IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

C218/06

In the matter between

ROGER AIREY **FIRST APPLICANT**

DAVID DENOON – STEVENS **SECOND APPLICANT**

VINCENT WATTERS **THIRD APPLICANT**

AND

GE SECURITY (AFRICA) **RESPONDENT**

JUDGMENT

CELE AJ

Introduction

1. This is a claim of unfair dismissal of each applicant based on the operational requirements of the respondent. There is no dispute about the need for the respondent to have undergone a structural change. The applicants contend that the respondent should have retained their services in the new structure, alternatively in a position within the respondent, alternatively in a position within the General Electric Organisation and, in the event that retrenchments were unavoidable, the respondent, on application of fair selection criteria and/ or by applying "bumping", should have retrenched other employees than the applicants. In its capacity as the erstwhile employer, the respondent opposed the claim by averring that there was, in general, a need to retrench the

applicants and that their dismissals were substantively fair. It said that the applicants were selected for retrenchments in accordance with criteria to which they had agreed. Alternatively and in any event, the selection criteria were fair and objective. It denied that “bumping”, which it said was at no stage raised by the applicants during the consultation process, was of any relevance to the matter.

Background facts

2. The respondent was a GE Security (Africa) a South African general partnership comprised of General Electric Interlogix (Pty) Ltd and General Electric (Infrastructure) (Pty) Ltd. The applicants commenced their employment at different times with a Company called Ziton SA (Pty) Ltd, (“Ziton”). In March 2005 their services were transferred with Ziton’s business, as a going concern, to the respondent. The first applicant commenced his employment with Ziton in or during 1986 on a contract basis. He was permanently appointed with effect from 1 July 1990. He held the position of a Certification, Validation and Test (CVT) Manager where he was in charge of the registration, validation and testing of the product of the company. His employment with the respondent terminated in November 2005. The respondent offered him a fixed term employment from 1 December 2005 to 31 March 2006, which he accepted. The second applicant commenced his employment with Ziton in April 1985. He held the position of a Technical Director, in charge of the technological development of new products in the company. His employment was terminated with the respondent in November 2005. He was offered and accepted a fixed term employment with the respondent from 1 December 2005 to 31 May 2006. The third applicant commenced his employment with Ziton in October 2001. He held the position of an Engineering Manager, accountable for managing engineers daily in their workloads. His last working day with the respondent was on 21 October 2005.

The respondent paid him his salary for October 2005 and notice pay in respect of November 2005.

3. Between November 2004 and January 2005, Ziton's Human Resources Manager Ms Susan Barrington conducted interviews with a selected group of engineering staff in order to gain an understanding of their roles and their job descriptions. A "brown paper" exercise was thereafter carried out with staff, including the applicants. According to the respondent, its current structure had duplicated processes which were not conducive to the company system. Data had to be collected to determine if any bottleneck existed in the organisation. Ms Barrington had to facilitate the process for a change in the structure. She lay out the paper and asked for input on how heads of departments in the company saw things. Discussions on the process of change were held. According to the respondent, the interviews conducted between November 2004 and January 2005 were performed in order to determine the details of the engineering staff members' respective roles and job profiles so as to get their overviews of the work flow process and bottlenecks in that work flow. The respondent's purpose of the "brown paper" exercise was to develop a new staff structure for the engineering department.

4. On 29 June 2005 the applicants and other employees in the engineering business unit were handed notices by the respondent in terms of section 189 (3) of the Labour Relations Act 66 of 1995 ("the Act"). In terms of such notices the respondent proposed that a process be embarked upon in terms of which its engineering and manufacturing business unit were to be restructured. It was envisaged that the restructuring could lead to the redundance of certain positions and consequently to the loss of jobs of certain of its employees. Still on 29 July 2005, the respondent convened a meeting with its affected staff. It advised the first applicant that his job did not appear to be impacted by the restructuring and that should that occur, he would be consulted. His position as a CVT Manager was at that stage retained in the new structure. The

respondent disclosed to the staff the draft new structure for its engineering department. The second and third applicants' positions were at risk of being declared redundant as their positions were to be replaced with that of a single "Engineering Business Unit Manager's" position. The respondent invited employees to consult with it on the restructuring process and to make representations and counter-proposals on or before 12 July 2005. Further, the respondent sought to introduce the positions of "Product Support Managers" and "Test Manager" at the level of a CVT Manager. It was determined that the respondent would no longer be involved in new platform or product development.

5. Further meetings were held with the affected staff on 4, 7, 8, 12, 26 and 28 July 2005 as part of the consultation process. At such meetings, certain of the issues raised by the affected staff were addressed by the respondent. In addition the respondent on a number of occasions, responded in writing to questions that had been raised in writing by the affected employees. The stated objective of the restructuring exercise was to improve efficiency, to rationalise and to implement a new structure with adequate skill sets. Representatives of the affected employees presented to the respondent a written memorandum detailing their concerns and objections to the action intended to be taken by the respondent. Included in the memorandum were a number of questions required to be answered by the respondent. The affected employees further called for the disclosure of information relevant to the issues on which the respondent sought to consult with the employees. The employees made proposals in respect of severance packages. They raised for consideration by the respondent the options for voluntary retrenchment and early retirement.

