

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO JS619/01

In the matter between:

BAFANA MAHLANGU

Applicant

and

AMPLATS DEVELOPMENT CENTRE

Respondent

JUDGMENT

JAMMY AJ

1. This matter comes before this Court as a consequence of a ruling by a Commissioner of the Commission for Conciliation Mediation and Arbitration to the effect that, on the basis of the referral of the dispute to the Commission by the Applicant, his allegation is deemed to be one of automatically unfair dismissal and as such, falls to be adjudicated in Court proceedings and not by way of Arbitration in terms of the Labour Relations Act 1995.

2. Of material relevance in that regard, is the Applicant's allegation, expressly made in his statement of case and confirmed by way of answer to a specific question in that regard addressed to him by this Court, that the automatic unfairness of his dismissal is sourced in discrimination against him which was racially motivated in the context that he is black.

3. That dismissal is classified by the Applicant as constructive. A proper adjudication of this matter necessitates, in my view, a brief review of the history of the Applicant's relationship with the Respondent.

3.1 On or about 5 August 1996 the Applicant and Rustenburg Platinum Mines Limited ("RPM") entered into a written bursary agreement ("the bursary agreement") in terms of which, *inter alia*, RPM provided financial assistance to the Applicant, who at the time was in the second year of study for the degree of Bachelor of Science in Mining Engineering at the University of the Witwatersrand, the effect of which was to finance the obtaining of that degree, provided that it was completed within 3.5 academic years. The agreement further stipulated periods of practical training to be undergone by the Applicant at RPM and obliged the Applicant to accept employment with RPM or any Amplats Group Company and to remain in such employment for a period of six months for each semester that the Applicant was funded in terms of the bursary agreement. He was, immediately upon graduation, to report to the Senior Training Manager in order to finalise employment arrangements.

3.2 A further material condition of the bursary agreement was that it would automatically be cancelled should the Practical Training Agreement, to be concluded by the Applicant with RPM be cancelled for any reason whatsoever.

- 3.3 A further agreement, "the loan agreement", was concluded between the Applicant and RPM in April 1998 and in terms of that agreement RPM lent the Applicant the sum of R6 600,00 for the purchase of a personal computer for use in his studies. As consideration for that loan the Applicant would be obliged to be in the service of RPM for a period of one month per R1 100,00 loaned to him, which period would run concurrently with the last six months of his service obligation to it in terms of the bursary agreement.
- 3.4 The Practical Training Agreement above referred to was entered into by the parties on 1 December 1998, following the Applicant's graduation. In terms thereof the Applicant was to receive in-house training from RPM or any Amplats Group Company, which training would be deemed to commence on 30 November 1998 and would be completed on 31 December 1999, during which period the Applicant was required to complete a minimum of fifty-eight weeks of practical training.
- 3.5 During the currency of the Practical Training Agreement, the Applicant would receive a training allowance of R3 833,00 per month which the Respondent describes as a discretionary amount, to be paid to the Applicant only when he received the training provided for.
- 3.6 In the event of the cancellation of the Practical Training Agreement for any reason before its scheduled date of completion, the Applicant would have no claim against RPM or any Amplats Group Company for any amount and howsoever arising. Such cancellation could be effected by either party for any reason on twenty-four hours written notice to the other of them.
- 3.7 The Practical Training Agreement, having being duly implemented, was

extended during January 2000, the material terms of such extension being that the extended training period therein provided for would commence on 3 January 2000 and be completed by 31 December 2000 and that during that period, the Applicant would receive a training allowance of R3 833,00 per month. The in-house training received by the Applicant was provided by RPM and the Amplats Group Companies and administered by Amplats Development Centre, a division of Anglo American Platinum Corporation Limited, and cited as the Respondent in these proceedings. The gravamen of the Applicant's case was that as a graduate, he was being paid a salary less than that of other employees, that he was severely underpaid, that he was thereby degraded, that this treatment was a consequence of racial discrimination against him and that ultimately, the cumulative effect of these factors was to render his continued employment by the Respondent intolerable, leaving him with no alternative other than to resign. That decision on his part was expressed in a letter dated 7 July 2000, addressed to the Senior Training Manager of the Respondent in the following terms:

“Termination Of The Practical Training Agreement

I, the undersigned, Bafana Mahlangu (ID. No: 731222 5338 088), on this 7th day of July 2000, hereby terminate the Practical Training Agreement entered into between the Company and I on the 1st day of December 1998 because of unfair labour practices practised by the Company, and as a result made continuing training intolerable for me”.

