IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J1568/99

In the matter between:

JAN GRAHAM STEYN	First Applicant
SLAWOMIR ZBIGNIEW JARECKI	Second Applicant
ROLAND EARL ILOTT	Third Applicant
WESSEL JOHANNES GERBER	Fourth Applicant
RALPH WILLIAM DOUGLAS MAPHAM	Fifth Applicant
GERHARDUS JOHANNES BEUKES	Sixth Applicant
HENNIE FERREIRA	Seventh Applicant
ABEL GERHARDUS WALDECK	Eighth Applicant
HENRY BOWLER	Ninth Applicant

and

DRIEFONTEIN CONSOLIDATED LIMITED t/a WEST DRIEFONTEIN	Respondent

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JUDGMENT

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JAMMY AJ

Introduction.

1. The mining group, Driefontein Consolidated Limited, was comprised of three divisions, East Driefontein, Driefontein Deeps and West Driefontein, which is the division cited in these proceedings and which for the sake of convenience, will be referred to hereafter as the Respondent.
2. In or about December 1997/January 1998, a corporate merger between Goldfields of South Africa Limited, of which the Driefontein Consolidated

Limited group was part, and Gencor Limited, spawned an entity known as Goldfields Limited. The Applicants in this matter had, at that time, varying lengths of service with different companies formerly falling within the Goldfields of South Africa Limited group.

3. That group, during 1997 and prior to the corporate restructuring above referred to, had commenced a programme known Vulindlela. Mr A R Bloom, at the time the Communications Manager of the Respondent, testified that the objective of that programme was to restructure and revise reporting levels and operational methods "entrenched in traditional prehistoric processes", in order to render the group internationally competitive and to ensure its survival into the new millennium.

4. The grading structure applicable in the Respondent's operations is known as the Patterson System and the categories of employees to which it is applied are defined in various bargaining units. They are the following:

4.1 Mine labourers, who fall within a bargaining unit made up of Grades 3 to 8 and who are in the main represented by the National Union of Mineworkers ("NUM").

4.2 Artisans, colloquially referred to as "union men", the majority of whom are represented by the Mine Workers Union ("MWU").

4.3 Officials, principally represented by the United Associations of South Africa ("UASA"). This unit comprises three subdivisions, each with an upper and lower level and which are known as C-Band, D-Band and E-Band. In the context of that particular benefit to which they are entitled in that regard, officials in the D-Band and E-Band are colloquially referred to as "company-car drivers." All employees in the C, D and E Bands are graded 9 and higher in the Patterson system and, within the Respondent's hierarchy, are referred to as "category 9 and above" employees.

The material facts.

5. The merger of its corporate constituents and the transfers and combinations of assets into the Goldfields Limited entity necessitated a broad restructuring

programme which, inter alia, radically affected the internal corporate structure of the Respondent and the testimony presented by its witnesses and the documentation submitted to substantiate it, indicates a series of consultations with its executives in that regard. Notice of and details regarding the merger were conveyed in meetings, initially on 25 November 1997 when all the Applicants other than the Second Applicant were present and then on 19 January 1998 when details of what was referred to as "the most significant restructuring that our company has seen in its 110 year history", were comprehensively traversed.

6. On 3 February 1998, Mr Bloom circulated an executive team brief dated 2 February 1998 - the specific day upon which the new entity, Goldfields Limited, was listed on the Johannesburg Stock Exchange - to all the Respondent's heads of department, supervisors and company-car drivers. It included the following pertinent statement:

"We are busy with consultations about possible retrenchments, there are two recruitment and selection processes running concurrently, and soon we will be moving people to new positions and start separating the business of Goldfields Limited and GFSA. All of this while our operations and this head office are faced with some very crucial business challenges."

The brief concluded with the following statement:

"The next few weeks are going to be taxing on every person in GFSA and Goldfields Limited. The executive and senior management are committed to do everything within our power to ensure that the transition for the company and each individual is as smooth, fair and painless as possible. I invite you to join us in our efforts to ensure that the process is credible and successful. If you have any suggestions on how the process can be improved, at any level, please let us know."

