

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)

Case No.: **JA 29/02**

In the matter between:

HIGHVELD STEEL AND VANADIUM CORPORATION LIMITED Appellant

and

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA** First Respondent

P NGWENYA AND 67 OTHERS
Second and Further
Respondents

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JUDGMENT

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COMRIE AJA :

[1.] The appellant (Highveld) is a large scale producer of steel and ferro alloy products which it sells on the domestic and international markets. In order to remain competitive it embarked, over a period of time, on a succession of exercises to cut production costs and improve efficiency. In July 1999 Highveld commenced a round of consultations with the affected unions and in particular with the first respondent, the National Union of Metalworkers of

South Africa (Numsa). These consultations were protracted and were punctuated by various disputes. One such dispute led to an application in the Labour Court for an interdict. The application was settled and the talks were resumed.

[2.] Eventually, on 17 January 2000, Highveld informed the unions that it regarded the consultation process in terms of s. 189 of the Labour Relations Act 66 of 1995 as being at an end. It further informed the unions of its intention to retrench 77 employees, most of whom were members of Numsa. Over 70 employees were in fact retrenched by the end of the month.

[3.] Numsa, on behalf of its members and some others (the individual applicants) challenged the fairness of these dismissals in the Labour Court. After a trial of some length **Maleka AJ** held that the retrenchments were substantively fair, but procedurally unfair. The learned Judge ordered Highveld to pay each of the individual respondents, subject to certain exclusions, compensation equivalent to twelve months' remuneration calculated at the rates applicable immediately before the retrenchment, and costs. With leave granted by the Court *a quo* Highveld appeals against the order of compensation awarded by the Labour Court which was based on the finding that the dismissals were procedurally unfair. There is no cross-appeal.

[4.] The trial Judge held:

“20. I agree with Mr Barrie, who appeared on behalf of Highveld that Numsa adopted a particular strategic approach to the consultation process, namely to

delay the implementation of the retrenchments as much as possible. In my judgment, that approach, however much regrettable, did not relieve Highveld of its duty to implement the retrenchments in a manner which was fair and objective.”

I agree with that assessment. The learned Judge then proceeded to find that Highveld had failed in that duty in three major respects. In summary these were:

- a) the particular employees to be retrenched were identified for the first time in a list which was furnished to Numsa on 17 January 2000, concurrently with Highveld’s declaration that consultations were closed. Although the listed individuals fell substantially within the category of job grades which Highveld had decided to abolish (and which had been the subject of consultations), “there is no evidence to show how that list was arrived at.”
- b) not all of the employees who fell within the affected job grades were retrenched. Others remained and continued to be employed. The Court was not satisfied that the selection and inclusion of the listed employees “was achieved through an agreed selection process or a process which was fair and objective.” Previous selection criteria were not shown by evidence to be relevant.
- c) the timing of the implementation of the

retrenchments, which followed immediately upon disclosure of the list, was unfair.

[5.] The employees who were retrenched worked in four divisions and fell into several classes. The first main class consisted of “artisan helpers” in two divisions of Highveld’s works at Witbank. They were unskilled, and their work was to carry the tools of artisans and on occasions to assist such artisans in a physical way. Highveld concluded that, subject to certain exceptions where a second pair of hands was required, artisan helpers were an expensive luxury which could no longer be afforded. Overseas competitors did not employ such persons. Highveld introduced an education scheme in terms of which helpers were encouraged to improve their skills so as to qualify as “utility men”, who would be able to perform a wider range of tasks. Many helpers qualified, but others did not. Most of the latter were “pooled” as general workers and eventually a substantial number of them were retrenched.

[6.] The second main class of retrenched employees consisted of unskilled cleaners. They fell into various sub-groups which will be considered in due course. Then there is a third class of miscellaneous employees in various divisions who were considered by Highveld to be redundant for various reasons. It may be noted that the trial Court did not distinguish between the different classes and sub-groups of employees, but held that all the individual applicants had been unfairly treated. The few applicants who were excluded from relief, were excluded for other reasons. Likewise, when it came to the question of compensation, the trial Court drew no distinction between the different categories of employees.

[7.] In view of the conclusions reached by the Court *a quo*, and the contentions on appeal, it is necessary to set out an overview of the consultation process, paying particular attention to whether it was properly concluded and to the questions of the selection criteria and the timing. On 23 July 1999 Highveld gave the unions notice in terms of s. 189 of the Labour Relations Act of about 80 potential dismissals for operational reasons. At early meetings with the unions motivation for redundancies was furnished and selection criteria were discussed. Numsa favoured a variation of LIFO, whereas Highveld preferred a skills-based approach. Numsa suggested the introduction of a four shift system and a concomittant reduction in overtime. The numbers of potential retrenchees fluctuated. The union began to ask for information (i.e. documentation) on the need for retrenchment.

[8.] Negotiations were conducted for Highveld for the most part by Mr Hugo, its assistant general manager of human resources. On 30 August 1999 he sent a detailed document to the unions entitled: “Early Retirement and Redundancies”. With regard to redundancies it itemised 89 specified positions by division or department, and it furnished reasons for the various possible retrenchments. Examples of such reasons were: “position no longer exists”; “outsourcing”; and “surplus to requirement”. While some of the specified positions later fell out of the picture, and others were later added, many of the employees who were eventually retrenched can be found by description in this listing. In the flat products department, 9 artisan helpers and 2 “slabyard” were said to be redundant because “position no longer exists”. “Slabyard” were later better described as slabyard cutters; 3 were dismissed; and the reason changed. Under iron plant 20 artisan helpers were specified for the reason: “members reduced by 50 %”. There was an asterixed note to this item, reading:

“*The criteria to be used will be as per the attached schedule.”

The schedule in question, headed “Redundancy Criteria” , revealed a points system which took into account factors such as years of service, age, disciplinary record, sick leave, skills and education. Those artisan helpers in iron making who fared the worst would be considered redundant.

[9.] In the light of what had gone before, it is in my view fair to say that Highveld had indicated some selection criteria for the various positions, even to the extent of drawing a distinction between artisan helpers in one division (flat products, part of the steel division) and artisan helpers in another division (iron making). Highveld had previously indicated that it was not in favour of using LIFO as a selection criterion.

[10.] At subsequent meetings, prior to the interdict application, there was more discussion of the selection criteria among other subjects. After the application was settled, Highveld gave notice of a meeting “to further discuss the planned redundancies”. The meeting was held on 23 September 1999 and Numsa was represented among others by Mr Daniels, who was the union’s internal legal adviser. Highveld regarded this as a resumption of the consultations that had commenced in July. In evidence Mr Daniels initially conceded this on more than one occasion; but at the end of his evidence he sought to retract this concession and claimed that the talks were starting afresh. Mr Daniels was

new to the matter and I have no doubt that the meeting of 23 September was a resumption of the consultations, even though the agenda changed in some respects. At the meeting detailed presentations were made in respect of the various divisions and indications were given of potential redundancies, some of them in the longer term.

