IN THE LABOUR COURT OF SOUTH AFRICA

Held at Braamfontein Case no J869/00

In the matter between

Jakob Oosthuizen Wolfaardt First applicant

Renier Nicolaas Jansen van Rensburg Second applicant

and

The Industrial Development Corporation of

Respondent

JUDGMENT

LANDMAN J:

Introduction

1. The Industrial Development Corporation (IDC) is a South African corporation which over the past 60 years has promoted, through various means, industrial development and other initiatives in this country.

2. Late in 1998 the IDC appreciated that its activities, which were focussed for the main on mega projects, had changed. The IDC *decided to look at its operational structure in order to ensure that its resources were concentrated on its core business to enable it to carry out its mandate. There was also concern about the costs of doing business. The exercise was named "**Alignment for success**". A bosberaad (high level workshop or indaba) was held at Sun City with the members of the board and the executive committee (ie the Chief Executive Officer (CEO) and head of

departments) to which I shall refer as Exco. The upshot of this meeting was that IDC could not conduct business as usual and would have to realign itself to meet a changed economic environment.

Restructuring Envisaged

3. On 26 February 1999, a notice from the CEO was distributed to all employees informing them that:

4.

1.1. external consultants would be appointed to advise the respondent on its restructuring;

1.2. tenders would be called for from consultants; and

1.3. five of respondent's employees had been appointed to facilitate the investigation by the consultants to be appointed and oversee the implementation of their recommendations.

5. Bain-XKM was appointed as consultants to investigate IDC's structure, business practices and processes. All employees were advised of this by notice on 19 March. A second bosberaad was held at Mount Grace in April 1999 with Exco and other managers attending. On 6 May the staff were informed that the consultants had completed the fact-finding part of their assignment and that the CEO would present a report-back to the employees on 11 May.

6. The CEO addressed a general meeting of employees on 11 May. He presented the status of the investigations by means of powerpoint slides during which employees were invited to and did raise questions, which were clarified by the CEO and his management team. The venue, the training centre, could only accommodate 250 employees standing. There were about 600 employees working for IDC.

7. On 18 May the finishing touches to a plan entitled “Implementation of the Restructuring Process of the Industrial Development Corporation of SA Ltd” was done. This plan was based on an initial draft prepared by Mr Van Rensburg the second applicant. Mr van Rensburg assisted Mr Mathlape, the General Manager Human Resources, in finalising the plan which Mr Mathlape was to present to Exco. The plan was discussed by a meeting of the HR Department. The relevant portions of the plan or proposal drafted by Mr Van Rensburg read:

“4.1. Once approval has been obtained on the new structure, and the process as set out in section three above has been completed, all current job positions, below that of Managing Director/CEO, will be done away with in order to facilitate the introduction of the new structure...

5. The CEO will, within his discretion, appoint all employees at the

level of General Manager. All General Managers, in consultation with the CEO, will, within their discretion, appoint the first line of Management reporting directly to them....

5.2. Selection process. All interviews for positions not filled by block appointments must be conducted in such a manner so as to comply with all relevant legislation and must be transparent and objective. A period of one month will be allowed, after finalisation of the new structure, for employees to apply for positions not filled by way of block appointments....

5.2.4. The selection process will be conducted strictly according to fair and objective criteria. The following will, however, be taken into account:

- *Relevant qualifications.*
- *The length of service with the Corporation.*
- *Experience and potential in a particular discipline."*

8. Bain-XKM made a presentation or presentations to Exco on 20 May. Mr Mathlape was present as a member of Exco. The minutes seem to reflect two presentations. Mr Mathlape thinks there was one presentation. Whatever the position, the presentation or presentations by Bain-XKM dealt with "recommendations for the

transformation and organisational restructuring of the Corporation" and "issues surrounding the implementation of the recommendations". The restructuring part of the presentation coincides with slides presented to staff on 11 May. The implementation part of the presentation does not. It corresponds with the "Roll-out plan" part of IDC's slides presented to staff on 14 June. The slides bear the date "12 May 1999" which suggests that they were created at least on that date.

9. On 21 May, Mr Mathlape presented HR's plan, on which he and Mr Van Rensburg had worked, to Exco. The final implementation plan differed from Mr van Rensburg's plan and that presented by Mr Mathlape.