7. The series of consultations then continued and by now involved all appropriate

trade unions and associations including the Mine Workers Union, the National Employees Trade Union, the South African Electrical Workers Association and the United Association of South Africa. At one such meeting, on 3 March 1998, the Mine Manager informed those present that a retrenchment was contemplated of approximately 5000 employees.

8. Detailed briefings to all employees in the category 9 and above bands ensued, alternatives to retrenchment were canvassed and a draft retrenchment agreement was submitted by management and circulated to the representatives of the unions and associations involved.

9. The issue of retrenchment was then specifically addressed in a circular from the Mine Manager to all employees on 19 March 1998. It is of relevance that reference therein was made to consultation with various employee organisations in categories 2 to 8 and, with regard to category 9 employees, to meetings with "unions and associations representatives to consult on measures to avoid or minimise job losses." Reference was specifically made to the effect on residential, medical aid and pension benefits in the event of retrenchment.

10. The concept of voluntary retrenchment as an alternative to forced retrenchment was canvassed at subsequent meetings which now included the National Union of Mineworkers. Negotiations continued towards the conclusion of a retrenchment agreement and eventually, an agreement, signed variously at the end of March and early in April by the parties thereto, was entered into by the Respondent on the one hand and the Mineworkers Union, the National Employees Trade Union, the South African Electrical Workers' Associations and the United Association of South Africa (collectively referred to therein as "the unions/associations") and which would be applicable to the retrenchment of any employee in category 9 and above for the duration of the agreement, which was expressly stated to constitute a collective agreement for the purposes of the Labour Relations Act and any other relevant legislation and which would be valid "for the period of 1997/1998 wage accord."

11. Pursuant to the consultations to that date, applications for voluntary retrenchment were then invited, a separate agreement between the Respondent on the one hand and NUM and UASA on the other was concluded relating to the retrenchment of employees in categories 3 to 8 and a series of meetings then ensued between representatives of UASA and management relating to the specific circumstances of those D-Band employees known as the company-car drivers. The thrust of those meetings related to the re-negotiation of severance packages previously canvassed and it was agreed, at a meeting on 27 March 1998 that a negotiating team, elected by and representing D-Band employees, would thereafter pursue consultations with Respondent's management in a joint negotiating body to be known as the "D-Band Forum."

12. A series of meetings of the D-Band Forum then ensued during April 1998, culminating on 21 April in a formal agreement between the Respondent on the one hand and the D-Band Forum on the other relating to the proposed retrenchment of company-car drivers.

13. That agreement recorded inter alia that reasonable notice of the Respondent's intention to retrench and the reasons for it had been furnished, that the approximate number of employees likely to be affected as well as their designations, job categories and departments would be conveyed, that various specified alternatives would be considered with a view to the avoidance or minimising of the retrenchment programme, particularly with reference to possible vacancies in other companies in the Goldfields Limited group, that selection criteria, benefits upon retrenchment and the formulation of severance package remuneration had been agreed upon and that the terms and conditions of the agreement "would constitute a full and final settlement of this retrenchment process conducted at the company."

14. It is common cause that on 22 June 1999 the agreement was extended for a further period of one year and that on 12 June 2000 it was extended for a further year.

15. Pursuant to the agreements concluded by it respectively with NUM and the D-Band Forum, the Respondent embarked on an ongoing process of retrenchment. In the result, approximately 4500 applications for voluntary retrenchment were accepted, a process of "flattening" the reporting structures within its separate mining operations was commenced, resulting in a series of forced retrenchments and in particular the closing down entirely of one of its shafts and, later in the year, the determination that one such operation, known as the Raise-Bore operation was surplus to its requirements. This in turn again resulted in various retrenchments both voluntary and forced, all of which were conducted, the Respondent submits, in accordance with the agreements which had been reached without dispute or challenge from the parties thereto.

16. During September 1998, the newly appointed Technical Manager of the Respondent, Mr A Smit, was directed by the new Mine Manager of the Respondent, Mr G Nell, to review existing structures in the Respondent's technical department and to present proposals for such changes therein as would accord with the Respondent's stated aim of flattening its structures. Smit implemented that instruction through a process of workshops attended by heads of department within the affected division.

