IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

<u>HELD AT JOHANNESBURG</u>

CASE NO: JA 3/2007

In the matter between:

MOLAPO TECHNOLOGY (PTY) LTD **APPELLANT**

and

MICHAEL JOHN KUKARD & OTHERS **RESPONDENTS**

J U D G M E N T

<u>LEEUW JA</u>:

Introduction:

[1] This appeal, with the leave of the Labour Court, is against part of the judgment granted by Ntsebenza AJ reported as ***<u>Kukard & Others v Molapo Technology Pty (Ltd)</u>*** [2006] 4 BLLR 334 (LC). In the Labour Court, Ntsebenza AJ held that the dismissal of the respondents by the appellant for operational requirements was not in accordance with a fair procedure because the appellant did not afford the respondents more time to consider

certain issues raised during the consultation process which was not complete when the respondents were dismissed. As a consequence the Court ordered the appellant to pay each respondent compensation equal to three (3) months remuneration.

[2] The Labour Court made a finding that the "decision to lay off the selected employees was substantially (sic) fair." It had been admitted by the respondents in the pre-trial minute that in general there was a need to retrench. The respondents applied for leave to cross-appeal against the Court's order that the dismissal was substantively fair but leave to cross-appeal was refused. The second respondent was a shop steward of Communication Workers Union (CWU). The respondents did not oppose this appeal and thus the appeal is unopposed.

Background

[3] The respondents were all employees of the appellant and were members of CWU.

3.1 The appellant purchased a business from Telkom called IUVATEK as a going concern. The transfer of a business pursuant to such a purchase is subject to the provisions of section 197 of the Labour Relations Act No 66 of 1995 (LRA). IUVATEK was a division of Telkom. It conducted business in electronic systems. It was essentially involved in the repair of circuit boards and electronic pay phones normally operated in the streets. The respondents were employees of IUVATEK prior to the transfer.

3.2 It is common cause between the parties that, when IUVATEK was transferred to the appellant, Telkom had not fully disclosed to the appellant the true financial state of affairs of IUVATEK which was that IUVATEK was running at a loss. More details about this will emerge later in this judgment.

3.3 For some time prior to the transfer of IUVATEK to appellant, Telkom had held discussions with respondents and their trade union with regard to the restructuring of IUVATEK. In 1999 some employees of Telkom were retrenched and others offered voluntary severance packages. Employees of IUVATEK who were under the age of fifty (50) years were not offered voluntary severance packages by Telkom. The respondents, who were employees of the IUVATEK Division then, were advised that they were not eligible for voluntary severance packages. They were informed at the beginning of 2000 that they would be transferred to appellant with effect from the 1st April 2000.

22 March 2000

3.4 A meeting was held on the 22nd March 2000 between CWU representatives which included the second respondent and the appellant's management where it was indicated to the union that:

3.4.1 Telkom was offering voluntary separation packages to the affected employees who would be over the age of 50 years prior to the transfer of IUVATEK on the 1st April 2000. The appellant urged affected employees who were eligible to accept the offer of voluntary separation packages.

3.4.2 In that meeting the management informed the union representatives that certain affected employees of IUVATEK had indicated their wish to be retrenched. According to the management the employees concerned were of the opinion that the appellant purchased IUVATEK with the purpose of selling it at a profit which the employees thought would affect them adversely in that there was a likelihood that they would forfeit their retirement benefits and other benefits due to them. The management also said that the employees complained of lack of work in certain sections.

3.4.3 The appellant's representative also indicated to the respondents that:

(a) appellant intended to turn IUVATEK into a profitable business;

(b) Alexander Forbes would be appointed and be responsible for the transfer and administration of the Pension Fund;

(c) appellant was conducting an analysis of the organisational structure of IUVATEK and the results thereof would be made available to the union.

3.5 It was agreed in the meeting that the shop stewards would conduct a survey within its members with the purpose of determining the general morale and commitment of its members to appellant as well as the above mentioned offer of voluntary separation packages and other issues that could arise relating to the transfer of IUVATEK and that the union would report to the management at a meeting that was scheduled for the 29th March 2000.

