

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case No: JA 36/05

In the matter between:

SOUTH AFRICAN AIRWAYS

Appellant

and

MOGAGABO AVC BOGOPA

First respondent

LAWRENCE MABUNDA

Second Respondent

SINDY ANGELIQUE MABE

Third Respondent

VICTOR THOMAS MANGANYI

Fourth Respondent

BRADLEY SIBUSISO ZIKHALI

Fifth Respondent

MERYLIN ANNE POWYS

Sixth Respondent

BAVESH DESAI

Seventh Respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal against a judgment of the Labour Court given by Pillay J after a trial concerning a dispute between the South African Airways, the appellant herein, and the respondents about the fairness of the appellant's dismissal of the respondents from its employ on the 30th June 2000. The Labour Court found the

dismissal to have been both procedurally and substantively unfair. It declined to order the reinstatement of those of the respondents who had sought reinstatement. It ordered the appellant to pay each one of the respondents a certain amount by way of compensation. The appellant sought and obtained leave from the Labour Court to appeal against that order. The respondents who had sought reinstatement did not note a cross-appeal against the Labour Court's refusal to order their reinstatement.

The facts

[2] The appellant, as already stated above, is the South African Airways. The respondents were employed by the appellant in its Inflight Service Department in Johannesburg as crew managers. If it becomes necessary later on to give more precise details of the positions that they each held, I shall do so then. They were dismissed from the appellant's employ with effect from the 30th June 2000. The appellant's dismissal was said to be for operational requirements of the appellant. The respondents' dismissal was the culmination of a series of events and communications that took place between the appellant and its employees in the In-flight Service Department in general but with the respondents in particular. I deal with those events and communications hereunder.

[3] Mr Desai, the only one of the respondents to testify, gave his evidence on a number of issues and events. Mr Desai testified that about 28 January 2000 an entity known as Bain and Company, an independent consultancy that had been brought in by the Chief Executive Officer of the appellant at the time, a Mr Colman Andrews, made available a report compiled pursuant to an audit that it had conducted on the Inflight Service Department across the board. Mr Desai said that in terms of that report Bain and Company's audit had found that with regard to the Inflight Service

cabin crew management there was only **“a need for process of engineering and reaffirming of the key performance areas of the individual cabin crew managers”**. Mr Desai testified that on the 4th to the 6th February 2000 there was a **“strategic break away to conform our key performance areas to the recommendations of the Bain and Company audit”**. This evidence given by Mr Desai was not challenged.

- [4] Mr Martin Kemp, who was the immediate superior of the respondents, and Mr Basson, who was the human resources Manager, testified on behalf of the appellant. The appellant did not call any other witness. Mr Kemp testified that at some stage in April or May 2000 a meeting took place which was attended by the senior managers of the Inflight Service Department. Those who attended the meeting included the Vice-President: Inflight Services : Ms N Isaacs, Mr Kemp, Mr Basson and others whose identity is of no significance for present purposes. According to Mr Kemp the meeting was a strategic session. None of the respondents had been invited to that meeting nor had there been any prior discussion with them about the subject of the meeting. Mr Kemp testified that the senior management had found that there was **“lack of efficiencies”** within the Inflight Service Department some of which were due to the way that the Inflight Service Department was structured. He said that there was no accountability. In this regard Mr Kemp made the example that there would be three managers responsible for a group of employees on a specific rank

of cabin crew.

- [5] Mr Kemp said that in the Inflight Service Department there were a crew management side and an operational side. He said that it was at that strategic session that it was decided to do away with the old structure of the department and to adopt a new structure. He said that the senior management believed that through the new operational structure the department would be able to achieve higher service levels, cost savings and efficiency. Mr Kemp said that in the new operational structure two positions among the positions that had been occupied by the respondents in the old structure were going to be done away with. He said that the appellant decided that the best competency fit test would be used to decide who would be appointed to positions in the new structure of the department. He further stated that except for three of the members of the management in the department - that is the senior management – each employee in the department would be required to submit his or her curriculum vitae and apply for positions in the new structure. When he gave evidence, Mr Kemp said that these decisions could be changed if, during consultation with the employees, it was shown that they should be changed. This evidence by Mr Kemp was not challenged.

- [6] Mr Desai testified that on the 19th May 2000 an electronic mail information circular was sent out notifying the respondents and other crew managers in the Inflight Service Department that on Monday, the 22nd May 2000, there would be what Mr Desai

referred to as “**a mass inflight services general management meeting**”. He said that no agenda was provided for the meeting.

[7] On the 22nd May 2000 a meeting took place between the senior management of the Inflight Service Department and the crew management. It was addressed by Ms Isaacs. A letter was given to each one of the crew managers, including the respondents, dated the 22nd May 2000. There is a dispute between Mr Kemp and Mr Desai whether that letter was given before the commencement of the meeting or after the meeting. Mr Desai testified that the letters were given to the crew managers on their arrival at the meeting. Mr Kemp testified that this occurred after the meeting. In the view I take of the matter it does not matter much whether the letters were given before or after the meeting. However, I am prepared to assume that they were given before the commencement of the meeting. Actually, Desai’s version in this regard seems very persuasive.

[8] At the meeting of the 22nd May Ms Isaacs made a presentation to the crew management. Mr Kemp’s evidence was that most of what she said was what was contained in the letters of the 22nd May 2000 referred to above which were addressed to the crew managers. For that reason and the reason that the contents of that letter are very important I propose to quote a sample of those letters. The body of such letter read as follows:

“As a result of the stringent demands placed by the

aviation market on SAA and the need to deliver a more effective In-flight Services operation it has been decided to restructure certain operations at In-flight Services. A number of options have been considered and it has been decided that the revised organisational structure would be the most cost effective manner in which to provide an effective managerial control.

This has resulted in the new positions being created, which differ significantly from the current positions and also the number of jobs in the new structure. The new structure effectively renders all current Crew Management positions redundant and as a result you are an affected employee.

It is our intention to fill the new positions at In-flight Services by way of recruitment and selection on the criteria of best competency fit. Should you be interested in these positions you are required to hand your C.V to Recruitment and Selection by no later than 12H00 on Monday, 29 May 2000. Selection processes will be completed by 15 June 2000.

