IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: PA5/04

In the matter between

Andre Johan Oosthuizen **Appellant**

And

Telkom SA Ltd **respondent**

JUDGMENT

ZONDO JP

[1] I have had the benefit of reading the judgment prepared by McCall AJA in this matter. I agree with him that the appellant's appeal must succeed. I also share McCall AJA's conclusion that the dismissal of the appellant was without a fair reason. In the light of this conclusion it is, in my view, unnecessary to consider and decide whether the appellant's dismissal was also procedurally unfair. A finding that the appellant's dismissal was also procedurally unfair will not give the appellant any practical benefit which he will not have any way once it is found that his dismissal was substantively unfair. I set out below my reasons for the conclusion that the appellant's dismissal was without a fair reason

or was substantively unfair.

[2] In his judgment McCall AJA has set out most, if not all, of the factual background to this matter. For that reason I do not propose to set it out in this judgment save that I shall highlight those facts that seem important for a proper understanding of this judgment. It may be helpful to refer to some provisions of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**") at the outset.

[3] Sec 185 of the Act confers on every employee the right not to be dismissed unfairly. In so far as it is relevant to the present matter sec 188(1) provides:

> "**(1) A dismissal that is not automatically unfair is unfair if the employer fails to prove –**
>
> **a) that the reason for dismissal is a fair reason –**
>
> (i) ….
>
> **(ii) based on the employer's operational requirements, and**
>
> **(b) ….. ."**

[4] Sec 189 of the Act governs dismissals for operational requirements. Sec 189(1) requires the employer to engage employees or their representatives, depending on the circumstances, in a consultation process when it contemplates dismissals based on its operational requirements. Sec 189(2)(a)(i) of the Act provides that the employer and the employees or their representatives must attempt to reach consensus on appropriate measures to avoid the contemplated dismissals. Sec 189(3)(b)

requires the employer to disclose to the other consulting party in writing the reasons for the proposed dismissals and "**the alternatives that the employer considered before proposing the dismissals and the reasons for rejecting each one of those alternatives**." Implicit in sec 189 (2)(a)(i) and (ii) and sec 189(3) (a) and (b) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if that can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer's operational requirements constitute the so-called "**no-fault terminations**".

[5] The obligation of an employer not to dismiss an employee for reasons of its operational requirements where it can avoid such employee's dismissal as now provided for implicitly in sec 189(2) (a)(i), (ii) and 189(3)(a) and (b) of the Act is not a new obligation that came with the enactment of the Act. It is as old as our modern law of retrenchment in this country. (see Halton Cheadle: Retrenchment: The New Guidelines (1985) 6 ILJ 127 at 128-129 particularly guideline No 5 at the top of 129 and the case of **Gumede & others Richdens (Pty)Ltd t/a Richdens Foodliner (1984) 5 ILJ 84 (IC) at 91B-C.**) Recently this Court re-affirmed this principle in **General Food Industries Ltd t/a Blue Ribbon Bakers v FAWU & others (2004) 25 ILJ 1655 (LAC**). In this regard it is to be noted that article 13(1)(b) of ILO Convention 158, the Termination of Employment Convention provides that the

employer must give workers' representatives an opportunity to consult on measures to be taken to avert dismissals or to find alternative employment. This obligation also includes that, where the employee may need some training in order to be able to perform the duties attached to an alternative position, the employer should afford the employee the opportunity to get such training. Naturally, this has to be within reason because, obviously, the employer should also not be burdened with an exercise that may have undue cost implications. I note that par 21 of ILO Recommendation 166, the Termination of Employment Recommendation, 1982 provides as follows:

> "**The measures which should be considered with a view to averting or minimising termination of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, … <u>internal transfers, training and retraining, ...</u>"** (my underlining).

[6] Two of the grounds upon which the appellant challenged the substantive fairness of his dismissal relate to the selection criteria and to the fact that he was dismissed at a time when the respondent had vacancies in which, the appellant contended, he could have been accommodated and for which vacant positions he had applied. In this regard note must be taken of the provisions of sec 189(7) of the Act. It requires the employer to "**select the employees to be dismissed according to selection criteria –**

(a) that have been agreed to by the consulting parties; or

(b) <u>if no criteria have been agreed, criteria that are fair and objective</u>."

[7] The appellant made applications in respect of twenty two vacancies within the respondent before he was dismissed and four after he had been dismissed. He was shortlisted for interviews in respect of four but was not appointed. In respect of some of the vacancies for which he had applied, he was advised that his applications had been unsuccessful. In respect of others he was not even afforded the courtesy of a letter advising him of the outcome of his application. The dismissal of the appellant while there were such vacancies must be viewed against the background that it is common cause that the respondent had undertaken to give employees training should they require some training in order to do other work.

[8] In my view an employer has an obligation not to dismiss an employee for operational requirements if that employer has work which such employee can perform either without any additional training or with minimal training. This is because that is a measure that can be employed to avoid the dismissal and the employer has an obligation to take appropriate measures to avoid an employee's dismissal for operational requirements. Such obligation particularly applies to a situation where the employer relies on the employee's redundancy as the operational requirement. It is in accordance with this obligation of the employer that in the *General Foods* case referred to above this Court found the dismissal of the employees

unfair. In that case while the employer was retrenching some employees, it was busy recruiting new employees for work which the employees being retrenched could perform. As already stated, this Court found the dismissal substantively unfair for this reason. In such a case the dismissal is a dismissal that could have been avoided. A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason.

[9] In his statement of claim the appellant also complained that in selecting him for dismissal the respondent had not applied fair and objective selection criteria. This was in par 6.4 of the statement of claim. In par 5.20 of the statement of claim the appellant alleged that there was no need for the termination of his services because "**there existed alternative positions within in the respondent's structures**". He also alleged that the respondent failed to retrain and redeploy him despite having previously undertaken to do so. In its response the respondent maintained that there was a need to terminate the appellant's services. It did not deny that there were vacant positions but stated that there were "**no suitable alternative positions for the [appellant] within the Respondent's structures**." It denied having failed to retrain and redeploy the appellant and alleged that it bore no knowledge of any previous undertaking in this regard.

[10] In reply to a request for reasons why the appellant was not appointed to one of the positions he had applied for, the respondent referred to a document which it said it annexed as annexure "**A**" to

its reply to such notice but either no such document was attached or whatever document may have been attached did not contain the reasons requested.

[11] In a pre-trial minute signed by the parties' attorneys in February 2003 it was stated to be common cause that **"(t)he respondent bore the responsibility to make a concerted effort to place affected staff within the organisation**". In that same pre-trial minute one of the issues that the parties agreed was in dispute was "**whether or not there existed, within the respondent's structures valid alternatives to dismissal**." Another matter which the parties agreed was in dispute and which the Court was called upon to decide was **"(w)hether the respondent failed to take adequate or any steps to retrain and redeploy the [appellant] within the organisation as it had undertaken to do**."

[12] In his amended statement of claim dated 18 September 2003 the appellant inter alia alleged that the respondent unfairly declined to employ him in a post vacated by one De Beer (project manager, Logistics) when he emigrated to New Zealand when the appellant had previously applied for that position before De Beer was appointed to it. The appellant also alleged in par 5.27.2 of his amended statement of claim that the respondent "**unfairly failed to appoint [him] to the positions afforded D Venter, R Naidoo, L Vermeulen, L Faro, A Bames, M Skozana, R Naicker, K G Abdull, N Mpati, S Francis and J Scholtz. In this particular**

regard the [appellant] applied for all the aforementioned positions and was, in addition, possessed of the required skill and had longer service than the appointed employees (as listed above)." In par 5.28 of the amended statement of claim the appellant specifically stated:

> "**In view of the respondent's failure to consult the [appellant] as required by the Act, the respondent is put to the express proof of its rationale for terminating the [appellant's] services, the absence of alternatives to the [appellant's] termination and the fairness of the selection criteria and their application."**

In par 4.11 of the pre-trial minute signed by the attorneys for both sides the parties recorded, among other things, that the Court was called upon to decide whether the respondent in selecting the appellant for retrenchment had failed to apply criteria that were either fair or objective.

