

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case JS174/02

In the matter between:

DONALD MAFOMANE

Applicant

and

RUSTENBURG PLATINUM MINES LIMITED

Respondent

JUDGMENT

INTRODUCTION

1. The applicant was employed by the respondent as a Human Resources Officer with effect from 5 May 2000. On 12 October 2000 the applicant resigned from the respondent's employ on one month's notice. The applicant says that he resigned only because the respondent had made his continued employment intolerable by discriminating against him on the ground of race. He claims that he was constructively dismissed within the

meaning of s 186(1)(e) and that his dismissal was automatically unfair in terms of s 187(1)(f) of the Labour Relations Act 66 of 1995. He claims compensation in terms of s 193(1)(c) read with s 194(3).

2. At the trial, each side adduced the evidence of two witnesses. The applicant gave evidence and called an erstwhile colleague, Mr Jacob Aphane. The respondent called the applicant's erstwhile immediate superior Mr Marius Fourie and an erstwhile colleague Mr Ricky Finn. I am of the view that all four witnesses generally gave their evidence honestly and to the best of their ability. When they contradicted one another, it was because of differences of perception and misunderstandings at the time, an element of wishful thinking in the way that they remembered the events and faded memories of commonplace events some three years ago.
3. I will commence with a description of the general background and a chronology of the more significant events and then turn to the particular disputes and the rules of law that govern their determination.

BACKGROUND

4. The applicant is Mr Donald Mafomane. He worked for the JCI mining house before joining the respondent. He joined JCI in 1980 and made his way

through the ranks in their HR department. He ultimately attained the position of HR Manager. When JCI was unbundled, he was retrenched. That was when he joined the respondent.

5. The respondent is Rustenburg Platinum Mines Limited. Mr Mafomane was employed in its Union Section at Swartklip in Northern Province. It comprised three shafts known as Richard Shaft, Spud Shaft and Declines. Mr Mafomane was employed as an HR Officer at Richard Shaft.

6. Ms Renée Steyn was the HR Manager of Rustenburg's Union Section. She was in charge of the HR departments at the shafts. Each of those departments had the same basic structure. The structure of the HR department at Richard Shaft before Mr Mafomane joined them, was as follows:

6.1. The head of the department was Mr Marius Fourie. His title changed but it was for the most part that of Senior Personnel Officer or SPO.

6.2. Mr Fourie was in charge of six HR Assistants. Each of them was responsible for the HR function at one or two of the sections of Richard Shaft. They reported directly to the SPO.

6.3. Each of the HR Assistants had one or two HR Administrators to assist them. Each HR Administrator was responsible for the mundane HR paperwork relating to a section.

7. Because Mr Mafomane's complaint is one of race discrimination, it is necessary to say something about his race and that of his colleagues. He is a black man. Ms Steyn and Mr Fourie are white people. The HR Assistants are black except for one of them who is white.

8. Three of the HR Assistants feature more prominently than the others in the events that culminated in Mr Mafomane's resignation:

8.1. Mr Ricky Finn was the only white HR Assistant. He lived on the mine at Union Section where his father had been a manager since 1986. He joined the mine in its metallurgical department in September 1990. He worked for them as a shift foreman until 1995 when he went to university. He obtained a B.Comm Honours in Industrial Psychology. He excelled in his studies and was at or near the top of his class. He returned to the mine in December 1999 when he joined the HR department at Richard Shaft as an HR Assistant. By May 2000 when Mr Mafomane

joined, Mr Finn had only been an HR Assistant for five or six months but, because he had lived and worked on the mine since 1986, he had intimate knowledge of the mine, its people and its operations. He knew every manager on the mine and all the union officials. It gave him a significant advantage in the performance of his HR functions. At some time after the events in question in this case, he was promoted to the position of HR Officer. He is still in that position.

8.2. Mr Thabo Mathoka joined the HR department at Richard Shaft in early 1999. He was an HR Assistant at the time of Mr Mafomane's appointment. He was promoted to the position of HR Officer after Mr Mafomane's departure but he is no longer with the mine. He resigned for personal reasons.

8.3. Mr Jacob Aphane joined the HR department at Richard Shaft as an HR Assistant in October 1999. He remained in that position until September 2002 when he was dismissed. His dismissal led to a dispute which is still subject to litigation.

9. Mr Fourie's management style was informal. Everybody from the SPO down to the HR Administrators were on first name terms. Mr Fourie

regularly met with his staff. The staff meetings were informal and everybody was allowed to contribute. Mr Fourie also maintained an open door policy which allowed his staff to see him whenever they wished to do so.

10. One of the controversies in this case, arose from the fact that Mr Fourie on occasion appointed Mr Finn as acting SPO when he (Mr Fourie) went on leave. Mr Mafomane pleaded that it was contrary to the practice at the mine *“for personnel to appoint persons who are most senior but below them in rank, to perform their duties while on leave”*. There was however no evidence of such a practice. Mr Fourie and Mr Finn testified that the rule was that, when managers went on leave or were temporarily absent for any other reason, they appointed *“the most appropriate person”* to act in their stead. The most appropriate person would often be their second-in-command but not necessarily so. It depended on the circumstances of every case. This evidence was not contradicted or challenged.

11. Mr Fourie also testified that the mine had adopted an aggressive affirmative action policy. Ms Steyn was particularly insistent that they make every effort to recruit and groom previously disadvantaged people for ultimate appointment to senior management positions on the mine. It was generally difficult to find suitable candidates particularly because the mine was

situated at a remote location far from the nearest town and it was difficult to attract people to work there. The mine generally and Ms Steyn in particular, however kept up their efforts to seek out and recruit appropriate candidates in pursuit of their affirmative action policy. This evidence was also not challenged or contradicted.

