IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JA 45/00

In the matter between

GOLD FIELDS TRUST(PTY)LIMITED **First Appellant**

GOLD FIELDS MINING AND DEVELOPMENT LIMITED **Second Appellant**

and

PHILIP STANDER AND 4 OTHERS
Respondent

JUDGEMENT

ZONDO JP

Introduction

[1] In a dispute between the appellants and the respondents on whether the first appellant's dismissal of the respondent for operational requirements was fair or unfair, the Labour Court, through Maserumule AJ, gave a judgement to the effect that the dismissal was unfair and ordered the first appellant to pay 12 months remuneration to each one of the respondents plus costs. With the leave of the Court a quo, the appellants now appeal to this Court against that judgement and order.

[2] Before I can deal with the merits of the appeal, there are procedural matters that I must dispose of. The one is an application by the appellants for the condonation of their failure to deliver the record within 60 days from the date of the granting of leave to appeal as prescribed by the rules of this

Court and for the reinstatement of the appeal. The other is an application by the third respondent for the condonation of the late delivery of his heads of argument. I shall first deal with the appellants' application and thereafter with the third respondent's application.

Appellants' application for condonation and for the reinstatement of the appeal

[3] In terms of rule 12(1) of the Rules of this Court an appellant is required to deliver the record of appeal to the registrar within 60 days from the date on which the Labour Court granted leave to appeal. In this matter the order granting leave to appeal was apparently delivered on 7 June 2000. Neither the registrar of this Court nor any one seems to have notified the appellants' attorneys in advance that the order was going to be handed down on that day. As a result the appellants' attorneys were unaware that the order would be handed down. After the order had been handed down, they only became aware that such an order had already been handed down on the 27th September 2000 when they received a letter from the attorney for some of the respondents to which was enclosed a copy of the order. By then the prescribed period of 60 days had expired.

[4] The appellants' attorney then delivered a notice of appeal on the 23rd October 2000. The notice of appeal was filed late. In terms of rule 5(1) of the rules of this Court such a notice was required to have been delivered within 15 days after the date on which leave to appeal was granted. Although the notice of

appeal was delivered outside the 15 days prescribed by rule 5(1), this was simply because the appellants and their attorneys were unaware that the order granting leave to appeal had already been delivered. Once the appellants' attorney became aware of the order, he delivered the notice within 15 court days thereafter. There can be no doubt that the appellants' failure to deliver the notice within the prescribed period should be condoned. The circumstances clearly reveal good cause for the failure. It is hereby condoned.

[5] The record of appeal was delivered to the registrar on the 19th March 2001. As the order granting leave to appeal had been delivered on the 7th June 2000, this means that the record of appeal was delivered about eight and a half months after the date of such order. That is not the period by which the appellants were late in delivering the record. The record should have been delivered within 60 court days from the date of such order. The appellants have not in their application for condonation indicated the date on which that period expired. They should have done so because this is necessary to establish precisely from which date the delay can be said to have begun. Their failure to do so places the burden of making the necessary calculations to establish such a date on the Court. This is an unnecessary burden that is placed on the Court by a party that seeks the indulgence of the Court.

[6] The 60th court day was the 1st September 2000. That

period from 7 June 2000 to the 27th September 2000 is the period during which the appellants and their attorneys were not aware that the order granting leave to appeal had been granted. The explanation in respect of that period is accepted. It is necessary to then deal with the explanation for the delay from the 27th September 2000 to the 19th March 2001 in the delivery of the record. A period of 60 court days from the 27th September 2000 (counting from 28 September) expired on the 20th December 2000. This means that from the 27th September when the appellants became aware of the order a period of 81 calendar days expired after the expiry of 60 court days. As already stated above the record was delivered on the 19th March 2001. From the 27th September 2000 to the 19th March 2001 is about 114 court days. From the 20th December 2000 when the 60 court days expired from the date the appellants' attorney became aware of the order to the 19th March 2001 when the record was delivered, it is about 54 court days.

