IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NUMBER C 54/97

In the matter between:

PHILIP BENJAMIN & 12 OTHERS ***Applicants***

and

PLESSEY TELLUMAT SA LIMITED ***Respondent***

JUDGMENT

BASSON J

1] The 13 applicants were retrenched by the respondent, Plessey Tellumat SA Limited (hereafter also "the company") on 6 December 1996. The applicants contend that their dismissals were both substantively and procedurally unfair. Section 188(1) of the Labour Relations Act, 66 of 1995, (hereafter "the Act") requires that the respondent must prove that the reason for the dismissals was a fair reason based upon the respondent's operational requirements and that the dismissals were effected in accordance with a fair procedure. By agreement between the parties, the respondent started with its case.

2] The witnesses for the respondent made a good impression on the Court and also earned a well-deserved concession from the applicants' counsel in this regard in that their credibility was not specifically attacked in argument before the Court.

3] The respondent's witnesses testified to the fact that, during 1996, the broadcasting and metering departments, which were two of the manufacturing departments of the PLESGEM division of the company in Cape Town, experienced a drop-off in production which resulted in over-manning in these two departments. The company presented detailed evidence in regard to the reasons for these problems. In a nutshell, the drop-off in production was mainly attributable to the fact that business in South Africa was slow as well as the fact that the respondent's attempts to obtain international business had not produced sufficient work, especially because the foreign markets required the manufacturing element of the contract to be carried out in their own countries.

4] These facts were, on the whole, not attacked by the applicants' witnesses. However, the allegation was made that these misfortunes were due to mismanagement by the company of its affairs. In this regard, mention was made of design problems which had been a matter of concern to the employees in the broadcasting department in 1996 but were allegedly not properly attended to. The company's witnesses disagreed and stated that these problems were attended to and were, in fact, not the reason for the drop-off in production. I accept this evidence in the light of the detailed evidence presented by the respondent to show what the reasons for the economic problems were. In any event, even if the economic rationale for the retrenchments, that is, the drop-off in production and the resultant over-manning, was due to mismanagement, the Court will generally still regard it as a legitimate basis for dismissals for operational requirements. After all, it is generally inconceivable that a company will

mismanage itself with a view to getting rid of its employees. The *bona fides* of such employers are accordingly not suspect unless there is clear evidence of such ulterior motives.

5] After holding various meetings between themselves during September 1996, at which the managing director of PLESGEM, Mr A Roy, and Mr K Alborough, the group human resources director, (both of whom testified in Court) were present, management was of the view that the operational requirement to reduce manning levels in the two departments was not of a temporary nature. Management therefore decided to engage in retrenchment consultations with the employees who were going to be affected. It is common cause that all of the applicants were members of the Metal and Electrical Workers Union of South Africa (hereafter referred to as "the union" or "MEWUSA") and that they were represented during the consultation meetings by Mr P Benjamin primarily (the first applicant who was also a shop steward of the union at the time); Mr M Tyatyeka (a full-time union official); Mr D Lewis (a full-time shop steward of the union at the respondent at the time); as well as by the other shop stewards of the union. Both Mr Benjamin and Mr Lewis testified on behalf of the applicants.

6] On 18 October 1996 the employees and the union were informed that a consultative meeting in regard to possible retrenchments in the said two departments was to take place on 25 October 1996. The employees were invited to attempt to reach consensus on appropriate measures to avoid, minimise the number, change the timing and/or mitigate the adverse effects of the possible retrenchments and on the method of

selecting retrenchees as well as on severance pay. Section 189(2) of the Act, of course, requires the consulting parties to attempt to reach consensus on these very same and crucial issues. After being thus informed, the union's shop steward council resolved to do nothing until the consultative process commenced.

7] On 25 October 1996 the first of seven consultative meetings between the union and the company took place and details were given of the operational requirements giving rise to possible retrenchments. The union representatives at these meetings now complain that they were "bombarded" with information and that Mr Alborough tended to "over-explain". I am not convinced that the company did anything wrong, procedurally speaking. The union, by its own admission, had time to put questions and the material (including slides) was made available after the meeting. After all, Mr Lewis who did not attend the meeting, testified that he had not even bothered going through the material before the next meeting on 4 November 1996. Unfortunately, this unhelpful attitude that was displayed by Mr Lewis became the rule rather than the exception as the consultative process unfolded.

8] At the next meeting on 4 November 1996, Mr Alborough explained the details of various of the vacancies within the company that had been identified and in which possible retrenchees might be able to be accommodated. Other alternatives to retrenchment which were discussed included voluntary early retirement; a moratorium on recruitment in the manufacturing areas; a moratorium on overtime in the manufacturing areas except where this was critical to satisfy customer requirements; the reduction of night shifts except in areas where night shifts were required because

of machine capacity or customer requirements; the elimination of contract work; the retirement of employees beyond retirement age; short time; layoffs; and job-sharing. Mr Benjamin admitted that the respondent had thought about everything conceivable as alternatives to retrenchment. In fact, the minutes clearly show that the union representatives never challenged the respondent's stance or proposals in relation to any of the above alternatives at any stage of the consultation process.