6. On or about 20 July 2005 the respondent submitted a written reply to the aforementioned memorandum from the affected employees. The

aforementioned response contained *inter alia* the following questions and replies:-

Q: "Where does the restructuring come from. Has this restructure come from within CT branch or have we been given a directive to restructure by GE.

A: There is no one single driver and is a result of a number of interactions both local and overseas.

Q: Cost Reduction: put a value to the cost reduction.
There was no answer to what cost reduction CT had to meet. I find it strange that we are prepared to lose good engineers and staff without knowing what cost reductions have to be met. I would have thought that this site was to be perfect for the design of new products. Definitely would be cost effective with cheaper labour and good engineers.

A: We are currently R2M behind budget with a very poor looking forward order book, however, it is not only rand value that we are looking at but improved efficiencies and aligning the business wit the international strategy.

……

Q 2. If we do not apply for a position advertised, will it mean that you are automatically retrench (sic) or will you be put into the pool that management will look at for other positions.

A: Not necessarily, a person may be offered a reasonable alternative or may be placed in a pool until all other alternative positions have been considered and then if there is no other suitable alternative the person will be retrenched.

……

Q: 9. Shouldn't all positions be advertised including those positions that are currently "safe" as a person other than those in the position might be more suitably qualified to do the job.

A: This would be wasted effort as strictly speaking if there are two positions that have not changed in any way and two incumbents in those positions, then they have first right to these positions."

7. Further questions to senior management dated 25 July 2005 were submitted in terms of the consultation process and the respondent responded to those on 28 July 2005. Simultaneously, it responded to questions raised in the consultation meeting held on that day, 28 July 2005. A further list of questions was received from the employees and was responded to on 29 July 2005. The respondent responded favourably to the affected employees' proposals relating to the options for voluntary retrenchment and early retirement, and in its letter 28 July 2005 undertook to consider the voluntary retrenchment option in the event that redundancy led to job losses. The only condition attached to this undertaking was that the respondent's operational requirements would determine whether voluntary retrenchments were appropriate.

8. On 5 August 2005, a further consultation meeting was held, at which the affected staff presented their proposed draft structure for the engineering department, *inter alia* by proposing an increase in resources and not a reduction thereof. In terms of the proposed structure, the number of employees in the engineering department would increase. The respondent considered the proposals and in a consultation meeting of 23 August 2005, presented its revised draft structure, together with reasons for the changes suggested. The affected employees were requested to consider the revised structure and to revert with their input at the next consultation meeting of 26 August 2005. At the next consultation meeting of 30 August 2005, the

respondent presented a further revised structure, which was presented to the affected staff as the final structure. In terms of it;-

- The "Engineering Unit Business Manager" position was replaced with that of an "Engineering Project Manager".
- Slight changes were affected to the job specification of the CVT Manager (First Applicant) and the Product Support Manager.
- The position of Test Manager was removed and replaced with a position called "Senior Test Engineer", who would report to the quality function.
- The Product Manager's position was converted to that of an off-shore position. One Mr Kenneth Sinclair was proposed to fill the position of Product Manager.

9. On or about 2 September 2005, the available positions within the proposed structure were advertised on the respondent's "intranet". Affected staff members were invited to apply for positions in which they were interested by 17h00 of 7 December 2005. Each of the applicants applied for the position of Engineering Project Manager.

10. Between 18 and 22 September 2005 Mr Leon Mintjens, the Engineering Development Manager of the respondent based in Europe, but in South Africa at the time, provided input regarding the structure of the engineering department of the respondent in South Africa. Certain of his suggestions were accepted by the respondent, resulting in a revision to the proposed structure.

11. The respondent proposed selecting employees to populate the new structures through the following processes:-

- The positions in question would be advertised by the respondent.
- Affected employees were required to apply for all posts in which they were interested as and when the positions were advertised.
- Interviews would be conducted by an external Human Resources Consultant, together with an employee of the GE.
- Selection would be based on the employee's experience, skills and qualifications.
- In the event that an employee was not successful in securing a position in the new structure, he/she would be placed in a pool of employees who had not obtained positions and the respondent's Management would evaluate all other possible alternatives, with a view to placing him/her in any remaining vacant positions.
- If no suitable alternatives were found, the employee's services would be terminated.

