

IN THE LABOUR COURT OF LESOTHO LC/36/10

HELD AT MASERU

IN THE MATTER BETWEEN

LERATO MOHAPI & 93 OTHERS

APPLICANT

AND

NIEN HSING INTERNATIONAL (PTY) LTD RESPONDENT

JUDGMENT

Date: 04/11/10

Strike – Workers defiance of management directive not to hold celebration during working hours amounted to a strike especially when workers abandoned work despite management pleas for them to resume work – Ultimatums sufficiently met requirements of principle of audi alteram partem – Selective rehiring – Employer showing it reemployed people who applied for reemployment – such not constituting inconsistency – dismissals fair.

1. This case arises out of the dismissal of approximately 1200 employees of the respondent on the 11th December 2009. According to the statement of case, the respondent scheduled to close for Christmas and New Year holidays on the 15th December 2009. This was a Tuesday. Staff allege that they were used to closing on Fridays, which is usually marked with a Christmas party by the workers at knock off.

2. On Friday 11th at 12.00 noon workers started to sing, ululate and blew vuvuzelas in what they termed a celebration. There was no serious problem with the timing, because that was their lunch hour. The problem started when the “celebrations” spilled into the afternoon when the workers were expected to resume their work. In their statement of case the applicants allege that those workers who wanted to resume work were disturbed by those who were celebrating. They allege further that power was switched off thus further denying those who wanted to work the opportunity to switch on their machines.
3. Applicants conceded further that the employer sought to persuade the workers to stop the singing and resume work. The workers did not heed management’s call to resume work. Management interpreted their act of stopping to work to amount to a strike and consequently dismissed some 1200 employees. They were served with formal letters of dismissal on the following Monday 14th December 2009.
4. When the firm reopened on the 5th January 2010, some 1000 of the dismissed employees were reinstated. The remaining ones referred a dispute of unfair dismissal to the DDPR. On the date of hearing a shop steward by the name of Matobako was reinstated and the claims of 36 others were settled at conciliation. This left 98 employees who remained dismissed. 94 of those have referred a dispute of unfair dismissal alleging that their dismissal is unfair because:
 - (a) There was no strike.
 - (b) The respondent failed to follow a fair procedure
 - (c) The selection criteria was unfair because there is no evidence that the dismissed employees were the ones who were singing.
 - (d) There was inconsistency in reinstating and payment of Terminal benefits which were agreed at conciliation.
5. In their Answer the respondent stated that applicants embarked on an unlawful strike and/or unlawful work stoppage. They averred that the alleged Christmas party celebration was not authorized by management and that it caused intolerable

disturbance to other employees who were willing to work. Respondent averred specifically that the present applicants were among those who did not resume their work at 1.00 pm when work resumed.

6. The respondent denied that power was switched off and undertook to present a video footage of the happenings of the day as evidence. They averred that they consulted with employees, shop stewards and trade union officials to establish the cause of the work stoppage, before issuing ultimatums starting at 2.30 pm. The workers were finally dismissed at 4.00 pm after failing to heed three ultimatums.
7. Only one witness testified on both sides. Mrs. Mamahlosi Ramathalea sought to testify on behalf of the applicants. She however, fell into the trap of often seeking to save herself personally as opposed to the group she initially sought to represent. She testified that on the day in question management called supervisors and told them that the closure for Christmas had been moved to Tuesday 15th December. They were further told to tell workers that there should be no Christmas party celebration that day.
8. She testified that at 12.00 noon, which is their time to break for lunch she heard a song allegedly started by supervisors and management. The rest of the workers joined in the singing. She testified that at 13.00 hrs when they were supposed to return from lunch only the supervisors returned. The rest of the workers continued to sing. She testified that she returned to her machine to work, but could not do so because the machines had been switched off even though lights were still on. She stated that the singing continued until 5.00 pm when they knocked off and went home.
9. On Monday 14th December workers reported for work as usual, the witness testified. However, when they arrived they found gates closed and the workers were being allowed inside one by one. When she got inside she was paid off and issued a letter of dismissal. She testified that there was another table where some employees were being rehired. The witness corrected

herself and said there was infact no rehiring that day, but workers were actually applying for reemployment at the table where she wrongly said they were being rehired.