9] At this meeting, the respondent also proffered a so-called shopping list of selection criteria to which the union objected at the next meeting on 12 November 1996. The company then changed its view and proposed that the selection criteria be LIFO subject to the retention of critical skills. At this meeting, the company also tabled a formal written proposal indicating that it would give consideration to applications by employees in all of the manufacturing departments in Cape Town who wished to volunteer to be retrenched, subject to the retention of critical skills and approval by the company. Further, in terms of this proposal, the company undertook to retrench temporary employees first. The document also contained the company's proposal in relation to severance pay, comprising two "formulas".

10] The union representatives raised the question of alternative jobs and redeployment into such vacancies. Mr Alborough informed them that, if alternative jobs became available, also those following successful applications for voluntary retrenchment, these vacancies could be made available to retrenchees, but at the grade or rate of pay of the vacancy, even if such grade or rate of pay was lower than that of the position occupied by the potential retrenchee to whom the job would be offered. Mr Benjamin

denied that he knew, even when a further written proposal was made available on 15 November 1996 which stated that such transfers would be on "terms and conditions of employment commensurate with the vacancy", that this meant that redeployment could be at lower grades or rates of pay.

11] This evidence is unconvincing as Mr Benjamin was an experienced shop steward who could hardly have misunderstood. Moreover, Mr Alborough's version is borne out by the written notes that he kept of the meeting of 12 November 1996 (of which no minutes were kept). Mr Alborough also undertook at the meeting to try to match the grade of employees facing retrenchment to the grade of the vacancies available, subject to the necessary skills matching. It also became clear at a later meeting that the longest serving employees would be given first choice of the redeployment positions on offer. Lastly in this regard, I can see no reason whatsoever to doubt Mr Alborough's evidence that he had given the union representatives the company's reasons for adopting this position. The company's position was, that to have offered higher wage rates to the transferees, would have caused problems with existing employees and that it would have increased costs in a manner that did not make economic sense. In my view, there was nothing inherently unfair in offering the vacancies at the commensurate grades even if these grades were lower that of the retrenchees' former positions. After all, this was being offered as an alternative to being dismissed.

12] In terms of a management brief of 13 November 1996, all of the employees in the manufacturing section in Cape Town were invited to apply for early retirement or

voluntary retrenchment on the basis set out above (at paragraph [9]) and were required to do so before 20 November 1996.

13] After a further consultation meeting on 15 November 1996, the union representatives obtained a mandate from the union's members, *inter alia*, to put a proposal of LIFO "across the board" as selection criteria. Mr Benjamin tried to convince the Court that the union had put a position that the scope of application of the selection criteria should be "at least the manufacturing areas in Cape Town" and not only the two affected departments (the company's stance throughout) already at the (unminuted) meeting of 12 November 1996. This proposition was, however, never put to Mr Alborough when he gave evidence. It is evident from the minutes of the meeting of 4 November 1996 that Mr Alborough specifically requested the union to put its position in regard to "whether we should look at the affected areas only, that is, metering and broadcasting or whether we should look at the entire manufacturing operations in Cape Town as a whole unit" (the Bundle at page 95). It is therefore clear that the union's view was not known to the company at the meeting of 4 November 1996. The union representatives never adopted a clear position in this regard during any of the minuted consultation meetings and, in fact, at the meeting of 19 November 1996 they appeared to support the idea of applying LIFO within "Plessey as a company" (see the Bundle at pages 211 to 212). By his own admission, Mr Benjamin failed to give a clear answer when Mr Alborough asked what this entailed: "You mean country wide, world wide, Cape Town?" to which he answered "No", without giving any explanation at all. By contrast, Mr Benjamin, acknowledging that the application of LIFO to Plessey as a company worldwide would be "ridiculous", tried to persuade the

Court that the union's position in regard to this matter was made clear. Furthermore, the fact that Mr Alborough had to specifically try to elicit this information at the meeting of 19 November 1996 showed that the statement by Mr Benjamin that this matter had already been made clear by the union representatives at the (unminuted) meeting of 12 November 1996 (*supra*) simply could not be correct. The union representatives' negative attitude towards consultations is, of course, evident from these quoted portions of the minutes as they clearly did not wish to put forward a proper counter-proposal on the application of the selection criteria.

14] Consultations, of course, remain a two-way street where both parties must give their full cooperation in the quest for consensus on these very sensitive matters. After all, section 189(2) of the Act makes it clear that both consulting parties must attempt to reach consensus on matters such as the method for selecting employees to be dismissed. The union representatives can now hardly complain about the fact that the company had implemented its own position in regard to the selection criteria, that is, that LIFO would apply in the affected departments or areas only. As the representatives of the retrenchees, the union representatives should at least have put a clear counter-proposal on the table in order to make the consultations meaningful in the quest for consensus.

15] The same reasoning applies in regard to the applicants' complaint that the company simply introduced its own two formulas on severance packages, without more ado and thereby failed to attempt to reach consensus on severance pay. In reality, the union representatives simply failed to put forward a proper counter-proposal in this regard.

The request by Mr Benjamin at the meeting of 19 November 1996 for clarity: "Are you saying, you are offering two weeks for every year of service up to ten years and thereafter whatever is contained in the main agreement?" (the Bundle at page 168), hardly qualifies as a proper counter-offer. In fact, Mr Benjamin conceded as much.

