

Sneller Verbatim/idem

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1626/99

2000-12-13

In the matter between

PHEELO AND OTHERS

Applicant

and

LEEUDOORN GOLD MINE

Respondent

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J U D G M E N T

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SUTHERLAND J: This is a matter in which certain workers were retrenched by the Leeudoorn Gold Mine, the respondent in the principal claim. For reasons of convenience I shall refer to the parties as the workers and as the gold mine. The workers were aggrieved at their retrenchment, and referred the matter to the CCMA, and ultimately to this court for adjudication. The prosecution of the matter became protracted, and on 27 October 1999 a pre-trial conference was convened between the legal representatives of both parties. It was not possible to conclude the business of the pre-trial conference because the workers were unable to furnish certain information requested by the representatives of the mine. The

meeting was adjourned on the basis that the workers would revert. Naturally this meant to revert through their legal representatives, a firm of attorneys. They did not revert. In consequence, on 7 June 2000, that is to say some eight months later, the gold mine approached the Registrar of the Labour Court to have a pre-trial conference convened before a judge of this court. On that day a pre-trial conference was held before Judge Pienaar. It is common cause that the invitation by way of notice to the attorneys of the workers was received by the workers' attorney, but on 7 June, the day of the pre-trial conference, they were not represented. In consequence of that, Judge Pienaar handed down a judgment, which in its corrected form read as follows:

- 1 There was no appearance by the applicants.
- 2 The applicants are barred from proceeding with the matter unless good cause is shown.

The reference to applicants is a reference to the workers. That judgment, which erroneously referred to the parties rather than the applicants, was corrected and then issued on 4 July 2000, approximately a month after it was first made. On 6 July 2000 the gold mine launched an application to have the claim of the workers dismissed, essentially for want of prosecution, and therein complained of prejudice on account of the delay. Subsequent thereto the workers' attorneys filed, on or about 2 August, a set of answers to the questions which had remained unanswered on 27 October 1999. Subsequent thereto, at the instance of the gold mine, the matter was set down on the roll of this court today, being 13 December, in order to place before the court its application for the dismissal of the workers' claim. Both parties are represented today by counsel, and the question arose in regard to whether or not the bar imposed on the workers by way of the judgment of Judge Pienaar has been satisfied.

In support of a contention that the bar should be lifted, I was referred to a notice of motion dated 10 August 2000 on behalf of the workers, to which is attached the supporting affidavit of Memele Jeremiah Temane, an attorney and a member of the firm which was the attorneys of record of the workers throughout the entire relevant period.

It is plain from the order of Judge Pienaar that this matter may not proceed until and unless good cause is shown. Good cause, as I understand it, means a satisfactory explanation for the default, that is to say the non-appearance on the day set for the pre-trial conference, and also an indication that there is at least a semblance of a case to be prosecuted.

The concept of good cause is well known to the law, and has been in use by superior courts and magistrate's courts for many decades. One of the places where a useful commentary on what needs to be shown may be found, is in the work of Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 1997 4th edition, page 540. The authors there were dealing with the rescission application of a default judgment, and the following was stated in regard to such a matter:

"An applicant for the rescission of a default judgment must show good cause and prove that he at no time renounced his defence and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation of his default. His application must be made *bona fide*, and he must show that he has a *bona fide* defence to the plaintiff's claim. Where the failure to deliver a notice of intention to defend has been due to an oversight on the part of an attorney, or to a misunderstanding in the registrar's office, and the defendant has a *bona fide* defence to the action, the court will usually give leave to reopen, but will not necessarily do so. On the other hand,

the mere fact that the fault lies with the defendant personally is not a ground for refusing relief, although it is a factor which will weigh with the court in deciding whether or not to exercise its discretion in favour of the defendant."

