IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case No: JA31/2002

In the matter between

Chemical Workers Industrial Union **1st Appellant**

Sangiveni and others **2nd and Further appellants**

And

Latex Surgical Products (Pty)Ltd **Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] The first appellant is the Chemical Workers Industrial Union ("**the union**") which is a registered trade union. The second and further appellants ("**the individual appellants**") are members of the union and former employees of the respondent. The respondent is a registered company. It dismissed the individual appellants from its employ on the 16th February 1999. After it had dismissed them, a dispute arose between the appellants and the respondent about the fairness of the dismissal. In due course that dispute was referred to, and, adjudicated by, the Labour Court. Through Jammy AJ, the Labour Court found that there was a fair reason for the dismissal

and that such dismissal was preceded by a fair procedure. It, accordingly, dismissed the appellants' claim with costs. It later granted the appellants leave to appeal against the whole of its judgment. This, then, is the appeal against that judgment and order of the Labour Court. Before the appeal can be considered, it is necessary to set out the factual background to the matter.

The facts

[2] The respondent manufactures and distributes condoms, surgical and examination gloves and medicinal orientated glove substances. It employed a number of employees including the individual appellants. The union had the majority of the respondent's employees as its members.

[3] On the 18th June 1998 the respondent sent a letter to the union. It was written by Ms Desiree Pule, the general manager of the respondent. Six of the points made in that letter require to be emphasised. The first is that the purpose of the letter was to give the union a notice in terms of sec 189(1) of the Labour Relations Act, 1995 (Act 66 of 1995)("**the Act**") and to invite it for consultations required by that Act. The second is that the respondent stated that, in order to sustain itself, it had to consider restructuring and downsizing which it said could lead to the dismissal of a number employees at all levels. The third is that the respondent said that it was "**in a vulnerable position**" due to:

a) the considerable turmoil in the financial markets and foreign currencies resulting in a substantial depreciation of the Rand and

increased interest rates;

b) the potential loss of important contracts;

pressure on its pricing levels, and,

c) exposure to a substantial liability with the Southern Metropolitan Council.

[4] The fourth is that the respondent estimated the number of employees who could be affected by the exercise at 33 full-time employees at all levels of the company. The fifth is that the selection criteria that the respondent proposed for the selection of the employees to be dismissed were:

a) key skills required;

length of service;
performance record;
disciplinary record;
education requirement; and,

b) experience.

The sixth is that the respondent proposed to give preference to the employees selected for dismissal should it have to employ employees within 12 months after their dismissal but said that such re-employment would depend on each employee's suitability, skills and previous performance records.

[5] Between the date of that letter and the 16th February 1999 a number of meetings were held between the respondent and the union. Those meetings were meant for the two parties to discuss various issues arising out of the letter of the 18th June or out of subsequent developments. The meetings were held on 1 July, 19 August, 4, 10 and 14 December 1998, 4, 8, 13 and 19 January 1999. It is not necessary to set out what was discussed in each

meeting. It suffices to state that not much progress, if any, had been made by the end of 1998. A certain amount of time was not used productively because the parties were arguing about whether they should discuss issues relating to wage negotiations which the union had initiated by way of a letter of the 6th June 1998 or whether they should discuss matters relating to consultation on the respondent's proposals relating to restructuring and downsizing.

[6] According to the minutes of the meeting of the 1st July 1998 the respondent advanced the following as the reasons why the respondent had to consider the course of action that it was considering:

. depreciation in currency;
. rise in interest rates;
. increased competition;
. loss of tender contracts, and,
. pricing levels.

According to those minutes, the union stated at the meeting that:

. the respondent was not the only company in the position in which it was;

. as selection criteria, it preferred LIFO but there could be instances where length of service would not be so important;
. there was emphasis placed on the retention of skills;
. it would like the respondent to "**look at the contract workers"**; and,
. it would "**consult about**" the night shift contract workers working in the condom section.

[7] In a letter dated 7 July 1998 addressed by Ms Pule to the union she stated, among other things, that at that stage the respondent employed 230 employees of which 28 were contract employees who were with an outside contractor as well as 12 employees who

were weekly paid who had initially been taken as casual employees but had subsequently been employed on a permanent basis. From these figures it is clear that a total of 230 plus 12 employees were employed on a permanent basis. That makes a total of 242.

[8] Ms Pule went on to say in the letter that from the exercise that the management had conducted, it was estimated that the respondent would require 169 full-time positions excluding the 12 employees who were employed on night shift in the condoms section at the time. This means that inclusive of these 12 employees, the respondent would require 181 employees for the future. Ms Pule also pointed out that the management foresaw a need for additional two positions which required specific skills and experience relating to production and quality control in the latex/rubber fields. She indicated in the letter that the management was considering the possibility of reducing the workforce by thirty three employees or less depending on the replacement of the contract night shift. She expressed the hope that the union would give the respondent's proposals careful consideration. It would seem that the union's attitude to all this was that it would not participate in the proposed consultation unless the management first commenced wage negotiations with it.

[9] By way of a letter dated the 28th August 1998 the respondent addressed a letter to the union accusing it of linking the issue of wage negotiations with that of consultations that the respondent sought to have with the union in regard to restructuring. The respondent further stated that the union had indicated that it would not participate in the consultation process unless wage negotiations were commenced forthwith.

[10] The respondent also wrote in the letter that, although it believed

that the consultation should precede wage negotiations because its outcome could impact on the wage negotiations, it recorded that it had agreed, as a matter of compromise, to commence with wage negotiations on condition that the union gave an undertaking that it, too, would participate meaningfully in the consultation process relating to the restructuring. In this regard the respondent proposed certain dates for a consultation meeting. The dates were 1 September 1998 at 14h00, 2 September 1998 at 08h00 and 3 September 1998 at 14h00. The respondent asked the union to choose from these dates a date for the consultation. The respondent stated that, if it did not hear from the union with regard to any of these dates, it would commence with the consultations even if the union did not attend. However, it urged the union to attend the consultation.

[11] It is not clear whether any consultation meeting took place on any of the dates that the respondent had proposed. However, it would seem that on the 25th September 1998 a meeting was held between the respondent and the union. This appears from a memorandum bearing that date which the respondent addressed to "**all staff**" and copied to the union. The respondent's management sought to record in the memorandum what had transpired in such meeting. In the paragraphs numbered 4 and 5 in that memorandum the respondent's management is recorded as having told the union that the "**company was in this predicament**" for a number of reasons. It gave the following as the reasons:.

> "**4.1 the reject rates were far too high and Company could ill-afford the wastage in production.**

4.2 Productivity levels were not good enough in certain areas in production.

4.3 The Company had lost some important contracts to both international and local suppliers who were offering more competitive prices than LSP.

4.4 The core business being surgical gloves was losing the largest amount of money."

The respondent also warned in that memorandum that "**so long as a careless attitude prevailed, that standard operating procedures and quality standards were ignored, the situation would not improve"**. The respondent's management also placed on record that this attitude was to be found at all levels of employees and not simply at shop floor level.

[12] It was also recorded in the memorandum that the union acknowledged the problem of rejects but stated that it was not just the workers but also the supervisors who were responsible for rejects. The union also suggested to the respondent that it (i.e. the respondent) consider "**getting outside assistance to help find a solution to the problem."** The respondent responded by saying that it was at that stage in discussion with certain consultants to help it.

[13] On the 16th November 1998 the union's members began a protected strike in support of their demands for a wage increase and other terms and conditions of employment. That strike continued until early in January 1999. On the 4th December 1998 a meeting was held between the respondent and the union. Nothing of any significance emerged from that meeting.

[14] On the 7th December 1998 the respondent addressed a letter to the union on consultations. In the letter the respondent stated that its circumstances were at that stage such that it seemed "**an extreme possibility that an operational restructuring with the company needs to be seriously considered."** The respondent went on to say that it wished to consult with the union on certain proposals. Those proposals were set out in the second and third pages of that letter. It is convenient to quote them in full. They read thus:

> "1. With regard to examination gloves, this business will be acquired by another entity as firstly, we are not in a position to upgrade our line in terms of technology and secondly, we are unable to improve the quality of gloves that are being manufactured. Any party that acquires this operation of our business would inevitably be required to invest time, effort and money in upgrading the product and implementing modernised technological facilities. This would necessitate the termination of all forms of contracts of independent contractors and indeed, the possible retrenchment of approximately 5 of your members.
>
> **2. Surgical gloves: Having regard to the fact that sales have decreased since August 1998 by approximately 300 000 pairs per month, steps must be taken to rationalise the staff complement in this department. To this end, approximately 32 of your members employed in**

production, testing and packing might be dismissed due to our operational requirements.

3. **Certain other positions that may impact [on] your membership include quality control, cleaning and maintenance where approximately 12 will be affected.**

4. **In addition, we wish to outsource our stock control, distribution and aspects of our administration to a third party who has indicated that it will do so at a nominal charge and, in addition, will utilize resources and personnel which are currently surplus to its requirements. Approximately 7 of your members may be affected."**

The respondent then asked for a meeting with the union for the 10th December 1998. In terms of those proposals the selection criteria that the respondent would use were the "**last in first out, save and except to the extent that an individual has special**

skills, qualifications and an appropriate work record."

[15] On the 10th December 1998 a meeting was held between the union and the respondent. According to Ms Pule's evidence at the trial and her letter of the 11th December 1998 addressed to the union, the union indicated to the respondent's management at this meeting that, until the wage negotiations, in respect of which the union members were still on strike, were finalised, the union would not be attending any consultations. In the letter of the 11th December 1998 Ms Pule wrote among other things: "**We urge you for the sake of your members to attend the consultations and for this purpose you are given a final opportunity – a consultation has accordingly been arranged for Monday 14th December 1998 at 12h00".** Ms Pule concluded that letter thus: "**This consultation will take place at our premises and should you elect not to attend or to meaningfully participate we shall have no alternative but to take decisions in your absence."** The meeting scheduled for the 14th December went ahead with the union in attendance. However, not much progress was made. Another meeting was then scheduled for the 4th January 1999.

[16] At the meeting of the 4th January 1999 one of the points that the union made was in effect that the respondent should dismiss casual employees before there could be a proper consultation. The respondent's response to this was that, while the strike was going on, it could not dismiss casual employees because the respondent

had to continue running its business. The respondent urged the union to make proposals to avoid possible retrenchments. The union appealed to the respondent to call off the retrenchment and to work jointly with it to address the problem. The union said that, if the respondent worked together with it, the rate of rejects could be reduced and productivity could be doubled. The respondent also made the point that it had proposed the working of a continental shift which it had believed would have avoided the retrenchment but pointed out that the union had rejected the proposal. It would appear also that the union proposed that, in order to avoid the retrenchment, the workers share the work. It is not clear whether or not the respondent responded to this proposal at this meeting.

[17] A further meeting was held on the 8th January 1999 between the union and the respondent. The minutes of this meeting suggest that the union emphasised that it was not convinced that the respondent had to retrench. The union apparently said that, if the respondent was adamant about retrenching, the workers would rather share the work. The union said that it would need to have a list of the workers to be affected and a list of all the employees. The union also stated that it wanted to know what was going to happen to "**scabs**". It said that the "**scabs**" should be the first to go. The union also pointed out that all temporary workers and casual workers should be dismissed first if the consultation process was to be fair. The respondent emphasised that it was continuing to make losses and it could not continue making losses. It said that it had given the union financial statements. It challenged the union to investigate "**the authenticity**" thereof. The respondent also stated that, as it needed to continue with its business during the strike, it could not

do away with casual employees.

