IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA68/2018

In the matter between:

TELKOM SA SOC LIMITED	**Appellant**
and	
NYLLIN VAN STADEN	**First Respondent**
GLYN HAWKINGS	**Second Respondent**
DEES RAMSUNDER	**Third Respondent**
KGODISHO KEKANA	**Fourth Respondent**
ED FRENTZEL	**Fifth Respondent**
GODFREY MARTHINUSSEN	**Sixth Respondent**
KEVIN HOWES	**Seventh Respondent**
JOHN COLTMAN	**Eighth Respondent**
GABRIEL RAMOSOLO	**Ninth Respondent**
SYDNEY SEJENG	**Tenth Respondent**

Heard: **18 August 2020 and 29 September 2020**

Delivered: **1 December 2020**

Coram: Phatshoane ADJP, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA

[1] This appeal, with the leave of this Court granted on petition, is against the judgment and orders of the Labour Court (Moshoana J) delivered on 11 May 2018 in terms of which the dismissal of the respondents on grounds of operational requirements was found substantively unfair. The Labour Court ordered that the respondents be reinstated into the positions held with the appellant prior to their dismissal "*or any equivalent position without loss of any benefits*" and that they repay any amount paid as severance pay to the appellant. No order as to costs was made.

[2] The respondent employees were employed on management and specialist level M/S 5 by the appellant, Telkom SA Soc Limited (Telkom). In October 2014, they were retrenched following Telkom's "Fit for the Future" business restructuring exercise which commenced in 2014 in response to declining revenues, market share and profitability.

[3] Notice in terms of sections 189 and 189A of the Labour Relations Act 66 of 1995 (the LRA) was given to affected managerial and specialist employees, including the respondents. The notice, as required by section 189(3), set out *inter alia* –

i. the rationale for the restructuring exercise, which was to improve profitability and secure financial sustainability by reducing human capital costs in the management and specialist employee group. This need arose given Telkom's declining gross revenue due to inadequate performance in the fixed voice market and fixed data market as well as organisational and operational inefficiencies. The aim was to flatten the organisational hierarchy and reduce the number of levels between the top management team and consumers;

ii. alternatives considered by Telkom before proposing retrenchments, including voluntary severance and early retirement packages, included a strategy to expand and diversify its revenue base, divestment from non-performing assets, measures to reduce operational costs and improve efficiencies and revenue generation. It was stated that despite these measures, Telkom's financial and organisational performance had continued to decline;

iii. that it was anticipated that of its total number of 19 215 employees, 2 635 management staff would be affected, with retrenchments to be effected from 30 June 2014 until 31 March 2015. Four months' notice pay and 1.5 weeks' severance pay would be paid for the first ten years of continuous service. A social plan benefit of R30 000 was to be made available for training purposes to retrenched employees, of which R4000 could be used to acquire tools, and employees would be released from any obligations to repay bursary and/or study loans. Employees aged 50 years or older would be allowed to retire in terms of the rules of the Telkom Retirement Fund and Telkom Pension Fund;

iv. the proposed method for selecting which employees to dismiss with it stated that placement selection criteria proposed for newly created and merged positions had been discussed with unions and staff during the consultation process. The placement criteria proposed by Telkom to be applied in placements were *'(a) qualifications and experience (best fit for the job); (b) qualification and potential (c) LIFO where more than one employee qualifies for appointment to the same position; and (d) employment equity retention*'. It was stated that employees not appointed after all positions had been filled '*will be retrenched'*;

v. that a position was deemed affected if the job functions changed, with the selection process allowing employees to apply for roles on their current level, or one level higher or lower, according to their qualifications and experience through completing an expression of interest ("EOI") application form. A placement panel would consider suitability for the first three roles as well as other roles if an employee

was not placed in one of the first three. An assurance panel would ratify placements to ensure compliance with set criteria. Where a number of employees had applied for and qualified for the same position, LIFO would be applied in making the appointment. Criteria to be applied in determining the suitability of a candidate included '*applicability of skills to a specific position, future business requirements to execute strategy, qualifications, relevant experience, employment equity, gender and leadership potential*'; and