3.6 Whilst awaiting a response from CWU on the issues discussed at the meeting of 22nd March 2000, before the meeting of the 29th March 2000, the respondents brought an urgent application in the Labour Court for an order restraining Telkom from transferring IUVATEK as a going concern to the appellant. The application was dismissed with costs.

29 March 2000

[4] On the 29th March 2000, prior to the transfer of IUVATEK to the appellant, a meeting was held between the representatives of CWU, Telkom, and the appellant. I deal below with what transpired in that meeting.

4.1 CWU stated that Telkom's offer of voluntary early retirement for employees 50 years and older was discussed at length with its members and that, though it was not the union's policy to encourage its members to take the offer, it was, nevertheless, acceptable to some members who raised concerns about the future availability of their medical and telephone benefits, which would not be available in the future. The exact number of possible retirees was not yet established;

4.2 Mr Hart, who was the chairman of appellant, informed CWU representatives that the management would present the employees with an offer of voluntary retrenchment on Monday 3 April 2000 and those employees who wished to take voluntary retrenchment would most likely receive more favourable terms than those who would be laid off through any possible future restructuring process that could be initiated by the appellant.

4.3 It was agreed that the management would prepare a "Draft General Notice" to employees which would outline the terms and conditions of the offer of voluntary termination of service. This document would be given to CWU for comment as soon as possible and the management would in turn consider any "constructive input" in that regard. The terms and conditions of the voluntary termination of service were discussed.

4.4 Mr Hart informed the meeting that **"management had initiated an analysis to assist in the evaluation of the most appropriate organizational structure in order to sustain a viable company in the future."** He said that the first draft structure would be completed by the **5th or 6th April 2000.** He further stated that he had made an undertaking during the **"road show"** exercise with the IUVATEK employees that he would **"endeavour to let all employees know where they stood in terms of any new structure within two weeks of the beginning of April 2000".**

4.5 Mr Hart said that the management would give a report back to the unions at a combined meeting of CWU and the other trade union at appellant's: Alliance of Telkom

Unions (ATU). That meeting was scheduled for 10h00 on Friday 7 April 2000 where the management was going to provide details of the proposed structure of the new organization.

[5] IUVATEK was transferred to the appellant on the 1st April 2009. The appellant was able to enter into the financial system of IUVATEK which it had bought with the business. It was discovered that the single line telephone repairs which constituted a major portion of the business of IUVATEK seemed to have little or no work. It was then that the management discovered that a large portion of its anticipated revenue was being depleted.

[6] Appellant was at all times, prior to the transfer of IUVATEK, under the mistaken belief that Telkom would relinquish ownership of the phones and sell or outsource same to another party, which party would be responsible for doing the “stock out service” and continue the supply of single line telephones to the Telkom subscribers and that appellant would have exclusive rights to repair those phones. That right was included in the appellant’s service level agreement with Telkom. However, it came to light on the 1st April 2000, when transfer took place, that Telkom had instead made an arrangement in terms of which every single subscriber had to own a single line telephone and these subscribers were responsible for fixing their telephones or have them replaced when damaged. This

was so despite the fact that in the appellant's service level agreement with Telkom which was to the effect that any equipment sold by Telkom as well as the rights attached thereto, would be transferred to the appellant as a new buyer.

[7] The subscribers could then go to any supplier, for instance, Pick and Pay or Hyperama, and other suppliers who rendered the same service as appellant and did not have to only go to the appellant. Telkom was not responsible for providing such service - not even through an outsourced subscriber. Appellant, according to Mr Hart, was now faced with a situation where it had to search for the subscribers. Other stores rendering similar repair services as appellant emerged. As a result of this unforeseen situation the appellant had to expedite the restructuring process and approach the unions with a proposal of a possible closure of business by having the company liquidated or by restructuring its business. When management realised that the appellant was in dire straits, it initiated a consultation process in contemplation of retrenchments.

