IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JS 413/2019

In the matter between:

MATTHEW MONGEZI NTSOKOLO **Applicant**

and

ESKOM SOC LIMITED **Respondent**

Heard: **25 January 2024**

Delivered: **23 April 2024**

Summary: **Section 189 of LRA – retrenchment – competitive recruitment and placement within the context of a section 189 process is not a selection criterion but a method to avoid retrenchment – reasonableness of the process is subject to scrutiny – the displaced employee is not automatically retrenched if not appointed following an interview – employer would still be enjoined to consult with a displaced employee sufficiently and reasonably as envisaged in section 189 of the LRA.**

JUDGMENT

NKUTHA-NKONTWANA, J

<u>Introduction</u>

[1] The applicant (Mr Ntsokolo), was dismissed from the employ of the respondent (Eskom) due to operational requirements following a consultation process in terms of section 189 of the Labour Relations Act[1] (LRA). The section 189 process was pursuant to Eskom's restructuring process which impacted its executive structure and, pertinently, the F-Band level.

[2] In this litigation, Mr Ntsokolo is challenging the substantive and procedural fairness of his dismissal and seeks an order in the following terms:

2.1 Compensation equivalent to twenty-four months' remuneration;

2.1 Policy on voluntary severance packages (VSP) applies to him;

2.1 Payment of his full benefits as per the Eskom Provident Fund; and

2.1 Compensation for the inconvenience and trauma he suffered due to his alleged unfair dismissal.

<u>Background</u>

[3] Mr Ntsokolo commenced his employment with Eskom on 1 February 1991. During his employment, he held various positions including the position of Group Executive: Transmission, Group Executive: Human Resources; and Group Executive: Generation. At the time of his dismissal, 31 December 2018, he held the position of Group Executive: Distribution, the F-Band level position.

[4] It is common cause that Mr Ntsokolo and Ms Elsie Pule, the Group Executive: Human Resources and one of the two Eskom witnesses, were part of the F-Band level and members of the Eskom Executive Committee (EXCO), reporting to the Group Chief Executive Officer (GCEO). At the time the GCEO was Mr Phakamani Hadebe (Mr Hadebe) who has since left the employ of Eskom.

[5] When the restructuring process commenced, Eskom had 21 F-Band roles, 16 of whom reported to the GCEO. It is common cause that, as early as 2014, the EXCO began the discussions about turning the organisation around, including

[1] Act 66 of 1995, as amended.

reducing the headcount and associated employee benefit costs which were a big part of an unsustainable cost structure. In the same period, EXCO undertook a Business Productivity Programme and offered voluntary severance packages as a measure to reduce the headcount.

[6] In 2016, EXCO embarked on a Design to Cost project to identify opportunities to reduce employee benefits. Mr Ntsokolo was part of the EXCO discussions and decisions. In 2018, Eskom's debt situation was spiralling and Mr Hadebe was instructed by the Eskom Board of Directors (Board) to develop a financial viability plan. The EXCO undertook a financial viability study and all the Executives were tasked to come up with ideas. The committees collected information in their functional areas and fed it into the project for consideration by the EXCO. The respondent's financial viability was reflected as a matter of concern with substantial employee costs which required to be reduced as part of the levers to remedy the unsustainable financial condition of Eskom.

[7] Boston Consulting Group (BCG) was appointed to assist and advise on restructuring and Lazard Consulting to advise on financial matters in consultation with the EXCO. The study that was conducted by BCG found that the span of control was wide at the top and recommended a restructuring of the organisation, commencing with the top leadership because such an approach was a "no regret" option as it would determine how the lower levels are configured.

[8] In June 2018, the respondent appointed a Chief Operating Officer (COO), a position which did not exist in the approved structure that existed at the time. The COO had, as direct reports, the operational functions that reported to the GCEO. In July 2018, the EXCO made the decision to reduce employee costs by 50% as part of the Financial Viability Plan. In August 2018, the Board approved the advice to restructure the F-Band and the decision to reduce it by 50%.