16] I also do not accept Mr Benjamin's evidence that he put a clear counter-offer at the (unminuted) meeting of 12 November 1996. In fact, it was worrying that Mr Benjamin time and again appeared to seek refuge in the unminuted meetings to back up his version. In this regard it is significant that Mr Lewis, who was also present at this meeting, did not corroborate Mr Benjamin's version. Moreover, Mr Alborough testified on behalf of the company to the effect that the union had never put a counter-offer to him in relation to severance pay and this evidence was not challenged in cross-examination. I accordingly accept the respondent's version that no counter-offer on severance pay was forthcoming. The union representatives' proffered excuse, that is, that Mr Alborough appeared to be intransigent, hardly excused them for not making a counter-offer. It must also be noted that, as far as the consultations on the selection criteria are concerned, such excuse also does not hold water as Mr Alborough was evidently trying his level best to get a clear answer from Mr Benjamin (as it appears from the minutes quoted above at paragraph [13]).

17] In the same vein, the applicants complained about the fact that layoffs were never considered as alternative to retrenchments. However, the union representatives never raised this possibility with management during the consultation meetings. The evidence on behalf of the respondent to the effect that it was explained that layoffs as

alternative to retrenchments would be inappropriate because the downturn was perceived to be a permanent and not a temporary one, was never challenged. It was only when Mr Benjamin came to testify that he stated that "layoffs maybe could have worked". The same reasoning also applies to the applicants' complaint in regard to the fact that a moratorium in the non-manufacturing departments was not introduced. No such alternative was ever raised in the consultation meetings.

18] The union representatives likewise displayed a negative attitude during the redeployment process, thereby reaffirming their unhelpful attitude towards the retrenchment process as such. As it will appear more fully below (at paragraphs [40] to [42]), some individual applicants had raised specific complaints in regard to the implementation of the redeployment process and the union representatives' role in this process must accordingly also be carefully scrutinised.

19] In this regard, Mr Benjamin admitted that the union representatives had failed to explain to their members that (i) the method that the respondent would be applying in selecting who was to be redeployed would be LIFO subject to the retention of critical skills; (ii) some of the positions which the respondent would offer would be at lower grades than those enjoyed by them at the time; and (iii) if those offered redeployment were not successfully redeployed they were more than likely to be retrenched, having regard to the respondent's approach that the selection criteria would apply in the affected departments or areas only.

20] Moreover, a list of the vacancies that were available elsewhere as well as a further

list, detailing the employees who had opted for voluntary retirement or retrenchment and the vacancies left by their departure, were made available to the union representatives. A further redeployment list, showing the affected employees in the affected areas, was also given to the union representatives. Notwithstanding the fact that these lists were made available, none of these lists were ever given to the union's members because the union "did not want to do the company's dirty work for them"(the testimony of Mr Lewis). This happened despite the fact that management had made it clear in its brief on the same day (20 November 1996) that the affected employees could get the redeployment and vacancy lists from their full-time shop stewards. Somehow, at least the redeployment list became available on the shop floor.

21] The respondent continued with the redeployment process and the applicants (with the exception of Messrs Benjamin and Matroos) were informed on Friday 22 November 1996, in both group and individual discussions, that they had been identified for redeployment and that the only redeployment jobs that the respondent was able to offer them were at grades lower than their existing grades. The only exceptions were Messrs Benjamin and Meintjies who were eventually offered jobs at the same grade than their existing job grades. The applicants were also told that formal written offers of redeployment would be put to them for consideration on Monday 25 November 1996. On 25 November 1996, written offers of redeployment were duly put to the affected employees (including the applicants) and those who did not accept immediately were afforded until Wednesday 27 November 1996 to make a decision as to whether to accept or not. The said letters of redeployment recorded that, if the employee in question did not accept the redeployment offer, he or she will be

retrenched (the Bundle at pages 245 to 281). The union representatives expressed concern and a further consultation meeting took place on 26 November 1996. Specific issues such as the dates of appointment of Messrs Lowings and Daniels as well as the transfer of Ms Beukes and Ms R Thompson came up for discussion (none of these employees were applicants). These issues are dealt with more fully below (at paragraphs [33] to [35] and paragraphs [45] to [47], respectively).

22] A further consultative meeting was held on 28 November 1996 where these issues were once again discussed. The retrenchments were eventually postponed from the original target date of 30 November 1996 to 6 December 1996 to allow time for the verification of information that was queried by the union representatives. A report from a manager, Mr K Rhode, dealing with the said transfers was handed to the union on about 2 December 1996 and a final consultative meeting took place on 6 December 1996 where the dates of the appointment of Messrs Lowings and Daniels were confirmed as correct.

23] The applicants, having rejected the offers of redeployment, were thus given notice of their retrenchments by no later than 6 December 1996 and received payment in lieu of their respective notice periods. The retrenchees were also paid out their outstanding leave entitlement, pro-rata annual bonus, health bonus (if applicable), annual leave bonus and severance pay in accordance with the above-mentioned formulas (see paragraph [9]).

24] The applicants still appeared to complain about not receiving certain information from

the company. However, in the light of Mr Benjamin's concession that by the close of the last consultative meeting on 6 December 1996 there were no further outstanding issues or information that needed to be dealt with, this complaint appears to have no substance at all.

25] In view of the aforegoing discussion on the retrenchment process, it appears that the respondent consulted the union as the representative of the applicants in terms of section 189(1)(c) of the Act on all of the issues required in terms of section 189(2) of the Act. In general, all of the information required to be given to the applicants in terms of section 189(3) of the Act was also provided. The Court was also persuaded on the basis of the evidence discussed above (at paragraphs [3] to [4]) that a proper economic rationale existed for the retrenchment of the applicants from their positions in the two affected departments. After all, the operational need to retrench was never seriously challenged during the consultation meetings or during the proceedings in Court. The bulk of the retrenchment exercise had focused on minimising the number of retrenchments by way of especially redeployment.