10. Bain-XKM presented their final report and recommendations to the IDC's Board on 28 May. The board, after debating it, approved it. This report and recommendations were presented to all the employees on 31 May. In his presentation to employees, the CEO stated, inter alia, that:

1.1. the new structure as approved by respondent's Board would involve a possible reduction in the number of jobs and positions;
1.2. the respondent as structured was not generating enough business and that its capacity to generate revenue was not sufficient to off-set its costs;

1.3. recorded that information had previously been disclosed and employees consulted;

1.4. senior positions would be filled first to enable the incumbents to implement the new structure;

1.5. the process of consultation would continue and employees should communicate their concerns through the respondent's human resources department.

11. The new plan essentially involved the creation of what may be termed a new, restructured IDC with new posts. The new posts were fewer those that which existed in, what may be termed, the old IDC. The idea, as envisaged in the HR implementation plan and that of Bain-XKM, was to roll out the appointments from the top. The filling of posts would cascade down from the top. A process which could be described as pouring old wine into new skins. But as the new skins were smaller than the old, there would be some plonk left over. This case is partly about who decides what goes into the new skins and what happens to the plonk.

Restructuring Implemented

12. The process commenced with the appointment of the CEO (who was the CEO of the old IDC). The appointment of the Executive Team of five people and Heads of the Strategic Business Units (SBU) and similar posts followed. No place could be found for

three members of the old Exco team and they were subsequently retrenched. The CEO issued a notice on 9 June to employees. The notice of 9 June informed employees that:

1.1. SBU leaders and departmental heads would commence with overseeing the implementation of the new structure;
1.2. it was proposed that positions in the new structure would be filled by IDC employees selected on the basis of skills, competencies, employment equity plan and by a series of selection processes which might include interviews;
1.3. regrettably retrenchments were likely to follow in some cases; and
1.4. as soon as it had been determined who of the employees would be affected, appropriate consultations with such employees would continue.

13. On 14 June, the IDC made a further presentation to all employees explaining:

1.1. interim operational procedures necessitated by the on-going restructuring process;
1.2. the staffing process which involved the selection and assessment of possible appointees to new position by departmental heads and the screening thereof by the human resources department prior to appointment; and thereafter the advertisement of all other positions to be filled after a process of

screening by human resources and interviews of short listed candidates.

14. An IDC committee was appointed to implement the new system. The implementation team consisted of 11 persons under the leadership of a Mr Paver. Included in this committee were Messrs Seema, Mabena and Van Schalkwyk of HR. Staff were informed of this on 10 June.

15. The process of populating the new structure was discussed with staff at a meeting held on 14 June 1999. The process differed slightly but importantly from the HR plan proposed by Mr Mathlape The heads of SBU's were permitted to propose individuals for selected appointment to their units. These were to be done according to the criteria previously mentioned. HR was to monitor this to ensure objectivity and fairness. This system appears to be the block system mentioned earlier. Any remaining vacancies were to be advertised and other staff could apply for them. The timetable for announcing further vacancies was to be 5 July. On 19 July appointments would be made and confirmed. The appointments would be announced on 26 July.

Restructuring HR

16. It is only necessary to consider the course of implementation

process in the new and old HR departments as the present matter relates only to two persons, Mr Van Rensburg and Mr Wolfaardt who were employed in HR. It took place as follows:

1.1. The old HR department employed a total of 18 people, of whom 6 were “managers” (4 white males and 2 black males);

1.2. Mr Matlhape was appointed Executive Vice-President: Human Resources and Support Services.

1.3. Mr Seema was appointed Head: Recruitment, Performance Management and Industrial Relations. This post was an amalgamation of the posts of Labour Relations (headed by Mr Van Rensburg) and Recruitment and Performance Management (headed by Mr Seema).

1.4. Mr Mabena was appointed Head of Training, Development and Organisation Development. The post was an amalgamation of the posts of Organisational Development and Transformation (headed by Mr Wolfaardt) and Training Development (headed by Mr Mabena).

1.5. Mr Van Schalkwyk, previously Head: Human Resources Support and Remuneration was appointed to the new post of the same name.

