

Sneller Verbatim/hvr

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J901/98

2001-04-30

In the matter between

OZART DU TOIT

Applicant

and

FREE STATE CONSOLIDATED GOLD MINE

(OPERATIONS) LTD

Respondent

J U D G M E N T

Delivered on 5 May 2001

REVELAS J:

- 1.The applicant had been in the employ of the respondent since 1974 when his services were terminated in February 1998. He was then employed as a technical official. He was transferred to President Steyn Mine during 1997.
- 2.The applicant claimed that his dismissal was not for a fair reason due to the respondent's operational requirements as alleged by the latter and neither did the respondent comply with the provisions of section 189 of Labour Relations Act 66 of 1995, ("the Act").
- 3.Conciliation failed to resolve the dismissal dispute which the applicant had referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The matter was then referred to trial.
- 4.It is common cause that during August 1996 the applicant became ill as a result of a brain tumour and was not permitted to work for two months.

The applicant thereafter received further medical treatment for a period of approximately six months, while working.

5. When commencing his duties after the two month period, he was only permitted to perform light duties and he worked a one-day shift. In other words, he could not work the night shift or more than the one daily shift. At the time he worked in the respondent's President Steyn Gold Mine, in the smelting house.

6. A further important fact which is common cause between the parties, is that the President Steyn Mine, due to the general decline in the mining industry was in the process of closing down some of its operations and, as witnesses in this matter put it, the mine was in "shut-down mode".

7. It is also common cause that the union of which the applicant was a member, had negotiated a collective agreement with the respondent with regard to the retrenchment procedures that were to be followed as a result of the closing down of the operations at President Steyn and other mines of the respondent.

8. The applicant testified that on 14 December 1997 he was summoned to the offices of the mine superintendent, Mr Peter Mooney, to discuss his leave which was about to commence on 20 December, a few days later. Mr Mooney had informed him that on his return from leave, he would be required to work at the respondent's, President Brand Mine. The applicant said he was happy with this arrangement since President Brand mine had a long term operational "life expectancy". He even phoned his wife to tell her that he had a job the following year. At the time employees were apparently in doubt as to how the shut down mode would impact on their job security.

9. Mr Van Biljon, a union official of the applicant's union, gave evidence that he was also present at the meeting and that he represented the applicant and that he and Mr Mooney explained to the applicant that he

could be transferred to President Brand Mine provided he was medically fit to work more than one day shifts. It was at this meeting that the applicant had informed Mr Van Biljon that he had a problem, a medical problem, and therefore could not work the day shift. Mr Van Biljon testified that the applicant was advised to consider the matter during his December holiday and to return with a medical certificate.

10. According to the pre-trial minute and the evidence of Mr Van Biljon, a further meeting was also held on 1 October 1997 where the applicant was also urged to see a doctor and obtain the necessary medical certificate. The applicant denies that this meeting on 1 October took place or that Mr Van Biljon represented him at any stage including at the 14 October meeting. The applicant did not dispute that Mr Van Biljon was present at the meeting of 14 December 1997 initially in his evidence, but during argument he denied that the latter was present. He never put to Mr Van Biljon that he was absent at this particular meeting.

11. He also disputed Mr Van Biljon's version about the discussion that took place on 14 October 1997. According to the applicant he went on holiday looking forward to his new job and reported at President Steyn Mine on 2 February 1998. The applicant reported to the plant superintendent, Mr Montero. The latter advised him to return to President Steyn Mine, unable to provide him with an explanation as to why he could not commence working.

12. The applicant attached a medical certificate (or doctor's note), dated 26 January 1998, to his pleadings. The applicant, according to this note, went to see a neurosurgeon, Dr W J van Jaarsveld, on 26 January and was evaluated by him. The neuro surgeon found that the applicant had improved but should only perform: "bo-grondse veilige werk" and if it falls within his abilities, he may resume working shifts again.

13. The applicant testified that, on his return to the President Steyn Gold

Plant, after having been turned away by Mr Montero at the President Brand Mine, the applicant said that Mr Errol Smith could also not provide him with an explanation as to why he was sent back. Mr Smith requested him to resume his duties in the smelt house (at President Steyn Mine), which he duly did.

