

IN THE LABOUR COURT OF LESOTHO LC/29/10

HELD AT MASERU

IN THE MATTER BETWEEN

MINING AND CONSTRUCTION
WORKERS UNION & 87 OTHERS

APPLICANT

AND

MATEKANE MINING &
INVESTMENT CO. (PTY) LTD

RESPONDENT

JUDGMENT

Dates: 31/08/10, 02/90/10, 02/11/10, 17/02/11
Strike – Employees unhappy with the exemption granted to the employer by the Minister from the effect of sections 117 and 118 of the Code concerning daily working hours and overtime – Court is enjoined to recognize existence of and to enforce the exemption –hearing – in case of collective misconduct a collective hearing is justifiable – ultimatum constitutes opportunity to strikers to make representations against the threat to dismiss them- The ultimatum should give employees adequate time to reconsider their position – held while group that was dismissed on the 16th April 2010 was given ample time of three and a half hours to reflect the 30 minutes given to the group that was dismissed on 15th April was evidently inadequate – Held that dismissal of this group was procedurally unfair.

INTRODUCTION

1. The applicant union has filed the present application alongside its members who were dismissed by the respondent on the 15th April 2010 and the 16th April 2010. The respondent is subcontracted by the Letseng Diamond Mine to execute mining operations at Letseng Mine in the Mokhotlong District.
2. 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.
3. 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 3 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 are employed by various companies contracted by Letseng Diamond Mine. Among them were the representatives of the employees of the respondent company.
4. 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.
5. The management responded that they did not have record of accidents as none had been reported to them. Evidence further shows 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 have standby workers who relieve those on duty such that the workers do not actually work all the 12 hours they are supposed to work in terms of their contracts.

6. On the 31st March 2010, the acting Secretary General of the 1st respondent. Mr. Bale Malee wrote to the Human Resources Manager of the respondent requesting permission to visit 1st respondent'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.
7. According to the statement of case the HRM 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 HRM and informed her that they would henceforth work for eight hours a day instead of the twelve hours because the HRM was not willing to allow them to consult with the union official.
8. Starting 15th 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 HRM 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.
9. On the 16th April 2010 Ms Pelesa 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 HRM 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. The union together with its dismissed members filed the present application contending that:

- (a) The respondent did not follow the rules of natural justice in that no form of disciplinary mechanism was engaged at all.
- (b) The dismissal of the applicants is premised upon unfair labour practice that is being practiced continually and unlawfully.
- (c) The dismissal of applicants is aimed at coercing them to succumb to an unlawful exemption which was granted contrary to labour laws of Lesotho.
- (d) 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.

EVIDENCE

10. The 1st witness for the applicants was the site secretary of the shop stewards Mr. Aki Mafika. He confirmed that workers of the respondent worked 12 hours from 6.00am to 6.00pm for 14 days after which they would proceed to take 7 days off. He testified that they worked a total of 246 hours a month and that 195 of these were paid as normal hours. 48 hours were paid as overtime and 3 hours were paid at twice the ordinary rate. This is in fact provided by the exemption regulations.
11. He testified that the workers were unhappy with the way the hours were broken and paid. He stated that according to them the hours should have been broken thus: 135 normal hours, 81 overtime hours and 36 hours should have been paid at double the rate. Asked if they ever discussed this issue with the employer he said they were never given the opportunity to discuss it with the employer. Asked how he got the 135 hours of normal rate, he said the hours are gleaned from an 8 hour day for five days and 5 hours for a Saturday. The 81 hours of overtime are derived from the extra hours they work beyond 8 hours for 5 days and beyond 5 hours on Saturday.