In the event that you are not successful in being appointed to one of the new positions you will then be effectively redundant and informed of that decision. Redundant employees may elect to take voluntary severance or apply for alternate positions in S.A.A on the basis that they are successful in any recruitment and

selection procedure followed for such positions.

It is envisaged that any redundant employees' services will therefore be effectively terminated by no later than 30 June 2000 with payment in lieu of notice.

You are hereby invited to provide and discuss any inputs or alternative options you may have, with your Senior Manager, Martin Kemp."

- [9] The respondents' version of what happened at the meeting of the 22nd May and afterwards was given by Mr Desai. Mr Desai testified that on Monday, the 22nd May 2000, the crew management assembled in the boardroom for the meeting. He said that all managers were present. He said in part: **"As we arrived in we were handed out brown envelopes and on the cover there was a title 'retrenchment packs'. We took up our seats. We were informed not to open our packs until the information session was over. Ms Noedene Isaacs, our vice-president at the time, went on to do a presentation regarding [the] restructuring of Inflight Services and notification to us. I am just summing up in the gist, notification to all crew managers. Well specifically I am talking about crew managers, but just notifying all managers at 110 level and 109 level, in some cases, that they were now effectively redundant and would have to re-**

apply for their positions. She completed quite an extensive presentation and then she invited questions”.

[10] It is important to note that the following were some of the points made in the letter:

- a) a decision had already been taken to do away with the structure which was operational at the time and to use a new structure;
- b) the crew managers, including the respondents, were being informed that they were effectively rendered redundant by the new structure;
- c) new positions had been created which **“differ significantly from the current positions and also the number of jobs in the new structure;”**
- d) there would be a recruitment and selection process to fill the positions in the new structure;
- e) the criterion that would be used to select people to fill positions in the new structure would be the **“best competency fit”**;
- f) each crew manager who was interested in filling a position in the new structure had to hand in his or her curriculum vitae to the Recruitment and Selection section by no later than 12h00 on the 29th May 2000;

- g) the selection process would have to be completed by the 15th June 2000;
- h) the respondents were invited to “**provide and discuss any inputs or alternative options**” that they may have had with Mr Kemp;
- i) if the respondents and the other crew managers did not succeed in being appointed to any of the positions in the Department, they would effectively be redundant and would be informed of that decision at which stage they would have an election to make. They could either take a voluntary retrenchment package and leave or they could apply for any vacant positions within the appellant but outside the Inflight Services Department. If they took the latter option, the recruitment and selection procedure would be followed;
- j) it was envisaged that the services of employees who were redundant would be terminated by no later than 30 June 2000.

[11] Mr Desai further testified that a new structure for the department was handed out to the crew management. He said that on seeing the new structure he noticed that some people had already been assigned positions in the new structure. He said that he then asked why some people had been slotted in the new structure when they were being required to apply. He said that, for example, there was a

Mr Paul Naicker who was a fellow colleague of his and a 110 manager who had suddenly been placed in the new structure. He also referred to a Mr Lenley Sharp who, Mr Desai said, was busy on a certain project for a certain period of time in the Inflight Service Department and, once the project had been completed, was meant to move back to the human resources department where he was based. Mr Desai said that, when he raised these questions, Ms Isaacs reprimanded him saying that he was “**inciting chaos**” and that he should keep quiet. Mr Desai said that Mr Zikhali, one of the respondents, asked the relevance of the restructuring in the light of the team building exercise that had been done pursuant to the audit of Bain and Company. Mr Desai said that Mr Zikhali was instructed by Ms Isaacs to remain silent for the rest of the meeting.

- [12] Mr Desai further stated that Mr Thomas Manganye, one of the respondents, asked what the justification was for the fact that the severance pay for those who agreed to take a voluntary retrenchment package was on a sliding scale depending on when one took it. Mr Desai said that either Mr Kemp or Mr Basson or both answered Mr Mangaye by saying that that was in accordance with the appellant’s standard policy. Mr Desai further testified that Mr Mabunda, also one of the respondents, asked what the status of the crew managers was since they had been declared redundant. He also asked what the crew management’s reporting lines would be and what their authority in terms of management would be. According to Mr Desai, at this stage Ms Isaacs became “**considerably annoyed**” and said that the crew management

should take those questions up with their line managers. The respondents' line manager was Mr Kemp. The meeting was then adjourned.

[13] Mr Desai's evidence about what happened at the meeting of the 22nd May 2000 as set out above was not disputed in any significant way. Mr Kemp simply disputed the evidence that the envelopes or packets marked "**retrenchment packs**" were given to employees at the commencement of the meeting. His version was that the envelopes or letters were given after the meeting. As I have said above, in my view which version is the true version on this point does not make much difference. The fact of the matter is that, when the meeting began, the envelopes had been prepared already. Mr Desai's evidence as to the questions which Mr Desai said were asked and what he said were the reactions from Ms Isaacs and Mr Kemp and or Mr Basson was not disputed. On this evidence the appellant treated the crew managers, including the respondents, very badly and, indeed, in a very insensitive manner.

[14] After the meeting at which Ms Isaacs had made a presentation, a meeting took place between Mr Kemp and the respondents. It is possible that there were other employees at the meeting as well. This meeting took place because Ms Isaacs had told those who had attended her presentation that the employees could direct their questions or queries to their line managers. It would seem that some of the questions that had been asked at Ms Isaac's presentation and had not been answered were taken up at the

meeting between the respondents and Mr Kemp. Mr Kemp's version about what happened at that meeting differs in certain respects from that of the respondents though their respective versions do converge in respect of certain points.

[15] Mr Desai testified that Mr Mabunda asked Mr Kemp the same question that he had asked Ms Isaacs. According to Mr Desai, Mr Kemp's response was to urge the respondents to comply with the process and to tell them that their behaviour in questioning the process was unbecoming. Mr Desai testified that Mr Kemp said that a decision had been taken and that it was irreversible. Mr Desai testified that **"there were some back and forth discussion and there it ended with Mr Kemp telling Mr Mabunda that his continued behaviour would cost him dearly when it came to the appointment process to the new structure"**.

[16] Mr Desai testified that, after he and his colleagues had left Mr Kemp's office, they had a discussion among themselves assessing the situation and they decided that, in the absence of clarity on the issues that they had raised and **"the hostility of the senior management towards us, that we should seek legal advice which we subsequently did"**. Mr Kemp said that he could not recall whether he had said that the decision was irreversible.