[9] On 26 October 2018, the Board resolved to reduce employee costs, across the staffing levels, by 50% and to restructure Eskom so that it is fit for purpose. That was followed by Mr Hadebe's meeting with the F-Band employees to inform them of

the intention to embark on a section 189 process. The F-Band comprised 21 positions, including the GCEO, Group Executives, Senior General Managers and support functions. Mr Ntsokolo was one of the attendees at this meeting as well as an external consultant, Mr Charles Nupen of StratAlign.[2]

[10] The first consultation was held on 7 November 2018. Mr Hadebe convened a meeting to introduce the Board-approved structure of the section 189 consultation process for the F-Band employees. The section 189(3) notices were issued. It is not in dispute that this meeting formally commenced the consultation process on restructuring of the F-Band level.

[11] The F-Band employees were invited to make any submissions relating to the matters addressed in the letter by 12 November 2018 and advised that the process would be completed on 10 December 2018. The date was extended to 21 December 2018 as a result of the extensions of time granted to employees to make submissions.

[12] The second consultation meeting was held on 14 November 2018. It is not in dispute that there was an agreement on the rationale for the restructuring. Eskom then introduced the proposed new structure and invited the F-Band employees to make representations on the structure. The proposed new structure merged the positions of Group Executive: Distribution and Group Executive: Customer Service into one position of Group Executive: Distribution. As a result, the Group Executive: Distribution, occupied by Mr Ntsokolo, and the Group Executive: Customer Service positions were to be abolished.

[13] The F-Band employees were requested to make representations on the proposed new structure by 19 November 2018. Mr Ntsokolo, made his representations which were addressed to Mr Hadebe, raising several issues,

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[2] StratAlign is a company that, *inter alia*, facilitates and assists companies with restructuring and was appointed by the respondent to guide the consultation process and assist the parties in the consultation process.

including requesting job profiles. Mr. Hadebe replied to the applicant on 23 November 2018.

[14] The third consultation meeting was held on 27 November 2018. It was established during that meeting that there was consensus on the structure which was thereafter proposed to the Board for approval. The new job profiles were only communicated after the meeting and employees had to respond in writing. Mr Ntsokolo submitted his input on the profiles on 3 December 2018.

[15] The fourth meeting was held on 8 December 2018. It would seem that nothing much was discussed as the new structure was still pending approval by the Board, which was expected on 11 December 2018. In fact, on 13 December 2018, Ms Pule advised the F-Band employees that, subject to the Board resolution, the next action would be as follows:

15.1 On 13 - 14 December 2018, the individual letters to all F-Band employees would be communicated;

15.2 The jobs would be advertised where necessary;

15.3 Interviews would be scheduled for 18 - 19 December 2018; and

15.4 The final outcome would be communicated on 21 December 2018.

[16] It is common cause that Mr Ntsokolo had a separate discussion with Mr Hadebe and made his representations on the issues that had been discussed during the consultation meetings. Mr Hadebe accordingly responded to all the issues that had been raised and proposed by Mr Ntsokolo; most of which pertained to the rationale for the restructuring, the proposed new structure and the profiles for the new positions.

[17] On 14 December 2018, Mr Ntsokolo received a letter that informed him that the new structure had been approved and, as a result, he was affected by the restructuring. His former position no longer existed as it had been merged with that of Group Executive: Customer Service, resulting in a new position of Group Executive: Distribution. He was given options in terms of the process thereon, which included a VSP or applying for any vacant position per the list that was attached to

the letter. Eskom promised to consult with Mr Ntsokolo on selection criteria and proposed severance pay; and that he would be informed of a date of such consultation “in the interim”.

