SEBAKO AND ANOTHER v SHONA GAS 2006 (1) BLR 86 (IC)

Citation: 2006 (1) BLR 86 (IC)

Court: Industrial Court, Gaborone

Case No: IC No 665 of 2004

Judge: De Villiers J

Judgement Date: 0000-00-00

Counsel: Applicants in person. M L Gare for the respondent.

Flynote

Employment - Dismissal - Validity of - Employer could only dismiss employee on notice or without notice if valid reason existing for such dismissal - Employee may not be dismissed for misconduct unless disciplinary enquiry held.

Headnote

The first applicant worked as a driver for the respondent, delivering gas cylinders, while the second applicant was the first applicant's assistant. Following an allegation by the manager that a full gas cylinder was missing from the supply, both applicants were given two weeks' notice of termination of their contracts of employment. They were further paid 14 days' notice pay in lieu of notice and their accrued leave pay.
Held: (1) The real reason for the dismissal of the two applicants was because the manager believed that they had stolen the full cylinder.
(2) An employer could only terminate an employee's contract of employment without notice or with notice or by paying him notice pay in lieu of notice, if he had a valid reason for such termination. An employee may not be dismissed for misconduct unless a disciplinary enquiry has been held.
(3) The manger in the instant circumstances had failed to prove that a gas cylinder had in fact been stolen. No theft had accordingly been proved and it had not been proved that the applicants were involved in any theft. Therefore there had been no reason to dismiss the applicants and such dismissal was substantively unfair.
(4) No disciplinary enquiry was held prior to the applicants being dismissed. The dismissal was therefore also procedurally unfair.

Case Information

Cases referred to:
Phirinyane v Spie Batignolles [1995] B.L.R. 1, IC Claim for compensation for unfair dismissal. The facts are sufficiently stated in the judgment. Applicants in person.
M L Gare for the respondent.

Judgement

DE VILLIERS J:
Evidence of the applicant
The first applicant testified that he started working for the respondent as a driver on 13 June 2004. He had to deliver full gas cylinders to businesses and private homes and to collect the empty cylinders. There were two drivers and the respondent had two delivery trucks. Each driver had an assistant and the second applicant washis assistant.
He said that on 29 October 2004 the respondent's manager, Mr Gare took one truck as he had to go to Lobatse. The second driver could therefore not deliver and sat in the office the whole day with the lady checker. He and the second applicant therefore had to do all the deliveries on that day, which happened to be a very busy day.The checker had checked all the full gas cylinders which they loaded onto the truck and they went off to deliver. That afternoon they had to do more deliveries as the manager had not yet returned from Lobatse with the other truck.

They returned to the depot with empty gas cylinders to collect more full ones for further deliveries. He said the normal procedure was that in such cases they had to off load the empty cylinders first, which had to be checkedby the checker and then she had to check the full ones they had loaded for further deliveries. He said on that day the checker told them that as they were running late, they need not offload the empty cylinders. She just checked them on the truck. He and

his assistant then started loading full gas cylinders from the cage onto the truck and these were also checked by the checker.

When they returned that evening after doing all their deliveries, they found the manager there. He had already taken his daily stock and he was raving about one full gas cylinder which was missing from the cage. He then called the two of them, the other driver and the checker into his office. He asked them how come there was onefull cylinder missing and all four of them said that they did not know. The first applicant explained to the manager how they loaded and offloaded that day and each time the full and the empty gas cylinders balanced with the checker's check list. The manager was not happy that they did not offload the empty cylinders first that afternoon before loading further full cylinders. He then told all four of them to go home.

The next morning, 30 October 2004, the manager called only the two applicants to his office and said to them that there is nothing further he can now do about this missing full gas cylinder, but to give both of them two weeks' notice of termination of their contracts of employment. Shortly after they started working this notice period, the manager told them to leave and serve the rest of their notice at home which they then did. At the endof the 14 days they were paid 14 days' notice pay in lieu of notice. Much later, on the recommendation of the labour officer, the manager paid them a further 14 days' notice pay in lieu of notice, as well as their accrued leave pay.

The first applicant said that as he was unfairly dismissed, he is now claiming compensation. He said he and the second applicant worked 12 hours per day and were not paid any overtime. He now wants overtime paymentand payment for the off days on which he worked, as well as for 44 weekend days, that is Saturdays and Sundays on which they had worked.