vi. that since employees falling within the scope of the exercise were either union or non-union members, Telkom would consult with unions under the auspices of the Restructuring/Company Forums. Telkom stated that it was considered fair and in the interests of employees to engage in some form of consultation with non-union members, but that given the number of employees potentially affected and their spread across the country one-on-one consultations were not possible or practicable. Group consultations were possible and would occur in the form of roadshows in a number of towns across the country. In addition, a portal would be created on Telkom's intranet where information provided to the unions would be posted and through which non-unionised employees could interact with the company. Where a non-unionised employee was to be finally affected and his/her retrenchment could not be avoided, one-on-one meetings would be arranged. Telkom stated that it would provide highlights of its 2008 to 2013 annual reports and make available the complete reports if required. It indicated that it would also provide its current and proposed organisational structure (M/S5 and above) and additional information as requested.

[4] Four trade unions, the Communication Workers' Union (CWU), the Information Communication Trade Union (ICTU), the South African Communication Union (SACU) and Solidarity, were consulted between April 2014 and September 2014 regarding the three phases to be used to fill positions in the new organisational structure and the criteria to be used in

appointments. Following an urgent application in terms of section 189A(13), the process was halted and a facilitator was appointed to facilitate further consultations which occurred from July 2014 to September 2014.

[5] Affected employees were provided with the new organogram to allow them to identify vacant positions into which they could apply to be placed. Employees who were not affected were excluded from the placement process. Phase 1 of the process gave only affected employees, which included the respondents, an opportunity to apply for placement into positions on their current level or one level higher using the online EOI form in which they were required to detail their qualifications, experience and skills.

[6] Employees were placed, without interviews, using strict criteria as per the job description and specifications of each post. A placement panel consisting of three senior managers, which included an independent member from outside the candidate's operational area, a representative from human resources and line management, considered each application and the suitability of the affected employee for placement. The panel made recommendations to a validation committee which in turn submitted its recommendations to an assurance committee which made the decision on placement. Employees who were not placed by the end of Phase 1 were entitled to lodge an objection, which was considered by the chairperson of the placement panel and the employee's line manager, in response to which reasons were provided. Thereafter, an appeal could be lodged, with the appeal hearing chaired by an external chairperson from a human resources consultancy, Mandate Molefi. Employees were permitted to appear before the appeal panel, together with a representative, with the decision of the appeal panel being final.

[7] During Phase 2, affected employees were considered for placement into positions for which they had applied and which remained vacant. In phase 2, the requirements for a post were less strictly applied. Phase 3, termed "Business as Usual", allowed affected employees to apply for placement into vacant posts. All employees at Telkom, not only those affected by

restructuring, as well as external applicants were entitled to apply for these positions.

[8] While many employees accepted voluntary severance packages and voluntary early retirement, around 100 employees affected employees who had not been placed into alternative posts were retrenched. This included the respondents who received notice of retrenchment on 1 October 2014, with their dismissal effective from 31 October 2014. Retrenched employees received payment of four months' notice pay, 1½ weeks' severance pay for each of the first 10 years of service and 1 week thereafter.

Unfair dismissal claim

[9] Aggrieved with their dismissals, the ten respondents referred an unfair dismissal dispute to the Labour Court. In their statement of claim, they claimed an absence of *bona fide* economic, technological, structural or similar reasons to justify their dismissals. They disputed that their dismissals were aimed at stemming losses or increasing profits when surplus funds were paid to lower level employees over ten years as part of a gain sharing scheme; approximately 2000 employees were employed by Telkom on a contract basis; and wasteful expenditure was incurred in the R4 million refurbishment of a gym and the relocation of Telkom's head office. It was also disputed that the selection criteria for retrenchment were fair and objective, with consensus not reached on these criteria and it was claimed that employees had been identified and selected for retrenchment before consultations had commenced. The respondents claimed that consultations were not meaningful or exhaustive and, not being represented by a trade union, claimed their suggestions and proposals to avoid retrenchments were not considered.

[10] Since Telkom had through voluntary severance packages exceeded its target to reduce its managerial staff component by 223 employees, issue was taken with the decision to retrench 105 managerial level employees and when 169 vacancies remained available at Telkom. The respondents claimed there to be no objective rationale for their dismissals, which were avoidable, and that Telkom had failed to comply with the provisions of sections 189 and 189A.