12. In late 1999 or early 2000, the mine introduced a new computerised system of record-keeping in their HR departments at Union Section. It was known as the SAP system. It is not clear from the evidence whether this system was introduced in all the departments at Union Section or only in the HR departments. It is also not clear precisely how the system worked and what it did. These matters are however not important. What is important is that the SAP system became an important tool in the HR departments at Union Section. It was necessary for all the staff to be able to operate the system, at least to the level required by the particular functions they performed. They underwent training courses on the SAP system from late 1999. Those training courses progressively allowed those who participated in them, increasing levels of access to the SAP system as their competency increased. Mr Fourie and all the HR Assistants at Richard Shaft underwent these courses. Mr Finn who had just joined the HR department at Richard Shaft, was particularly keen to qualify himself on the SAP system. He attended more training courses than his colleagues. By May 2000 when Mr

Mafothane joined them, he was more proficient on the system than any of the other HR Assistants and had acquired the same level of access as Mr Fourie. The latter indeed testified that Mr Finn's expertise on the system exceeded his own. This evidence was not challenged or contradicted.

13. On 18 March 2000 an incident occurred which set in train a series of events that ultimately led to Mr Mafothane's main complaint of race discrimination. Mr Fourie's teenage son fell seriously ill. The details are unimportant except to say that within a day or two, the boy was paralysed and unable to walk and his prognosis uncertain. He was urgently hospitalised in Pretoria. Mr Fourie took two weeks' leave to be with his son. He returned to work thereafter but his son remained in hospital, initially in Pretoria and later in Johannesburg. It is not clear for how long he remained in hospital but it continued at least until late in the year. During that time, Mr Fourie continued to live and work on the mine and cared for the couple's two other children. Mrs Fourie stayed in Pretoria and later Johannesburg to be with their son in hospital. They were however allowed to spend their weekends at home. Mrs Fourie and the boy in other words spent their weeks at hospital in Pretoria and later Johannesburg and their weekends at home on the mine.
14. During Mr Fourie's absence from the mine for the two weeks he took off

when his son fell ill, he appointed Mr Finn as acting SPO to take care of his functions as head of the HR department at Richard Shaft. He said that Mr Finn was the most appropriate person to do so by virtue of his long experience and intimate knowledge of the mine, its people and its operations and his expertise on the SAP system. By all accounts Mr Finn coped well with his duties as acting SPO.

MR MAFOMANE'S APPOINTMENT

15. Mr Mafomane applied for the post at the Richard Shaft at the mine, in response to an advertisement. The advertisement was not before the court. Mr Mafomane said that it advertised for an HR Officer. The vacancy in the HR department at the Richard Shaft, was however that of an HR Assistant. They never had an HR Officer and their management structure did not have a level between the SPO and the HR Assistants who reported directly to him. The HR departments at the other shafts also did not have a line-function position of HR Officer. There were two other HR Officers at the other shafts but they did not perform line-functions. The one was a Ms Lamos who worked in the litigation department and the other was a Ms Van Rooyen who worked in the communications department.
16. Mr Mafomane was interviewed by Ms Steyn and one or more other people.

She decided to appoint him as HR Officer at the Richard Shaft. Mr Mafomane said that she told him that he would report to the SPO and that the HR Assistants would in turn report to him.

17. Mr Mafomane was appointed by a letter of appointment dated 4 April 2000. It appointed him as HR Officer at the Richard Shaft. It did not include a job description. There was in fact no post of HR Officer at the Richard Shaft. Although it was an established rank in the mine's employment grading system, the Richard Shaft did not have a post of HR Officer.
18. Ms Steyn told Mr Fourie of Mr Mafomane's appointment in his department. She was enthusiastic about the appointment, not only because he was appropriately qualified for the job, but also because he seemed an ideal affirmative action candidate. She told Mr Fourie to train and groom him as his successor as SPO.
19. Mr Mafomane commenced his employment on 5 May 2000. Mr Fourie gave him an induction course of one week. He shared Mr Fourie's office for the first two weeks until his own office was ready. He also did some SAP training. He was put in charge of the HR functions of two of the sections at Richard Shaft. They were sections 141 and 142, together known as the Merensky Section. His functions and responsibilities in relation to those

sections, were the same as that performed by the HR Assistants but, in recognition of his superior experience and status, he was given two sections and they were moreover mining sections that were more complicated than some of the other sections. Because he was responsible for two sections, he was also allocated two HR Administrators, one for each section. He reported to Mr Fourie. Although it was initially suggested that the HR Assistants would report to him, they in fact continued to report directly to Mr Fourie.

20. All of this meant that Mr Mafomane's position in the HR department at Richard Shaft was as follows. He held the rank of HR Officer. It afforded him status, seniority and remuneration superior to that of the HR Assistants. The position that he held within the hierarchy of the department, was however practically at the same level as that of the HR Assistants. He performed the same functions and had the same responsibilities as they did, albeit that his were somewhat more extensive and complicated than most of theirs. He had no say over them. He and they reported directly to Mr Fourie. When the latter discussed operational issues in staff meetings, he dealt with Mr Mafomane and the HR Assistants as a group insofar as they performed the same functions and had the same responsibilities.
21. Mr Fourie had a number of discussions with Mr Mafomane about their plans

to train and groom him for promotion to the position of SPO and beyond. They discussed ways in which Mr Mafomane could be given the exposure and experience required for future appointment to more senior management positions. In the meantime, Mr Fourie was of the view that Mr Mafomane first needed to learn the ropes in the management of the two sections allocated to him. Although he had previously had practical experience on a JCI mine, his more recent experience was at JCI's corporate headquarters rather than hands-on management at a mine. Mr Fourie moreover gained the impression that Mr Mafomane may have had expectations borne of his recent experience at JCI's corporate headquarters, that were unrealistically lofty. Mr Mafomane for instance requested his own telephone line (which the HR Assistants did not have because telephone lines were scarce), suggested that they should have their own photocopier and fax machine (which they never had) and suggested that a section of people who were not part of their department, should report to him. Mr Fourie's response was that Mr Mafomane should be patient and "*give it time*".