[11.] In the ensuing weeks there were disputes about the disclosure of information and regarding its confidentiality. The parties eventually signed a confidentiality agreement in November. The union also sought to achieve a collective agreement on job security. There was another dispute about whether certain provisions of the “house agreement” were applicable to the consultation. I should mention that it appears to have been the attitude of Numsa at this point that the need for retrenchment should be debated first, and that the selection criteria should, if necessary, be discussed later. This may account for the fact that from September onwards, the union’s input on such criteria did not amount to much.

[12.] Despite the difficulties which arose, consultations continued. On 15 October 1999 Highveld sent an important document to Mr Daniels. It proposed a meeting to discuss further motivations of “the proposed divisional retrenchments in the following categories of employees” of which details were furnished. The positions under review were listed by division and by position. The numbers were given and the reasons provided. There was a summary which read thus:

“

Number of positions

Iron Plant		38
Structural Mill	8	
Flat Products	12	
Engineering Services	16	
Human Resources		21
	—	
TOTAL		95 ."

Four divisions were involved: iron, steel (which included structural mill and flat products), engineering services, and human resources. The two latter divisions were new to the process; at the same time some other planned redundancies were dropped for the time being at least. It became common cause during the trial that it was this total of 95 which was eventually reduced to 77 in January 2000.

[13.] It may be helpful to compare the two totals (ignoring for the moment the exclusions made by the learned trial Judge):

	15/10/99	17/1/2000
Iron Plant –		
artisan helpers	18	19
belt cleaners	9	7
other cleaners	11	5
Structural Mill and Flat Products –		

artisan helpers	16 or 17	16
slabyard cutters	3	3
Engineering Services -		
motor rewind workshop	9	5
aircon workshop	4	-
test department	3	3
Human Resources -		
single quarters	9	2
waiters		
		1 cook
personnel cleaners	12	15 cleaners
	95	77

[14.] Some commentary on this comparison is necessary. First, with regard to the artisan helpers in iron making, whose numbers were being reduced, selection criteria (the points system) had been proposed on 30 August. Second, with regard to artisan helpers in the structural mill and flat products division, it is not clear from the typescript whether the proposed number was 16 or 17. Third, as to engineering services, the proposal to close the air-conditioning workshop was later abandoned or postponed. Further, the motor rewind workshop (armature rewinding) was replaced by a "strip and quote" facility of 3 positions. Fourth, in human resources, the personnel cleaners appear to have been the cleaners employed at the change houses which (like the single quarters) were to be outsourced.

[15.] The next important meeting for present purposes occurred on 7 December

1999. At that meeting the new grading system for employees, which had already been introduced, was explained. It meant that unskilled labourers, including artisan helpers, “would disappear from the scene.” A purpose of the meeting was to discuss the redundancies proposed on 15 October, *supra*. There was no material change to the figures. Mr Marshall spoke for the iron making division. He was then assistant general manager, iron making production services and mining. In response to questions he is reported in the minutes to have said:

- “(a) whether artisan helpers had been tested for utility men position. Mr Marshall stated that all had been tested but that there were insufficient utility men positions available to accommodate the 18 artisan helpers. A policy decision had been made that artisan helpers are no longer required.
- b) Cleaner positions were no longer needed as a result of automation and outsourcing.”

Mr Sherlock (works manager) spoke for flat products and the structural mill, and Mr Frost (service manager) for engineering services. He mentioned the “strip and quote” facility. With regard to the test department (weighfeeder), he said that “cleaning and maintenance to be done by I.P. personnel.” [I.P. meant iron plant]. I should add that it appears from the evidence

of Mr Frost, and from other documents, that retrenchments were still being debated by a committee at divisional level in his department. I shall return to this aspect later. Mr Mafoane (manager, personnel and industrial relations) spoke for human resources and explained that the single (residential) quarters had outlived their usefulness and were to be outsourced from 1 January 2000. The consequent redundancies were 9 people (cleaning and food preparation), of which the contractor had indicated that he would accept 6. Mr Mafoane explained that the change house facilities were to be outsourced from the same date, leading to 12 redundancies, some of whom might be taken over by the contractor. Mr Hugo set forth the proposed redundancy package. Because the main purpose of the meeting of 7 December was for Highveld to furnish information, the union had little to say.

[16.] In a letter dated 10 December 1999 Mr Hugo re-iterated that the motor rewind workshop was to be closed, and provided further information regarding the single quarters and change houses. With regard to the latter, the inference is that there were only 12 employees. It is evident from the correspondence and the evidence that by this time Highveld was becoming impatient with what it perceived to be the unnecessary delays caused by Numsa. It endeavoured to accelerate the process but eventually agreed, with reluctance, to the next meeting being held on 13 January 2000, as previously scheduled.

[17.] Meanwhile a dispute about the disclosure of information had been referred to the Commission for Conciliation, Mediation and Arbitration. According to Highveld's Mr Mafoane, he attended a meeting at the Commission on 13 December 1999 when the commissioner directed Numsa (per Mr Boshielo) to inform him before 1 January 2000 of any information which it was claimed Highveld had failed to provide, failing which the commissioner would regard the matter as closed (ie. resolved). Mr Mafoane stated in evidence that in January 2000, and again in April, he checked the Commission's file and found no letter from Mr Boshielo or Numsa. Mr Mafoane's evidence on this point was uncontroverted - Mr Boshielo did not testify - and there is no reason not to accept it. The relevance of the point is that at the meeting of 13 January 2000 Highveld took the stance that, by reason of the foregoing, the information dispute was not being pursued and that Highveld was not required to supply further information.

[18.] The final meeting (except at engineering services divisional level) took place on 13 January 2000 after the holiday period. Highveld had already indicated its wish to finalise the consultations at this meeting. There are no minutes, and we have to gather what occurred from the correspondence, the evidence and certain notes. At all events a list of 79 proposed retrenchments was tabled (p. 1169 of the appeal record), a reduction from 95. The air-conditioning department was dropped (4 positions), and some of the other previous figures had been trimmed. In summary the revised figures were:

Iron Plant	31	
Structural Mill and Flat Products	19	
Human Resources		19

Engineering Services	10
	79

While it is clear that the retrenchments were debated at length, and that various proposals were advanced by the unions, little seems to have been added about selection criteria. In its letter of 17 January 2000, in which Highveld responded to Numsa's queries and proposals, Mr Hugo wrote:

“. . . the corporation believes that the consultative process has now been concluded. The corporation further advises that compulsory retrenchments will unfortunately now be implemented.”

