IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J1152/98

In the matter between:

Applicant

and

Respondent

JUDGMENT

FRANCIS AJ

1.This is a referral for adjudication to this Court in terms of section 191(5)(b)(ii) of the Labour Relations Act 66 of 1995 (the Act). The applicant alleges that the reason for his dismissal is based on the respondent's operational requirements. He contends that his dismissal was unfair *inter alia* in that he was not consulted.

2.Both parties called one witness each.

3.There are not material disputes of facts in this matter.

4.The respondent called Antonius Jacob Vandenmunckhof as a witness. The respondent's version is that prior to 1997 there were four separate mining companies each with their own legal personality. During June 1997 the four mining companies amalgamated and became the Evander Gold Mines Limited, the respondent in this matter. Soon after the amalgamation of the four separate companies the applicant was given a letter of appointment dated 7 July 1997 to confirm that he was now part of the amalgamated company. He was also given a letter confirming that he had been appointed as a training practitioner as required to in terms of section 7(2) of the Mines Health and Safety Act No 29 of 1996. The respondent was bought over by the Harmony Gold Mine in August 1998. In 1997 Vandenmunckhof was the Industrial Relations Manager for the Kinross Mine which later became part of the respondent.

5.A restructuring process started in 1997 after the amalgamation of the four different companies. The respondent suffered financial losses and commenced embarking on negotiations and consultations with all the unions in the three recognised bargaining chambers. One of the unions that the respondent negotiated with is the Officials Association of South Africa (OASA) of which the applicant was a paid up member. OASA had between 70 to 75 members. This started in September 1997 and culminated into an agreement in early October 1997. The retrenchment agreement was signed with the relevant parties on 7 October 1997. Vandenmunckhof was personally involved in the said negotiations.

6.During the said negotiations and consultations with the unions, certain positions were identified that would become redundant which included the position of management, a position that was held by the applicant. This was agreed with OASA. The parties agreed that the effective date of the retrenchment would be 8 October 1997. The negotiations went longer than anticipated. Consultation with and counselling with of affected employees would commence immediately thereafter.

7.In terms of the retrenchment agreement the severance pay was agreed to be two weeks for every completed year of continuous service. It was also agreed that should any other union negotiate a package to include the last year of service to be paid on a pro-rata basis, than the same would apply to this agreement. Page 3 of the said agreement sets out the retrenchments procedures. It was also agreed that bumping would not take place. Bumping was defined "*the placement of an employee in another class of work, thereby causing another employee to be retrenched, where such employee would not normally have been retrenched"*. There was also a recall provision which was valid for six months after the retrenchment had been completed.

8.LIFO was defined as Last in First Out as a selection criteria. For the purpose of this agreement, the application of LIFO would be subject to the refinement and stipulations of the selection criteria, with due regard to specific skills retention, meaning that if an employee fell within the selection for retrenchment, the company could retain his services if he had specific appropriate skills. The unions signed the retrenchment agreement in full and final settlement of the dispute. The applicant was not treated unfairly.

9.The applicant was a trainee officer and did management training. With the restructuring of the respondent, training was also restructured. The training at Winkelhaak mine was amalgamated. The surface training and management training became redundant and was stopped. The employees went to on job training and surface management training stopped. The underground training continued. The applicant was not medically fit for underground training and was not considered for it since 1985 due to the fact that he was a diabetic. He was expected to have been boarded off but was given alternative sheltered employment.

10.Over three thousand employees were affected and were retrenched over a two-month period. Various facilities were set up to meet with the individual employees. On 24 October 1997 subsequent to the retrenchment agreement being signed Vandenmunckhof, Mr d Mr Lucas Bornman who was the industrial relations and human resources development manager met with the applicant. During the meeting the applicant was told that the management training had ceased and that the position had become redundant. The applicant was about the retrenchment agreement and what his entitlement in terms of the agreement would be. The applicant requested that enquires be made about alternative employment at other mines. The enquiries were made at the respondent's head office and other mines to see if the applicant could be accommodated. Letters were including a list of the positions.

