REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C 549/99

In the matter between:

W NEUWENHUIS Applicant

and

GROUP FIVE ROADS SAVAGE & LOVEMORE WESTERN CAPE, AGENTS FOR GROUP FIVE CONSTRUCTION (PTY) LTD Respondent

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JUDGMENT

GAMBLE, AJ

INTRODUCTION:

1. At the beginning of 1999 the Applicant was employed by the Respondent as its Human Resources Manager at its operation in Somerset West.

2. At the end of June 1999 the Applicant's employment was terminated, allegedly due to the Respondent's operational requirements, and he was retrenched with effect from 30 June 1999.

3. On 2 July 1999 the Applicant declared a dispute with the Respondent alleging an unfair

dismissal and on 11 August 1999 the Commission for Conciliation, Mediation and Arbitration issued a certificate in terms of section 135(5)(a) of the Labour Relations Act, No. 66 of 1995 ("the LRA") stating that the dispute had not been resolved. On 28 October 1999 the Applicant commenced the present proceedings in terms of section 191(5)(b)(ii) of the LRA, alleging an unfair dismissal and claiming compensation in an amount equivalent to 12 months' remuneration.

4. At the hearing of the matter the Respondent, which bears the onus of establishing the fairness of the dismissal, led the evidence of two witnesses, Hendrik Botha, who is employed by Group Five Limited as the Group Industrial Relations Manager, and Michael Lawson, who is an executive director of Group Five Limited, as well as the managing director of the Roads Division of Group Five Construction (Pty) Limited and Group Five Roads and Earthworks (Pty) Limited. The Applicant himself testified and called three witnesses, *viz* Deon Nel, an attorney with Webber Wentzel Bowens, formerly the Respondent's legal advisers, Johan Gouws, a former human resources director with the Roads Division, and Johan Maree, the financial director of Franki Africa (Pty) Ltd ("Franki Africa"), the Applicant's current employer.

5. At the end of the day there was common cause between the parties on a substantial number of the issues and facts, and it is accordingly not necessary for me to dwell unduly thereon.

<u>GROUP FIVE CORPORATE STRUCTURE</u>

6. The Respondent produced a corporate organogram which depicts the structure of the various

companies falling under Group Five Limited (a holding company) and Group Five Construction (Pty) Limited (a subsidiary of the holding company). The structure is intricate and has, no doubt, been designed to provide a profitable operation with maximum tax efficiency. While the actual status of Group Five Construction (Pty) Limited ("Construction") was not dealt with in the evidence, it would seem to me that this company is the principal trading entity within the group.

7. "Construction" has seven divisions, namely "Civils", "Engineering", "Corporate and Business Services", "Building", "Properties", "Roads", "Infrastructure". As I see it each division has a principal operating company (probably more aptly described as a divisional head office) with a number of companies reporting in to the divisional head office.

8. No evidence was placed before me regarding the extent of shareholding by the various companies in each other and, accordingly, I use the term "subsidiary" in a general sense rather than a strictly legal sense. It was apparent from the evidence that various of the directors serve on boards at subsidiary, divisional and group level, although the precise extent of this is not clear (and is in any event not material).

9. This case revolves around the structure of the Roads Division of "Construction" which, at the beginning of 1999, consisted of the following corporate entities:

9.1 Group Five Roads and Earthworks (Pty) Limited ("Roads and Earthworks") which was the divisional head office;

9.2 Group Five Roads Africa (Pty) Limited ("Africa"), an entity involved in road construction and maintenance beyond the borders of South Africa at the beginning of 1999;

9.3 Group Five Roads North (Pty) Limited ("North") which at the beginning of 1999 covered the area formerly known as the Transvaal;

9.4 Group Five Roads East (Pty) Limited ("East") which at the beginning of 1999 covered Kwa-Zulu Natal and the Eastern Cape;

9.5 Group Five Roads South (Pty) Limited ("South") which operated in the area formerly known as the Cape Province, as well as Namibia;

9.6 Group Five Pipe Joint Venture – an entity which is not relevant to the present case at all.

10. As will be seen from the description referred to above, "Africa", "North", "East" and "South" operated as separated limited liability companies in specific geographic regions. "Construction" ran its business in such a way that each of these four subsidiary companies was a separate profit-centre with its own board of directors. The managing director of each subsidiary served on the board of "Roads and Earthworks". The latter's managing director, Lawson, in turn served on the board of "Construction", of which one Lomas was the managing director. Lomas was also the chief executive officer of Group Five Limited.

11. The Civils, Engineering and Building Divisions also had an extensive array of subsidiary companies functioning within them, while the Corporate and Business Services Division

apparently provided information technology, corporate and business support to each of the other divisions.

12. It was suggested during cross-examination of the Applicant by Mr Redding, Counsel for the Respondent, that the total workforce, excluding contract workers, of the entire Group Five group was of the order of 8000 people.

13. At the commencement of proceedings I enquired from the parties what the status of the Respondent was insofar as it was cited as ***"agents for"*** "Construction". I was assured (and it is common cause) that the Applicant was employed by "South" (formerly known as Group Five Roads Savage & Lovemore Western Cape (Pty) Limited).

14. From a perusal of certain of "South's" financial statements for the year ended 30 June 1999, the following information emerges regarding the relationship between "South" and "Construction":

    14.1 "A directors' report has not been prepared as the company is a wholly-owned subsidiary of Group Five Construction (Proprietary) Limited, a company incorporated in the Republic of South Africa."

    14.2 The balance sheet reflected the "***employment of capital"*** as an amount of R340 000,00 due by the holding company.

    14.3 In the notes to the financial statements the following was recorded:

14.3.1 "3. Income Statement and Cash Flow Statement

No income statement or cash flow statement has been prepared as the company did not trade during the year. All expenses have been borne by Group Five Construction (Proprietary) Limited. No provision for taxation is required under these circumstances."

*14.3.2 "**4. Trade Transactions:***

All trading transactions are entered into as agents for Group Five Construction (Proprietary) Limited and its subsidiaries, the results thereof being incorporated in the accounting records and financial statements of that company."

15. In terms of his contract of employment, the Applicant's appointment was defined as follows:

*"**Appointment***

*Employment shall be as **alternate director of Group Five Roads Savage and Lovemore West Cape (Pty) Limited**, agents for Group Five Construction (Pty) Limited, situated at Naauwland Road, Sir Lowry's Pass, Somerset West, Cape."*

16. Further relevant clauses of the contract of employment are the following:

16.1 "6. Performance and Equity Bonus

The employee will continue to participate in the Group's Performance and Equity Bonus Schemes, as per the rules."

16.2 "9. Health Care

The employee shall continue to be a member of G5 Med, the company's health care plan."

16.3 "10. Group Five Holdings Retirement Benefit Fund

The employee shall continue to be a member of the Group Five Holdings Retirement Benefit

Fund."