Consultations in terms of section 189 of the LRA

6 April 2000

[8] According to Mr Hart, the first week of April 2000 was hectic. On the 6th April 2000 a meeting was held with the respondents'

union where Mr Hart made a presentation. The necessary figures with regard to the viability of continuing with the business of IUVATEK at a profit were presented. At this meeting, Mr Hart presented: an analysis of the income statement of the old IUVATEK Electronics Division, and explained that IUVATEK did not conduct an efficient financial accounting system. The financial statements of IUVATEK were also provided to the union. It was explained that the total expenditure was approximately R50 million higher than the revenue earned. Mr Hart further informed the union that appellant had procured the services of outside consultants at great expense over the previous one or two weeks, and that they put together a proposal on the total restructuring of IUVATEK.

[9] Mr Hart also disclosed in the meeting the figures submitted to appellant by Telkom. He said that those figures were unreliable because of the inefficient accounting system used by Telkom. Mr Hart pointed out that this was the information upon which appellant had relied when it formed the view that the organization could increase its income by a further R30 million. Mr Campbell of the Human Resources Consultants also explained the processes applied in the review of the business.

[10] A notice issued in terms of section 189 of the LRA was read out at the meeting. Mr Campbell went through a detailed schedule for conducting the restructuring process of the repairs division.

CWU was invited to actively consult with the management and to prove suggestions on any possible alternatives that could avoid the need to retrench whilst at the same time facilitating the organization's conversion to a profitable business concern. The management said that the time frame was tight because:

(a) the shareholders of appellant wanted an early conclusion of the restructuring process so as to determine the long term viability of the organization and,

(b) appellant had promised the employees during the road show presentations that the restructuring exercise would be finalized within two weeks after the transfer of IUVATEK to the appellant.

[11] In terms of the "General Notice" dated 6th April 2000 prepared by Mr Hart, permanent employees of IUVATEK were offered voluntary termination services. This letter was read and discussed at the meeting of the 6th April 2000. Certain changes were effected to the "Offer of Voluntary Termination of Service" document and an application form was to be drafted which would allow the employees who would be eligible for voluntary termination of service to (i) subsequently qualify for preferential treatment if re-employment opportunities arose subject to qualification and experience requirements, and (ii) that they be given a period of 48 hours after receiving their

actual package information sheets to make a final determination on whether or not to accept the offer.

[12] CWU was given an opportunity (approximately 20 minutes) to caucus on the issues raised. After the caucus CWU indicated that it was not in a position to respond to the presentation at that time. It was further agreed by all parties at the instance of ATU that the meeting which was scheduled for the 14th April 2000 be moved to the 12th April 2000 at 14h00, and also that the consultations be held jointly with the management and the two unions and each union be given 2 hours at all sites to give a report back to their members. It was stated that the deadline for submitting applications for voluntary termination of service (VTOS) was to be 16h00 on Wednesday 12 April 2000. The timetable for the proposed action plan was from 6th April 2000 and 2nd May 2000. The management and the unions agreed to adhere to this programme. It was further agreed that the report back, with regard to the issues discussed at this meeting, would be held on Friday 7th April 2000 at 9h00.

7 April 2000

[13] On the 7th April 2000, a special meeting was held between the management (Messrs Hart, Peddie and Campbell) and CWU representatives (Messrs Roberts, Sithebe, Makolo and Kemp). The purpose of the meeting was to finalise the communication processes between the management and the unions and the recognition and service level agreements with Telkom. CWU

apologised to the management for not having come back to them on the retrenchment proposals when they were supposed to have done so. Mr Roberts of CWU requested that they be given an opportunity to address their members on the proposals from the management. It was decided that all communication from appellant to CWU be made through CWU's head office. CWU representatives were given a copy of the service level agreement between appellant and Telkom as well as annexures relating to all the equipment to which appellant had exclusive rights. The meeting was then postponed to the 12th April 2000.