1.6. Block appointments were made. No posts in the new HR department were advertised.

1.7. Mr Van Schalkwyk informally informed “his buddy” Mr Wolfaardt on 17 June that all their jobs were safe. He did this because he had sight of the new structure for HR. It provided for 18 posts and there were 18 persons in the old HR department. He was not to know that the applicants were not to be appointed in the new HR department.

1.8. As at 28 June HR was, according to the business plan, still to consist of 18 staff members as was the case with the old department. The new posts included 1 junior consultant, 3 consultant and 3 senior consultant posts. This is according to Mr Van Schalkwyk who was a member of the implementation team. But Mr Mathlape advised him that these posts were for the present. The future position was still under consideration.

1.9. On 30 June Exco reduced the 18 posts to 15. In effect the consultants’ post (and a secretarial post which does not concern this matter) fell away. They had not been filled. They had not been advertised. This number of posts is confirmed in the slides relating to the final recommendations which are dated 23 July.

1.10 Early in July or thereabout 70-80 positions were advertised. None of them in the new HR Department. The applicants did not apply for any post. Mr Van Rensburg had however explored the possibility of working in the business unit of Mr Caligo. But this was impractical. The applicants were not invited to apply for the posts. It is common cause that none of the posts advertised were suitable for them.

1.11. At the request of Mr Mathlape, Mr Van Schalkwyk approached Mr Van Rensburg in his office to consult on retrenchment. Mr Van Rensburg was upset and pre-empted him. Mr Van Rensburg said just tell me how much I am to get and I am out of here. The conversation lasted about 2 minutes.

1.12. On 23 July Mr Mathlape consulted with Mr Wolfaardt about the “possible”or “inevitable” retrenchment. There is a dispute about what was said. But there is no dispute that retrenchment was the only subject of the discussion.

1.13. Both applicants were given letters of retrenchment on 23 July. The letters are dated 27 July 1999.

1.14. Both applicants received retrenchment packages calculated on the basis of 4 weeks pay per each completed year of service.

Mr Wolfaardt received a severance package of R 430 615-20 and Mr Van Rensburg, R 244 887-24. These amounts exclude statutory entitlements such as notice pay, leave pay and accrued bonuses.

IDC's Submissions

15. Mr Maserumule submitted that the law relating to this type of retrenchment was the following. An employer intending to restructure its operations by way of re-engineering jobs and making all existing jobs redundant is required to show that:

1. A reasonable and commercial rationale for the decision to restructure exists;
1.
2. the decision to restructure must be taken in a manner which is fair to the employees to be retrenched;

3. the retrenchment of the employees is essential to achieve the purpose of the restructuring;

4. the criteria for appointment to the new positions is fair and justifiable;

5. the eventual selections for appointment are objectively

justifiable.

See **SA Mutual Life Assurance Society v Insurance & Banking Staff Association** C132/98 (LAC) (unreported) and Alan Rycroft: "*Corporate Restructuring and 'applying for your own job'"* (2002) 23 ILJ 678-682 .

16. In **Grieg Afrox Ltd** (2001) 21 ILJ 2102 (ARB), Rycroft A recognised that an employer may indeed declare all jobs redundant, but cautioned against abusing this process to get rid of non-performing employees. His subsequent article in the ILJ referred to in the preceding paragraph pursued the same point.

17. For purposes of determining whether or not there has been compliance with the provisions of section 189 of the LRA, "a mechanical "checklist" kind of approach" is inappropriate," see **Johnson & Johnson (Pty) Ltd v CWIU** (1999) 20 ILJ 89 (LAC). The respondent elected to commence with the consultation process from the very beginning of the restructuring process, and in the absence of a trade union, consulted with all employees as a collective, particularly because the restructuring was of its entire operations. The final one-to-one consultations could only take place at the very end of the process, given what had preceded the decision to retrench employees.

18. In **Singh & Others v Mondi Paper** (2000) 21 ILJ 966 (LC) at 972, De Villiers AJ suggested the following approach to restructuring:

"[31] There may well be instance where the proposed restructuring or reorganization if implemented will inevitably lead to the retrenchment of the employees concerned. In such cases the employer is bound to consult on the proposed restructuring and reorganization prior to prior to implementation. But this is not the one of them. There is nothing in the evidence to persuade me that as at July 1997, the respondent had an intention, let alone had made up its mind, to retrench the applicants despite the fact that their positions in the purchasing department had become factually redundant…."