[13] In its amended response to par 5.27 of the appellant's amended statement of claim, the respondent alleged in par 25.1 – 25.5:

> "**25.1 All interviews of staff in the redeployment pool for alternative positions including interviews with the [appellant] were conducted in accordance with a fair and objective procedure.**
>
> **25.2 Interviews were conducted by a selection panel consisting of relevant line managers and human resources personnel to make sure that the interview and selection process was fair and sometimes also**

recruitment specialists.

25.3[appellant] along with the rest of the employees in the redeployment pool went through this process. If he was unsuccessful in obtaining alternative employment at the respondent, that nonetheless was the result of a fair and objective procedure. Employees who were successful in respect of jobs for which [appellant] also applied were better qualified and suited for those jobs, performed better in the interviews and were selected as the result of a targeted fair and objective selection procedure.

25.4De Beer was a grade 6 project manager and the position offered to him was project manager, material logistics. He declined the offer and elected instead to take the VSP at the end of February 2002. The moratorium meant that this position was not offered after 8 March 2002.

25.5Most of the positions referred to were offered outside of Port Elizabeth and the Southern region and Respondent is unable to reply to the allegations concerning these posts with any particularity.

Except for the above, these allegations are denied."

[14] The respondent said that the criteria used by it in selecting the employees from the redeployment pool to be given other jobs were

skills, suitability and employment equity policy. The evidence of its witnesses was also to the effect that length of an employee's service was not taken into account. It will have been observed from the above that the appellant complained in his statement of claim that he was retrenched and yet some employees were retained by the respondent even though he had longer service periods than them and they were retained in jobs that he could do. In this regard it needs to be remembered that the appellant had been in the respondent's employment for 30 years. The appellant was prepared to take any position even if it was at a lower grade than the grade he was occupying at the time of his dismissal. Furthermore, the appellant was prepared to move to any part of the country to take a position.

[15] It will also have been observed that the respondent's version was in effect that it left the decision as to which one of the employees in the redeployment pool would be given each of the vacant posts to panels which would interview shortlisted candidates. Those interview panels were required to use the selection criteria referred to above, namely, skills, suitability and employment equity. Mr Amod, one of the witnesses called by the respondent, was part of the panel involved in filling one of the positions for which the appellant had applied but he said that the appellant was not shortlisted for that position. He said that he was not involved in any of the other positions and interviews.

[16] The respondent did not call a single person who was part of the interviewing panel in respect of any of the positions for which the appellant was interviewed. The effect of this is that the respondent did not lead any evidence to explain why the appellant was not given any of those positions, particularly those for which he was shortlisted. I say particularly those for which he was shortlisted because the fact that the respondent had shortlisted him for those means that on the respondent's own version he met the basic requirements for those positions. The respondent also led no evidence about the qualifications, suitability, or race or gender of those employees who were appointed to those positions.

[17] For his part the appellant testified that the positions that he applied for were positions which involved work that he could do. He also said that the four positions for which he was shortlisted required experience that he had or that was very close to the experience that he had. In fact he said that after some of the interviews he felt that he was going to be appointed. He testified that he was not told the reasons why his application was unsuccessful. The respondent's witnesses had no idea why length of service was not part of the criteria used to select the employees from the redeployment pool who would be appointed to the vacant positions.

[18] It seems to me that the effect of the evidence placed before the Court a quo is that at the time that the appellant was retrenched:

(a) the respondent had a number of vacant positions;

(b) the respondent knew that the appellant was desirous of being appointed to any one of at least twenty two vacant positions;

(c) both the appellant and the respondent were agreed that the appellant met the basic requirements of some of the vacant positions – which is why he had been shortlisted for them;

(d) the respondent disregarded the appellant's long service of 30 years in considering whether or not he should be given one of the vacant positions;

(e) those of the respondent's employees who were appointed to some of the positions have not been shown to have had longer service periods than the appellant nor to have had better skills or qualifications than the appellant nor to have been more suitable for those positions than the appellant nor has it been shown that they were black or female and that, therefore, being preferred above the appellant may have been on grounds of advancing employment equity; accordingly, on what is before the Court, the decision not to give one of those positions to the appellant may well have been on arbitrary or capricious grounds; the respondent made absolutely no attempt to place evidence before the Court to explain why

an employee with 30 years service could not be appointed to one of the positions.

[19] The fact that the respondent did not place any evidence before the Court to explain why it did not give one of the positions to the appellant and gave positions to other employees means that the respondent has failed to justify the dismissal of the appellant. In other words the respondent selected employees from the redeployment pool to remain in its employ by virtue of appointing them to certain positions and selected those to be retrenched by not appointing them to any of the vacant positions. The respondent was obliged to explain the basis of such selection criteria applied should have complied with the applicable criteria in terms of the Act. And that means that if such criteria have not been agreed, they should be fair and objective. In the end one is left in the dark as to why the appellant was in effect selected to be among those who did not get any of its available positions and had to be retrenched.

[20] In the light of the above I am of the opinion that the respondent has failed to prove that there was a fair reason for the dismissal of the appellant in this case. Sec 188(1) of the Act provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for dismissal is a fair reason based on the employer's operational requirements. Furthermore, as already stated, sec 189(7) of the Act requires the employer, in selecting employees to be dismissed for operational requirements, to select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties or if no criteria have been agreed, criteria that are fair and objective.

[21] In this case the evidence revealed that the respondent initially selected employees as potential candidates for retrenchment. Once it had identified such employees, it gave them an option to either

take a voluntary severance package or to join the redeployment pool. Those who elected to take the voluntary severance package obviously left the company on a voluntary retrenchment basis. The respondent was going to try and find jobs for all or as many as possible of, those who were in the redeployment pool. Obviously those who would be put in some vacant positions would have successfully avoided dismissal for operational requirements but those whom the respondent failed to put in vacant positions would have to be dismissed. Part of what the respondent has failed to do in this case is to explain the basis upon which it chose to retain those employees that it retained in those positions and not the appellant.

[22] In this matter the respondent had undertaken to try and accommodate the employees in the redeployment pool, which included the appellant, in vacant positions. It had also undertaken to give training. It seems highly unlikely that of all the 26 positions that the appellant applied for – 22 before dismissal and four after dismissal – there was not even one position in which the respondent could accommodate him - an employee who had served it – probably very loyally – for thirty years with a clean disciplinary record - even if he might need a little or some training. I would be very surprised if out of all the employees from the redeployment pool who were appointed to some of the positions there was not even one who had far less than 30 years of service with the respondent and who was appointed to a position that the appellant would have accepted and the duties of which he could

perform with or without some limited training.

[23] I conclude, therefore, that the respondent has failed to prove that there was a fair reason for the selection of the appellants for dismissal. Accordingly, his dismissal was substantively unfair. The Court below, per R Pillay AJ, did not consider the issue of the substantive fairness of the appellant's dismissal at all nor did it consider the issue of the fairness of the selection criteria or whether the selection criteria were applied fairly or not. In particular the Court below did not consider the appellant's complaint that his dismissal could have been avoided by his appointment to one or other of the vacant positions for which he had applied including those for which he was shortlisted for interviews. The failure of the Court below to consider these issues occurred despite the fact that in the pleadings and in the pre-trial minute they were part of the issues that the Court was called upon to decide. Indeed, in the evidence the issues had been dealt with, certainly from the point of view of the appellant. The Court a quo confined itself in its judgment only to the procedural issue of consultation.

Relief

[24] Now that I have found the dismissal to be substantively unfair, the question arises as to what relief, if any, should be granted to the appellant. Sec 193 of the Act makes reinstatement the preferred remedy where a dismissal has been found to be without a fair reason unless one or more of the exceptions stipulated in sec 193 applies. The appellant testified that he was seeking reinstatement and, if reinstatement was not granted, he would seek compensation.

> The respondent did not place any evidence before the Court a quo to say why reinstatement would not be an appropriate remedy if the Court found that the appellant's dismissal was substantively unfair. If there was such evidence, it was its duty to place it before the Court. Obviously, if there was no such evidence, there would have been nothing to place before the Court.