12 April 2000

[14] At a consultation meeting attended by CWU and ATU representatives and appellant's management on the 12th April 2000 a letter dated 11 April 2000 from Mr Sithebe, the Sector Co-ordinator of CWU, which was addressed to the "Chairman" of the appellant, was read out. The subject matter thereof was "voluntary retrenchment and requests for disclosure of information." In this letter CWU:

14.1 confirmed the discussions held at the meeting of the 6th April 2000, and the appellant's intention to restructure and that they had agreed to meet on the 14th April 2000;

14.2 complained about the fact that appellant, when it bought the business from Telkom, had already contemplated its intention to retrench and that it started the consultation process with CWU at the last minute which CWU regarded as undermining the consultation process;

14.3 stated that at the "last-minute" consultation meeting of the 6th April 2000, they were advised that, if they failed to co-operate with the management, appellant would consider liquidation proceedings;

14.4 stated that it required more time to consult and canvass the issue of retrenchments with its members so as to have a meaningful and informed consultation with the management in that regard;

14.5 stated that the management did not have consultations with them on the retrenchment package, the selection criteria, the skills required and the training that could be offered to the employees;

14.6 stated that there was no clarity with regard to the number of workers to be retrenched and the reasons therefor as well as information on voluntary retrenchment packages, and, as such, they required more time to consult with their members;

14.7 stated that the deadline of 12 April 2000 for the submission of applications for voluntary retrenchments was unrealistic and they urged the management to extend the date; and

14.8 also requested the management to disclose certain technical information such as audited financial statements, organizational financial and logistical evaluation by the consultants and management, and the reasons why Telkom did not want to be involved in the "single line telephone repairs" and whether appellant had been made aware of the state of affairs when it took transfer of IUVATEK, and many other issues.

[15] The contents of the union's letter of the 11th April 2000 was discussed at this meeting and Mr Campbell, said that

(a) CWU was engaging in the consultation process in bad faith;

(b) the management was prepared to meet everyday including weekends with the unions in order to allow the report back sessions to all employees to take place expeditiously since time was running out for the appellant's restructuring of its business, which was to be urgently completed.

[16] It was agreed that a meeting would be held on Tuesday <u>18 April 2000</u> at 18h00. Management undertook to respond in writing to

the concerns raised and to furnish the unions with information in terms of section 189 of the LRA by close of business on Monday 17 April 2000.

[17] ATU, after having queried some of the calculations stipulated in the offer of voluntary termination of service package, and these having been corrected or adjusted by the management at the meeting, indicated that they were satisfied with the offer made.

18 April 2000

[18] Mr Hart responded in writing and furnished the union representative, Mr Sithebe with the required information at the consultation meeting of the **18th April 2000**. At this meeting, which was attended by the management and the representatives of ATU and CWU, the issues raised by the unions in the previous meeting were discussed and each point addressed.

18.1 With regard to the issue of facilitating a discussion between CWU and Telkom, CWU proposed that a meeting be arranged between itself and Telkom Financial Personnel to discuss the repairs division. It was agreed that the meeting would be scheduled for the following day (19 April 2000). However, later CWU requested that the meeting be postponed to a later date as it wanted to focus on the key issues relating to the consultation process in an attempt to assist in meeting the time frames prescribed for the consulting process. This request was granted.

18.2 ATU stated that there was information still outstanding from appellant and that they were not in a position to propose an alternative retrenchment strategy without the required information. The meeting was adjourned in order to reconvene on the 25th April 2000 at 10h00.

25 April 2000

[19] The minutes of the meeting of the 25th April 2000 are not available but the version of the appellant is that, on the **25th April 2000** the meeting was delayed for two hours because CWU's key representatives namely, Messrs Sithebe and Roberts, did not arrive on time and the meeting had to proceed in their absence. CWU was represented by Messrs Makola and Joachim and ATU by four (4) members.

19.1 The management was expected to report back to the unions on:

"● A diagram reflecting the structure of the organization

● Key job requirements for the proposed organizational staffing model;

● Criteria to be used for skills retention;

● The reason for Molapo continuing with the purchase of the Iuvatek organization with the "Single Line Repairs Function;

- A confidential list of the names of all employees whose applications for VTOS had been rejected
- Management's view on employees whose applications for the VTOS had been rejected but were later to be retrenched."

19.2 CWU was to report back to the management on the relationship it had had with its members regarding their suggestion on possible alternatives that would avoid retrenchments and other proposals from the management.

