IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG **CASE NO J4116/98**

In the matter between:

MM PRETORIUS **Applicant**

and

BLYVOORUITZICHT GOLD MINING COMPANY LIMITED
Respondent

JUDGMENT

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de VILLIERS AJ

1. This is an application in terms of section 191 (5) (b) (ii) of the Labour Relations Act of 1995 ("the Act") in which the Applicant claims that his dismissal on 24 February 1998, based on the operational requirements of the Respondent, was unfair.

1. Relative to the fairness of the dismissal, according to the pre-trial minute, the parties are agreed that:

1.1. the Applicant's position as safety manager became redundant due to a change in the respondent's operational requirements; and

1.1. the Applicant is bound by the terms of a retrenchment agreement concluded between the Respondent and the union of which the Applicant was a member at the time the agreement.

1. What is in dispute, is that the Respondent failed to properly consider possible avoidance measures and that the Respondent should have considered the following possibilities:

1.1. the Respondent ought to have created a position of chief safety officer at Category 18; and

1.1. the Respondent ought to have paid the Applicant the agreed retrenchment package, appointed the Applicant to the new position and retained the employee, who was appointed chief safety officer, in the position he currently held (that of training officer).

1. In addition, the Applicant contended that consultations regarding the dismissal of the Applicant were not conducted in accordance with the provisions of the retrenchment agreement or in accordance with the provisions of section 189 of the Act.

1. Evidence material to the dispute is as follows.

1. As a result of his position as safety manager becoming redundant, the Applicant was requested by his immediate superior, the Respondent's general manager, Derek Steyn, to prepare a proposal on how his department should be restructured.

2. Five alternative proposals, in which the Applicant suggests that he be retrenched and either be demoted to chief safety officer/safety officer or be employed on retainer as a consultant are attached to a memorandum from the Applicant to Steyn dated 26 January 1998. In the memorandum, the

Applicant, *inter alia*, says the following:

"I realise that the mine cannot employ a safety manager, but must employ a chief safety officer in terms of the Regulations [of the Mines and Works Act]**. I propose that I be retrenched under the present agreement and be re-engaged as a chief safety officer. A retrenchment package could be used to pay the outstanding amount due on my car and that monthly saving would make up for the lowered monthly earnings over 3 years."**

1. It is common cause that the Applicant presented these proposals to the mine's forum (a body made up of representatives of the Respondent and representatives of the various unions involved at the Respondent's mine, which was established as a consultative forum to consider the restructuring of the Respondent) on 14 February 1998.

2. Steyn testified that, after the Applicant had made his presentation to the forum and left, the forum, at the instance of the trade union representatives, decided that a new position combining the position of chief safety officer (which is a legal requirement in terms of the Mines and Works Act) and training officer should be created. This was confirmed in evidence by the Respondent's Human Resources manager, Willie Boshoff.

3. Thereafter Bosoff advised Steyn that, in discussion with the Monitoring Committee, (a structure established in terms of the retrenchment agreement to deal with "specific cases"), it was agreed that the Respondent's training officer, a Willie Nelson, should be appointed to the newly created position mainly because the failure to do so would result in "bumping" (the term used when a senior employee's position becomes redundant and a more junior employee is retrenched in order to make way for the senior employee) and that the Applicant should be retrenched.

“Bumping” is prohibited in terms of the retrenchment agreement.

4. On 20 February 1998, the Applicant was advised in writing that his services with the Respondent had been terminated and he was given 30 days’ notice. However, it is common cause that he left the premises on 24 February 1999 and the parties agreed that his dismissal took place on that date.

5. Steyn testified that after he gave the Applicant the letter advising him that he had been retrenched, he “asked him to come back with things for us to consider, proposals for his re-deployment”.

1. Steyn testified that the Respondent could not afford to retrench and re-employ the Applicant in the new position because it would then also have to pay Nelson a retrenchment package.

