IN THE HIGH COURT OF BOTSWANA HELD AT LOBATSE

MAHLB- 000631-11

In the matter between:

BOTSWANA LANDBOARDS & LOCAL AUTHORITIES WORKERS' UNION	**1st Applicant**
BOTSWANA PUBLIC EMPLOYEES' UNION	**2nd Applicant**
NATIONAL AMALGAMATED LOCAL AND CENTRAL GOVERNMENT	**3rd Applicant**
KEFILWE TOTENG	**4th Applicant**

And

THE ATTORNEY GENERAL (for and on behalf of the Director of Public Service Management)	**Respondent**

Mr. M.S.M. Brassey SC (with Mr. T. Rantao, Ms K. Kewagamang and Mr. Chilisa) for the Applicants
Mr. A. Myburgh SC (with Mr. B.B. Tafa, Ms D. Makati-Mpho, Mr. Katse) for the Respondents

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J U D G M E N T

DINGAKE J:

Introduction

1. The applicants in this matter are duly registered trade unions who represent various categories of public sector employees. These employees will henceforth be described simply as employees or public sector employees.

2. The respondent, the Attorney General, was sued in her capacity as the legal representative of Government, for and on behalf of the Director of Public Service Management.

3. In this case the court is called upon to decide the legal rights of public sector employees who were dismissed for taking part in an illegal strike.

4. It is a test case of considerable importance as it is to my knowledge, the first strike case to be decided after the passage of the Public Service Act No. 30 of 2008, which entrenches the principles of natural justice save were it is not reasonably practicable to observe same.

5. The applicants challenge the decision of the respondent on the Administrative Law ground of breach of the principle of natural justice, more particularly, the *audi alteram partem rule.*

6. The key issue having regard to the papers filed and submissions of the parties is whether the respondent acted fairly in dismissing the public sector employees who participated in the illegal strike.

7. With the above brief introductory remarks, I now turn to the background information.

Background information

8. On or about the 18th of April, 2011, the parties hereto started engaging in what turned out to be a prolonged power play; each wanting to impose its wish on the other.

9. By power play, I am referring to the industrial action embarked upon by members of the applicants demanding a salary increase which the respondent was unable to accede to.

10. In terms of the Trade Disputes Act 2003, Cap 48:02, Laws of Botswana, every party to a dispute of interest has the right to strike or lockout if all the requisites of a lawful strike prescribed by the Act have been met.

11. The industrial action, which hitherto was accepted by the parties as lawful, was in the course of time declared unlawful and unprotected by the Industrial Court.

12. In declaring the industrial action unlawful and unprotected the Industrial Court did not decide which categories of work was properly to be classified as essential service.

13. Following the Order of the Industrial Court aforesaid, the respondent dismissed employees who it said refused to return to work and continued to participate in the unlawful and unprotected strike.

14. As a general rule, courts do not lightly intervene in a power play unless clearly justified by considerations of extreme necessity, for if this was not so, an ill-considered interdict or one that is overboard in the circumstances, may have the unintended consequences of tilting the balance against one of the parties; with far reaching consequences for the disadvantaged party.

15. That undue interference or an overboard order may threaten the very logic of collective bargaining was stated by Conradie J in the case of

Metal and Electrical Workers Union of SA v National Panasonic Co 1991 (12) ILJ 533 at page 536, D – J when he stated that:

> *"A strike or lock-out is like a boxing match. Each opponent tries, within the rules, to hurt the other as much as possible. There is a referee to see that the rules are observed. The court is the referee. It does not intervene simply because one of the opponents is being hurt – that is the idea of the contest. The referee may intervene if one of them is struck a blow below the belt, but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong with the weigh-in. Parties to an industrial contest take time and trouble to shape up for the fight. There are all kinds of things which they are expected to do before they are permitted to enter the ring. Some of these things may be done carelessly or maybe not at all; but if the opponent has not taken the point before he has entered the ring, I do not think that he should lightly be permitted to do so once the blows have started landing.*
>
> *It is impossible to lay down any fixed rule. Each case would depend upon its own circumstances, in particular the nature of the alleged irregularity, the reason that it had not been raised earlier the stage which the economic contest had reached and whatever other factors may be relevant. But a court should in my view always bear in mind that the party to industrial action who (belatedly) takes a point on the proceedings or the decision of an industrial council would often do so because he desires relief from the economic struggle precipitated by a strike or lock-out. It would not be conducive to the ultimate settlement of disputes by attrition if, having reached or passed the pain threshold, a party was to be able to stop the strike or lock-out on the strength of a point he had carelessly or deliberately not mentioned earlier."*

16. It is the dismissal of the applicants' members who were adjudged essential service employees by the Industrial Court which precipitated this application.

17. The applicants bring the above application in a representative capacity, on behalf of all public officers who were dismissed on the 16th of May, 2011.

18. The dismissed employees comprise of essentially three categories: local government employees, represented by the first applicant, general public sector employees represented by the second applicant, and the industrial class employees represented by the third applicant.

19. The applicants complain that the dismissals effected by the respondent were unlawful and liable to be set aside. The applicants seek an order of this court to review and set aside the dismissal of certain public sector employees by the respondent.

20. The applicants pray for the reinstatement of the dismissed employees with effect from the date of dismissal.

21. At the commencement of the hearing, the court admitted by consent, the respondent's supplementary affidavit filed with the court on the 30th of April, 2012, and the applicant's reply thereto filed on the 7th of May, 2012, both parties being in agreement that no prejudice would be

occasioned to either party by such admission and further that it is in the interest of justice to do so.

22. The respondent did not pursue any preliminary points that it had indicated it would pursue and the parties were content to delve into the merits of the application. Further, the respondent abandoned the points appearing at pages 4 – 8 of its heads of arguments dated the 7th of May, 2012.

23. In order to appreciate the issues of moment more clearly, it is imperative to set out in some detail the respective versions of the parties hereto.

The Case for the Applicants

24. The case for the applicants is set out in detail in the founding affidavit of Andrew Motsamai, the Secretary General of the Botswana Federation of Public Sector Unions. He is also the President of the second applicant.

25. At paragraph 9 of his founding affidavit Mr. Motsamai makes reference to Annexure "FA1", to his affidavit as containing all the necessary details of all the public sector employees who were dismissed.

26. Mr. Motsamai sets out the chronology of events from the 18th of April, 2011, up to the 16th of May, 2011, when the dismissals were effected. He avers in essence that the parties had agreed on a minimum service level.

27. According to Mr. Motsamai, the applicants and its members complied with the interim interdict issued by the Industrial Court on the 26th April, 2011, in which persons in essential services were prohibited from continuing to participate in the industrial action.

28. Mr. Motsamai avers that after the respondent was granted leave to execute the judgment of the Industrial Court on the 10th of May, 2011, a copy of the Order was not immediately available for distribution to various shop stewards throughout the country, who would then advise members of its contents. He says by the 11th of May, 2011, they still did not know of the contents of the Order. It was only on the 12th of May that they managed to transmit through fax, to some areas of the country.

29. Mr. Motsamai says that during the course of the strike, national broadcasters, Radio Botswana and Botswana Television were biased in their coverage of the strike, in favour of Government, with the result that

their members were advised not to listen to the said broadcasters as they misinformed the public and confused union members.

30. According to Mr. Motsamai, word of the Court Order had begun to spread on the 13th of May, 2011, within those areas where union members were advised of the Court Order, that members were required to report to work. He says that the 14th and 15th of May, 2011, was a weekend and that there were no meetings at designated points because meetings only took place during weekdays.

31. At paragraph 33 of his founding affidavit, Mr. Motsamai says that before the applicants' members involved in the provision of essential services could reflect on the Order of the 10th of May, 2011, and the advice of the Unions that they were required to return to work, the Government announced on the 16th of May, 2011, that all persons providing essential services who had failed to show up for work despite Orders granted on the 26th of April, 2011, 6th May and 10th May, 2011, were dismissed.