THE EVENTS OF AUGUST 2000

22. Mr Fourie suddenly and unexpectedly had to take leave for the week from

Monday 14th to Friday 18th August 2000. His son was still in hospital in Johannesburg where he and his mother spent their weeks and returned home for weekends. When they were due to return to Johannesburg after their weekend at home on 12 and 13 August 2000, Mrs Fourie told her husband that she could not take it any longer and needed a break of a week at home to gather herself and spend time with their other children. Mr Fourie told Ms Steyn of the problem and she immediately told him to take the week off. On Monday morning 14 August 2000, he went to the office to attend to a few urgent matters and then left for Pretoria with his son later that morning. One of the things he did before he left, was to appoint Mr Finn to act as SPO in his absence. This appointment turned out to be controversial and the source of much of Mr Mafomane's complaint.

23. Mr Fourie explained that he appointed Mr Finn to stand in for him, because he regarded him as the most appropriate person to do so. His reasons for appointing Mr Finn rather than Mr Mafomane, were the following:

- 23.1. He had to make the appointment urgently and on short notice at a time when he was distressed. He had to appoint someone whom he could trust to run the department in his absence without referring back to him because he expected to have his hands full with the care of his son in Johannesburg. Mr Finn had acted as

SPO in March and had shown himself to be capable of doing so effectively.

23.2. Mr Finn's ability to act as SPO, was superior to that of Mr Mafomane for a number of reasons. Mr Finn had many years' experience on the mine, albeit not in the HR field. He had intimate knowledge of the mine, its people and its operations. He would not have any difficulty interacting with the rest of the mine. Mr Mafomane on the other hand, was new to the mine and had not had any exposure to the rest of it beyond Richard Shaft. He would not interact with the rest of the mine with the ease that Mr Finn could do so. Mr Finn's proficiency on the SAP system was also superior to that of Mr Mafomane. He had the necessary qualifications and skills to perform all the functions on the SAP system required of an SPO. Mr Mafomane had not yet mastered the SAP system to the level required for that purpose.

23.3. Mr Finn had his own section completely under control and ran it smoothly without assistance. Mr Mafomane on the other hand, still required considerable assistance with the running of his two sections. It was consequently easier to burden Mr Finn with the additional duties of SPO for a week than it would have been to

impose them on Mr Mafomane.

23.4. Mr Finn was responsible for only one section. Mr Mafomane on the other hand, was responsible for two sections that were moreover more complicated than that of Mr Finn. It was easier to get other people to assist Mr Finn in the running of his section while he acted as SPO, than it would have been to get someone to assist in the running of Mr Mafomane's two more complicated sections while he was doing so.

23.5. It would for essentially the same reasons not have been feasible to appoint Mr Mafomane as acting SPO with the assistance of Mr Finn. It would have affected all three sections for which the two of them were responsible and would consequently have been more difficult to accommodate.

24. The appointment of Mr Finn as acting SPO, meant that Mr Mafomane had to report to him. Mr Mafomane felt slighted by the fact that he had to report to someone who was junior to him in rank.

25. One of the other last things that Mr Fourie did before his departure for Johannesburg, was to forward an e-mail he had received about certain HR

procedures that had to be followed, to Mr Finn for him to convey to the members of the HR department at Richard Shaft. Mr Finn called a staff meeting and described the procedures to the staff. Mr Mafomane felt slighted that this function was entrusted to Mr Finn in his capacity as acting SPO, because it meant that Mr Mafomane had to receive a briefing from someone who was his junior.

26. During the week, Mr Finn attended an SPO's meeting called by Ms Steyn. On his return, he called a staff meeting at Richard Shaft to inform them of the outcome of the SPO's meeting. Mr Mafomane did not attend this report-back meeting. He sent a message that he was "*too busy*" to attend. When Mr Finn however called on him immediately after the meeting, it became apparent that Mr Mafomane was not busy but had refused to attend the meeting. The inference is that he also felt slighted by the idea of having to attend a report-back by someone who was his junior.

27. In the course of the week, Mr Lyndane Mtwla, the business manager at Richard Shaft, requested Mr Finn to have a letter due to be circulated to all employees, translated into Fanagalo. Mr Finn requested or instructed Mr Mafomane to do the translation. Mr Mafomane refused to do it and said that it was "*not his job*". He later explained that he would never, ever take an instruction from someone who was his junior. He was quite adamant

that he would not under any circumstances ever do so.

28. On Friday afternoon 18 August 2000, the HR standby duty-roster for Union Section for the period from 9 June to 21 September 2000, came to Mr Mafomane's attention for the first time. According to the roster, Mr Mafomane had to perform standby duty for the week commencing that very Friday afternoon. It offended Mr Mafomane for a number of reasons. The first was that he had planned to spend the weekend with his family who lived elsewhere. The standby duty however meant that he had to remain on the mine for the weekend. The second was that all the other names on the list, were those of HR Assistants. It did not include any HR Officers. Mr Mafomane inferred that he was the only HR Officer required to do standby duty. The third was that there was a note at the top of the roster in Mr Fourie's handwriting that read "*HR Assistants*". Mr Mafomane inferred from the note that Mr Fourie regarded him as an HR Assistant and did not acknowledge his status as an HR Officer.
29. Mr Mafomane's distress about the standby duty-roster was understandable but based on a number of misconceptions. It is not clear why it was only brought to Mr Mafomane's attention only on 18 August 2000. The uncontradicted evidence was that the rule was that both HR Assistants and HR Officers had to do standby duty. Some people were exempted from