10. On the 5th January 2010 when the firm reopened, PW1 said she reported at work as if nothing had happened because she did not consider herself dismissed. She stated that only those who had applied were reemployed. Indeed on the 8th January 2010, the two unions FAWU and LECAWU, signed a memorandum of agreement whereby dismissed employees who applied for reemployment were going to be reemployed with effect from 5th January 2010. 186 employees would remain dismissed.
11. The witness testified that those who were not reinstated referred a dispute of unfair dismissal to the DDPR. It would appear from annexure "E" to the Originating Application that there were 135 applicants in the DDPR referral. The cases of 37 employees were settled at conciliation and the 98 whose claims were not settled were referred to the Labour Court for adjudication.
12. Under cross-examination the witness was asked whether washing and packing departments worked on the afternoon of the 11th December. She said she did not know. It was put to her that those two departments worked as usual that afternoon. She said she did not deny. It was put to her again that the two departments that stopped work were sewing where she worked and cutting room. She denied. The witness had said in chief that the employer was talking to groups of workers but she could not hear what was being said. It was put to her that the employer was infact imploring workers to resume work. She did not deny.
13. It was put to her further that the employer could not switch off the machines because the employer wanted work to be done. She denied. The denial cannot be a true understanding of the attitude and approach of the employer to the situation. It would be an illogical contradiction for the employer to switch off the machines and then seek to persuade the workers to do the work. Infact the workers would be the first to point out the

absurdity if at all that was the case. That they did not do so, is evidence of the untruthfulness of PW1's testimony in this regard.

14. It was put to her that management worked with shop stewards to get them to return to work and that those shop stewards had switched on their machines. Mention was made of Matobako and Sehlabaka in this regard. She disagreed. She was asked if she requested any one of management to help her switch on her machine. She said she approached a Chinese man who was a mechanic and he said he did not know anything. This is clear fabrication on the part of the witness. If indeed this was what she did, she would not have omitted that crucial piece of evidence during her testimony in chief.
15. She was asked whether she ever sought help from those supervisors who were persuading workers to resume work, she said she did not. Asked whether she asked for help from the supervisors whom she testified returned to work in the afternoon, she said she only saw Basotho supervisors. Asked if she asked for help from them, she said she did ask for help from her Mosotho supervisor but she appeared to be still in a celebration mood. She said she was sitting down and doing nothing. This is a serious contradiction, because this same witness told us that supervisors returned to their work in the afternoon. Furthermore, someone sitting down and doing nothing cannot be said to be in a festive mood. We have no doubt that this witness was fabricating her evidence to suit her latest version that supervisors were also part of the singing, which caused workers not to return to work in the afternoon.
16. It was put to her that management tried for one and a half hours to persuade workers to return to work without success and that at 2.30 pm the first ultimatum was issued which was not heeded. She agreed. She also accepted that the 2nd and 3rd notices were issued at the interval of 30 minutes in between, all of which were not heeded. It was put to her that at 4.00 pm workers were told through a loudspeaker that they were dismissed and that they should come on Monday at 8.00 am to

- collect their pay. She agreed that was the case save that she said they were not told what time they should come.
17. The admissions of PW1 in this regard are in contrast with her evidence in chief when she said they sang until knock off time at 5.00 pm when they left for home. It further contradicts her testimony where she said on Monday they came to work as usual and only learned of their dismissal after being allowed into the factory premises one by one. It now emerges that the truth is that they came on Monday already aware they were dismissed, as such they could not be coming to work as usual. This is clear evidence that PW1 is an untruthful witness.
 18. DW1 was the Assistant Factory Manager Mr. Daniel Lei Bu. He testified that on the 11th December 2009 he arrived at the Factory from a business lunch he had had with the Managing Director at 1.00pm. He found some workers roaming around with vuvuzelas. He sought explanation regarding what was happening from the shop steward by the name of Matobako. She replied that she did not know.
 19. He testified that he proceeded to enquire from officials of the two unions represented at the factory, FAWU and LECAWU. The General Secretary of LECAWU Mr. Maraisane said he was on his way to Mafeteng and asked him to contact his deputy. The deputy told him he was committed and promised to send someone. There is no evidence to show whether that someone was eventually sent.
 20. DW1 said he then contacted the Deputy Secretary of FAWU one Stephen who promised to come to the factory but said he would be late somehow. He said he proceeded to call the National Organiser Mr. Sam Mokhele. He promised that he was on his way. By the time he finished calling union people the witness says it was 1.20 pm. He sought to enquire from supervisors and they told him workers were just happy, they wanted to celebrate. He said he explained that it was working time and that no one had the right to celebrate inside working hours.

