striking workers. He said he went to the factory and found a group of workers who were not working; but were singing outside the factory. He said he asked them to appoint representatives to come and explain to him their problem. They said they would not talk to him, they were waiting for Sam Mokhele to come and talk to them.
61. The witness repeated what DW1 said that he told the singing group who were insolent in their songs that he was their policeman and that he was there to protect them and the property of the firm, and that he was not in any way against their struggle to fight for their rights; however, they must pursue their rights peacefully.
62. He thereafter left and went to the office of the Managing Director, where Mr. Mokhele found him when he arrived. Mr. Mokhele entered into negotiations with the MD, which culminated in an agreement that was drafted by Mr. Mokhele himself. However, when it came to signing, the MD refused to sign before his lawyer could arrive. Indeed when Mr. Mohaleroe finally arrived, he is the one who signed the agreement on behalf of the company while Mr. Mokhele signed on behalf of the union.

63. The Managing Director Mr. David Chen was DW3. He testified that he got a report on the 18th that workers were sitting down and not working. He enquired from the supervisors why workers were not working. They told him that workers were saying they wanted to talk to him. He stated that he asked them to resume work and elect representatives to go and talk with him. They refused.
64. He stated further that he called the LNDC and Police and started to issue ultimatums. At around 4.00 pm he got a letter from FAWU seeking a meeting with him. He stated that he asked the people who brought the letter why the union was only writing him a letter asking for a meeting after the start of the strike.
65. He testified further that as it was already late he asked the workers to go home and return the following day. They however, refused and decided to sleep in the factory. He testified further that the following day the striking workers made more trouble by breaking machines and beating some Chinese supervisors. He stated that he asked security to take them out. He testified that he called the LNDC, and the union and that at the meeting that was held by the stakeholders, it was agreed that the striking workers had engaged in an unlawful strike and that persons involved would be dismissed. The agreement to this effect was written down and signed by the union and the employer.
66. He testified further that thereafter, the Factory Manager, the supervisors and the union representatives went through the lines and identified the individuals who were to be disciplined. They were given notices of hearing. However, on the day of hearing those workers who were to be disciplined came and caused more trouble by preventing workers who were still at work from working. The employees were subsequently dismissed even though he did not remember the date when they were dismissed.

ANALYSIS OF THE EVIDENCE AND CONCLUSIONS

67. When these proceedings commenced on the 1st March 2006, Counsel for the applicants Mr. Thoahlane placed on record the issue to be decided as follows: “The issue is whether there was an unlawful strike and if so, were proper procedures followed in dismissing the members of the applicant (the union).” The statement of case of the applicant is the first port of call to try to ascertain from it what exactly happened.
68. According to it there was clearly a work stoppage on the afternoon of the 18th August 2003. That work stoppage was occasioned by the workers’ desire to meet with the Managing Director. The stoppage led to the management calling on the LNDC and the Labour Department to intervene. The Police were also called in. Warnings/ultimatums were issued and the workers still did not respond. The statement of case however, claims that the act of the workers did not amount to a strike. They simply demanded to talk with their manager.
69. The witnesses led by the applicant sought to show that there was no strike either on the 18th or 19th August. Other than their say so, the evidence of PW1 clearly point to an intentional work stoppage on the afternoon of the 18th August. She said they wrote a letter on the 14th August 2003, requesting a meeting on the 18th August 2003. They started work as usual but in the afternoon when they returned from lunch they sat down and refused to start their machines as they were waiting for the MD to come to talk to them. The Managing Director came at around 13.15 hours and asked them why they were not working.
70. This alleged enquiry of the Managing Director would not be expected if he had indeed promised to meet with the workers that afternoon as they allege. PW1 testified that after a while the Managing Director started issuing them with ultimatums to end the strike and resume work. Their response was that they were not on strike. They only wanted talks. She said the second ultimatum informed them that they would be dismissed if they did not return/resume work. It is clear from the stand point taken by the management that they considered the work

stoppage as an illegal strike and they told the workers the same. They (the workers) however decided to brand their act something else short of a strike.