26] In the event, the retrenchment process appeared to have been conducted in a procedurally fair manner and the existence of a legitimate economic rationale appeared to support a conclusion also of a substantively fair dismissal. The general complaint that all was done in haste and that the company did not consult in good faith was clearly not supported by the evidence as set out above. The fact that the consultation process lasted for some seven weeks and comprised so many consultative meetings also bears this out. The company also recorded the proceedings of five of

the consultation meetings and furnished transcripts thereof to the union representatives - hardly the attitude of a party simply going through the motions of consultations. Furthermore, as is also mentioned above (at paragraph [24]), the union's primary representative, Mr Benjamin, conceded that by the close of the last meeting there were no outstanding issues which had not already been debated between the parties. In the same vein, the union representatives never expressed any disquiet about the target date for retrenchment during the consultation meetings. Moreover, any perceived intransigence on the part of management must clearly be balanced against the unexplained negative attitude of the union representatives towards the retrenchment process. It is also of some importance to note that, following the redeployment exercise, only 20 employees (including the 13 applicants) out of an original figure of approximately 74 employees had to be retrenched. Furthermore, all of the applicants with the exception of Mr Matroos were offered redeployment and two of the applicants, Mr Benjamin and Mr S Meintjies (the 9th applicant), were offered jobs not at lower grades but at the same grade or rate of pay.

27] It is also against this background that the applicants' complaint that the respondent failed to give adequate notice has to be evaluated. Clause 6.2 of the respondent's "retrenchment redundancy policy and procedure" requires that 45 days' notice of the intended retrenchment be given to the monthly paid employees. The 1st applicant and the 7th applicant were monthly paid employees and it was contended that they did not receive the required notice. The Court was not persuaded that the company's representatives had acted unfairly in this regard. Mr Alborough pointed out that this policy was not an agreement between the parties but a mere company guideline. He

added that the company representatives, even though they strived to follow these procedures, did not consider themselves bound to it. He further stated that the company had indeed and in any event complied with the 45 days notice requirement because the required number of days had elapsed between the first consultative meeting on 25 October 1996 and the eventual retrenchment on 6 December 1996. I see no reason to quarrel with Mr Alborough's interpretation in this regard as it was, after all, the company's own guideline and not an agreed procedure that he was following. The mere fact that the company did not disclose all of the relevant information on the first day of consultations clearly does not, by itself, make the retrenchment process unfair. The real test is whether there were exhaustive consultations on the required matters and not the unduly technical question of the proper interpretation of what was essentially the company's own guidelines. For the sake of completeness, it may be mentioned that this ground of complaint was not pleaded but that the pleadings were nevertheless amended at the close of the proceedings. The application for such amendment was granted because timeous notice of such possible amendment had been given to the respondent and accordingly no real prejudice was occasioned thereby.

28] Despite the fact that the economic rationale for the retrenchments and the process itself can, in general, not be faulted, it nevertheless remains for the Court to adjudicate further disputes which relate in particular to the manner in which the retrenchments were effected in certain individual instances. These specific applicants state (for various reasons) that they should not have been selected for retrenchment and accordingly challenge, in essence, the substantive fairness of their dismissals.

29] The first complaint in this regard was that the application of LIFO with the retention of critical skills criteria "was vague, subjective, unfair and capable of manipulation and was unfairly applied" in the cases of Ms S Thompson (the 11th applicant) and Ms F Sydow (the 4th applicant).

30] Of all the applicants, Ms S Thompson was the only person not selected strictly on the basis of LIFO. The retention of critical skills criterion was applied in her case. In other words, in the case of Ms S Thompson, employees with shorter service were retained in preference to her. According to the company's witnesses, this was done because her department was going to be considerably reduced by the retrenchments, and those few employees remaining needed to have a fairly full complement of skills, more particularly the ability to do full mechanical cabinet assembly. In cross-examination it was demonstrated clearly that she did not have the necessary skills to undertake cabinet assembly and, in fact, it became clear that she had very little knowledge of the full end-product and its components. I accordingly accept the evidence of a company witness (Mr J Grobler) that it would have taken up to six months to train her. In any event, Ms Thompson admitted that she did not have the physical strength to deal with certain aspects of the mechanical assembly. This admission also showed that there was no basis for the complaint that the company had failed to train Ms Thompson in the past. In this regard, another company witness, Mr P Goldschmidt testified that she was not amenable to being trained and that her lack of skills could accordingly not be ascribed to any fault on the part of the company. In my view, the retention of critical skills criterion is not subjective or vague in itself and

means (as was also mentioned in evidence by Mr Alborough) that the employees remaining after the retrenchment exercise must have the necessary skills to meet the department's requirements. In fact, such skills were defined as those "required to maintain the operational capacity at the time or for the foreseeable future" (the Bundle at page 331). *In casu*, the evidence demonstrated clearly that the department's requirements were such that another employee with shorter service had to be retained because the person with longer service (Ms Thompson) did not have the necessary skills to make up the complement of skills needed. In the event, the selection of Ms S Thompson was conducted according to objective criteria and, as such, was fair.