[17] Mr Kemp subsequently invited the respondents and other employees to another meeting on the 25th May 2000 in which a

consultation would also take place. Initially the respondents indicated through their attorneys at the time that they would not be able to attend the meeting owing to short notice. However, after Mr Kemp had written to the attorneys effectively insisting that the respondents should attend the meeting, they attended the meeting. Mr Basson also attended the meeting. Mr Desai testified that the respondents had decided amongst themselves that **“it would be perceived that we were not interested in any form of discussions and that we should go ahead and go to the meeting armed with information that we got in terms of the legal advice, the informal opinion”**. According to Mr Desai the respondents had elected him to be their spokesperson.

- [18] Mr Desai testified that at the meeting of the 25th May he raised a number of issues with Mr Kemp. He testified that he raised **“the issue of the employment contracts in terms of consultation when contemplating restructuring...”** He also said that the respondents also raised issues relating to compliance with the Labour Relations Act and consulting the respondents before and not after a decision had been made. Mr Desai testified that Mr Kemp told them, particularly him as the spokesperson of the group, that **“our continued insolence and dissent, our inciting behaviour or insolence was being viewed as insolence and dissent and that it was counter productive for the current operations at Inflight Services”**. Although Mr Kemp might not have admitted all the evidence given by Mr Desai as to what

happened at the meeting of the 25th May 2000, it would seem that, on the whole, Mr Desai's evidence is probably true. Mr Kemp's behaviour as testified to by Mr Desai would be consistent not only with how Ms Isaacs had herself treated the respondents when they asked certain questions but with what happened on the 26th May.

[19] According to Mr Desai, on the 26th May Mr Kemp called the respondents into his office. Once the respondents were in his office, Mr Kemp informed them that they would be put on **“administrative leave”**. The reason for the administrative leave, continued Mr Desai, was that **“in the (indistinct) of the insolence and dissent and that we were inciting colleagues at work and therefore it would be best that we were removed from the work environment and I think it would end on the 15th...”** Mr Desai testified that in terms of the policy of the appellant there was nothing called **“an administrative leave”**.

[20] Mr Kemp was not convincing when in his evidence he tried to defend his decision to place the respondents on the so-called **“administrative leave”**. The more he tried to defend his decision, the more, it seemed to me, he gave one the impression that there was more to that decision than he would have been comfortable to admit. It is difficult to read the evidence relating to the placement of the respondents on **“administrative leave”** without getting a strong feeling that Mr Kemp and senior management were annoyed

or irritated at being asked certain questions by the respondents or by the respondents' conduct in questioning the way in which they were handling the restructuring and that putting them on administrative leave was intended to be punitive.

[21] On the 29th May 2000 an article appeared in the Business Report of "**The Star**" dealing with the issue of restructuring in the Inflight Service Department of the appellant. The article also carried photographs of the respondents. The appellant's senior management appears to have felt very strongly about this article as will be apparent from their conduct on the 15th June which will be dealt with later herein. Two further articles appeared in the same newspaper on the 30th May and 7th June dealing with the restructuring in the Department. On the 29th May 2000 the respondents sent a letter to Mr Kemp. Its contents are important. For that reason I quote them in full. The body of the letter read thus:

- "1. With reference to the letter dated 22nd May 2000 received from Noedine Isaacs, Vice President/In-flight Services, a copy of which is attached hereto for your attention.**
- 2. We refer to the last paragraph thereof and therefore correspond with yourself.**
- 3. At this juncture we inform you that we are unable to participate in the recruitment and selection schedule for no later than 12h00 of even date.**

4. The reason for the aforesaid is that it is our opinion that the restructuring and concomitant redundancy referred to in the aforesaid letter is procedurally and substantively unfair and fails to comply with the provisions of the Labour Relations Act.

5. Accordingly we are unable to partake therein to avoid any potential prejudice to our positions.

6. Our rights are hereby reserved.

7. Nevertheless we would welcome an opportunity for consultation with yourselves regarding this issue”.

It will be observed that the respondents made it clear that they would not apply for positions in the Inflight Service Department. However, it is also to be observed that in the last paragraph of their letter they took the appellant up on its invitation to them to engage in a consultation with them as contained in the appellant's letter of the 22nd May 2000.

[22] Mr Kemp testified that after reading the respondents' letter of the 29th May 2000 he made a handwritten note thereon to respond to it. The handwritten note was, inter alia, to the effect that the respondents should contact his secretary to make an appointment to have a consultation with him. He also gave his secretary's telephone number in the note. When Mr Kemp gave his evidence-in-chief and under cross-examination, his evidence was very vague about what happened to the letter after he had made the handwritten note on it. The respondent's version was that that handwritten note did not reach them or the letter with the handwritten note was not sent to him.

[23] Mr Kemp's secretary was not called to give evidence. When Mr Kemp was being cross-examined, it appeared from some other letter addressed to him by the respondents that the letter on which he had made the handwritten note had been delivered to him. In the light of this Mr Kemp became more emphatic that he must have handed the letter back to the person who had delivered it to him after he had made the handwritten note.

[24] Counsel for the respondents disputed the suggestion that the letter with the handwritten note reached the respondents. He pointed out to Mr Kemp two or three things which, so he contended, did not support Mr Kemp's version. I do not think it is necessary to deal with those aspects or factors because what transpired during Mr Desai's cross-examination tipped the balance of probabilities overwhelmingly in favour of Mr Kemp's version. The article that was published in the Business Report about restructuring in the appellant contained excerpts from Mr Kemp's handwritten note made on the respondent's letter of the 29th May. Mr Desai was unable to provide any sound explanation as to how the journalist who wrote that article could have had access to the handwritten note if he did not get it from him or the respondents, particularly because the journalist had interviewed Mr Desai. Mr Desai attempted to say that there were other people who had access to the letter from whom the journalist could have got the letter but, really, that was an extremely remote possibility. The probabilities are, as I have said, overwhelming that the journalist got the letter with the handwritten note from Mr Desai or one of the other respondents.

For the respondents to deny this was to deny the obvious. The effect of this is that the respondents did become aware of Mr Kemp's response to their wish to be consulted but, for certain reasons, they elected not to take him up on his invitation to make an appointment through his secretary for a consultation meeting.