12. The 36 hours of double rate were according to him for the Sundays that they worked before going on the 7 days off. He testified that workers approached the HRM Ms. Pelesa for discussion, but she refused and said Mr. Malee should first meet with Mr. Makeka. He averred that they told Mr. Malee about Ms Pelesa's response who undertook to go and meet with Mr. Makeka. He (Mr. Malee) reported back to the workers that Mr. Makeka was ignorant about any meeting that he was to have with him. The witness testified that failure to resolve the issue of the hours of work is the one that led the workers to suspend the 12 hours shift.
13. PW1 testified that workers resolved to work "legal" hours until their complaint had been resolved. He testified that on the 15th April the first shift started work at 6.00am and knocked off at 14.00 hours, when the second shift came in. After the 2nd shift had worked for an hour Ms. Pelesa made an announcement on a loudspeaker that the 2nd shift workers must return to the hostel and report back to work at 18.00 hours. The workers obliged.
14. At 18.00 hours the 2nd shift again reported to work. Before they could start work Ms. Pelesa asked them if they were going to work 12 hours or 8 hours. He testified that workers responded that they would work 8 hours while their problems were being addressed. Asked how many people Ms. Pelesa was speaking to, he said she was speaking to three of them who were representing the rest of the workers. He testified that Ms. Pelesa gave them 30 minutes to consider their position. When she came back and found that the position had not changed she gave them another one hour to think, and said if they would not have changed their position, she was going to dismiss them. He was asked if Ms. Pelesa opened doors for the union representative to come to site to address the issues of concern to the workers he said she did not.
15. He was asked whether there were any arrangements made with them regarding the 12 hour shift. He said there were no arrangements. He was told that the employer says the 12 hour shift is a contractual arrangement with the workers. He agreed that was so. This is a clear contradiction of his earlier answer when he said there was no arrangement made with workers regarding the 12 hour shift.

16. He was asked if they ever discussed the 12 hour shift with Letseng. He said they did not. This is to be expected because the applicants are not the employees of Letseng Diamonds. He was asked further if they ever discussed the issue with the respondent. He said they never did. On the contrary evidence of the respondent will show that they did discuss the issue and the discussion culminated in an agreement where workers individually signed that they accepted to work the 12 hour shift.
17. The witness testified that workers never stopped working but they were stopped by Ms. Pelesa. He stated further that they were not disciplinarily charged prior to their dismissal. He said they were instead given 30 minutes ultimatum before they were dismissed. He had no information on what time the 2nd shift was dismissed on the night of the 15th except what he was told. He repeated what he said earlier that the Human Resources Manager did not involve their union in the resolution of the dispute.
18. Under cross examination the witness contradicted his earlier version that MMC never discussed the 12 hour shift with the workers. He was asked if it was true that he signed a contract to work 12 hours and that the arrangement to work 12 hours was explained to him when he was first employed. He agreed that was so and he confirmed that exhibit 1 is the minutes of a meeting where the 12 hour shift was explained to the workers himself included.
19. The witness was again shown a document exhibit 3 which is a layout of shift schedule which shows when shift 1 for instance will be at work and when it will be off. He agreed he knew the document and that it was given to the workers. It was put to him that the meeting which he confirmed he knew of explained to him and other workers why they worked 246 hours in a month and why their pay was broken down in the manner he said he was not happy with in his evidence. He said the explanation was not given. This answer is contradicted by the very minutes which he said he knew i.e. exhibit 1 at p.3. The witness has even appended his signature at the bottom of p5 to confirm the contents, which say the hours were explained to him.

20. To confirm that the 12 hour shift was explained to their satisfaction Ms. Ntene for the respondent asked the witness to state exactly what they were not happy with, the 12 hour shift or the way the hours were paid. He said he was unhappy with the way the hours were paid. He was asked further whether workers would be happy if the hours were paid as he suggested in his evidence in chief he said they would be happy. It is apposite to state that the manner of payment of the hours as suggested by the witness is valid only if there is no exemption in place.
21. The 246 hours a month, which the workers worked and the manner of their payment are all prescribed by the exemption regulations issued by the Minister of Labour together with the certificate of exemption in terms of section 119(3) of the Labour Code Order 1992 (the Code). (See regulation 6 of the exemption regulations.). They cannot therefore be disregarded and be replaced by those desired by the applicants. This court is enjoined to enforce them; and give effect to them.
22. PW1 sought to discredit exhibit 1 by saying at that meeting they were not allowed to give their views and further that they were forced to sign under duress. They were threatened that they would not be paid for attending that meeting because that was a date on which they had to be home. Ms. Ntene immediately discredited Mr. Mafika by referring him to exhibit 3, the shift schedule lay out, which showed that his shift was on duty that week. Equally discredited was his claim that they were not allowed to make input and that they were forced to sign. All these allegations are so material that the witness would have raised them in chief if indeed that is what transpired.
23. Regarding the refusal to allow them a meeting with management he was asked when they requested a meeting between their union and management. He responded that the general secretary made several requests for a meeting. He was asked if he knew when the respondent became aware of Mr. Malee as general secretary following the death of then general secretary Mr. Qhola Zuma. He did not know. It was put to him that it was in December 2009. He could not deny.