14. On 3 February 1998 the applicant was requested to attend a meeting at 11 o'clock in Mr Smith's office on the same day. It is common cause that such a meeting was held. The meeting was attended by Mr Geldenhuys, Mr Erasmus and Mr Smith of management. Mr Van Biljon, the applicant and Mr Fouché, (an official of another union of whom the applicant is not a member) was also present.

15. The applicant stated that he required Mr Fouché's presence because he had his suspicions about this meeting.

16. The applicant's testimony is that at the meeting, he was simply informed by Mr Smith that the respondent had no choice but to terminate his services. He was also questioned about his medical condition but the applicant was rather vague as to what was asked about, in this regard.

17. The applicant said that he had told the meeting that he was prepared to do any work, including shifts. He was however unable to persuade management to give him an alternative position. He added that the members of management present at the meeting, did not want to see the doctor's note even though he was prepared to give it to them.

18. He was, according to his pleadings, given 24 hours to decide on "the particular issue". The applicant's evidence on this aspect, did not explain what the "particular issue" was that he wanted to discuss with his wife that evening.

19. The respondent called no witnesses from management. Only Mr Van Biljon of the applicant's union testified on the respondent's behalf.

20. According to his testimony about the meeting of 3 February, the applicant

was again offered the position at President Brand Mine at this meeting, but the applicant persisted with the stance he had adopted at previous meetings, namely that he was only prepared to work daily one shift.

21. During a break in that meeting, Mr Van Biljon advised the applicant that if he could not work shifts and was not able to provide a certificate, there will be no other alternative but to face retrenchment. This is denied by the applicant. He also denied that there was ever an adjournment of the meeting taken during the meeting.

22. Mr Van Biljon disputed that the applicant wanted to obtain an alternative position or that he ever offered to work more than one daily shift. Mr Van Biljon also disputed that the applicant wanted to hand a medical certificate to the meeting. He said it was also explained by the management to the applicant, that a certificate was required.

23. Mr van Biljon testified that the applicant was given an opportunity to discuss with his wife whether he would take the position at the President Brand Mine with shifts or accept a retrenchment package.

24. Faced with the two conflicting versions, I must make a credibility finding.

25. None of the members of management who were present at the meeting of 3 February 1998 were called as witnesses. One witness' absence was due to brain surgery that he underwent and Mr Montero no longer works for the respondent. Mr Montero could either corroborate or confirm the applicant's version about the events of 2 February 1998. He could perhaps also cast light on the question why the applicant was sent back to the President Brand Mine.

26. Mr Mooney, if called, could have confirmed or denied that Mr Van Biljon was present at the meeting of 14 December 1997.

27. I have to decide the matter on the evidence presented. Mr Van Biljon, the union official at the time, represented employees who faced possible

retrenchment in terms of the collective agreement. The applicant was a member of this union. Mr Van Biljon had no obvious reason to perjure himself by placing himself at a meeting where the applicant's position and his medical condition was discussed when this was not so. He confirmed that the applicant was advised to use his holiday to decide whether he wanted to accept the position at President Brand and the applicant was advised to see a doctor and bring back a doctor's note to the effect that he could not work shifts.

28.The applicant did in fact see a doctor on 26 January 1998, on his return from holiday, just as he was advised to do.

29.It seems unlikely that Mr Van Biljon in the aforesaid circumstances, had lied about his presence at the meeting. It is also hardly likely that Mr Mooney of management, would have discussed alternative employment with an employee, about to be retrenched, without somebody from the employee's union being present, particularly seen against the background of the collective agreement that was concluded.

30.An important question which remained unexplained, is why the applicant went to see a neurosurgeon for an evaluation of his potential working abilities if he was simply offered (and had accepted) the President Brand position, without any questions being asked. On this version of the applicant, a medical evaluation was not required by Mr Mooney. The fact that he did obtain a note from the doctor tends to support Mr Van Biljon's version that he was advised to do so and that Mr Van Biljon was present at that meeting.