standby duty because of the particular functions they performed. Those who were exempted at the time, included the only other HR Officers Ms Lamos (because of her litigation responsibilities) and Ms Van Rooyen (because of her communications responsibilities). It meant that Mr Mafomane was in fact the only HR Officer required to do standby duty at the time. But the uncontradicted evidence was, not only that it was the rule that HR Officers had to do standby duty, but also that all the other HR Officers appointed since Mr Mafomane's departure, have always had to do standby duty. Mr Fourie lastly explained the note on the roster as one he had made merely to indicate the category of people to whom it had to be distributed, without suggesting that all of them were HR Assistants. It was an inaccurate note but one made in the course of ordinary office routine without any intention to characterise Mr Mafomane as an HR Assistant.

30. Mr Fourie returned to the office on Monday 21 August 2000. Mr Mtwana and Mr Finn told him about Mr Mafomane's refusal to translate the letter. He met with Mr Mafomane to discuss the matter. Mr Mafomane confirmed that he had refused to translate the letter because he said that he would never, ever under any circumstances take an instruction from a junior. Mr Fourie told him that he regarded his attitude as very negative and explained that he (Mr Fourie) often took instructions from junior people if the circumstances warranted it. Mr Finn had moreover been appointed as

acting SPO and in that capacity had the authority to request Mr Mafomane to do the translation. Mr Mafomane taxed Mr Fourie on his appointment of Mr Finn as acting SPO and asked him why he had not appointed him (Mr Mafomane) instead. Mr Fourie explained that, by virtue of his long experience on the mine, Mr Finn was equipped to perform the functions of SPO while Mr Mafomane had only been there for a short while and was consequently not yet able to do so.

31. Mr Mafomane was not satisfied by the outcome of his meeting with Mr Fourie and raised the matter with Ms Steyn. She met with him and Mr Fourie on 28 August 2000. When she asked Mr Mafomane about his refusal to translate the letter, he reiterated that he would never, ever under any circumstances take an instruction from a junior. She told him that, if that was his attitude, it would affect his prospects of promotion. There is a slight difference between Mr Mafomane and Mr Fourie about precisely what Ms Steyn said in this regard. According to Mr Mafomane, she told him not to have any expectations of promotion if that was his attitude. According to Mr Fourie, on the other hand, she said that, if that was his attitude, he would have difficulty getting promotion. Mr Fourie again explained why he had appointed Mr Finn and not Mr Mafomane to act as SPO in his absence.
32. Mr Mafomane and Mr Fourie had materially different perceptions of the

outcome of their meeting with Ms Steyn. Mr Mafomane said that it left him feeling lonely and isolated with nowhere to turn. Mr Fourie said on the other hand that he left the meeting thinking that the issue had been resolved in the sense that Mr Mafomane had been placated and persuaded not to feel that he had been slighted. He said that, if Mr Mafomane had told him that he was still unhappy, he would have taken further steps to have the issue resolved. He said that he was sure that he and Ms Steyn would have found a solution acceptable to Mr Mafomane, if necessary by offering him a transfer to a different shaft or even to a different mine. If they were not able to find a solution satisfactory to Mr Mafomane, he would have advised Mr Mafomane to pursue the matter with the mine manager or with group management at corporate headquarters. He was confident that they would have been able to resolve the issue to Mr Mafomane's satisfaction.

33. The saga had a sequel that only emerged in the cross-examination of Mr Aphane. He said that some of the other HR Assistants were unhappy about the fact that Mr Finn had been appointed acting SPO in Mr Fourie's place instead of giving Mr Mafomane the opportunity to do so. They raised their unhappiness with "*senior management*" by e-mail. A Mr Geldenhuys and another person came from head office and held individual interviews with the authors of the e-mail correspondence. Mr Aphane was one of them. Although they had not mentioned any names in their e-mail

correspondence, he did so in his interview with the people from head office. They said that they would take steps to ensure that the problem was addressed. The evidence did not reveal anything more of these meetings or the impact they had, if any. It is difficult to imagine that Mr Mafomane and Mr Fourie did not know about these meetings but I infer from their failure to mention them, that they did not. No further evidence was led on the question whether senior management responded to these grievances and, if they did so, what they did.

MR MAFOMANE'S RESIGNATION AND ITS AFTERMATH

34. Mr Gouws van Wyk was the SPO at Declines and his wife, Ms Leonie van Wyk was the SPO at Spud Shaft. They went on their annual leave from 6 October until 12 November 2000. During their absence, HR Assistants in their respective departments were appointed acting SPO's in their stead. A Mr André Naude stood in for Mr van Wyk and a Mr Marius Joubert stood in for Ms van Wyk. Mr Mafomane learnt of this arrangement on 5 October 2000, on the eve of the Van Wyk's departure. He felt that he was once again overlooked for appointment as acting SPO. Mr Fourie explained that the acting appointments would have been made by Mr and Ms van Wyk respectively. He did not know why they regarded Mr Naude and Mr Joubert to be the most appropriate people to take their place but did hold the view

that it would in any event not have been appropriate for Mr Mafomane to be appointed acting SPO at those shafts. Mr Mafomane had not yet had any exposure to or experience of those shafts. Although Spud Shaft was very similar to Richard Shaft, each had their own habits and detailed procedures and it was necessary for anybody acting as SPO, to be acquainted with them. Mr Mafomane had no exposure to or experience of Spud Shaft and was consequently not competent to be appointed acting SPO. Declines was moreover a significantly different operation because it was an incline shaft with significantly more mechanical mining than at Richard Shaft. It entailed very different HR functions of which Mr Mafomane had no experience.