24. Ms Ntene for the respondent asked him if they were not breaching their contracts of employment by unilaterally imposing a 12 hour shift. He agreed that they were in breach. She asked him if he knew about the exemption granted to Letseng from the provisions of sections 117, and 118 of the Code. He said he did not know about it. Asked if he was hearing the word exemption for the first time, he said he had heard about it in 2006, even then the exemption was for Letseng and not the respondent. The truth of the matter however, is that the meeting of the 13th March did discuss the exemption as is evidenced by exhibit 1, which the witness has already confirmed that he knows.
25. The witness was asked where the General Secretary was when the workers unilaterally changed to an 8 hour shift. He responded that they could not find him on his cell phone. He said even the Human Resources Manager was trying to contact him and she too could not find him. This testimony clearly contradicted his version in chief when he said the Human Resources Manager did not afford the union officials the opportunity to come to site to help resolve the stalemate.
26. Ms. Ntene for the respondent gave him the opportunity to explain the contradiction. He failed to do so as there was no answer that he could give. She asked him further if it was not true that when Mr. Malee could not be found Ms. Pelesa called Mr. Macaefa and requested him to come to Letseng in connection with the dispute. The witness conceded that this is what happened. The witness concluded by agreeing that Ms. Pelesa did make an effort to find the union to come and help resolve the dispute.
27. The second witness was the General Secretary Mr. Malee. His evidence was that he wrote the letter annexure "M2" to the respondent requesting to meet with his members. He stated that Ms. Pelesa wrote him annexure "M3" denying him access. She referred him to Mr. Makeka of Association of Lesotho Employers instead. He averred that he did go to Mr. Makeka's office and found that they were totally ignorant about what he had come to discuss with them.

28. He was asked if this was the first request he made to meet with the workers. He said it was the second. The first request he did not get a response until he decided to go to Letseng to get a response. He met with the Human Resources Manager of Letseng Mine who telephoned Ms. Pelesa. The latter came to welcome him and told him that she was not expecting him as she did not know that he was coming. Asked if he met his members he said he was not allowed by Ms. Pelesa. She only allowed him to meet with the site stewards. He concluded by stating that this was between January and February 2010.
29. In response to a question under cross examination he stated that he first became acting General Secretary on 25th November 2009, following the death of then General Secretary Mr. Qhola Zuma. Asked to whom he had written the first letter that requested a meeting, he said he had written to the Human Resources Manager of Letseng Diamond Mine. He stated that it was on that visit that he first learned of the difference between Letseng Diamond Mine and the respondent. Asked why he was surprised when Pelesa said she did not know that he was coming because he had written the letter to Letseng and not the respondent, he said he was no longer surprised because he has now become aware of the difference between the two.
30. When he was asked if Pelesa arranged the meeting between him and the stewards, he initially sought to deny. Asked how he met them, he said they arrived jointly with the stewards at Pelesa's office. It was put to him that the stewards were there because Pelesa had arranged for them to be there. He said he noted that. He was asked if Pelesa gave him the reason for not allowing him to meet with the workers. He said she said she had not made proper arrangements, because she did not know that he was coming. He stated that she advised him to communicate with her directly in future and gave him the numbers where he can find her.
31. He was asked how he accused the person who treated him as Ms. Pelesa did of unfair labour practice. He said his complaint related to the second request for a meeting. He stated that Pelesa's response to his request was to send him to Mr. Makeka about a recognition agreement, which as a different thing from what he was requesting. He was asked if it is not correct that annexure "M3" was written after