The second applicant testified that he started working for the respondent on 13 June 2004 as a truck driver assistant. He confirmed the evidence of the first applicant and said that as they had worked the exact same days and hours, his claims are exactly the same as that of the first applicant.

Reasons for dismissal

Both applicants stated that they were dismissed because the manager had suspected them of having stolen the said full gas cylinder. Both applicants received similar letters of dismissal on 1 November 2004, which letters read as follows and were signed by the manager:

'Dear Mr Sebako

After carefull (sic) consideration and clear observation towards your performance with the employ of this company Shona Gas. I have made oral warnings to you in a number of occasions on your misconduct's while on duty.

From my personal opinion this does not bear any fruit as there is no improvement from your side in conducting yourself well. I therefore have no option, but have decided to terminate your services from work with notice of (14) fourteen dayseffective from 1st November 2004 until the 14 November 2004.'

In reply to a question by one of the assessors, who asked what the reason was for the dismissal of the two applicants, the manager stated that there were other reasons as well, besides this missing full gas cylinder.When asked about what the other reasons were he said he did not like their attitude, because according to their custom they should respect their elders. He said he often spoke to them about it. When questioned further about this by the court, he said: 'I spoke to all employees together about this. I never spoke to the two applicants separately.' (My notes) The court finds that if it had not been for the missing full gas cylinder, the manager wouldnot have done anything further regarding the staff's disrespect for elders. When the manager questioned the four of them in his office about this missing full gas cylinder, he referred to them as snakes and said they thought they were clever. In his cross-examination of the first applicant, the manager said that because the applicants had not followed normal procedure by first offloading the empty gas cylinders before loading the full ones, hetherefore linked the two of them to the shortage of the said full gas cylinder. The court therefore finds that the real reason for the dismissal of the two applicants was because the manager believed that they had stolen the said full gas cylinder.

Before dealing with further aspects of the applicants' evidence and the evidence of the manager, the court willfirst set out general principles of law and of equity relevant to a fair dismissal on a charge of theft and then determine whether the respondent had complied with such principles.

Substantive fairness

Substantive fairness relates to the reason for terminating an employee's contract of employment. An employercan only terminate an employee's contract of employment without notice or with notice or by paying him notice pay in lieu of notice, if he has a valid reason for such termination.

In terms of s 26(1) of the Employment Act (Cap 47:01), an employer may dismiss an employee without notice, where the employee has been found guilty of serious misconduct in the course of his employment. 'Serious misconduct' is defined in s 26(4) and s 26(4)(d) is obviously the section relied on by the said manager as the reason fordismissing the applicants, on 14 days notice. The said section provides as follows:

'For purposes of this section the term "serious misconduct" shall, without prejudice to its general meaning, include or be deemed to include the following -

(a)-(c) ...
(d) acts of theft, misappropriation or wilful dishonesty against the employer, another employee, or a customer or client of the employer;
(e)-(l) ...'
A dismissal as a result of misconduct, albeit ordinary misconduct or serious misconduct, on the part of anemployee, is also known as a disciplinary dismissal. This means that the general rule is that an employee may not be dismissed for misconduct unless a disciplinary enquiry has been held. In this court's judgment in the case of Phirinyane v Spie Batignolles [1995] B.L.R. 1, IC the court found that, although the Employment Act does notprescribe any procedure which an employer should follow before dismissing an employee for misconduct, the rules of natural justice nevertheless dictate that there must be a valid reason for such dismissal. To establish whether there is a valid reason, it is necessary to hold a disciplinary enquiry prior to a dismissal.

These rules of natural justice, or rules of equity as they are sometimes called, are derived from conventions andrecommendations of the International Labour Organization (ILO), which this court, also being a court of equity, applies when determining trade disputes. These conventions and recommendations are international labour standards. The basic requirements for a fair dismissal are set out in art 4 of ILO Convention 158 of 1982. Article 4 reads as follows:

'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with thecapacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service'. (My emphasis.)
This art 4 is then also the origin of the equitable requirement that an employee can only be dismissed if theemployer has a valid reason for doing so.