32. The General Notice of dismissal, Annexure "**FA6**" to the applicants' papers is critical to this dispute and it is reproduced hereunder in its entirety:

*"**FROM**: Director of Public Service Management*

***TO**: Essential Services Public Service Employees on Strike*

***AND TO**: BOFEPUSO and Public Sector Unions*

RE: DISMISSAL OF PUBLIC SERVICE EMPLOYEES ON ILLEGAL ESSENTIAL SERVICES SRTIKE

DPSM wishes to inform all public officers employed in essential services and/or employed to render essential services embarking on the illegal strike and who have failed to report for duty on 16 May 2011, that they have now been dismissed from employment with immediate effect.

The dismissals of each individual employee concerned has been brought about by their continued participation in on-going industrial action in essential services which has been declared illegal, unlawful and unprotected by the Industrial Court.

The employees on strike in essential services have defied several Court Orders directing them to return to work, as well as a series of ultimatums publicly issued by DPSM, as the employer, urging them to return to work immediately with effect from Tuesday 26 April 2011, and pointing out in clear and uncertain terms that their failure to do so would expose them to dismissal.

Each employee is advised to report to their workplace to receive delivery of their individual letter of termination of employment through their Head of Department and/or their supervisors.

Letters which are not collected within 5 working days will be sent registered post to their last known address.

(Signed)
F.S Bakwena
DIRECTOR OF PUBLIC SERVICE MANAGEMENT
16 MAY 2011"

33. Mr. Motsamai avers that the General Notice of dismissals disregarded the fact that most public officers who render essential services, as then defined, returned to work following the Order of the 26th of April, 2011, only to rejoin the strike after the Order of 26th April, 2011, was nullified by a notice of appeal that was filed on the 6th of May, 2011.

34. According to Mr. Motsamai in the period between the interim interdict granted on the 26th of April and its confirmation on 6th of May, 2011, as many as 50 doctors at Marina Princess Hospital had returned to work. He says it is incorrect to assert that the dismissed essential service public officers disregarded several Court Orders.

35. Mr. Motsamai complains that Government made no effort to bring the Court Orders to the attention of each individual employee. He further disputes that the respondent issued any ultimatums urging the striking workers to return to work. He says no ultimatums were directed at the Unions who were the public officers' representatives.

36. According to Mr. Motsamai, the period between the granting of the Order of the 10th May, 2011, and 16th May, 2011, was insufficient to facilitate the return to work of all workers rendering essential services.

37. At paragraph 42 to 62 of the applicants' founding affidavit, the applicants canvass a number of administrative grounds for review including that the dismissals were grossly unreasonable in that they were based on a material error of law and for failure to have regard to material considerations.

38. The ground of gross unreasonableness was not pursued during the course of argument and the applicants' counsel focused on the alleged failure by the respondent to afford members of the applicants a hearing before being dismissed.

39. In elaboration of the above ground, the applicants contend that the decision to terminate the contracts of public officers constitute an exercise of public power and is susceptible to judicial review in accordance with well-known principles of Administrative Law.

40. The applicants contend that an employee, whose dismissal is contemplated, being exposed to potential detriment by the exercise of public power, is entitled to a hearing before the decision to act is taken, unless the right to a hearing before the decision to act is taken has been expressly or impliedly excluded by statute.

41. In *casu* the applicants contend that they and or its members had a statutory right to be heard having regard to the relevant provisions of the Public Service Act 30 of 2008 and other codes that are applicable to the applicants. These include the General Orders and the Regulations for Industrial Class Employees.

42. The above in essence is the version of the applicants.

43. I turn now to the respondent's version.

The Case for the Respondents

44. The factual basis of the case of the respondent is set out in detail in the affidavit of Ms. Festina Bakwena, the Director of Public Service Management.

45. Ms. Bakwena sets out the chronology of events and avers that following the issuance of the temporary interdict/order restraining essential services employees from engaging in strike action, she caused to be published a press release dated the 26th April, 2011. A copy of the press

release is attached to her answering affidavit and is marked "**FB3**". The said press release is reproduced hereunder:

"PRESS RELEASE

The Industrial Court has this evening ***Tuesday 26 April 2011****, issued an interim order declaring the strike undertaken by all Public Service employees employed in all essential services as defined by the Trade Disputes Act illegal. Justice Tebogo Maruping has ordered that the affected employees must immediately return to work.*

The Court Order, which is returnable on ***Friday 29 April 2011*** *has further declared the strike to be in breach of the Trade Disputes Act and the Collective Agreements between the parties and is therefore unprotected strike in terms of the Trade Disputes Act. The three public sector unions which had taken the Government to Court (BLLAWU, BOPEU and NALCGPWU) were further ordered to ensure that all their members who are employed in essential services do not conduct themselves in an unlawful manner.*

The Court Order was granted pursuant to a Counter-Application brought by attorneys Collins Newman & Co on behalf of the Government of Botswana.

All public service employees affected must forthwith return to work and by no later than ***7:30 am Wednesday 27 April 2011****. The affected essential services are:*

1. *Health Services including hospitals and clinics*
2. *Sewerage Services*
3. *Fire Services*
4. *Electricity Services, and*
5. *Water Services*

The affected employees are advised that failure to comply with the Court Order is unlawful.

F S Bakwena"

46. Ms. Bakwena says the aforesaid press release was read in the 8:00 p.m. news bulletin of Radio Botswana of the same day. She says when the civil servants failed to report to work on the 27th and 28th of April, 2011, despite the Industrial Court having declared the strike unlawful she issued another press release, Annexure **"FB4"** to her answering affidavit. The said press release is reproduced hereunder:

> ***"PRESS RELEASE***
>
> *The Directorate of Public Service Management has noted, with grave concern that a large number of Public Service employees employed in essential services have defied the Court Order dated 26 April 2011 issued by the Industrial Court declaring their strike unlawful and ordering them to return to work with immediate effect.*
>
> *The concerned employees are advised that their defiance of the Court Order is in breach of the Trade Disputes Act and their individual employment contracts. Moreover, by refusing to return to work as ordered by the Industrial Court, they are in contempt of Court which renders them liable to action by the Court. In the circumstances, all concerned Public Service employees are advised to immediately return to work failing which they not only expose themselves to termination of their employment but also to civil contempt of Court proceedings.*
>
> *Director*
>
> *F S Bakwena*
>
> *28 April 2011"*

47. Ms. Bakwena avers that the said press release was read in the Radio Botswana news bulletin on the 29th April, 2011, from early morning at 6:00 a.m. and throughout the day. She also caused another statement to be published in the daily newspaper of the 30th April, 2011. The statement is in many respects similar to the one reproduced earlier.

48. Ms. Bakwena says that on the 3rd of May, 2011, she informed the public that some essential services employees did not adhere to the interdict of the 26th April, 2011. She avers further that after the Industrial Court confirmed the interim interdict it issued on or about the 6th May, 2011, all major media, including the private media carried the outcome of the proceedings.

49. Ms. Bakwena contends that Radio Botswana and Daily News reported on the terms of the judgment. She says further that after the applicants filed an appeal against the decision of the Industrial Court, they went on a major campaign informing their members that the noting of an appeal stayed the judgment of the Court.

50. Ms. Bakwena says that after the respondent successfully applied for the execution of the Industrial Court Judgment of the 6th of May, 2011, the

Government issued another notice informing all affected employees to return to work.

51. According to her, the notice made it clear that those who failed to report to work exposed themselves to possible dismissal.

52. She further states that this notice was read over Radio Botswana on the 11th of May, 2011. The transcript read over Radio Botswana is attached to her affidavit and marked **"FB15"**. The said annexure called upon all essential service employees to return to work and pointed out that those who fail to return to work risk disciplinary action, including summary dismissal.