16.4 "13. ***Transfer***

If a suitable vacancy exists and after consultation with the employee, the Company may transfer the Employee to another operation of Group Five Construction (Pty) Limited, or to another Group Five Limited associated company, in which event a new Contract of Employment shall be offered."

.5 ***"21.*** *The Employee agrees to the above terms and conditions, and furthermore, undertakes, whilst employed by the Company, not to enter into Agreement or engage in any business or negotiations which may conflict with the interests of Group Five, or any of its subsidiaries or associated companies."*

17. It will be seen, therefore, that while the contract of employment was between the Applicant and the South profit-centre, there were various rights and obligations which existed between him and the Group Five group, its subsidiaries and associated companies. Indeed, the evidence suggested that there was a culture, at least to an extent, of integration, interaction and transfer of employment between the various divisions and/or their subsidiaries and/or associated companies as well as financial dependence. In fact, one of the witnesses referred to the corporate culture of "the Group Five Family".

CORPORATE RESTRUCTURING

18. During the second half of 1998 the Roads Division embarked upon an exercise of evaluation of its operational requirements. At a seminar held at Sun City in September 1998, Lawson cautioned the senior management (including the Applicant) of the companies in the Roads Division, of the necessity to expand the Roads Division market both in South Africa and

beyond its borders into Africa, as well as a need to seriously reduce the overheads of the entities within the Division.

19. At a board meeting held on 6 November 1998, the managing director of the Respondent, one R.A. Mundy, painted a fairly gloomy picture of the Respondent's performance as far as financial results and expectations were concerned.

20. In addition, Lawson testified that in mid-November 1998 he held a meeting with all the managing directors in the Roads Division regarding the future of the Division. He said that the management structure in the Division was top-heavy and that the companies therein should be looking to reduce their respective overheads. In addition, there was a need to change the focus to look towards Africa for new contracts. He suggested that each of the managing directors should consider the future of their companies during the upcoming Christmas vacation, that they should thereafter discuss the matter with their relevant boards and that there should be a further discussion early in the new year as to the future of the Division.

21. On Thursday, 11 February 1999, there was a quarterly board meeting of the directors of "Roads and Earthworks" which was attended, *inter alia*, by Mundy. At this meeting Mundy reported (in regard to "South") that:

"*His profit-centre had had a poor quarter due to lack of turnover and under-recovery of overheads.*

The PPC contract was in trouble due to a sub-contractor leaving the site and a further R1m provision was to be provided for potential losses. Forecast loss for the year could be R1750k.

There was not much room for any upside this financial year."

22. The minutes of this meeting also record the following facts which are material to this case:

"***5. Roads Division Structure***

The managing director [i.e. Lawson] *stated that he had had discussions with each of the profit-centre MD's regarding a suitable Roads structure.*

The following points had in principle been agreed upon at these discussions:

- *The proportion of work being done in SA had reduced considerably and would continue to decline.*
- *The current structure of four profit-centres in SA was too many …*
- *Defined rigid boundaries for profit-centres to work in.*

At this stage an open discussion took place regarding a future suitable Roads structure.

The outcome of this discussion was that "the Golden Thread" that had serviced the Roads Division in the past and had led the old Savage & Lovemore to becoming the best road builders in the country should be maintained. It would be left up to the Division to find a suitable structure.

In addition, it was agreed that a positive message must be conveyed to the people in the Division that a restructure within the Division was in progress.

No date was initially set for implementation. (However, after lunch it was agreed that a suitable plan should be in place by the end of March 1999 and implemented by June 1999)."

23. Lawson testified further that, flowing from this meeting, the managing directors within his division were to go back to their respective profit-centres, to discuss the proposed restructuring with their respective boards and to revert to him with feedback after the matter

had been so discussed.

24. It is fair to say, therefore, that by mid-February 1999 the Roads Division board had arrived at a decision in principle whereby it:

24.1 accepted that there was a necessity to restructure;

24.2 considered that the existence of four profit-centres was excessive;

24.3 foresaw the possibility of a reduction in the number of profit-centres;

24.4 accepted that the prospect of redundancies within the Division could not be excluded as a consequence of the restructuring process.

25. On 23 February 1999 Mundy (in response to the request referred to in paragraph 23 above) submitted a highly confidential handwritten memorandum to Lawson regarding his proposals for the restructuring of the Roads Division. This document was intended only for Lawson's eyes and contained comments by Mundy on the potential retrenchment of certain of "South's" senior management. It is significant that Mundy did not consider there to be any likelihood that the Applicant would be retrenched in the restructuring exercise.

26. This document also reflected Mundy's preference for the restructuring of the company to a three profit-centre model. In essence, this involved the retention of Africa, North and South with East being "**absorbed**" by North and South.

27. On 24 February 1999 Mundy (in further response to the request referred to in paragraph 23 above) submitted a further memorandum to Lawson (titled "Private and Confidential"), but not regarded as confidential as the previous memorandum. This purported to be Mundy's formal and "open" response on the restructuring issue. It is important to note that in this document, too, Mundy proposed a three profit-centre approach in the following manner:

"*Possible restructure*

The very nature of the business, its senior people and geographical areas of operation, make a simple 2-Profit-centre arrangement a bit difficult (i.e. RSA work and non-RSA work). Taking into account the realities of the current set-up, (i.e. workload and client basis, future markets, location of profit-centre head office, specialised expertise, personalities, etc.), I believe a 3-profit-centre arrangement could work."

28. The debate around the restructuring of the Roads Division, then, turned upon the choice of a two or three profit-centre model. No other workable proposal for restructuring appears to have been suggested or considered by Lawson.

29. Lawson testified that after the board meeting on 11 February 1999 he spoke to his respective managing directors telephonically and thereafter met with them on 15 April 1999 to further deliberate on the matter. At the latter meeting, he stated, a final decision was arrived at to proceed with a two profit-centre approach. The effect of this, he said, was that "South" and "East" would cease functioning as separate profit-centres with "South's" obligations and contracts (both existing and future) being taken up by "North", while "East's" obligations and contracts would henceforth be the responsibility of "Africa".

30. As will appear more fully hereunder, the precise nature of what was to become of "South" and "East" as a consequence of this decision, was the subject of some considerable debate both within the Roads Division and between the parties in evidence before me. Lawson, who is an engineer and, by his own admission, not phrased in the terminology of corporate structure, human resources or industrial relations, refused to be drawn in to the use of the appropriate phrase to describe what was happening. He did, however, quite frankly describe the situation as follows. As regards "North" and "South", he said, **"two profit-centres became one".** I pause to mention that Botha testified that he regarded the correct interpretation as being simply the closure of a profit-centre ("South") rather than a merger of the operations of the two.