To comply with the 'valid reason' test, an employer must be satisfied, judged objectively, that the misconduct, with which the employee is charged, especially misconduct of which dishonesty is an element, for example theft, fraud, forgery, etc, has in fact been committed and that there is sufficient proof that the said misconduct has infact been committed by the employee so charged. It must be remembered that it is not for an employee to prove his innocence. It is for the employer to prove the employee's guilt.
As to the degree of proof required, Rycroft and Jordaan A Guide to South African Labour Law (2nd ed) state at p 196 para 4.6.1:

'The employer's reasons for dismissing an employee must be both valid
and fair. Validity, it has been said, "goes to proof and to the applicability to the particular employee of the reason for thedismissal". The enquiry is whether the facts on which the employer relied to justify the dismissal actually existed. The employer is not allowed to rely in court on reasons not relied upon or not known at the time of the dismissal. While a mere suspicion of misconduct is not sufficient to warrant dismissal, the employer is also not required to prove the employee'smisconduct beyond reasonable doubt. It is sufficient if the employer had reason to believe on a balance of probabilities that an offence had been committed'.
The court wants to emphasis that mere suspicion is not sufficient grounds or a valid reason for dismissing an employee. When an employee denies any misconduct it is essential for an employer to hold a disciplinaryenquiry as soon as possible to establish whether that employee has in fact committed such misconduct. Even when an employee pleads guilty, a disciplinary enquiry must still be held, because after the pronouncement of being guilty, the employee must be given the opportunity to lead evidence in mitigation of any punishment.

As stated above, the manager called the four staff members into his office and asked all four of them for anexplanation as to how the said full gas cylinder could have gone missing. When all four of them denied any knowledge thereof, he called them snakes and that they thought they were clever. This clearly shows that the manager suspected all four or any one or more of them of having stolen the said gas cylinder. He was not sure, because he had no evidence against any one of them. All he had was a mere suspicion that any one or more ofthe four could have done it. As stated above, mere suspicion is not a valid reason for dismissing an employee.

Yet on having suspicion against all four the aforesaid staff members, the manager went and dismissed only the two applicants because, as stated above, he linked the two applicants to this missing cylinder just because they had not followed the normal procedure in first offloading all empty gas cylinders before loading full ones. Thecourt finds this a farfetched and unacceptable explanation. What have empty gas cylinders left on the truck got to do with a full gas cylinder that disappeared from the cage, if indeed one did disappear from the cage.

The court finds that the manager did not even clear the first hurdle to prove that one full gas cylinder had in factbeen stolen. The first applicant kept on asking the manager to produce his stocktaking book to prove that there was one full gas cylinder missing on that day. Eventually the manager conceded that the stock book will not show that there was one full gas cylinder missing on that day, as he did not enter it as a loss. He then came up with another farfetched and unacceptable explanation that the directors of this company do not tolerate any stocklosses. He is held responsible for all stock losses and only he has to pay for such stock losses out his pocket if he cannot pinpoint it to a specific employee. Even if he does pay for a stock loss it still reflects badly on his record. He said he therefore showed this missing full gas cylinder as a sale on that day and he paid for it.

In the circumstances the court finds that the manager failed to prove any theft and also failed to prove that the two applicants were involved in any
theft of a full gas cylinder on 29 October 2004. The court therefore finds that the manager had no valid reason,only a suspicion, for dismissing the two applicants, and was not even entitled to do so on notice. The court consequently finds that the dismissal of the two applicants was unlawful as well as wrongful, it being substantively unfair.
Procedural fairness

Procedural fairness relates to the proceedings followed by an employer prior to dismissing an employee. The basic requirement for a procedurally fair dismissal is set out in art 7 of ILO Convention 158 of 1982, which article reads as follows:

'[t]he employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before heis provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity'.
The court has already stated above that in order to determine whether there is a valid and fair reason fordismissing an employee, a fair procedure must be followed by the employer prior to dismissing an employee especially where an employee denies the charge, as in this case. A fair procedure means that a fair disciplinary enquiry must be held. In the Spie Batignolles case, (supra) the court mentioned a few exceptions to the general rule of natural justice that a fair disciplinary enquiry should precede a dismissal for misconduct, whichexceptions are not applicable in this case and need therefore not be repeated. In the said Spie Batignolles case the court also set out the equitable requirements (rules of equity) for a fair disciplinary enquiry, which will also not be repeated here as they have also been set out in so many subsequent cases.
The aforesaid rules of equity are not binding rules of law. They are merely guidelines to assist employers in F arriving at a fair decision when an employee is charged with misconduct. The general rule is still however that an employee may not be dismissed for misconduct unless a fair disciplinary enquiry has been held. Although the said guidelines are not binding rules of law, if an employer fails to comply with such guidelines, the court could find such dismissal to be procedurally unfair.
It was common cause that no disciplinary enquiry was held prior to the dismissal of the two applicants. Once again the manager gave a farfetched and unacceptable explanation for not holding a disciplinary enquiry. He stated that he did not hold a disciplinary enquiry before dismissing the two applicants because he did not think that this case was going to lead to a court case.
The court consequently finds that the dismissal of the two applicants was also procedurally unfair. The court will now deal with the various claims of the applicants.