[18] The respondent's management also pointed out that the respondent was looking at various options to deal with the situation in which it found itself. It said that one option would be automation. In this regard it stated that it was competing with companies which used advanced technology. The management also told the union that they had been approached by prospective buyers of the company. The management also said that a prospective buyer had indicated that he would employ a consultant to investigate the prospect of taking over the company. It was stated that the prospective buyer wanted to do an evaluation of personnel. The management stated that this would be done on the basis of operational requirements. The management further said that there would be no logic in someone investing in a non-profitable company. The management invited the union to get involved in the evaluation exercise.

[19] On the 9th January 1999 the respondent addressed a letter to the union as a follow-up to the meeting of the previous day. In the first paragraph of the letter the respondent pointed out that the union had been told that the "**potential acquiring party**" had indicated that it was of the view that prima facie certain of the operations needed to be curtailed significantly and that the management would need to attend to such exercise prior to such party acquiring the business.

[20] Ms Pule, the author of the letter, pointed out in the letter that, in order to give the management and the "**potential acquiring party**" the opportunity "**to assess each individual's skills, acumen,**

technical and other expertise and general attitude to work," the respondent had arranged for an independent assessment to take place under the auspices of an entity called Ten Napel Management Consultants CC ("**TNMC**"). The purpose of the assessment was to determine which employees would be most suitable for the respondent's operations in order to make any future selection criteria for retrenchment fair and objective. She went on to say that the union was invited to participate in the assessment in order to ensure that the interests of its members were taken care of.

[21] Ms Pule also made the point in the letter that the union had stated in the meeting the previous day that, as long as the strike was going on, there would be no possibility of securing the attendance of members of the union at such evaluation. She urged the union to ensure that it and its members took part in the exercise. She stated that, if the union members chose not to attend the evaluation, the respondent would assume that they had no interest in pursuing alternative employment with the prospective acquiring party and that, accordingly, they would be "**deleted from the exercise**."

[22] A further meeting was held on the 13th January 1999 between the respondent and the union. One of the points made by the management at this meeting was that to bring the respondent's business to a break-even point, it had to "**downsize the labour force**". In this regard the observation was made that the respondent had previously looked at selling 800 000 pairs of surgeon's gloves per month but this figure had since come down to 600 00 per month. The management made the point that the respondent needed to be restructured and an investor needed to be brought in.

The meeting ended without any agreement. According to the evidence given by Ms Pule, the management felt very positive that an agreement would be reached at the next meeting.

[23] On the 18th January 1999 Ms Pule addressed a notice to all employees. In the notice Ms Pule advised the employees of the evaluation process that was going to be conducted by TNMC. She said that as part of that exercise each employee needed to be evaluated. She also wrote that the evaluation process would allow each person to be objectively assessed against certain criteria in regard to his/her job function. She announced that over the next few days the management would be calling each one of the employees individually to participate in an interview where he/she would be asked certain questions relating to the particular job function.

[24] Ms Pule also wrote another letter to the union on the 18th January 1999 advising it that the evaluations would commence on the 19th January. She once again invited the union to safeguard the interests of its members by participating in the evaluation process. The union responded to that letter on the same day. It adopted the attitude that it was "**materially substantively impossible for any assessor to make an assessment of inter alia, skills, performance/productivity of each employee without a concrete observance of work in motion."** The union further wrote: "**Taking into account that the majority of employees are on strike such an evaluation would be devoid of any scientific and concrete basis.**" It also wrote that even to evaluate those that were

not on strike would be impractical because such an exercise required "**the workforce as a collective unit.**" It stated that it was willing to participate in discussions on restructuring but maintained that restructuring could only be addressed meaningfully once the strike had come to an end.

[25] In another letter of the 18th January 1999 to the union Ms Pule advised the union that the assessment would be conducted on the basis of the following criteria for each job function:.

"**1. qualification level**
2. Special skills

performance record/discipline and absenteeism
years of service
multi-skilled
Willingness/motivation levels

3. An interview and should it be required on the job evaluation."

Ms Pule expressed the view that such criteria were "**the most fair and objective under which the exercise [could] be conducted and the selection criteria ultimately be determined.**"

[26] A meeting took place on the morning of the 19th January 1999 between the union, the management and representatives of TNMC to discuss the evaluation exercise which was about to begin. At the meeting the union criticised the management on the way it had handled the issue of the evaluation exercise. The union also stated that the management should have involved it in the choice of the people who would conduct the evaluation. It said that it was not prepared to participate in the evaluation as then envisaged to be

conducted. The respondent said that the union would be accorded an observer status in the evaluation process. The union was unhappy with such a role. In a letter of the same day to Ms Pule the union placed on record its rejection of the management's proposals by the management in regard to the evaluation process. The management responded by a letter of the same day. It stated, among other things, that, although the union was going to be accorded an observer status, it was going to be allowed to make a meaningful contribution and to represent its members.

[27] The evaluation exercise took place over a number of days from the 19th January 1999. A panel interviewed certain employees. Mr Ten Napel, the owner of TNMC, who led the TNMC team, was not part of the panel that interviewed the employees. He gave evidence at the trial but his evidence could, obviously, not cover what occurred during the interviews of the employees. No member of the interviewing panel gave evidence. The evaluation of the employees was conducted on the basis that an employee was awarded marks under the various criteria referred to above, namely, qualifications, special skills, performance or disciplinary records, years of service, willingness and interview and, if need be, on the job evaluation. The total mark was then divided among the various criteria by way of giving a total mark for each criterion. In the documentation the relevant table was reflected thus:

Evaluation criteria used

criteria	order of importance	%

qualification	1		20
Special skills	2	20	
Performance record, Discipline and absenteeism	3	15	
Years of service	4	15	
Multi-skilling	5	10	
Willingness	6		10
Interview	7		10

Employees who participated in the evaluation exercise were required to answer certain specific questions that had been prepared. Some of the questions were:

1. How do you see your path at LSP (i.e. respondent)?

Where do your instructions come from Production or Maintenance?
Do you get enough training to do the job?
Would you like your children to work at LSP (i.e. respondent)?
How do you feel when you are required to work overtime and/or shifts?
How do you like your job at LSP (i.e. respondent)?
How do you see your career path within LSP (i.e. respondent)?

Another question that was not included in the above was: "**Will you allow your children to work at LSP? Why?"**

[28] Ms Pule testified that the respondent's management left the question of how much rating was given to an employee in respect of the various criteria during the evaluation to Mr Ten Napel's team. Accordingly, Ms Pule could not testify as to the rating, if any, that may have been given to the individual appellants. Mr Ten Napel testified about the evaluation but his evidence went as far as what the recommendations were which he and his team made to the

respondent's management. He had no knowledge as to whether they were implemented.

[29] It is necessary at this stage to record that Mr Mahlawunyane, who was the human resources manager of the respondent, conceded under cross-examination that there was logic in the proposition that the use of disciplinary records as well as performance records of an employee as part of selection criteria was problematic. He further conceded under cross-examination that reliance on education as part of the selection criteria could only be done if education was relevant to the job. In this regard it can also be said that under cross-examination Mr Ten Napel was presented with a scenario which showed that the manner in which his team conducted the evaluation of employees using the selection criteria they used was such that the respondent's objective of retaining employees who had certain skills which the respondent needed could be undermined if not defeated. The scenario was that of an employee who did not possess skills of any significance needed by the respondent but who happened to have had a clean disciplinary record. It was suggested that such employee could have easily been retained and an excellent employee with important skills required by the respondent but who happened to have had some bad disciplinary record could have been selected for dismissal. Mr Ten Napel conceded this. The effect hereof is that the selection criteria that were used did not guarantee the respondent employees who possessed skills that it required in order for it to be a world player and to compete effectively both locally and internationally.

[30] Mr Ten Napel also conceded in his evidence-in-chief that seven of

the questions that employees were required to answer in the evaluation exercise had an element of subjectivity. By way of example he referred to the question that required the employee to state whether he or she liked working alone. His only basis to justify that element of subjectivity was: **"I think the panel which we established there were mature enough to evaluate that."** He also conceded that the scoring system had a subjective element. As an example he referred to the question that asked the employee how he liked to work on his own.

[31] During the trial the appellants made an application to amend their statement of claim to the effect that, soon after the dismissal of the individual appellants, the respondent employed a number of contract employees. Initially the respondent gave notice that it would oppose that application. However, later the respondent withdrew its opposition to the application and the amendment was granted by the Court a quo and effected. The respondent does not appear to have amended its response to the statement of claim so as to either deny that allegation or confess and avoid. However, during Ms Pule's evidence-in-chief she was asked whether the allegation that, subsequent to the individual appellants' dismissal, the respondent employed "**temporary employees, contract workers or casual workers"** was true. She admitted that this was true but added that, even before the dismissal of the second and further appellants, the respondent had employed contract and casual workers.

[32] Ms Pule testified that at a meeting that was held at the Commission for Conciliation Mediation and Arbitration ("**the CCMA**") on the

10th November 1998 the respondent's management had made a proposal to the union which would have made it unnecessary for the respondent to proceed with the retrenchment. The proposal was for the union to agree that the workers work what was referred to as a continental shift. It is not clear exactly what such a shift entailed. However, Ms Pule and Mr Mhlautshane testified that the union was informed that, if it did not accept the proposal by a certain date, such proposal would fall away. They also both testified that the union did not accept the proposal within the period. This evidence was not contradicted.

[33] Ms Pule testified that by the 4th December the continental shift proposal would no longer have been viable. She was asked under cross-examination why that proposal would have been viable on the 10th November but had lost its viability by the 4th December. Ms Pule's explanation for this was that she had realised in the meantime that it would address only one aspect of the respondent's problem and not the whole problem. The appellant's Counsel seems to have accepted this explanation because he did not challenge it nor did he put to Ms Pule any suggestion either that the union had accepted the proposal or had a justification for not going back to the respondent within the time that had been stipulated.

[34] Ms Pule testified that the evaluation report that was submitted to the respondent's management by TNMC was used by the management to select the employees that were retrenched. She said that each employee had been given a rating in the report and the employees with the least rating were the ones who were selected

for retrenchment. In this regard Ms Pule testified that, in so far as TNMC would have wanted to know how the employees had performed their work, the management had kept records of what the employees had tested or packed. Counsel for the appellants also seemed to accept this.

[35] What Counsel for the appellants did not accept and, indeed, challenged Ms Pule on, was the relevance of the criterion of education in addition to that of skills. The implication of this challenge was that, if an employee had skills that the respondent needed, that should be enough and it should not matter whether in addition to that the employee had some academic or educational certificate, diploma or degree which could well have no relevance to the business or operations of the respondent. In this regard Counsel for the appellant asked Ms Pule how the respondent would apply the selection criteria if they had to choose between an employee who was an excellent worker but had a bad disciplinary record and one who had a good disciplinary record but was not a good worker. In this regard I think Counsel for the appellants had in mind that both employees had the same years of service. Ms Pule did not answer this question. It seems that she avoided it. It is not clear whether that was deliberate or whether, in the course of giving the evidence purporting to answer this question, she forgot what the question was. It is stated elsewhere in this judgment that Mr Ten Napel conceded under cross-examination that the way that his team went about the evaluation exercise and the selection criteria that they used could easily produce the result that in such a case the bad employee with a good disciplinary record was retained and the skilled worker with a bad disciplinary record was selected

for dismissal.