- a telephone discussion Mr. Pelesa had had with him. He denied. He was asked if he was not surprised that the letter “M3” referred to previous discussions. He said he was. Asked what he did on seeing that the letter made reference to previous discussions, which he did not know about he said he now remembered that they had telephone discussion prior to the writing of “M3”.
32. He was asked if it is correct that in the telephone discussion, Ms. Pelesa told him that the issues he wanted to discuss with the workers were covered by the recognition agreement that was in the process of being negotiated at the time of Mr. Zuma’s death. He said that was so and that is why he went to Mr. Makeka’s office. Asked who he met he said he met the secretary who placed him in contact with Ms. Sephomolo. He told her what Ms. Pelesa had said and Ms. Sephomolo responded that she had no instruction to release such information to him. This version is clearly inconsistent with this witness’s evidence in chief where he said the office of the Association of Lesotho Employers was totally ignorant about what he was talking about.
33. He was asked if he knew about the workers’ letter where they imposed the 8 hour shift he said he did not know, he only heard about it. Asked where he was on the 15th April when the 8 hour shift was first imposed by the workers, he said he was in RSA Soweto for burial of a relative.
34. The first witness of the respondent was the Human Resources Manager herself. She stated that the respondent work a 12 hour shift, which is implemented in terms of an exemption granted to Letseng Mine. In terms of that exemption the employer is permitted to work more shift hours than those prescribed by the Code. She stated that the exemption was originally granted in 2006 for a period of 2 years, which expired in 2008.
35. An application for the extension of the exemption was made to the Minister of Labour. A team of labour officers was sent to Letseng Diamond Mine to go and consult with the workers about the exemption. The team invited employees of the respondent to be represented at the consultations. Employees of other companies

contracted to Letseng diamond Mine were also represented at the consultation.

36. DW1 testified that after the team met with the workers they sought a meeting with her to clear certain issues raised by the representatives of the employees of the respondent. The team explained to her that employees of the respondent complained that the long hours cause them accidents especially at night and they get dismissed for that. They complained further that the exemption cause them to forfeit their overtime.
37. Since the workers' representatives were present, she asked them to show which cases they were speaking about which resulted in the dismissal of their colleagues. There were none. With regard to overtime she explained that overtime was paid in accordance with the exemption regulations made by the Minister. Apparently the representatives understood because DW1 says she asked them if they would convey the clarifications to their colleagues, but they asked her to do it.
38. She then arranged a further consultation meeting between the respondent and the workers on an individual basis to explain the exemption regulations. The respondent was represented by DW1, Mr. Bokako and Ms. Ntene. They met with the workers one by one and exhibit 1 is the record of the consultations which each worker signed after going through the consultation process.
39. She was asked why the exemption was deemed necessary. She explained that Letseng Diamond Mine is very far in the mountains of Lesotho. People working at the mine are from all over the county and is some instances Southern Africa. It was found to be time consuming to release workers on Friday and expect them back at the mine on Sunday. The 7 days off enable the workers to have more time with their families. The employer had also considered the effect the short weekend breaks would have on production, she testified. She stated that all this was explained to the workers individually and they understood.

40. The witness testified that after the consultation the labour officers made a report which reflected the dissatisfaction of respondent's employees and required the respondent to address the concerns raised. After that the exemption was granted. The workers were duly informed that the exemption had been granted. In August 2009, the workers of the respondent who were the only ones who had objected to the exemption wrote a letter saying the exemption had been granted without their approval. Quite clearly they were barking at a wrong tree, because such a complaint had to be addressed to the Minister who granted the exemption and not the employer.
41. She confirmed PW2's evidence that in January 2010 he went to Letseng unannounced and sought to meet with the workers, but failed because no arrangements had been made. She confirmed further that she advised PW2 of the procedure that he should follow when he wants to visit the site. She further advised him to meet with Mr. Makeka of the Association of Employers so that they could finalize the recognition agreement the union was negotiating at the time of the death of Mr. Zuma.
42. Ms. Pelesa denied Mr. Malee's claim that he heard of the recognition agreement negotiations for the first time when he made the request for the second meeting. She stated that she raised this issue at their very first meeting in January. Asked if she talked to PW2 about the letter he (PW2) had written requesting a meeting, she said PW2 called her to tell her that he had written a letter requesting a meeting with the workers.
43. Since she was returning from leave, she promised to look for the letter and revert to him once she had seen it. After she had found the letter she called PW2 to enquire what the purpose of the visit was. He said it was to train shop stewards. It was then that she advised him to meet with the Association to finalize the recognition agreement because it had clauses dealing with training. The idea for concluding the agreement was to be properly guided on how such training should be done e.g. whether it could be done on site during working hours.