31] It was also contended that the company had to consult directly with Ms S Thompson on the issue of the application of the critical skills retention criteria. However, no such request was ever made by her representatives who did, in fact, take the matter up with management on her behalf. I am of the view that, under these circumstances, the company representatives did not act unfairly towards her when they consulted her representatives, that is, the union representatives on this matter as they were, in fact, required to do in terms of the clear provisions of section 189(1)(c) of the Act.

32] Ms Sydow was selected straight on LIFO (as were the other applicants). In my view, it is when the company wishes to deviate from the objective and easily ascertainable criterion of LIFO that it has to carefully motivate its stance and then may do so only in cases where other objective criteria are implemented in this regard, such as critical skills retention (discussed above at paragraph [30]). It was therefore not necessary for the company to motivate why it had selected Ms Sydow straight on LIFO because this

was the objective criterion that was primarily being applied as the selection criterion of first instance. After all, LIFO has become accepted as a fair criterion in selecting employees for retrenchment. In the event, the company in selecting Ms Sydow for retrenchment on the basis of LIFO, did not act unfairly.

33] A further complaint was that the respondent failed to apply LIFO in the case of Mr Benjamin (the 1st applicant), thereby "unfairly according longer service to Stephen Daniels and Brian Lowings". This complaint was, however, never pleaded. It was only after argument on behalf of both the respondent and the applicants had already been concluded that the applicants' counsel brought an application to amend the pleadings to include this dispute. Due to the fact that such amendment at such late stage of the proceedings would clearly have prejudiced the respondent's case, the application was refused.

34] It is, of course, possible to adjudicate upon such unpleaded dispute, provided that it was fully ventilated during the trial proceedings. I am of the view that the said dispute was not fully ventilated and accordingly this dispute cannot, in all fairness, be decided on the evidence presented to Court. The real complaint in this regard appeared to be the fact that Mr Daniels was accorded longer service *vis-á-vis* Mr Benjamin because his starting date with the company was taken as the date on which he had commenced with his trainee technician scheme (as it appeared from his letter of appointment). The applicants contended that this was wrong and referred in this regard to the fact that Mr Alborough had stated (during the consultation process) that the scheme according to which trainee technicians were permanently appointed (as had happened

in the case of Mr Daniels) had come to an end in about 1988. As Mr Daniels had been appointed after that date, so the contention goes, he should not have been permanently appointed then but only after completing his training, which was at a much later date. If this had happened, it would have given him shorter and not longer service than Mr Benjamin, making him and not Mr Benjamin eligible for retrenchment on the basis of LIFO. However, as the company was not made aware that it had to meet such a case and thus was not made aware that it had to present a proper explanation for the starting dates accorded to Mr Daniels, Mr Alborough gave no evidence in chief as to why this had happened and it was also not dealt with exhaustively in cross-examination. In the event, it is not possible to decide this (unpleaded) dispute on the evidence presented to Court.

35] In any event, the evidence before Court does not support the contention that Mr Benjamin was treated unfairly. Cogent evidence was given by the company's witnesses to the effect that Mr Benjamin would, in any event, have been selected for retrenchment on the basis of LIFO coupled with critical skills retention, that is, the criteria which applied in the selection process (discussed above at paragraph [30]). It namely became evident that it would have been imperative to retain the services of Mr Daniels, even if he had been in line for retrenchment, as he and not Mr Benjamin had the necessary skills that were needed for the department to continue to function properly after the retrenchments. Mr Benjamin appeared to accept this evidence. Where there remains a dispute between the parties in this regard, I accept the evidence of the company's witnesses as they were the more credible witnesses, on the whole. After all, as it also appears from the evidence discussed above, Mr Benjamin's

version was time and again held as unreliable. In the event, the selection of Mr Benjamin for retrenchment on the basis of the criteria that applied during the retrenchment process was objective and fair and he therefore had no reason for complaint.

36] Mr Benjamin further also complained that he should have been redeployed into a job in the postal automation services section and in this regard should have been assisted with transport problems and difficulties with shift work. This complaint was also not pleaded until argument was concluded and the amendment in this regard was likewise refused for the reasons already discussed above (at paragraph [33]). The evidence in this regard showed that Mr Benjamin had been fortunate enough to receive an offer of redeployment on the very same grade or rate of pay than the job from which he was being retrenched. His only complaints were that he was unable to accept the redeployment offer because of transport difficulties and the fact that his wife and children suffered from illnesses which would have made shift work difficult. However, under cross-examination he conceded that the real reason why he did not take up the job was because of perceived transport problems. Nonetheless, he admitted that he did not even bother making proper enquiries as to the possible transport which was available. In my view, it was unfair of him to have insisted under these circumstance to be provided with transport by the company (apparently in the form of a company car). In the event, I take view that the respondent did not act unfairly when it offered the first applicant redeployment which was, after all, at the same grade than his previous position, and his complaint in this regard, once again, appeared to be unfounded.

37] Further, Mr I Matroos (the 7th applicant) and Mr P van Kradenberg (the 8th applicant) complained that they had applied for available vacancies (they were not offered these vacancies) but were unsuccessful. These complaints were not pleaded and the late request for the amendment of the pleadings at the close of the proceedings was refused (see the discussion above at paragraph [33]).