Consequently, they claimed that their dismissals were unfair, with retrospective reinstatement with no loss of benefits sought, alternatively an order of re-employment on similar terms and conditions of employment or of maximum compensation, together with an order of costs.

[11] In opposing the claim, Telkom stated that it had embarked on a restructuring exercise from March 2014 following the redesign of its operational model and organisational structure given significant revenue, operating costs and profitability constraints. Of the 2500 managers affected, around 100 were ultimately retrenched. Some positions were made redundant, others were merged and new positions were created. The placement and selection process, including the selection criteria, had been "extensively discussed" with unions during extensive consultation meetings over an extended period, with the objection and appeal processes having been included into the placement process at the request of the unions. It was stated that no retrenchments could have been prevented if the gym was not refurbished when this was for the benefit of employees; any head office move was into premises owned by Telkom to save rental; and fixed term contracts with employees below managerial level were terminated in November 2014. All alternatives to retrenchment were considered and the respondents were retrenched for valid reason after having been considered for placement into vacant positions. Consequently, it contended that their dismissal was procedurally and substantively fair.

Pre-trial minutes

[12] Two pre-trial minutes were signed by the parties. The first minute recorded it as common cause that the retrenchment of the respondents followed Telkom's restructuring exercise; that the respondents had received notices in terms of section 189 and 189A; that they had been informed in a briefing given by the Chief Executive Officer of the intention to restructure the business; that four unions had been consulted between April 2014 and September 2014; and that three placement phases applied. The issues in dispute were recorded to be whether the respondents' dismissals were procedurally and substantively fair; there was a general need to retrench and

sufficient reason to dismiss the respondents; Telkom had embarked on a meaningful consultation process as set out in section 189(1) and (2); Telkom had a legal obligation to consult and communicate separately with respondents who were not union members regarding the restructuring; and the respondents were bound by the agreements reached between Telkom and organised labour regarding the retrenchment process. Also in issue was whether the selection criteria were fair, objectively applied, clear and justifiable when the respondents' positions had not been declared redundant; and whether a fair procedure was followed prior to dismissal.

[13] In the supplementary pre-trial minute, the respondents took issue with the commercial rationale for the retrenchment. Under the heading 'selection criteria' it was recorded that:

> '…2 The parties have agreed that notwithstanding the number of positions applied for, for the purposes of trial, the [respondents] contend that they should each have been appointed into one of three positions listed below, for which they applied. The positions include those advertised during Phases 1 & 2 of the Fit for the Future (FFTF) restructuring process.
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> 3. [Telkom] is thus required to justify the non-appointment of the [respondents] and subsequent retrenchment, in relation to only the three positions as indicated by each [respondent].'

Judgment of the Labour Court

[14] The Labour Court accepted that Telkom's need to restructure its business had gone unchallenged by the respondents and noted that it was not for the Court to second-guess such a business decision which, if commercially rational, must be accepted as fair. The Court found, however, that making employees apply for available positions was unfair and that even if this was not so, the method used to decide placements was applied unfairly. Issue was taken with the fact that no interviews were held and that no objection and appeal process was available at the conclusion of phase 2. The Court found the selection criteria to have been subjectively and inconsistently applied, the scoring

method to have been unfair and took issue with the fact that no placement panel members testified at the trial to justify decisions taken or explain why a veto was exercised in some instances by the validation committee but not in others. Furthermore, the Court found that although Last-In-First-Out ("LIFO") would have been a fair selection criterion it was not applied and that employment equity had been used as the tie breaker. The decision not to appoint each of the respondents into any position was found to be unfair and their retrenchment therefore unfair. Although the respondents' posts no longer existed, the Court found no reason to deny the respondents the primary remedy of reinstatement given that it was reasonably practicable to reinstate them into one of the 169 vacant positions which existed. The respondents were ordered to repay any amount paid as severance pay to the appellant. No order as to costs was made.

[15] On appeal, Telkom takes issue with each of these findings.