44. The witness testified that after their telephone discussion she wrote annexure "M3" confirming their discussion. She sent it by email and called PW2 to check his mail. He said he was out of the office as such he could not check his mail. DW1 asked him what she should do and he said she should give the copy of the letter to one of the shop stewards, which she did. She gave it to one Phamotse Ramarikhoane.
45. On the 14th April 2010, mine security came to enquire from her about a meeting being held by employees of the respondent. She told them she did not know about it, but went to check, whereupon she found them assembled. She was surprised because they ought to have informed her about the gathering so that she in turn could inform mine security. She testified that she asked one Mohato Makholela to call shop stewards so that she could find out from them what was happening. They refused to attend. She called shop stewards of the shift that was then on duty and asked them to round up others for a meeting. They came back and said they had not found them.
46. DW1 testified that when she arrived at work at 6.00am on the 15th April she was served with a letter by Aki Mafika which stated that from then henceforth the workers would work an 8 hour shift. She testified that she called all shop stewards including those who were supposed to be sleeping for a meeting at 10.00am. She testified that she informed the shop stewards that their unilateral decision was a breach of contract. Workers complained that the decision was prompted by her refusal to grant Mr. Malee permission to visit them. She stated that she explained to the workers that she had not denied him permission to visit.
47. In the meantime she sought to get in touch with Mr. Malee, but could not find him. While calling the telephone numbers on the union's letterhead she found Mr. Billy Macaefa and told him about the situation. Billy said he could not go to Letseng but advised her to come to Maseru with the shop stewards the following day. He further recommended that workers reinstate the 12 hour shift while the negotiations were ongoing. Meantime they agreed with the shop stewards that they would meet with the workers at 2.00pm, their anticipated knock off time to impress on them to continue to work 12 hour shift. The shop stewards later came back to report that the workers were not listening to them.

48. At 13.45pm the workers started changing shifts without following procedure which was to stop the machines and check them before being taken charge of by the person of the next shift. This further frustrated any effort at talking to the workers. The shift that took over at 2.00pm was not doing the work properly either. They were over speeding and purposely racing the machines. In some instances they deliberately loaded wrong material. This led to a meeting with the management of Letseng Diamonds, which resolved that the workers of the 2nd shift be ordered to stop work.
49. They were stopped at 3.30pm. DW1 said after stopping them she addressed them and enquired why they were at work at that time when they were supposed to start at 6.00pm. No one responded. She testified that she told them that their action amounted to breach of contract. She instructed them to go and sleep and come back at 6.00pm ready to work the 12 hours they have contracted to work. She stated that she wrote what she had been saying down and put up the summary at their dormitories and the refectory.
50. The 2nd shift reported to work at 6.00pm as directed. DW1 said she addressed them before they started work and asked if she could speak to them as a group or their representatives. They preferred that she spoke to the representatives. She informed the representatives that she expected the workers to reinstate the 12 hour shift. The representatives conveyed the message to the rest of the workers. They later came back to report that the workers were adamant they were going to work 8 hours. They went on to say since they already worked one hour from 2.00pm to 3.00pm when they were stopped they were now going to work 7 hours. They stressed that if their suggestion is not accepted they were not going to work.
51. DW1 testified that she again called Mr. Macaefa who asked to be given one of the shop stewards to talk to him. After talking to the shop steward Mr. Macaefa reported to DW1 that the workers were adamant that they if they are required to work 12 hours they were not going to work. The witness testified that she brought to the attention of Mr. Macaefa that the action of the workers now amounted to a strike and that she was going to give them ultimatums. She stated that she related the same information to the shop stewards and warned

them that the action could lead to their dismissal. The shop stewards conveyed the message to the workers and came back to report that the workers were not changing their standpoint.