17. In November 1998 the Respondent concluded an agreement with UASA which provided, inter alia, for the appointment of a "full-time association representative", to be regarded by the parties as an authorised agent of UASA and whose primary functions were defined to include the following:
"To seek mandates from the employees he represents;
To, through the process of liaising, consulting and negotiating at the appropriate levels with company management on issues of mutual concern, promote safety, monitor and promote harmonious and productive working relationships between members of the Association and the company."
The person appointed to that position pursuant to that agreement, was certain Mr Eddie Dye.

18. Pursuant to Nell's instruction to Smit to investigate existing structures in the technical department and the extension thereof to the structures in the Human Resources Department with Bloom, then acting as the relieving Human Resources Manager also being involved in the exercise, Bloom proposed a new structure for the Human Resources Department in which, inter alia, the position of hostel manager was found to be redundant and surplus to the needs of the Respondent. The Third Applicant in this matter, Mr R E Ilott, was the incumbent in that position and Bloom's proposals were submitted to and endorsed by Nell.

19. The situation in the technical department was reviewed and certain positions therein were identified as being redundant, by Smit. These included the position of Chief Engineer, at the time held by the Second Applicant, Sectional Engineer in the metallurgical department, held by the Fourth Applicant, Ventilation Engineer in the environmental department, held by the Sixth Applicant, Chief Electrician, held by the Ninth Applicant, two Engineering Supervisor positions, respectively held by the Fifth Applicant and certain Campbell and Engineering Technical Assistant in the risk co-ordination department, held by the First Applicant.

20. Two other positions, neither of them in either the technical or Human Resources Departments, were also identified as being redundant and these were the position of Raise-Bore supervisor, held by the Eighth Applicant and Acting Chief Electrician at the Respondent's No 6 Shaft, held by the Seventh Applicant.

21. I have made earlier reference to the closure of the Raise-Bore department. It is common cause that when that occurred the Eighth Applicant, Mr A G Waldeck, applied for voluntary retrenchment and that his application was approved but aborted in the face of an ongoing security investigation involving him.

22. On 30 December 1998 the gravamen of the analyses thus carried out and the

positions identified therefrom as redundant were communicated by Bloom to UASA in the person of the association representative Dye. The individuals holding the 13 positions affected were all members of the Respondent's senior management and Bloom testified that what was then agreed was that each individual would be apprised of the overall state of affairs and his own resultant redundancy in a separate interview, that alternative employment would be sought for him elsewhere in the group and that in the event of vacancies thus being identified, interviews would be set up and if no alternative employment resulted therefrom, further discussions would be held regarding retrenchment packages. This process was to take place during the first week of January 1999 and the association representative if he wished or was so required, "would be welcome to attend interviews or seek clarity on behalf of members."

23. Separate meetings were then held by Bloom with the Third and Seventh Applicants in which they were informed that their positions had become redundant.

24. A critical meeting was convened by Smit on 31 December 1999 with members of the various departments falling within the technical division and at which, Smit testified, he described to them in detail the new structure which had been approved and was to be implemented and in which he identified the positions which had in consequence become redundant.

25. Later the same day Nell telefaxed a letter to the Managing Directors of the Driefontein Consolidated, Kloof and Free State Mines and all mine managers, identifying the specific positions and their employment levels which had become redundant and requesting information as to whether any of the persons thus affected could be placed at their mines. The association representative, Dye, was similarly informed by Bloom. It is common cause, as it emerged in the course of the following few days, that none of the affected persons could be accommodated in any of the other operations within the Goldfields Limited Group.

26. On 5 January 1999 therefore, Nell, in his capacity as Mine Manager, addressed a letter to each of the Applicants, in essence in identical terms. Each was informed that his service with the company was being terminated as a consequence of the "downscaling of operations, due to operational requirements and gold price constraints" and the necessary "review of the company's employment position." The terms and conditions to be applied to that termination and which, it was pertinently stated, had been "agreed to by the Unions and Associations" were then set out in detail. These included a notice period of thirty days, the severance benefits to be paid and ancillary aspects relating to housing, medical aid, loans and the position regarding company vehicles.