Discussion

[16] A pre-trial agreement is a consensual document which narrows down the issues in dispute between the parties so as to limit the scope of litigation. Such an agreement binds the parties and the court in the same way as pleadings.[1] Where parties have concluded such a minute, the issues as set out in pleadings have not been abandoned but -

> '…the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute... It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness. Were that approach to be permissible, there would be no point at all to efforts to narrow issues and trim down the scope of contestations. It was suggested in argument on behalf of Louw that the contention on behalf of SAB was that Louw had narrowed his cause of action; that understanding is incorrect. The argument, properly understood, was that the

[1] *National Union of Metalworkers of SA v Driveline Technologies (Pty) Ltd & another* (2000) 21 ILJ 142 LAC at para 94; *Filta-Matix (Pty) Ltd v Freudenberg and Others* [1997] ZASCA 110, 1998 (1) SA 606 (SCA) at 614B-D*; Zondo & others v St Martins School* (2015) 36 ILJ 1386 (LC) at para 10.

terms of the minute narrowed the permissible grounds upon which the cause of action was to be presented.'[2]

[17] The parties agreed in the supplementary pre-trial minute that "*notwithstanding the number of positions applied for, for the purposes of trial, the* [respondents] *contend that that they should each have been appointed into one of three positions…for which they applied*" and that Telkom "*justify the non-appointment of the* [respondents] *and subsequent retrenchment, in relation to only the three positions as indicated by each* [respondent]". Telkom appealed against the Labour Court's failure to narrow its consideration of the matter on this basis.

[18] In opposing the appeal on this ground, the respondents sought, for the first time on appeal, that an interpretation be given to the supplementary minute so as to not limit a consideration of the fairness of the retrenchments to only three positions on the basis that to do so would render their "*referral and contention of unfairness worthless*". The respondents sought that effect should be given to "*the common intention*" of the parties, with the "*surrounding circumstances*" considered to give the supplementary pre-trial an "*equitable interpretation*". Alternatively, with reference to *Zondo & others v St Martins School,*[3] the respondents sought that special circumstances be found to allow the respondents to resile from the agreement since to narrow the Court's enquiry would not be in the interests of justice, would infringe their fundamental rights and contravene public policy.

[19] In *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[4] it was stated that:

> '…Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances

[2] *South African Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC) at para 14.
[3] (2015) 36 ILJ 1386 (LC) at para 10.
[4] [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

> attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (footnotes omitted)

[20] Having regard to the document as whole, including the language used in it, the context and apparent purpose of the document, the common intention of the parties is clear. Clearly ascertainable from the language and context of the documents concluded, the parties intended to narrow down the terms of the dispute between them on the basis recorded in the minutes. The "*equitable interpretation*" which the respondents now seek be given to the supplementary minute is nothing more than an impermissible attempt, raised for the first time on appeal, to seek to resile from the terms of the minute.

[21] The two minutes concluded by the parties were contracts entered into consensually between them,[5] from which, in the absence of special circumstances, neither party can resile. This is so in that, as was stated in *Filta-Matix (Pty) Ltd v Freudenberg and Others*:[6]

> 'To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation. If a

[5] *Shoredits Construction* (*Pty*) *Ltd v Pienaar NO and others* [1995] 4 BLLR 32 (LAC) at 34E–F.
[6] 1998 (1) SA 606 (SCA); [1998] 1 All SA 239 (A).

> party elects to limit the ambit of his case, the election is usually binding. No reason exists why the principle should not apply in this case.' (footnotes omitted)[7]

[22] There is no reason why the same should not equally be applicable to the Rules of the Labour Courts.[8] In *National Union of Mineworkers of SA v Driveline Technologies* (*Pty*) *Ltd & another,*[9] this Court made it clear that "*a party would be able to resile from such an agreement on the same basis as he would be able in law to resile from any other contract*."[10] In *Rademeyer v Minister of Correctional Services,*[11] the Court indicated that for special circumstances to exist such as to allow the Court to exercise its discretion in favour of a party seeking to resile from the agreement:

> 'Three requirements must be met: firstly, the defendant must furnish an explanation sufficiently full of the circumstances under which the concession was made and why it is sought to be withdrawn; secondly, he should satisfy the court as to his *bona fides*; and thirdly, show that in all the circumstances justice and fairness would justify the restoration of the status *quo ante*.'[12]

[23] Yet, in *Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union & others v CTP Ltd & another* (*CEPPWAWU*)[13] the Labour Court differed, taking the view that –

> '…setting the test for special circumstances as being substantially equivalent to the test for the grant of condonation (as *Rademeyer* does) is too lenient and does not take account of the fact that a pre-trial agreement equates to a contract between the parties. Once this is accepted, then special circumstances in the present context should, in my view, be understood as meaning that, in order to resile from the agreement (or part thereof), the applicant must establish a basis for doing so in the law of contract'.