11.The management training had stopped and the post has since not been filled as it was made redundant. There was no other alternative post available. Some employees were placed underground but because the applicant was a diabetic he could not be placed underground. During 1985 the applicant was given an alternative sheltered employment.

12.During the meeting with the applicant, he did not request to be boarded off or to be placed on early retirement. Such a request would be considered by the Mine Officials Pension Fund, to which the applicant belonged. In such a case he would have been entitled to his pension benefits and the company's contributions. If he was retrenched, nothing prevented him to have been boarded by the Official Pension Fund which was not administered by the respondent. If the applicant had been boarded off, he would not have received his retrenchment benefits. It would be better to have been retrenched and than boarded off. Early retirement had to take place in terms of the rules of the Mine Official Pension Fund which was not administered by the respondent and he would have had to apply and would be paid out in terms of a certain formula and it was not mutual exclusive from the retrenchment. If he was retrenched, he could still get his early retirement and he would have benefited. He was not at early retirement age which would have been 50 years.

13.The parties met again on the 4 November 1997 where the applicant was informed that no alternative employment could be secured at the other mines. He was given a retrenchment letter and three letters from

the other mines confirming that no employment could be secured which was requirement of the Pension Fund. He was told to go to the pay office for his benefits. The applicant had been considered for alternative positions but was found not to be suitable for it. The posts included that of hostel officer who was required to work underground and economic controller which no longer existed.

14.He testified that after the respondent had gone through the restructure process it suffered further financial losses. It faced closure and was sold to Harmony Gold Mine at a good purchase price of R72 million rands. Since it was taken over by Harmony Gold Mine there was a further rationalisation process and retrenchments in October/November 1998. There was a change in structure and it made a profit.

15.The applicant, Michael Christoffel Cloete himself testified. His version is that he commenced employment with Union Corporation in 1969 until he was retrenched by the respondent on 4 November 1997. He started off as a learner official at the Central College and than became a shift boss. Later he was appointed to be a trainer for the whole group. He became a management trainer. In 1985 he was classified as unfit to work underground and he was appointed as a manpower officer. He was then approached to do surface training and the respondent did not know that he was diabetic. He was told that he would get all the benefits that the people that do underground training got. He was promoted and became a management trainer for the Evander, Springs and Barberton with all the gold and platinum mines he did for the Group. He later went back to management training. He became an economic controller where he had to do vegetation on the mine and slime dams. They had to rehabilitate the Mine and Slime dams and he became an Economic Controller. The dams still have to be rehabilitated.

16.When the government forced the respondent to do Adult Basic Education and Training (ABET) and the applicant was asked to start ABET at the Kinross Mine. Mariet Swarts a graduate from the Potchefstroom University was employed and started co-ordinating ABET and the applicant went back to management training. The applicant and Swarts moved to a new complex where he did management training and she took over ABET. They reported to Johan Labuschagne who was in charge of surface training which was completely separate from underground training. Whenever Swarts went on leave, the applicant would take over the ABET training. When Labuschagne went on leave, the applicant acted in his place as acting training manager until he was retrenched in November 1997.

17.During July 1997 he was asked by the unit mining technical manager to draw up his curriculum vitae ss a decision had to be made between him and his assistant Kenneth Mbewe who had commenced working for the respondent in 1996. He was told that decision would have to be made about retrenchments that would have to take place at the Kinross mine where he was working but the retrenchments would not take place at the training centre.

18.In August 1997 Labuschagne handed the applicant a letter of appointment and a letter that he had been appointed as a training practitioner. Both letters were dated 11 July 1997. The employees were required to sign new contracts for training practitioners. He enquired from Labuschagne about his future with the respondent. Labuschagne who had been told to look for alternative employment told the applicant that his job was secure and that a person with 28 years of experience would not be retrenched. He did not sign the letters because he feared that it might affect his length of service.

