IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case number: JS380\06

In the matter between:

JACOB JOHANNES THERON **Applicant**

and

NORKIM CONSTRUCTION AND MINING SERVICES CC **Respondent**

JUDGEMENT

BHOOLA AJ

Introduction

[1] This matter concerns the dismissal of the applicant by the respondent. The applicant contends that his dismissal was procedurally and substantively unfair. The respondent relies on the existence of a mutual agreement between applicant and respondent to terminate his employment for operational reasons, and contends that this obviates the need for compliance with section 189 of the Labour Relations Act, 66 of 1995 ("the Act").

[2] The applicant seeks the following relief:

2.1 An order that his dismissal was procedurally and substantively unfair;

2.2 Payment of compensation by respondent in the amount of 12 months remuneration;

2.3 Payment of outstanding statutory and contractual monies; and

2.4 Further and/or alternative relief.

Background facts

[3] The applicant was employed by the respondent as senior foreman, also known as shift boss, at the Elandsrand mine. The respondent conducts mining operations at different mines, *inter alia* as a contractor for mining companies.

[4] The applicant's monthly remuneration was R14, 241.25. It is common cause that he was employed in terms of a fixed term contract, and his employment continued beyond the scope of the contract.

[5] During December 2005 the respondent furnished the applicant with a letter dated 30 November 2005 ("the final notice"), informing him that his employment would terminate with effect from 31 January 2006 due to operational requirements. The respondent proposed no alternatives to the applicant prior to the decision to retrench, nor did the respondent disclose information or issue a notice to the applicant as required by section 189(3) of the Act. The respondent paid the applicant severance pay in the amount of R5219.51. The applicant was given 60 days' notice and was the only employee dismissed. The applicant referred an unfair dismissal dispute to the Commission for

Conciliation, Mediation and Arbitration ("CCMA") and a certificate of outcome was issued as the matter remained unresolved.

Issues to be decided

The issues before this court are:

[6] Whether there was a mutual agreement between the parties to terminate the applicant's employment;

[7] If no agreement was reached, whether the dismissal of the applicant was procedurally and substantively unfair;

[8] If the dismissal of the applicant was unfair, what relief the applicant should be entitled to; and

[9] Whether the applicant is entitled to further payments in respect of outstanding severance pay, notice pay and *pro rata* bonus pay.

Evidence

[10] The respondent agreed to begin and led Willie Bruwer ("Bruwer") as its first witness. Bruwer was the site manager employed by the respondent at the Elandsrand mine and was the applicant's immediate superior in 2005. The applicant was employed as senior foreman/shift boss at the time.

[11] Bruwer testified that the applicant's position had become redundant due to financial considerations and downscaling of the respondent's operations. In addition, he said that the applicant was unable, on account of his poor eyesight, to complete log books recording the statutory health and safety inspections he was required to conduct as a component of his duties. His log books were accordingly completed by the two shift bosses who worked under his supervision.

[12] Bruwer testified that on 12 January 2005 he was approached by the applicant and Ferdie Telescourt ("Telescourt"), the shaft steward of the Underground Officials Association of South Africa ("UASA"), in regard to the notice of retrenchment applicant had been issued with that day ("the first notice"). The first notice advised the applicant that his position was redundant and his employment would terminate on 12 February 2005. The first notice also referred to consultations with UASA which had taken place the previous day, 11 January, as well as on that day. Bruwer had, prior to issue of the first notice, understood that the respondent had to "*due to downscaling, get this position redundant because the cost to the company is too high".* The selection of the applicant, he said, was further motivated by complaints from the client, Elandsrand mine, relating to the applicant's poor eyesight.

[13] Bruwer's evidence was that the applicant and Telescourt had expressed their dissatisfaction with "*the whole issue of him getting dismissed".* Telescourt had questioned whether the applicant had been offered an alternative, and what the reasons

for the termination were. Bruwer confirmed that alternatives had not been discussed with the applicant. He realised there was a procedural problem and discussed this with Morné Saunders ("Saunders"), the human resource manager and the general manager Johan Potgieter ("Potgieter"), who agreed to extend the notice period until June 2005. This was motivated, according to Bruwer, by the respondent's desire to "*help"* the applicant, notwithstanding the fact that his fixed term contract would only expire in October 2005. Bruwer conceded in cross examination that insofar as the first notice referred to consultations between the parties prior to issue of the first notice, that this was not correct and may have been inserted in the notice in a belated attempt to comply with the Act.