12. On dates between 19 and 22 September 2005, the applicants were interviewed by Ms Rene Steenkamp, an external Human Resources Consultant together with Mr Mintjens. None of the applicants were recommended by the interview panel for the position of Engineering Project Manager. Based on the outcome of the interview process, and after consultation with Ms Steenkamp, none of the applicants were considered suitable for the Engineering Managers position. The respondent had no consultation with the applicants on:-

    - the content of the interview process;
    - the measurement criteria to be used by the interviewing parties in order to determine who would be successful in the competitive process;

- the method of evaluation of the outcome of the interview process, in order to determine who was the best fit for the position advertised and applied for;
- how outside of the interview process, an applicant employee's competitiveness would be measured and determined; and
- how the result of each applicant employee's assessed competencies would be weighed and evaluated against competing applicant employees.

13. Between 3 and 7 October 2005 the applicants were advised that the new structure would be implemented. The new structure was finalised on 7 October 2005. The respondent did not conduct a fresh round of interviews.

14. On or about 18 October 2005 the respondent held separate meetings with the individual applicants, at which the applicants were informed that they had not been successful in securing the Engineering Manager's position or any other position within the new structure. The applicants were informed that the primary reason for their failure to be appointed was the fact that they were not suitable for that position. In addition, the applicants were informed that the respondent would appoint a General Electric candidate to the position of Engineering Manager. As on 18 October 2005 the respondent had filled all positions on the new structure in the Engineering Department.

15. On 18 October 2005 the respondent handed the individual applicants letters of possible termination of employment due to operational requirements. As an alternative to termination the applicants could consider early retirement, which in the view of the respondent, was of no advantage to the applicant. The letter informed the applicants further that failing securement of employment, management were of the view that there was no other suitable alternatives to retrenchment. It set out the terms of retrenchment which, in respect of

severance pay, stated that each would receive two week's remuneration per each completed year of service for the first five years and one week's remuneration per each completed year of service thereafter, with the company. The severance pay which had been suggested by the applicants was one of one month pay for each year (or part thereof) served, for the first five years, and two weeks pay for every additional year of service (or part thereof). The respondent rejected that proposal on the basis that it would be setting a precedent which the respondent could not afford. The date of dismissal was stated as 30 November 2005, with the month of November being a notice period. It ended with a note that if the applicants were aware of any alternatives which the respondent might have overlooked, they were to advise the Human Resource Manager of it by 24 October 2005 failing which the respondent would assume that they were not aware of any such alternatives and dismissal would take effect.

16. The first and second applicants requested to be considered for the position of Product Manager which did not fall within the respondent's new structure, but was located within the General Electric organisation in Europe. None of the applicants was successful in his application for that position.

17. The respondent did not consider "bumping" in order to retain the applicants. In its view, "bumping" had not formed part of its proposed restructuring process, nor had, in its view, that option been suggested by the affected employees in the course of the consultation process. In applicants' view the respondent did not consider applying "bumping" and/or retaining applicants in positions occupied at the time by other employees, either within the engineering business unit or elsewhere. According to the applicants the respondent did not consult with the applicants over the option of bumping and did not provide reasons to the applicants as to why the option was not considered or implemented.

18. A dispute about an unfair dismissal of the applicants arose consequent upon their retrenchment by the respondent. They referred it to the MEIBC for conciliation which failed to resolve it and certificates of outcome were issued on 12 January 2006 for the third applicant and on 31 January 2006 for the first and second applicant. The applicants referred the dispute to this Court on 12 April 2006 by means of a statement of case.

The trial issues

19. The claim of the applicants as foreshadowed in the statement of case with an amendment thereto and in the pretrial minute with a supplement to it, is premised on the following allegations:

    1. The respondent failed to provide the applicants will all the information necessary and as was requested by them for purposes of their proper participation in the consultation process.

    2. The respondent failed to follow agreed subjective selection criteria or fair and objective selection criteria in identifying employees to be dismissed.

    3. When determining the applicants' competency and suitability to appointment within the new structure, the respondent failed to implement the selection process it had identified or it failed to apply fair and objective selection criteria.

    4. The respondent failed to consult with the applicants on the possibility of bumping.

5. The respondent failed to consult with the first applicant before it later declared the position of CVT Manager redundant.

6. The respondent failed to retain the applicants' services in the new structure or in positions within itself or within the General Electric Organization.

7. The respondent's rejection of the applicants' proposals relating to severance pay in the light of the GE's policy or past practices relating to such payment.

20. In dealing with each of the listed issues, it is expedient not to follow their chronological listing. I shall deal firstly with the first, the seventh and then the last.