[7] This means that the record was delivered 54 court days later than the last day that the appellants would have been required to deliver the record if one adopts the approach that they should have delivered it within 60 court days. The appellants failure to deliver the record timeoulsy means that rule 5(17) has been triggered. Rule 5(17) provides that, if an appellant fails to deliver the record within the prescribed period, he is deemed to have withdrawn the appeal. However, rule 12 gives this Court a general power to condone any non-compliance with the rules of this Court. A consideration of the

explanation provided by the appellants' attorney for the delay reveals that part of the delay was caused by Vic and Dup, the company that the appellant's attorney had instructed to prepare the record and that another part of the delay was caused by the appellants' attorney's oversight of the rule of this Court that requires that the record of appeal be delivered within 60 days from the date of the handing down of the order granting leave to appeal. Vic and Dup and the appellant's attorney share some blame for their respective parts of the period of delay. The appellant's attorney has apologised to this Court and to the respondents for his oversight. This is not a case where the consequences Vic and Dup's negligence or fault in the preparation of the record can be visited upon the appellants or their attorney.

[8] The matter is an extremely important one to all the parties. The respondents have not been prejudiced by the appellants' failure to comply with the rules of the Court. That is why they have elected not to oppose the appellant's application for the condonation of its failure. As to the prospects of success on the merits, I am of the opinion that it can be said that the appellants' prospects of success are reasonable. In the light of all the circumstances I am of the view that good cause has been shown and that this Court should condone the appellants' failure to deliver the record timeously. Accordingly such failure is condoned and the appeal is reinstated. The application by the respondents for the condonation of their failure to deliver the respondents' heads of argument timeously also deserves to be granted. The delay was not excessive. Neither the appellants nor the Court were inconvenienced by the delay. Accordingly such failure is also hereby condoned.

[9] The facts surrounding the dismissal of the respondents are largely common cause. They were set out adequately in the judgement of the Labour Court. It is unnecessary to set them out in any way different from the way they were set out by the Labour Court.

[10] When Belcombe LJ had to give judgement in the Court of Appeal in **Secretary of State for Employment v Spence and others [1986]3 ALL ER 616 (CA),** he took the facts as

they were from the decision of the industrial tribunal. I find it convenient in this matter to follow suit and, accordingly, propose to take the facts from the judgement of the Labour Court as they have been adequately set out therein. They are set out in the following terms.

> "3.1 The applicants, except for Oleg Krzyzanowski, the second applicant, were originally employed by Deelkraal Gold Mining Company Limited (Deelkraal), in various capacities. Deelkraal was at the time one of a number of companies controlled by Gold Fields of South Africa Limited, (**"GFSA"**).
>
> 3.2 In May 1997, Deelkraal merged with or was bought by Elandsrand Gold Mining Company Limited (**"Elandsrand"**). Following the merger, and in November 1997, the applicants, again save for the second applicant, were transferred to Gold Fields Training Services Trust, (**"GFTS"**). The second applicant was employed by GFTS in September 1997 as an underground manager and was immediately thereafter seconded to the Vulindlela Project. Vulindlela was a project administered by GFM &D, the details of which are set out below. These applicants signed employment contracts with GFTS. GFTS is a trust which was created by GFSA to provide training services in the areas of panel mining training, stope-artisan training to the mining companies within the GFSA stable. These mining companies paid GFTS for the services provided. The first respondent is the

trustee of GFTS.

3.3 The rationale for transferring the applicants to Deelkraal appears from letters dated 21 May 1997, addressed to the applicants, save for the second applicant, by GFSA. The material portion of the letters, which are identical, reads as follows:

> **"Internal discussion have taken place with Elandsrand representatives, but it is not clear from these discussions which employees Elandsrand wish to retain (on a secondment basis) and for how long.**
>
> **With this uncertainty it is not possible at this stage to advise you which specific group operation will ultimately offer you employment. <u>The purpose of this letter is therefore to secure your employment in the interim with the Gold Fields Group.</u> According, GSA on behalf of GFTS TRUST thereby (sic) makes an offer to you to be employed by GFTS TRUST upon the same terms and conditions as currently apply to you ...**

Should this offer be accepted then depending on outcome of the discussions with Elandsrand you will either be seconded back to Deelkraal for a limited period or be made a specific offer in due course from another Gold Fields Group company on the same terms and conditions."

