IN THE LABOUR COURT OF LESOTHO **LC 39/10 (No.2)**

HELD AT MASERU

In the matter between:

TEBELLO THANDAZO **1ST APPLICANT**
MOTENA MOTALE **2ND APPLICANT**
MPINANE MOEJANE **3RD APPLICANT**
`MANTOA MOJAKI **4TH APPLICANT**

and

NIEN HSING INTERNATIONAL LESOTHO (PTY) LTD **RESPONDENT**

JUDGMENT

DATE: 03/07/13

Unfair dismissal claim - arising from an alleged participation in an illegal strike / unlawful work stoppage - Whether dismissal fair - As applicants allege that they did not participate in the illegal strike/ unlawful work stoppage - Court finds the employer to have failed to prove that the applicants participated in the said illegal work stoppage.

1. The applicants herein are all former employees of the respondent company and were dismissed for allegedly participating in an illegal strike or work stoppage on 11th December, 2009.

2. The alleged unfair dismissal arose from an alleged failure on their part to comply with ultimatums that were issued by the respondent consequent to the alleged illegal strike or an unlawful work stoppage embarked on by the applicants, among others, on the said date. The applicants contended that their dismissal was both substantively and procedurally unfair and sought an order of reinstatement which was changed to an order for compensation during the proceedings.

3. The applicants were all members of the Factory Workers' Union (FAWU). The issue that led to their dismissal arose on 11th December, 2009 when respondent's employees held a Christmas party on work premises. It is applicants' case that it was a tradition at respondent's workplace to hold a Christmas party organized by the employer on the last Friday of December before the Christmas break. Applicants contended that for some reason the employer had not organised a party that year. They on their own accord decided to have some celebration over the lunch hour from 1200 to 1300 hours. They intimated to the Court that the employer was far from pleased with this celebration interpreting it as a strike and consequently switched off electricity from plugs (power outlets).

4. It was testified on behalf of management that three ultimatums were issued for employees to stop the singing and dancing and resume work. Apparently shop stewards tried to intervene but the situation got out of hand. The purported unlawful work stoppage occurred on a Friday and employees were ordered to go home and report on the following Monday, 14th December, 2009. On the Monday they were ordered to get into the workplace individually. They were then served with letters of dismissal for participation in an illegal strike.

5. It is common cause that subsequent to this and following negotiations by the unions, viz., FAWU and the Lesotho Clothing and Allied Workers Union (LECAWU) an agreement was entered into with management whereby the latter undertook to reinstate some workers effective 5th January, 2010. Applicants were however not reinstated. The said agreement, annexure "B" to the originating application provided in paragraph I that:-

> ***The company will reinstate some of the employees dismissed on 11th December, 2009 who applied for re-employment on the 15th December, 2009 with effect from 5th January, 2010. Dismissal figure is to be 186 employees.***

This agreement was signed on 8th January, 2010 between Management of Nien Hsing International Lesotho (Pty) Ltd and representatives of FAWU and LECAWU.

6. Some employees were still not reinstated. The union subsequently filed referral No. A0096/10 before the Directorate of Dispute Prevention and Resolution (DDPR) in which they challenged the substantive and procedural fairness of their dismissals. The case involved one hundred and thirty-five (135) employees and was styled ***Masone Matobako & 134 Others v Nien Hsing International Lesotho***

(Pty) Ltd. The DDPR conciliated the matter before referring it to this Court as required by ***Section 227 (5) of the Labour Code (Amendment) Act, 2000*** which provides that;

> ***If the dispute is one that should be resolved by adjudication in the Labour Court, the Director shall appoint a conciliator to attempt to resolve the dispute by conciliation before the matter is referred to the Labour Court.***

7. Following the conciliation process a settlement agreement was entered into on 4th March, 2010. This settlement agreement resulted in another batch of employees being reinstated. Still ninety-eight (98) employees remained dismissed. Their case was then referred to this Court for adjudication in terms of ***Section 226 (1) (c) of the Labour Code (Amendment) Act, 2000*** on account of the employer's defence that the dismissal was a consequence of an unlawful strike.