Failure to provide necessary or requested information

21. From 29 June 2005, when section 189(3) notices were issued, to about 22 September 2005, the affected staff of the respondent participated in a joint consensus seeking consultation. While the respondent gave some answers to certain issues raised by the affected employees, there were a number of issues which the respondent was expected by the employees to address in September 2005. Then came the proposal by the respondent on how a selection of the employees to populate the new structure would be done. The unanimous response of the affected staff was one of acceptance of the proposal. Positions within the proposed structure of the respondent were advertised in its intranet and the applicants, as did other affected staff, applied. They applied for the position of Engineering Project Manager. At that stage no objections were raised by the applicants on the selection criteria. Nor did they insist that the answers which were still outstanding on the

questions they had raised, be firstly addressed before the next stage of populating the structure could be resorted to. Up until the stage for the suggestion for the population of the new structure, the affected employees had shown the respondent that they engage it on issues of their concern. When the affected employees did not oppose the proposal for the population of the new structure, the respondent was entitled to accept that the affected employees had abandoned or waived any of the issues that were still outstanding. The affected staff, which included the applicants, failed to put a clear counter-proposal on the table in order to continue to make the consultation process meaningful in the quest for consensus, as they had done hitherto. They therefore can hardly complain about the fact that the respondent had implemented its own proposal to the population of its structure – for this approach see Benjamin and others v Plessey Telumat SA Ltd [1998] 3 BLLR 272 (LC) at 277, and CWIU v Lennon Ltd [1994] 10 BLLR 1 (LAC).

22. The extent of participation by the affected employees to the joint consensus seeking process leads only to one conclusion, namely that they understood their rights and that is why they were able to effectively exercise them. Their failure to counter the proposal to populate the new structure is irreconcilable with any intention on their part to enforce such a right. Their conduct leaves no doubt that they intended to surrender the right to further information and to engage the respondent further on selection criteria. For this approach see – Linton v Corser 1952(3) SA 685 (AD) at 695.

23. The position of the applicants in failing to canvass further counter proposals is not determinable only on their tacit conduct. Mr Airey and Dr Watters were specifically cross-examined on the issue and both of their answers indicated that they actually agreed with the selection criteria as proposed by the respondent. I conclude therefore that the respondent was no longer obliged to

provide any necessary or requested information to the applicants as they accepted its proposed plan to populate the new structure.

The rejection of severance pay

24. The issue of the severance pay did surface during the consultation process of the parties albeit to a limited extent. The applicants stipulated it in the amended statement of claim thus:

> "Can the following retrenchment package be considered and, if not, why not.
>
> - One month for every year (or part thereof) served for the first five years and two weeks for every additional year service (or part thereof)."

25. The respondent answered this question by stating that:

> "Management's proposed package is already better than that required by the LRA and to agree to the above would be setting a precedent which we cannot afford."

The applicants did not counter this response with any further proposal.

26. There are two cases which the applicants have placed their reliance on for this claim. Both are however not originating from South Africa. The first is a payment of a severance packages of one month per year of service to a Mr Smit in 2002. Such payment was said to have been done within the Ziton Group of companies, in particular the GE Interlogics component thereof, all of whom dealt with fire detection

27. The second payment also of four weeks for every year of service was said to have been made in another fire detection affiliate of the Ziton, GE Interlogics, group in 2005 or 2006 period.

28. Dr Watters said in his evidence that there was a “best practices” policy in place within the GE group which required that whenever GE benefits applicable to anyone of the companies were greater than the benefits provided by the local practices or legislation, the greater benefits should be applied throughout the group.

29. The version of the respondent was presented through Ms Berrington and Mr McKechnie, Ms Berrington testified that, as the severance pay issue was discussed, she enquired from various other companies within the GE Group as to whether any uniform policy existed in regard to severance pay, but was informed that there was none, Mr McKechnie denied that there was some ‘precedent’ as a result of the retrenchment of five United Kingdom employees in 2005 or 2006.

30. I have problems with the approach adapted by the applicants in respect of this issue. The facts of the two cases they seek to place their reliance on were not pleaded to. In their amended statement of the case they merely posed a question, yet in their final submission they blame the respondent for not obtaining substantiated responses to the two cases they raised. Secondly, the circumstances of each of the two cases the applicants testified to are very vague. The terms under which the two payments were made were never testified to. All we know is that such payments might have been in terms of the applicable basic conditions of employment of the country or state where this occurred. It might have been in terms of applicable collective agreements which were unique to such parties. A further submission of note made on behalf of the respondent is that legislation governing severance packages in other countries differs from that applicable in South Africa. In the United

Kingdom for example, the Redundancy Payment Act of 1965 and the Employment Rights Act of 1996 govern the situation. As such, the applicants did not make any attempt to enlighten the court as to what the provisions contained in those Acts are. Thirdly, the retrenchment of the applicants took place in 2005. The severance payment of 2006 can not reasonably amount to a "precedent" in there circumstances. Fourthly, there is vagueness surrounding the evidence on the "best practices" policy, in the absence of a proof of such policy or substantiated cases where such policy was applied. Fifthly, the case of the applicants was not properly canvassed through the witnesses of the respondent. Instead they were asked questions in the form of a fishing expedition. Finally, I can not agree with applicants contention that it could hardly be expected of them to enquire into and obtain the relevant information. They made an allegation of a higher payment of severance pay within the GE group. They had to prove it so that the respondent would only then be expected to rebut it. Their evidence does not carry so much of evidential weight as to call for a response from the respondent. From the evidence adduced, the applicants were entitled to severance pay equal to one week's remuneration for each completed year of service, see section 41(2) of the Basic Conditions of employment Act No 75 of 1997 and Whall v Branded of Marketing (Pty) Ltd (1999) 20 ILJ 1314 (LC).