[14] Bruwer's testimony was that the decision to extend the applicant's employment until 30 June was subsequently confirmed in a letter dated 18 January to him ("the second notice"). The letter stated that "*you are being given notice as from the time you sign this document. On 30 June 2005 you'll receive your severance pay, and outstanding pro rata leave".* Bruwer was unable to explain why the second notice had not been signed by the applicant or the union, and his only explanation was that Saunders had issued it to the applicant.

[15] Bruwer testified that thereafter the applicant requested the respondent to permit him to continue in his employment until the end of the year, because that was when his wife would be retiring. Bruwer again approached Potgieter on the applicant's

behalf, sometime between June and October, and the latter agreed to the extension until December.

[16] Bruwer's evidence was that in December the applicant told him that he would not leave if he did not receive anything in writing, because *"what they agreed on does not hold water as there is nothing on paper".* As a result Bruwer again spoke with Potgieter and the letter of 30 November 2005 ("the final notice"), was issued to the applicant. Bruwer initially said that the final notice had been given to the applicant in October 2005. When it was put to him that this had to be wrong because the final notice was dated 30 November 2005, he conceded that it was later.

[17] In cross-examination Bruwer conceded that the applicant had not been offered an alternative prior to his retrenchment. His evidence was that a miner, Morné van Zyl, had been appointed to the vacant shift boss role in January 2006. He attributed the failure to offer this role as an alternative to the applicant's incapacity based on his poor eyesight.

[18] Bruwer was not sure who had issued the first notice to the applicant. He initially testified that it was André Steyn, but subsequently said: *"12 January is when I gave him a letter, when Morné Saunders gave him the letter for the retrenchment".*

[19] It was put to Bruwer in cross examination that the applicant's version was that he had been verbally instructed by Bruwer to

continue working after the end of June. Bruwer did not deny this but said he could not recall the conversation.

[20] Bruwer conceded that he was only involved in the one consultation with the applicant and Telescourt on 12 January. He admitted furthermore that no consultation between the parties took place after June.

[21] Bruwer conceded that the parties had reached agreement regarding the applicant's termination in June, and that there had been no subsequent agreement to extend the notice period until December. In his view the respondent, in determining that the could remain in employment until December had simply sought to "*help"* him because he had complained that "*you guys are buggering me around..If I do not get something in writing I am staying on. I am going to stay here".* Bruwer had reported this complaint to Potgieter and this prompted the issue of the final notice.

[22] Bruwer was unable to recall who had issued the final notice to the applicant although the applicant testified that it was him. His recollection was that it might have been Saunders. Bruwer conceded that the applicant had been visibly upset by the final notice, and he attributed this to applicant's lack of involvement in the decision to retrench him.

[23] Bruwer knew the applicant had poor eyesight and testified that Louw Coetzer ("Coetzer"), the contractor who represented the Elandsrand mine, had complained about the applicant's inability

to fulfil his responsibilities. When Bruwer was asked in cross examination whether the complaint related specifically to the log books, he replied that he assumed this is what Coetzer had meant. He denied that he had been negligent in not taking action despite this complaint and justified this on the basis that the applicant had not been dismissed for incapacity but because "*the position was made vacant*". He furthermore conceded that if there had been a problem with the applicant's eyesight this would have been noted on the exit medical certificate completed on 21 December 2005.

[24] Bruwer confirmed that when the applicant returned from leave on 16 January 2006 he instructed him to go home and informed him that he would be compensated for a further three months.

[25] The respondent's second witness was Ferdie Telescourt ("Telescourt"), who at the time was a shaft steward of the Underground Officials Association ("UASA") and also chief safety officer at the Elandsrand mine. He was not an employee of the respondent and testified that he is currently the mine's health and safety co-ordinator. His evidence was that the applicant came to him for advice after receiving the first notice on 12 January 2005, and he accompanied applicant to Bruwer's office to discuss it. He testified that he had not been party to any consultation prior to the notice being issued.