[36] Mr Ten Napel was asked how his organisation came to be asked to do the evaluation that it did in the respondent. He testified that the respondent asked his organisation to give it a quotation to assist it to get its products to the right level because it wanted to become a world player in terms of its products. He testified further that, after his organisation had begun to work with the respondent, it discovered that the respondent had a very high reject rate on its products, lacked training, had no understanding of the international standards and did not always conform to even the South African standards. He said: "**Due to that our services were engaged to assist them to get their products and their level of people to the skills required to conform to these strict requirements.**"

[37] Mr Ten Napel testified that the reject rate was in excess of 20% of the respondent's products. He said that he found that the main problem was "**lack of understanding, ability to be trained in terms of getting to the standard which was required, not only on the shop floor level but also on middle management level as well where a lot of emphasis had to be put into the company if the company really wanted to survive**." Mr Ten Napel referred to companies which competed with the respondent whose products came from India and Malaysia which he said were of a very high quality and yet were sold at very low prices. He said that, if the problem was not addressed, with a 20% reject rate the respondent would not survive.

[38] Mr Ten Napel also testified about how his organisation went about

the evaluation process. He said that his organisation examined the specific job functions from top to bottom, looked at the number of employees employed by the respondent, defined the requirement for each job function and defined the people resource plan based on the market requirements. Mr Ten Napel pointed out that his organisation also defined what the respondent's needs were in terms of human resources. He said that his organisation defined the selection criteria and compliance for personnel to fulfil each job function requirement.

[39] Mr Ten Napel testified that TNMC evaluated the workforce of the respondent against the job functions and required competence. Thereafter TNMC obtained the personnel records of the employees relating to their educational qualifications, skill levels, time in service, performance levels, absenteeism and disciplinary records. TNMC established an evaluation panel which would then conduct interviews of each employee. Thereafter, said Mr Ten Napel, the evaluations would be documented and a report containing recommendations would be compiled.

[40] Mr Ten Napel was asked to explain the basis for TNMC's decision to assign to the various selection criteria the rating or weight that it assigned to each one of them. For example, TNMC assigned 20% to educational qualifications, 20% to special skills but 15% to years of service, 15% to performance record, disciplinary record and absenteeism record. Mr Ten Napel's answer to this question reveals that the assignment of weight to be given to each criterion was arbitrary. I do not propose to detail it here. It is sufficient to say that it is clear from Mr Ten Napel's evidence that he and his

team took each criterion and said in effect that it was very important to the respondent and allocated the weight that they allocated to such criterion as recorded in the documentation. The explanation, if it can be said to be one, that Mr Ten Napel gave leaves one with no understanding as to why he and his team allocated 20% to qualifications but 10% to multi-skills and why 15% was allocated to years of service and not 20% as was done to special skills. In my judgement the **"explanation"** is no explanation at all.

[41] Mr Ten Napel was also asked to explain the basis upon which he and his team could determine whether a particular employee had the **"willingness"** that he and his team had included as one of the selection criteria. He testified that such willingness was the willingness "**to take on the challenge**" in terms of going where the respondent needed such employee and whether he was willing to be trained. He said that there was "**a certain amount of gut feel in terms of assessing a persons willingness and we base it obviously in terms of our interview which we have done as well, we put specific questions to try and assess the willingness of people".** Mr Ten Napel testified that his team was briefed before hand that they could **"not penalise someone because of his family situation, and he cannot for instance work overtime, then you cannot penalise him and say he is not willing."** He said that his team had a very good understanding of the required willingness. He added: "**Willingness to be at work or willingness to participate in training or willingness to take his career path further that is the willingness which we tried to assess.**"

[42] Mr Ten Napel was also asked to explain the basis upon which he and his team decided to allocate 10% weight to the criterion of interview. His answer provided no basis. He said: "**Finally, the interview was a very small portion [of] this whole selection criteria. We felt at best, to have an interview with people, where specific questions could be asked by the panel, the people could be assessed and that brought into the whole perspective, on 10%.**" This is as arbitrary as it can be.

[43] Mr Ten Napel said that he and his team got the statistics regarding qualifications, special skills, overtime work, disciplinary actions against an employee, years of service, multi-skills from the respondent's databank. He said that the respondent had all these records that TNMC could use.

[44] Mr Ten Napel also gave evidence regarding how the scoring was done. He explained the scoring system thus:

> "We said, if we look at the evaluation ratings, smaller than 6 would have given you a point of 1; 6 would have given you a point of 4; 7 would have given you a point of 5; 8; 15; 9; 10; 18; and… would have given you 20. Based on that we looked at special skills rating, very experienced, 20, medium experienced, 15, low experienced, no experience, zero. Job evaluation, 0, not competent, 5, very competent. Then literacy, verbal, read and write; if it was good, it would have scored you a point of 4; medium, 2 and poor zero. Then absenteeism statistics, absent and sic, low equals 3; sick, high, 1; sick, low, 2; absent, low, 2; and absent, high, zero. Disciplinary statistics, zero warnings would have given the person 3; one warning 2; two warnings, zero. Years in service, six to eight years, 15 points; four to five years, 12 points; two to three, 10 points; and smaller than two, 6 points. Multiskill rating, yes would have given you 10; no, zero. Overtime,

> willingness, 80 equals 5; bigger than 80 would have given you 5; bigger than 25, 4; bigger than 12,3 and bigger than 5,1. interview, on the job, very good 10 and poor, zero".

[45] Mr Ten Napel was asked what he had to say about the union's criticism that the evaluation had to be an on-the job evaluation. In response Mr Ten Napel said that, if one had regard to technical requirements of the manufacturing process in the respondent without doing a physical "**on the job verification assessment of the people's skills, you would not have achieved anything because that anything that the employees did was of a technical nature."** He said: **"you need specific skills to be able to, for instance, compound, doing inspection, changing forms, things like that. So it would not have helped if we did not do a proper on the job evaluation, assessment."**

[46] Mr Ten Napel was asked how he and his team evaluated the individual appellants in terms of qualifications, skills, multi-skills as they were on strike and did not participate in the evaluation. His answer was that "**obviously, if they did not participate in the interview, they would not have scored any points. The on the job assessment we had gone through a list of people, if they were there to be rated, then obviously we would have rated them in terms of on the job assessment. If they were not there – because the supervisor, they also know the people, they know the skills of the people, they could have given an input as well."**

[47] Mr Ten Napel testified that an on-the job evaluation was done in respect of every employee who participated in the evaluation but

later he qualified this and said that this was not true in respect of each and every individual. Indeed, later he said no on-the-job evaluation was done on a one on one basis. Under cross-examination he conceded that it was important to have done an on-the job evaluation of the employees on an individual basis.

[48] Mr Ten Napel testified that, if the respondent did not use the selection criteria recommended by TNMC, it would have gone into liquidation. Counsel for the appellants challenged this statement. He drew Mr Ten Napel's attention to the fact that according to Ms Pule the respondent had only used TNMC's selection criteria as guidelines and not strictly. Counsel also put it to Mr Ten Napel that, soon after the dismissal of the individual appellants, the respondent had employed a number of casual or contract workers - about 80 to 100 per week who were not evaluated in the way that TNMC had evaluated some of the employees and yet the respondent was not liquidated. Mr Ten Napel could not explain how come the respondent did not get liquidated and yet it had relied on so many workers who were not evaluated in terms of the selection criteria recommended by TNMC. He said that he did not know the facts but said he stood by his statement that, if such selection criteria had not been used, the respondent would have been liquidated.

[49] Ms Pule testified that, after TNMC had completed the evaluation of employees, she invited the union to come and discuss the evaluation results but the union did not take her invitation up. However, she testified that she gave the information to the union

anyway. She stated that at the meeting of the 12th February 1999 the only thing that the union said it wanted to discuss was the LIFO selection criterion. She said that the union later walked out of that meeting. On the 16th February 1999 the respondent issued letters dismissing the individual appellants and others from its employ with effect from the 16th February 1999.

[50] Ms Pule also wrote a letter to the union dated the 16th February 1999. In that letter Ms Pule sought among other things to place a number of things which had occurred between the respondent and the union regarding the consultation process on record. She informed the union that with effect from that date certain employees whose names she gave were being dismissed for operational requirements. The individual appellants were among those employees.

[51] Some of the things that Ms Pule wrote in the letter of the 16th February 1999 to the union were that:

2.1 the respondent and the union had been involved in consultations over a long period of time **"with a view to restructuring the company"** following its progressive losses running into millions over a long time;

2.2 it had been proposed that **"an independent evaluation be conducted of each employee's skills, educational levels and general performance and attitude towards his/her work which would include the experience levels of each**

employee. It was pointed out to you that this process was essential in order that we determine a fair and objective assessment of each person, particularly having regard to the interests expressed by a potential investor in the business as well as basic and fundamental legal requirements."

2.3 after the evaluation of the employees, the respondent and the union had held a consultation on the 8th February 1999.

2.4 during the consultation between the union and the respondent on the 8th February 1999:-

(a) the respondent specified to the union its intended course of action;

(b) the respondent gave the union a list of names of those employees whom it intended to retain based on the criteria of educational qualifications, special skills with regard to the business, absenteeism record, disciplinary record and years of service with the respondent, ability to be engaged in multi-skilling activities, overtime record and willingness to co-operate in this regard, general conduct and demeanour during interview and, to a limited degree, the general willingness of the employees to assist the respondent through "**these difficult and trying times"** was also taken into account in assessing the suitable person to be retained for one or more particular task or duties.

2.5 the respondent give an assurance to the union at the consultation of the 8th February 1999 that "**any employee who stood to be effected as a result of the company's proposed course of action would be provided alternative employment by Workforce (Pty) Ltd, a sub-contracting concern with which the company has had an ongoing relationship for some time now."** The assurance was given that whenever a situation arose where a service of such an employee would be required Workforce (Pty) Limited would duly liaise with the employee concerned with a view to him/her acquiring such a job provided that he/she had the necessary skills and ability to deal with the task at hand.

2.6 contractors on the condom night-shift section would be retained and arrangements would be made for any affected employee who met the criteria and expressed a willingness to work on the night-shift condom section to be interviewed by Workforce and to acquire a position with it.

2.7 the biggest area to be affected in the respondent's business was that of testing and packaging for surgeons' gloves where only half the workers would be dismissed.

2.8 the alternatives of working short-time, the elimination of the use of contractors and long leave had been considered but had been rejected.

<u>The dismissal dispute</u>

[52] Subsequent to the dismissal of the individual appellants, a dispute arose between the appellants and the respondent about the fairness or otherwise of the dismissal. In due course the dispute was referred to the Labour Court for adjudication. The appellants contended that the dismissal was automatically unfair, alternatively, was simply unfair. The contention that the dismissal was automatically unfair was based on the belief that the selection of the individual appellants was based on their membership of the union. The respondent disputed this and maintained that the dismissal was fair in every respect.

