BMJ/AE
5 February 1999

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO J 928/98

In the matter between:

MOKHETHI JOHANNES TSETSANA

Applicant

and

BLYVOORUITZICHT GOLD MINING COMPANY LIMITED

Respondent

J U D G M E N T

JAMMY, AJ

1.The "certificate of outcome of dispute referred for conciliation" signed by the presiding Commissioner of the Commission for Conciliation Mediation and Arbitration, at the conclusion of a conciliation meeting between the parties to this matter on 24 April 1998 records the dispute which remained unresolved as concerning an "alleged unfair retrenchment." The picture presented in the applicant's statement of claim in this matter and on which he relies in support of his claim for reinstatement, alternatively compensation, goes significantly further. It is one alleging ongoing racial discrimination during 1997, leading to the lodgment by him of a formal grievance as a consequence of which, he states, he was purportedly "retrenched" in February 1998.

2.At a pre-trial meeting with the parties convened by me in

Chambers before the hearing, the applicant augmented these allegations. The purported retrenchment, he inferred, was a subterfuge for the termination of his employment for other, discriminatory, reasons but even if I were to find that this was not the case and that it was commercially sustainable, the selection criteria applied by the respondent were unfair and he was not given proper notice of the termination of his employment.

THE RESPONDENT'S EVIDENCE

3.The first witness called by Mr N Pretorius, representing the respondent, was Mr W A Boshoff, its Human Resources Manager. The Blyvooruitzicht Gold Mining Company, he testified, had become a marginal mine in 1997, primarily as a result of financial pressure consequent upon the falling gold price. The necessity to introduce and implement radical cost-saving measures in that context, was canvassed in intensive consultations with five trade unions, respectively representing employees in different sectors of employment on the mine. Those unions were the Administrative, Technical and Electronic Association, the Mineworkers Union, the National Employees Trade Union, the Officials Association of South Africa, and the S A Electrical Workers Association.

4.In due course, a Retrenchment Agreement was concluded with these unions on 20 August 1997. That agreement recorded, inter alia, steps to be taken towards the avoidance of retrenchments where possible, the selection criteria to be applied in any retrenchment programme, the establishment of a "Monitoring Committee" comprising one mine level representative from each union/association party and two management representatives, as well as severance benefits and other related issues.

5.Pursuant to an ongoing consultation process in the Monitoring Committee, Mr Boshoff continued, three retrenchment exercises were implemented. The first, in September 1997, resulted in the laying off of approximately 1000 employees. A further 1000 employees were retrenched in December 1997 and in a final retrenchment, in February 1998, the employment of approximately 1000 more employees was terminated. At that stage, of a workforce originally exceeding 3000, only approximately 300 employees remained in the service of the company.

6.The applicant, Mr Tsetsana, who was employed as a learner radiation protection officer, was classed as an official, a category of employment represented in the negotiations by the Officials Association of South Africa. At the time of the retrenchment in September 1997, the company employed three learner radiation protection officers - the applicant and two white officials, certain Adams and De Beer. The applicant was initially erroneously identified for retrenchment at that time but when, at his instance, it became apparent that he had been in longer service with the company than either Adams or De Beer, it was those two officials whose services were terminated in the course of the initial retrenchment exercises leaving the applicant as the sole learner radiation officer in the employ of the company as at February 1998 when he too, together with virtually the entire remaining workforce on the mine, was retrenched.

7.The retrenchment programme, the necessity for which was outlined in detail by Mr Boshoff and which had been unreservedly accepted by the participating trade unions in the course of intensive ongoing consultation, had been carried out with meticulous adherence to the provisions of the Retrenchment Agreement and the requirements of the Labour Relations Act 1995, he said.

8.Asked by the applicant in the course of cross-examination why he, the applicant, had not received promotion to the position of full, as opposed to learner, radiation officer notwithstanding that he had passed the necessary examinations in that regard, Mr Boshoff replied that as a consequence of the financial constraints which the respondent was experiencing, all promotions had been frozen from approximately August 1997. Referred by the

applicant to a "career path" document applicable to radiation protection officers and which provided for the promotion of "Learner Radiation Screening Officers" (Category 10 salary scale) to the position of "Radiation Screening Officers" (Category 12 salary scale), "if a vacancy exists", and asked why, once he had passed the relevant examinations, he had not been promoted, Mr Boshoff replied that no vacancy in fact existed at the relevant time to which the applicant could have been so promoted. The career path document was in any event nothing more than a proposal for management discussion and had never been formally implemented.

9.It was correct, said Mr Boshoff in response to further questioning, that during January 1998 the applicant had handed to him a copy of a grievance letter addressed by him to the respondent's general manager, protesting the fact that he had not been promoted notwithstanding his success in the requisite examinations and purported discrimination against him in the training programmes which preceded them. He denied that his response to the letter had been that the company would not tolerate it. All that he had stated was that certain people might take offence at the tone in which it had been written.

10.Mr D H Jenner is the Chief Environmental Officer and Head of the Environmental Department on the respondent mine. The applicant was employed in his department as a learner radiation and screening officer. His training in the use of radiation detection instruments involved relatively simple examinations relating in the main to the use of that instrumentation.