19.During July to September 1997 the applicant conducted exit retrenchment interviews at other mines. The exit interviews that he conducted were under a different category of employees and not that of officials like him.

20.The applicant admitted that he was a member of OASA. When he started working for the respondent there, was a close shop agreement and he only heard for the first time in court that the close shop agreement was terminated in 1995. The retrenchment agreement was only given to him on 4 November 1997. He had been brought under the false pretences that he was not going to be retrenched and had though that his position

was secure. He was notified about his retrenchment for the first time on 4 November 1997.

21.The applicant testified that on 24 October 1997 his assistant Mbewe told him that Bornman wanted to see him. He went to Bornman's office where Vandenmunckhof was invited to attend. The meeting lasted 15 minutes. Bornman told him that his position was no longer needed and that he would have to hand over his things to Mbewe. He was told that he would have to stop working and once his documents were ready he would be called to collect it and would be told how much is due to him. He was told that he would be paid two week's severance pay for every completed year of service. He would also be allowed to remain in the respondent's house for two months. He was told to go to the pay office to ascertain how much he would get. He than asked whether any provisions were made for alternative employment at the other mines. Enquiries were then only made. He went back to his office where he told Mbewe that he had been retrenched. He worked until the Monday when he handed some other things to Swarts.

22.On 4 November 1997 he received a telephone call from Bornman's secretary to collect his documents. He went to Bornman's office but does not recall whether Vandenmunckhof was present. He was given incomplete retrenchment documents and was told to go to the time office to find out what his retrenchments benefits would amount to. He was also given faxes received from the other mines about alternative positions. No amounts were recorded on his retrenchment letters about what amount was due to him. He went to the time office but found nobody there. After three attempts he finally met with the person on 6 November 1997 who told him that he had not been informed that the applicant had been retrenched.

23.The applicant was not paid on 6 November 1997 and was told that a tax directive would have to be ascertained. He received no salary in December 1997 and in January 1998 he was given a cash advance of R20 000.00. He received some other cash advances and finally got all his benefits amounting to R53 153.44 in May 1998. He was not told how the benefits had been calculated.

24.The applicant believes that his dismissal was unfair in that for the 28 years of service that he had he felt secure with the respondent. He had received a merit honour for service rendered in the 1980's. He had a clean record and also received merit colours for long service rendered. When he was given his letter of appointment in August 1997 he was assured that he would not be retrenched yet he was retrenched three months thereafter. There was no discussions about early retirement or that he be boarded off. Alternatives were only considered after he had raised. He was not asked about his qualifications after alternatives were sought. He believes that he could have gone to the rehabilitation of the mine dumps and dams or have been employed in the place of his assistance or did ABET training in the place of Swarts. He could also have been employed as a hostel official. Before 24 October 1997 he was not aware that his position was made redundant and that he was going to be retrenched.

25.The dispute was referred to conciliation and after conciliation had failed it was referred to this court for adjudication.

26.It is common cause that the applicant was a member of OASA. The applicant denied in his statement of claim that he was a member of a trade union but admitted in the pre-trial minute that he was. This fact was disclosed to the applicant's attorney in November 1997 that he was such a member. It is of some concern that despite this fact, the applicant still deemed it necessary not to have disclosed this fact in his statement of claim. During the proceedings the applicant pleaded that he had no choice to be a member because of a close shop agreement that existed. He was unaware that the close shop agreement was terminated in 1995.

27.The applicant did not challenge the substantive fairness of the retrenchment. He admitted that there was a need to retrench. Evidence was led that the respondent suffered financial losses and even after the retrenchment exercise of 1997 it had to embark on further retrenchments. It was also faced with a stark choice of closing down completely or being sold which happened in 1998. I am satisfied that sufficient evidence was led by

the respondent that proved that the retrenchment was for a fair reason based on economical factors.