2. Boshoff conceded under cross-examination that the Monitoring Committee (as constituted in terms of the retrenchment agreement) had not considered the matter. Instead, he had consulted with a group of five mine-based union officials from a newly-created union, UASA (a merger of the Administrative, Technical and Electronic Association and OASA, the Officials Association of South Africa, the latter of which the Applicant was a member). He testified that this group agreed with his proposal that Nelson be appointed to the new position and that the Applicant should be retrenched. They agreed mainly because, to do otherwise, would have resulted in Nelson being “bumped”. He explained that the forum had delegated the monitoring function to union officials whose members were affected by the decisions of the forum. These officials were required to consult with the heads of departments whose employees were affected by

retrenchments.

3. The Applicant testified that he was unaware, at the time of his retrenchment, that his union, OASA, had amalgamated with another. (It is common cause that at the time of his dismissal, the dues being deducted from his salary were deducted in the name of OASA and not UASA.) He identified three of the five union officials who had discussed his position with Boshoff as being officials of the Administrative, Technical and Electronic Association and the only official representing the Applicant's union, OASA, as being an official from the Doornfontein and not the Blyvooruitzicht mine.

4. Boshoff testified that the Applicant was insistent that he could not take a demotion without being retrenched because he needed the severance package to pay off debt which would enable him to afford the demotion. He testified that the union officials he had spoken to had rejected the Applicant's proposal that he be retrenched and re-employed in the more junior, newly-created position because that would involve "bumping" Nelson. He also confirmed that after the Applicant was given the letter terminating his services (on Friday 20 February 1999) Steyn gave the Applicant the opportunity to return the following Monday with further proposals.

1. Boshoff also testified that, between the 14 and 20 February 1998, the Applicant had approached him on a number of occasions to find out what was going on. He had also had cause to counsel the Applicant because he had heard that the Applicant had been telling other employees that he was going to be appointed Chief Safety Officer. At these meetings, he advised the Applicant that he could not tell him anything until he had

consulted with the union officials. The Applicant denied this saying that Boshoff had told him that he (Boshoff) and he alone would make the decision about who would be retrenched.

1. Taking the approach suggested by the Labour Appeal Court in **Johnson & Johnson (Pty) Limited v Chemical Workers Industrial Union** [1998] 12 BLLR 1209 LAC, I do not intend applying a mechanical 'checklist' to see if the provisions of section 189 of the Act have been complied with in this case.

1. Against the background of the retrenchment agreement concluded by the parties which set the rules by which the retrenchment of the Applicant was to be effected, in order for me to determine whether the conduct of the Respondent relative to the dismissal of the Applicant was fair, I believe the following questions require consideration.

1.1. Did the Respondent have a fair reason to reject the Applicant's proposals?

1.1. Having rejected them, was the decision to select Nelson rather than the Applicant for the newly created position fair?

1.1. Was the decision to retrench the Applicant made in accordance with the agreed alternatively a fair procedure?

1. Answering the first question first. I have no reason to reject the testimony of both Steyn and Boshoff that the reason why the Applicant's proposals were rejected was because the forum, at the instance of the union representatives, decided it would make better business sense to

amalgamate the position of chief safety officer and training officer and create a new position. From the evidence it appears that this was a commercially rational and sustainable decision and that there was no ulterior motive involved and therefore this Court cannot question the commercial imperatives underlying this decision. (In this regard see **SACTWU & Others v Discreto (A Division of Trump and Springbok Holdings)** [1998] 12 BLLR 1228 (LAC). The Applicant adduced no evidence to persuade me otherwise. In any event, because his union was involved in the decision he is bound by that decision. I am therefore satisfied that the Respondent has a fair reason to reject the proposals made by the Applicant in favour of the decision taken at the forum meeting. The Applicant's contention that the Respondent ought to have created the position of chief safety officer and appointed him to that position cannot be sustained.

1. To answer the second question, I must have regard to the terms of the retrenchment agreement relative to selection criteria. The agreement clearly establishes the selection criteria in the event of retrenchment and the process to be followed by the parties in implementing the criteria. What falls to be considered is whether the Respondent applied the agreed selection criteria and the agreed process for selection.