[25] The appellant can be reinstated – not in the position which he occupied before he was put in the redeployment pool – but to the position he was in when he was in the redeployment pool. I do not understand that to have been a specific position. When he and other employees were in the redeployment pool, they were given certain tasks while the respondent was trying to redeploy them. Upon reinstatement the appellant can be dealt with in the same way that he was or could have been dealt with when he was in the redeployment pool. That means that, if the appellant can be put in a certain position and he is happy with such position, that would be the end of the matter. If, however, the respondent cannot find such a position or the two parties cannot agree, the respondent must consider itself to have a surplus of employees. It could be having one employee more than it needs. If that is the position, the respondent must then deal with that situation as the law requires it to when faced with such a situation. Of course, that situation does not necessarily mean that the appellant would be the employee to go. It may be that some other employee with a lesser period of service should go. In the end the appellant, like all employees, must be treated fairly, particularly when he has served the respondent for such a long time – namely, over 30 years and has, as I understand the position, an unblemished disciplinary record. The bottom line is that, if the appellant is effectively selected for dismissal for operational requirements, there must be a fair reason for that and it must be possible to say why he was chosen for dismissal and other employees with lesser service periods doing work that he can do were retained. And the basis thereof must disclose a fair reason. That must also disclose the use of selection criteria that are fair and objective, unless sec 189(7)(a) applies. If the appellant is once again dismissed for operational requirements and he feels aggrieved thereby, that would be a fresh dispute which can take its course. However, it seems to me that it ought to be possible for the parties to reach an agreement in the light of the appellant's age and his

preparedness to take a position lower than the one he had before and his preparedness to serve the respondent in any part of the country.

[26] In the result I make the following order:

1. The appeal is upheld.
2. The respondent is ordered to pay the appellant's costs of the appeal.
3. The order of the Court below is set aside and replaced with the following order:

"**(a) The applicant's dismissal was substantively unfair.**

b) The respondent is ordered to reinstate the applicant in its employ on terms and conditions no less favourable to him than those that governed his employment immediately before his dismissal.

c) the order in (b) above is to operate retrospectively for a period of 12 months from the date of this order.

d) The order in (b) above will also operate progressively.

e) It is hereby recorded that the reinstatement of the appellant in the respondent's employ in terms of par (b) above is not a

reinstatement to the post which the appellant occupied immediately before he joined the redeployment pool at about the end of 2001 or early in 2002 but it is a reinstatement to his employment as it was immediately before he was dismissed.

f) the appellant's reinstatement in terms of par (b) above is to give the respondent an opportunity to offer the appellant a specific position in its employ or to enable the appellant and the respondent to reach some other agreement about the future of the appellant in the respondent's employ.

g) Should the respondent be unable to offer the appellant a position that the appellant accepts or should the two parties fail to reach any other agreement with regard to the

appellant's future in the respondent's employ, the respondent's right to deal with the situation in accordance with the law relating to dismissal for operational requirements is not affected by this order.

h) It is recorded that, should the respondent find that, as a result of the order in (b) above, it has one employee in excess of its requirements, nothing contained in this order shall be construed as authorising the respondent to necessarily select the appellant for dismissal to deal with the situation.

i) The respondent is to pay the appellant's costs."

Zondo JP

I agree.

Kruger AJA

Appearances

For the appellant	:	R.B. Wade
Instructed by	:	Kaplan Bloemberg
For the respondent	:	T.J. Bruinders SC
Instructed by	:	Soni Inc.
Date of Judgment	:	29 June 2007

IN THE LABOUR APPEAL COURT

HELD AT JOHANNESBURG

CASE NO. PA5/04

In the matter between:

ANDRE JOHAN OOSTHUIZEN
APPELLANT

and

TELKOM (SA) LIMITED
RESPONDENT

J U D G M E N T

McCALL AJA

[1] As appears from the end of this judgment I agree with the conclusion reached by my brother, Zondo JP, in his judgment, but I have dealt, in this judgment, with the facts and some of the other issues raised in argument. The appellant had been employed by the respondent ("Telkom") but was dismissed with effect from 3 May 2002 on the grounds of operational requirements.

[2] At the relevant time the appellant was a member of the South African Communications Union ("SACU") but he did not fall within the bargaining unit because of the seniority of his position – namely a grade 5 specialist switching engineer.

[3] Because of a decrease in capital expenditure it was necessary to reduce the number of Telkom employees. This reduction in numbers was planned in accordance with a Staff Optimization Plan ("SOP").

[4] It is not disputed that Telkom began consulting with the Alliance of Telkom Unions ("ATU") about SOP at some stage during 2001 and that ATU includes SACU.

[5] On 23 August 2001 Telkom and ATU concluded a written agreement on staff optimization which provided, *inter alia*, for selection criteria, the procedure to be followed when contemplating retrenchment and/or redundancies, and a procedure for avoiding and/or minimizing dismissals. The agreement governed the bargaining unit which excluded the appellant, but, according to Telkom, it served as the framework within which all SOP measures were to be taken, including the procedure to be followed when Telkom determined redundancies or surplus numbers of employees.

[6] The procedure sought to avoid actual retrenchments by offering employees who were determined to be redundant two options, namely:-

1. a voluntary severance package ("VSP") or
2. entry into a redeployment pool which was aimed at providing employment within Telkom, although this was not guaranteed.

[7] By November 2001 Telkom had prepared a retrenchment timetable which contemplated a briefing of affected employees between 22 and 26 November 2001 and ended with the acceptance of either VSP or a voluntary early retirement package by no later than 28 February 2002.

[8] When appellant was declared redundant in November 2001 he was, on 27 November 2001, offered the choice between the two options on 5 December 2001. He elected, in writing, to accept the redeployment option. It, in turn was comprised of two options, namely "Consideration for redeployment opportunities" or "Redeployment".

[9] By accepting the redeployment option the appellant:-

(i) agreed that the last day in his redundant position was 31 December 2001;

(ii) accepted the offer to endeavour to retrain and redeploy him within Telkom until 28 February 2002;

(iii) accepted the option to take up the VSP offer at any time until 28 February 2002.

[10] On 25 February 2002 the decision was taken to terminate the employment of employees in the redeployment pool on 31 March 2002 and notice of termination was given on 10 March 2002.

[11] However, as a result of an urgent application brought by SACU and others to interdict the respondent from retrenching their members, including the appellant, on 31 March a written agreement was concluded between SACU and Telkom. It was made a consent order, in terms of which the retrenchment was postponed until 30 April 2002 and Telkom invited SACU to consult with Telkom on all outstanding issues concerning the proposed retrenchments "as soon as practicable". It is not disputed that the appellant did not know that he was an applicant in those proceedings and did not benefit from the extended period.

[12] Following his entry into the redeployment pool and until his ultimate retrenchment on 3 May 2002 the appellant applied unsuccessfully for 22 vacancies in Telkom's organization.

[13] On or about 22 May 2002, the appellant referred the matter of his dismissal to the Commission for Conciliation, Mediation and Arbitration. Conciliation was unsuccessful and the applicant brought an application in the Labour Court.

[14] The appellant alleged that the retrenchment process was unfair and that the respondent failed to consult him as required by s.189(1) of the Labour Relations Act of 1995 ("the Act"). He sought an order for reinstatement retrospective to the date of his dismissal, alternatively compensation in terms of ss.194(1) and (2) of the Act and costs.

[15] In opposing the application the respondent denied all of the appellant's complaints and denied that it failed to consult the appellant in terms of s. 189 of the Act.

[16] In the pretrial minute (Item 3.16) the respondent admitted that it had a duty to consult directly with the appellant regarding the issues dealt with in s. 189 of the Act and alleged that it did so consult.

[17] However, the appellant filed an amended statement of claim and, in its response, the respondent alleged that consultations with SACU were held in accordance with s. 189(1) of the Act and that, despite the fact that the appellant was consulted, respondent was not obliged to consult with the appellant "and/or he is precluded from complaining that he was not consulted".