28.All that remains to be determined is whether the retrenchment of the applicant was procedurally fair and in compliance with the provisions of section 189 of the Act.

29.It is common cause that the respondent negotiated and consulted with a host of trade unions including OASA which culminated in a retrenchment agreement being drawn and signed by the parties to it on 7 October 1997.

30.In terms of section 189(1)(c) an employer who contemplates retrenching employees is required to consult with a registered trade union on behalf of it members. There is no obligation placed on the employer to consult with individual employees who are members of a registered trade union.

31.The retrenchment agreement confirmed that the retrenchment had to be completed by the end of October 1997. The severance pay that was agreed upon was two weeks for every completed year of service. The respondent had to provide the affected employees with assistance. There was a recall provision that was in existence for six months after the retrenchment. The effective date of the retrenchment was 8 October 1997 where after consultations and counselling with affected employees had to take place. Bumping was not permitted.

32.During argument, Ms Hadjiconstantas conceded that there had been consultations with the applicant's union. She contended however that because the respondent had failed to make the list of affected employees available to the trade unions on the 7 October 1997 and it undertook to consult with the affected, it now had to consult with the applicant on the issue of severance pay, bumping, alternative positions and the timing of the retrenchment. She denied that this would reinvent the process. In support of her contention she relied on clause 11 of the retrenchment agreement which has the following:

11 *TIMETABLE*

It is agreed that the effective date of this retrenchment shall be 08 October 1997. The consultation with and counselling of affected employees shall commence immediately thereafter."

33. Ms Hadjiconstantas admitted that the above challenge was not raised in the statement of claim and seems to have been introduced in her closing arguments. It is to be noted that this was not raised with the respondent's witness. The applicant himself did not testify about what is now raised for the first time in the applicant's heads of arguments. It is also to be noted that no application was made to amend the applicant's statement of claim to cover this aspect.

34.In the statement of claim the applicant relied on eleven grounds why the retrenchment was procedurally unfair. These were reduced to five grounds in the pretrial minute which are as follows:

34.1 No proper consultations were held with the applicant;

34.2 He was presented with a *fait accompli* for the termination of his employment;

34.3 LIFO was not considered for the aforesaid reasons;

34.4 The respondent failed to consider the applicant for alternative positions for which he had the skills and was capable of performing in those positions;

34.5 The respondent failed to consider the applicant's suggestions as alternative retrenchment.

35.The new challenge came about when Vandenmunckhof was being cross examined about whether he had made a list of the affected employees available after the 7 October 1997. The testimony was that the heads of departments had compiled a list of names of employees who were going to be affected by the retrenchments. That list was made available to the trade unions which was scrutinised. The list was made available in September/October 1997. It was negotiated on and agreed upon. The applicant's name was on the list and was part of the discussions. He was the only dedicated management trainee. During the consultation process it was agreed that the list would be kept confidential and it would be perused later. It was not placed on the notice boards and management did not want the affected people to see their names on it. It was agreed with the unions that the respondent would inform the employees individually. The applicant was not told by his union and the respondent reserved the right to tell the applicant on 24 October 1997 that he had been retrenched.

36.It is to be noted that the applicant was not questioned by his representative nor by the respondent about what he felt about the failure to notify him earlier about the list. As stated it is now raised in the heads of arguments for the first time.

37.In the applicant's heads of arguments the applicant submitted that the issues to be decided are the following:

37.1 What was the purpose of the agreement?

37.2 Does the agreement comply with the provisions of the Act regarding retrenchments?
37.3 If the answer to 37.2 is yes, then has the respondent complied therewith?

37.4 If the reply is in the negative, and certain aspects of the agreement are unfair and do not comply with the provisions of the Act, then what is the effect and purpose of the agreement and what is to be made of circumstances where the respondent has followed an agreement which does not comply with the provisions of the Act and which is inherently unfair?