19.3 ATU had requested certain information from the management which was outstanding at the time of the meeting of the 18th April 2000 which information was required by it in order to propose an alternative strategy to deal with the problem which was threatening jobs.

[20] At this meeting Mr Peddie, the Human Resource Manager, identified the employees who would be affected by the retrenchment. The list was given to the representatives of the different trade unions at the end of the meeting. Mr Peddie informed the representatives of the trade unions that he had e-mailed the list of those names on the night of the 24th April 2000 to the offices of the different trade unions. The union representatives were not ready with the information required and they requested that they be given time to consult with their

members. They indicated that they would report back to the management on the 26th April 2000.

[21] The respondents' version with regard to the meeting of the <u>25th April 2000</u> is that:

21.1 prior to this date, the only information they had received from the management was the organogram and the list which was drawn up in respect of the status of the voluntary termination process;

21.2 they were given a list after the meeting at about 22h00 to consider the criteria that the appellant envisaged using for selecting employees for retrenchment and that the list was allegedly faxed to them by Mr Peddie at 18h00 on Thursday (25 April 2000);

21.3 When the meeting ended the voluntary termination process had not yet been completed and it was expected that the union was still to consult with its members on the new proposal concerning forced retrenchments;

21.4 they had consistently explained to the management that their efforts to consult during the April were impeded by the high number of public holidays, especially in view of the fact that their shop stewards came from various regions around the country and had other commitments besides the consultation process at appellant;

21.5 Their time constraints were brought to the attention of the management at all meetings of the 6th, 12th and 18th April 2000, but the management did not grant them any latitude in that regard;

21.6 the consultations were such that management was giving them information regarding structures proposed and other information but had not started addressing issues on how they could reach consensus on matters such as retention of skills, the criteria for selection and the voluntary retrenchment process that was in progress at that stage;

21.7 it was unrealistic of the management to formulate a position on retrenchments at that stage as it was yet uncertain as to how many employees would remain at the end of the voluntary severance package process;

[22] According to Mr Kemp, on the night of the 25th April 2000, the respondents were asked whether they would be available for a discussion on the 26th April 2000. CWU indicated that they were not available because the shop stewards were already committed to their various regions with regard to the April 27 activities which is a Freedom Day;

[23] According to the respondents, the consultation process was flawed in that the respondents were only afforded two days, one of which was a public holiday, to discuss the proposal from the appellant and report back on the mandate received from the affected employees.

[24] According to Mr Peddie, on the morning of the 26th April 2000 he sent the additional list which contained the names of those employees who faced forced retrenchments, and the full compliment of their skills, by e-mail to CWU and ATU offices. When no response was received from CWU, Mr Hart, on behalf of appellant, wrote a letter which was sent by facsimile transmission to the CWU office. That letter was marked for the attention of Mr Sithebe. It reads as follows:

> **Reference: Restructure Of Molapo Technology – LRA Section 189 Process**
>
> We refer to our consultation meeting of 25 April 2000 at which you undertook to respond to us by close of business on 26 April 2000 with alternatives and counter proposals in respect of the possible retrenchment of your members.
>
> You have now received all relevant information requested by you for purposes of consulting on all items as per our Section 189 notification of 6 April 2000 dealing with possible retrenchments. We have met on numerous occasions and have further entered into correspondence with you. Despite this and despite you undertaking on 25 April 2000 you have failed to respond to us by the deadline imposed by yourselves.

> We are therefore forced to assume that, having had access to all of the relevant information you neither have alternatives to retrenchment nor any further counter proposals in this regard.
>
> We have attached, for your information, our response to an ATU submission in this regard and are prepared to consider your comments thereon should you have any. Despite your inexplicable silence we are available to meet with you at 15h00 for purposes of discussing any proposals that you have relating to the possible retrenchments. Failing that we will have no alternative but to implement the proposed retrenchments from the morning of Friday 28 April 2000 as per the list of employees supplied to you.