[25] On the 7th June 2000 the appellant wrote to the respondents individually and, inter alia, advised them that, as they had failed or refused to apply for positions in the Inflight Service Department, they had been declared redundant in that department. The respondents were also advised in the letter that they could apply for any vacancies that the appellant could be having outside the Inflight Service Department and, if they got appointed to some vacancies outside that department before the 30th June 2000, the letter would become redundant. That letter also reminded each one of the respondents that they were being invited **“to make any further representations you wish to make at any stage in this regard”**. The respondents failed to take this latter invitation up as well.

[26] The 15th June 2000 was meant to be the last day of the **“administrative leave”** that the appellant had given to the respondents against their will. However, on that day they were served with notices to attend a disciplinary inquiry on the 27th June 2000 to answer certain allegations of misconduct arising from their association with the articles that had been published in the

Business Report on the restructuring in the Inflight Service Department. The notices also informed the respondents that they were being suspended from work until the 27th June 2000 and were not to enter the appellant's premises during the period of suspension except with Mr Kemp's permission. However, it said that they were "**required to daily report telephonically before 09h00**". Precisely why this was necessary is, quite frankly, incomprehensible to me.

- [27] In a letter dated 15 June 2000 Mr Kemp wrote to each one of the respondents advising that in discussions that he had had with Mr Desai on the 13th and 14th June 2000 the latter had indicated that the respondents would not be applying for any vacancies within the appellant. Mr Kemp, accordingly, sought confirmation from each one of the respondents that what Mr Desai had said about him/her was true. He indicated in the letter that, if he received no confirmation by the end of that day, namely, the 15th June 2000, that that was not the position, he would accept that it was the true position. Mr Kemp testified that he received no response to this letter. Indeed, it was common cause that what Mr Desai had told Mr Kemp was a true reflection of the respondents' attitude. The respondents did not apply for any positions within the appellant pursuant to Mr Kemp's letter of the 7th June 2000.

- [28] On the 27th June 2000 the respondents were found guilty in a

disciplinary hearing or in disciplinary hearings. The sanctions given to them were those of warnings. On the same day the appellant wrote a letter to each one of the respondents and informed them that they would be dismissed on the 30th June 2000 for operational requirements. The letter did not specify what the specific operational requirements were. However, during the evidence at trial both Mr Kemp and Mr Basson said repeatedly that the respondents were dismissed because they did not apply for positions or because they did not take part “**in the process**”. Indeed, even in the notice of appeal to this Court the appellant stated that the Court a quo should have held that the respondents were dismissed because they refused to apply for positions. On the 30th June 2000 the respondents were dismissed.

- [29] In the letters of dismissal dated 27 June 2000 addressed to each one of the respondents Mr Kemp pointed out that he/she would not be paid any severance pay “**as you did not make use of reasonable alternative employment offered to yourself in terms of section 41(4) of the Basic Conditions of Employment Act**”. Of course, the appellant misunderstood the legal position in respect of this last point because in terms of section 41 of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997) (“**the BCEA**”) an employee forfeits his right to severance pay if two conditions prescribed therein are met. The one is that the employer must have made him an “**offer of alternative employment**”. The second is that the employee must have “**unreasonably refused to accept**”

such offer. In this case the appellant never made the respondents an **“offer of alternative employment”**. All the appellant did was to offer the **respondents** an opportunity to be considered for alternative employment if they applied. They were not guaranteed appointment if they applied. They could still have been rejected even if the prospects of that happening were slim. The offer of alternative employment contemplated in section 41(4) of the BCEA is an offer which upon acceptance by the employee would automatically result in a contract of employment. This was not the case in this matter.

- [30] It is necessary at this stage to state that as its response to the respondents’ statement of claim filed in the Labour Court, the appellant filed an affidavit deposed to by Mr Kemp. I do not propose to deal with its contents in any detail. It is sufficient to make certain observations about some of its contents and then refer to some of the annexures to Mr Kemp’s affidavit. Mr Kemp said in his affidavit and in his oral evidence that it was as a result of competition and the need to provide a competitive service that it was felt that the Inflight Service Department needed to be restructured. He specified some of the problems and said it was believed that the new structure would help to address them. In fact he went on to say that the changes that were made did in fact result in better service and cost savings. This evidence was not challenged under cross-examination. Although there was some reference to the Bain and Company report and the break away get-together which was held pursuant to that report, it was never

suggested to Mr Kemp under cross-examination that the restructuring that occurred was unjustified or unjustifiable.

[31] In his affidavit Mr Kemp referred to annexure “SAA1” which represented the new In-Flight Services Revised Operations Structure. When one studies the revised structure, one can see that it had certain posts to which incumbents had already been allocated and many vacant posts to which no incumbents had been assigned. The posts to which incumbents had already been assigned appear in the first page of annexure “SAA1”. The posts were those of Vice-President: In-Flight Services, Executive Personal Assistant 110, Admin Officer 12 L Carine Klome, Senior Manager: In flight Academy, Senior Manager : Operations. Mr Kemp was one of those who had already been assigned posts at the time.

[32] Mr Kemp’s affidavit also had annexure “SAA3”. That annexure was a circular which was issued to crew managers in the Inflight Services Department at the meeting of the 22nd May. Paragraph 1 of annexure “SAA 3” dealt with selection criteria. The opening paragraph read as follows:

“In flight Services would be selecting redundant managers based on best competency fit. Where jobs have changed significantly or are new, they will be advertised. Candidates who best fit the competency profile will be selected for appointment.”

Paragraph 1.1 stated that the “best competency fit” could be

defined as follows:

“Managers, applicants or candidates who demonstrate the best fit to the behavioural indicators of the competencies required to deliver the outputs/outcomes of the job.”

It went on to say: **“The definition includes criteria such as knowledge, skills and attitude.”**

Paragraph 1.2 of Annexure “SAA3” read as follows:

“Jobs that have changed significantly are jobs where the outputs or competencies required to perform the outputs will change to the degree that the employee will be performing tasks which are significantly different to those for which he/she is performing. This also implies that duties/responsibilities as reflected in outputs have been added and or taken away. Job advertisements will initially be open to Inflight Services Managers, whereafter any positions that remain vacant will be open to external candidates.”