53. On the 12th May, 2011, Ms Bakwena caused to be released another press statement, Annexure "**FB16**", which is similar in many respects to the one issued on the 11th of May, 2011.

54. On the 13th of May, 2011, Ms Bakwena issued another press release, Annexure "**FB17**" to her answering affidavit. The said annexure is produced hereunder in its entirety:

"PRESS RELEASE

Government and Unions fail to reach agreement; Government urges return to work while negotiations continue

Members of the public are hereby informed that representatives of Government and five (5) recognized Unions affiliated to the Botswana Federation of Public Sector Unions (BOFEPUSO) met yesterday afternoon (12/05/11) to continue with salary negotiations.

At the end of the negotiating session, the two parties had failed to reach any agreement on Union demands for a salary adjustment.

During the meeting, Government re-tabled its conditional offer of a 5% increase, which could only be enacted following a joint review of the performance of the economy in the first quarter of this financial year (i.e. April – June 2011).

It remains the position of Government that such an adjustment could be implemented if the economy continues to improve, allowing it to meet its deficit reduction targets.

For their part, the Unions indicated that they were prepared to lower their salary adjustment from 16% to 13.8%.

During the session no further offers were put on the table.
The Unions representatives further stated that the conditional offer made by the Government was unacceptable.

Government as the employer urged Unions to encourage their members to return to work whilst the negotiation continues.

F. S Bakwena
DIRECTOR PUBLIC SERVICE MANAGEMENT
13th May 2011"

55. Ms. Bakwena avers at paragraph 4.20 of her answering affidavit that it became clear during this period that despite the numerous ultimatums

given to essential service employees to obey various Court Orders and return to work, a large section of these employees were not prepared to do so, notwithstanding several warnings of potential dismissal.

56. Ms. Bakwena denies that the Government broadcasters were biased in their coverage of the strike action. She also denies that the Order of the 26th April, 2011, was fully complied with within a couple of days. She further denies that by the 29th of April almost all essential services employees had returned to work.

57. Ms. Bakwena avers that Government had gone to great lengths to ensure that the terms of the Court Order are broadcasted and published widely.

58. Ms. Bakwena denies that the dismissals were in breach of the General Order 42.2 and Regulation 8 of the Regulations for Industrial Class Employees, adding that the dismissals were just, reasonable and fair in the circumstances.

59. According to Ms. Bakwena, the strike was not peaceful. She says there were news reports of violence, disruption and intimidation of non striking workers by striking employees.

60. Ms. Bakwena says there could never be individual disciplinary hearings in circumstances where the affected employees have ignored all pleas by Government to return to work. She says that by their own conduct they had rendered it impossible to hold any disciplinary hearings.

61. The above constitute the respondent's version.

Submission of the Parties

62. A synopsis of the submissions of the parties with respect to the material question that falls for determination will be in order.

63. The submissions were presented concisely and with amazing skill and tenacity by both sides, and it helped the court a great deal to come to grips with the burning issues of the moment.

64. Mr. Brassey, learned Counsel for the applicants, submitted that the dismissals of the public officers were invalid for failure to afford them a

hearing before an adverse decision against them was taken. He placed reliance on the South Africa case of **Administrator of Transvaal v Zenzile and Others 1991 SA (1) 21 (A)** in which the court held that illegal strikers were entitled to a hearing before dismissal. A decision to a similar effect was reached in the case of **Zondi and Others 1991 (3) SA 583 (A).**

65. Mr. Brassey also submitted that participation in an illegal strike is misconduct and that any contemplated dismissal, must comply with General Orders 42, 46 and Regulation 8 of the Regulations for Industrial Employees.

66. Mr. Brassey argued that although the legislation under which the above provisions were enacted has since been repealed, same continue to be in force by virtue of the Public Service Act 30 of 2008, which preserves the terms and conditions enjoyed under the repealed pieces of legislation to the extent that they may be more favourable to the ones introduced by the Public Service Act.

67. It was also Mr. Brassey's contention that the dictum in the case of **Phirinyane v Spie Batignolles 1995 BLR 1(IC)** which suggested that

the *audi rule* may not be applicable to striking workers was inapplicable to this case because it was concerned with the reach of the court's equity jurisdiction and focused on the entitlement of employees in the private sector.

68. Mr. Brassey argued that the case has no application to dismissal of public sector workers who seek relief in Administrative Law.

69. Furthermore, Mr. Brassey submitted that the respondent cannot seek refuge in the Court of Appeal case of **Botswana Mine Workers Union v Debswana Diamond (Pty) Ltd 2009 1 BLR 138 (CA)** as the dispute arose in the private sector and involved principles of labour law.

70. Mr. Brassey argued that in the circumstances of this case, a specially tailored hearing should have been afforded to the dismissed public sector employees.

71. The respondent contends to the contrary. On his feet, Counsel for the respondent Mr. Myburgh, contended, in answer to the question posed by the court that some form of a hearing was extended to the dismissed employees before they were dismissed.

72. Mr. Myburgh argued that these hearing(s) took the form of numerous ultimatums and proceedings at the Industrial Court. By this I understood Mr. Myburgh to be saying that the respondent complied with the dictates of natural justice because it acted fairly towards the applicants and its members.

73. According to learned Counsel for the respondent, not all cases are susceptible to an ordinary hearing. He suggested that a strike is a good example, where an ordinary hearing or showing cause on an individual basis may not lead to a just result.

74. Mr. Myburgh, learned Counsel for the respondent, placed heavy reliance on the case of **NALCGPW v Attorney General 1995 BLR 48 (CA)**.

75. In the above case the Court of Appeal set aside the dismissal of public servants who had embarked on an unlawful strike based, *inter alia*, on the fact that the agents of the Government had not acted fairly in the exercise of their powers in dismissing the striking workers.

76. Mr. Myburgh emphasized that the underlying rationale for the decision of the court was that Government had failed to invoke the Trade Disputes Act resolution machinery.

77. Mr. Myburgh pointed out that in this particular case, the holding in the case of **NALCGPWU** would not apply because the respondent invoked the dispute resolution machinery in the Trades Disputes Act in an attempt to resolve the illegal strike by the essential service employees.

78. The respondent contend that the provisions of the Codes relied upon by the applicants are inapplicable because they were not intended to apply to an illegal strike.

79. The respondent argued that this matter falls to be determined on the proper interpretation and application of Section 27 (2) of the Public Service Act.

80. Counsel for the respondent argued that in terms of Section 27 (2) of the Public Service Act, the respondent was exempt from holding a disciplinary enquiry having regard to the circumstances then prevailing.

81. The respondent contended that it was reasonable for the respondent not to hold a disciplinary enquiry in the following circumstances:

81.1 Where there was a crisis occasioned by essential service employees embarking on industrial action that was gravely prejudicial to the public.

81.2 Where the strike was characterized by a high degree violence and intimidation.

81.3 Where in the run up to the dismissal on the 16th of May 2011, the respondent was forced into obtaining an interim order, on the 26th April, 2011 and a final order on the 6th of May 2011, which the applicants did not comply with.

81.4 Where the applicants and or their members ignored several ultimatums.

82. According to Mr. Myburgh, although the respondent did not afford the essential service employees a disciplinary enquiry, the respondent applied an attenuated form of procedural fairness made up of at least three key elements. Firstly, the respondent invoked the dispute resolution machinery prescribed by the Trade Disputes Act to resolve the illegal strike, with each installment of the protracted litigation before the Industrial Court serving, in effect, as a hearing over the cause of the essential services employees' dismissal, being that they had engaged in an illegal strike.