31. Lawson then set about advising the various structures within the Roads Division of the impending changes. He visited "South's" offices on 30 April 1999 and informed the board members of the proposed changes. Simultaneously, a **"news flash"** was issued on the same day under the hand of Lomas and Lawson in which, under the heading **"Restructure: Roads Operations"**, the following was said:

> **"***It has therefore been decided to close down our Kwa-Zulu Natal and Western Cape head offices with effect from 30 June 1999. Most site operations will continue unchanged, with all contracts previously run from the Kwa-Zulu Natal office now falling under the administration and control of Group Five Roads Africa in North Riding, and all contracts run from the Western Cape office, falling under the administration and control of Group Five Roads North in Elandsfontein. A downsized regional office will continue to operate from Blue Rock near Somerset West. …*
>
> *The closure of these two head offices will affect many employees in administrative functions and every effort will be made to find alternative employment and to minimise retrenchments.*

Further consultations with each affected employee will commence in the week beginning 10 May 1999."

32. After the board meeting at "South" referred to in paragraph 31 above, Lawson and the human resources director of "Roads and Earthworks", one Vinod Ramdayal, met with the Applicant to discuss with him the implications of the proposed restructuring. The Applicant testified that it appeared to him that a decision in principle had already been made regarding his position and he sought reassurances from Lawson and Ramdayal that this was not so. Already at this stage, the Applicant was adamant that he should be given the position of human resources manager in the restructured "North", while Lawson felt that the existing management would wish to retain their **"teams"** as before. This would mean that one Neser (who at that time held the position of human resources manager with "North") would stay on in his post. At the conclusion of the meeting Lawson told the Applicant that he would look into the possibility of creating another position for him, but he was uncertain where or what this position would be.

33. As pointed out above, there was much debate during the evidence as to the precise description to be given to the corporate re-organisation which was taking place. Although the Respondent had, at an early stage, used the phraseology **"restructuring"**, it appears as if it preferred, at a later stage (and after the intervention of Botha) to regard the matter somewhat differently:

33.1 On 20 May 1999, and in a memorandum to all staff, Mundy stated the following:

"<u>Roads Division re-structure</u>

Group Five Roads (South) (Pty) Limited will continue to operate as a Profit-centre until the current financial year-end (31st June 1999) and thereafter re-structured at Blue Rock as a Regional Office of Group Five Roads (North) (Pty) Ltd. Details of the re-structured Regional Office will be communicated to all Personnel in due course.

Personnel affected by the aforementioned re-structure have now all been consulted with and talks with them will be on-going for a while.

*I wish to reiterate the importance of the last paragraph in my previous memo dated 13th May 1999 which states; … **'notwithstanding the re-structuring process, I feel it is important for everyone to understand that all our contracts will continue to operate as normal. We will continue to tender aggressively on selected contracts in the Western Cape, Northern Cape and Namibia. There is also no doubt that with reduced overheads and streamlined administration set-up we will be even more competitive'."***

33.2 In a letter dated 31 May 1999 Lawson said the following to the Applicant (it being common cause that the letter was drafted by Botha):

"***Reasons***

The reasons for the downsizing of the Somerset West office of your Profit-centre, and the effect that it will have on you, have been disclosed to you previously during our discussions. More information is contained in the news flash distributed within your profit-centre, and of which a copy was handed to you. For clarity sake a copy is attached.

In order to ensure understanding we confirm that the operations of Group Five Roads South are not merging with those of Group Five Roads North. The said operations will in future report to the management structures of Group Five Roads North."

34. By this time, the Applicant and, *inter alia,* Botha, were at odds as to the precise description to be given to the restructuring. In paragraph 30 above I referred to Lawson's understanding of what was happening. It is clear that both Lawson and Mundy held the view that a **merger** of the two profit-centres was taking place while Botha's description of the exercise as a closing down of a profit-centre may well have been influenced by the human resources and industrial

relations implications thereof.

35. In my mind the evidence clearly establishes that the contracts formerly managed out of the "South" office would remain intact and that these would now be managed out of "North's" office. Similarly, all assets and liabilities of "South" were to be taken over by "North". Finally, and perhaps quite significantly, "South" was never formally wound up under the Companies Act. It became (and remains) a dormant company.

36. I consider, therefore, that the appropriate description to be given to the corporate re-organisation, as far as "South" and "North" were concerned, was that of a **merger**. It was not a **"closure"** in the real sense of the word. If that was so, one would have expected a formal liquidation of the Respondent company with the concomitant legal consequences.

<u>CONSULTATIONS - THE RESTRUCTURING</u>

37. Section 189 of the LRA imposes a statutory duty to consult at a time

> **"***when an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements …***"**

38. I agree with the submission made by Counsel for the Applicant, Mr Rautenbach, that the statutory consultation process imposed by section 189 of the LRA is to be considered holistically. Accordingly, while section 189(3) follows upon section 189(2), it is reasonable to require the employer to take the obligatory steps under section 189(3) (broadly speaking, disclosure of relevant information) before embarking upon the consultation process set out in

section 189(2). Since the purpose of such consultation is a joint problem-solving exercise, that purpose would not be served if the employer could get away with taking the decision to close the relevant unit before disclosing the reasons therefor, as occurred in the present case.

39. In embarking upon the statutory consultation process, the employer is not required to follow the wording of the LRA as if it were a checklist which had to be strictly adhered to. Rather, the Court (in reviewing a party's purported compliance) should consider whether the ultimate purpose of the section has been achieved.

Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC) at 1216J-1217A.

The point of departure in the section is a process of joint problem-solving by way of consensus.

so: Eyre v Hough t/a Miller Eyre Travel (1999) 20 ILJ (LC) at 1051D-F;

Imperial Transport Services (Pty) Ltd v Stirling [1999] 3 BLLR 201 (LAC) at 206B-C;

Kotze v Rebel Discount Liquor Group (Pty) Ltd [2000] 2 BLLR 138 (LAC) at 142.

40. Mindful of the company's statutory obligations, Lawson and, in particular, Botha, purported to consult with the Applicant. Of course, since the Applicant was employed by "South" (a separate and distinct corporate entity) and since "South's" operations were effectively to be shut down, that consultation should have taken place between Mundy and the Applicant. There was no direct evidence that this occurred.

41. The Applicant's unchallenged evidence was that during February 1999 Mundy asked each of the individual members of "South's" board to consider appropriate measures to reduce the overheads of "South". Each director was to consider the matter individually, not to discuss it with any of his colleagues and to report back to Mundy in private. This the Applicant did and he described in his evidence the proposals which he made to Mundy in regard, *inter alia*, to cost efficiency. There was, the Applicant said, no question at that stage of a restructuring of the Roads Division nor was the question of a two or three profit-centre model ever discussed with him. He testified that the first knowledge that he had of the restructuring was on about 29 April 1999 when Mundy informed him that a decision had been taken by the Roads Division board to opt for a two profit-centre approach. The Applicant said that Mundy encouraged him to talk out against such an approach at a meeting to be held the following day.