71. PW2 claimed he was not at work on the 18th. He alleged he had been to a clinic and produced an appointment card which fell far short of proving what he claimed it to be. It was only an appointment card which did not even say it was a medical appointment. He however said on the 19th August he was one of those who were identified and served with a notification of hearing on the 20th August 2003. He was charged of assaulting Chinese supervisors and damaging property. His testimony that he was not at work on the 18th is clearly false. He would not have been charged if he was not there on the 18th, because persons who were identified and charged were those who started the work stoppage and slept in the factory in pursuit of that work stoppage.
72. PW3's evidence had lots of contradictions. However its relevant aspects were that on the afternoon of 18th August he got a message that workers at respondent factory were being served with ultimatums. He admitted that workers slept in the factory that day. He stated that he went to the factory on the 19th. In his own words he said even on the 19th the situation was still abnormal and that when he got there he found Police already there. He met with management who told him that workers had embarked on an unlawful strike. He admitted that he wrote "TZICC1" after talks he had with the management.
73. "TZICC1" states clearly that the "(management) raised concern of an unlawful strike that took place on the 18th August 2003." It went further that the conclusion reached is that the people who assaulted six Chinese supervisors and damaged property in the process would be dismissed. As far as we are concerned this annexure is the answer to the question whether there was a strike on the afternoon of 18th and morning of the 19th August 2003.
74. The Originating Application says as much and it is confirmed by the evidence of PW1 and PW3 who said the situation was

abnormal. If the workers were calmly sitting down waiting for a promised meeting, there would not have been the following: ultimatums, involvement of the Police, the writing and signing of “TZICC1”, the LNDC and the Labour Department officials. The act of sleeping in the factory was a further act pointing to a collective act aimed at persuading the management to accede to certain demands.

75. Applicants’ contention that their action did not amount to a strike cannot be supported by the facts. At worst their actions are clearly consistent with the legal definition of a strike which says:

“strike means the act of any number of employees who are or have been in the employment of the same employer or of different employers 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*
- (c) in refusing or failing to accept engagement for any work in which they were or are usually employed or,*
- (d) in reducing their normal output on their normal rate of work.”*

76. In her testimony PW1 said they had put certain demands to the Managing Director which they made by letter of the 14th August. It was these demands they were seeking to compel their employer to accede to when they stopped work and failed to resume the work even after they were warned to do so. The Originating Application says so as well. The union sealed it by agreeing with management that a strike occurred. We can safely conclude on the evidence analysed thus far, even without the evidence of the remaining witnesses that a strike did take place.

77. Save only to add that despite conflicting aspects of their testimony, the tenor of the evidence of the other witnesses of

applicant is that they confirm the basic elements of the events of the afternoon of the 18th and the morning of the 19th August 2003. Witnesses for the respondent also show very clearly that a strike that had not followed the procedure laid in the law took place at the respondent starting the afternoon of the 18th August. This comes out clearly from the testimony of DW1 Matoka Mabusela and DW3 David Chen. As for DW2 Inspector Masupha, his testimony confirmed that when he arrived at the factory there was that group of workers who were not working, but were grouped in the forecourt of the factory and singing insulting songs. He was there when the representative of the union negotiated the workers return to work with management including when he drafted "TZICC1", which is a documented agreement that an illegal strike took place and in the process some people were assaulted and property was damaged. There is therefore no doubt that workers engaged in an unlawful strike on the dates mentioned.

78. The second issue that was agreed to be decided is whether a proper procedure was followed in dismissing the members of the applicant union who were on strike. Evidence of all the witnesses who could remember the charges against them was that they were charged with assaulting Chinese supervisors, participating in an illegal strike and destroying property. These charges are confirmed by "TZICC1" which is the agreement between the union and management of the respondent that those involved in the mentioned acts would be disciplined.
79. Evidence is further that the hearings were due to be held on the 21st August 2003. Witnesses for the applicant aver that the hearings did not take place despite their being in attendance. It would appear from their evidence that the reason for the hearings not to be held was either because the Personnel Manager Mr. Nkesi or the Managing Director Mr. David Chen were not there. This according to their evidence is the response they got from one Tsitoe Molekane when they enquired from him why the hearings were not commencing.
80. PW1 testified that while they waited for the hearings to commence, they saw the Factory Manager Ashang driving out

- those workers who were still working telling them that the factory is closed. She stated that DW2 Inspector Masupha told those workers to leave so that they avoid getting caught in the cross-fire. In the meantime Mr. Tsitoe Molekane came out of the gate and put up a notice saying they were all dismissed, they must come back on the 22nd August 2003 to collect their terminal benefits.
81. This analogy of events by PW1 was not challenged under cross-examination. The evidence of PW2 is not helpful in this regard as it is confusing the events especially regarding what happened. PW3 said he was not there on the day in question so he could not testify to the events of that day. PW4 was one of those workers who had not been charged and who were still supposed to be at work. Even though she slightly confused dates and said 21st, what she testified to was clearly the events of the 20th August 2003.
82. She stated in her testimony that on the 20th August 2003, their clock cards were taken away by Ashang. They tried to proceed to the machines to commence work nonetheless, but Ashang came and drove them out and told them to leave. They tried to resist but the Police told them to comply and they left and proceeded home. PW5 said whilst they waited for the hearing they saw those workers who were still working come out of the factory. The Police told them to leave to avoid being caught in the cross-fire. Those workers who were awaiting the holding of their disciplinary hearings also moved out of the factory gate. Whilst they waited there they saw notice being put up saying that they had all been dismissed.
83. The evidence of PW4 went unchallenged as Counsel for the respondent elected not to cross-examine her. It was put to PW5 that the hearings could not proceed because of the disturbance resulting from a letter (TZICC3) that was written by non-striking workers to the Managing Director. The witness said she did not know of that letter as she was already outside awaiting disciplinary charges. When it was put to her that the said letter was the cause of disturbances she said she was not aware of any disturbances.