83. Secondly, Mr. Myburgh argued that the respondent issued a series of ultimata before resorting to dismissal. He submitted that the press releases of the 6th of May, 2011, 11th May, 2011, and that of the 12th of

May, 2011, made it plain that all essential service employees had to return to work immediately failing which their employment may be terminated. Relying on the case of **SRC of the Molepolole College of Education And Another v Attorney General (1996) BLR 182 (CA)**, Mr. Myburgh argued that an ultimatum can satisfy the requirements of *audi alteram partem rule.* He argued that taken together with the Industrial Court litigation, it is clear that the employees were, in fact, given a substantial form of attenuated *audi.*

84. Thirdly, Mr. Myburgh, learned counsel for the respondent, argued that in addition to the Industrial Court litigation and issuing of ultimata, Government also met with the applicants on the 12 May, 2011, to continue negotiations, during the course of which it urged unions to encourage their members to go back to work whilst the negotiation continued.

85. Mr. Myburgh argued that the record does not reflect that the applicants protested in any way against the threatened dismissal of the employees.

86. Having summarized the respective versions of the parties and their submissions, I turn now to assess the evidence.

Assessment of the evidence and findings of facts

87. I have read the affidavits of the parties with a fine comb. Both sets of papers are detailed and lengthy. The story line is similar in many respects and parties only differ on emphasis, opinion and inference, and occasionally on facts.

88. On the papers the following disputes of facts are apparent:

(i) On whether or not the members of the applicants refused to obey the court orders of the 26th April, 6th and 10th May, 2011;

(ii) Whether or not the applicants members received the ultimatums that the respondent says it issued and ignored them.

(iii) Whether or not the State broadcaster and or media particularly Radio Botswana and Botswana Television were biased against the applicants.

89. The above disputes may not be resolved on the papers. Fortunately, the attitude of the parties was that the matter may be resolved on the common cause facts. Consequently, they did not take issue with the disputes of facts that are manifest on the papers.

90. I agree that this matter may be disposed of on the common cause facts which I will, in due course, set out.

91. Before I set out the facts that are common cause between the parties and after carefully reading the papers in totality, I must make certain findings of facts. These are that:

(i) It is probable that not all employees of the respondent who participated in the unlawful strike could have heard or read the various notices issued by the respondent. These notices include those dated the 6, 11, and 12 of May, 2012, which the respondent contends made it clear that all essential service employees had to return to work immediately failing which their employment will be terminated. This is so because, the applicants had taken the view that Radio Botswana or DailyNews and Botswana Television can no longer be trusted because they side with the respondent and resolved not to listen to them. Further, there is no satisfactory proof or evidence that the above notices came to their attention.

(ii) There was no sufficient time for the applicants to communicate the Order of the 10th May, 2011, to their members having regard to a number of factors such as the vastness of the country, the fact that the Order was issued on Tuesday the 10th of May, 2011,

and that the 14 and 15th of May, 2011, were not working days and the notice of dismissal was on the 16th of May, 2011,

(iii) On the evidence it cannot be ascertained how long the employees of the respondent, well knowing that the strike had been declared illegal, continued to participate in the strike,

(iv) After the Order of the Industrial Court dated the 10th of May, 2011, the respondent's attitude seemed to have changed from warning employees to return to work or face dismissal to one of engaging in dialogue. This is manifest from the notice of the 13th of May, 2011.

(v) The notice of the 13th of May, 2011, which was written on a Friday, did not afford the applicants sufficient time to implement the request of the respondent, again having regard to the fact that the 14th and 15th of May were not working days and the dismissal was effected on Monday the 16th of May, 2011,

(vi) Whilst it may be true that the Government had gone to great lengths to ensure that the terms of various Court Orders were

broadcasted and published widely, it seems to me that such effort was considerably weakened by the instruction of the applicants leadership to its members not to read and or listen to Radio Botswana and Botswana Television, which are the only mediums with a capacity to reach the employees of the applicants scattered all over the country on account of perceived bias,

(viii) Whilst it is probably true that there were some instances of violence, on the papers it seems probable that the industrial action was largely peaceful for the most part of its duration. This should be so because no credible evidence of violence exists; Ms. Bakwena only relying on news reports to assert that the strike was not peaceful. To this extent, it is instructive that no confirmatory affidavit of the person who witnessed the violence was filed.

92. I turn now to the common cause facts:

92.1 On the 18th April, 2011, the applicants unions embarked upon industrial action which covered both essential and non-essential services.

92.2 On or about the 16th of May, 2011, the respondent dismissed public service employees in the essential service sector who embarked in the industrial action, which the Industrial Court had declared unlawful and unprotected.

92.3 The Order of the Industrial Court prohibiting participation in the strike was sweeping in its reach and did not decide which categories of work was properly to be classified as essential service.

92.4 Some of the dismissed employees were subsequently "re-employed" with a final written warning and on condition that a repetition of their misconduct within the ensuing year would lead to their dismissal.

92.5 That on or about the 26th April 2011, the Industrial Court issued an order interdicting strike participation by employees in the essential services sector of the public service.

92.6 It is common cause that the interdict was made final on the 6th May, 2011.

93. It is also common cause that the applicants unions filed an appeal against the decision of the Industrial Court with the result that the final order was effectively suspended since the effect of noting an appeal against the decision of the Industrial Court is to suspend the order given.

94. However, following the noting of the appeal, the respondent successfully applied before the Industrial Court that the interdict of the

6th of May, 2011, be executed pending the outcome of an appeal. This was on the 10th of May 2011.

95. On the 16th of May, 2011, the respondent (Government) dismissed those of its employees who failed to return to work by the 16th of May, 2011.

96. It is also common cause that subsequent to the dismissals, various essential service officers were re-employed and placed on final written warnings.

97. After setting out in some detail the respective versions of the parties hereto, their submissions, my findings of facts, and common cause facts, it appears to me that it would be prudent to have regard to the Code(s) of Good Practice (hereinafter referred to as the "Code") issued by the Minister of Labour and Home Affairs in accordance with Section 51 of the Trades Disputes Act Cap: 48:02. Thereafter, I shall discuss the legal framework governing the relationship between the parties, more particularly the relevant provisions of the Public Service Act.

Code of Good Practice

98. Some insights regarding the requirements of fairness when considering dismissal of employees participating in an unlawful strike is provided by the Code referred to above. It must be emphasized that this Code at best provides guidelines; and although it is not law it would be wrong to regard it as irrelevant. The Code provides that in determining whether or not dismissal is the appropriate sanction, the employer should consider the circumstances of the employee, such as the employee's employment record and personal circumstances.

99. According to the Code, participation in an unprotected strike is serious misconduct. It says that the fairness of the dismissal must be determined in the light of the facts of each case, including the seriousness of the contravention of the Act and whether the strike was in response to unjustified conduct by the employer. In terms of the Code, prior to dismissal, the employer must, at the earliest opportunity, make reasonable attempts to contact a trade union official to discuss the course of action it intends to adopt.

100. Clause 12.3 provides that:

> *"If dismissals are contemplated, the employer should issue an ultimatum in clear and unambiguous terms that should state what*

is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it."

The Law

The Legal Framework

101. It is common cause that the applicants' members being public sector employees are governed by the Public Service Act No: 30 of 2008. It is noteworthy that the Act was passed to give effect to best practice as conceived by the International Labour Organization (ILO)

102. Section 27 (1) and (2) of the aforesaid Act provides:

> '(1) *An employee who is guilty of serious misconduct shall be summarily dismissed from the public service on the basis of that serious misconduct.*
>
> *(2) Except in those cases in which the employer cannot reasonably be excepted to hold a disciplinary enquiry, subsection (1) shall not be construed as permitting an employer to disregard the rules of natural justice in dealing with cases of summary dismissal' (my emphasis).*

103. Section 27 of the Public Service Act explicitly entrenches the observance of the rules of natural justice. Put differently, the rules of natural justice, in the context of the Public Service Act, are a statutory

right, save in instances where the employer cannot be reasonably be expected to hold a disciplinary enquiry.