The criteria to be followed

31. It is common cause that the selection criteria to be used by the respondent in selecting employees to be dismissed had been agreed to by the consulting parties.

32. However during the trial Mr Rautenbach, for the applicants, put to the witnesses of the respondent that criteria that were fair and objective were, in the alternative not followed by the respondent. In their evidence, the

applicants adopted a similar approach. This issue has been deliberated upon in the closing submissions of the parties.

33. The selection criteria are regulated by section 189 (7) (a) and (b) of the Act which states that:

> "(7) The employer must select the employees to be dismissed according to selection criteria-
> (a) That have been agreed to by the consulting parties, or
> (b) If no criteria have been agreed, criteria that are fair and objective."

34. The case of the applicants is that the moment the employer departs from the criteria agreed to by consulting parties, which form a legal and contractual obligation, it can only avoid a finding of unfair dismissal by following fair and objective selection criteria. This approach, if correct, means that where parties have agreed on selection criteria to be used, the employer has a choice of either applying those agreed criteria or has to follow fair and objective selection criteria. Mr Rautenbach placed reliance for this view on the decision in Chemical Workers Industrial Union and others v Latex Surgical Products (Pty) Ltd (2006) 27 ILJ 2902 (LAC) where the following appears in pages 320C-321E:

> "[85] An employer and union are free to agree upon selection criteria that are or may be subjective. When the agreed selection criteria are subjective, the employer does not act unfairly in using such selection criteria to select the employees to be dismissed. Indeed, he may be acting unfairly if he departed from the agreed selection criteria simply because they are or may be subjective or may include a certain element of subjectivity. If the agreed selection criteria are contained in a collective agreement, he may be acting in breach of a collective agreement if he departed from them. However, where the employer does not use agreed selection criteria to select the employees to be

> dismissed, he may not use selection criteria other than 'fair and objective; selection criteria. The effect of section 189 (7) is therefore that, when the court deals with a dispute concerning a dismissal for operational requirements where the selection criteria used by the employer to select employees for dismissal are challenged, it must first determine whether the selection criteria used were agreed or not. If they were agreed, section 189(7)(a) applies. If they are not agreed, section 189(7) (b) applies.
>
> …….
>
> [88] The use of subjective selection criteria where they have not been agreed upon can easily lead to abuse of such criteria. This would be the case where they are used to get rid of employees that the employer may view as unwanted but against whom it is unable to produce acceptable proof of unacceptable conduct. That is why the Act contemplates the use of subjective selection criteria only where the parties have reached agreement thereupon. In other words, the policy behind the provisions of the Act is that there is a price to be paid by an employer if he wants to use subjective selection criteria in a retrenchment case. That price is to secure an agreement with the other consulting party about the use of such selection criteria. If an employer strikes such a deal, it can go ahead and use subjective selection criteria. However, if it does not strike a deal with other consulting party on the use of such criteria, the price it pays for not reaching an agreement thereon is that it may not use subjective selection criteria to select employees to be dismissed. In such a case it must use selection criteria that are "fair and objective' as required by section 189(7)(b) of the Act."

35. A party seeking to place reliance on the Latex decision as authority for selection criteria is better advised to be alert to the fact that the criteria used in that case were of a hybrid nature. Some of the criteria, such as "willingness" and "interview" were subjective where the majority were

objective. So much of this is clearly stated in paragraph 89 of the judgment. Paragraph 93 is a further example of the hybrid nature of the section criteria. The relevant position reads:

> "[93] Mr Ten Napel conceded under-cross examination that some of the above selection criteria are subjective. He further conceded that at least seven of the questions that employees who participated in the evaluation exercise had to answer were subjected……..."

36. Mr Rautenbach further placed reliance on paragraphs 24-96 of the Latex decision in support of his submission. In paragraph 96 the court concluded thus:

> "I conclude that the selection criteria have not been demonstrated to have been fair and objective nor has the respondent shown that there was a fair reason to select the individual appellants and not other employees for dismissal. I have no hesitation in concluding that the individual appellants' dismissal was unfair for lack of a fair reason"

37. According to Mr Rautenbach, the following principles emerge from the Latex decision:
    - Any reliance on subjective criteria which could materially influence the result would render the application of the selection criteria unfair.
    - Even if the selection criteria are viewed with reference only those criteria which are objective, the applicants in question must be compared will all other employees with whom they competed for selection, on the basis of those objective criteria.
    - Failure to comply with either of these two principles will lead to a finding of substantially unfair dismissal.