[25] On the <u>26th April 2000</u> Mr Sithebe wrote a letter and had drawn up a document in which alternatives to retrenchment were proposed. He indicated in the document that he would send a list of the affected employees to appellant early on Friday the <u>28th April 2000</u>. At this stage I pause to point out that the 27th April was a public holiday of great significance to the black majority in this country. It was on the 27th April 1994 that black people in South Africa exercised the right to vote for the first time. That day marked the end of the white minority rule and racial oppression of the black people by white people in this country. Since 1994 the 27th April is a public holiday and black people in particular celebrate that day. Mr Hart testified that he did not receive the letter and as there was no response from the union, he issued letters of dismissal on the 28th April 2000 to everyone who was to be retrenched. In the termination notices, Mr Hart stated that the cut-off date for the consultation

process was the 30th April 2000 and that it was surprising that the employees received their notices of termination of employment on the 28th April 2000.

Labour Court

[26] I have already alluded to the fact that the Labour Court found that the decision to dismiss the selected employees, including the respondents, for operational requirements was substantively fair.

[27] As regards the procedural fairness of the dismissals, the Court stated, amongst others, the following: "I am not persuaded that the employer, on the evidence tendered by it, can be held, justifiably, to have followed a process that can be labeled as having been wholly unfair" because of the following:

27.1 the evidence of Messrs "Hart and Peddie is unblemished in its clarity" that as soon as the appellant contemplated that retrenchments might be necessary, it attempted to engage the unions' representatives with the first consultation of the 6th April 2000;

27.2 on realising that the relevant division of the appellant was in dire straits, and, having gone through an intensive exercise on how to salvage the company, the appellant had embarked upon and conducted an intensive consultation process over a period of three (3) weeks in April 2000;

27.3 it was common cause that the situation demanded urgent attention and also that the appellant did provide the unions with a great deal of information during the consultation process; and that

27.4 the detailed memorandum provided to the unions on the 20th April 2000, was as a result of the discussions which were held with the unions on the 18th April 2000, which information assisted the appellant to compile a list of the employees identified for retrenchment and whose criteria were discussed at the meeting of the 25th April 2000.

[28] Notwithstanding the above, the Labour Court held that the procedural process was to a limited extent unfair based on the different perceptions held by the appellant, on the one hand, and employees, on the other, with regard to the significance of Freedom Day celebrations on the 27th April in South Africa. Mr Kemp and the respondents had explained that the union could not have any meaningful and effective consultation with their members between the 20 April 2000 and 25 April 2000 (which was the Easter Weekend) and 26th and 27th April 2000 (the latter date being Freedom Day). The Labour Court rejected a submission by Counsel for the employer with the latter that the reason given is an insignificant one.

[29] With regard to the appellant's conduct relating to the consultation process, the court stated the following:

29.1 "There is, in my view, something precipitous about the way in which, over that critical period, the employer conducted itself. The **formalistically correct approach - business like if you want - with which the employer dealt with this time in its negotiations process with the workers was insensitive. It failed to appreciate the passion with which workers, black workers in particular, hold the advent of freedom close to their hearts. Insofar as I am called to make a value judgment by Mr Wesley to the effect that the Union failed the Applicants – and not the Respondent – in the process that was not as complete as it could have been, that value judgment must be premised not only on the evidence, but also on what I perceive to be the values of present day South African society. I hold that the values of dignity, freedom and ubuntu, values enshrined in our Constitution, place an imperative on Employers to be much more sensitive to what is dear and sacrosanct to their employees. In this case, a long Easter Weekend culminating in the Freedom Day celebrations of 27 April 2000, was conducive to the employees' desire to celebrate a historic event in the history of the land. I do not consider that it is fair, to**

suggest that the choice the workers made is something that they ought to be blamed for." ; and that

29.2 the appellant should have been flexible especially in view of the fact that "a fair process up to the point when the long weekend came about was somewhat **marred by this unfortunate attitude by the Employer."** The Court described this attitude as **"hardnosed"** which **"rendered this process not as exhaustive as it could have been, had there been some sensitivity on the part of the Employer".** The Court went further to state that: **"It is an insensitivity that does not amount to *mala fides*. It is one, however, that is not a technical deficiency either. It goes to the heart of what should weigh with me heavily as to whether a matter of weeks could have made a difference to the ultimate fate of the employer."**

[30] The Court held that, had the appellant allowed the consultation process to continue for a week and to complete it, it would not have been flawed based on the reservations the Court strongly expressed with regard to the Easter and Freedom Day celebrations, which holidays are of national interest to the people and the employees especially in the context referred to above.