Compensation
Finding that the dismissal of the applicants was unlawful as well as substantively
and procedurally unfair, will therefore entitle them to an award of some compensation as both are not interestedin reinstatement.
Section 19(2) of the Trade Disputes Act (Cap 48:02) sets out seven factors the court may (my emphasis) take into account in assessing a fair and an appropriate amount of compensation and the court will briefly deal with these factors. The factors mentioned in subparas (a) and (c), actual and future loss and the applicant'sprospects of finding other equivalent employment, are closely related and will be considered by the court in this case in favour of the applicants.
The first applicant testified that he managed to find other employment and he started working there on 1 February 2005. He was paid for his notice month in November 2004, so he was without work and without income for two months. The second applicant testified that he was looking for other work but without success. Hestopped looking for work in the middle of June 2005 as he enrolled as a student at Kanye on 22 June 2005. He was therefore without work and without income for seven and a half months.
The court finds that the factor mentioned in subpara (b), the age of the applicants, is not really relevant. The first applicant is 23 years old and the second applicant is 20 years old. Their ages as such should therefore not have prevented them from finding other employment sooner.

The factor mentioned in subpara (d), the circumstances of the dismissal, is very relevant and the court will consider it in favour of the applicants as the respondent had no valid reason for dismissing them and also followed no disciplinary procedure prior to dismissing them.
The factors mentioned in subparas (e) and (f) are not relevant in this case. Similarly the court finds that thefactor mentioned in subpara (g), the employer's ability to pay, is not relevant, there being no evidence as to ability or inability to pay, from the respondent's witness.
The court finds that by using the underlined permissive word 'may' in the said s 19(2), the legislature did not intend the said seven factors to be exhaustive. This means that there could be other relevant factors as well,not mentioned in s 19(2), which the court may take into account as well in assessing an appropriate amount of compensation. One such factor, not mentioned in s 19(2), which the court finds relevant and will take into account in favour of the respondent, is the relatively short period of employment of the applicants. The first and second applicants were both in the respondent's employ for just five and a half months.

Another such factor, not mentioned in s 19(2), which the court finds relevant and will take into account in favour of the respondent, is the fact that it has already paid the applicants one month's notice pay in lieu of notice.

This court has already stated in numerous previous judgments that an employer can only dismiss an employee on notice if he has a valid reason for doing so. It therefore follows that if an employer has no valid reason for dismissing an employee on notice, he may also not dismiss the employee by giving him notice pay in lieu of notice in terms of s 19(a) of the Employment Act. That means that if dismissal on notice does not enter the picture, then notice pay in lieu of notice can also not enter the picture. To put it differently, where an employee is dismissed for whatever reason, but the court finds that the employer had no valid reason to dismiss him, such employee is then not entitled to noticepay. Having already found that the respondent had no valid reason for terminating the contracts of employment of the applicants, the court finds that the applicants are therefore not, as of right, entitled to any notice pay in lieu of notice. As the respondent has paid each applicant one month's notice pay in lieu of notice, which he was notobliged to pay, the said one month's notice pay must therefore be deducted from any compensation this court intends awarding.

Having considered the aforesaid factors in favour of and against each party, the members of the court are agreed that a fair and an appropriate award of compensation, in the particular circumstances of this case, would in normal circumstances have been compensation equal to four months monetary wages. From this amountmust then be deducted the one month's notice pay in lieu of notice, which means that the applicants will receive compensation approximately equal to three months' monetary wages. The amounts so to be awarded to the applicants are not wages but compensation. The full amounts without any deductions, must therefore be paid to the applicants.