APPLICANTS` CASE

8. Applicants' case is that they never participated in the unlawful work stoppage. Besides papers filed of record, the following tendered viva voc`e evidence:

(i) ***TEBELLO THANDAZO*** - 1st Applicant

The 1stapplicant, Thandazo testified that they indeed had some festivity to celebrate Christmas over the lunch hour but herself and the other applicants returned to their respective workstations after the lunch break. She testified that there was no power on the plugs for the operation of the machines but lights were still on. She testified that there were placards asking them to sit down and wait for electricity but around 1500 hours they were told to leave the workplace and to collect their bonus pay on Monday, 14th. On the day, she was paid her salary, bonus and served with a letter of dismissal. She indicated that she went back on 5th January when work resumed but her supervisor told her that she no longer wanted to work with her. She pointed out that on her part she was heavily pregnant at the time, seven months into her pregnancy. She contended that she could not participate in the singing and dancing due to her condition. She however could not work as power had been cut off on the plugs rendering it impossible for them to operate their sewing machines.

(ii) ***MPINANE MOEJANE -*** 3rd Applicant

She confirmed Thandazo's evidence and pointed out that she enquired from her supervisor, one `Makopano about the lack of electricity. She denied participating in

the illegal work stoppage and indicated that she never saw the ultimatums that were issued by the employer. She acceded that she was part of the party at lunch but at 1300 hours she went back to her workstation. She said she was under an impression that they had been permitted to hold the said party.

(iii) `***MANTOA MOJAKI*** - 4th Applicant

She testified that she worked in the Cutting Room. She averred that she had been sitting in her Section waiting for work but the men from whom she receives material pieces for sewing told her that there was a power cut. She said she saw the ultimatums, but she was still sitting at her workstation. Then around 1500 hours they were told to leave the workplace.

(iv) ***MOTENA MOTALE -*** 2nd Applicant

She testified that she worked in the Cutting Section and her job entailed counting the material pieces that had been cut in preparation for sewing. She reiterated as with the other applicants that they had a celebration at lunch from 1200 hours to 1300 hours but she went back to her workstation after lunch. She saw the ultimatums, and they were later told to leave the workplace, and come back on Monday whereupon they received their wages, bonus pay and letters of dismissal. She said she did not recall being given an opportunity to reapply.

9. Applicants' evidence was similar and consistent to the effect that there was a Christmas party on the 11th December, 2009 at lunch break but it spilled over to the afternoon. Applicants' case is however that they were not part of the singing and dancing taking place after 1300 hours. They testified that they went back to their workstations after lunch.

RESPONDENT'S CASE

10. Besides papers filed of record, Sekhonyana Ntlhabo, the group's Human Resources Manager and Daniel Lei Bu, the Assistant managing director tendered evidence on behalf of the respondent. In disputing applicants` version, Ntlhabo argued that three (3) ultimatums were issued by management following the illegal work stoppage but the workers did not heed them. Management then decided to dismiss the employees ***en masse***. He testified that all the employees were on strike. He denied there was a power cut at any stage. Counsel for the respondent pointed out that evidence would be tendered by way of a video to prove that the applicants

had participated in the strike. Daniel Lei Bu was the one who took the video footage.

THE COURT'S VIEW

11. The issue confronting this Court ***in casu*** is to ascertain whether or not the employer had a valid or fair reason to dismiss the applicants. It is trite that participation in an unlawful strike could render an employee liable to a dismissal. The fairness or otherwise of a dismissal arising from participation in an illegal strike has to be assessed on the basis of facts and the circumstances of a given case. An illegal strike generally constitutes serious and unacceptable misconduct by employees - see ***Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers' Union and Others 1994 (2) SA204 (A)*** at ***216 E***.

12. In our view, it was not disputable that there was an illegal work stoppage on 11th December, 2009 from 1300 hours onwards at respondent's workplace. What is in issue is whether the applicants participated in it to render them liable to dismissal for misconduct. They contended they did not. This is a question of evidence. To lend credence to their case it was incumbent upon the applicants to tender evidence to establish that they did not participate in the illegal strike. Whether what occurred was a strike or a work stoppage is not relevant for the determination of the question before us. What is in issue is whether the applicants withheld their labour when it was needed, whatever such withdrawal of services might be termed.

13. A question comes to mind, was the employer under a duty to identify each participant in the strike or whether the individual employees were obliged to show that they did not take part in the illegal work stoppage? Applicants' defence was that indeed they were not working but pointed out that they were impeded in the performance of their duties by the lack of power on the plugs. It was therefore impossible for them to render their services but they were at their work stations and willing to work. The identity of the individuals involved in the illegal work stoppage was critical in the circumstances of this case.