3.4 The applicants, although formally employed by GFTS, did not render any services to GFTS, except for the fifth applicant, and even in his case, to a very limited degree. GFTS did not need their services, had no vacancies for them and had only employed them as an interim measure as stated in the letter quoted above. Upon their transfer to GFTS, the applicants were seconded to Gold Fields Mining & Development Limited, (**"GFM&D"**) and to Vulindlela, which was a project managed by GFM&D. GFM&D is a wholly owned subsidiary of GFSA and provides management services to the former. GFSA itself does not have any employees.

3.5 GFTS paid applicants' salaries and then invoiced the project to which they were seconded or GFM&D in cases where they were seconded to the latter. GFM&D would then reimburse GFTS.

3.6 In February 1998, a new company was formed, comprising of Gengold Mining Company Limited, (**“Gengold”**) and the gold assets of GFSA. The new company was called Gold Fields Limited, (**“GFL”**) and was listed on the Johannesburg Stock Exchange. As a result of the formation of GFL, GFSA was divested of all the gold mines and remained only with non-gold mining interests and was also delisted from the Johannesburg Stock Exchange.

3.7 One of the consequences of the creation of GFL was that GFTS merged with Gengold’s Training Centre as both of them provided the same kind of services. Following the merger, a consultation process with employees of GFTS on possible retrenchments was set in motion. I will return to this aspect later.

3.8 Following the creation of GFL, GFSA made an announcement that GFM&D would be restructured and employees would be retrenched. This was necessitated by the fact that GFM&D would no longer provide management services to the gold mines which had now become part of GFL. GFM&D employees formed a consultative forum which became the vehicle for consultations about the pending retrenchments. The applicants did not take part in the activities of this consultative forum. On 27

February 1998, the vast majority of GFM&D employees were retrenched. Their retrenchment package consisted of:

3.8.1 two months' notice pay;

3.8.2 one month's ex-gratia payment to employees with less than ten years' service and two months' ex-gratia payment to employees with more than ten years' service; and

3.8.3 two weeks' pay for each completed year of service.

3.9 On 6 March 1998, the manager of GFTS, Mr Lutman, addressed a memorandum to a Mr. PDK Robinson of GFL. The material portion of the memorandum reads as follows:

> **'The following employees are currently on the books of GFTS despite the fact that they have not reported to or performed any work for GFTS. It would be appreciated if some guidance can be given concerning their future in Gold Fields Limited as well as how to deal with them and**

who should deal with them."

3.10 The applicants' and other persons' names are listed in this memorandum. There is a handwritten note dated 9 March 1998 and which deals with the query raised by Lutman in his memorandum of 6 March. In this note, the names of the applicants appear and alongside them is the notation, **"Retrench"**. The note goes on to say that **"all these decisions were made by Opsco, the Gold Field's Limited Company."** During evidence, Rothman testified that the note was made by Lutman, GFTS' manager.

3.11 On 11 March 1998, GFTS made an announcement about its restructuring and the possible retrenchment of employees. GFTS employees formed a consultative forum which consulted with GFTS management about the restructuring and retrenchments. The first applicant was elected on to the forum as a representative of the ex-Deelkraal and Vulindlela employees who were still on the books of GFTS.

3.12 On 19 March 1998, the first applicant received a letter from GFTS in which he was advised that there was no alternative employment available to him at GFL, that he might be affected by the pending

retrenchments at GFTS and that he should apply for a suitable position at GFTS once positions were advertised as part of its restructuring. Other applicants received similar letters.

3.13 On 27 March 1998, the first applicant, acting on behalf of ex-Deelkraal and Vulindlela employees, including the other applicants herein, wrote a letter to GFTS in which he, inter alia, stated that:

3.13.1 they regarded themselves as GFSA employees, and not GFTS employees;

3.13.2 they had not been afforded an opportunity to apply for posts at GFL after its formation;

3.13.3 a decision had already been made to retrench them and the only issue open for discussion was the severance package; and

3.13.4 they were prepared to accept the same retrenchment package as the one paid to GFM & D employees, plus an additional three months' pay for **"procedural and substantive errors."**

3.14 Further correspondence ensued between the

first applicant and GFTS concerning the status of the applicants and their retrenchment. The essence of the dispute between the two parties was that the applicants claimed that they were not GFTS employees and ought to have been dealt with during the GFM&D retrenchments and that were they to be retrenched, they should be paid the same package as that paid to GFM&D employees. GFTS resisted these claims and maintained that the applicants were its employees and their future would be determined by the outcome of the consultation process then in progress.