42. Mundy is still employed by one of the companies within the Group Five group and was available to the Respondent to dispute any of these allegations on the part of the Applicant. The Respondent's failure to challenge the Applicant's evidence on this score is capable only of one reasonable inference: that the Applicant's evidence is correct.

43. The advice given to the Applicant by Mundy on 29 April 1999 was against the background of:

43.1 a final decision regarding a proposed two profit-centre model already having been taken by the directors of the Roads Division on 15 April 1999; and

43.2 the pending meeting of the board of the Respondent the following day at which Lawson was to convey the decision already having been taken; and

43.3 the imminent news flash referred to in paragraph 31 above.

44. Mr Redding argued that the probabilities were that Mundy must have discussed the two and three profit-centre models with the Applicant prior to the decision of the board of the Road's Division of 15 April 1999. He argues that this could be inferred from the facts referred to in paragraph 41 above. I am unable to agree with this submission in the light of the unchallenged evidence of the Applicant. If Mundy had in fact purported to comply with the provisions of section 189 in this fashion, I have no doubt that the Respondent would have adduced his evidence to bolster its case. I am accordingly satisfied that there was no proper consultation between the Applicant and his actual employer (the Respondent) prior to 30 April 1999 regarding the proposed restructuring and that there was a manifest failure on the part of the Respondent to comply with the provisions of section 189 of the LRA in this respect.

45. Of course, the consultation process is not only limited to discussing issues of selection criteria, severance pay, the possibility of future re-employment and alternatives to retrenchment. It is incumbent on the employer to consult the employee as soon as it (i.e. the employer) **"contemplates"** the possibility of a dismissal.

Kotze v Rebel, *supra*, at p.142C-143E.

While there can be no brook with the employer's entitlement to consider a restructuring exercise and even to take a decision in principle, once the employer has identified retrenchment as a possible consequence of its restructuring process, it is obliged, **at that stage**, to consult the employee on the issues stipulated in the statute. In Kotze's case, *supra,* at p.150H, Conradie J postulated the test as follows:

"[45] From a productive point of view the employer wants to be certain of his decision before facing the disruption which it is bound to cause; from an industrial relations point of view, he dare not be certain before he invites consultation (and thereby makes his intention known). How open or closed an employer's mind was when he embarked on the consultation process, can only afterwards be monitored by a court on whatever manifestations of the workings of his mind become available. Despite his own, for the reasons set out above, pardonably strong view, an employer must remain sufficiently flexible to conduct meaningful discussions with his employees. He is therefore obliged to invite input from the employees. If he fails to do this, and fails to give a reasonable opportunity for the employees to make their contribution, he leaves himself small opportunity for arguing before a court that his mind had not been made up."

46. Having established that there was no proper consultation as contemplated by the provisions of section 189 of the LRA at the profit-centre level (i.e. between the Applicant and Mundy), I consider that one must turn to the Divisional level to see what transpired there. As I have attempted to demonstrate above, it is apparent that, as far as the Applicant was concerned, the corporate "guiding mind" which determined his future position was located at the board of "Roads and Earthworks". In the present case Lawson was - by his own admission - the person with whom the ultimate decision to restructure rested. Having obtained the approval of his board to restructure, Lawson relied upon the intercession of Botha (from Group and/or Construction level) to handle the human resources and industrial relations consequences of that Divisional decision. Indeed, the manner in which the Respondent purported to consult

with the Applicant (i.e. at the higher Divisional level) is indicative of where the real and actual control of the Respondent lies.

47. Mr Redding accepted during argument that there was no consultation between Lawson and/or Ramdayal and/or Botha on the one hand, and the Applicant on the other hand, before the meeting of 30 April 1999. This concession would, on the face of it, appear to be fatal to the Respondent's case. There could have been no doubt in the mind of the members of the board of "Roads and Earthworks" that the decision to opt for a two profit-centre approach with the concomitant closure of the office of "South" would lead to redundancies within "South". This decision entailed the closing down of the entire head office of "South", including the Applicant's post. That necessarily entailed the redundancy of the Applicant's position.

48. The subsequent consultations embarked upon by, in the main Botha, regarding alternative positions within the Division or Group or elsewhere, came about at a time when the Applicant's redundancy was no longer capable of being challenged by him. The adoption of a two profit-centre approach on 15 April 1999 not only had the effect of rendering the Applicant's position redundant, but the Respondent (or rather the Roads Division) had in effect also decided on the selection criteria for the restructuring of the Division.

49. The proposed two profit-centre structure, which, as pointed out above, was an immutable decision by the time it was brought to the Applicant's attention by Mundy on 29 April 1999, enabled the Respondent to argue, as it did throughout the dispute, that the Applicant's position was the only human resources management position affected by the restructuring,

because the restructuring was merely a profit-centre downsizing. In other words, by pre-judging the structural issue (a two profit-centre model) the Respondent (or more properly the Roads Division) at once also pre-judged the selection criteria issue.

50. By failing to consult the Applicant about possible alternatives to its two profit-centre model, the Respondent effectively closed its mind to a proper consultation on the merits of the adoption of LIFO as an appropriate selection criterion for the human resources position in the restructured entity. This procedural choice on the part of the Respondent resulted in an artificial obstacle to a fair application of LIFO which, in turn, led to the rejection of that selection criterion which should otherwise have been adopted.

51. It should be noted, too, that section 189(3) of the LRA requires the employer to make prior disclosure of the **reasons for the dismissal** in addition to the reasons for, or existence of, operational problems. The rationale for this would seem to be that the mere existence of operational problems in the business does not reasonably alert the employee to the need to defend himself/herself against a possible redundancy. In the present matter, it does not lie in the mouth of the employer to simply contend that the Applicant knew about the operational problems of the Respondent. Such knowledge on his part does not imply that the Applicant was consulted about the specific solution proposed by the employer, namely to close down the head office of “South”.

52. For these reasons, and in particular because of the unavoidable consequences of the decision to restructure in regard to the Applicant’s redundancy, I am of the opinion that the

failure by the Respondent (or more properly the Roads Division) to consult the Applicant on the proposed changes to the corporate structure, constitutes a fundamental procedurally unfair omission on its part.

<u>CONSULTATIONS – SELECTION CRITERIA</u>

53. After the decision to restructure to a two-profit-centre model had been announced to staff, Lawson and, more importantly, Botha purported to engage the Applicant in consultations regarding the future of his position within the Group. The Applicant's perception that this consultation process took place in the context of a *fait accompli* is not misplaced. Given the principial approach which Botha took regarding the nature of the corporate re-organisation (a "downsizing" as opposed to a "merger"), the purported consultation was skewed from the start because of the way in which the company viewed the matter.