It is in my view apposite to record at this stage that the evidence which I have reviewed was presented *viva voce*, with reference where appropriate and relevant to substantial documentation before the Court, solely by the Respondent's two witnesses, Messrs Bloom and Smit. None of the Applicants testified and nor was any other form of direct evidence adduced on their behalf. The Applicants' case is structured solely on inroads into the validity, and concessions submitted to have been extracted in the course of, the Respondent's testimony by way of cross-examination.

28. The Applicants contend that their retrenchments were both substantively and procedurally unfair and in their Statement of Claim, identify seven specific areas of dereliction on the part of the Respondent in that context. They are the following:

i. None of them was privy to the conclusion of the retrenchment agreement between the Respondent and the D-Band Forum.

ii. The majority of the Applicants were only apprised of their possible retrenchments when they received the letters from the Respondent to which I have earlier referred, informing them of the termination of their services.

iii. They were not consulted regarding the new structures of the affected departments which were presented to them at the end of December 1998.

iv. The Respondent, they contend, "failed to appreciate the uniqueness of the positions" of the Applicants and should have advised them, at a far earlier stage, that they would be affected by the restructuring.

v. The Respondent's selection criteria were meaningless in relation to the positions held by the Applicants.

vi. The Respondent failed to disclose relevant information to the Applicants to enable them properly to consult and finally and addition to those areas of alleged non-compliance with s189 of the Labour Relations Act 1995,-("the Act").

vii. they were unfairly discriminated against by the Respondent "in that there was no consultation on their selection for retrenchment or on the reason why it was necessary for the Applicants to be retrenched as part of the cost saving exercise." This, it is submitted, constitutes a residual unfair labour practice as contemplated in Item 2 of Schedule 7 of the Act.

The issues.

29. The disputed issues which fall to be determined on the evidence before this Court are defined in a pre-trial minute filed by the parties, as being

whether there was a need to retrench the Applicants;

whether the series of 8 meetings, traversing the period 3 March 1998 to 16 April 1998 "constituted part of the process of consultation as far as the Applicants' retrenchments are concerned"; and

whether the retrenchment agreements concluded on 26 March 1998 and 21 April 1998 were applicable to the retrenchment of the Applicants and if so, whether there was compliance by the Respondent with the terms of those agreements.

<u>The substantive issue.</u>

30. That the onus to establish the substantive justification for retrenchment for operational reasons rests with the employer, is not open to question. In **Mamabolo & others v Manchu Consulting CC (1999) 20 ILJ 1826 (LC)** that issue was examined by the Labour Court. At 1831, **Van Niekerk AJ** said this:

"The first issue that the court is required to determine is the substantive fairness of the applicants' dismissal. S188 of the Labour Relations Act 66 of 1995 (the LRA) requires an employer that dismisses an employee for reasons relating to operational requirements to establish a fair reason for the dismissal. The approach adopted by this court is to require the employer to provide substantive proof of a need to retrench in the form of a commercially rational and sustainable reason, but not to question the commercial imperatives that underlay that decision, unless some ulterior motive is established. In other words, it is not the function of the court to second-guess the employer's decision to retrench. It is not appropriate to intervene only because the decision taken by the employer was not the one to which the court would have come in the same circumstances."

31. Stated differently, it is the employer's prerogative, provided that it is exercised rationally, in good faith and transparently, to determine the parameters, the direction, the structure and the objectives of its business operations. The competitive challenges prevailing in the commercial sphere will invariably be differently assessed and addressed from enterprise to enterprise and how this is done will inevitably bear emphatically on the success or failure of the business concerned. The role of this Court is not one of a judgmental business consultant or adviser and it will not readily presume to dictate or prescribe to commercial sophisticates or industry captains how they should direct or manage their business affairs.

32. The Respondent's testimony that, having identified the necessity to achieve a more cost effective deployment of personnel in the face of a reporting structure bedevilled by what it described as traditional and prehistoric processes, it perceived the necessity to flatten those structures, was not subjected to any commercially-based challenge, whether in the form, as I have stated, of direct rebutting evidence or by way of material cross-examination.