[18] On 14 December 2018, Mr Ntsokolo applied for the positions of Group Executive Distribution, Group Executive Generation, Group Executive Transmission, and Group Executive Group Capital. His application comprised a cover letter and his curriculum vitae (CV). Mr Ntsokolo testified that there were no internal advertisements for the positions that he had applied for, contrary to Ms Pule’s evidence. He was adamant that he only became aware of the recruitment profiles of the positions he had applied for after he had been interviewed on Tuesday, 18 December 2018, which was the next workday after Friday 14 December 2018. That was so because Sunday, 16 December 2018, was a public holiday and, accordingly, Monday was not a workday.

[19] It is common cause that Mr Ntsokolo’s interview was held on 18 December 2018 and at a venue away from Eskom’s premises. Ms Pule testified that there was a consultation meeting on 18 December 2018 and that Ms Ntsokolo attended telephonically wherein selection criteria and severance pay were discussed. This evidence was refuted by Mr Ntsokolo who challenged the practicality of it as he was attending an interview on the day in question.

[20] On 21 December 2018, the applicant was informed that his application for the vacant positions was unsuccessful and his last workday would be 31 December 2018, giving him 10 days to clear his desk.

<u>Issues for determination</u>

[21] The crux of Mr Ntsokolo’s challenge is the conduct of Eskom from 18 to 21 December 2018. As such, the issues for determination are mainly that:

23.1 Whether the decision not to appoint Mr Ntsokolo in one of the positions he had applied for was rational;

23.2 Whether Eskom did consider alternatives to retrenchment;

23.3 Whether Mr Ntsokolo was consulted on the selection criteria and severance pay as promised in the letter dated 14 December 2018; and

23.4 Whether the relief is sustainable.

[22] Mr Ntsokolo took no issue with the rationale and the new F-Band structure. Even the consultation process prior to 18 December 2018 is not seriously challenged.

<u>Was the decision not to appoint Mr Ntsokolo in order to avoid his retrenchment rational?</u>

[23] As mentioned above, Mr Ntsokolo accepts that, once his position was abolished, he became displaced. Consequently, he had to compete for placement in the new structure in order to avoid his retrenchment.[3] It is also not in dispute that the new positions and, in particular, the new position of Group Executive: Distribution, were significantly different in content as compared to Mr Ntsokolo's extinct position so as to justify assessment for his suitability for appointment.

[24] Mr Brews, Eskom's main witness from StratAlign, was the main external facilitator throughout the section 189 process. He was also part of the panel that interviewed Mr Ntsokolo. Other panel members were Messrs Hadebe, GCEO; Jan Oberholzer (Mr Oberholzer), the Chief Operating Officer (COO); and Mmes. Busisiwe Mavuso and Nelisiwe Magubane, Non-Executive Board members.

[25] Mr Brews is the only panel member who recommended Mr Ntsokolo for appointment, though he expressed reservations about his people management, leadership and failure to take accountability for the state Eskom found itself in. Mr. Oberholzer wrote in his score sheet *"[n]ot Recommended after 15 years on Exco*" as a reason for not recommending Mr Ntsokolo for appointment. The rest of the panel members did not record their recommendations in their scoring sheets. Also, there

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[3] *SA Breweries (Pty) Ltd v Louw* [2017] ZALAC 63; [2018] 1 BLLR 26 (LAC) at para 22.

was no overall consensus score recorded in the respective panel members' score sheets.

[26] Mr Brews testified that the panel did have a debate on individual panel members' scores and reached consensus on the ultimate decision not to recommend Mr Ntsokolo for appointment. He then referred to the document titled "Panel Interview Questionnaire Responses Summary" (interview questionnaire summary). The essence of his evidence in chief was that the interview questionnaire summary was prepared as part of the court process, three years after Mr Ntsokolo's interview. Apparently, Ms Dorcas Moloi, an Eskom employee, prepared a draft by transcribing questions in the questionnaires. Thereafter other Eskom employees contacted each of the panel members to confirm whether the transcription was accurate.