35. Mr Mafomane said that this latest slight was the final straw that caused him to resign. He did so by giving one month's notice of resignation on 12 October 2000. His letter of resignation was polite but to the point and merely said that he gave notice of his resignation with effect from 12 November 2000. Rustenburg's counsel suggested that the polite terms of the letter indicated that Mr Mafomane in fact did not harbour any grievance. But this submission is in my view unfounded. The letter was in polite terms and no more. It does not justify any inference about Mr Mafomane's state of mind at the time, other than that he had decided to resign.

36. Both Mr Fourie and Mr Finn testified that they asked Mr Mafomane why he was resigning. He did not mention any unhappiness and said that he intended to establish a business of his own for the supply of “*personal protection equipment*” to the mine. He told them that he had contacts on the mines and the support of the unions and thought that it was a prospect he could not forego. Mr Fourie said that he was sorry to lose Mr Mafomane but wished him luck with his new venture. Mr Mafomane denied these conversations altogether and said that neither Mr Fourie nor Mr Finn ever asked him why he had resigned. He did not have any plans to start a business of his own and did not resign for any such reason. He also did not do anything to establish such a business. It is not clear where the truth lies but in my view the evidence of Mr Fourie and Mr Finn is overwhelmingly more probable than that of Mr Mafomane. It is common cause that the three of them remained on a collegial and friendly footing and had contact with one another on a daily basis for the duration of Mr Mafomane’s notice month. It is inconceivable that they would not have discussed the reasons for his resignation. His denial that they ever did so, is too improbable to accept. One must conclude that they had some discussion on the topic. The only evidence of it, is that of Mr Fourie and Mr Finn. Their version must accordingly be accepted. It does not follow that Mr Mafomane in fact resigned to pursue a business venture rather than as a result of his unhappiness with his work. He may just have told a white lie about the true

reason for his resignation, particularly if it was because he felt that they had treated him in a racist manner but did not wish to trigger a confrontation about an issue as sensitive as that. However, that is mere speculation and the issue remains unclear.

37. After Mr Mafomane's departure, Mr Finn again stood in for Mr Fourie over the Christmas holidays from December 2000 to January 2001. In January 2001, Ms Steyn suddenly resigned. Mr Fourie was appointed acting HR Manager in her place from February to June 2001. Mr Mathoka was in turn appointed acting SPO in Mr Fourie's place for the same period.
38. Since these events, the HR structure at Union Section has been altered. One of the changes that has been made at each shaft, is that a position of HR Officer has been introduced as a line-function between the SPO and the HR Assistants. Under the current structure, the HR Assistants report to the HR Officer and the latter in turn reports to the SPO. Both Mr Finn and Mr Mathoka were appointed HR Officers.
39. Mr Fourie testified that, if Mr Mafomane had not resigned and had stayed at the mine, he would today have been the SPO of Richard Shaft. This evidence was not challenged.

40. I turn against the background to an analysis of Mr Mafomane's claim and the rules of law that govern it.

THE ESSENCE OF MR MAFOMANE'S CLAIM

41. The essence of Mr Mafomane's claim is captured in paragraph 5 of his statement of claim which says that,

"the subject matter of this application concerns the unfair discrimination against the applicant by the respondent based on race and colour which discrimination resulted in applicant unwillingly resigning from the respondent's employ".

It concludes by saying that *"the constructive dismissal of applicant by the respondent constitutes an automatic unfair dismissal"*.

42. The essence of the claim is in other words one based on the constructive dismissal of Mr Mafomane within the meaning of s 186(1)(e) of the LRA which was automatically unfair in terms of s 187(1)(f) of the LRA in that it was Rustenburg's unfair discrimination against Mr Mafomane that made his continued employment with it intolerable and caused him to resign.

43. The race discrimination of which Mr Mafomane complains, is important for two separate but interrelated reasons. The first is that it is alleged to have

been the circumstance that caused Mr Mafomane's continued employment with Rustenburg to become intolerable and thus rendered his resignation from Rustenburg's employ, a constructive dismissal by the latter. The second is that it is the unfair race discrimination that rendered Mr Mafomane's constructive dismissal automatically unfair insofar as it was the reason for his resignation and consequently for his constructive dismissal.

44. Mr Mafomane's claim thus lies at the intersection between constructive dismissal on the one hand and dismissal that is automatically unfair on the other. They intersect at the point they have in common, which is Mr Mafomane's allegation that the mine made his continued employment intolerable by its discrimination against him on the ground of his race. It is consequently necessary to consider the rules that govern constructive dismissal and automatically unfair dismissal by reason of race discrimination.

CONSTRUCTIVE DISMISSAL BY RACE DISCRIMINATION

45. Constructive dismissal is a well-known concept in our labour law and pre-dates the LRA. Its predecessor did not give express recognition to the concept but the Industrial Court and the Labour Appeal Court held that in certain circumstances, where the employee resigned due to the conduct of

the employer, the resignation by the former could be characterised as a dismissal by the latter. The courts based this conclusion on, or derived support for it from, the analogy to the termination of a contract at common law, by one party on the grounds of the wrongful repudiation of the contract by the other. That was for instance why the Labour Appeal Court said in Pretoria Society for the Care of the Retarded, that, when an employer renders the employee's continued employment unbearable, *"the employer is repudiating the contract and (the employee) has a choice either to stand by the contract or accept the repudiation"*.

46. The concept of constructive dismissal is now codified in s 186(1)(e) of the LRA. It defines a "*dismissal*" to include the circumstance where,

"an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".