The letter was signed “Bafana Mahlangu, Mining Trainee”.

4. The discrepancy which the Applicant alleged existed in the remuneration

paid to him was apparent, he contended, when that salary was compared with that of other employees of the Respondent who were placed in what was described as “the graduate pool” of employees and who were appointed to substantive positions as shift supervisors.

5. The Applicant testified that in February 1999, whilst working underground, he was approached by his Senior Training Officer Mr D Bodenstein, who conducted what he referred to as a “competency test” on him. When this was completed Bodenstein explained that the main objective of his training course would be to qualify him for appointment as a shift supervisor. Until that appointment had been made however, his remuneration would remain the same, - it was already at the maximum paid for trainees.
6. As time passed however, said Mr Mahlangu, he discovered that other graduates with similar qualifications were being paid twice as much and were also receiving other benefits to which he was not entitled. When he queried this in July 1999, it was explained that the reason for this was that the “graduate pool”, of which the other graduates to whom he referred formed part, did not apply to miners.
7. When he continued thereafter to express his unhappiness with his present position, through various levels of management, articulating that he was being paid as a fourth year student whilst others with similar qualifications were treated and paid as professional employees, he was informed again that those persons were employed in the engineering, and not the mining sector of the company group. He considered resigning but decided not to do so when he was informed that this would necessitate his repayment of the loan which had been made to him.
8. He continued to work on the prevailing basis, his unhappiness continuing

and increasing, until, in January 2000, following repeated expressions of his dissatisfaction, he was informed that he could only improve and advance his position if he became part of the graduate pool. Shortly thereafter he was informed of dissatisfaction with the standard of his performance and told that if it did not improve, his services would be terminated.

9. By this time, the Applicant conceded under cross-examination, he had endured his dissatisfaction and his perception of racial discrimination for a period of sixteen months, during which he suffered severe emotional distress leaving eventually, he testified, no other avenue open to him but to terminate what he regarded as an intolerable state of affairs – hence his letter of resignation of 7 July 2000 above referred to.
10. Mr Peter Barnes and Mr Paul Wilsenach, Human Resources Managers in the employ of the Respondent, were the two witnesses called in support of its repudiation of the Applicant's claims. The perceived practice by the Amplats Group of Companies of racial discrimination in any form, let alone as directed towards the Applicant personally, was discounted, they testified, by the fact that since 1994, the Respondent had engaged in a concerted programme to recruit black employees, particularly in the mining discipline. At the stage of this hearing, the Respondent's recruitment programme comprised 70% black as opposed to 30% white employees and its long term-goal, inherent in that programme, is ultimately to increase the number of blacks at senior levels within the Respondent.
11. No racial criteria whatsoever inform the different levels of remuneration paid to the Respondent's employees. Newly graduated employees, irrespective of their race, receive lower remuneration than employees appointed to the "graduate pool" or to other substantive positions. At the

time of the Applicant's employment however the graduate pool did not include employees in the mining discipline, in which the first level of employment was in the position of shift supervisor.

12. In December 2000 however, this policy was changed to extend the graduate pool system to all disciplines including mining. This was in accordance with general policy and not as a consequence of any complaints or with the intention of benefiting any particular group of persons.
13. The first substantive appointment for miners would be made only after the employee concerned received his blasting certificate and displayed a level of competence and other required characteristics meriting such appointment. These included suitability to the harsh mining environment, and safety and supervisory skills.
14. Although the Applicant duly obtained his blasting certificate, it was further testified, he was deemed unsuitable to be appointed as a shift supervisor as he did not display the level of competence required. This notwithstanding, Mr Barnes testified, no decision was taken to terminate his employment but he was transferred to an open mine, where underground activity did not apply, situated at Potgietersrus. This move occurred following a consultation with the Applicant in March 2000 and conformed to the Respondent's broad objective of retaining black employees within the group. The Applicant, acknowledging in the course of those discussions, his unsuitability for underground work, purported to welcome the proposed transfer. The Respondent, the witnesses testified, had every intention of retaining the Applicant in its employ after he returned from Potgietersrus, had his level of competence been suitable for appointment to the substantive position of shift supervisor, although, it was

stressed, no undertaking was given to him in that regard and he could have had no legitimate expectation in that context. Before that stage was reached however, the Applicant, in the circumstances earlier referred to, submitted his resignation.

15. In response to the Applicant's resignation letter, Mr Wilsenach testified, he wrote to him on 14 July 2000, in the following terms -

"We are in receipt of your letter dated 07 July 2000 and we accept your withdrawal from the Training Scheme.