2. This raises a jurisdictional question. Because the criteria are contained in the agreement (which complies with the definition of a collective agreement in terms of the Act), I have considered whether, in fact, the dispute is one which is covered by section 24 of the Act relating to the interpretation and application of a collective agreement. If this is so, then the CCMA and not this Court has jurisdiction to determine the dispute by arbitration.

3. Incidental and necessary, if not fundamental, to the determination of the dispute concerning the fairness of the dismissal of the Applicant for operational requirements, a function conferred on this Court in terms of the provisions of section 191 (5) (b) (ii) of the Act, is a determination as to whether the Respondent applied the agreed selection criteria and followed the agreed procedure for selection as contained in the retrenchment agreement.

1. By virtue of the provisions of section 158 (1) (j) of the Act which empowers the Court to:

"**deal with all matters necessary or incidental to performing its functions in terms of this Act……"**

I believe this Court does have the necessary jurisdiction to deal with this aspect of the dispute.

1. The key agreed criterion, and the one applicable to this case, is that special skills had to be retained. In this regard, the agreement requires that heads of departments identify the skills to be retained and "motivate to the relevant Full Time Officials" (Clause 2.3 and 3.1 of the retrenchment agreement). Should the application of this criterion result in employees ranking equally, then breadwinners and those with continuous group service would be retained, in consultation with the Monitoring Committee.

2. The Respondent (as I understand its evidence through Steyn and Boshoff) justifies its decision to place Nelson, and not the Applicant, in the position of chief safety officer/training officer on two grounds.

2.1. Firstly, it claims that, operationally, in the amalgamation of the two functions (safety and training), it made more business sense that the safety function should be absorbed into the training function. In the words of Boshoff, that “training should drive safety”. Nelson had superior training skills to those of the Applicant and therefore his skills had to be retained at the expense of the Applicant.

2.1. Secondly, the union representatives who consulted with Boshoff agreed to this proposal mainly because to do otherwise would have led to Nelson being “bumped”.

1. As I see it, when the Respondent decided to amalgamate the two functions of chief safety and training officers, it created a new position. The new position was on a different grade (Grade 18) to the positions held by both the Applicant (Grade 20) and Nelson (Grade 16). Therefore as a result of the creation of the new position both the Applicant’s position and Nelson’s position became redundant and they both became contenders for the new position. Hence, on the second point, the Respondent was wrong. Nelson would only have been ”bumped” had the Respondent decided to place the Applicant in the position of training officer and retrenched Nelson as a result. With the creation of a new post on a different grade, “bumping” did not come into the picture because Nelson’s position had become redundant as well.

1. Hence, the critical decision on this aspect of the dispute is whether the Applicant’s or Nelson’s skills were better suited to the newly created position. In this regard, I must find for the Respondent. Once one accepts (and I have no reason to doubt the testimony of Steyn and Boshoff in this

regard) that training was the core function in the newly created position, one must then evaluate the two contenders' abilities as trainers.

1. There is no doubt, on the evidence before me, that, while the Applicant had some, not inadequate training skills, Nelson's were far superior. He had been head of the Chamber of Mines Training College and was conversant with training in the full range of mining activity whereas Applicant's training was limited to the production of course materials in loss control and the evaluation and production of course materials in and presentations on the safety function only.

1. In order to find for the Applicant in this regard, I would have to second guess the wisdom of people who are intimately involved in the industry and know what skills are required. The Applicant failed to convince me that his training skills were sufficient to make him rank equally with Nelson in the race for the new position. Inequality in the ranking meant that, in terms of the agreement, a consideration of his longer service in making the choice between him and Nelson was irrelevant.

1. I therefore find that the selection criterion relative to the retention of special skills was applied and that the selection of Nelson rather than the Applicant for the newly created position was fair.

1. Which brings me to the third question namely whether the Respondent's decision to appoint Nelson to the new position and to dismiss the Applicant, without further reference to the Applicant, was effected in accordance with the agreed procedure alternatively a fair procedure

1. In this regard, the Applicant contends that the process was flawed and unfair because:

1.1. the Monitoring Committee, as constituted in the retrenchment agreement, was not involved in the decision;

1.1. the union officials who met Boshoff and agreed to his retrenchment were not **full-time** officials; and

1.1. the officials who met Boshoff were not his representatives (they were unknown to him, they did not know about his qualifications and experience and were not sufficiently senior to represent his interests properly).