47. Landman J pointed out in Sappi Kraft that the LRA continues to use the concept of constructive dismissal as described in the earlier cases but introduced refinements and did not take over all the rules that governed constructive dismissal under the old law. The codification under the LRA has amongst other things severed the link between constructive dismissal and wrongful repudiation of a contract at common law. It is now a statutory

concept in its own right which does not need to retain its link to the common law doctrine of wrongful repudiation for its justification.

48. Constructive dismissal under the LRA, is treated as a species of dismissal subject to the rules that govern dismissals generally. One of those rules is the one in s 192(1) that in any proceedings concerning any dismissal, “*the employee must establish the existence of a dismissal*”. It means that an employee who complains about an unfair dismissal of the constructive kind, bears the onus of proving the elements of a constructive dismissal in s 186(1)(e). They are,

- that the employee terminated the contract of employment;
- that the employee’s continued employment had become intolerable;
- that the circumstances that rendered the employee’s continued employment intolerable, were of the employer’s making, and
- that it was because of those circumstances, that the employee terminated the contract of employment.

49. The requirement that the employee prove that his or her continued employment had become “*intolerable*”, has the following implications:

49.1. The test is an objective one. It means that the employee must prove at least two things. The first is that the circumstances had

become so unbearable that the employee could no longer reasonably be expected to endure them. The second is that there was no reasonable alternative to escape those unbearable circumstances, than to resign.

49.2. When the latter issue is considered, it must be borne in mind that the termination of an employment relationship, is usually only appropriate as a remedy of last resort. An employee who resigns to escape an oppressive working environment despite the fact that there are other avenues of escape open to him or her, will usually find it hard to characterise the resignation as a constructive dismissal. The ultimate test however, remains whether it was reasonable to resign in order to escape the intolerable working environment. That is always a question of fact that depends on the circumstances of every case.

49.3. I have thus far spoken of circumstances that render continued employment "*intolerable*" in the sense that the employee can no longer "*reasonably*" be required to endure them, as if there is a single objective standard by which those matters can be judged. But that is often not the case. The question whether continued employment has become "*intolerable*" or whether the employee

can no longer “*reasonably*” be required to endure it, are based on value judgments which sometimes vitally depend on the perspective from which they are made. A case where a black employee suffers race discrimination by a white employer, is a good example. The assessment whether the race discrimination is so severe as to be intolerable, will often depend on the background and the perspective of the individual making it. What may seem inconsequential from the perspective of someone who has never suffered the humility and denigration of race discrimination, may be regarded far more seriously and indeed intolerable from the perspective of a lifelong victim of race discrimination and the humility and denigration that it entailed. From whose perspective then, should one judge whether the race discrimination was such that the employee could not reasonably have been expected to endure it? It seems to me that the judgment must be made from the perspective of a reasonable person in the shoes of the employee. Section 186(1)(e) firstly says that continued employment must have been made intolerable “*for the employee*”. It suggests that the assessment whether continued employment has become intolerable, must be made from the employee’s perspective. The purpose of the section is secondly to give effect to the right of every employee in

terms of s 185(b) of the LRA and ultimately in terms of section 23(1) of the Constitution, not to be subjected to unfair labour practices. This right requires that the question whether continued employment has been rendered intolerable, be judged from the perspective of the employee. It would be unfair to deny the remedies of dismissal to employees who resign because their continued employment became intolerable from their perspective.

49.4. The conclusion that the question whether the employee's continued employment has become intolerable in that he or she cannot "*reasonably*" be required to endure it, must be made from the perspective of a reasonable person in the shoes of the employee, obviously does not mean that the employee's own views must prevail. The test remains an objective one. The idiosyncracies of the particular employee, are not the benchmark. The assessment must be made from the perspective of a reasonable person in the shoes of the employee, that is, from the perspective of a reasonable person with the same background, life experience and position.

50. The requirement of s 186(1)(e) that "*the employer made continued employment intolerable*", means that the circumstances that rendered the

employee's continued employment intolerable, must have been of the employer's making. They must be circumstances under the employer's control. The employer must have brought them about by its act or omission. It does not mean that the employer must intentionally have done so. I respectfully disagree with the suggestion in Sappi Kraft that "*there should be some intention, even if it is unsaid, that the employment relationship should be ended.*"

51. The implication of the requirement of s 186(1)(f) that the employee must have resigned "*because*" the employer made continued employment intolerable, is that there must be a causal relationship between the intolerable working environment on the one hand and the resignation on the other. It is only if the employee resigns because continued employment has become intolerable, that the resignation may constitute a constructive dismissal. If the employee resigns for another reason, the resignation does not constitute a constructive dismissal, even if the employee's continued employment has been made intolerable.

AUTOMATICALLY UNFAIR DISMISSAL BY RACE DISCRIMINATION

52. A claim of unfair dismissal, whether of the actual or constructive kind, usually requires an enquiry in two stages. In the first, the question is

whether there was a dismissal. In the second, the question is whether the dismissal was unfair. However, when an employee contends that the dismissal was automatically unfair within the meaning of s 187 of the LRA, the second stage asks a different question. It does not ask whether the dismissal was unfair. It asks instead whether the dismissal was of a kind described in s 187. The employee must bring the dismissal within the ambit of s 187. He or she bears the onus of proving that the dismissal was of a kind contemplated in that section. Once the employee does so, that is the end of the matter.

53. One of the dismissals s 187(1)(f) characterises as automatically unfair, is,

“if the reason for the dismissal is that an employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary grounds, including, but not limited to race”.

Section 187(2) goes on to say that, despite s 187(1)(f),

“a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job”.