3.15 In between the exchange of correspondence between the applicants and GFTS, meetings between the consultative forum and GFTS took place as part of the consultations about the looming retrenchments. Consultation meetings between the consultative forum and GFTS management took place on 16,17,20 and 26 March 1,3,6 and 7 April 1998.

3.16 The first applicant attended all the consultation meetings except for the ones on 1 and 3 April 1998. At the meeting held on 6 April 1998, the first applicant informed GFTS’s representative, Mr Rothman, that the retrenchment package being discussed would not apply to ex-Deelkraal and Vulindlela employees because they were still

awaiting a response to their memorandum. The memorandum referred to is dated 6 April 1998 and essentially reiterates applicants' position as set out in their letter of 27 March 1998, whose essential contents are set out above.

3.17 On 14 April 1998, the consultative forum and GFTS signed a retrenchment agreement which included the retrenchment package to be paid to employees to be retrenched. The retrenchment package consisted of:

3.17.1 two weeks' pay of each completed year of service for the first six years of employment, and one weeks pay of each completed year of service in excess of six years; and

3.17.2 one month's basic ex-gratia payment.

3.18 The applicants received letters on 17 April 1998 in which they were advised of their retrenchment, effective from 17 May 1998, although they were not required to serve their notice period. They were paid the severance package set out in the preceding paragraph.

[11] The respondents were dissatisfied with their dismissal and, after an unsuccessful attempt at conciliation, referred a

dispute of an alleged unfair dismissal to the Labour Court for adjudication. The appellants defended the action. The Labour Court had to decide a number of issues which it did. However, the only issue on appeal is whether the Court a quo was right in finding that the dismissal of the respondents by the first appellant unfair. I turn to consider this issue.

Was the Court a quo right in its decision that the dismissal was unfair?

[12] The reason why the Labour Court found that the respondents' dismissal was unfair was that the first appellant had failed to comply with the requirements of sec 189 of the Labour Relations Act, 1995 (Act NO 66 of 1995)(**"the Act"**). Sec 189 provides that when an employer **"contemplates"** the dismissal of an employee or of employees for operational requirements, it must consult such employee or employees or his, her or their representative.

[13] The human resources manager for GFTS was Mr Rothman who was the main witness for the first appellant. Mr Bruce Lutman was appointed as the senior manger for GFTS or as the Head of GFTS on the 18th February 1998. According to Mr Rothman, people at GFTS were **"apprehensive and suspicious concerning the joining of Mr Lutman at the time".** Mr Rothman, as human resources manager, then suggested to Mr Lutman that a **"communication meeting"** be held with the staff of GFTS.

[14] A meeting as suggested by Mr Rothman was then arranged. At that meeting one of the questions which were

raised - rather aggressively, according to Mr Rothman, - was what the future held for the employees who had been transferred from Deelkraal and the ex-Vulindlela employees. As Mr Lutman did not have a straight answer to this question, he undertook to seek answers from Gold Fields Limited, the parent company.

[15] Pursuant to that undertaking, Mr Lutman addressed the memo of the 6th March 1998 referred to earlier in this judgement to Mr Robinson of Gold Fields Limited and asked for guidance concerning the future of various groups of employees who were **"on the books"** of GFTS despite the fact that they [had] not reported to or performed any work for GFTS. Mr Robinson was employed by GFL and was the person to whom Mr Lutman reported. The groups of employees included the ex-Vulindlela and Deelkraal employees. This included the respondents. On the 9th March 1998 Mr Lutman compiled a certain document the contents of which included a reference to the groups of employees in respect of whom he had sought guidance from Mr Robinson in his memorandum of the 6th March.

[16] The contents of that document read thus:-

> "**Manuscript document:**
>
> **1. Group Sports Organiser }**
> **Asst ,, ,, } wait on Opsco decision**
> **Group Firemaster }**

2. **Group Radiological Protection Advisor - Kieth Spencer's decision**

3. Underground Manager - KRYZYZANOWSKI - RETRENCH
[Initialled]

4. STANDER PP }
VAN DER NEST LS }
DU PLESSIS A } **RETRENCH [initialled]**
DE TAKE V }
ANNANDALE WG } TOWILL

All these decisions were made by OPSCO, the Gold Fields Limited company.