[27] Mr Brews was then asked by the panel members to prepare a first draft of the consensus conclusions based on the conversations that they had at the end of the interview. He discussed his draft with Mr. Oberholzer, who agreed that the draft recorded the consensus by the panel at the time. Mr. Hadebe did not participate in the reconstruction process.

[28] Quizzed on the interview questionnaire summary, Mr Brews conceded that it was riddled with errors; that he failed to mention in his evidence in chief that the alleged consensus by the interview panel was reconstructed three years after the interview; and that not all panel members who interviewed Mr Ntsokolo were involved in the reconstruction process.

[29] Eskom took no issue with Mr Ntsokolo's qualifications, skills and impressive organisational experience. In fact, both Mr Brews and Ms Pule conceded that he had the necessary skills and expertise suitable for the positions he was interviewed for.

[30] Yet, Mr Ntsokolo was not recommended for appointment. Notably, the conclusions allegedly reached by the interviewing panel as recorded in the interview

questionnaire summary are in essence the same as the views that were expressed by both Messrs Brews and Oberholzer in their individual score sheets.

[31] Mr Brews could not clearly articulate what he meant by his assertion that Mr Ntsokolo failed to take accountability for the situation in which Eskom found itself despite having been in leadership for 15 years. Tellingly, he conceded during his cross-examination that at no point during Mr Ntsokolo's interview was it suggested that he, Mr Ntsokolo, was supposed to take accountability for the past. Yet, he was castigated for his failure to do so and disqualified for appointment.

[32] As well, Mr Brews conceded that the panel could not have correctly concluded that Mr Ntsokolo was lacking in his leadership skills because they had no information to contradict his leadership track record as was contained in his CV. Conversely, Ms Pule testified that she had no reason to dispute Mr Ntsokolo's leadership acumen.

[33] Conspicuously absent is evidence by Eskom to show in what manner Mr Ntsokolo's 15 years of experience as a member of EXCO disqualified him for appointment. Instead, Mr Ntsokolo testified that Eskom acknowledged his skill and expertise even a few days before his interview when Mr Oberholzer appointed him to serve as a member of a team that had to implement the 9 Point-Plan turnarounds strategy (9 Point-Plan); a critical operational plan that was under the supervision of Mr Oberholzer. Ms Pule conceded that the members who were appointed to serve on the panel to implement the 9 Point-Plan had a proven track record of delivery.

[34] There is no merit in the contention by Eskom's counsel that an adverse inference should be drawn against Mr Ntsokolo for his failure to lead evidence to corroborate his assertion that he was informed by Oberholzer that he would lead the 9 Point-Plan and that his appointment had been agreed to. The point Mr Ntsokolo was basically making is that it did lie in the mouth of Mr Oberholzer to contest his capabilities because he had already appointed him to serve, at least, as a member of the team to implement the 9 Point-Plan turnaround strategy. It, therefore, follows logically that it is Eskom that was supposed to lead evidence to rebut these assertions and not the converse.

[35] The recruitment interview questionnaire outlined the context and methodology that were to guide the interviews. Mr Brews further conceded during cross-examination that the methodology proposed was aimed at predicting how the candidates would behave in the role for which they applied on the basis of past behaviour and learnings. Mr Ntsokolo's CV chronicled in detail his past engagements, achievements and expertise, and crafted a vision for Eskom in the event he was appointed.

[36] In addintion, Eskom did not dispute the fact that Ms Ntsokolo was the only F-Band employee who applied for three of the four positions he was interviewed for. He had a track record in all of the positions he was interviewed for as he had, at some stage, led those divisions at an executive level.

[37] It would seem to me that the approach that was adopted by the panel and the views they expressed in the end were contrary to the context provided in the recruitment Interview questionnaire which enjoined them to be cognisance of the fact that interviews were taking place as part of a section 189 consultation process, the candidates were F-Band employees with reasonable knowledge of the company and they had participated in high-level discussions about the direction and strategy of Eskom.