54. Both sections 187(1)(f) and 187(2) require an investigation into *“the reason for the dismissal”*. In the case of a constructive dismissal, *“the reason for the dismissal”* is the facts or circumstances that rendered the employee’s continued employment intolerable. In other words, an employee who

contends that his or her constructive dismissal was automatically unfair because the reason for it was the employer's unfair discrimination on the ground of race, must show that,

- the employer unfairly discriminated against the employee on the ground of race, and
- by doing so, the employer made the employee's continued employment intolerable.

55. It follows that an inquiry into a claim that a constructive dismissal was automatically unfair in that the reason for the dismissal was the employer's unfair discrimination against the employee on the ground of race, will usually logically start with the enquiry into the question whether the employer unfairly discriminated against the employee on the ground of race. Only if that enquiry yields an affirmative answer, does the enquiry turn to the second question whether the employer's unfair discrimination made the employee's continued employment intolerable.

56. An allegation that an employer unfairly discriminated against an employee on the ground of race, involves at least three components. The first is that the employer differentiated by treating the particular employee less favourably than other employees. The second is that the employer made the differentiation on the ground of race. The third is that it was unfair for

the employer to do so.

57. An employee who claims that his or her dismissal was automatically unfair on this ground, bears the burden of proving the first and second of these components. He or she must prove that the employer treated them less favourably than other employees and that the employer did so on the ground of race. The latter requirement has the following implications:

- 57.1. The mere fact that an employee of one race is treated less favourably than an employee of another race, does not in itself mean that the differentiation between them is made on the ground of race. For instance, if two workers of different races are paid different wages purely because the one is unskilled and the other highly skilled, the differentiation between them is not one on the ground of race. The differentiation is made on the ground of race only if it is made on the basis of race and not if it is made on another rational and justifiable basis.

- 57.2. It does not mean that the differentiation must overtly be based on race or that the employer must have intended to differentiate on that basis. Unfair discrimination may occur "*directly or indirectly*". Indirect discrimination looks at the effect of the employer's

conduct rather than the intention behind it or the means by which it is achieved. If the effect of the employer's conduct is that employees of one race are treated less favourably than employees of another race, then the differentiation between them is indirectly made on the ground of race, even if the employer does not intend to differentiate on the ground of race and even if the means by which the differentiation is effected, are not overtly race-based.

57.3. It follows that, if employees of one race are treated less favourably than employees of another, and there is no other obviously rational and justifiable basis for the differentiation between them, an inference arises that it is directly or indirectly made on the ground of race. It imposes an evidential burden on the employer to rebut the inference by evidence that the differentiation is based on another rational and justifiable ground and not on race.

58. Once the employee establishes that he or she was less favourably treated than others and that the differentiation was made on the ground of race, the differentiation is presumed to constitute unfair discrimination. The employer then bears the burden of proving that it was not unfair. This imposition of the burden of proof of the employer, once the employee has proved

differentiation on a ground specified in s 187(1)(f), is not directly comparable to, but is nonetheless broadly in line with, both the scheme of the LRA and particularly s 192(2) which requires the employer to prove the fairness of a dismissal and s 9(5) of the Constitution which deems discrimination on a specified ground to be unfair unless it is proved that it is not.

APPLICATION TO THIS CASE

59. I return to Mr Mafomane's claim that Rustenburg discriminated against him on the ground of his race. It is based on five complaints of race discrimination identified in paragraphs 9 to 16 of his statement of claim. I will deal with each of them in turn.

60. The first complaint is that Mr Fourie always addressed Mr Mafomane as "*Human Resources Assistant*" when he knew that he was an HR Officer. This complaint is not supported by the evidence. Mr Fourie's evidence in this regard was not challenged or contradicted. He said that he never addressed Mr Mafomane as "*Human Resources Assistant*". He always addressed him by his first name. The note that he made at the top of the standby duty-roster that read "*HR Assistants*", was not addressed to Mr Mafomane and could not have been so understood.

61. The second complaint is that Mr Fourie appointed Mr Finn to act as SPO in his absence while he was on leave for a week from 14 August 2000. Mr Mafomane complains about this appointment in two respects. He says firstly that it was made contrary to a “*common practice*” for staff due to go on leave, to appoint the most senior person below them in the hierarchy, to act in their stead. But the evidence of Mr Fourie and Mr Finn was that there was no such common practice and on the contrary, that the rule was that the acting appointment had to go to the most appropriate person who need not be the second-in-command. This evidence was also not challenged or contradicted. Mr Mafomane secondly says that the appointment required him to take instructions from his subordinate. That was so but the question is whether it constituted discrimination on the ground of race, in other words, whether this consequence was imposed on Mr Mafomane because he was black. It is clear from Mr Fourie’s evidence, that his appointment of Mr Finn was not in any way motivated by racist considerations. But that is of course not the end of the enquiry. The question remains, whatever Mr Fourie’s motive or intention might have been, whether the effect of his decision was to discriminate against Mr Mafomane on the ground of his race. I am of the view that it did not. I say so for the following reasons. First, the rule that, when a member of management was absent, the most appropriate person had to be appointed in his stead, whether it was the

most senior person below him in the hierarchy or not, would inevitably mean that junior people would sometimes act in positions senior to those members of staff who were ordinarily above them in the hierarchy. That would be so whatever the race of the more junior person who receives the acting appointment or that of the people senior to him who then have to report to him while he holds the acting appointment. The rule is in other words colour blind and there is nothing inherent in its application that would affect one race more favourably than another. Secondly, the application of the rule in this case, was indeed colour blind. Mr Fourie justified his conclusion that Mr Finn was the most appropriate person to act in his stead and his grounds of justification were never seriously challenged or contradicted. Thirdly, shortly after this incident, Mr Fourie appointed Mr Mathoka as acting SPO from February to June 2001. It demonstrated at the very least, that neither the "*most appropriate person*" rule nor Mr Fourie's application of it, invariably selected white members of staff for acting appointments rather than their black colleagues. While I have considerable sympathy for Mr Mafomane's bruised feelings about this incident, his response to it does seem to have been wholly unreasonable. He had only been with the mine for three months when the acting appointment was made. He had received various assurances from Ms Steyn and Mr Fourie that they had high ambitions for him and intended to train and groom him for appointment to senior management positions in

future. Their plans were to afford him preferential treatment on the ground of his race for the sake of the transformation of the staff complement at the mine to redress historical racial imbalances. In the light of those assurances, he should have realised that, when he did not get the acting appointment, it was due to his inexperience after only three months at the mine and not because of his race.