The appeal

[31] The appellant submitted that the Court ***a quo*,** erred in finding that the consultation process was not complete when the respondents were dismissed. In the alternative, it submitted that, even if it could be found that the consultation process was not complete on the date of dismissal, the Court ***a quo*,** erred in finding that the appellant was at fault for this. The appellant also appeals against the order of compensation granted as well as the costs order.

[32] Counsel for the appellant submitted that at no stage during the consultation process did CWU indicate that the timeframe adopted was unacceptable but that, on the contrary, during the final consultation of Tuesday 25 April 2000, when the selection criteria were applied to the remaining employees, the union had indicated that it would, in accordance with the time frame, make submissions concerning the application of the selection criteria on the 26th April 2000, and that the union failed to do as promised. He further submitted that the union had indicated in a letter sent to the appellant on the 27th April 2000 that it would submit alternatives to retrenchment on the 28th April 2000, which undertaking was not kept. He further submitted, on this issue, that the consultation process was complete on the 28th April 2000 because of CWU's failure to submit its input as arranged.

[33] This submission cannot be correct and it is a very unrealistic approach in that it overlooks the issues raised by the Court ***a quo*** that the period during the Easter Holidays and the 27th April 2000, wherein most workers and their union representatives in all regions in the country, would normally be involved in various Freedom Day celebrations, made it difficult for CWU representatives to meaningfully consult with its members. The respondents indicated, when they gave evidence, that it was not easy for their union to reach its members within the short space of time at their disposal. Furthermore, the list of employees who were to be retrenched was e-mailed to the union's offices on the evening of the 25th April 2000 and the complete list with the selection criteria was given to the union representative in the afternoon at a meeting of the 26th April 2000. It was expected of the respondents to consult with their members between the night of the 26th April 2000 and the morning of the 27th April 2000, and give the appellant a response on this date.

[34] I am of the view that in the circumstances it would have been very difficult for the union to assemble its members within that short space of time in order to discuss the list submitted by the appellant. The appellant ought to have been flexible by allowing a further extension of the consultation process instead of issuing letters of dismissal on the 28th April 2000 especially in view of the fact that the 27th April 2000 was such an important public holiday which behoved all concerned to show some

understanding and sensitivity. In this case the joint consensus seeking process was foiled by the appellant in that regard. See ***Johnson & Johmson (Pty) Ltd v Chemical Workers Industrial Union*** (1999) 20 ILJ 89 (LAC) par [26] – [31]; ***Alpha Plant & Services (Pty) Ltd v Simmonds & Others***; (2000) 22 ILJ 359 LAC; Compare ***Chemical Workers Industrial Union & Others v Latex Suraical Products (Pty) Ltd*** (2002) 23 ILJ 1386 (LC) at par [14];

[35] Mr Wesley further referred to the letter written by CWU on the 27th April 2000 and submits that nowhere in this letter was mention made of the union's alleged inability to consult on that date because of its pre-arranged commitments to COSATU. Although the letter does not make an express reference to the union's commitment to COSATU, in the letter the union did refer to the appellant's heavy and inflexible approach towards the completion of the retrenchment process. Part of the letter of the of the 27th April 2000 reads as follows:

> "**Time frames**
>
> The company has continuously remained extremely rigid with respect to the completion date of the process. We have time and again declared our willingness to do everything possible to do justice to the process in this regard but the company is hell-bent on meeting the deadline for possible retrenchments. We still feel that the process is the important issue and would thus once again request that you show flexibility with regards to the timing of the dismissals."

[36] It was further argued that Mr Kemp had indicated that he would be available for consultation for the best part of the 27th April

2000 and therefore the union could have attended the consultations despite the fact that it was Freedom Day. There is no merit in this submission. This line of argument detracts from the fact that the consultations would have been futile taking into consideration the fact that the union had not consulted with its members.