The list of 77 employees was attached.

[19.] Numsa was taken aback by this development since it was expecting further consultations. Meanwhile, Mr Frost's divisional committee was still busy, in the belief that there was a two week period of grace. Alternative jobs were in fact found for some of the employees, which explains some of the exclusions made by the Court *a quo*. A dispute was declared by Numsa on 31 January 2000.

[20.] I turn now to consider the various categories of retrenched employees division by division. It is convenient to begin with the human resources division.

HUMAN RESOURCES DIVISION

[21.] This division was first placed on the list of proposed redundancies in the communication of 15 October 1999. As will be seen from the annexure to this

judgment, 19 redundancies were proposed, being 9 for the single quarters and 12 for the personnel cleaners (in the change houses). The reason given in both instances was outsourcing to private contractors. The figures remained the same in the list of 13 January 2000. Ultimately, 18 employees were retrenched, being no.s 28 to 45 on the list of 17 January 2000. They comprised 15 cleaners, 2 waiters and 1 cook. At the consultation meeting on 7 December 1999 Mr Mafoane explained the outsourcing in detail. He explained that the single quarters were able to accommodate some 220 people, but currently had only 36 Highveld residents. Nine people (cleaning and food preparation) would become redundant, of whom the contractor had indicated his willingness to accept 6. Mr Mafoane explained that the cleaning of the change houses was undertaken at a cost of R75 980 per month. (At Numsa's request a breakdown of this cost was furnished three days later). The 12 cleaners would become redundant, all or some of whom might be taken over by the contractor. In the letter dated 10 December 1999 Highveld provided further information regarding the arrangements for the single quarters and the change houses, as well as the cost breakdown of the latter.

[22.] At the meeting of 13 January 2000 relatively little appears to have been said about the retrenchments in the human resources division. Numsa recorded its position thus:

“those persons who may be retrenched as a result of the *outsourcing* (of cleaning and single quarters) must first be offered voluntary retrenchment. For those who do not accept voluntary retrenchment, the company must negotiate with the potential contractor to employ these persons. We stated and warned you that we believed that section 197 of the LRA 1995 may be applicable.”

With regard to voluntary severance packages generally, Numsa proposed: four weeks per year of service with no ceiling.

[23.] Highveld recorded that it had noted the comment about transferring employees to the contractor. Highveld's response (in its letter of 17 January 2000) was that it undertook to provide successful contractors with the detail of redundant employees, but it would be the contractor's decision whether a redundant employee could be employed in terms of the contractor's conditions of employment. Highveld also recorded that it had noted Numsa's severance package proposal. Highveld's response, in the same letter, was:

“The severance package as tabled on 7 December 1999 is considered to be extremely fair and certainly far better than what is provided for in the House Agreement and the Basic Conditions of Employment Act.

The corporation cannot agree to a package of four weeks earnings per year of service and no maximum ceiling.”

[24.] In evidence Mr Mafoane confirmed that the minutes of 7 December 1999 were a reasonable reflection of what he had said at the meeting. He stated that the successful contractor for the single quarters, Reef Food Services, interviewed the employees, of whom only two accepted an offer to join Reefood. The change house cleaning contract was awarded to Acona Cleaning Services (Mrs Mazibuko) who was willing to take over all the cleaners. Only two employees arrived for a meeting, both of whom declined to join Mrs Mazibuko's company.

[25.] Looking at the position of the human resources division overall in the light of

the documentation and evidence, it appears to me that the consultation process was effectively exhausted when Highveld sent its letter of 17 January 2000. I gain the impression that Numsa was not seriously opposing the outsourcing of the single quarters or the change house cleaning function. It had been provided with the information which it requested. It made proposals for re-employment by the contractors, which were noted and responded to. It also sought for redundant employees generally a better severance package. Its proposal was noted and rejected. The selection criteria were clear: all the employees in the single quarters and all the cleaning personnel in the change houses. I can see nothing objectively unfair in such criteria if the outsourcings were to go ahead. As regards the timing, I can see nothing unfair in the retrenchments proceeding immediately upon the conclusion of the consultations. The evidence reveals that employees generally were well aware of the impending retrenchments, so that the actual notices of termination would not have come as a bolt from the blue.

[26.] There is a discrepancy of one between the number of retrenchments proposed on 15 October 1999 (and repeated on 13 January 2002) and the number of actual retrenchments. This discrepancy was not explored by either side in evidence. The evidence in regard to other divisions does disclose, however, that there were several possible “innocent” reasons for a discrepancy of this kind.

[27.] My conclusion with regard to the retrenchments in the human resources division is that, considered as a group on their own, such dismissals were both substantively and procedurally fair. As will be seen in due course, I have reached the conclusion that the dismissals of some employees in other

divisions were procedurally unfair. This raises the question whether the consultations could properly be severed, and if so, how. If such severance is not permitted, the question arises whether there should not be a distinction with respect to compensation. The leading cases on the joint consensus seeking process contemplated by s. 189 of the Labour Relations Act, and by the preceding unfair labour practice jurisprudence, are: *Media Workers Association of SA and Others v. The Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A); 1992 (4) SA 791 (A); *Atlantis Diesel Engines (Pty) Ltd v. National Union of Metal Workers of SA* (1994) 15 ILJ 1247 (A); 1995 (3) SA 22 (A); *Johnson & Johnson (Pty) Ltd v. Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC); *Alph Plant & Services (Pty) Ltd v. Simmonds and Others* (2001) 22 ILJ 352 (LAC). These cases do not, however, address the first of the questions mentioned above, and in regard to the second question they only do so obliquely. It seems to me that an employer may, for convenience or some other adequate reason, group several categories of employee within a s. 189 consultation process. The considerations that apply to one category of employees may not apply to another category, and the possible retrenchments in one category may not be dependent on the retrenchments in another category. There may be common features, for example the severance package. In such a case (unless there is a contrary agreement) no reason of logic or fairness suggests itself why the employer should not in principle, and on appropriate facts, be entitled to treat the consultations as closed in respect of one category but as remaining open in respect of another category. Indeed, it might well operate unfairly on the employer to preclude such a course, since otherwise it would be obliged to retain the services for an indefinite period of employees whose retrenchment is inevitable.