38. The contrary submissions made in this regard by Mr Oosthuizen for the respondent, appear to me to be maritorious. He argued that the submission

made on behalf of the applicants confuses the two separate categories of the selection criteria dealt with in section 189(7)(a) and 189(7)(b) of the Act. He submitted that if the selection criteria are agreed upon, they have to be implemented and the employer may be acting unfairly if he has departed from agreed selection criteria. He further said that a failure to abide by the agreed selection criteria does not, in some residually applicable way, bring the provisions of section 189(7)(b) into play. Such failure, rather means that the parties can be held to the agreed selection criteria.

39. Section 189(7) of the Act is clear. It requires the employer to use the selection criteria that have been agreed to by the consulting parties or if none have been agreed to, to use criteria that are fair and objective. Paragraph 88 of the Latex decision leaves no room for confusion in this regard. It is either the employer strikes a deal with the consulting party and selection criteria are agreed to or it pays, in the alternative, a price in that it may not use subjective selective criteria to select employees to be dismissed. In such a case, it must use selection criteria that are fair and objective in terms of section 189(7)(b) of the Act. Accordingly, I conclude that the respondent, having struck a deal with the applicants and selection criteria were agreed upon, does not have to prove that the retrenchment was based on criteria that are fair and objective, in the event it is found that it did not materially follow the subjective criteria.

40. I propose at this stage to deal with the alleged failure to consult with the applicants on the possibility of bumping I will then determine whether the respondent failed to follow the agreed selection criteria in identifying employees to be dismissed and when determining the applicants' competency and suitability to the appointment within the new structure.

Failure to consult on the possibility of bumping

41. In their amended statement of claim the applicants contended that by applying bumping, the respondent should have retrenched other employees and not the applicants. They said that the respondent should have retained their services at the expense of the relevant employees ultimately appointed to the new structure, or retained their services at the expense of the persons in the positions in respondent's other departments referred to in the statement of case, or retained their services at the expense of other employees within the GE organization, on the application of fair selection criteria. The respondent denied that bumping was of any relevance in this matter, saying that at no stage was it raised by the applicants during the consultation process. It also said that the applicants failed to set out the names of any person whom the applicants contended should have been selected for retrenchment in their places.

42. As has already been stated, the parties agreed during the negotiation stage on criteria to be used in popularity the new structure of the respondent. None of those terms agreed to, included bumping. During the negotiation stage, the applicants, as part of the affected employees, made extensive submissions to counter the proposals of the respondent. Such included a proposed organogram which, if it were accepted would be the one populated. Yet the applicants touched on bumping, at best, by inference than directly. Among questions they posed which the respondent replied to and to which I have earlier referred is question number 9. They asked if all positions should not have been advertised, including those positions that were currently "safe" as a person other than those in the position might be more suitably qualified to do the job. The respondent said that the exercise would be a wasted effort as strictly speaking, if there were two positions that were not changed in any way and there were two incumbents in those positions, then they have the first right to those positions. The applicants did not take issue with this response

as they were entitled to, in the process of a joint consensus seeking consultation. Instead they recapitulated to the proposal of the respondent on how the new structure was to be populated. Bumping involving the application of fair and objective selection criteria could not hold in a case where selection criteria were agreed upon by the parties. It is a curious co-incidence that Mr Rautenbach left the bumping issue and did not persist with it in his closing submissions. I am, therefore, unable to find that it has been shown that the respondent should be held liable for any failure to consult on the possibility of bumping.

Did the respondent fail to follow agreed selection criteria

43. A proper approach to this issue necessitates revisiting some of the questions posed by the applicants, under the hand of Dr Watters, dated 25 July 2005 and the respondent's answer thereto dated 28 July 2005. This consultation process formed the basis on which the applicants accepted the proposal which the respondent used to populate its structure. Three of these questions and answers are numbered 37 to 39. They read thus:

> "37. What is the process/procedure the company intends following? What positions will be filled first, when will interviews start, etc. When does the company see the end of the process?
>
> (a) Management would like to start by filling the proposed top structure first and then populate the proposed structure below. Interviews will begin as soon as the structure is finalized through consultation whereafter advertisements will be placed. Management proposes, if no viable alternative is forthcoming, to implement the new structure by 1 September 2005.
>
> 38. How will the company guarantee that the selection process will be fair?

(a) The company proposes to appoint an external consultant to hold interviews with candidates in conjunction with a Technical person from GE with fire detection and EN knowledge who does not personally know the candidates to assist in ensuring a fair selection process.

39. What will be the criteria for the selection of personnel?
(a) The criteria will be based on competencies assessed by way of an interview and the best fit for the job required as defined"

44. The selection criteria agreed to by the parties for the selection of the employees to populate the new structure, failing which they would be retrenched, constitute a process which I shall now deal with.

The positions in question would be advertised

45. The respondent complied with this requirement by advertising the positions in its intranet. The applicants have raised no dispute in respect of this requirement.