19. It was submitted that although retrenchments were not inevitable when it embarked on its restructuring in February 1999, the IDC nonetheless consulted with all its employees who were invited to and did make inputs into the proposed restructuring, prior to any of the positions being declared redundant.

20. Where an employee, by virtue of his/her proximity to the decision making process has access to considerable information about a restructuring process or is in a position to acquire such information, that employee cannot be heard to say

that she/he was not provided with sufficient information for purposes of the consultation process. See **Visser v Sanlam** (2001) 22 ILJ 666 (LAC) at 671G-I and **Peach & Hatton Heritage (Pty) Ltd v Neetling & Others** (2001) 22 ILJ 1349 (LAC).

21. The applicants, as members of the HR department, were aware of the restructuring process and had access to all the necessary information. The second applicant, in particular, was even tasked with the responsibility of drafting an implementation procedure. In so doing, he envisaged and proposed that the respondent had the right to decide on a new structure, that all jobs had to be made redundant and that appointments at SBU and departmental head level had to be made at the discretion of the respondent. They cannot now be heard to say that they were not consulted or that they did not have sufficient information to enable them to take part in meaningful consultations.

ation: fairness

22. I am of the opinion that there was a need for the IDC to restructure and that it was perfectly entitled to undertake this process. I also accept that the restructuring, when it was finally

decided, would mean the loss of jobs. Indeed in the support services, to which the applicants belonged, the staff numbers would be reduced by from 284 to 195 employees; ie 89 employees would lose their jobs.

23. The key to this case is whether it is permissible for an employer to make all the employees redundant and then select the employees, albeit according to certain broad criteria, that it wishes to retain. And with the result that the surplus redundant employees who are dismissed would have been fairly dismissed.

24. Mr Maserumule stressed, in the context of the discrimination claim, but it is of general applicability, that the reference to selection criteria for retrenchment in the context of this case is misplaced. All employees, save for the CEO, became redundant and all were candidates for retrenchment. This is what the second applicant himself envisaged. Selection criteria were in respect of the appointment of employees to positions in the new structure. Mr Maserumule continued: "**Employees were selected for retrenchment using one and only one criteria: failure to be appointed to a position in the new structure.** This criteria was fair and applied to all employees who were retrenched, and not just the applicants." (Original emphasis.)

25. Two points need to be made. The first is that advanced by Prof Rycroft namely that the employer must not use the restructuring as an exercise to dismiss employees on a no-fault basis where the employer cannot dismiss them by reason of misconduct or incapacity. This does not apply only where the employer uses restructuring as a sham or stratagem but also where the employer cannot show that the non-employment is fair, eg where the employees are not afforded an opportunity to deal with perceptions of their incapacity.

26. The second point which should be made, which Prof Rycroft touches on, is that it should not be easier to retrench an employee where restructuring is involved. I would add that a retrenchment following a process of restructuring whereby an employee applies for his or her own job must be closely scrutinised because it ignores, sometimes unconsciously, that an existing employee enjoys job security which will be protected especially against no-fault terminations. But placing an employee in the position of an applicant for a job, or worse, merely on a waiting list, creates a supplicant of the employee.

27. I am mindful that my sister Pillay J has ruled in **Clive Naicker v Q Data Consulting** (2002) 23 ILJ 730 (LC) that a dismissal following on an unsuccessful application for one's own job can be fair. The head note states that the employee, Mr Naicker,

was employed in the information technology industry at one of two client service centres. His employer decided, for pressing financial reasons, to restructure the centre. After consultation, it was proposed that all affected employees would be invited to apply for any of the positions in a remodelled service centre. The employee duly applied but was unsuccessful. The court approved the employer's decision to invite all affected employees to apply for positions in the restructured service centre. This was a deviation from the LIFO principle.