Remuneration of the applicants

In terms of s 135 of the Employment Act the minister is empowered to issue orders regulating minimum wages in certain trades and industries. Such orders do not only regulate minimum wages in any given trade or industry. It also regulates other aspects, such as hours of work, weekly rest periods, paid public holidays, overtime,annual paid leave, etc. Once such orders are published in the Government Gazette, they become subsidiary legislation and have the force of law and they then form annexures to the Employment Act.

For purposes of minimum wages, the manager said that he thinks their business falls under the ministerial order regulating wages in the manufacturing, service and repair trades. He however stated that they do notmanufacture gas. They only sell gas on the retail market to customers. The Minister has issued an order, Regulating of Wages (Wholesale and Retail Distributive Trades) Order (Cap 47:01) (Sub Leg) para 2(1)(a) of which Ministerial order provides as follows:

'2(1) This order shall apply to all persons employed in any undertaking or part of an undertaking which consists of thecarrying on of one or more of the following activities -
(a) the retail or wholesale supply of goods and merchandise;
(b)-(c) ...'

The court therefore finds that the respondent's business falls under the aforesaid ministerial order.

The Minister usually makes orders increasing the minimum wages in certain trades and industries once a year. He made such an order operative as from 1 June 2004, which was published in the Government Gazette on 18 June. Paragraph 3(b) of the said order provides that the minimum wages for employees in the 'retail distributive trade' will be P2.55 per hour as from 1 June 2004. Both applicants started working for the respondent on 13 June 2004. Both applicants were paidnotice pay up to 30 November 2004, which is therefore the date of their dismissal. For the whole period of their employment with the respondent, their minimum wages were therefore P2.55 per hour.

Paragraph 4 of the original Ministerial order regulating wages in the wholesale and retail distributive tradeprovides that the normal working hours for employees in the said trades are eight and a half hours in any one working day and the normal working week for such employees is five and a half days. The prescribed minimum daily rate of payment for the applicants was therefore P21.68 (8.5 x P2.55).

In terms of s 95(8) of the Employment Act, a five and a half day working week converts to a 24 day working month. To calculate an employee's monthly rate of payment his daily rate of payment must therefore bemultiplied by 24. On this basis the monthly rate of payment of each applicant should therefore have been P520.32 (24 x P21.68).

The manager testified that he did not calculate the wages of the two applicants according to the aforesaid minimum wages. He said they agreed to work 12 hours a day at fixed monthly wages. He said at the time of theirdismissal the first applicant was earning P500 per month and the second applicant P475 per month.

For the purposes of calculating the amount of their compensation, the court will take the aforesaid figure of their monthly wages and not the amounts which the respondent actually paid to them. Leaving aside for the moment the deduction of their notice pay, the applicants would have, under normal circumstances, been entitled tocompensation equal to four months' monetary wages, which is P2,081.28 (4 x P520.32). From this amount must then be deducted the one month's notice pay which the respondent paid to each applicant, namely P500 to the first applicant and P475 to the second applicant. The first applicant is therefore entitled to compensation in the amount of P1,581.28 (P2,081.28 less P500) and the second applicant is entitled to P1,606.28 (P2,081.28 lessP475).

The applicants have not claimed underpayment of minimum wages but only non-payment of overtime for the hours they worked overtime each day and also overtime for the Saturdays and Sundays they worked. They are also claiming for

working on their off days.

Overtime on week days and weekends
The manager testified that he does not owe the applicants any overtime payment as they had agreed to work 12 hours a day for fixed wages per month. They cannot therefore now want to breach this agreement by claiming overtime payment. If that is how the manager understands the labour law, then he is in for a big surprise.

Section 138(1) of the Employment Act provides as follows:

'138(1) Where any contract of employment provides for the payment of a wage less than the minimum wage to an employee to whom a minimum wages order applies, the contract shall have effect as if the minimum wage were substituted therefore.' (My emphasis.)
By using the emphasised word 'shall' in the aforesaid section, it is clear, in terms of s 45 of the Interpretation Act(Cap 01:04), that the provisions of the said section are imperative. This means that an employer has no option. He is obliged to pay his employees the prescribed minimum wage. He can therefore not even come to an agreement with his employees that they will accept less than the prescribed wage.