[18] Pillay R. AJ dismissed the appellant's application with costs. Following the decisions in *Baloyi v M & P Manufacturers* ILJ 2001 (22) 391 at par. 20-23 ("*Baloyi*"), and *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* ILJ 2001 (22) 1575 (LAC) ("*Mzeku*") he held that only where the agencies referred to in s 189(1)(b), (c) and (d) of the Act, before its amendment by Act 12 of 2002 from 1 August 2002, were unavailable and/or not applicable, would an employee be entitled to claim a right to be consulted personally. He further held that it was not open to the appellant to contend that the communications between him and respondent in respect of vacancies were in fact consultations in terms of s. 189 of the Act. He said that the appellant did not allege that the representative Union did not consult fully on his behalf and that consequently his claim that he was not properly consulted (in terms of the Union's consultations) must fail. He further held that his claim that he ought to have been consulted personally because he was not included in the agreement in terms of which the SOP would be implemented must also fail because the Union alliance, representing the appellant, had agreed to exclude his grade and he was bound by that agreement. Finally he found that the respondent had discharged its duty to consult with the appellant properly in terms of the Act.

[19] The appellant appeals against the decision of the Labour Court.

[20] At the commencement of the hearing of the appeal reference was made to the fact that the appellant had not filed a Notice of Appeal as required in terms of the provisions of Rule 5(1) of the Rules for the conduct of proceedings in the Labour Appeal Court. The appellant's counsel, Mr Wade, asked for leave to hand in a Notice of Appeal. The respondent did not object to the late filing of the Notice of Appeal.

The Court allowed the Notice to be handed in and agreed to hear the appeal, subject to a substantive application for condonation of the failure to file the Notice of Appeal being made. Such an application was made and was not opposed.

[21] This Court accordingly condones the late filing of the Notice of Appeal.

[22] Although in Mr Wade's Heads of Argument on appeal, the emphasis appeared to be on the failure of the respondent to consult with the appellant and the appellant's Union and, as a subsidiary point, that the respondent did not discharge the *onus* of establishing that there were no reasonable alternatives to the appellant's dismissal, Mr Wade began his argument before us with reference to the latter point. Also in the Notice of Appeal which was handed in, the latter point is listed as the first ground of appeal.

[23] The grounds of appeal in the belated Notice of Appeal are the following:-

"**1. The Learned Acting Judge erred in failing to conclude that the Respondent had not discharged its onus of proving that there were no viable alternatives to the Appellant's dismissal and that his dismissal was for that reason substantively unfair.**

2. The Learned Acting Judge erred in failing to conclude that the retrenchment of the Appellant was procedurally unfair on account of the fact that the Respondent, although intent upon doing so, failed to consult the Appellant in his individual capacity.

3. The Learned Acting Judge erred in failing to conclude that, in the light of the collective agreement entered into (sic) the Respondent and the ATU, the Respondent was in terms of Section 189 under a duty to consult the Appellant personally.

4. The Learned Acting Judge erred in failing to direct that the Appellant be retrospectively reinstated, with costs."

[24] The argument advanced by Mr Bruinders, for the respondent, may be summarized as follows:-

1. In terms of s 189(1) of the Act before its amendment with effect from 1 August 2002, the party with whom the respondent was obliged to consult over retrenchment was the registered trade union, SACU, of which the appellant was a member, and there was no duty on the respondent to consult with the appellant personally.

2. The evidence shows that the respondent did consult with SACU, as a member of ATU, over the retrenchment and, specifically, about the appellant personally and considered the appellant's situation before retrenching him.

3. The appellant's contention that there was an agreement or express undertaking by the respondent to consult with the appellant personally was not pleaded nor canvassed in evidence and therefore cannot be pursued on appeal. Assuming that the point can be considered on appeal, it cannot be said that the respondent elected to consult with the appellant personally, but even if it did so consult, such consultation merely supplemented the consultations with the appellant's union.

4. With regard to the appellant's contention that the respondent had not discharged the *onus* of proving that there were no reasonable or viable alternatives to the appellant's dismissal, the evidence showed that "Telkom had done everything possible to assist appellant's union in salvaging their members' jobs which met with some success. It had also explored proper alternatives to retrenchment".

5. The respondent and the appellant's union had concluded the three agreements relating to retrenchment and if the evidence establishes that the respondent did not comply with these three agreements, then it is not the appellant but his union that has the right or legal standing to claim performance in compliance with the agreements.

[25] As the argument developed before us, it became apparent that it may not be essential, in order to arrive at a decision on appeal, to determine whether or not the respondent had a duty, in law, to consult with the appellant personally. However, since the matter was decided in the Court *a quo* on the grounds that the respondent had no duty to consult with the appellant personally, and in

case this matter should go further, I consider it advisable to deal with the legal position regarding consultation.

[26] The source of the duty to consult is s 189(1) of the Act. It is common cause that the appellant was dismissed with effect from 3 May 2002. S 189(1) of the Act before section 189 was substituted by section 44 of Act 12 of 2002 with effect from 1 August 2002, provided as follows:-

> "**189 Dismissals based on operational requirements**
>
> **1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult –**
>
> **(a) any person whom the employer is required to consult in terms of a collective agreement;**
>
> **(b) if there is no collective agreement that requires consultation, a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is a workplace forum;**
>
> **(c) if there is no workplace forum in the workplace in which the employees likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals;**
>
> **(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."**

[27] In *Baloyi (supra)* the employer was obliged to retrench for economic reasons. After consultation with a union (NUMSA), of which trade union Baloyi was a member, the employer dismissed Baloyi. He was a welder who had longer service than other welders but who was less artistic and had less flair than the other welders and had a poor disciplinary record. Baloyi complained to the Labour Court that he had been unfairly retrenched. The Labour Court dismissed his claim and on appeal to the Labour Appeal Court it was contended that the

employer should have afforded Baloyi an opportunity to answer the allegations about his lack of 'artistic flair' and skill as a welder. This contention was rejected by the Labour Appeal Court. Davis AJA after referring to the provisions of s 189(1) of the Act said:-

> **"[20] In short, s 189(1) provides for the identity of the parties to be involved in the process of consultation with the employer. Section 189(2) sets out the agenda and objectives of the process to be adopted by an employer when the latter contemplates dismissing employees for reasons based upon operational requirements.**
>
> **[21] Read together, the two subsections represent the codification of the standards which had previously been developed by way of the principle of fairness as contained in the concept of an unfair labour practice. Section 185 may well require that an employer must comply with both the substance and the form of the requirements as contained in s 189, but it adds nothing to the content of the process to be followed.**
>
> > **Given the nature of the detailed codification of the procedure to be adopted for such dismissals, it cannot be said that some residual test remains, notwithstanding that the employer has complied meticulously with the requirements as laid out in s 189(1) and (2).**
> >
> > **[22] It was not contended that respondent did not follow the proper procedures in dealing with NUMSA nor, in the light of the meetings to which reference has already been made, could such an argument have been justified. The argument that the appellant should have been afforded a hearing in person in circumstances where the union which represented him had properly been consulted runs counter to the express terms of the section. Cf Benjamin & Others v Plessey Tellumat SA Ltd (1998) 19 ILJ 595 (LC) at para [31].**
> >
> > **[23] In keeping with a premise of the Act, s 189(1) envisages that the collectivities of management and labour represented by trade unions should engage in an appropriate process of consultation, save where the affected employees are not so represented. To interpret the section so as to allow an employee represented by a union to engage in a parallel process of consultation would undermine the very purpose of the section."**

[28] The appellant sought to distinguish *Baloyi* on the basis that in *Baloyi*, Baloyi was a member of the trade union, NUMSA, which acted as his representative at the employer's business and it was not contended that there had been no compliance by the employer with the duty to consult with NUMSA in terms of s 189(1), whereas in the present case, although the appellant was a member of SACU, he did not fall within the bargaining unit and the agreement of 23 August 2001 between the respondent and ATU on staff optimization, excluded the appellant's grade. In my opinion there is no merit in the appellant's argument in this regard. Even accepting that the appellant was excluded from the bargaining unit and the agreement of 23 August 2001, s 189(1)(c) would still have applied and the respondent would have been obliged to consult with the Union concerning the position of the appellant who was an employee likely to be affected by the proposed dismissals.