1. As to the first point raised by the Applicant, the agreement does not require consultations or discussion, where retention of skill is an issue, to take place with the Monitoring Committee. As I understand the agreement, the function of the Monitoring Committee is to monitor the progress of the retrenchments and "specific cases". I am unable to make a finding as to whether the Applicant's case would have qualified as a "specific case" as no evidence was led in this regard.

1. As I see it, with regard to the second point raised by the Applicant, in terms of the agreement, the Respondent was obliged to motivate and discuss its proposal to appoint Nelson and not the Applicant to the new position (because it involved the retention of special skills) with the **full-time** officials of the unions and associations which were party to the agreement (in terms of clauses 2.3 and 3.1). There is no evidence before me that the Respondent motivated its decision to keep Nelson and

retrench the Applicant with the full-time officials. On the evidence, the only discussion which took place with the full-time officials was in the forum where the decision to amalgamate the safety and training functions was discussed. As to who had the skill to fill that position, that was still to be determined.

1. On the Respondent's own version, the people to whom Boshoff motivated the decision to retain Nelson and not the Applicant were not full-time union officials but rather mine based officials and therefore the Respondent was in breach of the written agreement

1. I have attached very little weight to Boshoff's testimony that the forum dispensed with the agreed procedures in favour of the procedure which was followed and am in agreement with the Applicant's argument that this testimony is somewhat "suspect" for the following reasons.

1.1. Boshoff's evidence in this regard was that of a single witness and must, in any event, be treated with some caution;

1.1. Throughout his evidence-in-chief, Boshoff represented to the Court (as he had to Steyn) that agreement with regard to the appointment of Nelson had been reached with members of the Monitoring Committee. Only under cross-examination did he concede that the Monitoring Committee (as constituted) had not been party to the discussion or the agreement reached.

1.1. The evidentiary burden of proving that the written agreement had been varied in the way alleged by Boshoff lies with the Respondent. The Respondent adduced insufficient evidence in this regard persuade

me, on a balance of probability, that it had been varied and hence failed to discharge the burden.

1. I therefore find that the Respondent did not follow the agreed procedure.

1. The question then is: having departed from the agreed procedure, was the procedure which was followed fair?

1. The Respondent argued that the departure from the agreed procedure was technical in nature and that the only difference between the representatives which took part in the discussion and the Monitoring Committee as constituted in the agreement was the absence of two management representatives at the meeting. In this way, contends the Respondent, the Applicant got more rather than less representation that he would have got had the agreed procedures been adhered to.

1. The Respondent has missed the point. What was required, in terms of the agreement, given the criterion being applied, was motivation and discussion with the **full-time** union officials, not the Monitoring Committee. Whilst it would be incorrect, generally, to adopt an overly formalistic approach in respect of the status of an employees' representatives in the consultation process, the Respondent's failure to consult with the full-time officials and rather rely on the fruit of discussion with the officials with whom it alleges it did consult, in the circumstances of this case, is not a mere technical breach of procedure.

1. There is a material difference between what full-time union officials bring to the process of consultation and what company-employed shop

stewards contribute. Full-time officials are, by virtue of their position, independent of any company influence. Being paid from the dues of all members they are able to enter into debates, such as the one raised by the facts of this case, with greater objectivity and even-handedness. Also, full-time officials have a greater depth of experience and knowledge of what is required in a proper consultation process.

1. In this case it was even more important for the Respondent to engage with the full-time officials, at a distance from the mine, because Nelson was himself a mine-level union official. The Appellant is justified in querying the *bona fides,* objectivity and fairness of a process which involved only the colleagues of his rival for the position.

1. The Respondent's representative argued that, after Boshoff had told the Applicant that the decision regarding his position would be discussed with the union officials (on the evidence of Boshoff that was not challenged in cross-examination), the onus was then on the Applicant to seek out these officials and make representations to them. Although the Applicant conceded that he could not recall everything Boshoff said, he was insistent that he never believed he was going to be retrenched without being offered re-employment as chief safety officer. He also testified that, at the time of his discussion with Boshoff, he did not know about the forum decision to create the new position.