Natural Justice - An overview

104. The principles of natural justice try to guarantee that the parties who will be affected by decisions receive a fair and unbiased hearing before administrative authorities take decisions adverse to their rights and interests. By adhering to these principles, not only is justice seen to be done, but also these principles assist administrative bodies to reach substantively correct decisions. In disciplinary cases, case law both in this country and others seem to suggest, that generally, the *audi* rule (hear the other side) requires the following:

Before the hearing commences

The giving of reasonable notice to the person facing the charge.
The *audi* rule demands that a person accused of a disciplinary offence be placed in such a position that he is able to prepare his defence in advance of the hearing. Such a person must be given both adequate forewarning of the impending hearing and that he must be provided in the notice with adequate details of the charge he is to face.

Case law says that as regards the amount of detail of the allegation which must be supplied, it is not the minute detail which might be included in a criminal indictment, but there must be enough detail of the material particulars to enable the person being charged to prepare properly his defence case.

During the hearing

The *audi* rule requires that the person charged be given a fair hearing. What this means is that he be given an adequate opportunity to state his case fully and to reply to the allegations against him.

a) **Presence of the person charged.**

The hearing must take place with the person charged being present to hear all the evidence against him so that he can, if he wishes, seek to controvert it. It would thus be a violation of the *audi* rule if evidence was heard from a witness against the person charged in the absence of the latter.

b) **The right to cross-examine witnesses called to testify against him.**

The law on whether the person who is facing a disciplinary offence should cross-examine witnesses called to testify against him is not settled. On the basis of fairness, however, it would seem to me that such a right should be afforded because this is surely the best way to test the evidence given by such witnesses.

In some jurisdictions, such as United Kingdom, cross-examination is a recognised aspect of natural justice in appropriate circumstances. (See generally **Baxter, Administrative Law (Juta, Cape Town, 1984) and Bushell v Secretary of State for Environment [1981] AC 75, 97**)

c) **The right to testify and to call witnesses.**

It is in the interest of a fair hearing that the person charged must be allowed to state his case fully and to call witnesses to testify on his behalf.

d) **The right to be legally represented.**

Our case law does not say that the right to legal representation is part of the *audi* rule. I hasten to indicate though that in serious and complex disciplinary matters, it would be unfair to disallow legal representation. The right to be legally represented in grave cases in the United Kingdom, is recognised.

(See **Pett v Greyhound Racing Association [1969] 1 QB 125 and Enderby Town FC v The Football Association [1971] 1 ALL ER 215**)

e) **The right to disclosure of all prejudicial information.**

The person charged is entitled to notice of the charge before the hearing, but he is also entitled to have disclosed to him before the decision is made all information which may influence the decision maker against him in the making of its decision.

f) **The right to sum up at the end of the evidence**

The right to sum up at the end of the evidence is also an important element of the *audi* rule as it has the advantage of focusing attention on key issues.

g) **The decision itself:**

There is no obligation in our law to give reasons. Be that as it may, I must go on record to indicate that from the standpoint of fairness, obliging the decision-maker to give reasons is highly desirable in that it forces it to think carefully about its decision in order that it can articulate proper reasons to back up its conclusion. The learned author **Baxter** referred to earlier, argues that there is the strongest case for arguing that natural justice implies a right to reasons, as an unreasoned decision is arbitrary and unfair.

Natural Justice in context

105. Every era has its mood and the jurists for that mood. In the fifties, courts decided the issue of the applicability of the principles of natural justice by seeking to determine whether the decisions were quasi judicial as opposed to purely administrative decisions. Not anymore. In the Mid 1980s, the judges extended the *audi* rule to cases where an aggrieved party had a legitimate expectation to be heard because the decision complained of affected his interests adversely (**Council of Civil Service Unions v Minister for the Civil Service 1985 AC 374).** In

recent years, judges have insisted on applying the principles of natural justice to promote good governance and to bridge the gap between law on the books and law in action. The result is that the applicability of the *audi* rule is a contested terrain for the simple reason that its application requires some flexibility and depends in large part on the circumstances of each case.

An overview of Case Law

106. In the case of **NALCGPWU** cited supra at p80 C-D the court observed that: "*Those placed in authority should in the exercise of their discretionary powers act fairly. This requirement of the law is one of the manifestations of the rules of natural justice. A manifestation which in some cases is described as the audi alteram partem* rule."

107. In the case of **Malau and Another v Debswana Diamond Company (Pty) Limited and Another [2004] BLR 497**, my brother **Masuku** J (as he then was) when tracing the origins of the *audi alteram partem* rule quoted with approval Browde JA in the case of **Swaziland Federation of Trade Unions v The President of the Industrial Court and Another (Civ App 11/97) (Swaziland)** when he said:

> "*The audi alteram partem principle i.e. that the other party must be heard before an order can be granted against him, is one of the*

oldest and most universally applied principles enshrined in our law. That no man is to be judged unheard was a precept known to the Greeks; was inscribed in ancient times upon images in places where justice was administered; is enshrined in the scriptures; was asserted by an 18th century English Judge to be a principle of the divine justice and traced to the events in the Garden of Eden; and has been applied in cases from 1723 to the present time."

108. It is trite law that a party who complains that an adverse decision against it was taken in violation of the principles of natural justice may approach the court to review, correct or set aside such a decision.

109. It was stated by Innes CJ in the much celebrated case of **Johannesburg Consolidated Investment vs Johannesburg Town Council 1903 TS 111 at 115** that:

> *"Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings, complained of and set aside or correct them. This is no special machinery created by the legislature; it is a right inherent in the court, ..."*

110. The courts attach a lot of importance to the need to hear the other side before an adverse decision is taken, to the extent that where the legislation is silent on the right to be heard, the courts would insist on the right to be heard.

111. The above logic was articulated by Centlivres CJ in the case of **R v Ngwevela [1954] 1 SA 123** as follows:

> *"The maxim audi alteram partem should be enforced unless it is clear that parliament has expressly or by necessary implications enacted that it should not apply (audi principle) or that there are exceptional circumstances which would justify the court's not giving effect to it."*

112. The contents of the *audi* rule or its application in the most comprehensive form may vary from case to case. Sometime it may depend on the context or the gravity of the issues under consideration, including the complexity thereof.

113. In the case of **Makgoeng v The Attorney General, 1987 BLR 518 (CA)**, a matter concerning the termination of a teacher's employment, the court held that the principles of natural justice are applicable. The court expressed itself in the following terms at page 528:

> *"It appears to me that the appellant was entitled to a fair hearing albeit by written representation before he could be compulsorily retired from the service even in the interest of the service. There is nothing before this court to show that he has been given that fair hearing, and for this reason also the two letters dated 11 February 1987, and 17 June 1987 respectively were ineffective in bringing about the retirement of the appellant from the service."*

The *Audi* Rule in the context of a strike

114. Under this sub-heading, I discuss the jurisprudence of the Industrial Court and that of the Court of Appeal on the applicability of the *audi* rule in the context of a strike.

115. I will also make reference to foreign jurisprudence on the issue of the applicability of the *audi* rule in a strike situation, always bearing in mind of course that these foreign jurisprudence is persuasive and not binding.

116. In considering the jurisprudence of the Industrial Court, I bear in mind that it was dealing with the *audi* rule in the context of labour law principles, whilst that of the Court of Appeal also dealt with the application of Administrative Law principles, and therefore more relevant.

117. That Administrative Law and Labour Law are two distinct disciplines does not require professorial knowledge. The two disciplines however overlap in material respects. For instance, the issue of procedural fairness or natural justice is a dominant theme in both disciplines.

A synopsis of the Jurisprudence of the Industrial Court

118. In Botswana, the jurisprudence of the Industrial Court seems to suggest some reluctance to extending the right to be heard to striking employees, more particularly those participating in an illegal strike.