[28.] *In casu* the requisite circumstances were in my opinion present for the

employees in the human resources division. They constituted a separate group, clearly identified, whose fate was not dependent on the fate of employees in other divisions. The severance package, common to all employees, had been debated. There was no all or none agreement. To my mind it would have been proper for Highveld on 17 January 2000 to declare closure of the consultation process in respect of the human resources division, and had it done so, no unfairness to the employees in that division would have resulted. Where Highveld erred was to declare closure in respect of all the affected employees in all four divisions. I do not consider in the circumstances that this error should preclude Highveld from invoking a notional severance. I say this because there was no real unfairness to the employees in the human resources division. Their only complaint can be that they were retrenched earlier than they should have been, but that complaint on analysis is illusory: the unfairness of premature closure was towards other employees, not towards them. In my view therefore the dismissals of the employees in the human resources division was attended by no procedural unfairness.

[29.] If I should be wrong in the foregoing approach, I arrive at the same conclusion by applying the principles relating to compensation. It is well settled that prior to the recent amendment of the Labour Relations Act, the Court *a quo* had a discretion to award compensation according to a formula or to award no compensation. Compare *Johnson's case, supra*. As will appear later, we do not know what factors the trial Court took into account in awarding compensation. It may safely be accepted, however, that it did not take the present consideration – the lack of any real prejudice to the employees in the human resources division – into account when awarding them compensation. This appears manifestly from the Court's whole

approach to the matter, set out earlier in this judgment, as well as from its failure to appreciate or evaluate the distinction which I have drawn. If Highveld's procedural unfairness towards the employees in the human resources division was technical, as explained above, and resulted in no real prejudice to them, then it would be clear to me that they are not deserving of compensation and that the discretion should be exercised against them.

STEEL DIVISION

[30.] The steel division encompassed the structural mill department and the flat products department (but not the engineering services division, which was housed within the same premises). On 23 July 1999 Highveld invited the unions, including Numsa, to attend a meeting on 5 August to discuss the redundancy, for operational reasons, of employees in the iron and steel divisions. According to a note dated 23 July, Highveld stated that LIFO would not be suitable as the corporation needed to maintain skills. Proposed criteria were tabled and the unions agreed to consider and respond. At the meeting of 5 August Mr Hugo intimated 14 redundancies in the steel plant and 43 in the mills. He agreed to provide a detailed list of the affected positions. Redundancy criteria were discussed again. Mr Hugo also indicated that Highveld was considering a similar package to that which had prevailed for voluntary resignations. It appears from an internal Numsa letter written by Mr Boshielo that some detail was provided affecting 47 positions in the steel division. It was in this letter that Mr Boshielo asked his regional secretary:

“Is there anything that we can raise with management with a view to stop or at least delay the redundancy/retrenchment?”

I am inviting the views and strategy to counter management's action."

The letter was copied to other members of the union.

[31.] At the meeting on 11 August 1999 Mr Hugo tabled more particulars of affected employees in the steel division. There were 50, among them 12 artisan helpers and 3 slabyard. At this meeting Numsa suggested the introduction of a 4 shift system and a cut in overtime, and again suggested "LIFO but retain skills". At subsequent meetings the unions, especially Numsa, began to press for information justifying the retrenchments. Highveld agreed to the 4 shift system as a long term objective. On 30 August 1999 Highveld telefaxed to the unions a document entitled "Early Retirement and Redundancies" which set out Highveld's proposals in detail. This included a redundancy package. More detail was furnished regarding the affected employees: 16 in flat products and 10 in the structural mill. Among the former were 9 artisan helpers ("position no longer exists") and 3 slabyard ("position no longer exists"). Reference was made to the divisional restructuring and training committees, and to a future 4 shift system. Highveld stated that "implementation of the abovementioned redundancies is scheduled for 15 September 1999 to be the last working day".

[32.] At subsequent meetings the same or similar issues were debated, and Highveld altered the scheduled date to 17 September. Numsa declared a dispute regarding disclosure of information and failure to negotiate properly and on 7 September 1999 referred it to the CCMA. Highveld issued notices of retrenchment. Litigation followed and Highveld agreed to postpone the retrenchments pending further consultations. The first such consultation took place on 23 September 1999. Mr Daniels, who was Numsa's in-house legal adviser at the time, introduced himself. Presentations were made in respect

of various divisions; Mr Gardner made the presentations for the steel division. It was agreed that Numsa would set forth the information and motivation which it required; that Highveld would respond thereto; and that Highveld would provide an effective date for the redundancies and the members involved. Thereafter the consultations appear to have become bogged down in the several disputes which I have mentioned earlier in this judgment.

[33.] Nonetheless on 15 October 1999 Mr Mafoane wrote to Mr Daniels providing “Further motivation of the proposed divisional retrenchments in the following categories of employees”. In respect of the steel division, the following information was furnished:

“(II) Structural Mill

Artisan Helpers (8 positions)

The corporation proposes to adopt a policy to do away with

the position of helpers for artisans. All helpers would thus be redundant.

III) Flat Products

Slabyard (3 positions)

It is proposed that there are 3 positions surplus to the restructured team requirement.

Artisan Helpers (8 employees)

The corporation proposes to adopt a policy to do away with the position of helpers for artisans. All helpers would thus be redundant.”

It will be noted that with regard to the artisan helpers in the steel division (as distinct from the iron division, *infra*), all such helpers would be redundant.

[34.] At the meeting of 7 December 1999 Mr Sherlock “talked through the documents tabled on the Flat Products and Structural Mill”. He gave redundancy figures but it appears that he included a number of early retirements. The following day Mr Daniels wrote to Mr Hugo recording that the parties were still in dispute regarding the disclosure of information on ten points. Highveld replied on 10 December 1999. In the course of that letter Mr Hugo wrote: “To repeat ourselves, the position of artisan helper has become redundant and artisans will in future be responsible for tasks previously performed by such helpers”. I have already mentioned the list of retrenchments dated 13 January 2000. This indicated 7 artisan helpers in the structural mill, 9 artisan helpers in flat products, and 3 slabyard cutters. Pursuant to the meeting on that date, Highveld subsequently wrote in its letter of 17 January 2000: “the position of artisan helper has become obsolete” and “that there are no other vacancies for which artisan helpers could be trained”. It wrote further:

“(b) Testing and testing results of artisan helpers will serve no purpose in view of the fact that there are no vacancies for which testing, to determine trainability, would have been required. The employer also said that the corporation will not be in a recruitment mode for the foreseeable future and therefore there is no purpose in training the said employees for other positions which are not going to materialise.”

This was in response to a request for information by Numsa,

recorded in paragraph 2.2 of its letter of 17 January 2000. I have already alluded to some other matters raised in these two letters.

[35.] Eighteen employees were retrenched from the steel division. They were no.s 9 and 11 - 27 on the list of 17 January 2000 and they comprised 15 artisan helpers and 3 slabyard cutters. Mr Mafoane testified that employee no. 10 was not in fact retrenched but was retained in an operating position. The trial Court necessarily excluded him from relief. Also excluded was employee no. 13, who was not properly before the Court.