Affected employees to apply for all posts in which they were interested

46. The respondent stipulated that the affected employees were required to apply for all posts in which they were interested as and when the positions were advertised. All applicants applied for the position of Engineering Project Manager which in the new structure became Engineering Manager. The second applicant's evidence was further that he applied for the position of what he described as "Engineering Manager/Product Manager/Principal (Chief) Engineer + Existing R & D Project upfront evaluation that my current position embraces" If an ideal fit could not be found for him, he asked the respondent to forward his CV onto the GE Engineering Integration Manager for offshore development. The further application is dated 29 September 2005. The first applicant enquired from the respondent on 5 October 2005

about the salary of a Production Manager, Engineering Team Leader and Test Laboratory Team Leader. He testified that he applied for these positions. Ms Berrington answered him on the same day by stating that she could not tell him what the salary of a Production Manager would be as the position was to be appointed through Brussels. As for the two Team Leader positions, she said that the salary was considerably less than the one he was, at the time, earning.

47. A pertinent issue raised by the applicants during the trial relates to the question they posed to the respondent which it answered on 20 July 2005, in the cause of the consultation process. It is the following:

> "Q2. If we do not apply for a position advertised, will it mean that you are automatically retrench (sic) or will you be put into the pool that management will look at for other positions.
>
> A. Not necessarily, a person may be offered a reasonable alternative or may be placed in a pool until all other alternative positions have been considered and then if there is no other suitable alternative the person will be retrenched."

48. This selection criteria can not be seen in isolation from yet another very closely related to it. It states that, in the event that an employee was not successful in securing a position in the new structure, he/she would be placed in a pool of employees who had not obtained positions. The management would evaluate all other possible alternatives, with a view to placing him/ her in any remaining vacant positions.

49. The notices dated 29 June 2005 issued by the respondent to the applicants in terms of section 189 (3) of the Act stated, *inter alia* that:

> "All suitably qualified employees are free to apply for such posts [new or materially different positions] and the principles set out above will apply [ie the most suitable qualified applicant will be appointed].
>
> Those employees who do not succeed in securing a position within the new structure through the recruitment exercise will, unless otherwise employed be retrenched due to redundancy. It will accordingly be important to apply for the posts as and when they are advertised. Failure to apply or failure to secure a position may lead to retrenchment."

50. The position taken by the respondent throughout the trial was that each applicant had to file an application for each of the posts he wished to be considered for, as a trigger to being considered for placement in the company structure. Ms Berrington's explanation of the process which she testified to was that which she gave in a meeting held 26 July 2005 where she said that:

> "She would then have to advertise the positions, interviews would have to be held. The structure would be then have to be populated. They should then speak to the staff who are affected by the implementation and see what other alternatives there are." (sic)

51. Again, in a staff ,meeting held on 23 August 2005 her explanation of the process was that:

> "You would then go into an advertising selection and recruitment process. At the end of that, those people who weren't able to secure positions one would say to then unfortunately you have not secured a position what other alternatives are there, and then we would look at other alternatives and what they were etc."

52. Then, on 6 September 2005 Ms Berrington notified the affected staff through an email, saying that:

> "Just a reminder that applications for the new structure close tomorrow at close of business. In order to maximize the opportunity for each individual to be placed in positions that would be of most interest to them, you are strongly encouraged to submit your applications timeously.
>
> Failure to apply for any positions may result in a suitable alternative being allocated at management's discretion. Alternatively it may result in redundancy if no suitable alternative is available."

53. Ms Berrington testified in court that she had requested the employees to forward their good CV's to her and to indicate the posts they were applying for. Each employee could apply for as many a position as he wanted to. No limitations were put on the number of posts to be applied for. A person could apply for 20 posts if he/she wished to. Senior staff could apply for junior posts and they would be considered. She said that all three applicants applied for one post of Engineering Project Manager. She referred to a day when Dr Watters came to her office whereupon she pointed out to him that he had applied for one position. He responded by telling her that he only goes forward and not backwards. The staff, including the applicants, were told to prepare themselves well for the interviews as the panelists would not know them.

54. The applicants' evidence was that they understood that they would be considered for the position they applied for. In the event of not being successful in that position they would be considered for positions in the same or lower level. Dr Watters said that he had two meetings, one of which was scheduled with Ms Berrington. He wanted to know which way to apply. He said that he could not understand why he had to apply for a lower position when GE was looking for people to move up.

55. In that discussion with her, he was made to understand that there was to be a top-down process of populating the structure. That to him, meant that if the top position was filled, the unsuccessful applicant would be used to help fill positions on a lower level. He said that at the time, his financial position was very tight. He had just bought a new house and his son was attending at an expensive school. He was therefore eager to get a position within the respondent. Dr Watters said that he understood the message in the email of 6 September 2005 from Ms Berrington to be that the respondent wanted to understand if people were looking for promotion or change to sections within a department because they were not happy where they were. Mr Airey said that he believed he was not to be out of the race by not applying for positions in the new structure. There were two positions for which he said he was to be considered when populating the structure from top downwards. By not being considered, he was blocked off and it struck him hard. He said that by 24 October 2005 he had recently learnt that all positions has been filled. By then, debating the issue of how posts were filled when such was a *fait accomplii,* was what he could not start.