BEL
9/3/98 "

[17] Mr Rothman testified that the document was compiled by Mr Lutman. He testified that about a day or two after the day on which Mr Lutman had compiled it Mr Lutman had given it to him. Mr Rothman testified that Towill's name - that is one of the respondents - was added by him to the list of employees to which the word **"retrench"** would apply. Mr Rothman's evidence about the circumstances under which the document was compiled was hearsay evidence as he was only relating what he had allegedly heard from Mr Lutman and Mr Lutman was not called to testify.

[18] It will be seen from the document that against the group sports organiser, the assistant sports organiser, and the group fire master it is written: **“wait on OPSCO decision”.** Against the Group Radiological Protection Advisor it is written: **“Keith Spencer’s decision”.** Against the rest of the names it is written **“retrench”**. These names include the respondents’ names. Most importantly the last sentence of the document reads: **“All these decisions were made by Opsco, the Gold Fields Limited Company.”** The author of the document appears as **“BEL”** which is Mr Bruce Lutman. The date 9/3/98 also appears. Opsco was explained by Mr Rothman as the operations committee of Gold Fields Limited (**“GFL”**) which was the trustee of GFTS. GFL, as the trustee of GFTS, had appointed Mr Lutman as the head of GFTS. Mr Lutman reported to Mr Robinson of GFL.

[19] The question arises as to which decisions Mr Lutman was referring to when in the last sentence of the document he wrote:-**”all these decisions were made by Opsco, the Gold Fields company.”** Without doubt the reference to **“these decisions”** is a reference to, among others, the decision that the employees against whose names the word **“retrench”** appears be retrenched. What the contents of this memorandum therefore reveal is, among other things, that a decision was taken by Opsco of GFL that the respondents be retrenched. It is common cause that the consultation process began after the 6th March 1998.

[20] The Court a quo came to the conclusion that the decision to retrench the respondents was taken before the consultation process. Both in his evidence in chief and under cross-examination Mr Rothman tried to explain the contents of the document away by saying that they were to the effect that there was a possibility of the respondents being retrenched and not that a decision had been taken to retrench the respondents. Quite correctly, the Court a quo rejected his evidence in this regard. First, he did not write the document but Mr Lutman did. Second, he bore no personal knowledge of the circumstances under which the document had been written by Mr Lutman. Third, he was not present when the decisions referred to in the document were taken by OPSCO.

[21] Mr Lutman's evidence would have been critical in explaining the circumstances under which the memorandum was compiled and whether the contents thereof were or were not intended to mean what they say, namely, that OPSCO had taken the decision that the respondents be retrenched. He was not called to give evidence and from the record no explanation appears to have been given why he was not called when the circumstances cried out for an explanation of what the memorandum he wrote meant if it did not mean what it says. The evidence of the chairman of OPSCO or any member of OPSCO would also have been critical if it was to be accepted that the statement in the document that OPSCO made the decision that the respondents be retrenched was to be understood not to mean what it says or if the circumstances under which it was made were such that it was not a decision to retrench but a contemplation of a dismissal for operational requirements as envisaged in sec 189(1) of the Act. Neither chairman nor any member of such committee was called to testify.

[22] In argument before us Counsel for the appellant submitted that the decision to retrench that the document refers to was a contemplation of a dismissal for operational requirements which in terms of sec 189(1) of the Act occurs prior to the initiation of the consultation process. Unfortunately for the appellant in circumstances such as those in this case such an explanation cannot come from Counsel in argument. It must come from a witness in the witness stand. In this matter the persons who were competent to give such an explanation did

not testify. Accordingly there is no evidential basis on which it can be justified to say that what is reflected in the document as a decision to retrench was not a decision to retrench but a contemplation of taking a decision to retrench in the future.

