

SOUTH AFRICA / JUDGMENT

## Lepota v Lonmin Platinum Mine (JS920/16) [2019] ZALCJHB 341 (3 December 2019) [2019] ZALCJHB 341

COURT

Labour Court Johannesburg

BEFORE

E Tlhotlhlalemaje

CASE / FILE NUMBER

JS920/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 920/16

In the matter between:

JOHANNES LEBOHANG

LEPOTA

Applicant

and

LONMIN PLATINUM

MINE

Respondent

Delivered:

3 December 2019

### JUDGMENT

TLHOTLHALEMAJE, J

**Introduction:**

- [1] In his statement of claim, the applicant (Mr Lepota) alleges that his retrenchment by the respondent (Lonmin) on 2 March 2016 was substantively unfair. Lepota seeks an order of reinstatement and/or just and equitable compensation. Prior to his retrenchment, and during the consultation processes, Lepota was a member of the Association for Mineworkers and Construction Union (AMCU). He however instituted these proceedings on his own.
- [2] Lonmin opposed Lepota's claim on the basis that there was a commercial rationale for the retrenchment. It further contends that Lepota was offered alternatives short of dismissal which he had initially accepted. Lepota however according to Lonmin, failed to take up the alternative position at a different mining shaft, thus forcing Lonmin to retrench him.

**Background:**

- [3] The brief background to this dispute is as follows.

3.1 Lepota was employed by Lonmin with effect from 12 April 2011 in the position of Mechanised Operator Bolter at Lonmin's Hossy Shaft. Lonmin is a mining company with operations in Rustenburg in

North West Province.

3.2 In July 2015, Lonmin held a meeting with all the Mechanised Operators at Hossy Shaft and informed them that it would abandon the mechanisation operation system and implement a conventional operating system.

3.3 During further consultations in August 2015 Lonmin advised the Mechanised Operators that there were available positions at other mining shafts. An agreement was reached between Lonmin, AMCU and other consulting parties to establish a task team comprising of organised labour and Lonmin, which would endeavour to reach an agreement on the redeployment and re-skilling of affected employees. The task team was further mandated to oversee the redeployment exercise.

3.4 A further agreement was reached with AMCU, which had at all material times represented its members (including Lepota) in the consultation process, on the reduction of the employees' remuneration by at least 50% upon them being redeployed.

3.5 Most of the Mechanised Operators refused to accept redeployment to lower positions with reduced salary, re-skilling and the Voluntary Severance Packages (VPSs). On 9 October 2015, AMCU was informed that the positions of Mechanised Operators had become redundant. In the light of its members' resistance to the proposals in regard to alternatives, AMCU on 16 October 2015 sought a further opportunity to consult and advise them of their options.

3.6 On 26 October 2015, Lonmin addressed correspondence to Lepota offering him a position of operator loco at Roland Shaft. Lepota underwent a medical examination and was declared fit to resume duties. He also accepted the offer by attaching his signature to the offer on 30 October 2015.

3.7 Once the medical certificate was issued, Lepota was supposed to report for duty at Roland shaft. Despite the acceptance of the position, he did not report for duty at the shaft he had elected.

3.8 On 11 November 2015, Lonmin addressed a letter to Lepota inviting him to make an election between re-skilling and redeployment, or to opt for a VSP. Deadlines were set within which these options remained available, failing which compulsory retrenchment would take effect.

3.9 Further consultations were held with AMCU on 4 and 23 November 2015, since a majority of the Mechanised Operators had still refused to make any election. Lepota's clock card was blocked on 17 December 2015.

3.10 On 22 February 2016, a letter was written to Lepota in which he was advised that he was being given a final opportunity to make an election. He was further advised that the final opportunity would expire at 13h00 on 24 February 2016. He was advised that should he fail to make an election, Lonmin would be left with no option but to retrench him.

3.11 On 26 February 2016, a further meeting was held with the Mechanised Operators and they were again reminded to make an election. On 29 February 2016, and following further consultations with AMCU, a list of the Mechanised Operators affected was agreed upon, leading to the conclusion of a retrenchment agreement between AMCU and Lonmin.

3.12 In a letter dated 1 March 2016, Lonmin terminated the employment services of Lepota on account of its operational requirements, and further since he had failed to apply for the VSP and/or accept redeployment[1].