[36.] Mr Sherlock, the steel works manager, gave evidence explaining the five year plan. He stated that pursuant to a corporate-wide ruling that artisan helpers should be made redundant, the artisan helpers in his division were pooled some months before January 2000. They were allocated piecework as it arose. They could apply for advertised vacancies within the corporation. Employee no. 10, Mr Matabane, was temporarily given the job of a sample cutter, and after training through SBT, he got a permanent position. He was not retrenched. The witness referred to the three slabyard cutters, whose position was more fully explained by Mr Nkhambule, *infra*. Mr Sherlock stated that some artisan helpers had become utility men. There was no point in moving artisan helpers from one independent division to another as the position had become redundant.

[37.] In cross-examination it emerged that the artisan helpers were pooled by management in March 1999, and that the three slabyard cutters may also have been identified by that time. Mr Sherlock described this as a

“forewarning” of redundancy. He agreed that the decision to pool had not been the subject of consultation with the unions. He stated that:

“the slabyard cutter position was removed and the persons who were doing that job have learnt some other tasks and they are now known as team members and they have the option of learning all the tasks in the area, moving up the various levels, providing they meet the criteria set by Standards Based Training, whichever level they can achieve within the team.”

While the individuals were counselled and were made well aware of the implications, as were the shop stewards, the policy decision was not the subject of consultations at union level. The unions must, however, have been aware through the shop stewards of SBT and that restructuring was taking place. The Court put this question to Mr Sherlock:

“COURT : The point is the union did not make an input as to who is or is not suitable, who qualified, who did not qualify, who passed, and who did not pass the test? - - - No that’s correct.”

[38.] I review the position of artisan helpers. Their identity was known as early as March 1999. The number proposed on 15 October 1999 (16 or 17) differed only slightly from the number retrenched (15). Nothing was made in evidence, or in argument before us, of the fact that employee no. 10 was eventually retained. Highveld made it clear to the unions that, subject to immaterial exceptions, the position of artisan helper had become obsolete,

and that in the steel division all such helpers who had not made the grade to the post of utility man were redundant and would be retrenched. The selection criterion was therefore clear enough. One may debate, however, whether the process was not fundamentally flawed in that the selection was implemented prior to consultation with the unions. Highveld contemplated the retrenchment of artisan helpers (in this division) within the meaning of s. 189 of the Labour Relations Act at least by March 1999, when these employees were pooled, and arguably earlier. However, this was not the unions' complaint at the time. So far as appears from the documentation and evidence, the unions did not during consultation complain that the selection was premature, nor request that the selection process be revised. They questioned the need for retrenchment, repeatedly called for more information, made a few counter-proposals, and discussed the severance package. Over a period of consultation lasting virtually six months, premature selection was not on the unions' agenda. In the circumstances it would be wrong to hold against Highveld on a technical basis, when the unions had every opportunity over a period of months to revisit the question before the retrenchments were implemented. In respect of this group of employees it appears to me that the consultation process was effectively exhausted when Highveld wrote its letter of 17 January 2000. It was pointed out in argument that the package was improved during the period from August to January. The selection criteria were to my mind objectively fair. I have no criticism of the timing.

[39.] The 3 retrenched slabyard cutters were employees: no 25 Mr Masilela; no 26 Mr Magahle; and no 27 Mr Madiega. The proposed number of retrenchments remained constant from 11 August 1999. On 30 August 1999 Highveld stated that the "position no longer exists", but this reason was revised on 15 October 1999 to "three positions surplus to the restructured team requirement". It

does not appear from the available documentation that Numsa raised any specific queries regarding the slabyard cutters. However, Numsa was furnished by Highveld with an information dossier on 7 December 1999 and I infer that some of the presentations were based on the documents in this dossier. It is a substantial document running to over 130 pages and all or most of it appears to be a detailed statement of Highveld's five year restructuring plan. It does not appear whether Mr Daniels or other representatives of Numsa studied the dossier with any particularity. If they did so, they would have found some passages dealing with the slabyard. I have mentioned Mr Sherlock's testimony. Another witness for Highveld, Mr Nhkambule, who was a personnel officer in flat products, drew the trial Court's attention to these passages and explained them. There was a general reference under restructuring to the benefits of the standard based training modules, whereby higher skilled operators led to better productivity. The point was developed with regard to the steel division at p. 1064 of the appeal record. At pp 1124 - 5 there was an analysis of the Slabyard - Automation and Restructuring. It inter alia recorded that: "Through restructuring the inspectors were removed from the slabyard. The scarfing, cutting and chipping and crane driving functions were combined", and that 3 employees were redundant. At p. 1133 the report stated: "Through SBT restructuring in the slabyard P Masilele, J Magahle and P Madieza were released".

[40.] Mr Nkhambula told the trial Court that in 1998 employees in the slabyard wanted incentives for additional jobs they were performing, which management could not give because merit increases had been done away with. Management then told the employees about restructuring and the introduction of SBT "whereby employees would have to be assessed. And after assessment and found competent they will be able to get some

incentive” or advancement. The witness stated that the implication was the acquisition of literary skills to avoid possible redundancy. The shop stewards and the employees were aware of this. The jobs in the slabyard were regrouped and training of employees began. The three employees were illiterate. They were offered ABET (Adult Basic Education Training). Messrs. Masilele and Magahle declined to participate because they regarded themselves as too old. Mr Madiaga, who appears to have been of similar age, was willing and started the course. He eventually found that it was too much for him, that he was losing out on overtime, and he gave up.

[41.] It seems probable that these three employees had been identified for retrenchment by March 1999, and in any event by 11 August 1999. The unions did not raise premature selection as a complaint. Although Highveld and the employees were aware that possible redundancy loomed, Highveld could not contemplate the actual retrenchments until the training process had run its course, because all the employees might have passed. The three slabyard cutters were put on the consultation table by Highveld on 11 August 1999 and they remained there until their retrenchment in January 2000. They were a small and readily identifiable group. The selection criterion was declared on 15 October 1999, and further details could have been obtained by Numsa on enquiry. It could have ascertained their names, investigated the position, and made proposals for re-evaluation or further employment within the corporation. That was not done. Here again the consultation process was in my view effectively exhausted by 17 January 2000. I cannot find that the selection criterion was objectively unfair. I have no criticism of the timing; five months had passed from mid-August to mid-January.

[42.] I am accordingly of the view that the dismissals of all the employees in the steel division (artisan helpers and slabyard cutters) were substantively and procedurally fair. Alternatively, on a parity of reasoning with the human resources

division (supra), I would award them no compensation.