- [33] In its reply to the specific allegations contained in the respondents’ statement of claim, the appellant’s defence to the respondents’ challenge to the substantive fairness of the respondents’ dismissal was that the respondents refused to apply for positions in the appellant. It was common cause that the respondents had refused to apply for positions in the Inflight Service Department. With regard

to applying for positions within the appellant but outside the Inflight Service Department, the respondents asked certain questions about such positions through their attorneys and they were furnished with answers. They still did not apply. However, during the cross-examination of Mr Desai, it was established that in asking for that information, the respondents were not bona fide because they did not intend to apply if they got the information they asked for. In my view this was clearly established. The respondents wanted to give the appearance that they were genuinely interested in the information that they were seeking for purposes of deciding whether to apply or not when in fact they had no intention of applying for such positions.

- [34] In his evidence Mr Kemp was referred to that page of annexure “**SAA3**” to his affidavit which had a new structure with him at the top and asked to indicate the positions therein to which the respondents could have been appointed. Annexure “**SAA3**” was part of the new structure or organogram. Two of the positions immediately below Mr Kemp’s position bore the number: 109. The one position was that of Operations Manager: Crew Management, the other, that of Operations Manager: Crew Movement. Immediately below them was the level of “**Admin Assist**”. One level below that were, on the left hand side, four positions of Crew Rank Manager and, on the right hand, side on the same level, were four positions of Manager: Operations Centre. There were also other positions which it is unnecessary to deal with. I have explained the contents of part of annexure “**SAA3**” in detail so as to facilitate an understanding of that part of Mr Kemp’s evidence to

which I now turn.

[35] Mr Kemp testified that one of the respondents could have been appointed to one of the two positions of either Operations Manager: Crew Management or Operations Manager: Crew Movement. He testified that some of the respondents could have slotted in any of the four positions of Crew Rank Manager. Mr Kemp testified that the Crew Management side of the Inflight Service Department was what the respondents had been involved in before the new structure. Mr Kemp said that, since there were only four of the positions of Crew Rank Manager, this meant that those positions would not have been enough for the seven respondents but he said that the respondents who did not get appointed to those positions could have been appointed to other positions. He had already pointed out that one of the respondents could have fitted into one of the two positions immediately below his own position.

[36] Mr Kemp was asked what he thought the respondents' chances were of having been appointed to the four positions of Crew Rank Managers, the one of Operations Manager: Crew Management and that of Operations Manager: Crew Movement if they had applied for those positions. This question was put on the basis of the respondents' skills, experience and other qualities. That would be six positions. Mr Kemp's answer was: **"I would say 90%, they had exposure better than anybody else"**. He was then asked: **"So they would have known how to do this new job as it were?"** He answered: **"Correct"**. Later on Counsel for the appellant suggested

to Mr Kemp that, in accordance with his earlier evidence, the respondents would have had **“a 90% chance of filling the vacancies had they applied for it (sic) because they would have had this competency fit, is that right?”** Mr Kemp answered: **“yes, I mean obviously they have been doing the job, although not exactly the same, just a bit different previously. So they would be able, I mean most of them would have fit the profile of the new position.”** However, Mr Kemp did say that the respondents would have had to take **“some sort a test” – “the interview type of process determining...”** Mr Kemp testified that all the employees at Inflight Service Department who applied for positions in the new structure were appointed. He said that the respondents were the only crew managers who had decided not to apply and were, therefore, not appointed.

- [37] Mr Kemp was asked whether there were any changes in the new structure. It seems that this question was directed at eliciting information that would show whether such changes as may have been effected in the various positions were changes that would have had the effect that the respondents' previous jobs had completely or drastically or slightly changed. Mr Kemp answered that there were **“some changes”** but that they were not major changes. At another stage during his evidence Mr Kemp testified that the respondents had the necessary competence to fill the new positions. Under cross-examination Mr Kemp confirmed that the jobs which the respondents would have done in the new structure if they had applied and were appointed would have been similar even

if not the same as the jobs that they had performed in the old structure. He said that there would have been a slight difference in the jobs. Mr Kemp went on to say that the slight difference would have been in the sense that **“it [would have been] expected of them to manage one specific group of people with subordinates assisting them in terms of management to manage those people. There was better management control. So yes from that perspective it was different.”**

[38] Under cross-examination Mr Kemp testified that what would have caused the respondents to lose their jobs would have been their failure to apply for positions in the new structure or if they failed to meet the requirements of the specific positions. Asked under cross-examination why some employees had been put on the new structure without being required to apply when the respondents were required to apply, Mr Kemp said that he could not say why that distinction had been made as that had not been his decision. The person who had made that decision was not called to testify and justify or explain this decision.

[39] Mr Kemp was asked by Counsel for the respondent whether it would be correct to say that the respondents had lost their jobs because they had refused to apply for positions in the new structure. Mr Kemp answered: **“That is correct, they refused to participate in the process.”** Later Mr Kemp said that they were dismissed because of restructuring. Mr Kemp was asked to say for which operational requirements the respondents were dismissed.

His answer was: **“Based on the operational requirements was the jobs have changed and they did not apply for jobs. A number of jobs have changed.”**

- [40] Under cross-examination Mr Kemp was again asked to identify the operational requirements for which the respondents had been dismissed. His answer was: **“Based on the operational requirement was that the jobs have changed and they did not apply for jobs.”** Mr Basson was asked under cross-examination what the reason for the respondents’ dismissal was. His answer was: **“The reason for dismissal was that they did not participate in the process. There was no proper consultation and no proposals or alternatives was forthcoming which did not leave the employer with much else.”**

Proceedings in the Labour Court

- [41] The respondents were aggrieved by their dismissal which they felt was unfair. Naturally, the appellant felt differently about the fairness of its decision to dismiss the respondents. A dispute then arose between the appellant and the respondents about the fairness or otherwise of the dismissal. In due course the respondents referred the dispute to the Labour Court for adjudication as an unfair dismissal claim. Pillay J heard the matter. She subsequently delivered a judgment in which she found that the dismissal was both procedurally and substantively unfair. She declined to order

the reinstatement of those of the respondents who had sought reinstatement and ordered that all the respondents be paid certain amounts by way of compensation. Some of the respondents had elected not to seek reinstatement whereas others had sought reinstatement. The amounts of compensation ordered to be paid represented the respondents' remuneration for a period of twelve months. The respondents who had sought reinstatement did not note a cross-appeal against the Labour Court's refusal to order their reinstatement. This appeal is, therefore, against the order that the Labour Court made in this matter.