84. It was put to her that evidence would be led showing that the workers who had not been charged joined those who had been served with disciplinary notices and demanded that they be charged as well. She denied that. In our view the cross-examination failed to shake the testimony of PW5, firstly because the letter which was shown to her as the letter that was written by the non-striking workers should have rightly been put to PW4 as the person who would have probably known about it as she belonged to that group. PW5 was the wrong person to be asked to confirm it. Secondly, no evidence was subsequently advanced to the effect that workers who had not been charged demanded to be charged as well.
85. The closest they came was through the evidence of DW1 Matoka who said that they demanded to know why their colleagues were not at work. Even then she said they had sent one of them to the Managing Director. She made no mention of a letter in the form of "TZICC3." She stated that on the basis of the absence of their colleagues from work they switched off their machines and refused to resume work on the afternoon of the 20th August. She mentioned no disturbance. What she said was that as a result of that stoppage they were all dismissed; both the workers who had been charged and those who were not charged.
86. DW3's evidence on this aspect of the events is completely different from others because he says the disciplinary hearings went ahead. It however turned out during cross-examination that his evidence in this regard was hearsay as he did not conduct the hearings himself. He had assigned his Personnel Manager and his lawyer. He further said on the scheduled date of hearing there was no work done and that there was violence which was caused by the employees who had been served with notices of disciplinary hearing blocking the other workers from working. This is not what DW1 said as a person who was directly involved with the events of that day. She did not say any one blocked them from carrying on their work. She said they stopped of their own volition. She also mentioned no disturbance save that she said they sang.

87. It would appear from this evidence that there is no sound reason why the employees who were served with notices of disciplinary hearing were not disciplined on the 21st August as scheduled. The respondent speaks of violence that ensued on the 20th resulting in all the workers being dismissed. However, this only came from the evidence of DW3.
88. As we said earlier in this judgment, there is a big confusion concerning the correct date of the dismissal of the workers. For obvious reasons, the witnesses for the union say they were dismissed while they were at work waiting to be disciplined. This suggests that they were at work on the 21st. However, PW1 did concede under cross-examination that they were in fact dismissed on the 20th which was a day preceding the date on which the disciplinary hearings were scheduled to be held.
89. The evidence of DW1 Matoka Mabusela is the most consistent and reliable in this regard. It is obvious that following the suspension of those workers who were served with notices of disciplinary hearings, those workers who were supposed to be still working, voiced dissatisfaction and this was at the instigation of the union. This resulted in those workers stopping work demanding that their suspended colleagues be reinstated. This led to the dismissal of everybody including those workers who were already on suspension pending disciplinary hearing on the 21st August 2003.
90. There are clearly two groups of workers whose dismissals must be examined separately. The first group is those workers who were on suspension pending disciplinary action on the 21st August. The evidence of DW1 which we accept is that those hearings did not proceed because this group of workers were dismissed on the afternoon of the 20th August. Evidence of witnesses of the applicant is that the dismissals were uncalled for, as they were still awaiting the hearings to be conducted. Other than DW3's testimony none of the witnesses who testified gave account of violence on the 20th, which could have led to the instant dismissal of those workers. It follows that there is no sufficient evidence why the hearings that were scheduled for

the 21st August could not be proceeded with. On the basis of evidence before us it is justified to conclude that the respondent had no justifiable reason not to conduct the hearings that it had issued notices to the concerned workers that they would be held on the 21st August.