THE IRON DIVISION

[43.] The employees who were retrenched in this division fell into three categories: artisan helpers, belt cleaners, and “pool” cleaners. I shall deal with the artisan helpers first. There were 19 of them (no.s 47 to 65 on the list of 17 January 2000). Employee no. 55, Mr J. Mabena, was excluded by the trial Judge on the ground that he was not properly before the Court. The iron division was mentioned in the letter of 23 July 1999. At the meeting of 5 August 1999 46 redundancies were tabled. On 11 August 1999 Highveld’s list included 20 artisan helpers. Included in Highveld’s list of 30 August 1999 were:

“Artisan Helpers	20	numbers reduced by
50%.”		

The asterixed note read: “The criteria to be used will be as per the attached schedule”. The schedule, headed “Redundancy Criteria”, revealed a points system which took into account as factors: service, age, disciplinary record, sick leave, skills, and education”. Those with the worst scores would be considered redundant. On 15 October 1999 Mr Mafoane wrote to Mr Daniels:

“Artisan Helpers (18 positions)
The corporation proposes to adopt a policy to do away with
the position of helpers for artisans. The Iron Plant currently employs forty-one (41) artisan helpers and as a first step wishes to reduce the number by eighteen (18).”

[44.] At the meeting of 7 December 1999, Mr Marshall, on behalf of iron-making, talked through the information dossier. The redundancy of 18 artisan helpers was tabled. In response to a question whether artisan helpers had been tested for utility men positions, Mr Marshall said according to the minutes:

“that all had been tested but that there were insufficient utility men positions available to accommodate the 18 artisan helpers. A policy decision had been made that artisan helpers are no longer required.”

On 10 December 1999 Mr Hugo wrote the passage (“To repeat ourselves. . .”) quoted earlier. On the list of 13 January 2000 the number of artisan helpers to be retrenched remained at 18. At the meeting on that day Numsa again requested information about artisan helpers generally. Highveld responded on 17 January 2000 that the information requested was irrelevant because the position of artisan helpers had become obsolete. Highveld also wrote that testing would serve no purpose because there were no vacancies.

[45.] What actually happened was that while the consultations were underway, the selection process was implemented: 19 artisan helpers were identified as surplus (according to Mr Marshall, they were the least suitable) and retrenched. The position of the affected employees in the iron division differed materially from their counterparts in the steel division. In the latter division, as I have shown, all artisan helpers who had failed to qualify as utility

men were retrenched. In the iron division, however, there were not enough utility men positions available so that a choice or selection had to be made as to who would be trained. That selection process was completed, it would seem, by 7 December 1999. It is clear that from August 1999, and especially from 15 October, Highveld contemplated the retrenchment of some but not all artisan helpers; it tabled a proposal along with suggested criteria. It was premature for Highveld to have implemented the selection without, as a minimum, specifically informing the unions of that intention and specifically inviting the unions' views thereon. That the unions might in response have prevaricated or otherwise refused to co-operate is by the way. So is the fact that the actual selection might have been implemented in the fairest possible way. The point is that Highveld unilaterally closed the door on further consultations on the issue of the selection criteria.

[46.] Mr **Barrie**, for Highveld, submitted that his client was entitled but not obliged to consult with the unions about the appointment of employees whether as utility men or into other production positions (there was, for example, evidence that some of the potential retrenches found jobs which were advertised elsewhere within the corporation). The argument misses the point. The declared intention was to retrench those artisan helpers in the iron division who were not selected for training as utility men (or who did not find a job elsewhere). And that is what happened: the remainder men, as Mr **Barrie** called them, were retrenched. I am satisfied that the dismissals of these artisan helpers were procedurally unfair.

[47.] Eight belt cleaners in the iron division were retrenched. They were employees no.s 66 to 73 on the list of 17 January 2000. They were first identified as a

group in the list of 11 August 1999, the given reason being “(outsource)”. The document of 30 August 1999 identified 9 belt cleaners (“position no longer exists”). Mr Mafoane’s letter of 15 October 1999 stated:

“Belt Cleaners (9 positions)

Automation and technical improvements have made this function obsolete.”

On the list of 17 January 2000 7 belt cleaners were mentioned. Beyond what I have recorded, very little appears in the documentation with regard to the belt cleaners. In evidence in chief Mr Marshall was asked about the “automation and technical improvements”. He answered:

“Ja, what happened there is a better type of belt scraper was installed which reduced the amount of spillage and in fact you didn’t have to do full-time cleaning on all the conveyor belts that were around so it wasn’t really automation it was more a technical improvement. Automation into the fact that things like conveyor routes were improved and interlocked with each other so that spillage could not occur along these lines and better chutes and types of instruments like that were installed. And chute detection equipment so that if a chute blocked it would automatically stop the equipment and thing like, items like that, it reduced the spillages.”

Shortly after that the witness stated that spillages were not eliminated, they were reduced.

[48.] In cross-examination, after dealing with the artisan helpers who were sent to the test centre, Mr Marshall was asked:

“And the belt cleaners and pool cleaners, didn’t they go for tests? - - - I am not too sure, we didn’t encourage them at all, we didn’t say they should go, yes.”

Later there was a brief but muddled exchange regarding automation, obsolescence and redundancy.

[49.] All in all I am left at something of a loss as regards the belt cleaners. There is a paucity of evidence. I appreciate that as a result of technical improvements, a lesser number of belt cleaners was required. But it is unclear whether they all went or only some of them, and in the latter event, how the choice was made. The burden was on Highveld to adduce sufficient evidence but in my view it failed to do so. It is true that Numsa failed, as with some other types of employee, to make pertinent enquiries, but in my judgment that factor alone is not sufficient to pull Highveld through. I would not disturb the trial Judge’s finding that their dismissals were procedurally unfair.

[50.] The names of four “pool” cleaners appeared on the list of 17 January 2000. They were employee no.s: 74 Mr Maduma; 75 Mr Mpubane; 76 Mr Mtsweni; and 77 Mr Tshehla. In addition there was one employee described as a cleaner, no. 46 Mr Zwane. No’s 75 and 76 were excluded by the trial Court because it transpired that they had not in fact been retrenched but had been

given jobs as radial gate attendants. The first mention of cleaners in the iron division is to be found in Mr Boshielo's letter to his colleagues dated 6 August 1999. The list of 11 August 1999 featured 1 office cleaner, 3 paste cleaners, and 12 "Cleaning Pool (outsource)". On 30 August 1999 the list comprised:

"Pool Cleaners	9	position	no	longer
exists				
Paste Cleaners	3	position	no	
longer exists				
Office Cleaner	1	position	no	longer
exists"				

[51.] On 15 October 1999 Mr Mafoane wrote to Mr Daniels.