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[7] At 614B–D.
[8] See *Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union & others v CTP Ltd & another* [2012] ZALCJHB 163; [2013] 4 BLLR 378 (LC); (2013) 34 ILJ 1966 (LC) at para 104.
[9] [2000] 1 BLLR 20 (LAC).
[10] At para 91.
[11] [2008] JOL 21787 (W); [2008] ZAGPHC 141.
[12] At para 6.
[13] [2012] ZALCJHB 163; [2013] 4 BLLR 378 (LC); (2013) 34 ILJ 1966 (LC) at para 110.

[24] Given the status of a pre-trial agreement as a contract entered into between the parties, I am satisfied that the approach taken in *CEPPWAWU* is correct. No special circumstance has been shown such as would allow the respondents to resile from the agreement. In any event, the respondents raise the issue in argument on appeal for the first time which is impermissible.[14]

[25] It follows for these reasons that the issues in dispute had, by agreement between the parties, been narrowed to four, namely:

i. whether a commercial rationale existed which justified the retrenchments;

ii. whether Telkom was obliged to consult separately with the non-unionised respondents or could bind the respondents by the terms of agreements reached with organised labour;

iii. whether the selection criteria were fair and fairly applied; and

iv. whether the respondents should have been appointed into one of the three positions for which they applied during phases 1 and 2 of the restructuring process, with Telkom to justify their non-appointment and retrenchment in relation to only the three positions.

Commercial rationale

[26] As to the first issue, the Labour Court accepted that the evidence as to Telkom's need to restructure its business had gone unchallenged by the respondents at the trial of the matter and that it was not the duty of the Court to second-guess such a business decision, which, if commercially rational, must be accepted as fair. No cross-appeal was raised against this finding by the respondents and the commercial rationale for the restructuring and retrenchment exercise undertaken by Telkom is consequently not an issue before this Court for determination on appeal.

Consultation

[14] *Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others* [2020] ZASCA 15; [2020] 2 All SA 330 (SCA) at para 64.

[27] The Labour Court did not find the dismissal of the respondents unfair on the basis that they had not been consulted regarding the proposed retrenchments and there was no cross-appeal raised against this finding. Although no retrenchment agreement was entered into with the four trade unions representing employees at Telkom, the unions had been extensively consulted between April 2014 and September 2014 regarding the contemplated retrenchments. In light of these consultations, there was no obligation on Telkom to consult the individual respondents who were likely to be affected by the process.[15] The decisions in *AMCU and others v Royal Bafokeng Platinum Limited and others (AMCU 2)*[16] and *AMCU and Others v Chamber of Mines of South Africa and Others (AMCU 1)*[17] decided the issue. In *AMCU 2,* the Court found that section 189(1) of the LRA embodied the right to a fair procedure in the retrenchment process and that it passed the constitutional test of rationality,[18] with it "*near-futile to afford individual consultation*"[19] where unions had been consulted.

[28] The result is that the only live issues in this appeal are first, whether the Labour Court was correct in finding that selection criteria were unfair and unfairly applied. Second, whether it erred in failing to narrow its determination of the issue to whether Telkom had justified "the non-appointment of the [respondents] and subsequent retrenchment, in relation to only the three positions as indicated by each [respondent]". And third, whether in relation to the three positions the non-appointment and retrenchment of the respondents had been shown to be fair.

Selection criteria

[29] A restructuring exercise involves the re-organisation of an enterprise, usually through altering its organisational structure, adjusting and streamlining roles,

[15] Section 189(1)*(d).*
[16] 2020 (4) BCLR 373 (CC).
[17] 2017 (3) SA 242 (CC) (2017) 38 ILJ 831 (CC); [2017] 7 BLLR 641 (CC); [2017] ZACC 3 (CC); 2017 (6) BCLR 700 (CC)
[18] At para 120.
[19] At para 121.

positions and job functions to achieve certain identified operational or commercial outcomes. By its nature such an exercise can be disruptive.[20]

[30] Any retrenchments which follow an organisational restructure must accord with the standard of fairness prescribed by the Act. Section 189(1) requires that when an employer contemplates retrenching one or more employees it must consult with employees or their trade unions in the manner required by section 189(2):

> '(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on –
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> (a) appropriate measures –
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> (i) to avoid the dismissals;
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> (ii) to minimise the number of dismissals;
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> (iii) to change the timing of the dismissals; and
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> (iv) to mitigate the adverse effects of the dismissals;
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> (b) the method for selecting the employees to be dismissed; and
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> (c) the severance pay for dismissed employees."