The proceedings in the Labour Court

[53] The dispute came before Jammy AJ in the Labour Court for adjudication. He found that the dismissal was not only not automatically unfair but also that it was not substantively or procedurally unfair. He, accordingly, dismissed the appellants' claim with costs. He subsequently granted the appellants leave to appeal to this Court. Hence, this appeal.

The appeal

[54] On appeal before us Counsel for the appellants did not pursue the contention that the dismissal was automatically unfair. In my view he was wise not to do so. However, he persisted in his contention that the dismissal was unfair because:

(a) there was no fair reason for the dismissal of the individual

appellants;

(b) the selection criteria that were used to select the individual appellants for dismissal were not fair and objective; and

(c) the appellants were not consulted in regard to the real reason for the dismissal of the individual appellants. I turn to consider these contentions in turn.

Was there a fair reason to dismiss? If so, was there a fair reason for the dismissal of the individual appellants?

[55] Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place. In dealing with either question it is necessary to bear in mind that the onus lies with the respondent to prove that there was a fair reason to dismiss some employees and that there was a fair reason to dismiss the individual appellants. For convenience I propose to deal with both questions simultaneously.

[56] As to the question whether or not there was a reason to dismiss any employees, what has been established in this case is that the

respondent sustained very huge financial losses over a number of years. However, it was also established at the trial that, soon after the individual appellants' dismissal, the respondent employed over 80 contract and or casual employees. Ms Pule, the respondent's general manager admitted this under cross-examination.

[57] Once it was shown that, soon after the individual appellants had been dismissed (and the reasons advanced for their dismissal were said to be operational,) the respondent had employed many contract and/or casual employees, this raised doubts about whether or not the respondent dismissed the individual appellants because it needed to reduce its workforce. In other words it raised the question: how could the respondent say it was dismissing the individual appellants because it needed to reduce its workforce and yet no sooner had it dismissed them than it employed other employees? In the light of this Counsel for the appellants submitted that the respondent's conduct in employing over 80 contract and or Casual employees soon after the dismissal of the individual appellants belied the respondent's explanation that it had to reduce its workforce on grounds of operational requirements.

[58] Faced with this difficulty, Counsel for the respondent sought to avoid the appellants' reliance upon the the employment of contract or casual employees by submitting that the appellant's Counsel had never put to the respondent's witnesses the proposition that the reason for the individual appellants' dismissal was not downsizing. In this regard he was seeking to say that it would be unfair for the Court to decide the matter on the basis that the respondent did not seek to downsize its workforce because this had never been put to

its witnesses. I am afraid that the respondent's contention in this regard is not sustainable. The fact of the matter is that during the consultation process the respondent repeatedly informed the union that it was seeking to downsize its workforce and it bore the onus to prove that it had to downsize its workforce. The question is whether it has shown that it had to downsize its workforce. The fact that it employed over 80 contract and casual workers soon after the dismissal of the individual appellants is relevant to that question. It is in conflict with there having been a need for the respondent to reduce its workforce. Even if Counsel for the appellants did not put it to the respondent's witnesses that the reduction of the workforce was not the reason for the dismissal, the court must still decide whether the respondent has shown that there was a need to reduce the workforce.

[59] The respondent's case during the consultation process was, at least in part, that it needed to downsize its operations or reduce its workforce. Support for this can be found in:

(a) the first two paragraphs of the respondent's letter to the union dated the 18th June 1998; there it, *inter alia,* wrote that **"(i)n order for the Company to sustain itself, it has to consider restructuring and downsizing**."

(b) the top paragraph in the second page of Ms Pule's letter to the union dated the 7th July 1998 where she said: "**Given this analysis we are looking at possibly reducing our labour force by 33 people or less depending on the replacement of the contract night shift.**"

(c) the contents of the second and third pages of Ms Pule's letter or memorandum to the union dated 7 December 1998;

(d) point 3.6(under the heading: Human Resources) of a document

appearing at 1097 of the record (p 226 in the Court a quo) where it was stated that there would be "**a reduction of employment positions.**"

(e) the second paragraph of Ms Pule's letter to the union dated 9 January 1999 where she referred to the need for the curtailing of certain operations of the respondent before a third party could purchase part of the business.

(f) the minutes of the meeting of the 13th January 1999 between the union and the respondent which reflect that a person referred to as "**AP**", who must have been speaking on behalf of the management, stated in the second paragraph in the second page thereof that "**our analysis, to bring the business to a breakeven point, we have to downsize the labour force. Seen that previously looking at selling 800 000 pairs per month of surgeon's gloves, this has reduced to below 600 000 pair per month. The notion of trying to accommodate the same labour force under the circumstances is not an option**."

(g) paragraph 11.3 of the respondent's letter to the union dated 16 February 1999 which informed the union that the employees selected for dismissal would be dismissed with effect from the 16th February 1999 where Ms Pule stated, among other things, that only half the employees employed in the area of testing and packaging of surgeons' gloves were required. In para 11.4 Ms Pule wrote that separate "**cuffers**" were no longer required.

[60] I need to say something about the number of contract and/or casual employees that the respondent employed after the dismissal of the second and further appellants as well as the duration of such employment. I need to say something about this because earlier in this judgment I have referred simply to such contract and/or casual employees being more than 80 or being between 80 and 100. After the Court a quo had granted the amendment referred to earlier that the appellants had applied for which the respondent ultimately did not oppose, the appellants subpoenaed documents from Workforce, the labour broker that was used by the respondent then.

[61] According to the appellant's Counsel's supplementary heads of argument the documents from Workforce revealed that for at least

about 18 months after the dismissal of the individual appellants, the respondent employed between 80 and 100 contract and or casual employees. Furthermore, in the appellant's Counsel's supplementary heads of argument, it was stated that the documentation revealed that, after the dismissal one contract or casual employee worked an average of 47 hours per week at the respondent. In the respondent's supplementary heads of argument, Counsel for the respondent did not dispute this. Nor did the respondent's Counsel dispute the statement in the supplementary heads of argument of the appellants that it, i.e. the respondent, admitted the veracity of the contents of the documents subpoenaed from Workforce.

[62] There can be no doubt that, if such information was not true, the respondent's Counsel would have disputed the correctness or accuracy of such statements. Accordingly, this matter must be decided on the basis that, soon after the dismissal of the individual appellants, the respondent had a need for between 80 and 100 contract and or casual employees. It must also be decided on the basis that for about 18 months from soon after the dismissal of the individual appellants, the respondent continued to employ such contract and casual employees. There is no evidence of what happened after the period of 18 months. The respondent could have thrown light on this through evidence but it elected not to.

[63] To the extent that the respondent relied on the need to downsize its operations to justify the individual appellant's dismissal, I find that the respondent has failed to show that there was a reason to downsize. It has failed to show the basis upon which it could be

said that it had a reason to downsize because, soon after the dismissal of the individual appellants, it employed about 80 or more contract and/or casual employees who have not been shown to possess any skills which the individual appellants did not have and for whose preference to the individual appellants the respondent has provided no justification. Indeed, Ms Pule's evidence to the effect that the individual appellants could have continued to work for the respondent if they got themselves employed by Workforce is proof that their being dismissed might not or was not connected with the results of the evaluation process conducted by TNMC. It undermines the whole TNMC evaluation exercise. In **General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & Others (2004) 25 ILJ 1655 (LAC**), this Court found the dismissal of employees for alleged operational requirements unfair on the grounds that as the employees were being retrenched, the employer was busy recruiting other employees who were going to do work that had not been shown to be work that the employees being retrenched could not perform.

[64] What was the rationale of using the selection criteria that were used to select employees that the respondent could dispense with if, in employing others such as contract and/or casual employees, the same selection criteria were not used in order to ensure that such contract and/or casual employees were not virtually the same as the ones who had just been selected to be dispensed with? The respondent's employment of contract and/or casual employees without applying to them the selection criteria used to select the individual appellants for dismissal makes a mockery of the respondent's reliance on the selection criteria used to select the

individual appellants for dismissal as the criteria that were appropriate for its operational requirements. The respondent has advanced no evidence to suggest that the work which the contract and/or casual employees were employed to perform was work which the individual appellants had no skill or ability to perform. Accordingly, it can be said that the respondent dismissed the individual appellants when there was still ample work that they could perform. That means that there was no fair reason for their dismissal and renders their dismissal a dismissal without a fair reason.

[65] In her letter of the 16th February 1999 to the union Ms Pule dealt with, among other things, alternatives that the respondent had considered. One of these was the elimination of the use of contractors. She dealt with this issue in paragraph 12.2 of her letter. She said in paragraph 12.2.1 that what the respondent wanted with regard to contractors was "**the aspect of quality control."** She continued: **"No personnel management is necessary and to the extent that there is non-performance on the part of any staff, the burden in this regard rests with the contractor. This proves to be a huge benefit to the company which can concentrate on its core business, namely, the manufacture of latex related products."**

[66] In paragraph 12.2.2 Ms Pule wrote that contractors had ensured that, whenever necessary overtime would be worked. She further wrote that there had been a concerted refusal by "**numerous permanent employees to work overtime as and when required, notwithstanding the fact that the needs and exigencies of the**

company's operations required same as a matter of urgency." In paragraph 12.2.3 of the letter Ms Pule wrote that, "**having regard to the fluctuating requirements and the production process, the engagement of full-time employees is not a viable proposition."**

[67] What Ms Pule wrote in paragraph 12.2.1 to 12.2.3 of her aforesaid letter suggests that the respondent was not happy with the terms and conditions of employment of its workforce. She wrote that numerous of them had concertedly refused to work overtime when the respondent had required the working of overtime and that the respondent's fluctuating requirements and production process made full-time employment not a viable proposition. The respondent never raised this last mentioned concern during the consultation process. However, with regard to it and the alleged concerted refusal to work overtime, they could have been addressed by way of ensuring that the terms and conditions of employment of the workforce were amended appropriately with their agreement of the employees to deal with those concerns. In such a case the respondent would have entered into a process of negotiation with the union which could have led to the dismissal of the employees for operational requirements if they did not agree to such amendments in the same way as it happened in the Fry's Metals matter.

[68] If, prior to the consultation process, some of the individual appellants or even all of them had from time to time refused to do certain work or to work a certain shift such as the night shift, as was suggested by one or other witness called by the respondent,

which is why, according to such witness, the respondent had contract employees even during the employment of the individual appellants, the respondent ought to have pursued the negotiation route and ultimately the dismissal route followed by the employer in **Fry's Metals (Pty) Ltd v NUMSA(2003) 24 ILJ 133 LAC; NUMSA & others v Fry's Metals (Pty)Ltd (2005) 5 SA 433 (SCA)**.

[69] It is one thing for an employer to approach an employee to agree to working on certain terms and conditions such as on a night shift when the employee's decision not to agree will not put his job at risk. It is quite another when the employer puts such a proposal to an employee on the clear understanding that, if the employee does not agree, this may or will result in him losing his job to make way for someone else who will be prepared to work under such terms and conditions. Accordingly, when an employer's operational requirements dictate that its workforce should work in accordance with certain terms and conditions by which such workforce is not bound, the employer should convey this to the workforce and ask them to agree to work according to such terms and conditions, negotiate with them and warn them that, if they reject such terms and conditions, he will have to terminate their contracts of employment and employ new employees in their place, who will accept such terms and conditions. This is what was done in Fry's Metals. If the employees reject such proposals and the employer terminates their services, the employees cannot complain that they were not given a chance to avoid their dismissal by accepting the new terms and conditions of employment. In this case there is no evidence that the respondent ever proposed to the employees or the

individual appellants that they agree to work on different terms and conditions on the understanding that, if they refused, they would lose their jobs as the respondent would then look for employees who would be prepared to work according to such terms.