The aforesaid finding is supported by the provisions of s 138(2) of the Employment Act which provide that anemployer who fails to pay the prescribed minimum wages, shall be guilty of a criminal offence and upon conviction shall be liable to a fine not exceeding P2,000 or to imprisonment not exceeding 18 months or to both such fine and imprisonment.
As stated above, para 4 of the said original Ministerial wages order clearly states that:

'4. No employee shall be required to work ... more than eight and a half hours in any one working day or a total of 47 hours in any working week of five and a half days.' (My emphasis.)
Paragraph 7(1) of the said Ministerial order states:

'7(1) Where an employee works for any period in excess of eight and a half hours in a working day or a total of 47 hours in a working week of five and a half days ..., he shall be paid an overtime rate of his normal hourly rate plus one-half of such rate (otherwise known as "time-and-a-half").' (My emphasis.)
The provisions of both the aforesaid paragraphs are imperative because of the use of the emphasized imperative word 'shall'.
It was common cause that the applicants were required to work daily from 7.30am to 7.30pm, which is 12 hours per day. Their employment cards also reflect this. Their undisputed evidence is that they did not have a lunchbreak. Their employment cards also do not show any lunch break. They therefore actually worked 12 hours per day.

Their normal working hours per day were therefore from 7.30am to 4.00pm (eight and a half hours) and the remaining three and a half hours (4.00pm to 7.30pm) from Mondays to Fridays were therefore overtime at time-andÄa-half for which they were not paid. This is not disputed. Their normal working hours from Mondays toFridays were 42.5 hours (5 x 8ø). Their normal working hours for a week were 47 hours, which makes their normal working hours on a Saturday 4.5 hours (47 less 42.5), which is from 7.30am to 12 noon. The remaining seven and a half hours (12 noon to 7.30pm) on Saturdays were therefore overtime hours, which should have been paid at time-and-a-half.

It was common cause that the applicants were given four days off in a month. The undisputed evidence of theapplicants was that these off days were always given to them in the middle of the week. There is however a dispute as to whether they took these off days or not. Whether they took it or not will not effect the calculations under this heading, as the court will deal with off days under a separate heading. Their undisputed evidence then also means that they worked every Saturday and Sunday. As their normal
weekly hours of 47 hours had already run out on a Saturday, the full 12 hours they worked on Sundays will alsobe overtime at time-and-a-half. Sundays would have been overtime at double time only if Sundays were their off days but on their own evidence their off days were in the middle of the week.

As off days are excluded from the calculation under this heading the court will calculate this overtime over fourdays per week from Mondays to Fridays. The court accepts the manager's evidence that the applicants did not work during their notice month, being November 2004. These overtime calculations will therefore be done for the period from Sunday 13 June 2004 to Sunday 31 October 2004.

During the aforesaid period there were 80 weekdays (excluding off days), 20 Saturdays and 21 Sundays. Thehours worked overtime during the said period were as follows:

Weekdays:

x 31/2 hours

=

hours

Saturdays:

x 71/2 hours

=

hours

Sundays:

x 12 hours

=

hours

hours

The court has already stated above that the applicants' prescribed hourly minimum wage for this whole period was P2.55 per hour. The said minimum wage at time-and-a-half is therefore P3.83 (P2.55 x 1.5). For the aforesaid 682 hours at time-and-a-half the applicants are each entitled to overtime payment in the amount of P2,612.06 (682 x P3.83).

Because of the aforesaid criminal sanction for failing to pay the prescribed overtime wages, the court finds that the respondent had no right to withhold the aforesaid overtime payments from the applicants.
Payment for working on rest days
As stated above, it was either common cause or not disputed that the applicants had one day a week off or onerest day a week as it is also referred to. The evidence of the applicants is that during this whole period, although they were entitled to such rest days, they were never allowed to take such rest days as they were required to work on such rest days. During the aforesaid period of employment according to the applicants they were therefore entitled to 20 rest days, taking Wednesdays as the rest days, which they aver they were nevergiven. They are therefore claiming overtime at 'double time' for all of these rest days on which they aver they were required to work.

The manager testified that the applicants did take some of these rest days off. He produced his attendance register which indicated that the applicants in fact had taken certain rest days off during this period which will be set out below.
Paragraph 5 of the aforesaid Ministerial wages order provides as follows:

'5. An employee shall earn a rest period at the rate of not less than 24 consecutive hours in the course of each week at the employer's discretion to determine when this period shall be taken....' (My emphasis.)
It was common cause or not disputed that the applicants could take one day a week as their weekly rest periodin the middle of the week.