[31] The employer is required to issue a written notice inviting the other consulting parties to consult with it and disclose in writing all relevant information, including that detailed in section 189(3).[21] Thus, when retrenchments are

[20] See Eve Maria Fleming "The Effects of Organizational Restructuring and Acceptance of Change on Employees' Motivation" (2017) https://scholarworks.waldenu.edu/ at 5.

[21] Section 189(3) details relevant information to include (a) the reasons for the proposed dismissals; (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives; (c) the number of employees likely to be affected and the job categories in which they are employed; (d) the proposed method for selecting which employees to dismiss; (e) the time when, or the period during which, the dismissals are likely to take effect; (f) the severance pay proposed; (g) any assistance that the employer proposes to offer to the employees likely to be dismissed; (h) the possibility of the future re-employment of the employees who are dismissed; (i) the number of employees employed by the employer; and (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months.

contemplated at the start of a restructuring process, it is at that point that notice in terms of section 189(3) is to be given.

[32] Telkom contemplated retrenching one or more employees prior to the start of the placement process and consulted four trade unions whose members were likely to be affected by the proposed dismissals.[22] It gave notice of the relevant information as required by section 189(3) prior to that consultation. This included proposed placement criteria, being *"(a) qualifications and experience (best fit for the job); (b) qualification and potential (c) LIFO where more than one employee qualifies for appointment to the same position; and (d) employment equity retention*". It stated that those employees not appointed during the placement process "*will be retrenched"*. Since retrenchments were contemplated prior to the start of the placement process, Telkom was required by section 189 to propose selection criteria for retrenchment before the placement process started and not following the conclusion of such process.

[33] Where legitimate operational justification for restructuring exists, there is nothing innately unfair in requiring an employee with job security whose position is affected by such restructuring to apply for placement into a position in the restructured operation. The dismissal of an employee is not, however, made easier because it arises out of a restructuring process. An arbitrator or court in the context of a retrenchment dispute is entitled to scrutinise the placement process and the decisions taken in terms of it given that an employee enjoys job security.[23] That scrutiny does not however entitle the arbitrator or court to decide what process it would have adopted or the placement decision it would have preferred, but whether the process put in place and decisions taken in terms of it by the employer were fair.[24]

[34] In an unfair labour practice dispute relating to promotion an arbitrator is only to interfere with an employer's decision where there is "*no rational relationship between the decision not to promote, the purpose of the promotion and the*

[22] As required by section 189(1).
[23] *Wolfaardt v IDC* [2002] ZALC 61 at para 26; *City of Cape Town v SAMWU obo Jacobs and Others* [2009] 9 BLLR 882 (LAC) at para 30.
[24] See para 31.

information upon which the impugned decision is based".[25] It is not open to the arbitrator to decide what promotion decision or process it would have preferred. Similarly, an arbitrator or court, in the context of a retrenchment dispute arising from an organisational restructuring exercise, is not to impose its preference regarding the placement process or decisions taken in terms of it. The fact that in retrenchment dispute it is the fairness of the dismissal that is before the arbitrator or court for determination, does not insulate the fairness of the placement process during restructuring from consideration. This so particularly where it is the result of not being placed that has exposed the employee to selection for retrenchment. And, where the placement process has not met the required standard of fairness, in the sense that it has been subjective, arbitrary, capricious or inconsistent,[26] this is likely to taint the fairness of the decision to dismiss.