54. As noted above, a necessary consequence of the Respondent's unilateral decision to close down the administrative head office of "South" while merging its operational section with "North", was the selection of human resources manager's post for redundancy. The Respondent had made it clear from the inception that its formal position was that the change affected "South" as a profit-centre only, and therefore the positions of Neser and Swart (human resources manager of "Africa") were not affected. In the circumstances Botha contended that the application of LIFO as a selection criteria across the Division was impossible.

55. In a letter to the Applicant dated 31 May 1999, Lawson, writing on behalf of "Roads and Earthworks" (a letter which it is common cause was drafted by Botha), states, *inter alia*, the following:

*"1. **Reasons***

The reasons for the downsizing of the Somerset West office of your profit-centre, and the effect that it will have on you, have been disclosed to you previously during our discussions. More information is contained in the news flash distributed within your profit-centre, and of which a copy was handed to you. For clarity sake a copy is attached.

In order to ensure understanding we confirm that the operations of Group Five Roads South are not merging with those of Group Five Roads North. The said operations will in future report to the management structures of Group Five Roads North …

4. Method for selection

Your position, being the only position of its nature within the profit-centre becomes redundant for operational requirements due to the downsizing of the profit-centre. It is therefore not possible to apply the LIFO Principle in your instance. You have during previous consultations indicated that you believe that LIFO should be applied across the Roads division due to the fact that a restructuring in the division is taking place. Please be advised that two profit-centres are affected by closure and downsizing activities and not a whole division, and that the Human Resources function in the other affected profit-centre i.e. Group Five Roads East has also been declared redundant. It is therefore not possible to apply LIFO across the division, as the other operations within the division are not affected by the closure and/or downsizing of the two profit-centres. In your profit-centre it is the position of Human Resources Manager that is affected."

I should also point out that this letter which, it was common cause, was written in purported compliance with section 189 of the LRA, contains an explanation as to attempts made by Botha to find alternative employment for the Applicant within other corporate entities within the Group and also stipulates the timing of redundancy together with the proposed severance pay.

56. As an experienced human resources practitioner, the Applicant was very much alive to the issues at stake. He knew and understood the implications of the corporate restructuring and he had a good working knowledge of the law relating to retrenchment. Against this background the Applicant was at pains to attempt to engage the company in debate regarding the exact nature of the corporate re-organisation. He said that he perceived that there was a fundamental difference in opinion regarding the nature thereof and that these divergent views had the effect of the parties approaching the matter from differing points of departure. The Applicant contended that there was, in essence, a fallacy in the case put forward by Botha which affected his reasoning throughout the process.

57. The Applicant testified that he became increasingly frustrated during the purported consultative process. Botha had refused to debate with him the correctness or otherwise of his (i.e. Botha's) classification of the restructuring as a "downsizing". The Applicant, with his knowledge of human resource functions, said that he felt that **"he was going mad"** and that possibly he had misinterpreted the situation completely. In argument Mr Redding quite appropriately described this on-going debate between Botha and the Applicant as **"sterile"**.

58. In an obvious endeavour to achieve consensus, the Applicant proposed to Botha that the issue over which they had deadlocked be submitted to advisory arbitration. The Applicant proposed a quick and speedy arbitration to be presided over by an IMSSA arbitrator (or someone similar) to be conducted **"in house"**. The Applicant was so bold as to say to the Respondent that he would stand or fall by the outcome of any such advisory arbitration. The

company, however, refused to be drawn into this dispute resolution mechanism and did not, at the time, provide any trenchant reason for its refusal. In a letter written on behalf of Group Five Limited on 10 June 1999, Botha merely stated the following:

"During the consultation you indicated that you believe it would be in the interests of all Parties to have this matter referred to advisory arbitration. After careful consideration, it was decided that such action will not assist the Parties in this process. We are attempting to find a solution and amicable agreement. Should we fail to reach such an agreement, nothing prevents either party from taking steps in terms of the LRA."

59. The Respondent did not, as one would have expected of a reasonable employer, offer any explanation for its refusal to go to arbitration. At trial, it said that it was afraid that such a step would establish an unacceptable precedent in respect of other (or future) retrenchees. It is regrettable that the Respondent did not inform the Applicant of these reasons at the time – they may have elicited a further conciliatory proposal from the Applicant. (The company was after all dealing with a human resources practitioner who could engage meaningfully in the consensus-seeking exercise.) While the Respondent's reluctance to go to advisory arbitration is notionally grounded in principle, I consider that the Applicant's approach was a mature and non-confrontational way of attempting to reach consensus in terms of the statute. Unfortunately the Respondent's response on this score is indicative of a pre-determined attitude and a reluctance to consult properly on the issues at hand. After all, consultation envisages

"*a communication of ideas on a reciprocal basis*".

Maqoma v Sebe N.O. 1987 (1) SA 483 (Ck) at 490E.

60. Indeed, the Respondent paid scant regard to the provisions of section 189(6) of the LRA when dealing with the Applicant's repeated requests to have the crucial issue sent to arbitration. That sub-section provides that

"The employer must respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing."

To my mind this provision also requires that the employer must respond to the employee's representations in good faith. It must demonstrably act in good faith showing that it deals with the matter in issue as one of substance rather than form. The Respondent in this case, by baldly asserting that advisory arbitration would not assist the parties, effectively gave no reason at all. Implicit in the Applicant's suggestion was that the process of consensus-seeking would be assisted by advisory arbitration. To simply say that it would not (as the Respondent did), really begs the question.

61. It was not suggested by the Applicant that the company negotiated in bad faith around the issue of selection criteria and an enquiry in this regard is accordingly not necessary. What is clear, however, is that the company failed to consult properly on selection criteria in the sense in which that term ("consult") is to be understood in section 189 of the LRA.

PROPER SELECTION CRITERIA

62. Mr Rautenbach argued that the adoption or not of appropriate selection criteria by an employer is, in the first place, a matter of substantive and not procedural fairness. He argued further that selection criteria directly affect the substantive outcome of the process, in the same way as mitigating circumstances in misconduct cases or warnings in strike dismissals do. He stated that they form part and parcel of the **justification** for the dismissal. I agree with this approach.

63. Section 189(7) of the LRA imposes a duty on employer to make use of selection criteria that are, in the absence of agreement, fair and objective in the circumstances of the case. It was then argued that the consequence of a failure to invoke fair selection criteria renders such a dismissal substantively unfair.

64. In developing this argument, Mr Rautenbach pointed out that section 189 does not prescribe the so-called employment **"universe"** across which the selection criteria should be applied, i.e. whether by department, branch, division, company, corporate group or whatever. Apparently the coining of the phrase **"universe"** is derived from an article by André van Niekerk in Contemporary Labour Law, August 1992, entitled **"Selection Criteria – the 'bumping' debate".** The distinction implicit in this phrase was accepted by the Industrial Court in

Raad van Mynvakbonde en Andere v Harmony Goudmyn-maatskappy Beperk (1993) 14 ILJ 183 (IC) at 198C, where the following extract from van Niekerk's article is quoted:

"The application of LIFO on a plant basis would, it is suggested, be fair in respect of those employees whose employment universe is the plant. In respect of the personnel managers, it would be clearly unfair to apply LIFO on a plant basis, thereby selecting the personnel manager for retrenchment on the basis of a month's service at the plant, irrespective of his 20 years' service with the company. The employment universe in this instance is the head office and the three plants – the personnel manager with least service in that universe ought to be selected for retrenchment."