28. This approach was said to be fair because survival in the information technology industry requires employees to continually keep abreast of new technology and software development. Employees have to consistently re-skill themselves to remain relevant to the organisation. The court was of the opinion that every employee, long-serving and newly employed, would be able to compete. A long-serving employee who had constantly renewed his or her skills would not be at a disadvantage when competing with newly qualified recruits. Such an approach was held to be rational as regards the information technology industry from a commercial and sociol-economic perspective. This was so, inter alia, because the employer retains and rewards employees who have expended time and energy to keep abreast of developments.

29. This case is distinguishable from the present one. IDC did not invite its employees to compete for positions in the new IDC. Rather the new management handpicked the key staff and then also made block appointments.

30. I am of the opinion that the process of filling the posts in the new IDC was open to the charge of arbitrariness. The process denied existing employees the right to present facts in support of their retention. It was inherently flawed. So much so that it could lead to the unfair dismissal of existing employees.

31. When it comes to selection the procedure was simply a choice made by management. The procedure and selection criteria remind one of schoolboys picking a team by calling out names until the less desirable players are left and discarded or accepted reluctantly. This is not objective. It is probably unfair. Indeed Mr Mathlape said that he did not need to interview his staff for positions in the new IDC; he knew what they could do.

32. Mr Van Rensburg, and the HR department generally, designed a process which they believed would result in a fair selection of “new” employees. The obverse effect would be that surplus employees would be channelled in the direction of the door labelled “EXIT”. It seems unfair that the HR staff, who designed this process with a view that it was fair for their colleagues,

should be able to complain about it when they were subjected to it.

33. Some of the adjustments to the IDC implementation plan were not foreshadowed by Mr Van Rensburg and his colleagues. The length of service with the IDC and the employment equity plan are examples.

34. I accept that Mr Van Rensburg can only complain about his non-selection for two posts. The post of Head Recruitment, Performance, Management and Industrial Relations and the post of IR consultant. Mr Van Rensburg was not interviewed for the post of Head. This was in accordance with the system to which he had made a contribution. The new post of IR consultant stands on a slightly different footing.

35. As far as Mr Wolfaardt is concerned he was not considered for the post of Head of Training Development and Organisation Development nor the senior consultant post.

36. There was provision for a position of consultant under the department headed by Mr Kwena Seema. But, said Mr Mathlape, this was not a suitable alternative for the applicants because first, it was a junior position that would have entailed a salary cut in excess of R100 000 and secondly, it was meant for

a person with recruitment and performance management skills, which neither applicants had.

37. There was also another position for a senior consultant under Vusi Mabena's department, but it was also not a suitable alternative position for either applicants because it was also a junior position that would require a salary cut in excess of R 100 000 and secondly, was meant for a person who had a competency in financial training, which the applicants did not have.

38. These consultant posts were not advertised. This means that Mr Van Rensburg and Mr Wolfaardt were not allowed an opportunity to say whether it was feasible to appoint them and whether they would accept R100 000 pa less than they had been earning, or to bargain for more, or persuade the IDC to redline the post, or to outsource the post at some future time, as was envisaged by IDC, or to let them occupy the post for a period until it was outsourced. The applicants would have been able to respond to the IDC's equity policy and in particular the absence of a plan. The applicants would also have been told of the target of 40% black employees about which they were unaware. There may be other topics and issues. Who can say? No one can say. The opportunity was denied to them. The opportunity to apply for these posts and an interview could also

have led to the exploration of other avenues. This failure means that the dismissal of the applicants were so procedurally unfair that they are also substantively unfair. See **Ellias v Germiston Uitgewers (Pty) Ltd t/a Evalulab** (1998) 19 ILJ 314 (LC) and **Chetty v Scott Select-a-Shoe** (1998) 19 ILJ 1465 (LC).

39. Mr Wolfaardt was in disfavour with Mr Mathlape. He had been charged and found only technically guilty of misconduct in connection with the west coast project. A warning or reprimand was issued to him. But a reading of the finding tends to show that Mr Wolfaardt's management performance was less than optimum. It may be that the IDC could have discharged him for poor performance. But it did not do so. There is sufficient evidence pointing to IDC's unhappiness with Mr Wolfaardt in regard to the west coast project. In the light of IDC's process for selecting staff for the new IDC, I find that the IDC has not shown that Mr Wolfaardt's poor performance was not a reason for his dismissal.