11.During 1997, he testified, there were three learner radiation officers employed in the department but as sections of the mine in which they normally operated closed down, the necessity for the screening functions which they performed was significantly reduced.

12.In the course of the retrenchment exercises implemented on the mine during the period September 1997 to February 1998, two of the learner screening officers, Adams and De Beer, were retrenched in December and the applicant's services were terminated in February.

13.Following a meeting with union representatives on 13

February, said Mr Jenner, he was approached by an official of the Officials Association of South Africa regarding the number of people represented by that union who were to be retrenched in the final exercise. The applicant was the only employee involved and when the necessity to retrench him and all other aspects of that retrenchment were reviewed, the union official accepted the position without reservation. Letters of termination of employment were then prepared by the Financial Manager and he was directed to distribute them to the affected employees. That addressed to the applicant, who was described therein as "Learner Screen Officer" was handed to him, as far as he can now recall, on a Friday towards the end of the month. The applicant however objected to his description in the letter as a learner screen officer because, as far as he was concerned, he was no longer a learner but was fully qualified. In order to assist him in the context of future employment therefore, said Mr Jenner, he agreed that the letter would be retyped to reflect him as a Radiation Screening Officer and this was done on the morning of Tuesday 24 February 1998, the letter inadvertently being dated that date instead of the original date of 20 February. He located the applicant on the mine premises and handed him the letter in his office, for which he signed receipt.

14.He has at no time, Mr Jenner concluded, had any personal grudge against the applicant and there was no question of the applicant ever having been discriminated against because of his race or for any other reason. He was treated exactly as every other employee had been. The question of racial discrimination had never been raised by the applicant in any discussion with him.

THE APPLICANT'S TESTIMONY

15.At the time of his employment by the respondent, said Mr Tsetsana at the commencement of his testimony, he was appointed a learner screening officer and sent for vocational training. On its completion he received from the Chamber of Mines his first "Certificate in Radiation Protection Monitoring - Screening." Thus qualified, he raised with his immediate superior the question of his possible promotion and was assured that this

would be addressed as soon as possible. This did not happen however, despite further assurances that the matter was receiving attention and in the meantime he worked "patiently and obediently", he said.

16.During July 1997, two further learner officers were employed and in September, the company commenced a retrenchment exercise. At that time the head of his department, Mr Jenner, was on leave and when he returned to find the retrenchment in progress, he "did all in his power to protect all of us."

17.On 5 December, together with Mr De Beer, one of the other screening officers, he received a notice of retrenchment. The other learner officer, Mr Adams, the nephew of his supervisor, was not retrenched and this, said the applicant, was perceived by him as discriminatory nepotism. He protested that he had been in longer service than the other two and this was in due course acknowledged and his retrenchment withdrawn. Adams was retrenched in his stead and he again received an assurance from the general manager that the question of his promotion would receive attention. He was also told that the question of increased back pay, retrospective to the time of his qualification, would also be addressed.

18.Nothing more happened however, and he then decided to address a letter setting out his grievances to the general manager. He felt, he said, that he was being discriminated against because of his colour. He had by chance come across pay slips relating to Adams and De Beer, indicating that they had been promoted and had received salary increases. When he complained of this to Mr Jenner, the response was that his increase had been recommended but had been inadvertently not forwarded to management.

19.Further complaints went unheeded and eventually, on 23 February 1998, he commenced a period of leave for which he had previously applied and which had been approved. A leave advice form submitted by him indicated that approval in respect of the period 23 February to 24 March 1998. On 24 February however, he received a telephone call from Mr Jenner informing him that he had been retrenched and that his services had been terminated

on one month's notice, but that he was not required to work as he would be paid in lieu thereof. The payment subsequently tendered to him was based on his rate of remuneration as a learner screening officer at Salary Scale 10 and not as a qualified officer at Salary Scale 12 as should have been the case. He did not return to work thereafter.

20.Cross-examined by Mr Pretorius, Mr Tsetsana did not subsequently dispute the company's submission that, in fact, whatever documentation he may have seen to the contrary, which was not conceded, neither Mr Adams nor Mr De Beer, who had achieved the same qualifications as he had, had been promoted or had received increases in salary. The salary levels of each of them moreover, were lower than his own. He disputed Mr Jenner's evidence regarding the amendment of his initial notice of termination as a consequence of his own query regarding his stated designation. He had, he now conceded, received the initial letter but did not understand its contents. The advice that he was finally retrenched had been given to him telephonically by Mr Jenner on Tuesday 24 February. He had never joined the trade union which allegedly represented him and did not consider himself bound by negotiations and agreements in which it had purportedly been involved on behalf of himself and other employees.

CONCLUSION

21.The applicant, in what must clearly be acknowledged as his bitter and pained perception of the unacceptable treatment which he had received at the hands of the respondent, was an intense participant and a vigorous proponent of his own cause throughout this hearing. Whilst that is perhaps understandable, there is however nothing on the evidence before me to suggest, when the probabilities emerging therefrom are assessed, that that perception was justified. The applicant's testimony regarding the sequence of events leading up to the termination of his employment was at best for him questionable in the light of the precise evidence of the company's witnesses in that regard.