38] Mr Matroos was the only applicant not offered redeployment but he applied for a vacancy at the company. Mr Matroos was not called to testify but Mr A Connald (the general manager of the ECAM division of Plessey SA Limited in Gauteng) testified that he did not have the necessary supervisory skills for the position that he applied for. Although Mr Connald's evidence was not altogether clear, it stands uncontroverted and shows, at the very least, that serious consideration was given to the job application. In the event, I am satisfied that the respondent did not act unfairly when Mr Matroos was unsuccessful in his job application.

39] Mr van Kradenberg testified that he did not want to accept a redeployment offer at a lower grade and instead insisted to apply for a painter's job that appeared on the vacancy list at the same grade that he had worked on. He tried unsuccessfully to convince the Court that his main motivation for applying for the job was not the grade itself. In this regard it was telling that he had also refused a further offer of redeployment at a C grade, that is, a higher grade than the DDD grade first offered to him. Mr R Hartfree (who had interviewed him for the job) testified that he had displayed a negative attitude towards the work itself, had been interested in the grade

only and had shown a lack of knowledge. By contrast, the other applicant for the job had worked in that department for years, was fully qualified and experienced and had been eager to get promoted into the position. In my view, the respondent's duty to act fairly towards its employees who face retrenchment extends to the situation where retrenchees apply for possible job vacancies. This, however, does not mean that the company may act unfairly against its other employees who do not face retrenchment. On the evidence presented to Court, I am satisfied that the other applicant was better qualified to do the job and that it would thus have been manifestly unfair to refuse him the promotion after he had worked in that department for many years and to give the job to a less-qualified person, solely on the basis that the other person faced retrenchment in another department where he did a completely different job. In the event, I am satisfied that the respondent did not act unfairly when Mr van Kradenberg was unsuccessful in applying for the said vacancy.

40] According to the pleadings, the applicants also complained about the alleged failure of the respondent to offer the applicants sufficient opportunity to properly consider whether to accept redeployment or not. In this regard it is significant that none of Mr Benjamin, Mr van Kradenberg, Ms S Begg (the 10th applicant) or Ms V Wyngaardt (the 12th applicant) testified that, where offers of redeployment were made to them, they had insufficient time to properly consider whether to accept or reject the offer. Furthermore, the union representatives refused to cooperate by making a deliberate decision not to distribute the vacancy and redeployment lists to the affected employees (see the discussion at paragraph [20] above). Some of the applicants also testified that there was a "rumour" to the effect that there would again be

retrenchments early in 1997. It would therefore not have been wise to accept redeployment at a lower grade as the next retrenchment would then have been at a lower grade. It is accordingly against this background that the alleged failings of the redeployment exercise must be evaluated.

41] In fact, it was only Ms Sydow and Ms S Thompson (their positions were also discussed at paragraphs [29] to [32] above) who actually complained in this regard. Ms Sydow admitted that she saw the redeployment lists on the shop floor and that she knew that redeployment could be at lower grades. As from Friday 22 November 1996 to Wednesday 27 November 1996 (see the discussion of the redeployment process at paragraphs [18] to [21] above) she had five days within which to consider the offer. In this period, she first signed acceptance but then, after deliberation, decided to reject the position. Although this version was not pleaded, Ms Sydow stated in evidence that a few minutes after her meeting with Mr Goldschmidt (the manager who dealt with the redeployments) when she rejected the offer of redeployment, she went back and told Ms S Cupido (of the personnel department) that she had changed her mind. Ms Sydow then allegedly waited for the other interviews to be concluded before she went back into the meeting - only to be told that all of the redeployment jobs had been filled. Significantly, her version that she had told this to Ms Cupido was never put to Mr Goldschmidt when he testified. Ms Cupido did not testify. I accordingly have no hesitation to accept Mr Goldschmidt's version that he did not know of her change of mind before she returned only when all the jobs available had already been distributed. I do not find anything unfair in this happening as it certainly does not appear to be attributable to a lack of time within which to decide (especially also in

the light of the evidence in this regard discussed above at paragraph [40]). For the sake of completeness, it must be noted that Ms Sydow's evidence to the effect that she had pleaded for an alternative job but was told she could only be offered a B or C grade job as she had already rejected a D grade job was also never put to Mr Goldschmidt. This evidence can accordingly not be given any significant weight in the absence of corroborating evidence.

42] After first accepting the offer of redeployment and working in this new position for a short period, Ms S Thompson rejected the offer and accepted "voluntary" retrenchment instead. It can be pointed out that the respondent's argument in this regard to the effect that she was non-suited, having accepted "voluntary" retrenchment, failed to convince. It was clear from the facts that, after having gone through the whole retrenchment exercise up to and including redeployment, her retrenchment could hardly have been labelled as "voluntary" in the accepted meaning of the word. Ms Thompson complained that she had accepted the retrenchment option only "conditionally" and that, despite this being the case, she was refused redeployment when she went back to management and told them that she had changed her mind. This evidence was improbable in view of the fact that she had actually signed a written acceptance of the retrenchment option. Moreover, a written admission was made on her behalf (at page 43 of the pleadings) to the effect that she had requested to be allowed to volunteer for retrenchment as she no longer wished to work in a lower grade job, which request was granted, but that she had subsequently changed her mind at a time when the said position had already been offered to and accepted by another employee. Significantly, nothing at all is stated about her request

being “conditional” and this was also never put to the respondent’s witnesses. In the event, her evidence in this regard stands to be rejected. Furthermore, there clearly was nothing unfair in the company accepting Ms Thompson’s (unconditional) rejection of redeployment and thereafter failing to redeploy her once she had changed her mind and the redeployment job had become filled by another employee.