Paragraph 7 (2) of the Ministerial wages order provides as follows:

'7(2) ..., where an employee works on any paid public holiday or rest period prescribed by this Order, he shall be paid an overtime rate of twice his normal hourly rate (otherwise known as "double time").' (My emphasis.)
In terms of s 93(4) of the Employment Act, any employer who does not grant such employee the said rest period or does not pay him double time for working on such rest period, shall be guilty of a criminal offence and uponconviction shall be liable to a fine not exceeding P1,000 or to imprisonment not exceeding 6 months or to both such fine and imprisonment.

The applicants gave evidence as to their off days from memory whereas the manager gave evidence from his attendance register. The court consequently finds that the manager's evidence on this issue is more reliable and accepts it. The manager testified that he confirms his statement which forms part of the respondent's statementof defence. In this

statement he concedes that during their period of employment, without dealing with July 2004, each of the two applicants had 10 rest day credits as they had taken the rest of their rest days off. He gave details of each month but without mentioning July 2004, which had four Wednesdays. As the manager did not mention whether or not the applicants had taken these four rest days off, the court will accept their undisputedevidence that they had not taken these four rest days off. The court consequently finds that both applicants had worked on 14 (10 + 4) of their rest days during the whole period of employment.

The manager tried to reduce each applicant's rest day credits by four days. He said he gave the first applicant three days off to go to a funeral and a day off to go to the land board. He said he gave the second applicant fourdays off to go to a wedding. The court finds that the aforesaid days so given off have nothing to do with rest days and can therefore not be deducted from rest day credits. For the aforesaid reasons he should either have given the applicants compassionate leave or deducted it from their annual leave.

As set out above an employee is entitled to 'double time' when he works on a rest day. As stated above theapplicants' prescribed minimum wage was P2.55 per hour and double time will therefore be P5.10. They both worked 12 hours on these rest days and should therefore have been paid P61.20 (12 x P5.10) on each rest day worked. From this amount must however be deducted what they actually received per day on such rest days. The first applicant received P19.23 (P500 divided by 26) for each of such days. The court is using 26 as thedivisor as the manager contends that the applicants worked six days a week, having had four days a month off. See s 95(8) of the Employment Act. The second applicant received P18.27 (P475.26) for each of such days. The first applicant was therefore underpaid in the amount of P41.97 (P61.20 less P19.23) for each rest day on which he worked. His total underpayment for rest days worked is therefore P587.58 (14 x P41.97). The
second applicant was underpaid in the amount of P42.93 (P61.20 less P18.27) for each rest day on which heworked. His total underpayment for rest days worked is therefore P601.02 (14 x P42.93). The respondent had no right to withhold the aforesaid overtime payments.
Determination
The court consequently makes the following determination:

1. The termination of the contracts of employment of the first applicant, Kabo Sebako and the second applicant, Matthews Molefe, by the respondent on 30 November 2004 was unlawful as well as wrongful, it being both substantively and procedurally unfair.

2. In terms of s 24(1)(a) of the Trade Disputes Act, read with ss 135 and 138 of the Employment Act, the respondent ishereby directed to pay to the two applicants the following amounts, being compensation:

(a) to the first applicant the amount of P1,581.28; and
(b) to the second applicant the amount of P1,606.28.

3. In terms of s 20(1) of the Trade Disputes Act, read with ss 135 and 138 of the Employment Act, the respondent is hereby directed to pay to each of the two applicants the amount of P2,612.06, being minimum wages overtimeunlawfully withheld.

4. In terms of s 20(1) of the Trade Disputes Act, read with ss 135 and 138 of the Employment Act, the respondent is hereby directed to pay to the two applicants the following amounts, being payment for working on rest days unlawfully withheld:

(a) to the first applicant the amount of P587.58; and

(b) to the second applicant the amount of P601.02.
5. The respondent is hereby directed to pay the amounts, referred to in subparas 2, 3 and 4 hereof, totalling P9,600.28, to the two applicants, through the office of the registrar of this court, on or before Friday, 21 October 2005.

6. No order is made as to costs.
We agree on the facts:
E O Modise
Nominated Member (Union)
B S Tsayang
Nominated Member (BOCCIM)
Application granted.