[26] Telescourt's evidence was that this initial meeting with Bruwer was followed by further meetings and that "*there was a lot of consultation as well"*. Thereafter, the respondent conceded that

the applicant could remain in employment until December. The applicant was satisfied with this outcome. However, when the second notice was issued the applicant complained that "*we have agreed December but this letter says June 2005".* Saunders and Bruwer subsequently agreed to amend this to reflect December as the termination date, and he thought the respondent had been "taking a chance" by initially reflecting the date as June.

[27] Telescourt testified that he did not see the final agreement between the parties but had been verbally assured by the applicant that his employment had been extended until December. He only learnt after he left the union that the applicant was unhappy about the way things had turned out.

[28] Telescourt confirmed that he knew the applicant had poor eyesight, but he did not have personal knowledge of applicant's inability to fill out the log books. Telescourt denied that he had been negligent in not intervening when the applicant continued to work underground and attributed this to the fact that he knew the applicant was undergoing treatment. He confirmed that the applicant would have been tested and only sent underground if he was found to have been fit. However, he had not understood the poor eyesight to have been the reason for the termination of the applicant's services.

[29] Telescourt's evidence was that Bruwer had been present at *all* meetings regarding the applicant's termination. Telescourt considered every meeting held in regard to the issue to have

been official union business and as constituting formal consultation between the parties. While he could not remember the dates, his evidence was that there were several consultations and *"at least twice we sat with the HR guy, he took minutes"*. Furthermore, *"there were a lot of other discussions that took place when the HR guy was not there".* He testified that the meetings took place over a period of at least *"a month and a half".* When it was put to him in cross examination that if consultations took place it would have been over a two month period, i.e. January and February, he the admitted that there were further meetings after the second notice of 18 January. He then changed this to an admission that there were consultation meetings between January and April, but that no consultation took place after April.

[30] Telescourt's evidence was that the verbal agreement reached between himself, the applicant, Bruwer and Saunders had been in regard to termination of the applicant's services with effect from December 2005, and when he subsequently learnt that applicant's services had only ended on 31 January, he thought this was a bonus. It was put to him that it was improbable that the respondent would agree to December as the effective date of termination in that the respondent's case was that the parties agreed that the applicant would be retrenched in January. He disagreed with this. He conceded in cross examination that the December termination date had not been agreed by the parties from the beginning, and that only after a series of meetings "*eventually, eventually, we came to a final agreement probably in March, April".*

[31] When it was put to him that applicant had an expectation that his contract would be extended beyond its expiry date of October 2005, and that the December termination was unfair to him, he said that the respondent had treated applicant fairly in the context of his eyesight problem and the fact that he was being assigned to office-based work more often. He denied that he was biased in favour of the respondent because of potential liability that may have arisen out of his obligations as chief safety officer, and that his evidence was designed to mitigate both his risk and that of the respondent's in respect of safety standards contraventions. It was put to him, and he disagreed, that this was the most probable explanation for why he had not sought to secure the best deal for the applicant, and that he had moreover lied about representing the applicant in terms of a mandate and to the best of his ability. He was cross examined as to why he had not sought to extract an undertaking from the respondent to re-employ the applicant in future if a vacancy arose, he explained that this was due to the applicant being "*close to pension and he was having a problem with his eyes. In fact I cannot remember his age exactly, but it would have been that year that he would have reached 60 or the following year.*"

[32] Telescourt conceded that the applicant had not been present at every meeting that was held regarding his termination, and that he represented the applicant in those meetings. When it was put to him that applicant was not a union member and had never mandated him, he replied that he considered himself to have been mandated on account of being a shaft steward on the site.

[33] He testified that the main reason for the applicant's termination was that the mine was downscaling and contractors like the respondent had to follow suit, but that there were other issues such as applicant's health, age and capacity that were relevant to his termination.

[34] Telescourt conceded that he did not know what the retrenchment procedure was "*in terms of the Act"*, but that he had sought an explanation from the respondent as to the criteria used to select the applicant given that he had longer service than the other foremen. His evidence was that the respondent considered the applicant's responsibilities to have been different from the other foremen, even though he was doing the jobs of both a foreman and a senior foreman.