62. Mr Mafomane's third complaint is that he was required to do standby duty *"whilst white personnel holding precisely the same rank as applicant were exempted from such standby"*. That was true only insofar as Ms Lamos and Ms Van Rooyen were exempted from standby duty. Mr Mafomane was however not required to do standby duty because of his race. The uncontradicted and unchallenged evidence of Mr Fourie and Mr Finn was that the rule was that HR Assistants and HR Officers had to do standby duty. Ms Lamos and Ms Van Rooyen were exempted from it only because of the particular functions they performed. While there was no other HR Officer at the time of Mr Mafomane's employment with the mine, Mr Finn and Mr Mathoka were thereafter promoted to that position and continued to do standby duty in that capacity. In the other departments at the mine, senior management staff at levels equal to and higher than that of HR Officer, also always did standby duty. There was accordingly no race discrimination in the rule or its application.

63. Mr Mafomane's fourth complaint is that Ms Steyn told him during their meeting on 28 August 2000, "*not to harbour any expectations of promotion at any time in the future*". The evidence did however not bear out this complaint. It was common cause between Mr Mafomane and Mr Fourie that Ms Steyn made the comment referred to, in response to Mr Mafomane's reiteration that he would never, ever under any circumstances take an instruction from a junior. Ms Steyn said that she thought that that was a negative attitude. According to Mr Mafomane, she added that he should not have any expectations of promotion if that was his attitude. According to Mr Fourie, she said that he would have difficulty getting promotion if that was his attitude. The difference between them was slight. What they had in common, was that Ms Steyn merely said that Mr Mafomane's attitude to instructions received from people junior to him who were temporarily appointed to act as his senior, would block or impede his promotion. She never said and he could never have understood her to say, in the light of the repeated assurances given to him by Ms Steyn and Mr Fourie that he was to be trained and groomed for fast-track promotion, that he would never be promoted. She merely said in effect that his promotion would be blocked or impeded if he persisted in his refusal to accept and abide by the implications of the mine's "*most appropriate person*" rule. The comment was a reasonable one in the circumstances, was not motivated by

any racist considerations and could not reasonably have been understood to be so.

64. Mr Mafomane's last complaint is that, when Mr and Ms Van Wyk left on leave on 5 November 2000, Mr Naude and Mr Joubert were appointed to act in their stead despite the fact that they were both junior to Mr Mafomane in rank. It is true that they were HR Assistants while Mr Mafomane was an HR Officer. But it was again an instance of the application of the "*most appropriate person*" rule. According to the evidence, the appointments would have been made by Mr and Ms Van Wyk. There is no evidence of the reasons why they deemed Mr Naude and Mr Joubert respectively to be the most appropriate people to act in their stead. Mr Fourie however testified that, whatever their considerations might have been, Mr Mafomane was in any event not an appropriate replacement for them because he had not had any exposure to or experience of the shafts at which they were employed. Mr Mafomane's lack of exposure to or experience of those shafts, was common cause. Mr Mafomane was moreover unable seriously to quibble with Mr Fourie's evidence that Mr Mafomane's lack of knowledge of the workings of the HR departments at those shafts, rendered him incapable of acting as SPO of those departments. These appointments, or rather the failure to appoint Mr Mafomane as acting SPO in the place of Mr or Ms Van Wyk, accordingly also did not amount to discrimination on the

ground of race.

65. I conclude for these reasons that Mr Mafomane has not established the race discrimination of which he complains. Even if this conclusion is wrong however, there is another respect in which Mr Mafomane has failed to establish that his continued employment at the mine had been rendered intolerable. It arises from the fact that he failed to pursue further remedies reasonably open to him to obtain redress of such complaint as he might have had. He raised the issue with Mr Fourie and Ms Steyn but then left it there. He did not tell them that he remained dissatisfied and wished to pursue the matter. According to Mr Fourie, if they had known that he was still dissatisfied, a range of further remedial steps would have been taken. Mr Mafomane also did not raise his complaint with the manager of the mine or with senior management at head office. He should have pursued those avenues of redress before resorting to the drastic step of termination of his employment. That was how his colleagues in the HR department at Richard Shaft responded. He should have done the same. According to Mr Fourie the mine manager and senior management at head office, would have ensured that Mr Mafomane's complaint was addressed and resolved to his satisfaction. Mr Fourie's evidence in this regard was again not challenged or contradicted.

66. I conclude that Mr Mafomane has not established that his continued employment at the mine had become intolerable. Mr Fourie's uncontradicted and unchallenged evidence was that, if Mr Mafomane had stayed at the mine, he would today have been the SPO at Richard Shaft. That would clearly have dispelled any perception Mr Mafomane might have had, that he was being discriminated against on the ground of his race.

67. I conclude that Mr Mafomane has failed to establish an essential element of his claim which must for that reason fail. I am however of the view that it would not be appropriate to order him to pay the respondent's costs. I consequently make the following order:

The applicant's claim is dismissed.

W H Trengove AJ

11 August 2003