

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

Court of Appeal Civil Appeal No. 27/2002

High Court Civil Case No.125/2000

In the matter between:

KAGISO FUNERAL PARLOUR

Appellant

and

ONALENNA MODISE

1st Respondent

KITSISO TSELAWA

2ND Respondent

COLLEN LETSHWANYO

3RD Respondent

Mr. B. Sechele for the Appellant
Respondents appearing in person

J U D G M E N T

CORAM: TEBBUTT J.P.
ZIETSMAN J.A.
AKIWUMI J.A.

ZIETSMAN JA;

The appellant appeals against a finding by the Industrial Court that the termination of the contracts of employment of the three respondents by the appellant was substantively unfair. The Industrial Court ordered that the appellant pay compensation to the respondents and this order is also the subject of the appellant's appeal.

In the appeal before us Mr Sechele appeared for the appellant. Since the noting of the appeal Onalenna Modise (the first respondent) has died. The other two respondents appeared in person.

The appellant owns a funeral parlour at Francistown. The three respondents were employed by the appellant as mortuary attendants.

During 1997 the three respondents, and all but three of the appellant's other employees, joined a trade union. The unionised employees members then elected a workers' committee consisting of eight members and two of the committee members were elected as shop stewards. They were Ms Sergeant and a driver, Mc Intosh.

On 29th August 1997 the unionised employees raised a number of complaints or grievances which they set out in a letter addressed to the appellant. Ms Sergeant handed the letter to the appellant's management but the letter met with no response from the appellant. On 24 November 1997 the employees wrote another similar letter which letter was on 27 November 1997 delivered by Mc Intosh to the appellant's managing director, Stellenberg. Mc Intosh was on the same day summarily dismissed and told to leave the appellant's premises immediately. The employees were upset about Mc Intosh's dismissal and they decided to speak to Stellenberg about it the next morning. They wanted to seek an explanation from Stellenberg concerning Mc Intosh's dismissal, and also to ask for his reinstatement.

It is not entirely clear from the evidence given before the Industrial Court what happened on Friday the 28th November, 1997. According to the respondents they arrived at work at the usual time, cleaned the premises and placed the chairs outside. They then sat on the chairs and waited for Stellenberg to arrive. According to Stellenberg the premises had not been cleaned when he arrived, and the chairs had not been put outside. He stated in evidence that he asked them why the place had not been cleaned. He states further that he also asked them three times to return to work but says that they ignored him. The respondents allege that they wanted to talk to him about Mc Intosh but he refused to listen to them. A man from the District Labour Office, Samxhosa, came to the premises and told the workers to resume their duties. They allege that they wanted to resume work but that Stellenberg refused to allow them into the premises and served them with suspension letters. According to Stellenberg the employees told Samxhosa that they were striking because they wanted Mc Intosh to be reinstated. The respondents deny this.

What is common cause is that the employees (including the three respondents) did no further work at the funeral parlour on that day, and in terms of the suspension letters handed to them they did not return to work until the following Monday, the 1st of December 1997. On Monday the 1st December the employees (including the respondents) were served with further letters suspending them without pay for a further five days "pending the resolution of the dispute by the Department of Labour."

On the following Saturday, the 6th December, the employees again arrived for work, and they worked their normal hours on that Saturday and on the following day. On Monday the 8th December they again arrived for work and were told that they were to be questioned by Mr and Mrs Stellenberg. Each employee was interviewed separately. They say they were asked why they had gone on strike on Friday the 28th November and were told that the strike had caused the appellant much embarrassment and financial loss as the appellant had to employ a skeleton staff to do the work which should have been done by the striking employees.

After the interviews of all the employees, except for the three respondents and one other employee, were reinstated, and no further action was taken against them. The three respondents and the other employee were, however, summarily dismissed.

Several questions arise from the facts as outlined above. The first question is whether there was an actual strike by the employees on Friday the 28th November. According to the respondents they merely wanted an explanation from Stellenberg concerning Mc Intosh's dismissal and they wanted to ask him to reinstate Mc Intosh. When he refused to speak to them about Mc Intosh, and after they had spoken to Samxhosa, they wanted to resume work but were refused entry to the premises by Stellenberg. According to

Stellenberg on the other hand both he and Samxhosa wanted the workers to resume work but they refused to do so,

It is clear that the appellant did employ a skeleton staff, apparently at some considerable expense, to do the work on Friday the 28th November and this suggests perhaps that the employees did refuse to work on that day. The finding of the Industrial Court was that the employees did go on strike and we cannot say that the court erred in this finding. We accept, therefore, that the actions of the respondents did amount to a strike.