"Cleaners (8 positions)

It is planned to outsource this function to a private contractor."

and

"Office Cleaner (1 position)

It is planned to outsource this function to a private contractor."

At the meeting of 7 December 1999, when Mr Marshall spoke for iron making, he is reported to have tabled proposed redundancies of among others 8 cleaners and 1 office cleaner.

He gave the reason: “Cleaner positions were no longer needed as a result of automation and outsourcing” (the automation referred to the belt cleaners, supra). On the list of 13 January 2000 the number of cleaners was stated as 6. I have already noted (in connection with the human resources division) that at the meeting on that day Numsa requested Highveld to negotiate for the contractors to employ the cleaners. Highveld’s response, as noted earlier, was:

“The corporation undertakes to provide successful contractors with the detail of redundant employees but it will be the contractor’s decision whether a redundant employee could be employed in terms of the contractors conditions of employment.”

[52.] In evidence in chief Mr Marshall stated with regard to outsourcing of pool cleaners:

“They would be general cleaners for round the floors and around the plant, it is a very large area of the iron making, it is a huge area and the eight positions could not accommodate the total, how can I put it, you know could not move around the whole area of the cleaning and therefore it was necessary to look at ways of making this cleaning better utilised by less spillages, which we did a lot of work on, not only on the conveyor belts but also on

kilns, and we put in other things like high pressure water cleaning that also affected the cleaning and these positions became not as intensive, where only eight people were needed for the full period of the time, but only needed certain times of the day only.”

[53.] With regard to employees no.s 75 and 76, Mr Marshall stated that they were in the cleaning pool, that they applied for the advertised positions of radial gate attendant, were found to be suitable and were employed. In cross-examination Mr Marshall could not say when they were appointed. It was a different job, one grade up from cleaner. There had probably been other applicants, and a managerial panel would have made the selection without input from the unions. Management actively encouraged potential retrenchees to apply for vacancies, especially in iron making. Mr Mthimunye, who was an industrial relations officer at the time, testified that these two employees (and some others) were appointed by December 1999 when he arrived in the iron plant, and that the inclusion of their names on the final list was an administrative error. They were not handed retrenchment letters. He described pool cleaners as general cleaners. He could not explain how no’s 75 and 76 (and others) were appointed to vacancies by management because this had occurred before his arrival in the iron plant.

[54.] Mr Mafoane, who was called to testify on other matters, also adverted to the pool cleaners and to employees 75 and 76. In cross-examination he stated that at the request of the shop stewards, plant management interviewed potential retrenchees, and no’s 75 and 76 were successful. He maintained that this happened before 18 January. He had earlier been instructed by Mr Hugo to minimise the impact of the retrenchments together with the shop

stewards. This was one of the reasons for the number reducing from 95 to 77.

[55.] Mr Hugo gave evidence that the cleaners were pooled because they had little or no work to do, and were redundant. He stated that all the cleaners were affected, and that “no criteria applied there” (whatever that meant).

[56.] I review the cleaners. Once again there is a paucity of evidence. In the absence of direct evidence I infer, on the probabilities, that the paste cleaners fell away; they were not specifically mentioned from 15 October 1999 onwards. It also appears likely that the office cleaner was employee no. 46, Mr Zwane. It would seem that a group of cleaners had been “pooled” at least by August 1999. The reduction in the number of their proposed redundancies from August 1999 to January 2000 was not explained; nor, except for no.s 75 and 76, was there an explanation for the fact that out of the original 12, only 2 were retrenched. Initially, it was stated by Highveld that the “position no longer exists”. Later, the reason advanced was outsourcing to a private contractor. But the witnesses who could have testified about outsourcing (Messrs. Hugo and Marshall) failed to do so. On the contrary their evidence created the impression that the cleaning team had either been reduced or done away with; and if the former, they failed to explain how the choice had been made. The unions were entitled to rely on the outsourcing assertion once it was advanced and they ultimately made a request in that connection which I have cited above together with Highveld’s response. It appears to me that there was insufficient evidence to warrant a finding by the trial Judge that the dismissals of the pool cleaners and (office) cleaner were procedurally fair.

[57.] I therefore conclude that Highveld’s appeal in respect of all the employees in

the iron division should fail. I shall address the question of compensation later.

ENGINEERING SERVICES DIVISION

[58.] It is unnecessary to furnish a lengthy exposition in respect of this division. The names of eight employees (no.s 1 to 8) appeared on the list of 17 January 2000, but jobs were found for three of them (no's 3, 6 and 7), one or more after the retrenchments were announced. Those three employees were excluded by the trial Court. The division formed an Engineering Services Restructuring Committee which began meeting on 19 November 1999 under the chairmanship of Mr Frost. The unions were represented by shop stewards. These meetings continued until 7 February 2000. The minutes were placed before the trial court. It is apparent from these minutes and from the evidence of Mr Frost that the matters under discussion were the very redundancies which had been proposed as between Highveld and the unions. They related to the air-conditioning workshop (eventually postponed when employees put up a feasible proposal); the transfer of the weighfeeder test function to the iron plant (already implemented) but leaving a question of who should be retrenched; and the reduction of the armature rewinding workshop to a "strip and quote" facility (the actual repairs to be undertaken by outside contractors). This also raised the question of who should be retrenched. It is equally apparent that at divisional level the discussions were incomplete. Mr Frost testified that Mr Hugo gave him a two week period of grace from 21 January 2000 to finalise matters. Some significant decisions were taken by the committee during that fortnight. It is clear that the consultation process, as between Highveld and the unions, was not exhausted or completed by 17

January 2000, in respect of the engineering services division, and that the closure was premature. The likely reason was Highveld's impatience. There is no reason to interfere with the trial Court's decision that all five dismissals in this division were procedurally unfair. I shall deal with compensation next.