[70] In the light of the respondent's conduct in employing contract and/ or casual employees that it employed soon after the individual appellants' dismissal and its conduct in not using TNMC's selection criteria in recruiting such contract and casual employees, the respondent has failed to show that there was a fair reason for the selection of the individual appellants for dismissal. That alone renders the dismissal substantively unfair.

[71] Another matter that needs to be considered in relation to whether there was a fair reason to dismiss is the fact that during the consultation process, the union proposed to the respondent that rather than have some of the workers retrenched, the workers should share the available work. The respondent's management did not give this proposal any serious consideration. When during the trial Ms Pule was asked why the management had not accepted this proposal, she complained that it would have affected "**continuity**". I understand her evidence to suggest that, if implemented, this proposal would have been disruptive to the operation of the respondent. Her understanding of the proposal was that some of the workers would work some hours in a day and others would work another set of hours. I think that she spoke of some workers working four hours and others working the next four hours on the same day.

[72] I cannot see how it can be said that there would have been disruption if one group of workers worked the first four hours and another one the next four hours per day or whatever the required hours were. Accordingly, I cannot accept Ms Pule's evidence that such proposal, if implemented, would have affected "**continuity**". It seems from the record that the Acting Judge in the Court a quo interrupted the leading of evidence in regard to this point and made a remark which the respondent's attorney may have construed to mean that that was not a matter which he needed to bother about.

[73] The respondent's attorney elected not lead further evidence from Ms Pule on the proposal. In my view he should have made a submission to the Acting Judge a quo that this was a legitimate point on which the respondent should lead evidence and let the Court a quo make a ruling if there was a legal basis to preclude him from leading evidence on the point. The Court a quo did not make a ruling that he should not lead evidence on the point. It made a remark which showed that its prima facie view was that that was not an important point. By going along with that inclination - probably because it was in his favour - the respondent's attorney took the risk that, if there was an appeal against the Court a quo's judgment and a higher court took a different view of the importance of that point, the record before the higher court would be without all the evidence that the respondent could have led on the point and if that risk materialised, the respondent could be prejudiced by the absence of such evidence.

[74] It is very important for a practitioner appearing in a matter to know his case and the law governing it as fully as possible and not to go

along with every and any point or remark that the Court may make about the case in his favour or in his opponent's favour. He should carefully consider every point, question or remark that the Court makes during the hearing which is in his favour or tends to reveal that the Court may be thinking favourably of his or his opponent's case on one or other point and adopt a stance that is based on his honest and bona fide understanding of the law, the facts and his or his opponent's case. He should not adopt an approach in terms of which what he says depends on which way the wind is blowing if that will mean that he goes along with a remark or answer to a question either about the law, the evidence or his case or his opponent's case which is not in accordance with his honest understanding of the law, evidence, his case or his opponent's case.

[75] Lest I be misunderstood, let me make it clear that I do not at all suggest that the respondent's attorney in this case did anything dishonest in how he dealt with this point. On the contrary I think he was bona fide but may have erred in going along with the Court a quo's inclination to the point. It is the characteristic of a good practitioner to submit to the Court with the necessary courtesy and respect that, although the Court's remark on a certain point is favourable to his case, it is not in accordance with the legal position or it is not part of his case or it is not supported by the evidence. A practitioner should not just grab any point that comes from the Bench which seems to be in his favour whether on the law or facts. He might regret it later if the Judge changes his or her mind when preparing judgment having had time to reflect upon it or to consult authorities or when the matter is taken on appeal to a higher court.

[76] In my judgement there were other ways in which the proposal could have been implemented which, without doubt, would not have affected continuity. Obviously, the workers would all be workers who could perform the work. One very obvious way to implement the proposal would have been for the workers to be divided into two teams. The two teams of workers would then work on different days in a week. Yet another way would have been for the two teams to work alternate weeks (i.e. one week on, one week off). There would definitely have been no disruption if the proposal to share work was implemented in that way. I have no doubt that this proposal would have worked if the respondent's management had given it proper attention during the consultation process.

[77] In his heads of argument Counsel for the respondent submitted, in regard to the proposal to share work, that the union made it subject to the strike being resolved and subject to contract and casual employees being removed. That the problem with the proposal was that it was made subject to certain conditions was not Ms Pule's evidence. And Ms Pule was the general manager. The reason that she advanced is the one of "**continuity**" referred to above. At any rate, to the extent that what the union was saying was that contract and casual workers should be the first ones to lose their jobs before permanent employees could lose their jobs, that was a legitimate stance for the union to take, particularly in respect of casual employees. The respondent may have been perfectly entitled to retain temporary replacement labour during the strike. However, there could have been no justification to retrench permanent

employees while continuing to employ casual employees.

[78] In Ms Pule's letter of the 16th February 1999 to the union she dealt, among other things, with the issue of short time. In my view the way that the employee's proposal to share work would have worked would have amounted to the working of short time. For that reason it is necessary to refer to what Ms Pule wrote about short-time as an alternative to dismissal in paragraph 12.1.1 to 12.1.1.3 of that letter. There she wrote that short time had been considered "**but was not regarded as being feasible due to the following factors:**

12.1.1.1 not all personnel have the necessary skill to combine cuffing, testing and stripping operations;

12.1.1.2 the administrative and supervisory functions of a small group are far easier and more manageable with the result that far more investments can be obtained with a smaller workforce;

12.1.1.3 it is essential that an element of continuity be maintained from a production point of view."

[79] With regard to the point made in para 12.1.1 of Ms Pule's aforesaid letter, it is too general. It may be so that not all personnel had the necessary skill referred to but it may well be that a very limited training of those personnel who did not have such skill would have been enough to give them such skill and this could have made all the difference that was needed for them to continue to have a job and avoid joining the ever increasing number of those without employment. Furthermore, the respondent did not rely on this in the evidence led at the trial. At any rate the respondent also led no evidence at the trial to the effect that the employees' proposal to share work could not be accepted because the individual appellants

lacked certain skills. The respondent ought to have told the Court what skills each group of workers would have needed to have and in what numbers if short time had to be worked. It should also have looked at the workers who were likely to be dismissed and have determined whether it would not have been possible to arrange the groups in such a way that each group included people who had the required skills.

[80] I have some difficulty following the point made in para 12.1.1.2 of Ms Pule's aforesaid letter (i.e letter of 16 February 1999 to the union) within the context of short time. There Ms Pule wrote that in order to obtain more investments, it was far easier to have a small group from an administrative and supervisory point of view. I do not know what investments she was referring to. She also did not explain this in her evidence in Court. Obviously, this was because she was not asked to. She also wrote that it was preferable to have a small group. But, if workers were going to work short-time in the manner I have referred to above, the respondent would have been dealing with the same number of employees at any one time. All the respondent had to do was to determine the number of employees it needed for its operations. Presumably, there would have been a surplus of employees. The employees would take turns to do the same work either on the basis of working different hours or different days or different weeks but the respondent would always have the same number of employees required by its operations at any one time.

[81] I have already dealt above with the point made in para 12.1.1.3 of Ms Pule's aforesaid letter. In all of the circumstances I am of the

view that the respondent has failed to show that there was a sound reason for it not to accept the employees' proposal to share work or to work short time.

[82] It seems to me that the workers' proposal for them to share work was a sensible and constructive proposal that the union made to try and avoid the retrenchment of the individual appellants and others. In my view the respondent could and should have accepted the proposal, particularly seeing that it was about to employ contract and casual employees, who, for all one knows, may well have been doing the work that the individual appellants were doing before they were dismissed. The respondent has not advanced any valid reason for not utilising that proposal to avoid the dismissal of the individual appellants in compliance with its obligation in terms of sec 189 of the Act. For that reason, too, it has failed to discharge the onus it bears to prove that there was a fair reason for the dismissal of the individual appellants.

The selection criteria

[83] Section 189(2) of the Act deals with matters that are required to be the subjects of consultation when an employer contemplates the dismissal of one or more employees for operational requirements. One of these is provided for in sec 189(2)(b). It is "**the method for selecting the employees to be dismissed.**" Section 189(5) requires the employer to allow the other consulting party an opportunity during consultation to make representations about any matter on which they are consulting. Section 189(6) obliges the employer to "**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".

[84] Section 189(7) makes provision for what happens at the end of the process of consultation. Where attempts at finding measures that would avoid the dismissal of employees have failed, the end of the consultation process is the selection of the employees to be dismissed and then, finally, the dismissal. With regard to what selection criteria an employer must use when selecting employees to be dismissed, Counsel for the appellants submitted that, where the employer and the union have not agreed upon the selection criteria, the employer is obliged in terms of sec 189(7) (b) to use fair and objective selection criteria. I agree. Section 189(7) of the Act contemplates two types of selection criteria that may be used in the selection of employees to be dismissed. The one type is provided for in sec 189 (7) (a) and the other in sec 189(7) (b). Section 189(7) (a) and (b) read:.

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

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

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

The type provided for in sec 189(7) (a) is for a situation where the consulting parties have reached an agreement on the method of selection (selection criteria) to be used to select employees to be dismissed. The one provided for in sec 189(7) (b) is for a situation where the parties have not reached an agreement on the method of selection to be used to select the employees to be dismissed. The two types of selection criteria can be referred to as the agreed selection criteria and the fair and objective selection criteria

respectively. Obviously the agreed selection criteria are selection criteria that have been agreed upon between the consulting parties. The fair and objective selection criteria must be used where the selection criteria have not been agreed upon between the consulting parties. What sec 189(7), therefore, means is that, where the consulting parties have agreed upon the selection criteria, the employer is obliged to use the agreed selection criteria to select the employees to be dismissed. Where there are no agreed selection criteria, the employer is obliged to use only fair and objective selection criteria to select the employees to be dismissed.

[85] An employer and a union are free to agree upon selection criteria that are or may be subjective. When the agreed selection criteria are subjective, the employer does not act unfairly in using such selection criteria to select the employees to be dismissed. Indeed, he may be acting unfairly if he departed from the agreed selection criteria simply because they are or may be subjective or may include a certain element of subjectivity. If the agreed selection criteria are contained in a collective agreement, he may be acting in breach of a collective agreement if he departed from them. However, where the employer does not use agreed selection criteria to select the employees to be dismissed, he may not use selection criteria other than "**fair and objective**" selection criteria. The effect of sec 189(7) is therefore that, when the Court deals with a dispute concerning a dismissal for operational requirements where the selection criteria used by the employer to select employees for dismissal are challenged, it must first determine whether the selection criteria used were agreed or not. If they were agreed, sec 189(7) (a) applies. If they were not agreed, sec 189(7)

(b) applies.