31.The note obtained on 26 January, does not specifically advise against the applicant working shifts. This medical opinion envisages a situation where the applicant would be able to work normal shifts in time.

32.Of further significance is the fact that the applicant, having visited a neurosurgeon on 26 January 1998 and obtaining a medical opinion, he

returned to the same neurosurgeon only a week later, on 2 February 1998. This was incidently the same day he said he had reported at President Brand Mine.

33.This fact was not pleaded and the second medical note was only produced by the applicant during his evidence in chief. This is the note the applicant said he wanted to give to management, (as I understand it) and which they did not want to see. This medical note is for more specific about shift work than the previous opinion the applicant had received a week before. The note states (with reference to the applicant's diabetes, a previous convulsion and his high blood pressure) that: "Daar is dus meer as genoeg rede om te versoek dat die pasiënt (*sic*) nie verdere skofte of nagwerk verrig nie."

34.The applicant gave evidence that he told management on the meeting of 3 February 1998, that despite his medical circumstances he would work all the shifts at President Brand Mine which was required, but they would not consider this proposal and did not consider giving him an alternative employment position at President Brand Mine. This version seems improbable in the light of the second medical note and its contents. This note supports Mr van Biljon's version that the applicant was prepared to work only one day shifts at President Brand Mine.

35.As observed before, there was no proper explanation from the applicant what he had to discuss with his wife on the night of 3 February. If he was given no choice but retrenchment what was there to think about and report back about on the next day?

36.The version of Mr Van Biljon is more likely. The applicant had to decide whether he wanted the job at President Brand Mine with all shifts required or whether he wanted to accept a retrenchment package. It is common cause that he did in fact attend at the mine the following day to sign for his retrenchment package.

37. It is undisputed that the President Gold Mine was in the process of reducing its staff complement. The applicant's position at that mine had become redundant and he was offered alternative employment which he wanted on his terms, namely that he would work one day shifts which was apparently not acceptable to the respondent and understandable in circumstances where it was closing down its operations. At the time of determination of his services, the applicant was already on light duty.

38. Mr Van Biljon did not really explain why he wanted the applicant to produce the doctor's note, because it appears that if the applicant was unable to work shifts he would not be considered as suitable for the alternative employment position.

39. I have also considered why the applicant obtained two certificates and whether it was possible that management did in fact not want to see any medical note because they could not accommodate a person who would only work light duty when offered an alternative position. According to Mr Van Biljon, no medical note was produced.

40. The respondent lead only one witness on this aspect. The respondent also has an onus to discharge but in the circumstances, even if the employ party has an onus, it does not mean that the applicant is entitled to his relief, merely because the respondent did not provide enough evidence on one particular aspect.

41. The applicant's version contained inherent improbabilities and it is clear that he had lied about the question as to what he wanted to consider overnight on 3 February 1998 and about the meeting of the 14th October 1997.

42. I found it strange that the applicant had obtained two medical opinions which differ from each other. Even stranger, on the applicant's version, the medical opinion which did not strictly forbid shift work, he did not produced. It is also strange that the second note which

specifically forbade shift work is dated on the same day at which he would report at President Brand Mine.

43.I therefore accept Mr Van Biljon's version that the applicant did not produce any medical certificate at the meeting.

44.In the circumstances, I find that the dismissal was for a fair reason and even though members of the respondent's management did not testify as to the procedure fairness, Mr Van Biljon's evidence should be accepted as more probable than that of the applicant who gave a version of events during the discussions and meetings which was not credible.

45.In the circumstances it cannot be said that the respondent did not discharge its obligations in terms of section 189 of the Act.

46.In the circumstances the application is dismissed.

47.The applicant had put forward a version which departed from the truth on several crucial aspects. He should therefore be liable for costs.

48.In the circumstances I make the following order.

1.The application is dismissed with costs.

E. Revelas.

The Applicant appeared in person.

pondent: Adv MJ van As

Instructed by: Andrews, Podbielski & Grimsell Inc.