52. Ms. Pelesa testified that she requested the shop stewards to allow her to speak to the workers directly. She told them that their action amounted to a strike. She told them that she has warned them since 3.00pm when she dispersed them to come ready at 6.00pm to work 12 hours. Now that they still refused to work legal hours she was going to issue the last ultimatum leading to dismissal.
53. The workers still did not heed the warning. Ms. Pelesa testified that she then issued a 30 minutes ultimatum to return to work. They did not comply. She stated that she told them that she was giving them the last chance. They did not respond. She testified that she considered the 30 minutes adequate because the workers had already been previously warned at 3.00pm about the consequences of their action. When the workers still did not comply with the second ultimatum she verbally told them that they were dismissed and they were given until 8.00pm to vacate the mine premises. They did not vacate until security intervened and sought to remove them forcefully. The same Ms. Pelesa pleaded with Letseng Diamond Mine that they be allowed to stay in the mine premises overnight and that they be required to vacate the following day at 6.00am. this was agreed as such they were allowed to stay on mine compound overnight.
54. On the 16th April the 1st shift reported to work at 6.00am already aware of the fate that befell their compatriots the previous evening. DW1 testified that she told them at the start of the shift that they had disobeyed her order the previous day not to knock off at 2.00pm. She told them further that she was expecting them to work a 12 hour shift while negotiations continued. They told her in return that they would not work 12 hours.
55. The witness testified that she again called Mr. Macaefa and told him that even this shift was refusing to cooperate as a result she was going to start to issue ultimatums that would culminate in their dismissal. Mr. Macaefa requested 15 minutes to consult with the shop stewards. Afterwards he reported to Ms. Pelesa that workers were adamant that they were going to work 8 hours. The witness testified that she

- requested Mr. Macaefa to come to Letseng but he said he could not as he was attending the opening of Parliament.
56. DW1 testified that at 8.00am she issued the first ultimatum of one hour. She read the notice to the workers and thereafter posted it at a conspicuous place for workers to read for themselves. At 9.00am she issue the second ultimatum which was to run till 10.00am. When there was still no movement at 10.00am she told the workers that she was now going to issue the last ultimatum. Again workers remained adamant. The witness testified that when workers still did not work after the lapse of the last ultimatum, she spoke to them and told them that she was giving them the last opportunity to resume work, but they still failed to respond positively. She then dismissed them. Asked what their reaction was when she told them that they were dismissed, she said just like the other group the previous evening, they applauded by clapping their hands and went to their dormitories to collect their belongings.
57. At around 2.00pm the same day the witness said she got a call from Mr. Macaefa who said he was on his way to Letseng and he wanted the two of them to meet. The witness stated that she told him that all his members were dismissed and that she was herself on the way to Maseru. She proposed that they should meet in Maseru instead. When she got to Maseru she was informed that Mr. Macaefa had arrived at Letseng and was liaising with Letseng management to secure overnight accommodation for the dismissed workers.
58. The 2nd witness of the respondent was the Labour Officer Mrs. Mamphaphathi Molapo. She is one of the three Labour Officers who were dispatched to Letseng to consult with the workers who were going to be affected by the exemption. She confirmed the consultation process and that only representatives of the employees of the respondent had misgivings about the exemption. They complained that the long hours are not good for them as they operate large machines and extended hours of work cause them accidents.
59. DW2 testified that they conveyed the concerns of the workers to the management of the respondent and met with them in the presence of the workers' representatives. Management responded that there were no accidents reported and they were surprised that the workers had

said there were any accidents. She said they enquired what steps the company took to minimize the accidents the workers complain about. Management told them that there were standby workers who relief those on duty so that workers do not actually work the full 12 hours.

60. The witness was asked if the workers representative said anything to contradict management's responses. She said there was disagreement but it turned out that the workers had not reported the accidents they complained about to the office. She was asked why they consulted with all the workers when the exemption had been applied for by Letseng Diamonds. She replied that the previous year's exemption had applied to all the workers including employees of sub-contractors. It was thus deemed expedient that they be included in the consultations.
61. Following the dismissal of the last group of workers on the 16th April 2010, the General Secretary wrote a letter dated 22nd April appealing the dismissals on the ground that the letter of dismissal of the workers had been signed by the Contract Manager Mr. Ferreira Coetzee. He however quickly abandoned the appeal and referred the dispute to this court on the 17th May 2010. The grounds on which relief is sought are contained in paragraph 9 of the Originating Application as well as paragraph 9 of this judgment.
62. Against the backdrop of those grounds the applicants prayed for relief as follows:
 - (a) That the dismissal of 1st applicant's members be declared unlawful.
 - (b) That the 1st applicant's members be reinstated unconditionally.
 - (c) That the exemption purportedly granted to the respondent by the Minister of Labour be declared unlawful for having been granted without proper consultation and in contravention of the Labour Code in so far as it is purported to apply on applicants.
 - (d) The respondent should pay the costs of suit and further and alternative relief.