Applicant's version

[35] The Applicant's evidence was that on 12 January 2005 Telescourt summoned him to his office and announced that he was the bearer of "*bad news*". He gave applicant the first notice informing of his retrenchment with effect from 12 February 2005. Insofar as the first notice referred to a consultation preceding the notice on the previous day, applicant's testimony was that he would have been underground and was not party to any consultation. Telescourt then telephoned Saunders to enquire about the reason for the retrenchment and was informed that all senior foreman positions on the various shafts operated by the respondent were redundant. Telescourt enquired further whether there was a possible vacancy for the applicant as a

foreman and whether this had been offered to him, and Saunders confirmed that this had not been done. Telescourt suggested that the respondent should reconsider and revert to him at 14:00. That afternoon, following a meeting between Saunders, Telescourt, Bruwer and the applicant, the respondent confirmed that the notice period would be extended until the end of June. The applicant's version was that no further meetings either between the parties or between him and Telescourt were held thereafter, although he and Telescourt spoke informally when they met on site.

[36] The applicant testified that during the last week of June 2005 when they had finished work for the day he was walking to the car park when Bruwer enquired where he was going. When the applicant indicated that he was going home Bruwer said "*you are going nowhere".* Applicant repeated his reply and Bruwer said "*no man, I am not talking about this....you stay here, you are still working, do your job as in the past, carry on with your work, there is nothing going to happen, just carry on".* Applicant repeated that he said "*you are going to stay with Norkim, you stay here. Do your work as in the past".* The applicant understood this to mean the respondent had changed its mind about the retrenchment and he accordingly continued working after June.

[37] The applicant denied ever having received the second notice dated 18 January from the respondent. His evidence was that he found it inadvertently while acting on Bruwer's instructions to clean the office during a move. He furthermore denied that he

had requested that his termination date should be changed to December on account of personal issues.

[38] The applicant's evidence was that just before he went on leave in December Bruwer issued him with the final notice dated 30 November 2005. He was upset and queried this but Bruwer instructed him to return to work in January, and explained that he would be paid for January as well as an additional three months. The applicant said he was not satisfied, and when he returned to work in January he found his desk had been moved and that a former miner, Morné Van Zyl, had been appointed in his place. The applicant testified that in addition to his position as senior foreman he had also replaced one of the foremen who had resigned suddenly in March or April that year. When he expressed his concern to Bruwer he was instructed to go home because "*they have got Morné now in your place".* He complied with this instruction but was "*very, very cross".* At the end of January 2006 while he was "*braaing*" as a volunteer for an old age home Bruwer brought him his payslip and asked him to sign for it.

[39] The applicant's testimony was that he was not a member of the union and had never mandated Telescourt to represent him. Telescourt was aware of this and had given him new membership forms to complete.

[40] The applicant's evidence was that his fixed term contract had in the past been regularly renewed. On these occasions he was simply presented with a new contract to sign with the

explanation that his salary had changed. He was happy to sign without reading the contracts or asking for details. He anticipated that his contract would have again been renewed after its expiry in October 2005 and had he not been dismissed he would have stayed on to "*see what is happening...maybe they keep me on because why they chop and change every time".* It was only once he got the first notice that he read his current contract and noticed that the expiry date was 1 October 2005, and that none of his previous contracts had "*stopping dates*". The respondent had not produced any of his previous contracts, and argued that the dates on the current contract were incorrectly transposed.

[41] The applicant testified that he had never been offered any alternatives to his dismissal, and that despite his poor eyesight, he would have been able and willing to work as a foreman had this been offered to him. He testified that his eyesight did not prevent him from fulfilling his responsibilities in that respondent had been aware of this, had permitted him to work underground despite this condition and had in fact accommodated him in this regard by instructing the other shift boss to assist him with his log book, and that on one occasion Bruwer had even filled out applicant's log book based on information the applicant had given him. His evidence was that "[w]*hen we came out underground I just tell him, because why it is not a long story, it is like a monkey puzzle, places you visit, anything wrong, that is that*". He testified that he was better at doing the job than the other foremen because he was more trustworthy while they were unreliable and did not inspect the sites they were meant to. In

his view there had been no objective basis for selecting him for retrenchment over and above the junior foremen. When it was put to him in cross examination that all senior foremen were retrenched he conceded that he had been informed that this was the case but could not verify whether it had been implemented because he had left the employ of the respondent in January. While he conceded that there was a difference in pay for senior and junior foremen, he also explained that as a senior foreman he had more responsibilities, including more sites to inspect underground compared to the junior foremen.