It must of course be appreciated that considerations in relation to the decision of the judgment of the court are not on all fours with the judgment of Judge Pienaar in this matter, which is an interlocutory judgment, simply barring further prosecution of the case until or unless good cause has been shown, but the elements of good cause in my view remain the same, namely a reasonable explanation of default and an indication that it is worthwhile allowing the case to proceed, in as much as a *bona fide* and reasonable case can be made out in support of the party who is barred.

The statement of claim referring the dispute to this court simply articulates in reasonably bare terms what the workers claim were breaches of section 189 of the Labour Relations Act. No facts of any meaningful degree can be gleaned from that document, however generously may one read into it. The founding affidavit for the lifting of the bar says the following, and I quote the relevant portions:

"I took over the file in this matter towards the end of April 2000. It had previously been attended to by Mr G Nhlapo who left the services of the applicants' attorneys at the end of April 2000. When I took over the matter, it was apparent that the minute of the pre-trial conference which had been held on 22 October 1999 had yet to be finalised. The difficulty in the finalising arose from two sources. First, Mr Nhlapo had not attended the pre-trial conference. I have ascertained from the applicants' counsel that it had been arranged between him and Mr Nhlapo that the latter would meet counsel at the respondent's counsel's chambers at a time appointed for the pre-trial conference, but that he, Mr Nhlapo, failed to arrive. Mr Nhlapo subsequently informed applicants' counsel that he had got lost looking for

the chambers in question. I should add here that the chambers are not at Innes or Schreiner Chambers but in Johannesburg, in Sandton. The applicants' attorney had not been placed in sufficient funds to incur expenses to instruct applicants' counsel to draw the minute or provide the replies to respondent's questions. I was well aware of the formal pre-trial conference convened on 7 June 2000 before Acting Judge Pienaar. In fact, prior to that conference the respondent's attorney, Mr S Nthitsh, spoke to me telephonically and advised that if applicants were to answer the questions posed by the respondent in paragraph 15 of the minute signed on 13 November 1999, it would not be necessary to proceed with the hearing before Judge Pienaar. Since I could only obtain those answers from counsel, and since I had insufficient funds to instruct counsel, I was unable to comply with this request. I might add that I had since taking over the file requested our clients to be placed in funds in order to attend to the matter. They being unemployed were unable to do so forthwith. I was also reluctant to advise respondent's attorneys of this problem. Accordingly no one attended the pre-trial conference scheduled for 7 June 2000. I was aware of the possible consequences of this failure and advised the applicants accordingly. They were only able to place me in funds during the middle of July 2000 and it took me until 31 July 2000 to arrange a consultation with counsel. Subsequent to that date the outstanding answers to the respondent's questions had been provided. I am advised that it is necessary to deal with the prospects of success. The respondents have raised the aspect of non-compliance with the provisions of section 191(11)(a) of the Labour Relations Act of 1995. Legal argument will be addressed to the court in this regard. On the merits of the matter it is apparent from the answers contained in the annexure to Annexure A hereto that the applicants allege that the whole retrenchment process was not conducted in good faith, since the elections with a

view to which they were retrenched were never held. I am also further advised that it is necessary to deal with the prejudice the respective parties caused by the applicants' non-compliance with the rules, which has led to this application. In paragraph 7 of the affidavit of 6 July 2000 in support of an application to cause the applicants' application to be dismissed, the respondent's human resources manager, Mr Andre Koen, alleges that some of the respondents, that is to say the workers, were occupying premises owned by the respondent, that is to say the mine, which it needs for its employees. In fact, only one such person, the eleventh applicant, is occupying such premises. The other applicants have vacated the premises they occupied. The respondent attempted unsuccessfully to evict the eleventh respondent from the premises which he is occupying. The prejudice is thus one residential unit of whose use respondent is deprived. Given the long waiting time for a trial date in the Labour Court, the period which the respondent has been so deprived is not excessive, so I am advised."