[38] It is apparent that the interviewing panel veered off the objective process envisaged within the context of restructuring due to operational requirements. They became oblivious to the requirement that, in a section 189 process, the employer is expected to take such steps as may be reasonable to avoid or minimise retrenchments, which may include redeployment within the new structure or elsewhere in the organisation.[4]

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[4] See: *Manning v Metro Nissan - A Division of Venture Motor Holdings Ltd and another* (1998) 19 ILJ 1181 (LC) at para 29.

[39] Thus, as stated *in BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*[5], the court is entitled to scrutinise the reason given by the employer in order to establish whether there was a rational basis upon which the decision to retrench is predicated:

> 'Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness is the mandated test.'[6]

[40] It is true, as contended for Eskom, that the decision to require the applicant to apply for a vacant position in the new structure is not unfair on the basis of the Labour Appeal Court 's (LAC) dictum in *SA Breweries (Pty) Ltd v Louw*[7] (*SAB*). In *SAB*, the LAC pointed out that where the employer elects to appoint dislocated employees after a restructuring process, the assessment criteria used in doing so do not amount to 'selection criteria' as contemplated in section 189 of the LRA. Nonetheless, *SAB* is distinguishable as the employee in that matter was found not suitable as compared to the candidate that was appointed. Subsequently, he refused to apply for another vacant post, notwithstanding being invited to do so.[8]

[41] Still, even though the competitive process to seek to avoid retrenchment is not unfair*, "…this does not remove the obligation on an employer to ensure that any resultant retrenchment meets the requirements of substantive fairness, with fair and objective selection criteria used to select those employees to be retrenched and alternatives to retrenchment properly canvassed and carefully considered*".[9]

[42] In the present instance, the common cause and undisputed evidence show that there was no rational basis for the decision not to appoint Mr Ntsokolo in one of

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[5] (2001) 22 ILJ 2264 (LAC); [2001] 7 BLLR 705 (LAC) at para 19.
[6] Id.
[7] (2018) 39 *ILJ* 189 (LAC); [2018] 1 BLLR 26 (LAC).
[8] See: *Regenesys Management (Pty) Ltd t/a Regenesys v Nortje and others* [2022] ZALAC 96; (2022) 43 ILJ 2745 (LAC) at paras 21 - 22.
[9] Id at para 22.

the vacant positions he had applied for in order to avoid his retrenchment. Tellingly, he was not only qualified for appointment, he was the only candidate in three of those positions. While it is not in dispute that the was a justifiable rationale for the restructuring of the F-Band, Eskom failed to take reasonable steps to avoid Mr Ntsokolo's dismissal. Thus, the dismissal of Mr Ntsokolo was irrational.

<u>Failure to consult on alternatives, selection criteria, severance pay and timing</u>

[43] There is no evidence to justify the decision to terminate the consultation process consequent to the Board's decision to not appoint Mr Ntsokolo in one of the vacant positions. Since it is accepted that a competitive recruitment and placement process in the context of section 189 is not a selection criterion as envisaged in section 189(7), failure to appoint a displaced employee does not automatically result in a dismissal.

[44] Mr Ntsokolo also assails the fairness of the process that was undertaken by Eskom on various grounds, including failure to consult him on the selection criteria and severance pay, the timing of the retrenchment, reasonable time off in order to allow him the opportunity to seek alternative employment as promised in the section 189(3) notice. As well, Eskom had undertaken to consult Mr Ntsokolo on the selection criteria and severance pay in its communiqué of 14 December 2018.

[45] Ms Pule testified that there was a consultation meeting on 18 December 2018 that discussed selection criteria and severance pay. I find it difficult to accept this evidence for the following reasons: Firstly, it only emerged during Ms Pule's cross-examination; secondly, it was not corroborated by Mr Brews' evidence, who was allegedly in attendance; and, thirdly, Eskom failed to produce the minutes of the said meeting. In any event, it is highly improbable as it was Mr Ntsokolo's uncontested evidence that he was attending his interview on 18 December 2018. As such, he could not have attended any consultation meeting because the interviews were held at an external venue. Mr Pule's evidence that Mr Ntsokolo attended the consultation telephonically is nothing but a clutch at straws.