[29] In *United National Breweries (SA) Ltd v Khanyeza and Others* (2006) 27 ILJ 150 (LAC) there was a collective agreement applicable in the workplace where the employee concerned was employed. The Labour Appeal Court found, however, that the employee was not an employee as defined in the collective agreement and, as such, fell outside the definition of "union member" in the agreement. However, the Court found that although employees who were members of the union who fell outside the definition of the word "employee" were not entitled to union representation in terms of the collective agreement, they were entitled to such representation in terms of s 189(1)(c) of the Act. Zondo JP said, in para [24]:-

> **"On this approach employees who are members of the union who fall outside the definition of the word 'employee' are not entitled to union representation in terms of the collective agreement when the appellant contemplates their dismissal for operational requirements but they are still entitled to such representation in terms of s 189(1)(c) of the Act. The contention advanced on behalf of the appellant would have the effect of depriving union members employed as permanent employees of the appellant outside the specified departments of their right in terms of the Act to union representation which they ordinarily otherwise have**

> **when their employer contemplates their dismissal. A construction of the Act which has the effect of taking away employees' rights should not be lightly adopted. Indeed, if there is another construction of the statute which does not take away such rights, such construction is the one that should be preferred.**

The Court also rejected the contention that even if the employer was obliged to have consulted with the union and did not do so, it should be held to have substantially complied with the consultation requirements of s 189 because it consulted with the affected employees themselves, including the first respondent, because the evidence did not establish that the appellant held proper consultations with the employees before it made the decision to retrench. On the basis of the decision in *Khanyeza*, because the appellant fell outside the bargaining unit for the purposes of the agreement of 23 August 2001, the respondent had a duty in terms of s 189(1)(c) to consult with the appellant's union concerning the retrenchment of all those union members not covered by the agreement, including the appellant.

[30] The appellant sought to rely upon the decision in *SCCAWU v Amalgamated Retailers (Pty) Ltd* [2002] 1 BLLR 95 (LC), (2002) 23 ILJ 165 (LC). In that case the employer consulted with the recognized trade union but it was not mandated to represent non-union members affected by the proposed retrenchment. Van Niekerk AJ said, in para [26]:-

> "**The identification of a consulting party by applying the criteria established in s 189(1)(a), (b) and (c) might confer exclusive rights on the partner with first claim in relation to other potential partners listed in those paragraphs, but it does not relieve the employer of an obligation to consult in terms of subsection (d) with affected employees or their representatives nominated for the purpose if those employees are not represented in some manner or form by a collective bargaining agent, workplace forum or registered trade union respectively".**

[31] The Court found that in the case under consideration the employer had decided to initiate and conduct a separate consultation with *non-union* members but had not discharged the *onus* of establishing that the

consultation process complied with the requirements of s 189. The case is distinguishable from the one under consideration in that the appellant in the present case was a member of the union whose members were likely to be affected by the proposed dismissals and s 189(1)(c) therefore applied. In the *Amalgamated Retailers (Pty) Ltd case,* it was established that the employer had elected to consult with non-union members.

[32] In my opinion, therefore, since the appellant was a member of SACU which was a member of the Alliance of Telkom Unions, the respondent was obliged to consult with ATU concerning members of SACU who were not part of the bargaining unit, including the appellant, but was not obliged in terms of the LRA also to consult separately with the appellant. In that regard, I am of the view that the judgment in the Court *a quo* was correct, but that is not the end of the matter. It is still necessary to determine whether or not the respondent complied with s 189(2) of the Act in relation to the dismissal of the appellant and to consider the argument that the appellant did not discharge its *onus* of proving that there were no viable alternatives to that dismissal.

[33] The relevant portions of s 189(2) of the Act before its amendment are:-

"(2) The consulting parties must attempt to reach consensus on-

a) appropriate measures-

(i) to avoid dismissals;

(ii) to minimize the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

b) the method of selecting the employees to be dismissed; and

c) the severance pay for dismissed employees.

(3) The employee must disclose in writing to the other consulting party all relevant information, including, but not limited to-

a) the reasons for the proposed dismissals;

b) the alternatives that the employer considered before

proposing the dismissals, and the reasons for rejecting each of those alternatives;

c) the number of employees likely to be affected and the job categories in which they are employed;

d) the proposed method for selecting which employees to dismiss;

e) the time when, or the period during which, the dismissals are likely to take effect;

f) the severance pay proposed;

g) any assistance that the employer proposes to offer to the employees likely to be dismissed; and

h) the possibility of the future re-employment of the employees who are dismissed.

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(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matters on which they are consulting.

(6) The employer must consider and 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.

(7) **The employer must select the *employees* to be dismissed according to selection criteria –**

a) that have been agreed to by the consulting parties; or

b) if no criteria have been agreed, criteria that are fair and objective."

[34] The respondent called two witnesses to give evidence in the proceedings before the Labour Court. They were Mr A.K. Amod ("Amod") and Mr G.J. Allan ("Allan").

[35] Amod was the Senior Human Resources Manager at Telkom. He had been the Chief Negotiator for Telkom until 31 December 2001 and used to negotiate and bargain with the unions active in Telkom over, amongst other matters, retrenchment. He gave evidence regarding the course of events which eventually led to the retrenchment of the appellant and regarding the extent to which there were consultations between Telkom and the unions representing the affected parties.

[36] According to Amod, he initiated discussions with both ATU and CWU regarding SOP. He was a signatory, on behalf of the respondent to the

Agreement on Staff Optimisation concluded between the respondent and ATU on 23 August 2001. That is the agreement which provided that employees who were determined to be "surplus/redundant" would be allowed to exercise an option between a Voluntary Severance Package ("VSP") or a Voluntary Early Retirement Package ("VER") on the one hand and, on the other hand, to join a redeployment pool. The agreement specifically provided that where employees needed to be selected from a group of employees the selection criteria of Skills, LIFO (Last In First Out) and Race and Gender correction, where appropriate were to be applied.

[37] Amod said that on 16 November 2001 there was a meeting between management and ATU to discuss voluntary severance packages for, *inter alia*, Technology and Network Services ("TNS"), which was the service organisation in which the appellant was employed. However, it emerged under cross-examination by reference to a document headed "TNS STAFF OPTIMISATION PROCESS AND ASSOCIATED TIMELINES" that finalisation of affected numbers and work groups and the compilation of name lists of affected staff was to be completed by 6 November 2001 and the selection, using the aforesaid criteria, was to be completed by 12 November 2001 ie. before the meeting of 16 November. Amod said:-

> **"The selection criteria would have been applied and then lists of the people in the bargaining unit as well as managers who would be identified as selected and effected, would be made available."**

[38] He said that would have happened in the early part of November 2001.

[39] When faced with the proposition that, in the mind of the company, by 22 November 2001 the appellant's job was effectively redundant without any form of consultation having occurred in respect of the appellant, Amod justified the company's position by saying that the process was, in effect, a two stage process. The first stage was that selected people would be offered VSP or VER and this was a voluntary process, not retrenchment. Only when that process had been exhausted was the second stage, leading ultimately to retrenchment in the case of employees who were not redeployed or retired, put into operation. The final retrenchment date was envisaged to be 31 March 2002. However, as a result of the urgent application brought by SACU and two others on 28 March 2002, to interdict the retrenchments, and the resulting settlement agreement, retrenchments were postponed to 30 April 2002.

[40] Between 28 March and 3 May 2002 a process was put into place to see if respondent could assist in placing affected members into redeployed positions but, eventually, 223 including the appellant, were retrenched on 3 May 2002. Amod said that the appellant was interviewed for certain positions but unfortunately more suitable candidates were found. The appellant should have been retrenched on 31 March 2002 but as a result of the extension, was retrenched on 3 May 2002.

[41] Amod conceded that "at the time the exercise was being implemented" the appellant was 49 years and 1 month old, or 11 months shy of his 50thbirthday when he could have opted for and obtained the early retirement option. Early retirement carried with it certain benefits including a monthly pension and a telephone allowance. Although Amod said that when they selected employees for "ultimate retrenchment" they applied the aforesaid selection criteria, LIFO did not work for the appellant because he was in an area that was made redundant.