The first point to note is that no serious attempt is made to put the court in a position to assess the merits or demerits of the case which the workers seek to place before a trial court. It is true, of course, that reference is made to answers that were given to the pre-trial conference, initially held on 22 October 1999. A reading of those answers indicate that the information is so rudimentary that it makes no impact at all upon the consciousness of one endeavouring to decide whether there is a fact which if proven would support the applicants', that is to say the workers' case. I have nothing before me to indicate that there is a plausible case to be advanced.

I turn to deal with the explanation for the non-appearance on 7 June before Judge Pienaar. I do not regard the explanation tendered by the workers' attorneys as satisfactory in the least regard. It appears that he did not do anything in his

capacity as attorney of record because he was not placed in cover. He also did not withdraw as an attorney of record and he did not bother to inform his opponents, the attorneys of the gold mine, of that fact, that he was not going to attend the meeting. He simply ignored them, and I must infer from the affidavit that he did so deliberately.

Secondly, if the deponent to this affidavit is to be believed, he told some or all of the workers that he was not going to attend the meeting before Judge Pienaar, and told them of what the consequences were likely to be of such failure. They in turn must be taken to have deliberately decided not to attend, one or any, on that day.

The upshot of these circumstances is that notwithstanding the attorney and the workers knowing that there was a pre-trial conference convened for 7 June, each of them, albeit it for slightly different reasons, deliberately abstained from attending.

The plea is made *ad misericordiam*, that the individuals are unsophisticated working people, unfamiliar with the workings of the court, lacking in proficiency in the languages employed in the business of the court, and as such wholly in the hands of their attorneys, and that these things should weigh with me in an understanding of why no attendance took place on that day, and in consequence inure to their benefit in determining good cause. There can be no question that such facts elicit sympathy, and indeed understanding, but it has never been part of the way in which the courts of this land operated, that it is sufficient for an attorney or for a litigant to say, I did not or could not comply with my obligations as a litigant because I was impecunious. An attorney in particular who is placed in the embarrassing situation where he cannot fulfil his mandate, is duty bound to make disclosure of that fact and withdraw, not leave his opponent in the court in

the dark. Where, as I am to accept, at least on face value, full disclosure was made to the litigants that he was unable to fulfil his mandate, regardless of how unfamiliar one is with the affairs of the court, the very least that must be expected of a litigant in such a position is to endeavour to present himself in person and invite the presiding officer in the forum where he is required to attend, to give consideration to his circumstances. This simply was not done. The explanation, as I alluded to earlier on, emerging from the affidavit of Mr Temane, is simply unsatisfactory.

Had there been some basis before me upon which I could assess the merits of the claim sought, I might have been in a position to conclude that notwithstanding the unsatisfactory features of the explanation for the non-appearance, that an excellent case would have so mitigated that deficiency that the bar should be lifted. Alas, there is nothing before me into which I can reach in order to achieve such a solution. I must find that on the papers and facts placed before me, good cause has not been shown as contemplated in the order of Judge Pienaar.

The mine, on the other hand, press an application for the matter to be dismissed. They rely on the facts which I have already alluded to, and on the fact that the matter has been protracted and has given rise to prejudice in one way or another. It seems clear to me that once I have determined that no good cause has been shown for the lifting of the bar, there is no reason why this matter should languish on the current roll in perpetuity. No attempt has been made, other than the application I have already referred to, in response to the judgment of Judge Pienaar, to answer or to rebut the application launched by the gold mine to have this matter dismissed. It is difficult also to imagine what else might have been said, had such a formal resistance been launched.



The workers were retrenched in 1998. They continued to live on the premises of the gold mine for some time, although I should accept for the purposes of this judgment that at the time of this hearing only one remained in *de facto* occupation, and that the rest have returned to homes or have gone to live elsewhere in the countryside. In my view a proper case has been made out to have this matter dismissed for want of prosecution, and in the circumstances I propose to make the following order:

- 1 No compliance has been demonstrated with the order of Judge Pienaar of 7 June 2000, as amended.
- 2 The application for the dismissal of the matter is granted.
- 3 Given the respective parties' economic standing and the practicalities in relation to such matters, I propose that I shall make no order as to costs.