119. In the *locus classicus* case of **Phirinyane,** cited supra, the court stated the exceptions to the *audi* rule in the following terms:

> *"It is important to note that there are exceptions to this general rule of natural justice that a fair disciplinary enquiry should precede a dismissal for misconduct.*
>
> *Firstly, there may be rare cases of emergency in which an employer may have to dismiss workers summarily in order to save lives or property e.g. rioting, striking workers attacking casual labourers, who the employer has brought in to try and keep the business going or striking workers smashing windows or machinery or setting company cars alight. In such cases it can never reasonably be expected of an employer to first hold a disciplinary enquiry before dismissing such unruly workers...*
>
> *Secondly, there can be cases of waiver, in which the conduct of the employee is such that it in all fairness be said that he has waived or abandoned his right to a hearing, e.g. if he deserts or displays unruly behaviour or blatant abuse of the employer when the employer is trying to discuss, convene or hold a disciplinary enquiry. A further example is where an employee has been given notice to attend a disciplinary enquiry and he refuses. In such cases the employee has only himself to blame for not availing*

himself of the opportunity to state his case and explain his actions...

Thirdly, there may be cases where it cannot reasonably be expected of an employer in specific circumstances to hold a disciplinary enquiry before dismissing employees, e.g. employees who are striking illegally and who refuse to return to work after receiving a proper ultimatum may be dismissed without a disciplinary enquiry.

Fourthly, an employer may dispense with the greater of a disciplinary enquiry where an employee pleads guilty to the alleged misconduct. An employer cannot in such cases dispense with a disciplinary enquiry altogether, because before deciding on an appropriate sanction for misconduct, he must give the employee an opportunity to place facts before him in mitigation."

120. In the case of **Phirinyane** cited above, De Villiers J comments obiter that employees who participate in an illegal strike who refuse to return to work after a proper ultimatum may be dismissed without a hearing.

121. The court also mentioned other situations where a hearing may not be reasonably held, such as where striking employees smash windows, attack other employees and set cars alight.

122. In one case the Industrial Court went so far as to suggest that there is usually no need for a disciplinary hearing in the case of striking workers. (See **Thathana Nkwe and 43 others v Caratex Botswana Case No. IC 333/2006**).

123. Consistent with the view that striking workers may not be entitled to a hearing, my brother Tebogo-Maruping J (as he then was) stated in the case of **Othusitse Edward and 14 Others v Ramotswa Steel IC 57/2006** that:

> *"The decisions of courts have made it quite clear that employees who strike illegally are even less likely to receive the protection of the court..."*

A synopsis of the jurisprudence of the Court of Appeal in cases of dismissals in the context of a strike

124. In the case of **NALCGPWU**, cited supra, the Court of Appeal highlighted the need for parties involved in a strike to observe the terms of the Trade Disputes Act. At page 79H – 80A the court stated that: *"The Act is specifically designed to ensure that trade disputes are, as far as possible settled peacefully and amicably. It provides the appropriate machinery for the resolution of a dispute like the one that led to the workers going on strike. It is not, in my view, made to enable one side with the power to settle the dispute to its advantage. In any case, the Act does not contemplate wholesale dismissal of workers who take part in an illegal strike."*

125. At page 81H – 82A, the court said the following about the essence of natural justice:

> *'The essence of the rule of natural justice, therefore, may not always be a matter of giving a hearing but of acting fairly in the exercise of a discretionary power. Not all cases are susceptible to a hearing prior to a proper exercise of power. A strike situation seems to me to be a good example, where an ordinary hearing or showing cause on an individual basis may not lead to a just result. That I believe, is the reason why special provisions are made by the [TDA] and through collective bargaining agreements for the resolution of industrial disputes.'*

126. At the end of the day, the court set aside the dismissal of public servants who had embarked on an unlawful strike because "*the agents of Government had not acted fairly in the exercise of their powers in dismissing the striking workers*".

127. In the case of **SRC of Moleplole College of Education**, cited supra, the court held that adequate notice had been given when the Minister's ultimatum was read to the students, fully explaining the reasons for the Minister's decision to close the college and that the appellants' argument on *audi alteram partem* stands to be rejected.

128. In the case of **Botswana Mining Workers' Union v Debswana Diamond Co. (2009) 1 BLR 138 (CA)**, page 151 F-G the court stated that:

> *'With reference to pre-dismissal hearings, Botswana case law does not support the appellant's submission that the absence of such hearings was unfair. In Phirinyane v Spie Batignolies (1995) BLR 1, IC at p5E-F the court observed that a hearing could not reasonably be expected in the course of an illegal strike where the workers refused to respond to a proper ultimatum. And in [NALCGPWU] at p81H this court remarked that "an ordinary hearing in a strike situation may not lead to a just result." Here, again, counsel for the appellant sought assistance from South African case law, agreement with which by Botswana courts one can only regard as a matter of speculation' (our emphasis).*

An overview of the approach of the South African Courts to cases of dismissals in the context of a strike

129. In South Africa, the courts have often insisted that certain procedural steps should be taken by an employer before dismissing employees engaged in unprotected strike. These steps include the need to issue an ultimatum that states in clear terms what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum.

130. The courts have also insisted on the need to hold a hearing. But on this aspect the courts have not been consistent. Some courts have insisted

on a hearing, whilst others have taken the position that in a strike situation, particularly an unprotected strike, where employees are warned of dismissal in an ultimatum, it would hardly make sense to conduct a hearing before dismissal is imposed. The latter position appears to be in the minority.

131. The Labour Appeal Court in **Plaschem (Pty) Ltd v CWIU [1993] 14 ILJ 1000 (LAC)** summarized the desirability of issuing an ultimatum to strikers before resorting to dismissals as follows:

> *"When considering the question of dismissal it is important that an employer does not act overhastily. He must give fair warning or ultimatum that he intends to dismiss so that the employees involved in the dispute are afforded a proper opportunity of obtaining advice and taking a rational decision as to what course to follow. Both parties must have sufficient time to cool off so that the effect of anger on their decisions is eliminated or limited."*

132. The authorities also seems clear that sufficient time, from the moment of giving the ultimatum, must elapse to allow the workers to receive the ultimatum, reflect upon it and to respond to it by either compliance or rejection. The courts have also said the ultimatum must reach strikers. (See **Coin Security Group (Pty) Ltd v Adam & Others 2000 (4) BLLR 371 (LAC)**).

133. In South Africa the watershed case on whether employees participating in an illegal strike are entitled to a hearing was the case of **Modise & Others v Steve's Spar Blackheath 2000 BLLR 496.**

134. The case of **Modise** laid down the principle that illegal strikers are entitled to a hearing before the employer dismisses them – even if they have already been given an ultimatum warning them that they will be dismissed should they refuse to return to work.

135. The facts of the case were that striking workers were dismissed in November 1994. The reason for the strike was the union's demand that all bargaining for the franchise stores must be done centrally.

136. According to the 1956 Labour Relation Act, the strike was illegal and therefore **Steve's Spar Blackheath** warned the striking workers that the strike was illegal. Steve's Spar Blackheath also stated that the demand made by the union is impossible due to the fact that there is no forum that will be able to bargain on behalf of all the franchise stores. Nine days followed and there was an interdict issued against the strike which was ignored by the striking workers, therefore an

ultimatum was given to the striking workers. The striking workers did not comply with the ultimatum where after they were dismissed.

137. The Industrial Court held that the dismissal was fair. Thereafter, an appeal was lodged with the Labour Appeals Court by some of the dismissed employees.

138. The Labour Appeals Court was divided on whether the striking employees were entitled to a hearing. What follows hereunder is a summary of the minority and a majority view.