1. From the evidence taken as a whole, it appears that, even if one accepts Boshoff's version, the Applicant had no reason, at that stage, to believe that he was going to be retrenched without any alternative offer of employment. For six days (between the date on which he made his representations to the forum and the day he was advised that he had been

retrenched), the Applicant was kept in the dark, unaware that his proposals at the forum had been rejected and that the "organized labour" officials that Boshoff was talking to behind closed doors were not the full-time representatives that the Applicant knew and expected to be party to discussions about his future. Had the Applicant been aware of what was taking place, there might be a basis for the Respondent's argument in this regard. But, in the circumstances, there is no reason to for the Applicant to have thought it necessary to brief his representatives.

1. Given the sensitivity of the choice facing the Respondent and taking into account that the two key decision makers, Boshoff and Steyn, had been at the mine but a few months, the Respondent was obliged to ensure that the consultation process met the requirements of its own agreement which ensured, where skills were being compared, an objective input from the full-time officials. Instead it disregarded the agreement and entered into discussion with mine based officials from (on its own version and merely the *ipsa dixit* of Boshoff) a newly formed union with scant, if any, proof that the Applicant was even a member of the new union. (A copy of the Applicant's salary advice slip issued by the Respondent at the time of the retrenchment indicates his membership of "OASA" not "UASA" (the new union)). At best for the Respondent it seeks to rely on the fact that one of the five officials who spoke to Boshoff was an official of OASA. Boshoff did not contest that Applicant's evidence that this official was in fact from another mine and, as I understand it, had only been recently transferred to Blyvoortuitzicht).

1. The facts of this case are not the same as those in other disputes where this Court has found that employees are bound, through the law of agency, by agreements reached between the employer and their union. In

those cases representations were made, from employee to employer, that the union had the necessary authority to represent his or her interests in the consultation process and hence they were estopped from denying the authority. (In this regard see **Ngcobo & Others v Blyvooruitzicht Gold Mining Company** J1178/98 unreported and **Molatudi & Others v Centurion College** J2420/98 unreported). Here there was enough reason for Boshoff to have been on his guard regarding these officials' authority to properly protect the Applicant's interests in the consultation process and to agree to his retrenchment particularly in view of the fact that, on Boshoff's version, the Applicant pestered him almost daily (during the six days following the day on which the Applicant made his presentation to the forum and the day on which the Applicant was advised that he had been retrenched) for news of what was happening regarding his retrenchment. This, in itself, must have alerted Boshoff to the fact that the officials that he was consulting were not in touch with the Applicant.

1. The evidence of the Respondent's witnesses suggests that further consultation with the Applicant was unnecessary in any event because all his proposals had envisaged him being retrenched and that, in discussion, he had indicated that he could not accept a demotion without being paid the retrenchment package. Also that he could not perform the work of safety officer which involved "crawling around in the stopes".

1. What the Respondent has lost sight of is that the Applicant's proposal (that he be retrenched) was inextricably linked to a condition - that he would either be re-employed or engaged as an independent contractor. It was in this context that the Applicant voiced his financial and other concerns. Confronted with a choice between demotion or the outright loss of work, the Applicant may have seen the picture a little differently.

1. The onus was on the Respondent to persuade me that it either followed the agreed procedure or, having failed to do so, embarked on a procedure which was fair to the Applicant. This it has failed to do. The Respondent's half-hearted attempt at redress after it advised the Applicant that he had been retrenched by asking him to come back with suggestions, does not take the matter any further. As the Applicant's representative correctly argued, giving the Applicant a final notice of termination coupled with an invitation to return with suggestions after the weekend or merely giving the Applicant an opportunity to make representations or give advice does not satisfy the requirements of section 189 of the Act (**Chetty v Scotts Select a Shoe** (1998) 19 ILJ 1465 (LC); **Ellias v Germiston Uitgewers (Pty) Ltd** [1997] 12 BLLR 1571 (LC)).