65. In my mind the appropriate employment **"universe"** in respect of which selection should have applied in the present case would have been the Roads Division. This was the **"universe"** which effectively determined the Applicant's fate. It was common cause that of the three human resource practitioners within that **"universe"** the Applicant was the longest-serving employee. He had been within the Group Five **"family"** for almost ten years at the time of his retrenchment. Neser had been there for about 3 ½ years at the time, while Swart had not even completed his second year of service. There was, therefore, no debate as to the effect of the application of LIFO in the Roads **"universe"**. Obviously this is why the Applicant considered that he should have retained his employment as the human resources manager in "North".

66. In cross-examination, Botha conceded that if the restructuring had been regarded as a **merger**, it would have been correct to apply LIFO in favour of the Applicant. However, because it was only a **downsizing**, this method of selection criteria could not apply, so Botha argued.

67. In support of this contention, Botha noted that there was an existing policy decision that no "**bumping**" of employees should take place. This decision had been taken as far back as 1996, after a seminar at which Nel had discussed the implications of the new Labour Relations Act with the Group's human resources practitioners. Nel's evidence did not properly corroborate Botha on this aspect. The former stated that he would never have advised a client to adopt a rigid policy against "**bumping**" and that he would consider applying such an approach in appropriate circumstances.

68. To my mind it is inimical to good labour practice to adopt or apply such a policy rigidly and without differentiation. There may, notionally, be situations where the digression from such a policy would be warranted according to the dictates of fairness.

See: Unilever SA (Pty) Ltd v Salence [1996] 5 BLLR (LAC);

NCBAWU and Others v Natural Stone Processors (Pty) Ltd [2000] 6 BLLR 732 (LC).

In confirming the Group's aversion to "**bumping**", Botha stated the following in the abovementioned letter of 10 June 1999 to the Applicant:

"We believe that it would not be correct to consider all the human recourse (sic) managers across the Roads division and thereafter only consider the person with the longest service for employment.

We confirm that due to the nature of the industry that we operate in, bumping is not a viable option in order to deal with redundancy situations."

The Respondent did not, however, offer (as it was obliged to do in terms of section 189(6) of the LRA) adequate reasons for its refusal to consider or apply this practice.

69. To my mind the approach of considering the relevant employment **"universe"** within which the selection criteria should be applied was critical in the present case. It was, as I have pointed out repeatedly above, the Roads Division which was restructuring and it was the Roads Division which would have derived the ultimate benefits (increased profits and productivity) of that exercise. Indeed, the evidence of Lawson demonstrates precisely this.

70. In cross-examination Lawson conceded that the effect of the restructuring was that the two profit-centres became one. He then conceded that as a matter of logic and fairness, the Applicant should have been considered as one of the pool of candidates for the post of "North". This practical and realistic approach by someone who had a **"hands on"** involvement with the Division (as opposed to Botha who was probably more akin to an *ad hoc* "trouble shooter"), irreparably destroyed the carefully adopted formal position which the Respondent had manifested in its letter of 31 May 1999 (see paragraph 55 above).

71. The formal position was that LIFO could not apply across the Division since structurally the retrenchment only affected the "South" and "East" profit-centres. However, having been forced to depart from the Respondent's official position, Lawson was driven to enter the arena of merit selection across the Division. This he sought to do by reference to two criteria, namely:

71.1 operational disruption due to a lack of skills; and

71.2 the general policy of **“no bumping”**.

72. I agree with Mr Rautenbach’s argument that both of these criteria are fatally defective as attempts at *bona fide* selection criteria:

72.1 In the first place, operational disruption by reason of lack of skill was never disclosed to the Applicant at the time. It rather appears that the Respondent has seized upon this reason as an *ex post facto* justification of conduct which it realised was unfair. If it had been properly raised at the time the relative skills of the Applicant, Neser and Swart could have been considered and debated by the parties.

72.2 Secondly, for the reasons already mentioned, reliance upon a predetermined policy of **“no bumping”** can never be fair.

73. But, assuming that such an approach would be permissible, the problem which then confronts the Respondent is that if the two profit-centres were **“merged”** as Lawson said they were, bumping would not have been necessary because of the application of LIFO in the newly constituted entity. I consider that where a merger such as one has in the present case occurs, there is no reason in logic or fairness to exclude personnel from one of the entities in that merger from the process.

74. By reason of the fact that each of the previous separate head offices (“North” and “South”) now belonged to a merged administrative/ operational centre, there was no necessity to view the issue as one concerning **“bumping”**. Once again, logic and fairness would require that

one would simply apply the universally accepted LIFO principle.

75. Mr Redding relied heavily on the decision of this Court in Amalgamated Workers' Union of SA v Fedics Food Services [1999] 2 BLLR 123 (LC) in support of Respondent's attitude against **"bumping"**. I consider that the facts of the present case differ wholly from those in the Fedics's case, and for that reason alone the case is distinguishable. However, it will be noted that in that matter Landman J recognised the necessity to **"bump"** as a matter of principle.

*Although it was not the practice in the industry to **"bump"** employees, nevertheless there was an obligation on the employer to consider whether it should do so because, if it was able to do so in a fair manner which was not injurious to itself and to other employees, then it should have given serious consideration to doing so, to avoid the consequences of retrenchment. I have considered the evidence as to why Fedics decided not to **"bump"** employees. It appears to me that fair reasons have been provided."*

The Learned Judge then considers the arguments advanced in that case and finds that "**bumping"** would not have been practical or workable in the prevailing circumstances.

76. As I have pointed out above, no real reasons were advanced for the refusal to **"bump"** other than the issue of company policy.

77. To the extent that it may be necessary to determine whether **"bumping"** should have occurred in the present case, I have had regard to the following facts and circumstances:

77.1 The Applicant's natural career path may well have taken him to one of the other profit-centres or the Divisional head office (his contract of employment expressly provided for this);

77.2 The Respondent failed to prove that the **“bumping”** of Neser would have caused disruption to either “North” or the Roads Division based on the relative skills of the parties involved;

77.3 The Respondent failed to prove the existence or danger of any so-called **“domino”** effect as only a handful of managers were involved in the exercise;

77.4 The Applicant was prepared to relocate and adapt to the new position;

77.5 The new position (whether filled by Neser or the Applicant) would have entailed human resources work in the geographical areas previously covered by both “North” and “South” in fairly equal proportions. The transferral of such a workload to Neser would no doubt have caused some disruption in any event.