63. The first contention advanced on behalf of the applicants is that the employees were dismissed in violation of the rules of natural justice in as much as no disciplinary hearing was held. The applicants were issued with an ultimatum to resume work or face dismissal. They just ignored the ultimatum and continued with their obstinacy without saying a word why the employer must not carry out the threat to dismiss them. The various ultimatums they were given constituted an opportunity for them to make representations to the contrary regarding why they should not be dismissed. (see *Mzeku & Others .v. Volkswagen SA (Pty) Ltd* (2001) 22 ILJ 1575 at p.1589 paragraph 41 G).
64. Counsel for the applicants appreciated that in the circumstances of this case the employer had to issue ultimatums. He contended correctly that the message carried by the ultimatum must be clear and indicate the consequences of failure to comply with its requirements. He submitted that in casu the ultimatum threatened the employees with disciplinary measures and yet the employer dismissed the employees without following disciplinary procedures.
65. It appears that the learned counsel for the applicants is of the view that disciplinary process would have been followed only if individual hearings were held. The Labour Code (Codes of Good Practice) Notice 2004 clause 11(12) recognizes that in cases of collective misconduct a collective hearing may be held for the employees concerned. In his article *The Dismissal of Strikers* (1990) 11 ILJ 213 at 225-226 Professor Martin Brassey wrote that individual hearings before strikers could be dismissed would be senseless and impractical but emphasized that *“a hearing should nonetheless be given to the collective bargaining representative of the strikers and to those who bonafide believe, as a result of whatever reason their absence was justified.”*
66. Evidence which this court has heard is that the Human resources Manager first informed the shop stewards who were representing the workers of the contemplated dismissal if they did not reconsider their decision. The shop stewards conveyed the message to the workers and came back with a report that the workers were not prepared to budge. That was their response, that come what may, we are not changing one stance. Evidence further shows that she then spoke to

- the union representative in Maseru Mr. Macaefa and told him what she intended to do if there was still no change of the mind. Mr. Macaefa requested time to speak to the workers through their shop stewards. His efforts also did not bear any fruits. Clearly the workers were given ample opportunity to either defend their action or reconsider their decision as a group but they did neither.
67. Mr. Molati for the applicants contended further that the ultimatums did not give the workers enough time to reflect. That the ultimatum must give striking employees adequate time to reflect is a well established principle. (see *Metal & Allied Workers Union & Others .v. Bonar Long NPE (SA) (Pty) Ltd* (1987) 8 ILJ 108 at 112D; *National Union of Metal Workers of south Africa .v. GM Vincent Metal Solutions (Pty) Ltd* (1999) 20 ILJ 2003 and *Lerato Mohapi & 93 others .v. Nien Hsing International Lesotho (Pty) Ltd LC/36/10* (unreported)). Evidence adduced on behalf of the respondent is that workers were given ample time to reconsider.
68. DW1 testified that the first group to be dismissed was the 2nd shift which was to start their shift at 6.00pm on the 15th April 2010. She stated that when this group was stopped from continuing with work at 15.00 hours and to report for duty at their scheduled time at 18.00 hours, they were told already to come prepared to work the contractual 12 hour shift. They had the 3 hours to reflect before reporting back at 6.00pm as directed. When they refused to do as directed she repeated the warnings at 18.00 hours by giving them another 30 minutes. She dismissed them at 18.30 hours.
69. The second group was dismissed at around 11.30am after they were issued with warnings from 8.00am. It is clear right away that the two groups were not given equal time to reflect. The group that was dismissed on the evening of the 15th April was given evidently inadequate time of only 30 minutes. Ms. Pelesa's evidence that she counted the time from 3.00pm, when the workers were ordered to go back to their rooms is not acceptable because at that time i.e. 3.00pm the workers were not given an ultimatum. They were told to go back and report back to work at the normal time of 6.00pm when their shift is scheduled to start. They were first given the ultimatum after they said they were going to work only seven hours as they had already worked one hour from 2.00 to 3.00 when they were stopped. That

ultimatum was for 30 minutes and when they did not comply they were dismissed at 6.30pm. We have no doubt that 30 minutes was totally insufficient for that group to reconsider their position.