The appeal

The procedural fairness or otherwise of the dismissal

- [42] The appellant made the decision to declare the respondents' positions redundant before there could be consultation with them. This was procedurally wrong. To declare an employee's position redundant affects an employee's rights and interests in an adverse manner. Accordingly, an employer is obliged to consult with the incumbent of such a position before taking such a decision. As a general rule, when an employer contemplates declaring an employee's position redundant, it would also be contemplating the dismissal of such employee because, if no agreement is reached with regard to an alternative position to which the employee could be appointed, dismissal would be bound to follow. If an employer initiates a consultation with the employee or his union after having already declared such employee's position redundant, the

employee's position is already severely compromised and the consultation process is undermined.

[43] Where an employer has declared an employee's position redundant without any prior consultation with the affected employee(s) and the employee rejects an attempt by the employer to hold the consultation after such declaration on the basis that any consultation thereafter would be a sham or would be unfair in the light of the declaration, the employee may, generally speaking, be justified in rejecting such consultation. (compare with **Nkomo & others v Administrator, Natal & others (1991) 12 ILJ 521 (N)** at 521 I – 528 A which was in respect of the audi alteram partem rule). However, this would depend on the circumstances of each case.

[44] There may well be circumstances where the consultation offered after the declaration is even fairer than the consultation to which such employee was entitled before the declaration. In such a case, if the employee rejects an offer of such consultation, and a dismissal follows, the dismissal might not be procedurally unfair. (See Semenya's case, below). However, where the employee agrees to consult with the employer after the employer has declared his position redundant prior to consultation, the procedural fairness or otherwise of any subsequent dismissal would depend largely on what happens during the consultation process. The initial unfairness which would have taken the form of the declaration of the employee's post or position redundant without prior

consultation may be cured if the consultation becomes successful or if its ultimate failure has nothing to do with the initial unfairness but results from the conduct of the employee or his union during the consultation process. Where, for example, the consultation begins but fails to reach finality as a result of blameworthy conduct on the part of the employee or his trade union, the dismissal would be procedurally fair even though the consultation process may have started on a wrong footing. However, there may be a situation where the employer goes through the motions of a consultation process to try and cure the procedural defect which occurred when it declared the employee's position redundant without prior consultation with the employee. In such a case the subsequent dismissal may still be procedurally unfair because the employer participated in the consultation process with no intention of reaching consensus with the employee or his trade union.

- [45] In this case I am inclined to accept Mr Desai's version of what occurred in the meeting of the 22nd May in so far as he testified as to how he and his colleagues were treated by Ms Isaacs when they asked certain questions. Effectively, they were treated abusively by Ms Isaacs and told to go and consult with Mr Kemp. I also accept Mr Desai's version of what happened at the meeting that the respondents had with Mr Kemp immediately after Ms Isaacs' presentation on the 22nd May. That evidence was in effect that they were also abused in that meeting. This time it was by Mr Kemp.

[46] I also accept that at the meeting of the 25th May the respondents did not find much joy. With regard to that meeting the part of Mr Desai's evidence that presents me with some difficulty is where Mr Desai testified that Mr Kemp said that the decisions that had been taken were irreversible. My difficulty is two-fold. The one would support the version that Mr Kemp did not make that statement. The other one would support the version of the respondents that Mr Kemp did make such statement. The first is how probable it is that, if Mr Kemp had made such a statement at that meeting, Mr Desai and the rest of the respondents would still have continued to want to have a consultation with him. One would have thought that, if he had said such a thing, the respondents would have adopted the attitude that there was no point in having a consultation with him because such decisions were irreversible. This reasoning would support the appellant's version. The second is that a statement such as the one which Mr Desai attributed to Mr Kemp might be consistent with the behaviour of Ms Isaacs at the meeting of the 22nd May and that of Mr Kemp on that day and on the 25th May. It might also be consistent with the attitude of the appellant towards those who dared to question its decisions and how it was handling the restructuring as manifested in how Ms Isaacs and Mr Kemp dealt with the respondents in terms of the administrative leave as well. However, it may be argued that such a statement is not consistent with the letters which the appellant wrote to the respondents in which it repeatedly invited them to make suggestions on a number of issues. In this regard the letters of the

22nd May and the 7th June 2000 referred to earlier would be some of the relevant letters in this regard. Indeed, for all intents and purposes, the appellant had to coerce the respondents to attend the meeting of the 25th May so as to consult with them. The question would be why the appellant took all this trouble if it did not want to consult with the respondents or if its attitude was that its decisions were irreversible.

[47] The only way in which one can reconcile the respondents' apparent continued desire to consult with Mr Kemp with the latter having previously made such a statement would be if the position was that when, in their letters of the 29th, 30th May and 7 June 2000, the respondents expressed their willingness to consult with Mr Kemp, they did not mean what they were saying but were simply saying that because they thought it would strengthen their position in subsequent litigation if they were perceived to have wanted to be consulted. And that may well be the position because under cross-examination it was discovered that, in asking questions about vacancies outside the Inflight Service Department but within the appellant which appeared to seek clarification so that the respondents could apply once clarification had been provided, the respondents were shown not to have intended to apply for appointment to any positions but had simply been going through the motions. If this is so, this would support the conclusion that the dismissal was procedurally fair. That is because the respondents' case was not that they refused to be consulted because the appellant

had stated that it had made the relevant decisions and that such decisions were irreversible but their case was that the appellant did not consult them and was not willing to or prepared to consult with them even though they wanted to be consulted. Had the respondents' case been that their dismissal was procedurally unfair because the appellant's offer to consult them was a sham or because consultation was offered after the decision to declare their positions redundant had already been taken and they had, because of that, rejected such an offer of consultation, it might have been easier to conclude that Mr Kemp had made such a statement. However, since that was not their case and their case was that at all times they wanted to be consulted, this makes it difficult to accept this aspect of their version.