The evidence:

[4] Lonmin led the evidence of Mr Mpho Rathulwane (Rathulwane), its Senior Consultant: Human Capital, responsible for four mine shafts, namely Hossy, East One, West One and Newman Shafts. His evidence focused on the consultation meetings held with AMCU in respect of the retrenchment process and the redeployment of employees, and the attempts to redeploy Lepota. Rathulwana confirmed most of the common cause facts as summarised above, and specifically added that:

4.1. Upon the employees making an election to be placed into a suitable shaft, they would then be required to undergo medical assessments. The employees would generally be referred to the medical assessment by the Human Resource Administrator, Ramakgoka.

4.2. Upon the completion of the relevant medical assessments, employees would be expected to report with the medical assessment report to the preferred shaft. The Human Resource Office would then provide the employees with an offer of employment. Rathulwane would then receive a report on the employees who have accepted the offer of employment.

4.3. In the last consultation meeting held in February 2016 which was attended by inter alia AMCU officials and members of the task team, the affected employees present in the meeting were upset with AMCU officials, whom they had chased out of the meeting. The employees' position in the end was that they would rather be retrenched.

4.4. Lepota underwent a medical assessment and was declared fit to perform the duties of a loco operator at Roland shaft. Upon being issued with the medical assessment certificate, Lepota ought to have reported at Roland shaft for the purposes of being offered a position. He however failed to do so.

4.5. On 29 February 2016, a list of employees stationed at Hossy shaft that were to be retrenched was formulated and agreed

upon by Rathulwane on behalf of the respondent, and AMCU as part of the task team. Lepota's name was on the list. In the end, 87 employees were forcefully retrenched in view of the fact that they had turned down all options presented to them.

[5] Under cross-examination, Rathulwana further testified that:

5.1. The consultation meetings were not held with individual employees as they were represented by AMCU. He denied having consulted individually with Lepota.

5.2. He reiterated that at no stage had Lepota reported to his chosen shaft between October 2015 and November 2015. Although the affected employees were not required to perform underground duties, they were required to report for duty on the surface and the attendance report would therefore have reflected Lepota's attendance during that period. The clock records however showed that Lepota clocked from 3 December 2015.

5.3. Ordinarily if an employee did not report for duty (AWOL), they would be paraded (instructed through the internal communication system to report to the relevant authority or site). However, during the consultation exercise, the affected employees were not paraded unless they were specifically required to be at the work site for whatever reason.

5.4. In regards to the fact that Lepota had initially accepted the alternative position at Roland shaft but had allegedly subsequently requested to be transferred to Saffy shaft instead, Rathulwane maintained that Lepota had the responsibility to approach his preferred shaft with a medical assessments report, so that he could be offered a suitable position in that particular shaft. He did not however report at Saffy shaft.

5.5. Rathulwane further denied that he had instructed Lepota to await a decision on his transfer to Saffy shaft. He maintained that Lepota was served with the final opportunity letter dated 22 February 2016 which sought to persuade him to make an election.

[6] Ms Sarah Tshepiso Segabetla (Segabetla) the Human Resources Officer: Human Capital at Roland shaft, testified that:

6.1. She had personally handed over a copy of the written offer of redeployment to Roland shaft to Lepota as per the letter dated 26 October 2015 and the latter had communicated his acceptance. Lepota had further indicated that he required time to think over the matter.

6.2. When Lepota failed to return, he was paraded and upon his arrival he indicated his intention to be deployed to Saffy shaft. His position was thereafter offered to another affected employee when he did not report for duty at that shaft.

[7] Lepota's evidence is summarised as follows:

7.1. Having accepted the position of loco operator at Roland, he had then communicated the results of his medical assessment to Rathulwane like all the other affected employees.

7.2. At some point after having accepted the position at Roland, he was informed of additional available positions at the Saffy shaft. He however had to first approach the Human Resource Assistant at that shaft, Ms Kgontse Masiza (Masiza) with a request to be redeployed.

7.3. He subsequently communicated his intentions to be redeployed to Saffy shaft in view of the fact that it was close to his place of residence. He contended that he always had the intention to assume his duties at Saffy shaft utilising the same offer he had accepted in respect of Roland shaft.

7.4. On 23 November 2015 he had approached Masiza with the request to be redeployed to Saffy shaft. There was communication between Masiza and Rathulwane in respect of him being redeployed to the Saffy shaft.

7.5. At some point, Rathulwane had confirmed with Masiza that indeed he ought to be transferred to the Saffy shaft. Masiza thereafter provided him with documentation for the purposes of a medical assessment. His understanding of the procedure for deployment was that once he had obtained a medical assessment certificate, Rathulwane ought to have authorised the transfer or redeployment to the Saffy shaft. He insisted that he ought to have been paraded after he had made his election to be redeployed to Saffy shaft, but that this did not happen.