[86] The rationale for this is that the use of agreed selection criteria will not produce a dispute about the fairness of such criteria whereas the use of selection criteria that have not been agreed upon has the potential to lead to dissatisfaction and disputes about such criteria. The whole idea of the consultation process required by sec 189 before dismissals for operational requirements can be effected is fairness and the prevention of unnecessary disputes that could otherwise arise if such dismissals occurred without such a process. Obviously, there are many dismissals for operational requirements which do not produce dismissal disputes precisely because of the consultation process required by sec 189 and there would be many disputes that would arise if such a process did not occur.

[87] In this matter the scenario was a sec 189(7)(b) scenario because the parties had not agreed upon the selection criteria. Accordingly, it was not permissible for the respondent to use any selection criteria other than those that were "**fair and objective**" as required by sec 189 (7)(b) of the Act. The use of selection criteria that are not fair and objective in a sec 189(7)(b) scenario – in other words where the selection criteria have not been agreed upon – renders a dismissal substantively unfair. The use of subjective selection criteria in a sec 189(7) (a) scenario – that is where the selection criteria – have been agreed upon does not render the dismissal unfair because, although the criteria are not objective, their use is, as it were, by mutual consent.

[88] The use of subjective selection criteria where they have not been

agreed upon can easily lead to abuse of such criteria. This would be the case where they are used to get rid of employees that the employer may view as unwanted but against whom it is unable to produce acceptable proof of unacceptable conduct. That is why the Act contemplates the use of subjective selection criteria only where the parties have reached agreement thereupon. In other words the policy behind the provisions of the Act is that there is a price to be paid by an employer if he wants to use subjective selection criteria in a retrenchment case. That price is to secure an agreement with the other consulting party about the use of such selection criteria. If an employer strikes such a deal, it can go ahead and use subjective selection criteria. However, if it does not strike a deal with the other consulting party on the use of such criteria, the price it pays for not reaching an agreement thereon is that it may not use subjective selection criteria to select employees to be dismissed. In such a case, it must use selection criteria that are "**fair and objective**" as required by sec 189(7)(b) of the Act.

[89] In this matter the selection criteria that were used to select the individual appellants and other employees for dismissal were the following:.

Criteria		rating
(a)	qualifications	20%
(b)	skills	20%
(c)	performance and disciplinary record	15%
(d)	years of service	15%
(e)	willingness	10%
(f)	interview	10%

In his heads of argument, the respondent's attorney conceded that

the criteria of willingness and interview were subjective. He submitted that the rest were objective. During the cross-examination of Mr Ten Napel, the criteria of qualification were challenged. A hypothetical scenario was put to him which could lead to an excellent employee being selected for dismissal and an employee with poor work performance record being retained on the basis of his qualifications which might not be of any benefit to the organisation. Mr Ten Napel conceded that the selection criteria could, indeed, produce such a result.

[90] I shall assume, without deciding, that the criteria of work performance and disciplinary record are objective. That will mean, as was conceded by the respondent's attorney in his heads of argument, that 20% of the selection criteria that were used were subjective. What is the effect of the fact that 20% of the selection criteria used were subjective? The respondent's attorney submitted that 20% is so insignificant in the scheme of things that it should be ignored.

[91] In this regard it will be remembered that Mr Ten Napel testified that under the criterion of willingness an employee was given either 0% or 10% and nothing in between because, as he put it, a person is either willing - in which case he gets the whole or is not willing – in which case he gets zero. So it would have been easy for an employee to be awarded zero out of ten or to get 10 out of 10. Under "**interview**", if an employee did not attend the interview, he got 0 out of 10. It is common cause that the individual appellants did not attend the interviews. Accordingly, they would have been awarded 0 out of 10. So, already before the criteria

could be considered against them, they would already be 10% in debit. Under **"willingness"** if they also got 0 out of 10, that would mean that, when the criteria were applied to them, they were already 20% in debit.

[92] I am unable to uphold the respondent's attorney's submission that the presence of the two admittedly subjective selection criteria that were used to select the individual appellants is insignificant and should be ignored. In my view it is very significant and renders their selection unfair because those criteria were not supposed to be used in selecting them for dismissal as this was a sec 189(7)(b) scenario. It may be appropriate to give a practical life situation in order to demonstrate that 20% is a very significant percentage. A law student is writing his final year examination for his law degree. The paper is out of 100. The questions that relate to the last 20% of the marks are not supposed to have been in the paper because they relate to another law subject that he did not enrol for and which he was not supposed to be asked on. Such a student would have a legitimate complaint because, even before his answer paper is marked, he would already be less 20% marks. In my view the unfairness in that case speaks for itself.

[93] Mr Ten Napel conceded under cross-examination that some of the above selection criteria are subjective. He further conceded that at least seven of the questions that employees who participated in the evaluation exercise had to answer were subjective. Some of the questions were apparently intended to elicit from the employees answers which it was thought would give an indication of the employee's loyalty or commitment to the respondent. However,

some of the questions were such that no answer could possibly give the respondent the indications it was hoping for. One question was whether an employee would like his or her children to work at the respondent. If, for example, the answer to that question was no, that could not necessarily mean that the employee was less committed to the company than an employee who answered yes. As Counsel for the appellants put it to Mr Ten Nappel during cross-examination, the employee answering in the negative may well have better ambitions for his children. Accordingly, in such a case an answer in the negative would not be a reflection of lack of loyalty or commitment to the respondent. It is not an answer to the usefulness or otherwise of this question to say, as Mr Ten Nappel said, that there would be follow-up questions. The fact of the matter is that a question was put up for the purpose of determining from the answer thereto whether employees were committed to the company which could simply not produce such indication.

[94] If the respondent was to prove that there was a fair reason for its selection of the individual appellants for dismissal, it was required to place before the Court evidence that would show what qualifications all the employees, including the individual appellants, had, what years of service they all had, what multi-skills they all had and what answers they gave to questions as part of the evaluation. This would have placed the Court in a good position to determine whether or not there was a fair reason for the selection of the individual appellants as opposed to the selection of other employees for dismissal.

[95] The respondent's attorney referred to the fact that there were union

members who had been on strike when the evaluation was conducted just like the individual appellants were on strike but who were not dismissed after the application of the same selection criteria to them. That may be so but that is no answer. Such employees may have got very high marks under one or more of the first four selection criteria with the result that, despite being judged on a debit of a 20%, they still made it. But, if the two criteria were not supposed to be part of the equation, as in my view, they were not, then the individual appellants were entitled to be considered together with all other employees against the first four criteria only. In other words 100% should have been constituted by the first four criteria and not by the six criteria. Had the last two criteria not been part of the selection criteria and had the selection criteria been the first four only, employees who were selected for dismissal may well have been retained and employees who were retained may well have been selected for dismissal.

[96] Without knowing what skills or special skills the employees who remained behind had, what skills the individual appellants had compared to them, what years of service they all had, what performance records and disciplinary records all the employees including the individual appellants had, the Court is left to conclude on the basis of the respondent's ipse dixit that there was a fair reason for the selection of the individual appellants for dismissal. That cannot be accepted. In those circumstances I conclude that the selection criteria have not been demonstrated to have been fair and objective nor has the respondent shown that there was a fair reason to select the individual appellants and not other employees for dismissal. Accordingly, I have no hesitation in

concluding that the individual appellants' dismissal was unfair for lack of a fair reason.

[97] In these circumstances I am of the view that the use of the two selection criteria rendered the selection criteria unfair and the dismissal substantively unfair. On this ground, too, I find that there was no fair reason for the selection of the individual appellants for dismissal and, ultimately, for their dismissal.

Consultation

[98] The only basis upon which the appellants disputed the procedural fairness of their dismissal was that the respondent had not consulted the union on the real reason for the retrenchment. This submission was made in the light of the fact that, subsequent to the dismissal, the respondent employed more than 80 contract and casual employees to do work that the individual appellants were not unsuitable or unskilled to do. This was after the respondent had repeatedly told the union during the consultation process that it wanted to reduce the size of its workforce. In the light of the conclusion I have reached above that the dismissal was without a fair reason, it is unnecessary for me to decide whether it was also procedurally unfair. It will make no practical difference to the outcome of the matter.

The Judgment of the Court a quo

[99] The Court a quo found that the dismissal of the individual appellants was both substantively and procedurally fair. With

regard to the Court a quo's finding that there was a fair reason for the individual appellants' dismissal, it seems that the Court a quo completely overlooked three matters of great significance in this matter. The one is the fact that, soon after the respondent had dismissed the individual appellants, it employed more than 80 contract and casual employees to perform work that was not shown to be work that the individual appellants could not do. The Court a quo did not anywhere in its judgment refer to this aspect of the matter. That means that it also did not consider what the effect was of the employment of such contract and casual employees upon the existence or non-existence of a fair reason to dismiss the individual appellants. It is difficult to understand how the Court a quo could overlook such an important aspect of the matter, particularly when the appellants had gone to the extent of securing an amendment of their statement of claim and subpoenaing records from Workforce in order to be able to have this factor considered as part of their case.

[100] The Court a quo also did not anywhere in its judgment deal with the question whether or not the selection criteria that the respondent said it had used to select the individual appellants was fair and objective as required by sec 189(7) (b) of the Act. That the Court a quo also overlooked this part of the appellants' complaint is difficult to understand in the light of the fact that, just before leading his first witness at the trial, Counsel for the appellants announced three grounds upon which he would pursue the appellants' case and one of these was that he was challenging the selection criteria.

[101] The third matter is that the Court a quo did not give consideration to the question whether the employees' proposal that, rather than some of them getting retrenched, they should all share the available work could have avoided the dismissal of the individual appellants if it had been accepted and implemented. Nor did the Court a quo consider what the effect was of the failure to accept such proposal on the existence or otherwise of a fair reason to dismiss the individual appellants.

[102] It seems to me that the Court a quo's failure to consider and deal with the three matters referred to above is what led to it coming to the conclusion that there was a fair reason for the dismissal of the individual appellants when, in fact, there was none. As I have found elsewhere in this judgment I am unable to uphold that finding and have found that the appellants' contention that the dismissal of the individual appellants was without a fair reason should be upheld.

Relief

[103] The appellants seek reinstatement. The respondent did not in its heads of argument indicate what order should be granted if the Court came to the conclusion that there was no fair reason for the dismissal. If the finding of unfairness was limited to the procedure for the dismissal, reinstatement would not have been competent as a remedy. The respondent confined its submissions in the heads of argument to showing that the appeal should be dismissed and did not deal with the eventuality of what relief the Court should grant should the appeal be upheld.

[104] The finding that the dismissal of the individual appellants was unfair is based on the conclusion that there was no fair reason for their dismissal. The necessary implication of such a conclusion is that they should not have been dismissed in the first place either because there was no need for any employees to be dismissed or because, although there may have been a need for some employees to be dismissed, there was no fair reason for these particular employees to have been selected for dismissal. In either case such a finding means that the employees concerned should have been allowed for all the past years to continue to work and earn income in the respondent's employ.

[105] On the evidence that was led in the Court a quo, the only evidence that the respondent could possibly rely upon to argue that reinstatement should not be ordered is Mr Mhlawutshana's evidence that the respondent would have no work for the individual appellants if they were reinstated. Mr Mhlawutshana's evidence in this regard must be understood in its correct context. That context is that, soon after the individual appellants had been dismissed, the respondent employed more than 80 contract and casual employees for work which was not shown to be work which the individual appellants had no skills or ability to do and to do satisfactorily. Indeed, those contract and casual employees were not subjected to scrutiny of any kind to determine whether they had better skills or abilities than the individual appellants.