COMPENSATION

[59.] As indicated at para. [3] above, the trial Court ordered Highveld to pay each of the individual respondents, subject to certain exclusions, compensation equivalent to twelve months of the salary which each employee was entitled to receive immediately before retrenchment. In respect of the respondents who were employed in the human resources and steel divisions, that order necessarily falls to be set aside in view of my conclusion that they were fairly dismissed. However, the position requires reconsideration in respect of the individual respondents who were employed in the iron and engineering services divisions, whose dismissals were procedurally unfair. In the judgment under appeal **Maleka AJ** recorded that counsel for the employees had asked for reinstatement. The learned Judge thought this not to be an appropriate remedy for reasons which he furnished. He continued:

“It seems to me that the appropriate remedy is financial compensation for the individual applicants. The order I make, therefore, is the following”

[60.] It will be noted that **Maleka AJ** did not furnish particularised or any reasons for the latter conclusion. A possible interpretation is that the learned Judge

thought he was faced with a choice: either reinstatement or compensation. If so, he would have erred, since the law is clear that he had a discretion to refuse compensation. *Johnson & Johnson's* case *supra*. In the case of procedural unfairness the all or nothing principle meant that the Court *a quo* had either to award full compensation according to the statutory formula or nothing. (*Ibid*; *Alpha Plant & Services (Pty) Ltd v. Simmonds & Others* (2001)22 ILJ 359 (LAC). An alternative interpretation is that **Maleka AJ** weighed the proposition just stated and came down in favour of (full) compensation. If so, then (as I have pointed out) he furnished no reasons when, with respect, I would have expected at least brief reasons. *Road Accident Fund v Marunga* 2003(5) SA 164 (SCA) at para. 31 – 3. There was some debate at the bar as to the legal nature of the discretion exercisable by the Court *a quo* and as to the circumstances in which this Court might interfere with its exercise on appeal. The problem, however, is that in the absence of reasons we, as a court of appeal, cannot assess whether the discretion was properly exercised. It appears to me that on either interpretation we have no alternative but to reconsider the matter afresh and exercise the discretion ourselves.

[61.] In regard to the individual respondents in the engineering services division, I have shown that the consultation process with Numsa was prematurely terminated by Highveld. I have also shown that productive consultations continued after 17 January 2000 at shop steward level. I think the conclusion is unavoidable that, had Numsa been given a final opportunity to consult, and had it chosen to do so meaningfully, then other or at least different jobs may have been saved. Some or all of the individual respondents in this department may not have found themselves out of work. It is arguable that in the event of such an opportunity Numsa may have continued to drag its heels

to some extent, but I do not think it probable. Numsa was aware from recent correspondence, for example Highveld's letter of 10 December, that Highveld was anxious to move on with the retrenchments. Numsa's letter of 13 January (sent on 17 January), recording what was discussed at the meeting of 13 January reveals that it made a number of concrete proposals and was coming to grips with the position. Had Highveld on 17 January announced the closure of the consultation process in respect of the human resources and steel divisions only, and the concomittant retrenchments in those divisions, Numsa would no doubt have declared a dispute. But such an announcement would be likely in my view to have spurred Numsa to serious and urgent consultations in the other two divisions.

[62.] The *Alpha Plant* case, *supra*, enjoins us to have regard among other things to the extent of Highveld's deviation from the requirements of the Labour Relations Act. In the engineering services division the facts set forth earlier show that the deviation was substantial. The consultations at shop steward level after 17 January were not an attempt to rectify Highveld's error; it appears rather that the Head Office and the division were operating according to different time tables.

[63.] The severance package was as follows: 3 weeks' wages per year of service up to a maximum of 52 weeks; a training grant of R5 000 (the affected employees were all at the lower end of the skills spectrum); housing allowance to be paid for a period of 6 months. In addition persons 58 years and older would receive a retirement gratuity of 1% of basic earnings for each year of service (there were only two or three such employees, all in the iron division). This package was a generous one, in excess of statutory minimum.

The length of service in the engineering services division varied, but in the iron division it was, with two exceptions, uniformly long.

[64.] In the engineering services division we have only to consider, after exclusions, five employees whose ages and lengths of service varied. Three of them had served Highveld for many years. Compare the *Alpha Plant* case at para. 115. All in all it seems to me that it would be fair and appropriate to award all five employees compensation for the breach of their rights.

[65.] I turn to the iron division. Here we have to consider, after excusions, nearly 30 employees of whom two had 6 years service each. The remainder had served from 12 to 32 years. The youngest was 38 years old (he had served 16 years). The eldest was 60 years old (he had served 31 years). Of this group 18 were artisan helpers who were deprived of the benefit of proper consultations with regard to selection criteria, the selection having been implemented prematurely. As with their colleagues in the engineering services division, I consider that it would be fair and appropriate to award them compensation.

[66.] That leaves several cleaners of various descriptions in the iron division. I have already mentioned ages and length of service. It will be recalled from my detailed discussion of these employees that the common feature was the paucity of evidence. When it comes to compensation I do not think this should redound to Highveld's benefit, even though the extent of the breach of rights cannot be precisely fathomed. The youngest retrenched cleaner was 49 years old, and he had 26 years service. The severance pay was generous, as I have said, but on the other hand it would not have been easy for poorly

skilled employees in this age group to find other work. Again I consider that it would be fair and appropriate to award them compensation.

COSTS

[67.] My conclusion accordingly is that, exclusions aside, the appeal succeeds in respect of approximately half the individual respondents (being those in the human resources and steel divisions) and fails in respect of the other half (being those in the iron and engineering services divisions). This amounts to substantial success on appeal. Many of the issues were closely connected, and much ground had to be covered in evidence that was common to all four divisions. Had Highveld appealed only in respect of the two divisions where it has been successful, the argument before us (which lasted two days) would have been shorter, but not by a full day. I think there would have been little or no saving in the length of the appeal record. In my view there is no reason to deprive Highveld of part of its costs of appeal. Highveld's costs should be paid by Numsa and not by the individual respondents.

[68.] The Court below ordered Highveld to pay the costs of the trial. That order has to be revisited in the light of the fact that approximately half of the individual respondents should not have succeeded at first instance. Numsa's eventual position, however, is that it has achieved substantial success in the trial in that the best part of half of the employees whom it represented have won their cases and are to receive compensation. Numsa should therefore have its trial costs, subject to possible deduction. As on appeal, so at the trial many of the issues were linked and much ground common to all four divisions had to be considered. The question is whether Numsa, by including as claimants

employees in the human resources and steel divisions, materially lengthened the trial. On an overall conspectus I am not persuaded that the trial was lengthened by as much as one full day, and I would accordingly make no deduction.

THE ORDER ON APPEAL

[69.] The order is in the following terms:

- A) The appeal succeeds in part with costs, such costs being payable by the first respondent;
- B) The order granted by the Court *a quo* is amended by the further exclusion from paragraphs 1 and 2 of the individual applicants who were employed in the human resources and steel divisions.

COMRIE AJA

I agree.

ZONDO JP

I agree.

JAPPIE AJA

APPEARANCES:

For the appellant	:	ADV. F.G. BARRIE
INC Instructed by	:	BRINK COHEN LE ROUX & ROODT JOHANNESBURG

For the respondents : ADV. J.G. VAN DER RIET (SC)

Instructed by : RUTH EDMONDS ATTORNEYS
JOHANNESBURG

Dates of hearing : 25 FEBRUARY AND 8 MAY 2003

Date of judgment : 20 NOVEMBER 2003