Minority view

139. It was the minority opinion that the *audi alteram partem* –rule is not applicable to striking workers and that the only general rule that exist is that general fairness in the industrial relations is achieved. It was the view of the minority that fairness in cases of dismissals based on participation in a strike will be different in each situation.

Majority view

140. The majority judgment took the view that natural justice is an important part of South African law and that the *audi alteram partem* – rule is particularly significant.

141. The majority view referred with approval to the case of **Administrator, Natal & Another v Sibiya & Another 1992 (4) SA 532 (A)** in which the court held that strikers have a right to a hearing before being dismissed, because the dismissal can influence their right to work and remuneration.

142. The majority referred to those cases that denied strikers the right to a hearing and held that this right in those cases was not exercised because the strikers did not deserve to be heard.

143. It was the position of the majority that a formal hearing may not have been necessary, but that a mere letter to the unions requesting them to state their side of the matter can be sufficient. Then the majority looked at the case where it was held that should the employer issue a fair ultimatum, a hearing will not be necessary, to which the majority stated that one must not forget that some employees may be able to prove that they were not willing to strike, but they were forced to do so.

144. The majority judgment took the view that the aim of a hearing is to obtain information, whereas the ultimatum gives employees advice. The majority view held that an ultimatum cannot replace the *audi alteram partem* – rule. It was the view of the majority that the *audi alteram partem* – rule, not necessarily in the formal sense should be observed.

145. According to the majority judgment, a hearing may be formal or informal or a collective hearing or a mere letter or memorandum. The majority held that dismissal of the striking workers was procedurally unfair, because the employer failed to conduct a hearing.

146. I have traversed the jurisprudence of the labour courts in South Africa in some detail. These cases dealt with the application of the *audi* rule in the context of the private sector, on the main. It therefore makes sense to consider some jurisprudence concerning strike dismissals in the public sector.

147. In the case of **Mokoena v Administrator Transvaal 1988 (4) SA 912** the court held that workers that were dismissed had a right to, or at least a "legitimate expectation" of, a hearing because the termination of

their contracts deprived them of the pension benefits to which they would have been entitled had their contracts been completed.

148. The court found it "repugnant to any reasonable and decent person that applicants could be dismissed and their right to their pension destroyed on the whim of an official and without inquiry."

149. In the case of **Zenzile v Administrator of the Transvaal (1989) 10 ILJ 34**), the court held that the *audi* rule was applicable to striking employees.

150. In the above case, the employees had embarked on industrial action in protest against the dismissal of one of their colleagues. They had ignored an ultimatum to return to work.

151. The following day the dismissal notices were served on the workers who had been involved in the strike action and/ and or various acts of disruption attendant on it.

152. The court held that because the relationship between the employees and the employer was statutory, the rights of the employees were to be

determined exclusively by reference to the Public Service Act and the staff codes made thereunder.

153. In the case of **Tshabalala v Minister of Health 1987 (1) SA 513**, the court whilst stressing that strike action by nurses was particularly a grave disciplinary offence and constituted a material breach of the contract, nevertheless held that they could not be dismissed in terms of the applicable section of Nursing Act unless they were first given a hearing.

154. The rationale that the dismissed employees were entitled to a hearing was stated as follows at page 521 E-G:

> *"It may be as well to stress that, in the exercise of the discretion conferred by s 45 (5), the chief superintendent is obliged to give careful and bona fide consideration to the case of each individual in respect of whom he is considering dismissal. He must give each such person the right to be heard. He must thereafter exercise a discretion, having regard to all the facts at his disposal, and in particular as to whether such person made himself or herself guilty of unsatisfactory conduct, meriting summary dismissal. He must certainly have regard to whether the facts established that the individual participated in unlawful strike action. In the case of students who did strike, he may wish to have regard to the degree of their participation. In the individual cases it may have been for a short duration, and some or other mitigating factor may be urged upon him. All of that should be considered by an official exercising this kind of statutory discretion."*

155. The cases of **Modise, Mokoena, Zenzile** and others are clear authority for the preposition that striking public sector employees are generally entitled to a hearing before being dismissed for participating in strike action, including an illegal strike.

A Distillation of the Principles derived from the authorities referred to above

156. It is clear from the above authorities that whilst the trend in South Africa appears to be in favor of a hearing with respect to the dismissal of employees who participated in an illegal strike, the position in Botswana, more particularly with respect to the employees in the private sector, is that the absence of pre-dismissal hearings does not render the decision to dismiss employees necessarily unfair.

157. With respect to the dismissal of public sector employees who are dismissed pursuant to an exercise of statutory power, the courts in South Africa have held that unless it is not reasonably practicable to do so or for some other reasonable cause, a hearing must be extended to employees who participated in an illegal strike.

158. The Court of Appeal in Botswana has also held that government is obliged to act fairly in exercising its powers to dismiss striking employees. The Court of Appeal has also said, as indicated earlier, that the Trade Disputes Act does not contemplate "*wholesale dismissal of workers who take part in an illegal strike*".

159. The courts are also generally in agreement that the requirements of natural justice must depend on the circumstances of each case and may depend on the subject matter that is being dealt with and the rules under which the repository of power acts.

160. The Court of Appeal in Botswana has said the essence of natural justice is acting fairly in the exercise of a discretionary power; and that in a strike situation an ordinary hearing or showing cause on an individual basis may not lead to a just result.

Applying the principles gleaned from the authorities to the present case.

161. I turn now to the application of the principles gleaned from the above authorities to the facts and circumstances of this case.

162. Before doing so, I must state upfront that in my mind, it is incontrovertible that the employees in continuing with the strike action after the court declared same illegal constituted serious misconduct and liable to be dealt with in terms of the relevant provisions of the Public Service Act, more particularly Section 27 (1) and (2) thereof, or any other relevant law.

163. In interrogating whether the *audi* rule was applicable in this case, I bear in mind that the respondent does not deny the applicability of the *audi* rule as a general preposition.

164. It is plain that the respondent's position is that the court must find that the employees were given some form of a hearing which took the form of various ultimatums and industrial court hearings.

165. The respondent also says that the holding of a disciplinary enquiry was not reasonably practicable within the meaning of Section 27 (2) of the Public Service Act.

166. In this case, it is plain that the relationship between the dismissed employees and the respondent was statutory and that the rights of the employees are to be determined by reference to the Public Service Act and the law generally which entrenches the principles of natural justice, save where it may not be reasonably practicable to observe same.

167. As indicated earlier, one of the essential elements of the principles of natural justice is the right to be heard before an adverse decision is taken. The fullest application of the principle of natural justice embraces many possible facilities such as the right to make representations, either orally or in writing and the right to question witnesses. A necessary corollary of the right to make representations is that the party affected has the right to be informed of the facts and information which may be detrimental to his case.

168. In my opinion, the argument that the employees were afforded a hearing in the form of several ultimatums and Industrial Court hearings is fundamentally flawed for the reasons that appear hereunder. The Public Service Act prescribes a hearing unless for some

reason it is not reasonably practically to do so. In this case, no sufficient evidence has been led suggesting that it was not reasonably practicable to do so.

169. More significantly, as it was stated in the **Modise** case, an ultimatum and a hearing are two different concepts. An ultimatum is an advice: return to work or risk being dismissed. A hearing usually follows an ultimatum and its purpose is to hear the other side why the prior threat contained in the ultimatum should not be carried out.

170. In the case of **Modise**, cited supra, the majority held that an ultimatum cannot replace a hearing. I am in total agreement with the view of the majority in the case of **Modise** that an altimatum cannot replace a hearing. Further, in this case, there is no evidence that the ultimatum issued reached the applicants.

171. Additionally, I am of the view that even if this court was to accept that an ultimatum reached the applicants or their members, as opposed to just being dispatched or released, which in this case is not proven, such an ultimatum was not fair.