[37] Furthermore, after the meeting of the 25th April 2000, CWU responded to the issues which were raised at the meeting and it expressed its disquiet about the failure of appellant to adequately disclose information requested from it. I need not overburden this judgment with the information which the union alleged was still outstanding, but in that letter it was indicated by the union, amongst others, that a list had been drawn up by it as well as alternatives to retrenchment, which list would be provided on the morning of Friday 28th April 2000.

[38] ATU had responded by a letter dated 26 April 2000 which was sent by facsimile transmission to the appellant to the issues raised at the meeting of the 25th April 2000. The appellant responded to the issues raised in their memorandum but pertinently stated that it was proceeding with the retrenchment process and that letters of retrenchment would be issued on the 28th April 2000.

[39] At that stage, apparently the appellant had not received the letter dated 27th April 2000 from CWU. The appellant in return

wrote a letter to CWU and attached ATU's response thereto, and indicated to CWU that, if no response was received from CWU by 15h00 on the 27th April 2000, (which was the date on which the letter was sent by facsimile transmission), it would definitely proceed with the retrenchment process on the 28th April 2008. The appellant did not establish whether or not its letter was received by CWU, considering that it was a public holiday.

[40] With regard to the issues raised above it is clear from the correspondence between CWU and the appellant that the consultation process had not been concluded when the respondents' employment was terminated. The appellant's inflexibility and lack of sensitivity and understanding towards the consultation date which fell within the Easter week-end and Freedom Day celebrations, contributed greatly to the breakdown of the consultation process. I am satisfied that the Court ***a quo*** did not misdirect itself in any way and that it was correct in coming to the conclusion that the dismissal was partly procedurally unfair.

Compensation

[41] Section 194 (1) of the Act provides:

> "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 the

> *employee's* conduct or capacity or 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*.

[42] It is trite that the decision to award compensation where the Court finds that the dismissal was procedurally unfair, falls within the discretion of the Court or the arbitrator, as the case may be. See ***Johnson & Johmson (Pty) Ltd v Chemical Workers Industrial Union** supra*, ***Lorentzen v Sanachem (Pty) Ltd*** (2000) 21 ILJ 1075 (LAC) and ***H M Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes*** (2002) ILJ 278 (LAC) at [12] ***Alpha Plant & Services (Pty) Ltd v Simmonds & Others** supra.* The duty of the Court of Appeal is to assess whether such discretion was properly exercised.

[43] The extent of the deviation from the required standard of the consultation process is also important in determining the amount of compensation to be awarded. The Court ***a quo*** stated, with regard to compensation, that the appellant ought to have allowed the consultation process to continue for a period of four to six more weeks and that this did not happen because of the appellant's conduct. This is an important factor in considering the issue of compensation.

[44] The Court ***a quo*** did not give reasons for awarding three (3) months remuneration as compensation. In the absence of such

reasons for exercising its discretion, this Court is free to reconsider the appropriate amount of compensation in that regard. See ***Highveld Steel & Vanadium Corporation Ltd v National Union of Metalworkers of SA & Others*** (2004) 25 OLJ 71 (LAC) at [60]. In reconsidering the compensation awarded by the Court ***a quo***, it is correct that the extent of the deviation must be taken into consideration. In this case, taking into account the fact that the issues raised by the unions prior to the meeting of the 25th April 2000 were not adequately addressed by the appellant, and further considering that the appellant had not taken the proposals submitted by CWU into account, and the fact that factors raised by the Court ***a quo*** about the time limit constraints occasioned by the Easter and Freedom day celebrations weighed strongly in favour of the award for compensation, I am of the view that the compensation awarded is not excessive and unreasonable in the circumstances.

[46] The appeal must fail and the following order is accordingly made:

(1) The appeal is dismissed.

(2) There is no order as to costs

LEEUW JA

ZONDO JP

TLALETSI AJA

APPEARANCES:

For the appellant	:	Adv M A Wesley
For the respondent	:	Adv J Van Der Schyff

Date of hearing	:	03 June 2008
Date of judgment	:	08 May 2009