7.6. He conceded that he attended a consultation meeting wherein Rathulwane had reminded those affected employees who had not made an election to do so. He however did not immediately respond to that call on basis that in his view, he had made an election to be redeployed to the Saffy shaft but was not paraded despite waiting.

7.7. Upon being notified of the termination of his employment, he approached Rathulwane in order to inquire under what circumstances he was retrenched in view of him having made an election to be redeployed to Saffy shaft.

[8] Under cross-examination, Lepota testified that:

8.1. AMCU had not acted in accordance with his instructions during consultations. When he received that letter dated 22 February 2016, which implored him to make an election, he approached Rathulwane who in turn informed him that he should not be concerned as he had made a selection in 2015.

8.2. He maintained that some of the affected employees were paraded and others like himself were not paraded. He further contended that Rathulwane at some point became impatient with the affected employees.

[9] Mr Sekgonyana Mokoena (Mokoena), an erstwhile employee of Lonmin testified on behalf of Lepota.

9.1 He was employed at Hossy shaft as an LHD operator and was one of the affected employees.

9.2 His testimony mainly related to what Lepota had told him. He also had heard about available positions at Saffy shaft.

9.3 Central to his testimony was that once an employee had selected a shaft, he was supposed to have been paraded if he did not report for duty and be warned rather than being dismissed.

9.4 Mokoena conceded under cross examination that Lepota had accepted the offer at Roland shaft and was paraded. He however contended that Lepota subsequently got to know of other positions at Saffy. In the same vein, he conceded that he did not know of this offer made to Lepota, other than through what the latter told him.

The issues for determination and evaluation:

[10] It was not disputed that there was a general need to retrench, and that Lepota's position had become redundant. The crisp issue for determination in this case given the common cause facts is whether Lonmin had a fair reason to terminate the services of Lepota, in circumstances where it held the view that he had despite accepting an alternative position at Roland, failed to render his services at that shaft as expected. Aligned to that enquiry was whether the termination of Lepota's services was fair, in circumstances where he was of the view that that he was subsequently offered another position at Saffy Shaft, and was waiting to be paraded before he could report for duty at that site.

[11] The starting point in determining the factual disputes in this case is that it is trite that prior to ultimately deciding on a retrenchment,

there is an obligation on the employer to make every available effort to avoid the dismissal of an employee for operational requirements. This entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position the duties of

which the employee concerned can perform with or without at least minimal training.[2] If an employer offers such vacancies as an alternative to retrenchment, whether in the same position but on different terms or on the same terms but in a different position or in the same position and on the same terms but in a different place, that is still alternative employment. An employee who however unreasonably refuses such an offer of alternative employment is not without fault and cannot claim unfairness when ultimately retrenched.[3]

- [12] In this case, there can be no doubt that Lonmin took every available effort to ensure that a retrenchment was a measure of the last resort. The common cause facts indicate that protracted consultations took place with AMCU and through the task team, to afford the affected employees with available options, which included redeployment to other shafts, re-skilling and when all else failed, VPSs. Undisputed evidence further indicated that as late as February 2016, the affected employees, including Lepota, were given ultimatums within which to accept any of the offers failing which forced retrenchment would follow.
- [13] Aligned to the above, is that it is apparent from the undisputed facts, that the affected employees, and in particular, the Mechanised Operators of which Lepota formed part, were resistant to any of the alternatives. AMCU for its part had also faced resistance from its own members, and this was confirmed by Lepota's evidence to the effect that in his view, AMCU was not acting in accordance with the affected employees' mandate. This to a large extent confirmed Rathulwane's evidence that the employees had chased AMCU officials out of the consultation meetings.
- [14] The Mechanised Operator's mandate however, which appears to have been that the affected employees sought to remain in their positions as they were without any changes, was unsustainable, particularly in the light of it not being in dispute that there was an economic rationale for the retrenchments. The argument advanced therefore on behalf of Lepota that there was no evidence to suggest that he had aligned himself with the other Mechanised Operators' approach and resistance to the alternatives, is belied by his very own conduct as shall further be demonstrated below.
- [15] Arising from Lepota having made an election and further having accepted a redeployment to Roland Shaft, it was common cause that after having gone through the process of medical assessment, and all other procedural requirements, he had failed to report to that shaft from 30 October 2015 after having accepted the offer. Notwithstanding the failure to report at Roland Shaft, Lonmin had again on 11 November 2015, addressed a letter to Lepota inviting him to make an election between re-skilling and redeployment, or to opt for a VSP. The deadlines set within which these options remained available, failing which compulsory retrenchment would take effect were ignored. This was further despite the fact that Lepota's clock card was blocked on 17 December 2015.
- [16] Lepota further ignored a letter addressed to him on 22 February 2016, in which he was advised that he was being given a final opportunity to make an election by 24 February 2016, and he had again failed to make an election.