- [48] In their letter to Mr Kemp dated 29 May the respondents *inter alia* stated that they would like to be consulted about the restructuring. Mr Kemp said that in response to this letter he made a handwritten note on the letter in which he invited the respondents to make an appointment through his secretary so that he could meet and consult with them. Although Mr Desai denied that the respondents had been aware of that handwritten note, he was caught out under cross-examination. His denial had been false. The matter must be decided on the basis that the respondents became aware of the request that they contact Mr Kemp's secretary to set up the consultation that they "**wanted**" but they elected not to do so. Their election not to do so was probably because they had never genuinely wanted a consultation but had hoped that Mr Kemp

would refuse to consult with them and they would use that to strengthen their case in subsequent litigation. When an employer invites an employee or employees or his or their trade union to consult and the employee(s) or the trade union either rejects or ignores such invitation, or initially participates but later abandons the process due to no fault of the employer, the dismissal cannot be said to be procedurally unfair, if the employee is subsequently dismissed without consultation or without a completed consultation process.

- [49] The Court a quo also accepted the appellant's version that Mr Kemp made the handwritten note on the respondents' letter of the 29th May inviting the latter to contact his secretary to make an appointment for a consultation meeting. However, it seems that the approach taken by the Court a quo was that, if an employer starts a consultation process off on a wrong footing, the employer **"cannot hope to be rescued from its own illegality by securing the participation of the [employees]"**. I take a different view. A consultation process that may be defective or flawed at the beginning may later on end up being a fair consultation process depending on a number of things that may happen along the way. For example, an employer who may have taken certain decisions before there could be consultation with employees may withdraw those decisions and thereafter prove to be completely open - minded in a subsequent consultation process that may be initiated thereafter. (compare with **Semenya and others v CCMA and others (2006) 27 ILJ 1627 (LAC)**).

[50] The Court a quo went on to say that “**the invitation to consult was not supported by any conduct to convince the [respondents] that they [would] not be treated in the same way as they were treated between 22 May and 25 May**”. In my view this consideration was not appropriate because it was not the respondents’ case that, after they had been treated the way that they had been on the 22nd and 25th May, they were no longer prepared to take part in a consultation process with the appellant’s management. The respondents’ case was that at all material times they wanted a consultation with the appellant. The fact that they said this in both their letters of the 29th and 30th May is inconsistent with their having needed Mr Kemp to convince them by his conduct that they would not be treated in the same way as they had been on the 22nd and 25th May. Their own conduct shows that they needed no convincing in order to participate in a consultation process with the appellant. The consultation process could have taken place between the parties had the respondents responded to Mr Kemp’s handwritten note inviting them to telephone his secretary. They did not do so and for that reason they cannot be heard to complain that no consultation was held or that certain issues were not discussed which should have been discussed at a consultation process.

[51] In my judgement the finding of the Court a quo that the dismissal was procedurally unfair cannot be sustained. I am of the view that

the dismissal was procedurally fair. The next question for consideration is whether or not the dismissal was for a fair reason or, put differently, was substantively fair.

Was the dismissal of the respondents for a fair reason?

[52] Sec 188(1) of the Labour Relations Act, 1995 (Act 66 of 1995) (“**the Act**”) provides, inter alia, that a dismissal that is not automatically unfair is unfair if the employer fails to prove that there was a fair reason for the dismissal. The question that now requires consideration in this matter is whether the appellant proved that there was a fair reason for the dismissal and, therefore, their dismissal, of the respondents.

[53] In this case it is common cause that the respondents were not members of any trade union and that is why the appellant had to consult with them directly. It is also common cause that the appellant had no agreement with the respondents about what selection criteria should be used in either declaring them redundant or in selecting them for dismissal for operational requirements. Accordingly, the appellant had no choice but to use selection criteria that were fair and objective in selecting them for dismissal. (see **Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 292 (LAC)** at par 83 - 88). If the selection criteria used did not meet this requirement, their selection for dismissal and, therefore, their dismissal would lack a fair reason.

[54] The respondents were informed on the 22 May 2000 that their positions had been declared redundant. They were invited to apply for positions in the new structure. To this end the appellant ring-fenced positions in the new structure with the result that nobody other than employees from the old structure of the Inflight Service Department could be considered for appointment until either all the employees from the old structure who met the required test were appointed or were found not to meet the test. If some posts in the new structure were not filled from the pool of employees from the old structure because they were found not to satisfy the best competency fit test, then applications would be invited from other SAA employees outside the Inflight Service Department at that stage. It was common cause that employees who were not appointed to the positions in the new structure would then have the opportunity to apply for any vacant positions outside the Inflight Service Department but within the appellant. It is common cause that the respondents refused to apply for positions in the new structure. They also did not apply for appointment to any positions outside the Inflight Service Department but within the appellant.

[55] During his evidence Mr Kemp testified that there were 90% chances that, if the respondents had applied, they would have satisfied the best competency fit test and would have been appointed to certain positions in the new structure. His evidence was also for all intents and purposes to the effect that the respondents were competent or would have been competent to

perform the duties of certain positions in the new structure. He said that there was only a slight difference between some of the positions in the new structure and the positions previously held by the respondents in the old structure. Mr Basson's evidence was either to the same effect or was certainly not to the effect that there were no positions for which the respondents would have been suitable in the new structure.

- [56] All in all the factual position is that the appellant dismissed the respondents for alleged operational requirements at a time when it had vacancies which entailed work which the respondents could perform with or without minimal training. The appellant's defence was that the respondents had refused to apply for positions and, if they had applied, they would probably have been appointed. This defence supports the respondents' case rather than that of the appellant. This is so because, if the respondents would probably have been appointed to positions in the new structure if they had applied because they had about 90% chances of being appointed, that was a good enough reason for the appellant to have appointed them to those positions. If they were offered those positions and, despite whatever support or training they may have needed, and were given, they failed to do the work satisfactorily, the appellant could have dealt with their unsatisfactory or poor performance in terms of the law and procedure applicable to unsatisfactory or poor performance. If the appellant dealt with such issue in terms of such law and procedures but the respondents still failed to perform to the required standard it could have been a fair reason to dismiss them

once the relevant procedure had been followed. Of course, the appellant says: but they refused to apply? What, says the appellant, was I supposed to do if they were not prepared to apply?