The next question is whether their strike was a lawful strike.

In terms of section 26 (1) of the Employment Act (Cap 47:01) an employer may dismiss an employee without notice, i.e summarily, where the employee is guilty of serious misconduct in the course of his employment. In terms of section 26(4) (a) wilful disobedience of a lawful and reasonable order is serious misconduct and this would warrant summary dismissal.

The Industrial Court came to the conclusion that the strike in this case was a strike action in a non-essential service. The court also found that the strike was in furtherance of a trade dispute, and that the strike was therefore lawful. A lawful strike, so the Court found, remains lawful until it is declared unlawful by the Minister or by the Court.

Counsel for the appellant submitted that the strike in the present case was an unlawful strike. He conceded, however, that even if the strike was

unlawful the appellant was obliged to conduct a hearing before taking disciplinary action against the respondents and dismissing them.

I find it unnecessary to decide whether the strike in the present case was a lawful or an unlawful strike in view of my finding that a proper disciplinary enquiry and hearing was not conducted by the appellant before the decision was taken to dismiss the respondents.

The conduct of a disciplinary enquiry in such a case must be procedurally fair, and the rules of natural justice must be complied with. The appellant's counsel submits that this was done in this case. The facts are, however, the following.

On Monday the 1st December 1997, when they were served with notices suspending them for a further five days, the respondents were advised that their suspension was "pending the resolution of the dispute by the Department of Labour." It was stated in their letters that this was "since the dispute has not been amicably resolved." It is not clear from the record that any formal mediation proceedings were instituted although certain discussions did take place with members of the Labour Department. The appellant was advised by the Labour Department that an enquiry into the alleged strike by the employees should be held. The enquiry was to be a disciplinary enquiry and the procedure for the holding of such an enquiry must be fair. This requires the application of the rules of natural justice. The employee must at least be informed within a reasonable time of the nature of the charges against him and he must be given the opportunity of

being represented at the enquiry. See in this connection the cases of **Phirinyane v Spie Batignolles 1995 B.L.R. 1** and **Rabana v Botswana Housing Corporation** 1993 B.L.R. 175.

In the present case when the respondents arrived at the premises on the 8th December they continued with their normal working duties. They were then called in one by one to be questioned by Stellenberg and his wife. They were not informed that this questioning would constitute a formal enquiry or hearing in connection with the strike. No written charge was put to them. They were not given an opportunity to prepare their defence to any charges and they were not told that they could be represented at the hearing. What is clear from Stellenberg's own evidence is that this was not a proper enquiry or hearing. Although he asked each one why they had gone on strike, the main purpose of the interviews was, he admitted, to find out who the "ringleaders" were. He clearly resented the fact that most of his employees had joined a trade union and he wanted to get rid of the leading members of the trade union among his employees whom he also regarded as being the instigators of the strike. The actual merits or otherwise of the strike were not discussed at all.

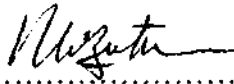
Mr Sechele has submitted that the appellant was entitled to combine an enquiry and a hearing in one sitting as long as the respondents were not prejudiced thereby. The failure to hold a proper hearing quite clearly did prejudice the respondents.

The dismissal of employees by their employer must be substantively fair. In the present case the person chosen by the employees to submit their grievances to their employer (the appellant) was dismissed when he handed the letter containing their grievances to Stellenberg. The workers were concerned and distressed by this and they wanted to discuss the matter with Stellenberg but he apparently refused to talk to them about it. This must inevitably have created the impression in the minds of the workers that the mere fact that they claimed the right to communicate to the appellant their grievances and problems had caused their shop steward to lose his employment. They had rights as workers and union members and they wanted to discuss the whole matter with Stellenberg. However, in the case of the three respondents this action led to their dismissal at a time when they were prepared to continue working for the appellant despite what had happened.

In all the circumstances it cannot be said that the dismissal of the respondents was substantively fair. This was the finding of the Industrial Court and that Court was justified in granting the orders appealed against.

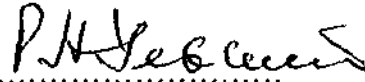
In the result the appeal is dismissed. No order is made as to costs.

**DELIVERED IN OPEN COURT AT LOBATSE ON THEDAY
OF JANUARY 2003.**



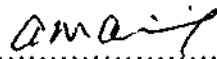
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N. W. ZIETSMAN
JUDGE OF APPEAL

I agree,



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P. H. TEBBUTT
JUDGE PRESIDENT

I agree,



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A. M. AKIWUMI
JUDGE OF APPEAL