43] For the sake of completeness it may be noted that the complaint that no stress counselling was provided (financial counselling was made available) must be viewed in the light of the fact that not a single applicant complained about this when giving evidence. In the same vein, the applicants contended that their personal circumstances were not taken into account, yet not a single applicant testified that he or she had not been accommodated in this regard. Furthermore, the applicants’ witnesses admitted that they could have made use of the extensive union structures to make their personal circumstances known if they had wished to do so. In the event, these alleged “oversights” by the company could clearly not have been so serious as to make the retrenchment process unfair.

44] The applicants complained that the respondent had breached the moratorium on overtime, alternatively that the respondent had failed to minimise overtime and in this regard relied specifically on the alleged “excessive” overtime worked in the pay phone section of the respondent’s telecoms department. The overtime moratorium was, of course, the alternative proposed by management (discussed above at paragraph [8]) to the effect that there would be a moratorium on overtime in the manufacturing departments only and that such moratorium on overtime would not

apply when it was critical to work in order to satisfy customer demand. Although the respondent's witnesses merely referred to a "hitch" which required the working of overtime in 1997 and did not mention any overtime worked in 1996, Mr Lewis investigated the company's clock cards for the period October to December 1996 and found that more than 300 hours of overtime had been worked in October, 225 hours in November and 95 hours in December 1996. During cross-examination, Mr Lewis conceded, however, that the overtime worked was "not excessive", thereby clearly placing it outside the allegation that was pleaded, that is, that the overtime worked had been "excessive" (*supra*). This was, after all, the case that the respondent had come to meet. The "hitch" to which the respondent's witnesses admitted appeared, by contrast, to have necessitated excessive overtime. However, the reason for this was explained and fell squarely within the exception, namely that it was critical to do the work in order to satisfy a customer demand (delays were experienced in materials arriving from Japan). All in all, the respondent therefore appeared to have heeded the moratorium on overtime that was proposed by its representatives during the consultation meetings. There is furthermore not a shred of evidence to show convincingly that the working of overtime in the manner described above (during either 1996 or 1997) had been prejudicial to the applicants' interests or that it had any decisive effect on the fairness of their retrenchments. After all, the fact that there was a drop-off in the production required in the two affected departments with the resultant drop-off in work was not seriously questioned as being the economic rationale necessitating the retrenchments (see the discussion at paragraphs [3] and [4] above).

45] The effect on the fairness of the dismissals of the complaint that the pool of persons facing retrenchments was increased by the respondent failing to execute the transfer from the broadcasting department to the AVLS/SVLS department of Ms R Thompson and Ms J Beukes (they were not applicants in this matter) is likewise uncertain. Ms Beukes gave evidence in this regard and tried to convince the Court that she and Ms R Thompson were, indeed, transferred to the AVLS/SVLS department but were nevertheless treated as part of the broadcasting department when it came to the retrenchments.

46] If I understand the reasoning of the applicants correctly, these two employees should not have been part of the "pool" of persons considered for redeployment and accordingly another two positions for redeployment would have become available to the applicants. The possible prejudice to the applicants arising from this was clearly tenuous, especially in view of the fact that all of the applicants (with the exception of Mr Matroos) were, in fact, offered redeployment but decided to refuse the offer. This is so, even though Ms Beukes received an offer for redeployment at a higher rate than that offered to the bulk of the applicants. More important, however, I am not satisfied that such transfer to the AVLS/SVLS department did, in fact, ever take place, for the following reasons.

47] First, the two said employees never actually worked in the AVLS/SVLS department. Second, and more important, the necessary documentation which usually accompanies such transfer was never completed and Ms Beukes admitted that such documentation always accompanied such transfers. Third, it was made clear to the

two employees that they would be transferred back to the broadcasting department as soon as work picked up. In fact, work picked up shortly thereafter due to an order from Malaysia and before the two employees could even be physically transferred. Ms Beukes denied that the Malaysian order had had this effect and tried to persuade the Court that this order was already in existence when the manager, Mr Rhode, had told them that they were being transferred. This evidence is in direct contrast with Mr Rhode's note (the Bundle at page 318) which shows clearly that the Malaysian order came in thereafter. Mr Rhode was also adamant when he gave evidence that they were never transferred. In the event, although the two employees may have felt uncertain as to whether they were in fact being transferred (it was never put to them explicitly that the proposed transfer was not to take place) and although they clearly lived under the threat of a possible future transfer should the work again taper off, I am satisfied that they had not, in fact, been transferred at that point in time. It follows that these two employees were legitimately part of the broadcasting department at the time. This state of affairs did therefore not impact unfairly upon the other employees who were facing possible retrenchments.