91. The second group of workers are those workers who had not been issued with notices of hearing and who were supposed to be still working on the 20th August. Witnesses for the applicant said they just saw them being driven out and told that the factory was closed. However, the evidence of DW1 was very informative in this regard.
92. She stated that, they had complained to the Managing Director why their colleagues were not at work. When they did not get a satisfactory answer they stopped work and started singing. In other words they did what those already suspended did on the afternoon of the 18th August. It is now common cause that that group was issued with a series of ultimatums which they ignored.
93. According to the evidence of DW1 once they switched off their machines and stopped working, they were dismissed instantly, without any ultimatums being issued. A fair employer would in accordance with Codes of Good Practice Notice 2003, normally be expected to warn employees of the consequences of their action before taking the harsh measure of dismissal unless the circumstances do not permit that such a step be complied with. (see sec. 18(1)(d) of Labour Code (Codes of Good Practice Notice 2003). A brief work stoppage which is ended after a warning to resume work would in accordance with the Code negative the notion of a strike. Thus a strike is defined, inter alia, as employees' refusal or failure after a discontinuance to resume or return to their employment. (see paragraph (b) of definition of a strike.
94. Clearly this definition implies that employees must after a heat of the moment rash decision to stop work be given a second chance to consider their decision to stop work. In terms of the

Codes of Good Practice the employer's compliance with this step i.e. issuance of ultimatums is significant in determining whether the termination of the contracts of the employees in question is substantively fair. (see section 18(1)(d) of the Codes of Good Practice 2003.

95. From what we have said, it is clear that the first group namely, those who were issued with notices of disciplinary hearing (there are approximately 98 of them) were substantively fairly dealt with, in as much as ultimatums were issued to them which by their own admission they ignored. They were subsequently due to be charged with involvement in that act and the allegations of assaults and destruction of property that occurred during the strike. We have already found as a fact that an illegal strike occurred during the dates in question. The respondent in its wisdom decided to charge those involved but for reasons that are not substantiated by evidence, the hearings did not proceed. It follows therefore, that the dismissal of those employees was procedurally unfair for want of a fair procedure in as much as the employees were not afforded the chance to defend themselves.
96. The second group, are those workers who were not singled out for disciplinary hearing. They were thus still at work on the 19th. However, they were dismissed on the 20th August for stopping work in support of their colleagues who were suspended pending disciplinary hearing on the 21st August. Those workers were summarily dismissed without any ultimatums being issued to enable them to ponder their action and indeed rethink their decision to stop work. The employer's act of dismissing this group was clearly hasty and precipitate. That then made the dismissal of this group substantively unfair.

AWARD

97. The union has sought that the dismissed employees be reinstated. It is now approximately five years since those employees were dismissed. If the respondent is still operating it is because it employed other employees to be able to continue to operate. However, the union has disclosed that some of

those who were dismissed were soon reemployed. In fairness to all sides reinstatement cannot be a proper remedy.

98. It follows that the remedy lies in an award of compensation to redress the unfairness suffered by the employees at the hands of the respondent. We cannot in awarding that compensation close our eyes to the fact that the witnesses who testified for the applicant were largely not candid. The Originating Application itself was not drawn in a manner that it placed the issues that were to be decided clearly.
99. One example will suffice. The Originating Application sought to place the blame for the work stoppage on the Production Manager one Ashang for allegedly pushing a woman dressed in traditional attire. None of the witnesses ascribed the work stoppage to this allegation despite all of them seeking to parrot it in their evidence, without showing what its relevance to their case is. Even the traditional dress the lady was wearing remain highly questionable because one witness said it was seshoeshoe and the other said it was a cow skin dress.
100. We mention this to point out that witnesses must give evidence that will help the court to get to the justice of the case before it. Applicants' witnesses were not doing that. This is why we want to thank DW1 who appeared to be a very candid witness. It was through her evidence that the court started to understand exactly what happened when during the saga that gave rise to these proceedings.
101. In awarding compensation therefore, we have awarded the minimum in order to show our displeasure at the untruths and the attempts to mislead the court by the same people whom this judgment is meant to benefit. Accordingly, we award as follows:
 - (a) The group of 98 employees who were supposed to be attending disciplinary hearings on 21st August and were not reemployed by the respondent within two months of their dismissal shall each be paid two months salary for the procedural unfairness they suffered by not being given a hearing as they were promised.

- (b) The group who were dismissed without being given any ultimatums and were not reemployed by the respondent within four months of their dismissal shall each be paid four months salary as compensation.
- (c) In both cases the compensation shall be calculated at the rate of earnings on the 20th August 2003.
- (d) This award is in full and final settlement of any disputes arising out of the dismissal of the workers at TZICC on the 20th August 2003 as a result of events that occurred between 18th and 20th August 2003.
- (e) There is no order as to costs.

THUS DONE AT MASERU THIS 13TH DAY OF MAY 2008

L. A. LETHOBANE
RRESIDENT

R. MOTHEPU
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANTS:
FOR RESPONDENT:

MR. THOHLANE
MR. MOHALEROE