- [17] To the extent that all of these endeavours were made to accommodate Lepota, I fail to appreciate the reason it can be said that Lonmin acted unfairly, especially in circumstances where it and Lonmin had reached an agreement on 29 February 2016, on the list of Mechanised Operators to be forcibly retrenched.
- [18] Lepota's contentions that he ought not have been retrenched as he had subsequently made an election to go to Saffy Shaft needs to be assessed within the overall factual context of what had happened throughout the consultation process, and in particular, how Lonmin had conducted itself as well as the attitude of the affected employees. It has already been stated that Lonmin, and AMCU for that matter, had throughout the consultation process, sought to avoid the retrenchment of the employees. Lonmin went out of its way to accommodate Lepota, and any deadlines set for him were completely ignored. AMCU for its part took all efforts to convince its members to exercise their options to no avail.
- [19] In my view, it is not far-fetched to conclude that Lepota's approach was symptomatic of the other Mechanised Operators' steadfast stance, which was resistance to all available options given to them, and a posture that they would rather be retrenched. It is found that his contentions that he was simply waiting to be paraded to report to Saffy Shaft ought to be rejected as improbable and lacking any credibility. My conclusions in this regard are further fortified by the following considerations;

19.1 Upon acceptance of the offer at Roland Shaft, even if it was common cause that he had expressed an interests to go to Saffy shaft, there is no evidence that he took any steps to pursue the latter offer, other than going through a medical examination as he had alleged.

19.2 Segabetla upon not hearing anything from Lepota had paraded him, which parade Lepota had ignored.

19.3 Several meetings were held with AMCU and Mechanised Operators in February 2016. At no stage during those meetings had Lepota indicated that he had made an election to go to Saffy shaft and had completed his medical assessment. Any reasonable employee in the circumstances where a retrenchment was imminent, would have raised the issue with AMCU or management in those meetings, and pointed out that he was waiting to be transferred to Saffy shaft.

19.4 His contentions that he had communicated his election to go to Saffy shaft to Rathulwane, who had informed him to wait is clearly improbable. Rathulwane's testimony was that he did not communicate or consult directly with individual employees as there was a forum for that process. Even if there was any iota of truth in Lepota's contentions that Rathulwana had informed him to wait, as to the reason that he had not advised AMCU as late as February 2016 of the reason he had still not reported at Saffy shaft remains unexplained.

19.5 In line with the above, Lepota's conduct and approach was clearly in alliance with his other colleagues as already discussed above, which was resistance to all the options made available, and/or to make an election to go to any of the available shafts, and yet fail or refuse to report at those shafts after being placed, as attested to by Rathulwane.

19.6 Lepota's further contention that he assumed that after having gone through the medical assessment process for the purposes of the post at Roland shaft, he did not need to go through the process again for the purposes of his election to go to Saffy shaft, is equally fallacious in the light of the general approach of all the Mechanised Operators as outlined above, and his other contention that he had in any event, undertaken the second medical assessment.

19.7 Lonmin had accepted that Lepota had communicated his interest to go to Saffy shaft. It however contended that mere expression of interest to go to Saffy shaft was not sufficient as he was required to take further steps in that regard. Even if it were to be accepted that Lepota held the view that he did not need to undertake any further medical assessment, nothing prevented him from responding to the parade by Segabetla at Roland shaft as already indicated, to advise her that indeed he had completed all processes, but only for the purposes of going to Saffy shaft.

19.8 The Human Resources Department at Saffy shaft however would not have paraded him in the absence of him having presented his medical assessment records to it or any documentation to demonstrate that he had been placed at that shaft. Accordingly, any contention by Lepota that he was simply waiting to be paraded at Saffy Shaft ought to be rejected, as his attitude throughout the consultation process was in line with the Merchandised Operators' overall approach, which was not only to resist all available options, but further to dare Lonmin to retrench them.