38.It was argued further that by reserving the right to advise the affected employees of the position and names on the list, the respondent failed to comply with its obligations in terms of the agreement and the Act, and deprive the applicant of timeous notification of the possibility of retrenchment. It excluded the applicant and deprived him of the opportunity to influence the respondent on *inter alia*, alternatives, selection criteria, packages, time periods.

39.I do not believe that the applicant is allowed to adapt its case on the evidence that was led in the proceedings. The applicant is bound to what appears in his statement of claim and what was recorded at the pre-trial conference. He cannot introduce a new cause of action in his heads of argument. This will have to be supported by the evidence that was led by the applicant. One would either have expected the applicant to have amended his statement of claim. This was not done.

40.There is no substance in the arguments that were raised by the applicant. The applicant initially denied that he was a member of a trade union. The statement of claim was drafted by his attorney who already in November 1997 knew that the applicant was a member of trade union. Why the persisted that the applicant was not a member of a trade union is unclear to me. There were consultations in terms of section 189(1)(c) of the Act with the applicant's trade union.

41.It is clear from the retrenchment agreement that the parties had reached an agreement on various issues. The parties agreed how the retrenchment exercise had to be taken forward. There were deadlines that had to be met which was *inter alia* that the effective date of the retrenchment had to be 8 October 1997. The retrenchments had to be completed by the end of October 1997. The applicant testified during cross

examination that after he was given the retrenchment agreement on 4 November 1997, he approached his union and was advised that his position was one of the ones that was discussed during the consultations and was agreed upon that it had to go.

42.The position for the applicant would have been different if his position was not discussed during the consultations with his trade union. If there were by way of an example ten employees where the applicant was employed who did the same work as the applicant and an agreement was reached with the trade union that only five positions had to be maintained, there would than be a duty on the respondent to have consulted with the applicant and the other affected employees. It could than have been argued that the consultations that are referred to in clause 11 would allow for consultations to have taken place. The position here is however different. It affected only the one person whose post had been made redundant which was agreed with his representatives.

43.The agreement does not only cover a general retrenchment but also a specific one. It sets out what was agreed upon. It has certain deadlines that had to be met. It how the process should be dealt with. All that the applicant had to do in terms of the retrenchment agreement was to have met with the applicant and informed him about the outcome of the consultation, that his position was made redundant, that there had been consultations with his trade union, what his entitlements were, what the date of the retrenchment was going to be, to have assisted him with looking for alternative positions, to advise him about the recall provisions of the retrenchment agreement. There was no need to have started the consultation process afresh. In any event in terms of section 189(1)(c) the respondent is prevented from consulting with the employee when he is represented by a trade union. That is what clause 11 of the retrenchment agreement had in mind.

44.There is no substance in the applicant's argument that the respondent should have been considered for the position of his assistant Kenneth Mbewe of the ABET training officers post. The parties had agreed that bumping was permitted. The respondent had considered the applicant for other positions like hostel official and environmental control officer and did not deem him suitable. It was also agreed that LIFO would apply under certain circumstances. Again this involved one position.

45.There is nothing sinister why the list of affected employees was not placed on the notice boards. The evidence was not that the respondent prevented the unions from disclosing the list to its members. It would have been more inhumane if the list of the affected employees was placed on the notice without personal counselling. In terms of the retrenchment agreement the duty was on the respondent to inform the affected employees of their retrenchment. The respondent was the employer of the applicant and not the trade union.

46.It is my finding that the applicant has complied with the provisions of section 189(1) of the Act.

47.This is a matter where costs should be awarded to the respondent. The applicant knew as long as 4 November 1997 that his union had entered into negotiations with the respondent and that his post had been raised and discussed. Despite this knowledge the applicant proceeded with a frivolous referral.

48.In the circumstances I make the following order:

(a) The applicant's referral is dismissed with costs.

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FRANCIS AJ

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

: 30 NOVEMBER AND 1 DECEMBER 2000

: 6 DECEMBER 2000

: ATTORNEY P HADJICONSTANTAS

: ATTORNEY R KHUMALO