78. In the light of the aforegoing, I cannot find that the Respondent has established that **“bumping”** would have led to impractical and unworkable consequences.

79. For the reasons set out above, it is my considered opinion that the Applicant was not chosen for selection in terms of fair selection criteria and for that reason, too, his dismissal is to be regarded as unfair.

<u>COMPENSATION</u>

80. Having found that the Applicant’s dismissal was unfair for the reasons set out above, I have a discretion in terms of section 193(1) of the LRA to order, *inter alia*, that the employer pay

compensation to the employee. That discretion must, obviously, be exercised in a judicial manner.

Johnson & Johnson, *supra*, at p.1220A.

81. It was common cause between the parties that, in the exercise of that discretion, the Court can decide not to award an applicant any compensation at all.

Johnson & Johnson, *supra*, at p.1220D.

The parties were further *ad idem* that, in the event of compensation being awarded in the present case, the amount would be calculated in accordance with the provisions of section 194(2) of the LRA as being R250 085 (effectively 11 months' remuneration).

82. In contending for the exercise of my discretion in favour of the payment of compensation, Mr Rautenbach relied heavily on the judgment of Froneman DJP in the Johnson & Johnson case, *supra*, where at para 41 on p.1220 the following was said:

"The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance. The nature of an employee's right to compensation under section 194(1) also implies that the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of section 194(1)), or where the employer's ability and willingness to make that redress is frustrated by the conduct of the employee."

83. Mr Redding argued that this was an appropriate case to refuse the Applicant compensation and relied on the latter portion of the passage cited in paragraph 82 above, as well as:

Whall v BrandAdd Marketing (Pty) Ltd [1999] 6 BLLR 626 (LC);

De Bruin v Sunnyside Locksmith Suppliers (Pty) Ltd [1999] 8 BLLR 761 (LC);

Lorentzen v Sanachem (Pty) Ltd (2000) 9 LAC 5.5.1.

84. The word "*solatium*" is defined in the New Shorter Oxford English Dictionary as:

"A sum of money or other compensation given to a person to make up for loss, inconvenience, injured feelings, etc; *specifically in Law,* such an amount awarded to a litigant over and above the actual loss."

85. The formula prescribed by the legislature for the calculation of such a *solatium* deprives the Court of a proper discretion in arriving at an appropriate award. By rigidly stipulating the way in which the Court is to arrive at the figure, no room is left for an award calculated at a different rate over a shorter period of time, which may be fair to both employer and employee.

86. This may have inequitable consequences. For example, a blue collar worker who earns a low wage and whose case is heard in a Court with a lighter case load may receive less than a white collar worker whose case is crowded out by a full Court roll. The consequences of a job loss for the former may be more devastating in the current economic climate than for the latter, whose services may be in demand and who is able to take up new employment fairly quickly.

87. Members of this Court have recently expressed dissatisfaction and frustration with the constraints imposed by section 194 of the LRA.

See, for example:

> Vickers v Aquahydro Projects [1999] 6 BLLR 620 (LC) at 624-I; Le Roux v CCMA and Others [2000] 6 BLLR 680 (LC) at 682-G.

88. In the Labour Appeal Court, the unexpressed (yet understandable) dissatisfaction of Froneman DJP with the limitations of the section as voiced in Johnson & Johnson, *supra*, were echoed in clear and unequivocal voice by Conradie JA in Lorentzen's case, *supra*, where the following was said:

"[9] The all or nothing choice facing the learned judge a quo has once again thrown into sharp relief the dismal state of affairs to which section 194(2), as interpreted in Johnson & Johnson (supra) has given rise. I do not wish to be understood as saying that Froneman DJP who gave the judgment for the Court could have found a better solution to what has turned out to be a section with major unintended consequences. An award has nothing to do with the magnitude of an employer's industrial relations transgression. It is a factor of the employee's wage level and the case load at the CCMA or the Labour Court. It has little of a true solatium about it. If the tribunal is busy the solace is large; if it is not, it is small."

89. I would respectfully wish to associate myself with the reservations expressed in these judgments. The facts of this case, once again, demonstrate why urgent legislative intervention is required to afford the Court a proper discretion to award appropriate compensation.

90. Mr Redding sought to argue, on the strength of Conradie JA's *dictum* referred to in paragraph

88 above, that the compensation is not a *solatium*, but rather proof of actual loss. I do not agree. What Conradie JA was saying was that by prescribing the method of calculation, section 194(2) has the effect that the Court is often unable to award a proper *solatium*.

91. The Applicant received a substantial package upon retrenchment. The sum of R166 274,51 was made up as follows:

90.1	Severance pay – calculated at one week per year of service	R52 465,40
90.2	Additional severance pay – calculated on the basis of service in excess of 5 years	R13 116,35
90.3	Accumulated leave	R23 084,76
90.4	One month's notice pay	R22 717,00
90.5	Profit participation in the company's relevant scheme	R54 891,00
	Total:	**R166 274,51**

The amounts paid in terms of paragraphs 90.1, 90.3 and 90.4 were pursuant to statutory obligations. The sums in paragraphs 90.2 and 90.5 (totalling R68 007,35) were paid *ex* *gratia.*

92. Johan Gouws, who happens to be the Applicant's step-brother, testified about the Applicant's potential within the Group Five **"family"** (as he put it). He pointed out that in terms of a manpower potential and succession plan drawn up in October 1996 the Applicant was identified as the successor to his position in the Roads Division. I pause to point out that that position was subsequently taken by Ramdayal in what appears to have been an affirmative action appointment.

93. While Gouws's assessment of the Applicant may have been influenced, to a measure, by his relationship with the Applicant, I do not think that his evidence on this aspect can be completely disregarded. What does appear from Gouws's evidence (and a general assessment of the other evidence including that of the Applicant), is that the Applicant was hardworking, loyal and ambitious. He appeared to be happy within the Group Five corporate structure, appreciated the good position in which he found himself and wished to retain that at all costs.

94. Gouws also testified about the bonus/incentive scheme which existed in the Group Five group for senior employees. He gave a detailed description of the way in which this scheme worked and I do not propose to recite those facts herein. Suffice it to say that when he lost his job, the Applicant forfeited the right to share in a well-planned (and no doubt tax efficient) bonus scheme which could have rendered annual bonuses of easily R80 000 to R100 000, depending on the level of remuneration.

95. In cross-examination by Mr Redding, Gouws conceded that a number of his assumptions about the Applicant's career prospects and his share in the bonus scheme were based on speculation and assumptions. These assumptions seemed to be, in the main, fairly conservative and reasonable. In short, it would be fair to say that if the Applicant's career path with the Group Five group had continued he would have enjoyed the possibility of future wealth, depending on the growth of the company. That possibility has now been destroyed.