[42] Amod conceded under cross-examination that whilst Telkom consults with the unions with regard to employees in the bargaining units, when it comes to managers they go an extra mile and consult with the managers themselves, irrespective of whether or not they belong to the unions. He said that the appellant was afforded the benefit of "a dual consultation process".

[43] According to Amod when it became quite apparent that they were not going to realise their reductions through the voluntary process, they would have continued with the s 189 process "with the applicant and the other managers". There was, however, no evidence from Amod that after the meeting of 22 November 2001 the provisions of s 189 were, in fact, complied with, either in consultations with the union or in consultation with individual managers, including the appellant. He was also not aware of any consultations with the appellant commencing in July 2001. He said independent consultations with

the appellant would have commenced after the group presentation by Marna Wilden which was on 22 November 2001. He confirmed that the affected managers had been identified by the company by 22 November 2001.

[44] Amod conceded that retrenchment only became an issue in January/February 2002 because prior to that the respondent had indicated that there would be no involuntary retrenchments.

[45] In re-examination it was put to Amod by the respondent's counsel that there must have been a stage when the respondent had to embark on s 189 proceedings with those who had not taken a voluntary package of any kind, that is to say those in the redeployment pool. Although Amod confirmed that a decision was taken to embark on such proceedings, he did not in fact give evidence of any such proceedings having taken place. He said "…. the company then took a decision that the redeployment pool cannot continue *ad infinitum*and that we need to come to a close and a convenient date to come to a close would be tied up with the financial year on 31 March 2002". He said that they would have gone into consultations with the unions and advise them that they were now going to consult with them in terms of s 189. There was a debate about whether there was a letter or minutes inviting the unions to discussions. Counsel for the respondent referred the Court to a newsletter from SACU dated 2002/03/13 the penultimate paragraph of which says:-

> **"To this end we were informed late in February 2002 that the company intends retrenching employees remaining in the pool at the end of March 2002."**

But the last paragraph states:-

> **"The Labour Relations Act is very specific in the process that must be followed when contemplating retrenchments, <u>but thus far the company has not abided by such provisions</u>, and therefore called for an urgent meeting with the company." (My emphasis.)**

[46] In a document dated 2 May 2002 and headed "MEMORANDUM OF UNDERSTANDING BETWEEN ALLIANCE OF TELKOM UNIONS (ATU) AND TELKOM SA ON THE FINALISATION OF THE STAFF OPTIMISATION PROGRAMME", it is recorded that the parties "had

consulted in terms of Section 189 of the Labour Relations Act in respect of the staff optimisation programme which commenced in August 2000". It is further recorded that the parties had concluded the consultations on 2 May 2002 and that the termination date of affected employees would be 3 May 2002. Paragraph 4 states:-

> **"The company undertakes together with a representative of ATU to investigate all instances and circumstances where there is alleged discrepancies and unfair procedural issues. The company is committed to investigate these circumstances and on the merits of each case address the particular circumstances fairly, justly and equitably. The parties will commence this task on the 6th May 2002 to 31st May 2002."**

[47] There was however no evidence from Amod that the specific requirements of s 189 of the Act were observed in respect of the retrenchment of the appellant.

[48] Allan was the line executive responsible for the Technology and Network Services Organisation for Telkom Southern Zone and was the acting executive during the relevant period of 2001/2002. He confirmed that the appellant was employed in the section called Switching Engineering which was a sub-section of regional network engineering.

[49] According to Allan the reduction in capital expenditure in the southern region over the years 1999/2000 to 2002/2003 rendered redundant the two specialist switching engineer positions, one of which was occupied by one Charles Williams and the other by the appellant. The redundancy was finalised and communicated to the managers in November 2001. In September 2001 the respondent offered voluntary early retirement packages to those who were over the age of 50 or 55 and only in November 2001 were voluntary severance packages offered. He referred to the letter dated 27 November 2001 addressed to the appellant recording that he had been informed by his immediate supervisor/manager that his current position was affected and stating that the "criteria … used to populate the structure and identify affected employees" were:-

> **"Qualifications**
> **Experience**
> **Performance**

Correction for race and gender."

[50] There was no mention of LIFO. It was in this letter that the appellant was offered the options of either a voluntary severance package or redeployment. Allan said that the respondent did not guarantee an employee a job if he went into the redeployment pool. He described how those in the redeployment pool could apply for positions which were published on a weekly basis in a vacancy bulletin. The respondent applied the "standard selection process" which it followed when appointments were made, to the applications for people in the redeployment pool. He referred to a document which set out the process. It recorded that "the selection process for redeployment and normal recruitment is exactly the same". There was an interview panel consisting of three to six people which arrived at a "consensus decision". He said that "Normally they would agree on beforehand the criteria to be used for selection and they would basically work out a scoring sheet. Each member would evaluate the responses by the applicant and at the end of the day generally the person with the highest mark awarded by the committee would get the position, but taking into account the company's employment equity policies".

[51] It emerged from Allan's evidence that when the appellant's position was "declared redundant", Allan was aware of that fact, but that he did not specifically talk to the appellant about retrenchment.

[52] Allan, too, adopted the attitude that as at 22 November 2001, although positions at risk had been identified, retrenchment was not the issue. He said:-

> **"At that stage there was no agreement with organised labour as to what the next steps would be with those members who were affected but who did not opt for the VSP or did not find alternative employment in the company."**

He specifically said that when it was communicated to employees in November (2001) that positions had become redundant, they did not tell them that they were being retrenched: "Because retrenchment as an alternative had not yet been agreed to with organised labour". He said, in regard to what was communicated in talks with managers after the meeting of 22 November

2001:-

> **"What was communicated that if there were still people in the redeployment pool by the end of February, beginning of March the company would have to consider other methods of how we would deal with these people because the retrenchment *per se* had not been negotiated with the union."**

[53] Although, according to Allan, LIFO was one of the selection criteria employed in selecting people for redundancy, this was, according to Allan's evidence, before the options were put to affected employees and not at the retrenchment stage.

[54] Allan described the steps which were taken to assist employees who had elected to participate in the redeployment process. He said he had spoken to the appellant unofficially several times after he moved into the redeployment pool. He said that the appellant had on one occasion requested that he give consideration to creating a special position to retain him on the section and also to give consideration to extending the cut-off date for taking the voluntary early retirement package so that he could apply for it. He said that he followed up this request and consulted with the HR division but the company could not grant him the request for extension of the date to March 2003.

[55] Allan was referred to an e-mail addressed to him by the appellant on 19 April 2002 in which the appellant said: "The job moratorium since beginning of March and employment equity restrictions has made it very difficult to secure positions as advertised on vacancy bulletins after the original redeployment drive ended in February." Asked about the moratorium Allan said:-

> **"The moratorium was an instruction issued by the Chief Technical Officer of Telkom that no positions, vacant positions, were to be filled without specific permission from himself and the Chief Deputy-Officer"**

and

> **"The notice was given late February or early March of 2002"**

and

> **"I think the decision as to who would fill a post would still be left up to the committee as I described earlier, but whether that post was actually filled or not that was special authority had to be taken – be obtained from the Chief Technical Officer."**

[56] Allan was referred to a passage in the same e-mail in which the appellant referred to "a motivation from Garth Schooling's section (product

development) with Reuben September for me to fill a position – no response yet." He said he discussed this with Garth Schooling. He thought that "some time towards the end of April, all the positions were finalised that were allowed to go through".

[57] Under cross-examination Allan confirmed that as at 21 November 2002 was not part of the process and said: "… what was going to be the result if there were not sufficient employees taking voluntary severance package, that was discussion or for subject to further negotiation with the unions". He conceded that that was also the case for the individuals themselves who were not represented by unions. He said that as the company was not contemplating retrenchments, there would have been no purpose for it to consult in terms of the section of the Act dealing with retrenchments. He conceded that he had no idea at what stage consultations started. He said:-

> **"… the first time I became aware that retrenchments were a certainty was round about the end of February when a company communicay was sent out."**

[58] Although, in response to a leading question by the Court, Allan said that he became aware that further negotiations with organised labour and the company were taking place about the manner in which they were to deal with employees who were still in the redeployment pool after all the alternatives were exercised, he was not a party to those discussions. He said that non-union members who were retrenched were not consulted but added that managers were: "If you define consultation as speaking to him, indicating reasons for the – the reasons for reduction in staff, exploring the options, assisting with options, then yes, that consultation did take place over a period".