[42] The applicant disputed that his age constituted a valid reason for his termination. He admitted that he had turned 60 on 26 January 2006, and when it was put to him that that respondent's policy was that employees retired at 60, he disputed that this was always applied since he was aware of other employees past retirement age still in the respondent's employ.

[43] The applicant admitted undergoing a medical examination on 21 December 2005 and knowing at that stage that his employment had been terminated. He stated however that his eyesight had never been mentioned as the reason for his termination and was simply an *ex post facto* attempt to justify the respondent's unfair conduct.

[44] The applicant testified that the respondent would *"chop and change"* dates constantly, and that even if he had not been instructed by Bruwer to continue working after June he would have done so because there was no certainty given that *"every*

day they came out with other stories". He explained that in January he was told he was dismissed with effect from February; this was then changed to June but he was then instructed to continue working, and in December was given final notice of his termination with effect from January 2006. In the interim his fixed term contract had expired in October and given the practice in the past, he had an expectation that this would be renewed.

Onus

[45] The onus rests on the applicant to prove he was dismissed and on the respondent to prove that the dismissal was substantively and procedurally fair.

Was there mutual agreement to terminate?

[46] The respondent argued, referring to the dictum of Zondo JP in *Stocks Civil Engineering v Rip NO & Another* 2002 (3) BLLR 189 (LAC), that where there is mutual agreement to terminate there cannot be a dismissal, and therefore there can be no finding of unfairness of any kind. The respondent submitted further that a mutual agreement to terminate is thus a complete defence to an unfair dismissal claim: *Springbok Trading (Pty) Ltd v Zondani* [2004] 9 BLLR 864 (LAC).

[47] The respondent relied on the existence of a mutual agreement to terminate the applicant's employment on 31 January 2006, and accordingly bears the onus in this regard. The respondent contended that it had intended to reduce to written terms the

verbal agreement between the parties but this had not been done. No evidence was led in regard to the failure to do so. The applicant denied the existence of any mutual agreement to terminate, and led evidence to the effect that the decision to retrench and the timing thereof had been unilaterally made by the respondent.

[48] The Labour Appeal Court has set out in *Springbok Trading* the approach to be followed where there are two mutually destructive versions on the existence of a mutual agreement to terminate. In such instances, the court held, the employer bears the onus of proving the parties' common intention to enter into the agreement, and this issue may well be decided on the probabilities.

[49] In my view, the evidence led by the respondent does not prove the existence of a mutual agreement. The evidence led however, does prove that the respondent, having made the decision to retrench applicant with effect from February 2005, thereafter amended this date on numerous occasions, on its on initiative or as a result of intervention by various parties. The initial agreement relating to termination in June of the applicant's employment, if indeed it can be said to constitute a mutual agreement, was superceded by the subsequent retractions which nullified it. On the respondent's own version, it sought to "*help*" the applicant by extending his notice periods. In this context the applicant's version that the respondent kept "chopping and changing", and that he had never agreed to a termination in January 2006, is plausible. Although the applicant was disgruntled and angry, and this is apparent from his evidence,

his version is credible and he withstood fairly robust cross examination.

[50] In my view the applicant's version stands to be accepted on a balance of probabilities, and I find that the respondent has not succeeded in proving the existence of a mutual agreement to terminate. My further reasons for this finding are as follows:

(a) The evidence led about the number of consultation meetings between the parties by respondent was contradictory. The respondent's main witness, Bruwer, confirmed the applicant's version that the meeting of 12 January 2005 was the ***only*** consultation meeting between the parties. Telescourt's testimony that there were numerous consultation meetings was contradicted by both Bruwer and the applicant. However, save to insist that several consultation meetings were held, all of which he considered to be formal meetings, he could not recall dates or other details. He produced no minutes or notes of such meetings, and never requested minutes or a written agreement from the human resources manager. The probability that these meetings occurred is unlikely. In any event, his evidence that after many meetings he eventually extracted the concession that applicant's notice was extended to December is neither confirmed by Bruwer, nor does it form part of respondent's case on the pleadings. It is, in the circumstances, highly improbable. Telescourt was insistent that Bruwer was present at all the various meetings and became aggressive when it was put to him that there was no reason for Bruwer to lie about

this. Another issue that is relevant to the probabilities is that Bruwer is no longer employed by the respondent, but Telescourt is still employed as health and safety co-ordinator on the mine.