96. Johan Maree testified that he is the financial director of the Applicant's present employer, Franki Africa, which is a specialist geotechnical company. It is a privately owned company, unlike the Group Five Group Ltd which is a listed company. Maree stated that the Applicant had assumed employment with Franki Africa with effect from 1 September 1999. His annual package (i.e. the cost to the company) amounts to R320 000,00. It appeared, as well, that the Applicant's employment fortuitously came about as a result of a telephonic discussion between Maree and Botha early in August 1999 when the latter mentioned the Applicant's name in positive terms. In effect, therefore, the Applicant was unemployed for one month and is now employed at a higher annual rate.

97. Maree also testified about the bonus share scheme available to senior employees of Franki Africa. Once again, without going into any detail, it would be fair to say that this scheme is wholly different and less beneficial to that offered by the Group Five group. In addition, due to the structure of Franki Africa's board of directors, it will take some time before the Applicant could even qualify for a directorship and the opportunity to deal in such a scheme.

98. During evidence, the Applicant mentioned the distress and emotional pain which his retrenchment caused him and his family. I do not think that he overstated this in any regard and I consider that, on this basis alone, he would be entitled to a *solatium* of the type referred to by Froneman DJP in the Johnson & Johnson case, *supra*.

99. Mr Rautenbach argued that the Applicant's good fortune in obtaining new employment relatively soon after his dismissal should not be affected by **"external factors which might have ameliorated the wrong"**. He argued, further, that the following factors should be considered in awarding the Applicant the agreed compensation which, in my mind, is not insubstantial.

99.1 The actions of the Respondent violated the most basic procedural right of an employee in a situation such as the present, namely the right to be consulted about his redundancy itself;

99.2 The decision violated the right to a fair consultation about selection criteria;

99.3 The decision displayed an unacceptably high degree of intransigence on the part of the employer. Not only did the employer steadfastly refuse to entertain the notion of the possible application of LIFO across the Division; the employer also deliberately blocked a most reasonable attempt at breaking the deadlock by means of advisory arbitration;

99.4 The employer, in refusing to consider LIFO across the Division, did so by withholding from the employee information or ideas that it relied on, namely the **"no bumping"** policy, the relative skills levels of the parties and its reasons for refusing advisory arbitration.

100. In addition it was argued that the employee was dismissed on a substantively unfair basis as well by virtue of the inappropriate application of selection criteria. The nature of such a dismissal was serious, so it was alleged, because it meant the difference between having a career interrupted or not.

101. It is significant, too, to note that the Applicant lost a career of 10 years. In the position in which he now is, if there are to be retrenchments, he will most certainly be affected by the application of LIFO. It was also argued that the Applicant had to forego his potential entitlement to a full directorship within the Group Five group and has lost a significant share in the bonus scheme. Such losses would be in the nature of patrimonial loss for which the Applicant is not entitled to be compensated. I do consider, nevertheless, that the loss of those benefits must have caused the Applicant a significant degree of personal distress for which he may be compensated.

102. Finally, I agree with Mr Rautenbach's description of the Respondent's treatment of the Applicant as **"shabby"**. It could have dealt with the Applicant in a far more conciliatory manner, particularly having regard to the Applicant's understanding of human resource issues.

103. In the circumstances, I am satisfied that the Applicant deserves compensation. In so doing, I

am mindful of the fact that, as pointed out in paragraph 91 above, the Applicant has received substantial *ex gratia* payment from his erstwhile employer. However, that payment was not made by the employer because it perceived that it had committed a procedural wrong. It would seem that the Applicant had an accrued right to share in the bonus scheme and the company favourably exercised its discretion to pay the Applicant his share.

104. If I were able to exercise a true discretion in this matter I would have awarded the Applicant an amount greater than the one month's salary which he lost as a consequence of the Respondent's actions. At the other end of the scale, I would have preferred not to have been bound by a determination of the *solatium* in the amount stipulated by the LRA.

105. However, as I have attempted to demonstrate above, I have little choice in the matter and, as I see it, if I consider that compensation is warranted, I am obliged to award the sum of R250 085.

106. I would point out further that I do not agree with the approach propounded by Grogan AJ in Whall's case, *supra*, at p.635-H, para 33, as a basis for refusing compensation where an employee immediately obtains alternative employment at a higher salary. I prefer the approach adopted by Jammy AJ in the case of Thomas Auf Der Heyde and University of Cape Town, Case No. C603/98, unreported judgment dated 5 May 2000 at para 80:

"80. I am respectfully unable to agree with that view which appears to me to be in direct contradiction to the Labour Appeal Court's determination that patrimonial or actual loss is not a factor to be taken into account in the exercise of the Court's discretion whether or not to award compensation where a fair procedure has not been followed. Whilst, as Grogan AJ

states, the examples given in Johnson may not be exhaustive, the example which he himself propounds as being consistent with the circumstances contemplated by the Labour Appeal Court, is in fact one based on the absence of patrimonial loss and is in fact expressly excluded from the criteria which the Court, in the exercise of its discretion, may validly take into account.

81. *The Respondent's contention, which the Applicant acknowledges, that he did not suffer patrimonial loss is therefore irrelevant as is, in my opinion, the further submission that the Respondent acted at all times in a bona fide manner. The absence of mala fides on the part of an employer who disregards fair and prescribed procedures will not absolve him from the compensatory consequences of his conduct."*

107. It follows, therefore, that the Applicant is entitled to compensation in the agreed sum of R250 085,00.

COSTS

108. Both parties were in agreement that costs should follow the result. In the circumstances I am of the opinion that the Applicant should be entitled to his costs. I noted throughout the hearing that Mr Rautenbach appeared in Court without the assistance of an attorney. While he appears to have been properly briefed by the Applicant's attorneys of record, I think it would be appropriate, for the purposes of taxation herein, to order that the Applicant should not be entitled to recover any costs relating to his attorneys of record, other than the costs associated with the drafting and filing of the statement of claim.

CONCLUSION

109. In the result I make the following order:

109.1 The dismissal of the Applicant by the Respondent on 30 June 1999 was unfair for want of compliance with a fair procedure;

109.2 The Respondent is to pay to the Applicant within 14 days of the date of this judgment, compensation in the amount of R250 085,00;

109.3 Interest on the aforesaid sum at the prescribed rate will run from a date calculated to be 14 days after date of this judgment until date of payment;

109.4 The Respondent is ordered to pay the Applicant's costs of suit herein on the High Court scale, including the costs of Counsel, save that the Applicant shall not be entitled to recover any costs in respect of his attorneys of record other than the costs associated with the drafting and filing of the statement of case.

P.A.L. GAMBLE
Acting Judge of the Labour Court

Date of hearing:	**19 June – 29 June 2000**
Date of judgment:	**13 July 2000**
Legal representative for the Applicant:	**Adv N.F. Rautenbach instructed by Heunis & Heunis Inc Cape Town**
Legal representative for the Respondent:	**Adv A.I.S. Redding**

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