[23] What does one make of the fact that the decision to retrench the respondents was taken before the consultation process was initiated? The Court a quo dealt with the matter on the basis that this was an instruction from OPSCO to GFTS to retrench. OPSCO was part of GFL. GFL was the trustee of GFTS to whom Mr Lutman, the head of GFTS, was accountable. Mr Rothman was asked whose decision it would have had to be to retrench the respondents. He testified that it would have had to be Mr Lutman's decision. As Mr Lutman reported to GFL, the trustee, it seems to me that in truth it was GFL which had the last say because just as it had hired Mr Lutman, it also could fire him. It may be that it would not have lightly interfered with Mr Lutman's decision. However, it could instruct him to dismiss employees and he would have to carry out such an instruction. However, for purposes of this case, not much turns on whether it was Mr Lutman or GFL that had the final decision to dismiss the respondents. Mr Lutman wrote in the memorandum that OPSCO had taken the decision that the respondents be retrenched. He did not take the witness stand to say that the decision lay with him and he did not associate himself with the decision of OPSCO nor did he take the witness stand to say that he took the decision to retrench the respondents only after the consultation process had been completed. In those circumstances I am satisfied, like the Court a quo, that a final decision to retrench the respondents was taken before the consultation process was initiated and that, for that reason, the consultation process that took place in this matter did not comply with the requirements of sec 189. This rendered the dismissal procedurally unfair.

[24] The Court a quo also found that there was no fair or valid reason for the dismissal of the respondents. On behalf of the appellants it was argued before us that such issue fell outside the issues that the Court a quo was called upon to decide and that it erred in deciding it. The respondents argued that such issue was one of the issues that the Court a quo was called upon to decide and that its finding in this regard was correct. In my view it is not necessary to decide whether or not this was

one of the issues that the Court a quo had to decide and, if so, whether its finding in that regard was correct. This is so because the relief sought by the respondents in the Court a quo was compensation. They did not seek reinstatement. On appeal they seek to defend the award of compensation. In this case whether the dismissal is substantively unfair or procedurally unfair will not make any difference on the amount of compensation that the respondents are entitled to. In the light of all the above I conclude that the appeal falls to be dismissed.

[25] With regard to costs the Court a quo ordered GFTS to pay the respondents' costs on the basis that both parties had asked that they be awarded costs if they were successful and, in the view of the Court a quo, such an approach accorded with the requirements of law and fairness. On appeal it was argued on behalf of the appellants that the logic of the approach adopted by the Court a quo was that the respondents should have been ordered to pay the second appellants' costs because the second appellant had successfully resisted their attempts to obtain a finding that they had been employed by it. I agree with this submission. Accordingly the Court a quo erred in not ordering the respondents to pay the second appellants' costs. Logic dictated that, if the award of costs depended on who was successful, then the second appellant was entitled to its costs because it was completely successful against the respondents. The taxing master will have to be particularly careful in taxing bills of costs in this matter because in the Court a quo the respondents were successful in the end against GFTS which substituted Gold Fields Trust (Pty)Ltd as first respondent in the Court a quo and first appellant on appeal and on appeal they have also been successful against GFTS. However the second appellant on appeal, i.e. second respondent in the Court a quo, was successful against the respondents both in the Court a quo and in this Court but it and GFTS had used the same attorneys and the same Counsel in both the Court a quo and this Court .

[26] In conclusion I make the following order:-

1. The appeal by GFTS is dismissed and GFTS is ordered to pay the respondents' costs of the appeal.

2. The appeal by the second appellant against the order of costs in the Court a quo is upheld and the respondents are ordered to pay the second appellants' costs on appeal jointly and severally, the one paying, the others to be absolved.
3. The order of the Court a quo on costs contained in par 65.3 of its judgement is set aside and replaced with the following one:.

"(a) GFTS is ordered to pay the applicants' costs

(b) The applicants are ordered to pay the second respondent's costs jointly and severally, the one paying, the others to be absolved.

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Zondo JP

I agree.

_____
Nicholson JA

I agree.

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Appearances

For Appellant	Mr Leech
Instructed by	Deneys Reitz Attorneys
For 1st, 2nd, & 4th respondents	Mr Pretorius

Instructed by	Niel Pretorius
For the 3rd respondent	Mr Higgins
Instructed by	Sampson Okes & Higgins Inc
Date of Judgement	: 29 May 2002