[35] It follows that the placement of an employee into a post in a restructuring exercise is distinct from but related to the selection of an employee who has not been placed for retrenchment. As was made clear in *South African Breweries (Pty) Ltd v Louw,*[27] the criteria for placement and selection criteria for retrenchment are different and the former is not converted into the latter where an employee is not placed.[28] In a competitive placement process the relative strengths and weaknesses of the different candidates are assessed,[29] particularly where more than one applicant seeks placement into a position.[30] Whereas, selection for retrenchment is undertaken through application of selection criteria which are either agreed or are, in terms of section 189(7), to be fair and objective.[31]

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[25] *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and others* [2020] 4 BLLR 353 (LAC) at para 23.
[26] See *NUM v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC). *Apollo* (*supra note 3)* at para 53; *SAPS v Safety and Security Sectoral Bargaining Council and others* [2016] JOL 35883 (LC) at para 41.5.
[27] [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC).
[28] At para 21.
[29] *South African Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC); (2018) 39 ILJ 189 (LAC) at para 26.
[30] *City of Cape Town v SAMWU obo Jacobs and Others* [2009] 9 BLLR 882 (LAC) at para 30.
[31] Section 189(7) provides: '*The employer must select the employees to be dismissed according to selection criteria – … (b) if no criteria have been agreed, criteria that are fair and objective*'.

[36] Since the selection criteria for retrenchment were not the subject of an agreement between Telkom and the four trade unions, such criteria were required to be fair and objective. Telkom proposed in its section 189(3) notice that after an employee had not be placed, retrenchment would follow. Although not stated in express terms, it was apparent from the notice that it was the fact of not having been placed into an alternative position that placed an employee at risk of selection for retrenchment. Non-placement was therefore what was proposed as the criterion for retrenchment. Telkom was not obliged to propose further selection criteria for retrenchment after the placement process had ended. This was so since it had contemplated retrenchments before the start of the placement process which was the point at which it was required by section 189 to propose such selection criteria; and it was not required to re-start the section 189 process upon having decided on placements. In any event, having undertaken the extensive consultation and then placement process that it had it is difficult to conceive of what further selection criteria Telkom could reasonably have advanced in addition to what had already been stated. Those employees not placed into an alternative position, and without an alternative to retrenchment available as a result, were those to be selected for retrenchment. There was no reason advanced by the respondents why such selection criterion was neither fair nor objective when an extensive placement process had been undertaken.

[37] Given that the fact of not having been placed into a new position exposed the respondents to the risk of being selected for retrenchment, the Labour Court was entitled to have regard to whether the placement process was fair. As stated above, this did not mean that the Court was to determine what placement process or decision it would have preferred, what selection criteria it considered appropriate or the weight to be given to one selection criterion over another. And, it was not the task of the Court to determine which employee should be placed into a new position above another, but to accord some deference to the exercise of the employer's discretion in this regard. Rather, the Court was to have regard to whether the placement process and decisions on placement taken in terms of it had met an objective standard of

fairness in the sense that they were not subjective, arbitrary, capricious or inconsistent.[32]

[38] The evidence was that the placement process had been the subject of extensive consultation. It applied across the board to all affected employees, with more than 1500 applications for placement made. There was nothing *per se* unfair in a process which, given its scale, did not allow for interviews but permitted employees to submit extensive written motivation in support of their placement and retention, to object and appeal against an unfavourable decision taken against them in phase 1 and to be considered against substantially relaxed criteria for placement in phase 2.

[39] Although the Labour Court objected to the fact that employees could only present facts in support of their retention in phase 1 and not in phase 2, it is unclear why this was unfair given the extensive opportunity to do so that was provided in phase 1. While the Court took issue with the fact that employees could not comment on their assessment by the placement panel, it overlooked the fact that the objection and appeal process was available to challenge any such assessment on which a placement decision was based. The Court's finding that the scoring method used was unfair and that decisions taken were inconsistent and subjective, disregarded the fact that different scores were given to different candidates for a range of different reasons, with an employee entitled to object and appeal against such scores at the end of phase 1.

[40] The Court also found it to be unfair that no objection and appeal process was available at the conclusion of phase 2, without regard to the fact that such process was available at the end of phase 1 and that the requirements for placement were significantly relaxed during phase 2. There was nothing inherently unfair in adopting a process which allowed for objection or appeal only at the end of the first phase. The Court's view that the veto by the

[32] See too *NUM v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC). *Apollo* (*supra note 3)* at para 53. Section 189(7) states: '*The employer must select the employees to be dismissed according to selection criteria – … (b) if no criteria have been agreed, criteria that are fair and objective*' See too *NUM v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC).

validation committee, which made the final placement decision, was exercised without explanation, similarly overlooked the fact that an employee could object or appeal against the exercise of any veto. Furthermore, in finding that LIFO would have been a fair selection criterion but that it was not applied, the Labour Court disregarded both that the facts did not support its application in many instances, given that employees were not equally positioned in terms of skills, qualifications and experience, and the fact that employment equity imperatives were important and therefore considered, with employment equity used as the tie breaker in certain decisions taken.