48] Lastly, the applicants complained that the respondent's representatives had inaccurately and in a misleading fashion forecast the future work in the broadcasting department. This allegation must, of course, be evaluated in the light of the detailed evidence which showed that there were sound economic reasons for the drop-off in production in the broadcasting department. This evidence was not challenged by the applicants either when it was presented in Court or during the retrenchment process itself (see the full discussion above at paragraphs [3] to [4]). Moreover, the

applicants' witnesses admitted that the evidence presented by the respondent to the effect that the manning levels shrank even lower in 1997, especially after voluntary retrenchments were implemented, was correct. In the light of these facts, it is abundantly clear that, if anything, the position in regard to work in the broadcasting department deteriorated even further in 1997. It follows that the forecast in 1996 of a drop-off in the manning levels that would be required was completely accurate. Mr Lewis' evidence to the effect that 20 or so employees were working in the broadcasting department in 1997 (more than those retained after the 1996 retrenchments) accordingly cannot mean that the work in the broadcasting department had increased. It is significant that this allegation was never put to the respondent's witnesses when they testified. The only allegation put to Mr Goldschmidt was that a Mr M Mouton and a Ms D Smith had come into the broadcasting department. This information was canvassed with Mr Goldschmidt during his evidence in chief and he testified that the Datalink department where Mr Mouton had worked in 1997 had experienced a loss of work and that he was accordingly used to assist in the broadcasting department, rather than having him sit idle. He added that Ms Smith was similarly without work in the AVLS department and was only moved into the broadcasting department for two to three weeks whereafter she was transferred elsewhere. Mr Goldschmidt also testified that there had, in fact, been an amalgamation of the broadcasting department and the AVLS department in 1997 in order to work more efficiently. Mr Lewis admitted that he knew of such amalgamation and the applicants also pleaded that they relied on the fact that the AVLS employees had been performing work in the broadcasting department in 1997. Even though some former AVLS staff may have worked on broadcasting matters, this

fact does not persuade me that the work in the broadcasting department had increased in 1997. This simply cannot be so in view of the overwhelming evidence that the work had, in fact, decreased. It follows that the Court is satisfied that there is no merit in the claim that the respondent deliberately misled the applicants in regard to the forecast of future work in the broadcasting department.

49] In the event, having painstakingly evaluated each and every complaint that was pleaded by the applicants (and even some complaints that were not pleaded), it appears that the retrenchment exercise was not flawed in the manner alleged and that, in fact, the respondent has shown that the dismissals of the applicants for operational requirements on 6 December 1996 were substantively as well as procedurally fair.

50] Turning now to the question of a possible costs order on the basis that the unsuccessful party (the applicants) is to pay the costs, the respondent party's contentions in this regard have to be evaluated. The respondent's legal representative, apart from asking for a costs order against the applicants, argued that a costs order should be made against the union (MEWUSA). The union was not a party to this matter but *Mr Faber* nevertheless argued that section 162(3) of the Act envisages such costs order.

51] Section 162(3) states that the Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings in Court" (Court's underlining). The Court was referred in this regard to the pleadings where the union is given as the "representative" of the applicants in terms of

applicants' statement of case (the Bundle at pages 2 and 5). However, the applicants were, in fact, represented in these proceedings by counsel who was properly briefed by a firm of attorneys.

52] It is, of course, in general not fair or legitimate to order costs against persons who were not parties to the proceedings before the Court. The only exception is that an award of costs can be made against any person who represented a party in Court. In this regard, one may cogently refer to the provisions of section 162(2)(b) of the Act, stating that the Court may, in awarding costs, take into account the conduct of the parties in proceeding with or defending the matter before the Court and during the proceedings before the Court. In other words, if a person who represents a party in Court, when proceeding with or defending the matter or during the proceedings, conducts himself or herself in a manner that warrants a costs order being made against such person, such order can be made. However, the conduct of a non-party at a time before the proceedings even started is not a factor that can legitimately or fairly be taken into account in order to award costs against such non-party. The provisions of the Act therefore clearly do not provide for such a possibility.

53] It follows that the union's actions during the retrenchment process before the proceedings even began can never legitimately or fairly be the basis for a costs order against it for the simple reason that the union was not a party to these proceedings. The respondent could, of course, have applied for the joinder of the union as a party in terms of Rule 22 of the Rules of Court on the basis that the union had "a substantial interest in the subject matter of the proceedings". Instead, the respondent did not even

make an attempt to apply for such joinder. In the event, it hardly befits the respondent party now to bemoan the fact that the Court is not in a position to make a costs order against the union on the basis of, as the respondent puts it, "an obstructive approach to the consultation process" of the MEWUSA representatives.

54] As the matter stands, I am of the view that it would be unfair to make a costs order against the applicants, especially in the light of the fact that it was the union representatives who had displayed an unhelpful and negative attitude towards the consultations, thereby clearly influencing their members in this regard and also in a sense causing their present predicament. Only one of the applicants, Mr Benjamin, was a union representative, but it would clearly be unfair to let him carry individual responsibility for what is, in essence, the collective responsibility of MEWUSA as the applicants' union.

55] In the event, the Court in exercising its very wide discretion in terms of section 162(1) of the Act to make an order for the payment of costs, according to the law and fairness, and in taking into account especially the aforementioned reasoning, considers it fair that there should be no costs order made against the applicants.

56] In the event, the Court makes the following order:

1. The dismissals of the applicants by the respondent on 6 December 1996 were both substantively and procedurally fair.

2. No order is made as to costs.

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Basson J

Date of judgment:	16 February 1998.
Last day of hearing:	4 February 1998.
Applicants' representative:	Advocate LJ Bozalek instructed by E. Moosa, Waglay and Petersen.
Respondent's representative: by	Mr PC Faber of Sonnenberg, Hoffmann and Galombik (assisted Mr S Harrison).

Note: This judgment is available on the Internet at website: http://www.law.wits.ac.za/labourcrt.