[46] Furthermore, according to Mr Ntsokolo, the timing of his retrenchment was never discussed with him; nor was he afforded an opportunity to seek alternative employment. He was served with a retrenchment letter on 21 December 2018 and had to vacate his office within 10 days thereafter. This evidence is undisputed.

[47] Granted, Eskom did consult the F-Band employee on the rationale for the restructuring and the structure from 7 November 2018 to 13 December 2018. The critical phase of the consultation process, however, commenced on 14 December 2018, when Mr Ntsokolo was informed that he was personally affected by the restructuring and consequently displaced.

[48] Other than the interview on 18 December 2018, there was no consultation thereafter on available alternatives to either avoid the retrenchment, to minimise its effect or to postpone the timing as envisaged in section 189(2) of the LRA. Instead, Eskom gave artificial respiration to a long-resolved allegation of misconduct against Mr Ntsokolo. According to Mr Ntsokolo, its timing was meant to discredit him and jeopardise his prospects of appointment to the new Eskom structure. This assertion was vehemently opposed by Eskom. I do not have to say much on this issue because it was rendered moot by the retrenchment of Mr Ntsokolo.

[49] Viewed holistically, notwithstanding the existence of a genuine business rationale, the decision to retrench Mr Ntsokolo without a reasonable attempt to avoid same and meaningly consult with a view to reach consensus on selection criteria, severance pay and the timing of retrenchment rendered the retrenchment both procedurally and substantively unfair.[10]

<u>Conclusion</u>

[50] In all the circumstances, I am satisfied that Mr Ntsokolo's retrenchment was substantively and procedurally unfair. Eskom failed to prove that it had properly

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[10] See: *Kotze v Rebel Discount Liquour Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 37.

considered alternatives to retrenchment and adequately embarked on a joint consensus-seeking process.

Relief

[51] When it comes to relief, it is apparent from Mr Ntsokolo's written submissions that he had abandoned the prayers in relation to the VSP payment per the policy, early retirement benefits and compensation for the inconvenience and trauma, prudently so. There was no evidence led to support the grant of these remedies.

[52] Mr Ntsokolo persistently contended for a relief of compensation instead of reinstatement. This entreaty is consistent with the pleadings and his evidence that, while he was adamant that he ought to have been appointed as he met all the requirements of the positions he has applied for, he was willing to consider other alternatives to retrenchment which included an early retirement.

[53] Curiously, during the hearing of oral submission, it was contended by Mr Ntsokolo's counsel that he now seeks to be reinstated should I find that his dismissal was substantively unfair. Obviously, this contention is not supported by Mr Ntsokolo's pleaded case and the pre-trial minutes which are binding; unless amended by agreement between the parties or with leave of the court.[11] Worse still, even in his written submissions no mention is made of a relief of a reinstatement.

[54] Eskom opposed the turn of events and correctly contented that it does not avail Mr Ntsokolo to seek a remedy he never pleaded. Eskom was only called to challenge a relief of 24 months' compensation and not reinstatement. As a result, both parties did not lead evidence on the reasonableness and practicability of an

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[11] *See: Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75; *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) at para 90. See *also Molusi and Others v Voges N.O. and Others* 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) at para 28.

order of reinstatement; especially, in the circumstances where the position Mr Ntsokolo held at the time of his retrenchment is now extinct.[12]

[55] Thus, Mr Ntsokolo must accordingly stand and fall by his pleaded claim. It is not for this Court to construe or infer from the asserted facts in the statement of case that they sustain another relief even though it is not pleaded. Absent authority that empowers me to pronounce on an issue that was not pleaded as proposed by Mr Ntsokolo's counsel, this submission is devoid of merit and must fail.