(b) Bruwer also conceded that the reference to consultations on 11 and 12 January in the retrenchment notice to applicant were incorrect and probably inserted to create the impression of consultation for purposes of compliance with the Act. This type of conduct on the part of the respondent is even more disconcerting in the light of Telescourt's assertion that the respondent was "*taking a chance"* with terminating the applicant's services on 30 June 2005, given that his fixed term contract would only expire in October 2005 .

(c) Saunders was not called to give evidence and Telescourt's evidence to the effect that he admitted to Telescourt that the 30 June date was an error constitutes hearsay and is disregarded. This date is therefore presumed to correctly reflect the respondent's intention at the time. In any event, Bruwer was extremely vague on whether Potgieter had referred to the December date, referring only to the decision to give the applicant more time.

(d) Bruwer's evidence was initially that the second notice had been given to the applicant in October, and he only conceded that it was December after it had been put to him that it was dated 30 November. Bruwer's intervention with Potgieter to seek an extension to December is consistent with applicant's version that Bruwer had instructed him to continue working after June. Bruwer did

not deny this but said he could not recall the conversation. Bruwer confirmed that the only agreement between the parties related to the June termination date, and that there was no further agreement. His instruction to the applicant to continue working beyond June meant that the respondent had retracted the first notice, and it has not succeeded in proving the existence of a mutual agreement to terminate in January 2006.

(e) Notwithstanding Telescourt's contention that he acted in the applicant's best interests, which in itself is improbable given his knowledge that applicant was not a union member, he did not attempt to secure a more favourable notice period. If regard is had to the fact that the applicant's employment terminated three months' after his fixed term contract would have expired in October, then Telescourt's evidence that he negotiated a December termination is implausible. What is even more implausible however, is his contention that this was fair to the Applicant. He testified that applicant had been fairly treated, that he had not been given a "*raw deal*", despite the fact that he had taken no account of the fact that the applicant was on a fixed term contract which he had a legitimate expectation would be extended after October 2005. Telescourt admitted that he did not attempt to secure an undertaking from the respondent to re-employ the applicant in the future, and in fact sought to justify the respondent's conduct on the basis of the applicant's retirement age when this had never been part of the respondent's case. Furthermore, as an experienced shaft

steward I find his evidence that he did not know what the principle of legitimate expectation related to, to be improbable.

(f) Both Bruwer and Telescourt confirmed that applicant was unhappy about the manner in which he had been treated. Telescourt heard about this sometime later and Bruwer had been told when he instructed applicant to go home in January. This is consistent with applicant's version that he had been treated unfairly and he was unhappy about it.

(g) Despite an indication by the respondent's counsel in opening that Potgieter would give evidence, he was not called nor was Saunders. There was accordingly no explanation about whether the letter of 18 January 2005 had been given to applicant, and if so why it was never signed by applicant or UASA. Nor was there any explanation for the fact that no minutes appeared to exist for the numerous meetings testified to by Telescourt, nor, more significantly, why the written agreement, if it had indeed been reduced to writing, was not produced. The applicant's version in this regard accordingly stands.

(h) Furthermore there is no explanation for why the respondent would seek to extract agreement from the applicant on his termination in December or January termination when it could simply have let the applicant's fixed term contract expire at the end of October 2005, without incurring the costs of employing him for an additional three months. It may in fact be that this was the three month notice that Bruwer referred to when he told applicant to go home in January. The only reasonable

inference that can be drawn is that, on a balance of probabilities, there was no mutual agreement to terminate.

(i) The respondent submitted that it was seeking an early termination of the fixed term contract due to end in October by giving the applicant notice on 12 January 2005. It was only because the applicant resisted this attempt that his services were terminated *after* the expiry of his fixed term contract. It is therefore highly unlikely that it would again seek to dismiss the applicant for operational reasons in January 2006, having failed in its first attempt to do so. I find this a highly implausible argument which in any event is not borne out by the evidence proffered by the respondent's own witnesses. If anything, it supports the applicant's version that there was no mutual agreement to terminate.

(j) Telescourt and Bruwer both confirmed that the discussion on 12 January 2005 ensued as a result of the first notice of termination being issued. The notice itself makes no reference to terminating the fixed term contract due to expire in October but simply refers to a decision to make the senior foreman position redundant. Furthermore, the final letter of 30 November issued to applicant on 21 December before he went on leave refers again to operational requirements as the reason for the 60 day notice of termination and states that the *"matter will be discussed with your union"*. If indeed there was a mutual agreement to terminate it is not mentioned and this seems to imply a new process has commenced *ab initio* in regard to the applicant's termination.