70. The position of the group that was dismissed on the 16th April at around 11.30am is completely different. Not only was Ms. Pelesa openly generous to them regarding the time, even after the 3 hours she had given them expired at 11.00am she still came back to tell them that she was giving them the last opportunity to reconsider and resume work. It is instructive that this group failed to utilize the ample time given to them to reflect, already aware what the consequences of failure to obey the ultimatum are going to be. By the time they were being persuaded to change their mind their colleagues of the 2nd shift had already been dismissed. They knew pretty well what awaited them if they continued to fail to heed the ultimatum. They persisted nonetheless. They cannot therefore complain like the other group of having not been given enough time to reflect.
71. The second ground on which relief is sought is that the employees' dismissal is premised upon unfair labour practices. No evidence was adduced to substantiate what is meant by this. Even in his closing arguments Mr. Molati for the applicants did not address this ground. We can therefore safely infer that he abandoned it.
72. It was applicants' further contention that the dismissal was aimed at coercing the employees to succumb to an unlawful exemption which was granted contrary to the labour laws of Lesotho. No court has adjudged the exemption granted by the Honourable Minister of Labour unlawful. Neither is there a case pending before the court of competent jurisdiction to pronounce the exemption unlawful. The applicants cannot therefore be heard to say the exemption is unlawful in the absence of a court pronouncement to that effect.
73. The second point to consider in relation to this contention is that the dismissal of the applicants were never conditional such that if they agreed to work according to the exemption they would be withdrawn. It is therefore incorrect to say the dismissals were intended to coerce the employees to succumb to the exemption. They were dismissed because they did not accept to work in accordance with the

exemption, even after they were given time through ultimatums to reconsider their position.

74. The applicants led no evidence to show why they say the exemption was granted contrary to the labour laws of Lesotho. On the face of it the certificate of exemption says it was granted in terms of section 119(3) of the Labour Code Order 1992. Neither oral evidence nor counsel's submissions were tendered to contradict the allegations contained in the certificate of exemption. Evidence presented before court show that extensive consultations were made with the persons who were going to be affected by the exemption prior to the granting of the exemption. This court does not see how in the circumstance the exemption can be said to have been granted contrary to the labour laws of the country.
75. The court has not been told how the dismissal was meant to subject the workers to slavery. Mr. Molati also did not pursue this point. That leaves us with the last contention that the exemption which is the subject of the dispute herein was granted to Letseng diamonds (Pty) Ltd and not the respondent. In response to this DW1 stated that the exemption has been granted to Letseng Diamond Mine which Matekane Mining is a part of and not Letseng Diamonds (Pty) Ltd. Mr. Molati quickly conceded this.
76. It is clear to this court that members of the 1st applicant did take part in an illegal work stoppage which as the respondent correctly labeled it constituted an illegal strike. As it was correctly stated in metal Workers Union case supra *"a work stoppage is obviously a breach of contract of employment and unless it can be justified it is a ground for dismissal which cannot be attacked on the basis that it was unfair if adequate time had been given for reflection and return to work."* At p.112 D.
77. Applicants' 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. The reading of "M3" which is the Human Resources Manager's response to Mr. Malee's request shows that the allegation is not correct. Evidence led by the respondent which Mr. Malee confirmed under cross-examination indicates that there was no denial of access. 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.

78. Assuming the workers misinterpreted the letter of the Human Resources Manager; the latter had occasion to explain to them that the letter was not preventing their union secretary to visit them. They however were wedded to their initial decision not to work according to their contracts and that rather than do so, they would rather stop work. For these reasons their dismissals were substantively fair.

79. The procedural fairness was sought to be achieved through the ultimatums which in the case of the group that was dismissed on the 16th April were given in intervals of one hour. According to evidence management sought to persuade this group to change their mind from 6.00am when they reported for work. It was only at 8.00am when the first ultimatum was issued. The last ultimatum of one hour was given at 10.00am. When it expired at 11.00am the Human Resources Manager still gave them a further unspecified time to change their mind before she made the final decision to dismiss them. We have no doubt that this group was given adequate time to reflect, but chose to remain steadfast in their resolve not to work in accordance with their contracts. Accordingly, the dismissal of this group was procedurally fair.

80. We are not equally 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.

THUS DONE AT MASERU THIS 29TH DAY OF APRIL 2011

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANTS:
FOR RESPONDENT:

MR. MOLATI
MS. NTENE