172. A fair ultimatum is required by case law and the Code of Good Practice referred to earlier in this judgment. The Code also requires that prior to dismissal, the employer must, at the earliest opportunity, make attempts to contact a trade union official to discuss the course of action it intends to adopt. This was not done in this case.

173. In my judgment, a fair ultimatum in the circumstances of this case should have been of sufficient duration to have enabled:

(a) Applicants to have consulted their members and urged them to go to work, consistent with the respondent's letter dated the 13/05/2011.

(b) It should have afforded the applicants and/or their members' time to cool down, reflect and take a rational decision with regard to their continued employment.

174. It must be stated, however, that the view propounded by the respondent that striking workers who have been given an ultimatum are not entitled to a hearing after such an ultimatum has been issued (because such ultimatum somehow amounts to a hearing) could lead to grave injustice. It may be, for example, that some of the strikers did not hear of the ultimatum, or they could not respond to it for some *bona fide* reason, (e.g. illness or the fact that they were on leave). In such

cases, natural justice demands that strikers faced with dismissal should be afforded an opportunity to be heard.

175. With respect to the hearings before the Industrial Court, I can only say that the proceedings before the Industrial Court related to the legality of the strike, not showing cause why the employees that participated in an illegal strike should not be dismissed. These hearings could therefore not constitute the hearing contemplated by Section 27 (2) of the Public Service Act.

176. With respect to the argument advanced by the respondent that a disciplinary enquiry or a hearing could not be held where there was a crisis occasioned by the employees embarking on industrial action, my only comment is that a crisis is inherent in any strike situation.

177. I readily accept that a hearing on an individual basis, in the sense of each employee who participated in the illegal strike, being called upon to show cause why he should not be dismissed, would have been cumbersome and not reasonably practical.

178. Consequently, this is not a case where the court would insist on all the elements that make up the *audi* rule as outlined earlier.

179. However, there is no reason why the applicants' members, facing in effect a death sentence in the employment context, should not be entitled to make representations before being dismissed. It would have been easy to write a letter to the Unions that represented the employees who embarked on the illegal strike to show cause why the employees should not been dismissed.

180. There is no evidence to suggest that a hearing even in the form of a letter to the Unions that represented the employees could not be done on account any violence or rioting.

181. This case is not similar to the case of **Lefu v Western Areas Gold Mining Company (1985) 6 ILJ 306 (IC)** where the court refused to apply the principles of natural justice because the strike had deteriorated into a two-day riot in which nine people were killed and damage running into millions of rands was incurred.

182. More significantly, the respondent has not demonstrated that the situation that existed prior to the dismissal being effected was one of emergency and that the employees were dismissed in order to save lives or property. It is this situation, among others, that Section 27 (2) of the

Public Service Act contemplated. In such cases, no reasonable court properly directing itself may hold that a hearing was reasonably expected of an employer before dismissing such unruly workers.

183. Furthermore, it is not enough to simply assert as the respondent seemed to do, that it was not reasonably practical to hold a hearing. Evidence must be tendered to prove such an assertion.

184. Further, it would seem from a careful reading of the papers in totality especially Annexure "R1" to the applicants replying affidavit that the reason why the respondent did not hold a pre-dismissal hearing was that it believed that the law in Botswana as reflected in the case of **Botswana Mine Workers' Union** cited supra, was that it was not part of Botswana law that the dismissal of striking employees, in an illegal and unprotected strike should be preceded by hearing, not that it was impossible to do so. In my opinion, such a view did not take into account a cause of action grounded on Administrative Law, as is the case here.

185. On the basis of the above, it seems to me that the decision-maker did not understand correctly the law that regulated its decision making power.

186. At the end of the day, I am attracted to the view that public sector employees who participated in unprotected strike are entitled to a hearing before being dismissed.

187. This court associates itself with the compelling logic of the majority decision in the case of **Mokoena, Tshabalala, Mayekiso, Zenzile** and **NALCGPWU** (Manual Workers), cited supra.

188. It is in my mind probable that some of the dismissed workers may not have participated in the strike; some may have been intimidated to participate, whilst others may have been absent for reasons unrelated to the strike. It is only when the employer has all the facts at its disposal, that he or she can take an informed decision.

189. The employer cannot competently dismiss an employee without having established that such an employee participated in an illegal strike. That would be a travesty of justice.

190. As lawyers would readily testify, the path of the law "is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered".

191. As Megarry J in the case of ***John v Rees 1969 ALL ER 274, p309*** stated:

> *"It may be that there are some who would decry the importance with which the courts attach to the observance of the rules of natural justice,... as everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of answerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events."*

192. It is my considered view that grave injustice would result if the employer is allowed to treat employees who participated in the illegal strike as undifferentiated mass.

193. It is my opinion that before dismissing employees who participated in an illegal strike, the employer should consider a number of relevant factors that may result in less punishment than dismissal.

194. The factors referred to above may include nature of the job, length of service, past loyalty and the effects of dismissal on benefits such as medical aid or pension.

195. In this case the respondent seems to have simply assumed that all the employees had taken part in the illegal strike and dismissal notices were accordingly issued against all of them.

196. In my view, the duty to be heard, in this case, was reinforced by the fact that the decision to dismiss the employees affected their livelihoods. It is a decision that should not have been taken hastily. As I have said before, dismissal is the ultimate punishment with disastrous consequences on employees livelihoods. It is akin to a death sentence in criminal law.

197. On the papers, it is plain that the applicants and their members were not given a hearing before a decision that terminated their employment was taken. This was a fundamental breach of the rules of natural justice. This breach is so material as to constitute a denial of justice and the 'attenuated hearings' in the form of Industrial Court hearings and ultimatums could not, on the most liberal

interpretations qualify as a hearing as contemplated by Section 27 (2) of the Public Service Act and/or the law generally.

198. Without the observance of the rules of natural justice, the dismissed applicant members were severely prejudiced. They lost their jobs; their dignity and sense of self-esteem.

199. In the case of **Smith v Texas, 233 US 630 at 641,** the court stated that:

> *"In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened ..."*

200. It was further held in the case of **Massachusetss B D of Retirement v Murgia 427 US (1970)**, Marshall J, Dissenting that:

> *"The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependant on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness ..."*

201. Essential service employees such as medical doctors constitute the most valuable professions whose rights must be jealousy guarded and protected by this court. They constitute the backbone of our very existence as a people. Without this backbone, the country would be considerably weakened.

202. There can, therefore, be no doubt that the decision of the respondent terminating the employment of members of the applicants without affording them a hearing stands to be invalidated. Where the breach of the Act and principles of natural justice relied on are material and highly prejudicial to the applicants' members as in this case, such decision is liable to be set aside as null and void, as I hereby do.

203. The above policy is crisply stated by Lord Wright in the **General Medical Council v Spackman 1943 AC 627 at 644 - 45** as follows:

> *'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision.'*

204. In the result, it is ordered that:

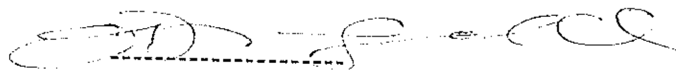
1. The decision of the Director of Public Service Management ("DPSM") on 16 May, 2011, to dismiss all public officers who were allegedly providing essential services is hereby reviewed and set aside.

2. All public officers who were dismissed by the DPSM on 16 May, 2011, are retrospectively reinstated to the posts which they were employed in, immediately prior to their dismissals.

3. Those employees seeking to associate themselves with this Order should report to work within 14 days, from today the 21st day of June, 2012.

4. The respondent to pay costs of the application.

DELIVERED IN OPEN COURT AT LOBATSE THIS 21st DAY OF JUNE 2012.



OBK DINGAKE
JUDGE

RANTAO KEWAGAMANG ATTORNEYS – APPLICANTS' ATTORNEYS
COLLINS NEWMAN & CO – RESPONDENT'S ATTORNEYS