21. He confirmed that at 2.30 pm the first ultimatum was issued. The 2nd was at 3.00 pm and the last one was at 3.30 pm. At 4.00 pm the workers were informed that they were all dismissed. The witness went on to show us the video footage which was taken from around 1.19 hrs. It shows pandemonium with workers singing and blowing whistles and vuvuzelas. The video carried us through sewing section where PW1 admittedly worked.
22. Contrary to PW1's testimony that she sat at her machine and was only unable to work because the machine was switched off, there was not a single person sitting at her machine. All the workers were singing and dancing, "Re sebellitse Mahala Letsatsi Lohle," the song went. Furthermore, contrary to her evidence that the notices were written in English they were in Sesotho and bold enough for everyone to read. They were paraded by Chinese supervisors through the sewing lines and workers mocked them by singing after the notice bearers through the lines. Moreover, contrary to her further evidence that Chinese supervisors were not anywhere to be seen and that only Basotho supervisors could be seen, there were Chinese supervisors around carrying the notices around and some of them are seen shouting instructions to workers to resume work.
23. Under cross-examination the witness was asked if people who are happy are on strike. The response was that the only thing that caused their happiness to go wrong was that they celebrated their happiness during working hours without permission from management. The witness was further asked if only those workers who were dancing and singing were dismissed, he agreed that was so. The question was further put that the video focused only on those who were singing and the witness said they focused on the ring leaders. Ms. Ramathalea put it to the witness that she was not singing. The witness was adamant that the dismissals were based on the video footage and stressed that it was not just one video that was being shot.

24. In her closing arguments Ms. Ramathalea for the applicants repeated their averrements in the founding papers and said there was no strike because there was no trade dispute in existence. This contention loses sight of the definition of a trade dispute which covers what happened at the respondent's firm on the 11th December 2009. Trade dispute is defined as:

“any dispute or difference between employers or their organizations and employees or their organizations or between employers and employees connected with the employment or non employment, or the terms of the employment, or the conditions of labour of, of any person.”

25. In hoc casu evidence is clear that the workers had been instructed through their supervisors not to hold the so-called close of year celebration that afternoon. However, the workers defied that directive and stopped work to celebrate. That was a clear difference between the employees and the employer. The difference or dispute did not stop there. It took a step further when the workers continued to refuse to resume work despite management's relentless effort to get them to restore normality and resume work. There was evidently a trade dispute which entitled the employer to conclude that the employees were on strike.
26. Mr. Ntlhabo for the respondent branded the action an illegal work stoppage. He was correct. That illegal stoppage was a breach of contract for which the employer could take an appropriate disciplinary action. It follows that whichever way one looks at it i.e. whether one sees it as an illegal strike, which it was, or an illegal work stoppage, applicants had by their action rendered themselves liable to possible harsh disciplinary action and they did get it.

27. Applicants contended that the respondent had failed to follow a fair procedure when effecting dismissals especially because there was no violence. Mr. Ntlhabo argued to the contrary that the employer acted in accordance with its personnel regulations clause 42, which provides for the issuing of ultimatums in situations of a strike. He contended that it would be odd to expect the employer to hold individual hearings for the approximately 2000 employees who had to be disciplined.
28. In the light of the impracticability of holding hearings for such large number of employees the employer resorted to clause 42 of the regulations. He said the employer tirelessly tried to persuade workers to return to work while at the sametime issuing well spaced ultimatums warning the employees of the illegality of their action and the consequences such an act could have on their continued employment. He contended correctly in our view that these ultimatums constituted sufficient compliance with the requirements of *audi alteram partem*. The approach of respondent has been endorsed by the Supreme Court of Appeal of South Africa in National Union of Metal Workers of South Africa .v. G. M. Vincent Metal Sections (Pty) Ltd (SCA) (1999) 20 ILJ 2003 at paragraph 28 of the judgment.
29. Applicants' further contention was that the respondent was inconsistent in reinstating some employees while excluding others. Evidence of PW1 which is confirmed by the preamble to the Memorandum of Agreement signed with LECAWU and FAWU, is that the people who were reemployed exercised the option to apply for reemployment after they were served with the letters of dismissals. Evidence further showed that shop steward Matobako and Sehlabaka were to be reinstated because they had actively taken part in trying to persuade the workers to resume work. The employer clearly had valid reasons for selecting those employees that he reinstated and those he reemployed.

30. Finally, it was argued on behalf of the applicants that there was no evidence that the applicants were the ones who were singing and therefore failed to return to work as required. According to evidence the employer had abundance of evidence of who was involved in the work stoppage. The first such evidence is that it was only two sections who took part in the unauthorized celebration. Employees of those sections are well known to management. The second is the video footage of the saga itself which DW1 said it took particular view of the ring leaders. We were shown this video and the pictures of the persons involved in the “celebrations” were very clear. Accordingly, the employer cannot be said to have selected the applicants capriciously. It had abundance of evidence which pointed to those involved. For these reasons this application cannot succeed. It is accordingly dismissed.

THUS DONE AT MASERU THIS 23RD DAY OF FEBRUARY 2011

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

M. MAKHETHA
MEMBER

I CONCUR

FOR APPLICANTS:
FOR RESPONDENT:

MR. RAMATHALEA
MR. NTLHABO