[59] In response to a question by the Court, Allan said that the appellant was not spoken to about retrenchment prior to 28 February and continued:-

> **"There was indi …. he was not specifically informed that his position would be redundant, was not a definite indication his position would be redundant prior to the 27th. There were indications that the positions in the switching engineering were going to be affected, but it was not definitive statement that your particular position is redundant."**

[60] He eventually agreed that prior to the 22nd November 2001 the appellant was not specifically informed that his position was at risk. He conceded that the

appellant was never consulted about whether the removal of his job from the organogram was a good idea or not because that was a head office decision.

[61] Allan did not dispute that the appellant was not consulted about the criteria to be applied in deciding who was to be selected out of the redeployment pool for any particular position but said:-

> **"Well the criteria used to fill those posts and the process was the standard company procedure and criteria which is known, or should be known to everybody in the company specifically persons in the managerial manner."**

[62] He conceded that the process or procedure for filling vacancies did not make any allowance for long service, and specifically said: "No, in applying for a position in terms of redeployment the length of service would not be a factor".

[63] Allan conceded that the moratorium did impact on a number of positions available for redeployment. He was not sure of the "exact practice rationale" for the fact that long service did not play some role in the placements. Asked by the Court if the policy of appointment was a policy that was derived in consultation with the union or with the workers, he said "The company recruitment policy was negotiated with organised labour, or elements of it was negotiated with organised labour". He did not, however, say what was agreed or what elements were agreed.

[64] Allan's evidence was that the applicant's position was not filled and that the work that was done in the switching network hierarchy actually disappeared in Port Elizabeth.

[65] To summarise, on the basis of the evidence presented by the respondent, the position regarding consultation and section 189 of the Act was as follows:-

a) For the period from about July 2001 until 22 November 2001 the respondent did consult with the unions regarding the Staff Optimisation Process.

(b) Before the presentation to managers on 22 November 2001 the respondent had already identified the areas which were affected and the specific posts which would become redundant.

(c) Although, according to the documentation, the criteria to be applied in selecting positions for redundancy were skill, LIFO and race and gender correction, there is no evidence that the criteria were actually applied in every case and, particularly, in the case of the appellant's position.

(d) The respondent did not regard it as being necessary to apply s 189 of the Act because it did not consider the staff optimisation plan or process to, at that stage, involve retrenchments or dismissals based on operational requirements.

(e) Because managers were not included in the bargaining unit the respondent did consult with managers whether or not they were members of a union on matters affecting SOP and their particular positions.

(f) Prior to his being presented with the letter on the 27th November 2001 offering him the choice between a voluntary severance package and redeployment, the appellant had not been consulted about the selection of his post for redundancy.

(g) There was no evidence before the Court *a quo* that, when the respondent did decide, in January or February 2002, to retrench those persons left in the redeployment pool, it consulted with either the unions or with individual managers concerning the matters referred to in s 189(2) of the Act.

(h) The criteria for selecting from applicants in the redeployment pool

employees to fill vacant posts were decided upon by the selection committee and did not include LIFO.

(i) There was no evidence of any attempts being made to place the appellant in another position, apart from affording him the opportunity of applying for listed vacancies and some enquiries made on his behalf by Allan.

(j) In late February or early March 2002 and at a time when displaced employees in the redeployment pool were still applying for alternative posts, the Chief Technical Officer of Telkom imposed a moratorium in the form of an instruction that no vacant positions were to be filled without specific permission from himself and the Chief Deputy-Officer.

(k) There was no evidence to explain the necessity for this moratorium or regarding the criteria which were applied in deciding whether or not to approve a placement, neither was there any evidence regarding which and how many of the applications made by the appellant were affected by this moratorium.

[66] The appellant gave evidence. He described himself as a specialist netplan and data integrity specialist, in category D.5 or N.5. He had been unable to secure alternative employment since his dismissal, although he had, with others, endeavoured to set up a close corporation doing job brokering to try and find employment for retrenched or older people.

[67] The appellant said that he was 49 years and 1 month of age on the date of his retrenchment, 3 May 2002. Had he been allowed early retirement, he would have been entitled to a number of benefits which he had lost on his retrenchment. The first intimation he had that his position was "effected and selected" was when he was notified to that effect by his then manager prior to receiving the letter of 27 November 2001 giving him the choice of four options. He had not been invited to the meeting addressed by Marna Wilden

on 22 November 2001 and had not attended that meeting. He did however attend a social plan workshop which was, as he described it, an "information cascading exercise" informing people basically what benefits would be allowed when they exited the company. This was after he had elected to take the redeployment option. Had he been allowed early retirement there would have been certain tax benefits.

[68] The appellant said he opted for redeployment because he had been with the respondent for 30 years and wanted to retain his association with the company. He was "absolutely convinced" that with his years of experience he would get some form of employment either in Telkom or in some other organisation based upon the fact that the letter of 27 November 2001 actually said, that the company would endeavour to retrain people who did not completely fit a position applied for.

[69] The appellant dealt in detail with the various applications he had made, referring to a schedule which appears at page 611 of the record. In all he had applied for 22 positions before his retrenchment date and 4 after his employment ended. He had applied for the 22 positions because he felt that he had the experience to do the job in those particular categories. He was only short-listed for 4 of the applications and was unsuccessful. He knew about the moratorium and understood that it did not preclude him from applying for positions but they would not necessarily appoint somebody even if successful until approval had been given for the appointment.

[70] The appellant referred to his e-mail to Allan on 19 April 2002 when he advanced the proposal to accommodate him at least to the age of 50 so that he qualified for early retirement. No-one ever came back to him regarding his proposal. He had also suggested that he could play an important part with the data integrity exercise leading up to Netplan Integration which he had been involved in for 10 months prior to his retrenchment, but this proposal was also not approved. He ultimately got the letter dated 3 May 2002 confirming that

he would be retrenched on that date. He identified a letter dated 17 July 2002 which he had addressed to The Executive, Telkom Employee Relations in which he set out the history of the process leading to his retrenchment and in which he asked for relief.

[71] The appellant said he wanted reinstatement and, if that was not possible, a form of compensation.

[72] In response to a question by the Court the appellant said that he did not really think that it was justified to declare his position redundant. In cross-examination he took the view that although Telkom had consulted with the union before his retrenchment, there was a duty and obligation to consult with him directly. Referring to the letter of 27 November 2001 and to the words "the company will endeavour to retrain and redeploy you within Telkom", in the context that there was no guarantee of redeployment, he said he understood the definition of endeavour to be "actually trying". Regarding his choice to go into the general redeployment pool, he said:-

> **"My interpretation of that at that at that stage was redeployment that the company would endeavour to redeploy, in other words, it would not be an effort on my behalf, it was something that the company would recommend."**

[73] He dealt with correspondence he had had by e-mail with Marna Wilden regarding his application for a certain position. In response to questions by the Court, he referred to positions which he thought he should have got. Asked if he felt that he was denied jobs he should have got because of any bias on the part of the selection panel, he replied "I quite honestly did not know what the selection criteria was, so I do not know if the bias was objective or subjective, I have absolutely no idea". He also said:-

> **"Well of these positions I actually applied, but when I was retrenched none of those positions had been filled, so I have absolutely no idea whether I was successful or not successful. I had no indication from the company whether I was in actual fact successful or not. Even afterwards there was no indication."**

[74] The appellant confirmed that he had received written communications from SACU from time to time because he was a member of the Union and that he had corresponded with his shop steward at the time. He said:-

> **"One of the reasons was because I was not getting much feedback from managerial side as far as the consultation process, as far as looking at or**

revisiting alternative positions in the company."