40. The consultation, to the extent that it occurred in July, was meaningless save for a discussion of severance benefits. The applicants had, according to Mr Mathlape, already been retrenched on 8 June. There was no intention to try and retain their services. The impediment, which is alleged to have existed, preventing consultation simply did not exist. There were

no posts for them. It was pointless to wait and see whether the applicants would apply for jobs when there were none which they could fill. But this approach, that there might have been a faint likelihood that they could do some other job in the new IDC, is precisely what should have been done in regard to posts in the new HR department.

41. The applicants' claim of an automatically unfair dismissal based on alleged arbitrary discrimination is without merit. Its factual basis lies in the claim that they were selected for retrenchment because of their involvement in the west coast initiative. Dismissal on this ground may point to an unfair dismissal but underlying it is a dismissal for conduct, capacity or retrenchment as I have found.

Appropriate remedy

42. I find that the dismissals of the applicants were substantively and procedurally unfair. What should be done? Should the applicants be reinstated? Should they be paid any compensation? Twelve months have passed since the date of the termination of their services.

43. On behalf of the IDC it is submitted that, should a decision be made in favour of one or both applicants, reinstatement would

be inappropriate. It is not reasonably practicable to reinstate or re-employ the applicants.

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44. With regard to Mr Wolfaardt it is submitted that there is no position available where he can be placed, nor does he have the financial knowledge and skill to be able to perform any of the functions in the HR department or anywhere else in the corporation. The respondent has restructured and has for the past three years, operated in terms of this new structure. It would be unduly disruptive to require it to unscramble the egg as it were, and revert to a structure and way of doing things which has been found to be inappropriate.

45. As regards Mr Van Rensburg it was contended that the uncontested evidence of Mr Mathlape was that IR forms an insignificant part of the functions that need to be performed, given the fact that by far the majority of the employees are highly skilled and generate very few disputes. IDC has cut down on providing IR services to its subsidiaries, something on which Mr Van Rensburg spent a major part of his time. He still wanted to spent a major part of his time in this field, as proved by his approaches to Mr Galigo, the leader of the Large Beneficiation SBU, for a position. Lastly, there is simply no position available in HR. He lacks the skills to be placed anywhere else in the corporation.

46. The primary remedy for an unfair dismissal is reinstatement. An order of compensation is restricted to an amount equivalent to 12 months remuneration. But in this case, the two applicants do not occupy the same position as other employees in similar positions. They, Mr van Rensburg more so than Mr Wolfaardt, were co-actors in the design of a flawed plan. A plan which leapt into action and devoured its makers. Although, as I have mentioned earlier, HR staff are also entitled to fair labour practices, it would be unjust to order their reinstatement. In my opinion compensation of 12 months is adequate in the circumstances.

47. IDC's retrenchment package, as discussed with employees during the consultation process, involved a differentiation between members of the Exco and all other employees. This differentiation was accepted by employees in consultation meetings prior to retrenchment. It flowed merely from the longer period of notice to which the Exco members were entitled. The applicants have no cause to complain.

48. Mr Wolfaardt's remuneration package amounted to R25 559,66 per month. Mr Van Rensburg's monthly remuneration was R 23 522,16 which includes study fees of R1

455,83.

49. This is a case where law and fairness requires that costs follow the result.

Order

It is ordered that:

17. the respondent pay compensation in the amount of R 306 716 to the first applicant.

18. the respondent pay compensation in the amount of R 299 736 to the second applicant.

19. the respondent pay the costs. These costs are to include the reserved costs and the costs of the application for discovery of documents.

SIGNED AND DATED AT BRAAMFONTEIN THIS THE 1ST DAY OF AUGUST 2002.

A A LANDMAN
JUDGE OF THE LABOUR COURT

HEARING: 12, 13, 14, 15, 16, 19, 20, 21 and 22 NOVEMBER 2001; 24, 25, 26, 27, and 28 JUNE 2002

JUDGMENT: 01 AUGUST 2002.

APPLICANTS: Advocate H van R Woudstra SC instructed by Hlatshwayo Du Plessis Van Der Merwe

Mr P M Maserumule of Maserumule Incorporated.