[56] That takes me to the issue of compensation to be awarded. Mr Ntsokolo seeks compensation equivalent to 24 months' remuneration. Yet, there is no iota of evidence to support such a relief. Instead, section 193(1)(c) of the LRA provides that "…*[i]f the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may… order the employer to pay compensation to the employee'*. While section 194(1) of the LRA provides:

> '<u>The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to</u> the employee's conduct or capacity or <u>the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal</u>.' [Own emphasis]

[57] Section 194(1) contains a cap of 12 months' remuneration and nothing more. It was contended for Eskom that even if the retrenchment is found to be unfair, the procedural mishaps were not serious enough to warrant a maximum compensation of 12 months. Of course, this contention may be true in instances where unfairness

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[12] See section 193(2)(c) of the LRA which provides that:

> 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –
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> …
>
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee…'

is only procedural. As aptly put by the LAC, per Davies JA, in *Total SA (Pty) Ltd v Meyer and others*[13] (*Total*):

> 'The first respondent's rights to be treated fairly, with care and concern and to enjoy the benefits of an adequate consultation process, as provided for in the LRA, before being retrenched, were ignored by a large and powerful employer, which unquestionably had the resources to ensure that its human relations management policy was congruent with the clear objectives of the LRA. The award of compensation represents a monetary response to the clear breach of an employee's rights and cannot be equated with the amount awarded in respect of the patrimonial loss suffered by an employee, such as the first respondent.'[14]

[58] On the contrary, *Total* is distinguishable from the facts *in casu* as compensation in that case was solely for procedural flaws. In the present instance, the dismissal of Mr Ntsokolo was also substantively unfair, as found hereinabove. As such, I have taken into consideration the fact that Eskom diverged from the context and methodology it had set for itself in order to avoid the retrenchment of the affected F-Band employees. Mr Ntsokolo was assessed and disqualified for appointment purely on subjective grounds that had nothing to do with his skills and experience of 27 years. What is more, Eskom adamantly contended that the selection criterion it adopted was the one of skills retention. Even so, it inexplicably disposed of one of its irrefutably impressive skills at its disposal, in the person of Mr Ntsokolo, on an irrational basis.

[59] Accordingly, in my view, this is a typical case where the award of a maximum compensation of 12 months as a solatium would be fair and equitable in light of the factual matrix of this case, viewed holistically.

<u>Costs</u>

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[13] (2021) 42 ILJ 1696 (LAC).
[14] Id at para 18.

[60] It was contended for Mr Ntsokolo that costs should follow the result given the conduct of Eskom leading to his retracement and its decision to oppose this litigation. On the other hand, Eskom opposed the awarding of costs against it, contending that it was dragged to oppose this ligation as a result of Mr Ntsokolo's claims in respect of the 24 months' compensation, early retirement claim and VSP. As alluded to hereinabove, these remedies were belatedly abandoned by Mr Ntsokolo; save for the 24 months' compensation. Thus, I agree with Eskom that its opposition was not frivolous so as to warrant that it be saddled with costs without, at least, apportionment. Thus, in view, it is fair and equitable that Eskom pays 80% of Mr Ntsokolo's costs.

[61] In all the circumstances, I make the following order:

<u>Order</u>

1. The dismissal of the applicant, Mr Matthew Mongezi Ntsokolo**,** was substantively and procedurally unfair.
2. The respondent, Eskom SOC Limited, shall pay the applicant compensation equivalent to 12 months' remuneration calculated at his rate of remuneration on the date of dismissal.
3. The respondent shall pay compensation as mentioned in paragraph 2 above to applicant within one month after delivery of this judgment.
4. The respondent shall pay 80% of the applicant's costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

<u>Appearances:</u>

Applicant:	Advocate D Mpofu SC
Instructed by:	Mabuza Attorneys
Third Respondent:	Advocate S Baloyi SC
Instructed by:	Bowman Gilfillan Attorneys