33. The review, in the course of the testimony presented by its witnesses, of the presentation and disclosure at various times and in various forms to its line management and employee body, indicates what is to my mind an acceptable level of transparency and broad statement of intent in that context. The possibility of retrenchments as an element of the exercise was in a broad context raised as early as 3 March 1998 when, at a meeting specifically recorded as being the first in the process required by s189 of the Act, the Mine Manager indicated that consultations on the issue should start as soon as possible, having regard to the urgency of a situation in which the Respondent "could not sustain any more serious financial losses."

34. The number of persons potentially to be affected in the proposed programme negated any realistic possibility **at that stage** of consultation other than on a representative basis and it is not disputed that unions and associations representing employees of the Respondent across the board, were involved in the process virtually from its outset.

35. Each of the Applicants, as is common cause, was an employee in the D-Band category and there can be no doubt in my view, that the retrenchment agreement concluded by the Respondent on 26 March 1998 with the various unions and associations therein defined, including UASA, was in its broad terms applicable to all of them. Of further significance in that context moreover, was the establishment of the D-Band Forum and the consultations specifically directed to the special circumstances of the "company-car drivers" whose interests it represented. Once again, the Respondent's testimony regarding the series of consultative meetings which culminated in the retrenchment agreement between the Respondent and the D-Band Forum concluded on 7 April 1998 was not disputed.

36. The D-Band agreement, which was comprehensive in its terms, was in operation at all times material to the dispute following its conclusion. It is a fact however, as the Applicants contend, that although they fell within the constituency to which it was directed, individuals to whom its terms might be

applied in the future were not identified. The fact however that at that time, their retrenchment was not envisaged, does not suggest to me that if, at any time in the future, that possibility or likelihood arose, a reversion to the terms of that agreement as being the governing general manifesto, would not be required.

37. There seems to me to be merit moreover, in the Applicants' submission that, in the light of letters addressed to them as late as 11 November 1998 by the Mine Manager in terms of which, with effect from 1 November 1998 their employment status and conditions were set out in detail and confirmed, they were justifiably lulled into the belief that whatever was taking place in the broad environment around them, they were not being or to be affected thereby.

38. No evidence was presented by the Respondent to indicate any consultative meetings between April 1998 and November 1998, when the association representative, Eddie Dye, emerged in essence as the collective bargaining representative. Mr Dye's direct involvement thereafter appears for the first time to have been on 30 December 1998, when he was informed of the positions which had been determined as redundant and the individuals thereby affected.

39. The further testimony by the Respondent's witnesses regarding Smit's briefing meeting on 31 December 1998 and the correspondence emanating from management which ensued thereafter, serves in my view to substantiate what is in any event the uncontested submission by the Applicants that no earlier direct indication of their demise as employees of the company had been received by them.

40. Patently, at that stage, their selection for retrenchment and the criteria applied by the Respondent in making, it were presented to them as *faits accomplis* and whether or not these were valid and justified is, to my mind, irrelevant to the fact that none of the Applicants was afforded any realistic opportunity to

debate or to contest them or meaningfully to attempt to divert or persuade the Respondent from its indicated course of action insofar as it affected them as individuals. It may well be, as the Respondent contends, that aspects such as the retention of skills and the broad internal restructuring presented by Smit on the last day of the year, were unassailable but this does not negate the clear entitlement of the individuals thereby affected to to seek appropriate assurance that, to the extent that the D-Band Agreement was now being specifically applied to them, it terms and provisions were being rationally and equitably implemented.

41. Irrespective therefore of the fact that the Applicants themselves did not elect to testify in these proceedings, the undisputed facts of the matter as they emerge from the Respondent's evidence indicate that, whilst the broad imperatives of Section 189 of the Act were met on a general basis in the context of the overall restructuring exercise, there was a radical failure on its part to have afforded the Applicants a meaningful opportunity to consult "at the death" so to speak, on aspects and factors which they perceived as materialy relevant to their individual circumstances. Whether or not this rendered that dismissal unfair however, is a separate question. In **Sikhosana & others v Sasol Synthetic Fuels (2000) 1 BLLR 101,** Brassey AJ, at 106D said this:

"The relationship between the dictates of s189 and those of fairness is not one to one, however. It cannot be assumed that every breach of s189 necessarily makes the retrenchment unfair: every invalid dismissal will doubtless be unfair but, as I have tried to make clear, not every dismissal in conflict with the section will necessarily be - or be treated as - invalid. It would be even more dangerous to assume that every retrenchment in compliance with the section is necessarily fair. Section 189, which (with one exception of no relevance here) deals only with matters of consultation, is obviously not intended to be exhaustive. A court determining the fairness of a retrenchment must consider, in addition to the matters for which the section provides, whether the employer really needed to retrench, what steps he took to avoid retrenchment, and whether fair criteria was

employed in deciding whom to retrench. Compliance with s189, in short, is neither a necessary nor a sufficient condition for the fairness or unfairness of the applicable act of retrenchment. The section gives content and colour to fairness in retrenchment and its significance as such should not be underrated; but ultimately it provides only a guide for the purpose, and cannot be treated as a set of rules that conclusively disposes of the issue of fairness."

See also -

Fletcher v Elna Sewing Machines Centres (Pty) Ltd (2000) 3 BLLR 280 (LC).

42. I have concluded, as I have indicated, that as far as the individual applicants were concerned, the basic consultation requirement of section 189 of the Act was not, in all the circumstances of this matter, satisfied by mere reference to the broad provisions of the D-Band agreement or by the mere notification to the association representative of what already, at that time, had been finally decided. Certainly there is no suggestion that Eddie Dye in that capacity was invited or sought in any respect to challenge, question or debate the issue. The analysis in the *Sikhosana* case to which I have referred therefore, whilst of undoubted validity in its broad terms, does not in my opinion bear on the present dispute. On the narrow issue of inadequate consultation regarding the factors and criteria applied in their individual identification for retrenchment, whether valid and justified or not, the termination of the Applicants'employment, in the manner and in the circumstances in which it was effected, was to my mind unfair.

43. I turn in conclusion therefore to the relief to which I consider that they are entitled. As far as the Eighth Applicant, Waldeck is concerned, I agree with the submission on his behalf that his application for voluntary retrenchment was superseded by the notice of termination contemporaneously given to him. On any assessment, the Respondent intended to retrench him and no basis, in my view, exists for his differential treatment in that context.

44. The commercial rationale for the restructuring which gave rise to it having in my view been established, the dismissal of the Applicants was, as contemplated in **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC),** unfair solely for want of adequate compliance with a proper procedure. No suggestion or submission has been made to me as to why the discretion reserved to me as to whether or not to award them compensation should not be exercised in their favour and on that basis, they are entitled, by way of a *solatium*, to an amount equivalent, in terms of the statutory prescribed formula applicable in the circumstances of this case, to 12 months remuneration, calculated at their respective remuneration rates prevailing at the time of their dismissals, subject however to the deduction therefrom of the amounts already paid to and received by them as retrenchment packages when they were dismissed.

45. I have concluded however that their reinstatement is not in the circumstances appropriate. In the first instance, that was not an element of the relief initially sought by their legal representatives when demand was first made on the Respondent on their behalf. Secondly, nearly two years after the event and at a time when, during that considerable period of time, the Respondent has presumably operated on the radically restructured basis which rendered the positions held by them redundant, their reintegration in the business operations of the Respondent would in my view be impractical and inequitable. Pertinently in that regard moreover, no evidence was presented by any of the Applicants as to what, in the prevailing circumstances, they might see themselves as willing or able to do in the Respondent's restructured operations or as to the terms and conditions in that regard which would be acceptable to them.

46. In all the circumstances of the matter, and for the reasons which I have stated, the order that I make is the following:

The termination by the Respondent of the employment of the First to Ninth Applicants was unfair for want of a fair procedure.

The Respondent is ordered to pay to each of the First to Ninth Applicants an amount equivalent to 12 months remuneration, calculated at the rate of remuneration prevailing at the date of his dismissal but subject to the deduction therefrom of the total amount received by him as a retrenchment package at the time of his dismissal.

The Respondent is to pay the Applicants' costs.

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B M JAMMY
Acting Judge of the Labour Court

17 October 2000

Representation:

For the Applicants: Mr G Higgins: Sampson Okes Higgins Inc

For the Respondent: Adv R Hutton instructed by Leppan Beech Attorneys