[41] Moreover, in its approach to the matter, the Labour Court failed to recognise that the dispute had, by agreement between the parties, been narrowed to a consideration of three placement applications made per respondent. Of the total of these applications for placement, only four objections against a placement decision were raised, of which one was withdrawn, and only one appeal was lodged by the ninth respondent, Mr Gabriel Ramosolo. As a result, save for the one appeal, the respondents had elected not to exhaust the internal remedies available to them to challenge the placement decisions taken.

[42] Internal objection and appeal mechanisms are designed to provide immediate and cost-effective relief and allow any irregularities to be rectified speedily.[33] In disregarding the respondents' failure to make use of these remedies, the Labour Court erred when such mechanisms provided the opportunity to rectify scores, reasons to be given for decisions taken or any errors or irregularities corrected where they may have arisen. The result was that, having failed to exhaust such internal remedies available, nine of the respondents were unable to show that by the end of phase 1 the selection criteria had been applied unfairly against them.

[43] Mr Ramosolo lodged the only appeal in respect of one of the two positions for which he applied. In it, he raised an objection to the decision not to place him when the successful appointee was scored 5 by the panel and he scored 3.

[33] See *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) at para 35 in the context of administrative action.

On raising an objection, he did not submit any additional information to the panel and the decision was upheld. On appeal, it was found that the successful appointee had more relevant experience for the post than Mr Ramosolo, whose EOI had been silent on his cable experience. The Labour Court, however, found that Mr Ramosolo should have been placed into the position. In doing so, the Court clearly erred. It was not entitled to interfere with placement decisions taken, nor tasked with taking any placement decision on behalf of the employer. Rather, it was required to determine whether the exercise was fair in the sense that it was not subjective, capricious, inconsistent or arbitrary. The decision taken by Telkom in relation to Mr Ramosolo was not shown to have been assailable. There was no evidence that it was made on an unreasonable, arbitrary, subjective or inconsistent basis and the Court's finding of unfairness was consequently without merit.

[44] The Labour Court erred further in failing to take cognisance of the fact that a number of the respondents failed to apply for placements during phase 2 of the process even when positions were available. In disregarding this failure, the Court did not have regard to the fact that these internal placement opportunities in respect of the three positions in issue were not exhausted by these respondents. Where certain respondents had applied for placement during phase 2, there was no evidence before the Court to show that the decisions taken by the employer were subjective, capricious, inconsistent or arbitrary and the Court's findings of unfairness in relation to these decisions taken were similarly without merit.

[45] The Court's failure to have regard to the narrowing effect of the pre-trial minute is clearly seen in its finding that an alternative to retrenchment existed in the form of placement into one of the 169 positions that remained vacant at Telkom. This finding overlooked the agreement between the parties that Telkom was required to prove the fairness of the non-appointment and retrenchment of the respondents in relation only to the three positions applied for during phases 1 and 2 of the restructuring process. Telkom was not called upon to show why the respondents were not appointed into any other vacant

positions. That was simply not an issue for determination and was consequently, although referenced, not properly addressed. The result was that by disregarding the narrowing effect of the pre-trial minutes and finding that any of these positions constituted an alternative to the retrenchment of the respondents, the Court clearly erred.

[46] It follows for these reasons that the respondents were not shown to have been unfairly selected for retrenchment and that their dismissal on grounds of the employer's operational requirements was not shown to be unfair. The appeal must therefore succeed and the finding of the Labour Court replaced with a finding to this effect. Having regard to considerations of law and fairness no costs order is warranted in this matter.

Order

[47] For these reasons, the following order is made:

1. The appeal is upheld.

2. The orders of the Labour Court are set aside and replaced with the following order:

   'The dismissal of the applicants was procedurally and substantively fair.'

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SAVAGE AJA

Phatshoane ADJP and Murphy AJA agree.

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