His perception of racially motivated discrimination against him, apart from the fact of its vague and uncertain development in the course of his evidence, is emphatically negated by the evidence of both Mr Boshoff and Mr Jenner to the effect that neither Mr Adams, who, in addition to being white, was allegedly nepotistically advantaged, nor Mr De Beer, were treated in any preferential manner. The facts that they were not promoted, did not receive salary increases and were retrenched before the applicant was, were ultimately not disputed by the applicant. The reasons for his non-promotion - the initial absence of any vacancy in that regard and the subsequent freezing of promotions across the board, are compelling and again unchallenged. I reiterate that, in my view, there is no suggestion, from the evidence before me, of any discriminatory practice on the part of the company in its dealings with the applicant at any stage.

22.I am also satisfied, both from the testimony and the documentation tabled in this matter that the retrenchment programme implemented by the respondent was in full compliance with the requirements of both the Retrenchment Agreement concluded by it with the collective trade unions recognised on the mine and Section 189 of the Labour Relations Act 1995. The applicant's contention that he is not bound by the terms of agreements concluded by a trade union of which he is not a member, is without substance or foundation. The Retrenchment Agreement of August 1997 is unquestionably a collective agreement which binds, inter alia, employees who, although not members of a registered trade union which is a party to it, are employed in the workplace to which it applies and in which that trade union enjoys majority representation of the employees there employed.

Labour Relations Act 1995: Section 23(1)(d)(iii).

23.For all of these reasons, I find:

23.1that the applicant was at no time subjected to any form of unlawful or unfair discrimination;
23.2that the retrenchment programme implemented by the respondent during the period September 1997 to February 1998 was substantively and procedurally fair and proper having regard to the provisions of the Retrenchment Agreement concluded by it with the representative trade unions involved and to the statutory requirements of the Labour Relations Act 1995;
23.3that the applicant is accordingly not entitled to any form of relief arising therefrom.

24.That however is not the end of the matter. The applicant's testimony regarding his notice of termination is confusing and contradictory. He asserts in the first instance that the notice which he received was oral and telephonic on 24 February 1998. He acknowledges however that he did receive earlier written notice of that termination which he read but did not understand. He denies that he required any amendment to that notice in the context of his designated status but it is improbable, in my view, that he would have been described any differently therein than was the case in the retracted notice of retrenchment given to him in December 1997 and in which he was referred to as a "Learner Screen Officer." The fact that the final notice, which I am prepared to accept, on Mr Jenner's evidence, was erroneously dated 24 February 1998 instead of its original date of 20 February, reflects the applicant's status as "Radiation Screening Officer" but that the payment made to him was nonetheless calculated on the basis of a salary level applicable to a learner screening officer, lends compelling substance, in my opinion, to Mr Jenner's testimony that the letter was retyped at the applicant's instance to reflect that changed status.

25.Section 14 of the **Basic Conditions of Employment Act 3 of 1983,** in force at the time of the applicant's retrenchment, deals with termination of contracts of employment. The proviso to Section 14(2) of that Act provides, inter alia, that notice of termination -

"(ii)..... shall not run concurrently with, and notice

shall not be given during, an employee's absence on leave granted in terms of Section 12 or any period of his military training."

26.As I have indicated, I am prepared to accept that notice of termination of his employment was given to the applicant on Friday 20 February 1998 and that the notice period therein indicated was 30 days. It is not however disputed by the respondent that the applicant was due to take approved leave for a period of approximately one month commencing on Monday 23 February 1998. Whilst I am satisfied therefore that the notice of termination was not given to him during his absence on leave, it will be immediately apparent that the period of that notice would run concurrently with a portion of his approved leave and, to that extent, cannot constitute valid notice for that period.

27.If, as I accept was the case, the 30 day notice period in the letter of termination was intended to commence on 21 February 1998, it would have expired on 23 March 1998. The applicant's scheduled leave, had his services not been terminated, would have expired on 24 March 1998 and the period of purported notice which ran concurrently with that leave is therefore null and void. That period constitutes 28 days of the notice period of 30 days and the applicant is accordingly entitled to be paid additional notice pay in respect of that 28 day period calculated at his rate of pay prevailing as at 20 February 1998.

28.I accordingly make the following order:

28.1The applicant's claim for reinstatement, alternatively compensation, is dismissed.

28.2The respondent is ordered to pay to the applicant, within 14 (fourteen) days of the date of this order, an amount equivalent to 28 days pay in lieu of valid notice, calculated on the applicant's prevailing rate of pay as at 20 February 1998.

28.3For the reason that the applicant has not emerged from these proceedings entirely without relief, there is no order as to costs.

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B M JAMMY

ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING:2 AND 3 FEBRUARY 1999

DATE OF JUDGMENT:9 FEBRUARY 1999

APPLICANT:IN PERSON

FOR THE RESPONDENT:MR N PRETORIUS