[106] It is known that those contract and casual employees worked for at least eighteen months from the time of the dismissal of the

individual appellants or from soon thereafter. It is not known what the respondent's position was from the expiry of that time to the date of the trial. What happened during that time was definitely within the knowledge of the respondent. If the respondent wanted to apprise the Court a quo of what its position was from the expiry of that 18 month period to the trial, it could have done so, particularly if its position was such that an order of reinstatement would not be appropriate. The onus is upon an employer, if it takes the view that its circumstances are such that an order of reinstatement should not be made against it, to place before the Court evidence to prove such circumstances. Where it does not do so, the Court may well have no reason not to order reinstatement, particularly because, as I said in my separate judgment in **Kroukam v S A Airlink (Pty) Ltd**, case no JA3/2003, as yet unreported, delivered on 16 September 2005, together with that of Davis AJA in which Willis JA concurred, sec 193(2) obliges an arbitrator, the Labour Court and, on appeal, this Court, to order reinstatement when an employee's dismissal has been found to be unfair for lack of a fair reason unless one or more of the situations provided for in sec 193(2) (a) – (d) exists. (see paragraphs 110, 114 – 118 of my separate judgment in Kroukam). This is not one of the points on which the majority and I could not agree in Kroukam. The majority did not deal at all with this question.

[107] I am of the view that none of the situations provided for in sec 193(2) (a) – (d) of the Act exists in this case. Mr Mhlawutshana's evidence that, if the individual appellants were reinstated, the respondent would not have work for them cannot be accepted. This is because, for all one knows, for about eighteen months after the

dismissal of the individual appellants, the respondent had work which was more than enough to keep its workforce as it was before the dismissal busy. The respondent provided no evidence to show what happened thereafter. The documentation that helped to show this situation had to be subpoenaed from Workforce (Pty)Ltd. It does not seem that the respondent was keen to take the Court a quo into its confidence and give it a picture as to its position after that eighteen month period. I find it difficult to believe that that evidence, if led, would have shown that reinstatement would have been inappropriate. I think it is highly unlikely that the respondent would have elected not to lead evidence that would have shown that reinstatement would be inappropriate. At any rate it was Ms Pule's evidence that each one of the employees who were retrenched, including the individual appellants, would have continued to work for the respondent if he got himself employed by Workforce (Pty)Ltd.

[108] In the light of all the circumstances I am of the view that I should order the respondent to reinstate the individual appellants. Whatever order I make must be an order which the Court a quo should have made as at the time when it delivered its own judgment. That was in June 2002. The next question that arises is whether, if the Court a quo had ordered reinstatement, as, in my view, it would have had to if it had come to the same conclusion that I have come to about the fairness of the dismissal, such order should have been one operating with retrospective effect and, if so, from what date. I turn to consider that question.

[109] In this matter Counsel for the appellants submitted that the

reinstatement of the individual appellants should operate with limited retrospectivity. In this regard he did not indicate how limited that retrospective operation should be. I shall assume that he was leaving that issue in the hands of the Court. As already indicated above, Counsel for the respondent made no submissions whatsoever on what relief the Court should grant if it upheld the appeal. I also take it that he was leaving that issue in the hands of the Court.

[110] In considering the question whether or not reinstatement that is ordered should operate with retrospective effect and, if so, how much retrospective effect, the court exercises a discretion. It is required to exercise such discretion judicially and fairly to all parties concerned with due regard to the applicable principles, the evidence and all relevant circumstances.

[111] The individual appellants were dismissed with effect from the 16th February 1999 with payment of notice pay in lieue of notice. Such notice pay was indicated in the respondent's letter of the 16th February 1999 to the union to be notice pay in lieue of 14 days notice or notice in terms of the contract of employment. It would be fair to deal with the matter on the basis that such notice pay covered the period up to the end of February 1999. That would mean that the first month when the individual appellants were without pay from the respondent is March 1999.

[112] It is necessary to consider the question whether there is any limitation on how far retrospective the Court may order the

operation of a reinstatement order because, obviously, an order of reinstatement with limited retrospective operation that the Court may make must still be one that is competent. This raises the question whether in a case where the dismissal is an ordinarily unfair dismissal (as opposed to an automatically unfair dismissal) it is competent for a court to order that the reinstatement order operate with retrospective effect for a period that is beyond twelve months from the date of the delivery of the order or judgment of the Labour Court backwards. This includes the question whether, where the period between the date of the order and the date of dismissal is in excess of twelve months, the reinstatement can competently be ordered to be with retrospective effect from the date of dismissal.

[113] I considered this question both in relation to an ordinarily unfair dismissal and in relation to an automatically unfair dismissal in Kroukam's matter. (see paragraphs 121-129 of my separate judgment in Kroukam). My view in this regard differed from that of Davis AJA with whom Willis JA agreed. However, both my and Davis AJA's dicta on this point were obiter because, in that case, being one relating to an automatically unfair dismissal, the period between the date of dismissal and the date of the delivery of the judgment of the Labour Court was less than 24 months and it was not necessary for purposes of our respective judgments to decide that point. Accordingly, Davis AJA's and Willis JA's judgment on this point is not binding upon me as it was obiter. However, in this case it seems to me that I have to decide this point because I must consider whether the limited retrospective operation of the reinstatement order that I may be disposed to granting can be in

excess of the 12 month period or whether it has to be 12 months or less.

[114] In regard to this question, I can do no better than adopt the view and reasoning that I expressed in Kroukam. I had the following to say in paragraphs 121 -129 of my judgment in that case:

> "[121] Counsel for the appellant submitted that, if an order of reinstatement was made, it should operate with retrospective effect to the date of the appellant's dismissal, namely, the 11th **May 2001. From that date to the 17th October 2002, which was the date of the delivery of the judgment of the Court a quo, it is just over seventeen months. As that period is below 24 months, the question whether it is competent to make a reinstatement order that operates with retrospective effect for a period longer than 24 months in the case of an automatically unfair dismissal and for a period longer than 12 months in all other unfair dismissal cases does not arise. The reference to 24 months and 12 months arises out of the fact that in terms of sec 194 of the Act compensation that is awardable to an employee whose dismissal has been found to be automatically unfair is capped at an amount equivalent to 24 months' remuneration and that of an employee whose dismissal has been found to be unfair for lack of a fair reason or because no fair procedure**

was followed in the employee's dismissal is limited to a maximum of 12 months remuneration.

[122] Davis AJA has expressed the view in his separate judgment that it is competent for the Court to make an order of reinstatement that operates with retrospective effect up to the date of dismissal even if that goes beyond 24 months or 12 months retrospectively, as the case may be, because, particularly in a case such as the present one, the Court may wish to ensure in effect that an employer who has dismissed an employee for a reason that renders the dismissal automatically unfair is dealt with firmly to show that such conduct will not be tolerated by the Court. I am unable to agree with this reasoning. This proposition ignores the fact that, if one has regard to sec 194 of the Act, provision has already been made in the Act for an employer who is found to have dismissed an employee for a reason that renders the dismissal automatically unfair to be ordered to pay double the amount of compensation that an employer who has unfairly dismissed an employee but not for such a reason may be ordered to pay.

[123] It can be argued that backpay which an unfairly dismissed employee gets paid when an order has been made for his reinstatement with retrospective

effect constitutes in effect compensation for unfair dismissal in the same way as compensation provided for under sec 194 of the Act constitutes compensation for unfair dismissal to an unfairly dismissed employee who is awarded compensation under sec 194 of the Act. If that is so, thus would run the argument, a reinstatement order the retrospective operation of which goes beyond 24 months or 12 months, as the case may be, would amount to an award of compensation for unfair dismissal which exceeds the relevant maximum prescribed by sec 194. The argument would be that such a retrospective operation of an order of reinstatement would undermine the capping of compensation prescribed by sec 194 of the Act.

[124] It would further seem that the construction that the only limitation on the extent of the retrospective operation of an order of reinstatement is the date of dismissal ignores the purpose of sec 194. The purpose of sec 194 is to limit the financial risk that an employer has when involved in an unfair dismissal claim. To secure organised labour's agreement to the limitation of such financial risk, employers made a concession at NEDLAC when the Labour Relations Bill was negotiated, that reinstatement would be the primary remedy in unfair dismissal cases. As already stated above, sec 193 gives effect to that

agreement as far as reinstatement being the primary remedy in unfair dismissal cases is concerned. Sec 194 gives effect to that agreement in so far as it relates to ensuring that the employer's financial risk in terms of payment to the employee is limited to either 24 months' remuneration or 12 months' remuneration, as the case may be.

[125] If it is accepted, as I think it should be, that at least part of what the retrospective operation of a reinstatement order means is that the employer must pay the employee backpay for the period covered by such retrospective operation and that in a case where the arbitrator or the Court awards a dismissed employee compensation under sec 194, such compensation is or at least part of such compensation is backpay, then the proposition that an order of reinstatement can operate retrospectively to the date of dismissal even if this goes beyond 24 months or 12 months retrospectively, as the case may be, would not only undermine but would also defeat the whole purpose of sec 194 of the Act. I am unable to see what purpose of the Act would be served by a construction to the effect that, if an employee is granted reinstatement, there is no limitation to the employer's financial risk in terms of backpay, but, if the same employee is awarded compensation and is not granted reinstatement, the employer's

financial risk is limited to 24 months remuneration or 12 months' remuneration, as the case may be. I prefer the view that the employer's financial risk is limited in either case.

[126] One way in which sec 194 would be undermined if an order of reinstatement which operates with retrospective effect beyond 24 months or 12 months, as the case may be, was made would be this one. An employee who no longer wants to be reinstated but only wants to be paid compensation would indicate that he wants to be reinstated with retrospective effect to the date of dismissal which would go beyond 24 months or 12 months, as the case may be. After the Court has granted him a reinstatement order with such retrospective effect and he has been paid his backpay covering the period of retrospectivity going beyond 24 months or 12 months, he would resign. In that way he would have been able to get paid what in effect would be compensation for unfair dismissal that would be in excess of the relevant maximum prescribed by sec 194. It seems to me that sec 193 should be construed to mean that an order of reinstatement can operate retrospectively to the date of dismissal or up to 24 months or 12 months backwards, as the case may be, whichever is the earlier. This construction will harmonise the provisions of sec 193 and 194. It would seem to me

that that is the correct construction of sec 193. The two sections must be construed in such a way that the one does not undermine the other or defeat the purpose of the other.

[127] I do not think that sec 195 of the Act changes any of the above. Sec 195 of the Act reads: "An order or award of compensation made in terms of this chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment" It seems to me that the backpay which flows from the retrospective operation of an order or award of reinstatement does not constitute an amount that such employee can be said to be entitled to in terms of any law, collective agreement or contract of employment as provided for in sec 195. In our law an employee is not entitled to have the Labour Court or an arbitrator order that the reinstatement order (in his favour) operate with retrospective effect. There is no such right. Once the Labour Court or an arbitrator has decided to order the employee's reinstatement, it or he has a discretion whether to order that the reinstatement order operate with retrospective effect. In the exercise of that discretion, the Court or the arbitrator may decide that such reinstatement order should or should not operate with retrospective effect to the date of

dismissal or might order a limited retrospective operation of the reinstatement order or might order no retrospective operation of the reinstatement order at all.