19.9 When Lepota had not reported at Roland shaft, Lonmin was within its rights to assume that he was no longer interested in the post, and to offer it to another employee. The evidence indicated that even as late 24 February 2016, other employees who had made an election at that belated stage were accommodated. It is inexplicable that only Lepota's election was not considered by Rathulwane at any stage, or even by AMCU, when the final list of employees to be retrenched was finalised. Lepota's contentions that he was not aware of the list until he received his letter of termination equally ought to be rejected, as it is improbable that AMCU would have finalised that list without consulting with him and all the other employees affected.

19.10 Given the protracted nature of the consultation process, and Lepota's conduct and approach, it was not necessary for Lonmin as it was suggested on his behalf, to have obtained his permission to terminate his services. He had been warned on several occasions as to what the consequences of failing to make an elections were.

19.11 Equally so, there was further no obligation on Lonmin to institute disciplinary proceedings against Lepota for failing to report at Roland shaft as suggested on his behalf, as he had in essence, repudiated his acceptance of the offer, which repudiation Lonmin was entitled to accept. Any suggestion that Lonmin had dismissed Lepota on the grounds of misconduct disguised as operational requirements is indeed far-fetched and without merit.

19.12 To the extent that Lepota further sought to disavow AMCU's mandate to act on his behalf in the consultation process, that view and approach is clearly belated in the light of the proverbial horse having bolted. Furthermore, the argument is unsustainable in the light of the provisions of section 200 of the LRA, which enjoined AMCU to act in its interests and those of its members during the consultation process. There is no evidence to suggest that Lepota had resigned from

AMCU at any stage during the consultations, for any argument that AMCU did not represent his interests to be sustainable.

[20] In conclusion, it needs to be stated that in a letter dated 1 March 2016, Lonmin terminated the employment services of

Lepota on account of its operational requirements, and further since he had failed to apply for the VSP and/or accept redeployment. This decision cannot on the authority of Latex Surgical[4] be faulted, as Lonmin had together with AMCU, done everything conceivable, to ensure that none of the Mechanised Operators

were retrenched. Lonmin and AMCU had engaged in protracted consultations and the employees, including Lepota, were warned that

if they rejected the options available, Lonmin would have no option but to terminate their services. To the extent that Lepota and others had over a period of October 2015 to February 2016 failed to reasonably consider these options despite repeated attempts by both AMCU and Lonmin to appeal to their senses, he and others cannot complain that they were not given a chance to avoid his dismissal.

[21] It follows in the light of the conclusions reached above that Lepota's claim ought to fail. I have further had regard to the requirements of law and fairness insofar as Lonmin sought an award of costs. Even though I am of the view that Lepota's claim was ill-considered, I equally hold the view that a costs order is not warranted in this case.

[22] Accordingly, the following order is made;

Order:

1. The Applicant's claim of an unfair dismissal on the grounds of the Respondent's operational requirements is dismissed.
2. There is no order as to costs.

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E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: N. E Matshikiri, instructed by Johannesburg Justice Centre (Legal-Aid South Africa)

For the Respondent: N. O Mamabolo of N.O Mamabolo Incorporated

[1] The letter reads as follows: "NOTICE OF TERMINATION OF EMPLOYMENT DUE TO RETRENCHMENT 1. In a previous communication to you, you were notified that, as a result of organisational restructuring, you are affected and the Company subsequently afford you

an extra opportunity to apply for a Voluntary Separation Package or to apply to be reskilled or retrained for a suitable alternative vacant position. 2. ... 3. You have failed to make an application for a Voluntary Separation Package or apply to be reskilled or retrained for a suitable alternative position and, as a result thereof, the Company is left with no choice but to retrench you. 4. Please note that your employment with the Company will terminate with effect from 2 March 2016 due to retrenchment. 5. ...”

[1] The letter reads as follows:

*“NOTICE OF TERMINATION OF EMPLOYMENT DUE TO RETRENCHMENT*

1. In a previous communication to you, you were notified that, as a result of organisational restructuring, you are affected and the Company subsequently afford you an extra opportunity to apply for a Voluntary Separation Package or to apply to be reskilled or retrained for a suitable alternative vacant position.
2. ...
3. You have failed to make an application for a Voluntary Separation Package or apply to be reskilled or retrained for a suitable alternative position and, as a result thereof, the Company is left with no choice but to retrench you.
4. Please note that your employment with the Company will terminate with effect from 2 March 2016 due to retrenchment.
5. ...”

[2] SA Airways v Bogopa and Others (2007) 28 ILJ 2718 (LAC) at para 60

[3] Freshmark (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (2003) 24 ILJ 373 (LAC) at para 24; Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd

(2006) 27 ILJ 292 (LAC)

[4] Supra at para 69

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