1. Hence, while I have no difficulty in finding that the dismissal of the Applicant was substantively fair, the procedure was not.

1. Which brings me to a consideration of the appropriate remedy. The Applicant has not asked for reinstatement and, in any event, it is not appropriate having regard to the provisions of section 193 (2) (d) of the Act. I must therefore consider the appropriate quantum of compensation to award the Applicant.

1. In accordance with the principles laid down by the Labour Appeal Court in **Johnson and Johnson** (supra), I have the discretion to award the Applicant nothing or the statutory amount set out in section 194 (1) of the Act - an amount equal to the remuneration the employee would have received between the date of dismissal and the last day of the adjudication or arbitration.

1. The only guidance given by the Labour Appeal Court as to how this "all or nothing" discretion ought to be exercised is at 1220A where Froneman DJP says the discretion not to award compensation must be exercised judicially and at 1220C-D where he says the following:

"The nature of an employee's right to compensation under s.194(1) also implies that the discretion *not* to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of s.194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

1. Subsequent to **Johnson and Johnson** (supra)**,** this Court has introduced the principle of fairness into the equation. (See **Whall v Brandadd Marketing (Pty) Limited** J1130/97 unreported **; Lorentzen v Sanachem (Pty) Limited** D637/98 unreported; **de Bruyn v Sunnyside Locksmith Suppliers (Pty) Limited** J361/98 unreported)

1. Applying these guidelines to the facts of this case, the Respondent's offer to the Applicant, after its general manager had given him the letter advising him of his retrenchment, to come back with "things for us to consider, proposals for re-deployment" (on the Applicant's version he was told that he could "come back on Monday if I had any questions or suggestions") does not amount to "substantially the same kind of redress" (**Johnson and Johnson** (supra at 1220 C - D)) and no evidence was adduced to suggest that the Applicant frustrated "the employer's ability or willingness to provide redress" (**Johnson and Johnson** (supra at 1220 C-D).

1. Although, by applying the statutory formula in section 194 (1) of the Act the quantum is indeed substantial and some evidence regarding the Respondent's financial difficulties was led (that, at the time of the retrenchment it was experiencing critical financial constraints due to the low gold price and that it could not afford to retrench and then re-employ the Applicant and retrench Nelson) no evidence was led as to the Respondent's inability to pay compensation should it be awarded. Given the Applicant's status with the Respondent, his age and what he lost by way of benefits and income as a result of the retrenchment (he testified that he lost R580 000 by having to cash in his pension three years before time, that his monthly pension was R8 500 less than it would have been had he been able to stay on until retirement and that the only employment he had managed to secure earned him about a third of what he was earning at the time of the retrenchment), fairness demands that he receive some compensation for the unfairness and therefore I am bound to apply the statutory formula.

1. More than 12 months had elapsed between the date of the Applicant's dismissal and the last day of the hearing of this dispute. Following the reasoning of Maserumule AJ in **Vickers v Aquahydro Projects (Pty) Limited** [1999] 6 BLLR 620 (LC)**,** I believe the Court must limit compensation for procedural fairness to an equivalent of the remuneration the employee would have earned over a 12-month period. According to the Applicant's last payslip (dated 28 February 1998) his normal pay is reflected as being R10 919,00. The only other amounts reflected under the "Earnings" column are travelling claims (R473,00), a car allowance (R4236,00) and share options (R15 733,31). Of these three amounts, only the car allowance would qualify as remuneration (see **Staff Association**

for the Motor and Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Limited [1998] 6 BLLR 616 LC) and it has therefore been included in the calculation.

1. I therefore make the following order.

1.1. The dismissal of the Applicant was substantively fair but procedurally unfair.

1.1. The Respondent is to pay the Applicant the sum of R181 860,00 (One Hundred and Eighty One Thousands Eight Hundred and Sixty Rands) within 30 days of the date judgment.

1. There is no order for costs.

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I de VILLIERS AJ

Date of Hearing	:	24 - 27 May 1999
Date of Judgment	:	25 August 1999
For the Applicant	:	Advocate S D Maritz instructed by Tienus Roos Attorneys
For the Respondent	:	Attorney D J Pretorius