[75] He had heard from the shop steward that there was a Union member up in Pretoria who was going to discuss revisiting alternate job applications. He had no response from his Union to this mail although he was assured that the list of job applications made by him had been given to somebody at Telkom.

[76] I have found earlier in this judgment, there was no obligation on the part of the respondent to consult with the appellant personally in terms of s 189 of the Act because he was a member of SACU. However, it is clear from the evidence of both Amod and Allan that it was the policy of the respondent to consult personally with employees in the management category whether or not they were members of a union. That was undoubtedly fair, bearing in mind that, the managers did not form part of the bargaining unit. There is much to be said for the contention advanced on behalf of the appellant that the respondent, having elected to consult with management regarding retrenchment issues, was obliged to consult with managers, including the appellant, in addition to consulting with the unions. It is, however, not necessary to decide that issue for the purposes of this case. That is because the evidence placed before the Court *a quo*did not establish that the respondent had consulted with ATU or SACU in an attempt to reach consensus on the matters referred to in s 189(2) of the Act or that it complied with sub-sections 189(3), (5), (6) and (7). Although there may have been consultation between the respondent and the unions regarding SOP, it was the respondent's own case that it did not regard those consultations as being consultations in terms of s 189 of the Act because there was no decision to retrench until January or February 2002, after the attempts to bring about a reduction of personnel by early retirement and the acceptance of a VSP had been exhausted. There is no evidence that the employees who remained in the redeployment pool were, as required by s 189(7) of the Act, dismissed according to selection criteria that had been agreed with the union or which were fair and objective. The decision that those remaining in the redeployment pool were to be dismissed by a certain date was solely a management decision. There is no evidence that thereafter there was compliance by the respondent with s 189 of the Act. Indeed as

appears that the application by the Union for an interdict to prevent the retrenchments was sought on the basis that the intended retrenchments would constitute unlawful dismissals in that the provisions of s 189 of the Act had not been complied with.

[77] The dismissal of the appellant was, therefore, unlawful because of non-compliance with s 189 of the Act.

[78] However, in my opinion, there is a much stronger and clearer ground for upholding the appeal. Even assuming that there was proper consultation between the respondent and the unions regarding the dismissals, pursuant to the agreed SOP, a distinction must be drawn between consultation regarding dismissal for reasons based on the employer's operational requirements and the implementation of those dismissals. In the case of the appellant and the others who elected to accept the redeployment option, the *modus operandi* was that their position would be regarded as redundant and non-existent and they would have to reapply, like any other applicant for employment, for alternative positions which became available, either within the redeployment pool or outside of it within the company. The issue to be decided is whether that procedure and its implementation in the case of the appellant was fair and reasonable.

[79] Once it has been proved that an employee was dismissed, the *onus* passes to the employer to prove that the employee was dismissed "for a fair reason and in accordance with a fair procedure" – see *John Grogan – Workplace Law* (8th Ed.) 168. As 188(1)and 189(7)(b) of the Act

In *FAWU and Others v SA Breweries Ltd* [2004] 11 BLLR 1093 (LC) at 1109B-D, Gamble AJ said:-

"**[39] The test for substantive fairness in dismissals for operational**

reasons has traditionally been described by the Labour Appeal Court as being whether the retrenchment is "properly and genuinely justified by operational requirements in the sense that it was a reasonable option in the circumstances" (*Decision Surveys International (Pty) Ltd v Dlamini & Others* [1999] 5 BLLR 413 (LAC). See also *SACTWU & Others v Discreto (A Division of Trump & Springbok Holdings)* (1998) 19 ILJ 1451 (LAC).

> **[40] More recently the Labour Appeal Court endorsed a less deferential test for proof of substantive fairness – an approach which calls for a more rigorous or exacting examination by the courts of the reasons advanced by the employer. This requires the employer to show that the dismissals were "a measure of last resort" which "could not be avoided" (see *CWIU & Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC)."**

In *General Food Industries Ltd v FAWU* [2004] 7 BLLR 667 (LAC) 682J, para. 55, Nicholson JA said:-

> **"The loss of jobs through retrenchment has such a deleterious impact on the life of workers and their families that it is imperative that – even though reasons to retrench employees may exist – they will only be accepted as valid *if the employer can show* that all viable alternative steps have been considered and taken to prevent the retrenchments or to limit these to a minimum" (My emphasis.)"**

[80] As I have said earlier in this judgment, Mr Wade, for the appellant, based his case mainly on the proposition that the respondent did not discharge the *onus* of establishing that there were no reasonable alternatives to the appellant's dismissal. I understood him to say in reply to the respondent's argument before us that the appellant did not disagree with the criteria applied but did question why he was not selected.

[81] In my opinion, Mr Wade may have unnecessarily restricted the scope of the appellant's case. In his amended Statement of Claim, the appellant, in paragraph 5.27, after alleging that the respondent unfairly failed to employ the appellant in certain named positions said, in

paragraph 5.28:-

> **"In view of the Respondent's failure to consult the Applicant as required by the Act, the Respondent is put to the express proof of its rationale for terminating the Applicant's services, the absence of alternatives to the Applicant's termination, and the fairness of the selection criteria and their Application."**

In reply the respondent said:-

> **"25.3 Applicant along with the rest of the employees in the redeployment pool went through this process (interview by a selection panel). If he was unsuccessful in obtaining alternative employment at the Respondent, that nonetheless was the result of a fair and objective procedure. Employees who were successful in respect of jobs for which Applicant also applied were better qualified and suited for those jobs, performed better in the interviews and were selected as the result of a targeted fair and objective selection procedure."**
> **And:**
> **"25.5 Most of the positions referred to were offered outside of Port Elizabeth and the Southern region and the Respondent is unable to reply to the allegations concerning these posts with any particularity."**

[82] In my view the evidence before the Court *a quo* did not establish that the procedure resulting in the appellant's dismissal was fair and objective, for the following reasons:-

1. There was no evidence to explain, or justify, why it was fair and reasonable to require the appellant, who had 30 years service and a clean record, and who was approaching the early retirement age, to forfeit his employment with the respondent and to have to reapply in competition with other displaced employees, who may have had far less service than him, for the available positions or as to why it was not possible to create a position for the appellant within the company.

2. Although, according to the respondent, it applied the criteria of Last In First Out in deciding which positions would become redundant, length of service did not, according to Allan, play any part in the process of

selection of applicants for the available positions.

3. In the letter dated 27 November 2001 informing the appellant that his current position was affected, he was led to believe that the respondent would endeavour to retrain and redeploy him within Telkom but there is no evidence whatsoever that it did endeavour to retrain him or to redeploy him in any manner other than to allow him to apply for vacancies in competition with other employees.

4. There is nothing in the said letter of 2001 which would have alerted the appellant to the fact that his length of service would not carry any weight in the process of redeployment from the pool.

5. There was no evidence to establish precisely why the applicant was less suitable than others for the positions for which he applied and was unsuccessful and no documentation was placed before the Court *a quo* in this regard. In addition, the appellant was treated in a most unreasonable manner, having regard to his seniority and length of service, in that he was not even informed of the outcome of some of his applications or told why others were selected in preference to him, if that was the case.

6. There was no evidence to establish the need for the moratorium which appears to have been an obstacle placed by the respondent in the way of a fair implementation of the redeployment plan, neither was there any evidence as to the criteria used in deciding whether or not to approve an appointment. It is possible

that some of the applications by the appellant were rendered unsuccessful under the moratorium, simply at the whim of the Chief Technical Officer and the Chief Deputy Officer.

[83] In my judgment, it was not established on the evidence before the Court *a* quo that there were, in fact, no alternatives to the dismissal of the appellant or that the procedure adopted leading to his dismissal was fair and objective. The appellant's claim in the Court *a quo* ought, accordingly, to have succeeded and the appeal must be upheld.

[84] As far as the remedy is concerned, I have read the judgment of my brother Zondo JP and, for the reasons given by him I agree with the order he proposes.

McCall AJA

Counsel for the appellant :	R.B. Wade
Instructed by :	Kaplan Bloemberg
Counsel for the respondent :	T.J. Bruinders SC
Instructed by:	Soni Inc.
Date of judgment :	29 June 2007