[57] In my judgement the appellant's requirement that employees should apply for appointment to the positions in the new structure was effectively part of a process used to select the employees who would remain in the appellant's employ and those who would be dismissed for operational requirements. The appellant required the respondents to apply for positions in the new structure so that it could, by the use of the so-called best competency fit test, decide whether they would remain in the Inflight Service Department or whether they would be dismissed, subject to whether they got appointed to other vacant positions outside the Inflight Service Department but within the appellant. The respondents refused to apply for what they referred to as their old positions. It is important to make the point that the appellant has failed to justify its decision to require some employees to apply when it appointed others without requiring them to apply. In this regard both Mr Kemp and Mr Basson testified that it was Ms Isaacs' decision to appoint some of the managers without requiring them to apply while others were required to apply. Ms Isaacs was not called to give evidence to justify her decision. Mr Desai testified that part of the reason why the respondents refused to apply was because of this inconsistency of treatment on the appellant's part.

[58] The best that Mr Kemp was able to say to try and explain or justify

the appellant's requirement that the respondents and other employees apply for positions in the new structure was that it would have been unfair on some of the employees to just appoint some without allowing all to compete for positions. There are two answers to this evidence. The first answer is that that is precisely the respondents' complaint because they ask: why was it fine for some to be appointed to positions without being required to apply for such positions while they and others were being required to apply for positions? As I have said, the appellant has failed to provide an explanation for its inconsistency in treating its employees in this regard. Accordingly, this matter must be decided on the basis that there was no justification for the appellant to require the respondents and other employees to apply for positions when others were not being subjected to such requirement. This means that in insisting on this requirement the appellant acted in breach of the parity principle. That is the principle that an employer should treat its employees equally or consistently when they are in the same circumstances unless there is justification to differentiate between them.

[59] The second answer to Mr Kemp's evidence in this regard is that fairness could have been achieved by relying on LIFO as part of the selection criteria. In such a case preference for appointment to positions would have been given to those employees with longer service periods than to those with shorter service periods whenever there were two or more employees who could do a particular job with or without some training. LIFO is an objective selection criterion and is well-established in our law of retrenchment. Accordingly, it is no answer to the respondents' unfair dismissal claim to say that they refused to apply because the requirement that they apply for positions in the new structure has not been shown to have been necessary or justified.

[60] The question which arises is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopts a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position the duties of which the employee concerned can perform with or without at least minimal training. This Court affirmed this principle in its decision in **General Foods Industries Ltd t/a Blue Ribbon Bakers v FAWU & others (2004) 25 ILJ 1655 (LAC)** and in its as yet unreported decision in **Oosthuizen v Telkom SA Ltd** case no PA5/04 handed down on 29 June 2007. Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the ensuing dismissal would be without a fair reason. Where, however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance.

[61] An employer should, generally speaking, not use procedures relating to dismissal for operational requirements to solve problems relating to poor work performance of its employees. There is a reason why there are different procedures for the different

permissible reasons for dismissal. There is a procedure applicable to dismissal for misconduct. There is a different procedure applicable to dismissals for incapacity. There is yet a different procedure applicable to dismissals based on the employer's operational requirements. Where an employer wants to have an employee dismissed because he has done something unacceptable to him - which should be dealt with through disciplinary procedures, it is unacceptable for the employer to use retrenchment to get rid of such employee because he knows that whatever the employee has done wrong would not constitute a fair reason to dismiss him on disciplinary grounds. Equally it would not be acceptable for an employer to dismiss an employee for misconduct to avoid having to pay such employee severance pay upon retrenchment when there is no fair reason to dismiss the employee on disciplinary grounds.

- [62] In the light of the above I conclude that the appellant had no justification for its insistence that the respondents and other employees apply for positions in the In Flight Service Department. Just as it had appointed some of the managers to positions in the new structure without requiring them to apply, it could also have appointed the respondents to positions in the new structure without requiring them to apply. As to which employees could have been appointed to which positions, it was clear from Mr Kemp's evidence that there were positions which the respondents could have been appointed to if they had applied. Mr Kemp was able to say this because, as the respondents' immediate superior, he knew

their abilities, skills and length of experience. He was one person who knew them very well.

[63] If there were more employees than there were positions, the appellant could have and should have used fair and objective selection criteria, including LIFO, to select those employees who would be kept in its employment by being appointed to certain positions and those who would not be appointed and would ultimately be dismissed unless they were appointed to other positions outside the department but within the appellant.

[64] The appellant's dismissal of the respondents is unfair for lack of a fair reason to dismiss because it is in breach of the principle of our law of retrenchment that says that, as dismissal for operational requirements is a no fault termination, an employer may not dismiss an employee on the basis that his position is redundant if he has another position which such employee may occupy or has other work which such employee may perform without additional training, or, if training is needed, without minimal training. (see the decision of this Court in **Oosthuizen v Telkom SA Ltd**, supra). It is clear from Mr Kemp's evidence that, when the appellant dismissed the respondents, it still had work which they could do or had positions which they could have been appointed to without any need for any training. Accordingly, the Court a quo's decision that the respondents' dismissal was substantively unfair is, for these reasons, fully justified and must be upheld.

Relief

[65] With regard to relief there was no cross-appeal against the Court a quo's decision refusing to grant an order of reinstatement to those of the respondents who had sought reinstatement. For that reason I shall say nothing about the Court a quo's decision declining to order reinstatement and its reasons therefor. The finding that the dismissal was substantively unfair is capable of sustaining the order of compensation that was made by the Court a quo. If an employee's dismissal lacks a fair reason – which means that it is substantively unfair – the primary remedy in our law is reinstatement. Reinstatement may be denied only in limited circumstances which are set out in sec 193 of the Act. In those cases where reinstatement is denied, compensation would normally be granted. It would be a rare case, indeed, where a court would find that an employee whose dismissal is without a fair reason should get neither reinstatement nor compensation. I am satisfied that, once the respondents were not granted reinstatement, it was fair that they be awarded the compensation that the Court a quo awarded them.

[66] In the light of all the above I am of the opinion that the appellant's appeal must fail.

Costs

[67] With regard to costs I am of the view that the requirements of the law and fairness dictate that the appellant should pay the respondents' costs.

[68] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

McCall AJA

I agree.

Kruger AJA

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Instructed by:

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SAXONWOLD

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BRAAMFONTEIN

Date of judgment:

3 August 2007