(k) On respondent's own version the applicant was not involved in the decision to keep him in employment until December. The fact that he subsequently declared a dispute should not have come as a surprise in this context. Finally, for the respondent to contend that there was mutual agreement requires quite a stretch of the imagination. I am of the view that the respondent has not succeeded in discharging the onus of proof in this regard. Accordingly I conclude that on a balance of probabilities the respondent has failed to prove the existence of a mutual agreement or the terms thereof.

Was the dismissal procedurally unfair?

[51] The respondent has conceded non-compliance with section 189, given its reliance on the mutual agreement, and it is accordingly common cause that the dismissal of the applicant was procedurally unfair.

Was the dismissal substantively unfair?

[52] The respondent's version was that the decision to dismiss the applicant was operational in that his position had become redundant on account of being too costly. Furthermore, the respondent had to downscale its operations and did not require a senior foreman. Another operational requirement, which emerged for the first time in the proceedings, was that the client had complained about the applicant's inability to complete his log books, a key component of the statutory health and safety functions of a senior foreman. A third operational reason cited was that the applicant was close to retirement age, although this

only became an issue when it was raised by the shaft steward, and had not been referred to in the pleadings.

[53] The applicant did not accept that these reasons justified his dismissal. His evidence was that had he been offered an alternative position as foreman (i.e. the position to which Morné Van Zyl was appointed), he would have accepted. He testified that he had been doing the job of both foreman and senior foreman as a result of a vacant foreman position, and that he had been a trusted and respected employee on account of his excellent work record and experience.

[54] The applicant's testimony was that his poor eyesight had always been accommodated by the respondent. Bruwer's evidence is consistent with the applicant's in this regard in that he retracted his statement about the contractor's complaint being in respect of the log books, and the contractor was never called. In addition, both Bruwer and Telescourt testified that that the applicant's poor eyesight was not the reason for his dismissal. In any event, Bruwer conceded that the respondent had not considered taking steps to dismiss the applicant on the grounds of incapacity because this would have been "*inhuman".*

[55] In regard to the applicant's approaching retirement age he testified that this had never been raised with him as being relevant, and that the policy was not strictly observed by the respondent.

[56] The applicant understood the reason for the senior foreman position being made redundant was that "he was costing the respondent too much". He conceded that if he had been consulted about this as required by section 189(3) the parties may very well have agreed on measures to avoid or mitigate the retrenchment in that the applicant was the only employee retrenched. Although the applicant had heard that all senior foremen were affected by the decision, he had no personal knowledge of this and no evidence was led in this regard by the respondent.

[57] The applicant denied that the reasons advanced by the respondent were relevant considerations in the decision to terminate his services.

[58] In my view the applicant's dismissal is therefore procedurally and substantively unfair.

Outstanding monies

[59] The only issue left for consideration is whether the applicant is entitled to payment of amounts claimed to be outstanding. During the proceedings the applicant abandoned his claim in respect of outstanding salary, and reduced his claim for a *pro rata* bonus to the sum of R2 200.00, which he testified would have been due in respect of November production. Bruwer's testimony to the effect that a bonus was discretionary and had always been paid to employees in the month in which it accrued was not disputed. However, this claim does not appear in the

applicant's heads of argument and it too appears to have been abandoned. It appears that the applicant received both leave pay and notice pay in respect of December, and I am not satisfied that any entitlement to additional severance pay has been proven.

Order

[60] In the circumstances I make the following order:

1. The dismissal of the applicant is procedurally and substantively unfair.
2. The respondent is ordered to pay the applicant 12 months' basic salary as compensation.
3. The applicant's claim for additional statutory and contractual amounts is dismissed.
4. There is no reason why costs should not follow the result, although I do not agree that applicant is entitled to the punitive costs order it seeks as a result of its contention that the respondent's defence was vexatious and frivolous.

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Bhoola AJ

Date of hearing: 23 and 24 October 2008
Date of judgement: 4 December 2008

Appearances:
For the applicant: Mr. W. P. Schöltz

For the respondent: Adv J Campanella instructed by L Cirone Attorneys