For the record we would like to clarify our point of view. Since obtaining your degree, Amplats has provided you with extensive training in an endeavour to provide you with the skills and knowledge that Amplats requires of its professional mining staff.

It also became evident that you were not adequately suited to the underground environment in Amplats. You were given the opportunity to develop and demonstrate suitability to the open pit environment via a structured training programme. It is apparent that you have not committed yourself to this opportunity.

Amplats is not in a position to offer you a permanent post and accordingly, you are released from your financial obligations to the company".

16. Finally, the witnesses testified, whilst the remuneration paid by the Respondent differs according to the status of the employee concerned, the sole criterion in determining those levels is competence, involving factors such as experience and qualifications and suitability to underground

environment. These are not assessed arbitrarily but are based on the inherent requirements of the job.

17. The Applicant, although eventually restricting, in the course of these proceedings, his allegations of racial discrimination as applicable solely to himself, purported to cite three other black employees as having been victims of similar treatment. Neither of the Respondent's witnesses, they testified, was aware of any complaints from or relating to those individuals, none of whom, it should be noted, was called by the Applicant to testify in support of that allegation.
18. There are two further aspects of this matter which are relevant to the Applicant's allegations. The evidence of the Company's witnesses regarding its affirmative action policy was not in any respect challenged by the Applicant in the course of cross-examination of the Respondent's witnesses as being inaccurate or untrue and his submission that the general policy which was amended in December 2000 to include miners in the graduate pool, was one changed precisely to redress acknowledged discrimination in that regard, cannot have substance when assessed against the established fundamental tenets of that policy. The second aspect of significance is that the Respondent's reply of 14 July 2000 to the Applicant's letter of resignation did not itself elicit any reaction or repudiation on his part. Asked under cross-examination why this was the case, his response was that he did not think that there was anything that he could do because he was no longer an employee. That, on any evaluation, is an inadequate response in the prevailing circumstances.
19. The legal principles applicable to the concept of constructive dismissal have been exhaustively examined in a line of cases in the Labour Courts. In a definitive judgment on the issue, the Labour Appeal Court in –

Pretoria Society for the Care of the Retarded v Loots 1997ILJ 981

laid down a number of principles. The employee bears the onus of proving the existence of an unbearable work environment unlawfully created by the employer. By doing so, the employer is repudiating the employment contract with the result that the employee is entitled to elect either to stand by it or accept the repudiation and terminate it. It is not necessary to show that such repudiation was intended. At page 984 of the report, Nicholson J A said this -

“When an employee resigns or terminates the contract as a result of constructive dismissal, such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned”.

See also –

Chemical Energy Paper Printing Wood and Allied Workers Union and Another v Glass and Aluminium 2000 CC (unreported Case No: JA56/00 (LAC)).

20. Perceptions of racial discrimination in the employment environment, endemic in the aftermath of the apartheid era, are not uncommon and are frequently justified. Those are cases which, if proved and established upon application of the relevant legal principles, will justify the award of the maximum relief which the Labour Relations Act 1995, recognising the absolute unacceptability of that form of conduct on the part of employers, prescribes. What is however a phenomenon also of not infrequent occurrence, although perhaps equally understandable in the historical context, is a hyper-sensitivity to a perceived state of affairs in which, upon objective analysis, the true facts are distorted.
21. The core factor in the Applicant's dissatisfaction in his relationship with the Respondent was the differentiation between the salary paid to him in terms of the Practical Training Agreement and that earned by employees in the graduate pool. In attributing that differentiation to racial discrimination against him, he evidences an emotional disregard of the applicable factual criteria comprehensively explained to, but rejected by him. The unchallenged evidence of the Company's general affirmative action policy and of its attempts, within the ambit of that policy, to advance the Applicant in areas considered to be more suitable than the underground environment with which his incompatibility had been established, negate that contention. There is nothing in the evidence presented in this matter, objectively assessed, to indicate the imposition by the Respondent of intolerable or unbearable working conditions which would justify a finding of constructive dismissal as opposed to one of uncoerced and voluntary resignation. Stated simply, the Applicant has failed to discharge the onus which he bears to establish the automatically unfair constructive dismissal for which he contends.

22. For all of these reasons, the application must fail. No submissions having been to me as to why the established principle that an award of costs will ordinarily follow the result in litigation of this nature should not be applied, the order that I make is the following:

The application is dismissed with costs.

B M JAMMY
Acting Judge of the Labour Court

30 April 2002

Representation:

Applicant in person

For the Respondent

Advocate L Hollander, instructed by Leppan Beech, Attorneys