[128] In the light of all this it seems to me that, prior to the Court or an arbitrator ordering that a reinstatement order made in favour of an employee shall operate with retrospective effect in favour of the employee, the employee has no right to, and therefore, cannot be said to be entitled to, any amount in that regard in terms of any law, collective agreement or contract of employment. What the employee is entitled to is to make an application to the Court or the arbitrator to exercise its or his discretion in favour of ordering that the reinstatement be with retrospective effect. Once an order has been made, the employee becomes entitled to such amount in terms of an order of court or an arbitration award and not in terms of any law, collective agreement or contract of employment as contemplated by sec 195 of the Act. I am accordingly inclined to think that any backpay that an unfairly dismissed employee gets paid when there has been an unfair dismissal claim gets paid such amount not because he is entitled to it in terms of any law or any collective agreement or contract of employment but because he is entitled to it in terms of an order of Court or an

arbitration award made in the exercise of a discretion.

[129] In the light of the above it would therefore seem that backpay flowing from the retrospective operation of an order of reinstatement made under sec 193 of the Act does not constitute an "amount to which the employee is entitled in terms of any law, collective agreement or contract of employment" as contemplated by sec 195 of the Act. It seems that the "amount that the employee is entitled to in terms of any law, collective agreement or contract of employment" that sec 195 refers to does not include an amount that the employee is entitled to in terms of an order of court or in terms of an arbitration award. It seems to relate to amounts such as unpaid wages for the period prior to the dismissal, notice pay, severance pay, pension or provident fund or amounts in terms of the unemployment insurance Act, 1996."

[115] It also seems to me that in regard to this question paragraphs 116 – 118 of my separate judgment in Kroukam are apposite. They read thus:

"[116] **The absence of a discretion on the part of the Labour Court or an arbitrator to deny reinstatement to an unfairly dismissed employee in the absence of anyone of the situations set out in sec 193(2) must be**

understood against the background that reinstatement was made a statutory primary remedy in unfair dismissal disputes in return for organised labour's agreement that there should be a capping of compensation that could be awarded to unfairly dismissed employees which was a huge concession and sacrifice on the part of organised labour and workers. In the explanatory memorandum ((1995) 16 ILJ 278) which accompanied the Labour Relations Bill, before the Bill was passed into the present Act, the following is part of what the drafters of the Bill had to say at 316 about the problems regarding remedies which existed under the old regime:

> 'There are also problems concerning the courts' decisions regarding remedies. The courts have on numerous occasions shown a reluctance to reinstate workers who have been unfairly dismissed because of the period of time that has passed between the date of dismissal and the date of the court order. This is a cause of dissatisfaction among workers and undermines the legitimacy of the adjudication process as an alternative to industrial action. It also creates problems for employers. Reinstatement orders have on occasion been granted years after the dismissals occurred. For the employer, who in the interim has engaged an alternative labour force in an endeavour to maintain production,

> the consequences of such an order, particularly in the case of mass dismissals, are self-evident. The alternative of compensatory awards presents its own difficulties. In the absence of statutory guidelines or caps on compensation, which are the norm in other countries, the courts have used tests applied in personal injury claims to assess losses. Awards have become open-ended and, in the case of the dismissal of executives, sometimes amount to hundreds of thousands of rands.'

[117] At 320 of the explanatory memorandum it is stated that the Bill gave statutory support for reinstatement as a primary remedy where the dismissal is found to be unfair. It is then said that this is appropriate when adjudication takes place shortly after the dismissal. It went on to set out "a number of benefits in providing for reinstatement as a primary remedy." In the second of seven bullet points against which the benefits were set out, the benefit set out was:

> 'it allows for legislative capping of compensation awards. Without reinstatement, compensation must be open-ended and calculated on a edictal damages basis. Because the draft Bill offers reinstatement as a primary remedy, it caps compensation awards.'

[118] In the light of the above it, therefore, seems to me that, with regard to what remedies courts and other tribunals would have power to make in

> **regard to dismissals that are found to be unfair, the main objection on the part of organised labour was that courts and other tribunals must ensure that, except in certain specified situations, workers were given their jobs back when they have been dismissed unfairly, whereas one of organised business' objectives was that Courts and other tribunals should not have power to make huge awards of compensation against employers and that, therefore, the compensation that they can award should be capped. The deal arrived at, as reflected in sec 193(2) and sec 194, was that workers should be reinstated and the courts and other tribunals should not have any discretion to deny an unfairly dismissed employee reinstatement except in specified situations and that there should be a limitation on the amount of compensation that Courts and other tribunals could award to employees. In the light of all the above I consider that the appellant should be granted an order of reinstatement."**

[116] In the light of all of the above I conclude that it is not competent to order a retrospective operation of a reinstatement order (even if limited) which is in excess of twelve months in an ordinarily unfair dismissal case. Accordingly, in this matter, retrospective operation of the order of reinstatement that I propose to grant has to be 12 months or less but not more. That is part of the limitation on my discretion to order that the reinstatement of the individual

appellants operate with retrospective effect.

[117] As the judgment of the Court a quo was delivered on the 19th June 2002, a period of 12 months from that date backwards would run from that date to 19 June 2001. Should the retrospectivity of the reinstatement order be for less than 12 months or 12 months from backwards to 19 June 2001? Even though in a case such as this one that it is not competent to make a reinstatement order that operates with retrospective effect beyond 12 months from the date of the delivery of the order of the Court a quo backwards, the fact that the individual appellants were without income during that period remains and must be taken into account in the exercise of the discretion. Their having been without income for that period was a direct consequence of the respondent's unfair conduct in dismissing them when they should not have been dismissed. In this case, as the reinstatement order can only operate with retrospective effect from the date of the order of the Court a quo to 19 June 2001, this means that the respondent keeps whatever money it otherwise may have had to pay the individual appellants were it not for the legal impediment relating to the period of 12 months. The respondent already benefited by a period of more than two years in this case in respect of which the law does not place an obligation upon it to pay backpay to the individual appellants even though it has been found that they should not have been dismissed in the first place. That is the period from March 1999 to June 2001. That is a period of over two years for which the individual appellants get penalised even if they are not in any way to blame for their dismissal.

[118] There is a schedule in the record showing which of the individual appellants got employment after the dismissal. That schedule is based on affidavits which the individual appellants filed. The only appellants who got employment after dismissal are E. Sobane and I Dondolo. The former apparently got employment with the University of the Witwatersrand from October 1999. His salary at that University was R2000, 00 per month. The latter seems to have got employed by an organisation referred to in the schedule simply as Quantum earning R1100, 00 per month. The former earned less at the respondent than at the University of the Witwatersrand while the latter earned slightly more at the respondent, namely R1266, 00 per month. Both were still so employed at the time of the trial. The rest of the individual appellants did not get any employment between the date of their dismissal and the trial. That means that for over at least two years from the date of their dismissal to the conclusion of their matter, they went without any income and, on my finding, unfairly so.

[119] Another factor which must be considered relates to whether or not the individual appellants could have mitigated their losses. If they could have but did not do so, such a factor would be relevant and should be taken into account in the exercise of the Court's discretion. In this regard Ms Pule's uncontradicted evidence that anyone of the individual appellants could have continued to work for the respondent if he got himself employed by Workforce (Pty) Ltd is relevant. In her evidence Ms Pule did not specify what the terms and conditions were under which the individual appellants could have been employed by Workforce (Pty) Ltd and continue to work at the respondent. This omission on her part includes what

the wage rate would have been for any individual appellant who chose to do so. This makes it difficult to say what income the individual appellants could have received in the interim if they had got themselves employed by Workforce. It, therefore, becomes difficult to say how much should be deducted from the backpay that the individual appellants should otherwise get.

[120] Ms Pule's evidence may or may not coincide with what she wrote in paragraph 11.1 and 11.2 of her letter to the union dated 16 February 1999. In those paragraphs she wrote:

> 11. "**By way of some background, we illustrate the**

co m pa ny ’s po siti on to be th us:

11.1 Contractors will be retained on the condom night-shift section having regard to the fluctuating needs and requirements which necessitate an increase or in fact minimising of labour on very short notice. Should any affected employee meet the criteria and express a willingness to work on the night-shift condom section of our operations, we will make the necessary arrangements for that person to be interviewed by Workforce and to acquire a position with it;

11.2 The status quo will be retained with regard to engaging contractors on the examination gloves for the same reasons as recorded above;”

[121] What did Ms Pule’s last statement in paragraph 11.1 of her letter of 16 February 1999 to the union mean? At first glance it seems to mean that the respondent would ensure that any affected employee

who met the necessary criteria and expressed a willingness to work on the night-shift condom section would be guaranteed appointment. However, on closer examination of the statement it seems that what the respondent was giving an assurance of was that it would secure an interview of such employee by Workforce. The last portion of that statement refers to "**to acquire a position with [Workforce]".** May be it was an assurance that such an employee would definitely get appointed if he met the criteria. But, if such employee would be assured of appointment, what would be the purpose of the interview that the respondent would arrange for such employee. The interview could not have been for determining whether he met the criteria because such an employee would have had to meet the criteria and express a willingness to work before the respondent could arrange the interview.

[122] At any rate the respondent did not lead any evidence as to which of the individual appellants in this case met the criteria applicable to working on the night-shift condom section. It should have done this because it is only in respect of those individual appellants that it could be said that they could have but did not mitigate their losses by taking up the respondent's offer, if it was an offer, contained in this regard. However, it is strange that the union and the individual appellants did not, after this letter of the 16th February 1999, approach the respondent to discuss possible utilisation of the individual appellant's services even if this was to be under protest pending the outcome of the litigation. This should count against the appellants. The union and the individual appellants simply showed no interest whatsoever.

[123] Ordinarily I would have taken the view that the retrospective operation of the reinstatement order in this case should operate from the 19 June 2001 which would have given a 12 months retrospective operation from the date of the judgment of the Court a quo. However, in the light of the appellants' failure to approach the respondent to discuss the utilisation of the individual appellants' services pending the outcome of the litigation, I propose to reduce the period by half. The result is that the reinstatement order that I propose to make is one the retrospective operation of which will commence from the 19th December 2001.

[124] With regard to costs, the appeal was dealt with by both Counsel on the footing that costs should follow the result.

[125] In the premises I make the following order**:**

1. The appeal is upheld with costs;

The order of the Labour Court is set aside and replaced with the following one:

"(a) The second and further applicants' dismissal is hereby declared to have been without any fair reason.

(b) subject to (c) below, the respondent is ordered to reinstate the second and further applicants in its employ with retrospective effect from the 19**th December 2001.**

(c) With regard to individual applicants E. Sobane and I. Dondolo the order of reinstatement in (b) operates with effect from the 19**th June 2002.**

(d) The respondent is ordered to pay the applicants' costs.

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Zondo JP

I agree.

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Mogoeng JA

I agree.

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Jafta AJA

Appearance:

For the appellant : Adv C Orr
Instructed by : Cheadle Thompson & Haysom

For the respondent : Adv W Hutchinson
Instructed by : Fluxmans Inc

Date of judgment : 25 November 2005