14. The respondent averred in his answer that the applicants did not take the opportunity to apply for re-employment when there was a public notice to that effect at the gate of the respondent's premises. This issue was not canvassed in Court and no evidence was adduced to support this allegation. It could have shed more light on why the applicants did not reapply. However, the employer's defence mainly revolved on that the applicants remained dismissed because they

participated in an illegal strike not that they declined the offer of re- employment. Since the issue was not motivated, the Court is not in a position to make any pronouncement on it.

15. Respondent's Counsel dwelled more on the party being illegal in that it was held on the employer's premises without authorisation. Indeed employees had to seek management's sanction for use of its premises. We cannot condone insubordination. Applicants acceded that they participated in the party during their lunch break, but availed their services after lunch. From papers filed of record and during proceedings the lunch break festivities appeared not to be the main bone contention but the carrying on of these festivities beyond lunch. We are here faced with a scenario where the applicants contend they never withdrew their labour as they went back to their workstations in the afternoon but the lack of electricity on the plugs made it impossible for them to work. They testified that some employees even those who participated in the strike were reinstated to their exclusion. The question is why? This impinges on fairness. A decision on fairness is not a decision on a question of law in the strict sense, but it is the passing of a moral judgment on a combination of findings of facts and opinions - see ***Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) SA 791 (A)*** at ***798 H-I***.

16. The 1st applicant averred in her testimony that she alerted her Chinese supervisor that there was no power and she or he in turn promised to investigate. This evidence was not controverted. Whilst not casting any aspersions on the respondents, one has observed a worrying trend where some employers instead of disciplining employees during the normal course of work, take advantage during strikes to get rid of employees who they do not like for one reason or another. This is improper. Employers have a right to discipline employees as and when a need arises. For instance, Tebello Thandazo testified that her supervisor indicated that she no longer wanted to work with her when she reported for duty on the 5th January, 2010. This could mean anything.

17. The video was not tendered as part of evidence before Court. The Court had adjourned before lunch on the day of hearing to facilitate presentation of the video footage. It however turned out that the witness, Daniel, had not brought facilities for the display of the video. By mutual consent both Counsel viewed it on a laptop. They both agreed that the video footage just reflected that there was a mass action but could not show who the actual participants were. He accede in cross-examination that since it was a mass action he could not easily identify who was who. The crux of applicants' case was that they never participated in the illegal

work stoppage and the respondent had a duty to adduce evidence to the effect that they did participate therein and it had a valid reason to dismiss them.

18. Applicants' Counsel implored this Court to draw a distinction between this case and ***Lerato Mohapi & 93 Others v Nien Hsing International Lesotho (Pty) Ltd LC36/10*** in which the applicants lost. Of course, Courts look at the circumstances of each case. From the evidence led, the applicants appeared to have resumed work after lunch but were affected by the singing and dancing of fellow employees in that their functions depended on the availability of electrical power and on work passed on from other employees. Their evidence was not challenged. The nature of their work was transitional. If one section was inoperative, the others became ineffective. The applicants successfully established that they were not part of a group that was singing and dancing after 1300 hours. It was critical to link the applicants to the alleged misdemeanor in order to prove validity of their dismissal.

AWARD

19. On the basis of the evidence led the Court comes to the following conclusion:

That the respondent has failed to show that the applicants actually participated in the illegal strike and as such it had a valid reason to dismiss them. The Court therefore finds the dismissal to have been unfair, and orders that each applicant be paid compensation equivalent to twelve months' wages. The compensation is payable within thirty (30) days of the handing down of this judgment.

There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 03rd DAY OF JULY, 2013.

F.M. KHABO
PRESIDENT (a.i)

M. MPHATS`OE **I CONCUR**
MEMBER

FOR THE APPLICANTS: Adv., M.S Rasekoai

FOR THE RESPONDENT: Adv., T. Mohaleroe

PS

When proceedings commenced there was a full panel, but along the way one of the assessors was not able to attend, hence we have one assessor. Rule 25 (2) of the Labour Court Rules,1994 provides that where in the course of a hearing a vacancy arises in the membership of the Court, provided the remaining members constitute a majority of the original membership of the Court, the decision of the remaining members shall be the decision of the Court.