56. Mr Danoon-Stevens said that the job he had been doing needed to be included in the new posts. He said that the second post he applied for did not have a clear job description. He asked what salary was offered for it but was given a strange answer.

57. It is common cause that the applicants were verbally advised by Ms Berrington on 17 October 2005 that their applications for the position of an Engineering Manager were unsuccessful. She subsequently confirmed the position in writing on the next day. She simultaneously invited them to raise any alternatives that the respondent might have overlooked. The letter stated that if the respondent would assume that they were not aware of any alternatives and no alternatives were raised their employment would be terminated with effect from 30 November 2005. The first and second

applicants asked to be considered for a post of Production Manager which position was outside the new structure. No other alternatives were recorded as having been raised by any other applicants for consideration by the respondent.

58. Mr Oosthuizen's submission in this regard is that the version of the applicants is an absurdity. He said that it is improbable that the respondent would opt for a process in which employees were not required to apply for all positions in which they were interested. An application is the essence of any recruitment and selection process and is by far the most efficient manner of determining the pool of candidates for each vacant post. He said that the very purpose of advertising post was to determine which employees were interested in each respective position. It was never the case that the purpose of advertising posts was to get people happy. He contended that the applicants' version was not borne out by any of the voluminous documentary evidence before court. He said that it was clear that the applicants were informed from the outset, in writing and in no uncertain terms, of the consequences should they fail to apply for the advertised posts. He said that there was no question that employees were required to submit applications for all the posts in which they were interested, and that they would not merely be considered for all available posts.

59. Regarding the applications for other posts by the first and second applicants, he said that the applicants' version contradicted their pleaded case. Their pleaded case was that they had applied for the Engineering Manager position without alleging that they had applied for additional positions. As they had requested, their CV's were forwarded to Europe for consideration for a Production Manager position. He argued that if, in addition, they made applications for other positions and such applications had simply been ignored one would have expected them to complain about it in the period 18-24 October 2005 given the circumstances then prevailing.

60. I have been persuaded by the contrary submissions made in this regard by Mr Rautenbach. Regarding the email message of September 2005 from Ms Berrington and all other communications from the respondent about the application procedure, he said that the first thing that should be noted is that it nowhere states that an application is a prerequisite for consideration for a job, or that failure to apply for positions would preclude consideration for such positions. On the contrary the email message suggests the opposite. It states that failure to apply *"may result in redundancy if no suitable alternative is available."* What is more, he argued, the email spells out the effect of a failure to apply in the following terms: *"failure to apply for any position may result in a suitable alternative being allocated at management's discretion."* In other words management may exercise its discretion as to the most suitable position for the employee in question, since then it would be ignorant of the employee's particular preferences. He said that it is significantly not stated that failure to apply will result in retrenchment, or that if an employee fails to apply he forfeits the right to be considered. He contended that the purpose of the application procedure was no more than to enable the employees affected to be placed in their first or second choice positions as the case might be, which version was confirmed by Dr Watters in his evidence. According to the respondent, the applicants did apply and therefore did not fall into a category of those who did not apply and in respect of whom the answer was given. In my view if the answer was to the benefit of those who did not apply, the applicants cannot be worse off after they applied for at least one post. When posts, other than the one they applied for are considered, it becomes irrelevant that they applied for the one post. They are entitled to be considered as employees who did not apply.

61. It has always to be borne in mind that a dismissal based on operational requirements of the employer is a no fault dismissal in respect of which the employer has to avoid such dismissals where possible. If not so possible, the

employer is under a legal obligation to exhaust all suitable alternatives possible. To use the application procedure as a means of excluding the employees who did not apply, in populating the company structure would result in the respondent not being able to consider reasonable alternatives to dismissal where it could turn out to be possible. A failure to apply for a position in the new structure of the respondent, ought not, in my view, to lead to an automatic retrenchment as such would necessarily result in an unfair dismissal, contrary to the spirit of section 189(3) of the Act. The respondent was consequently legally obliged to consider the placement of applicants in posts other than those they applied for, in the process of considering suitable alternatives possible in the circumstances. One significant question posed by the affected employees, during the consultation stage was whether an employee would automatically be retrenched if he/she did not apply for a position advertised or he/she would be put into the pool that management would look at for other positions. The respondent's answer was that failure to apply for an advertised post would not necessarily lead to automatic retrenchment. In its own version therefore, the respondent knew that a failure to apply for an advertised post ought not necessarily to lead to retrenchment as a person might be offered a reasonable alternative or might be placed in a pool until all other alternatives have been considered. Clearly therefore, the procedure followed by the respondent in excluding the applicants from a consideration to those positions they did not apply for had unfair consequences to them.

62. I have now to consider whether the population of the new structure of the respondent had to be done layer by layer, starting from the top, moving down.

63. Mr Oosthuizen identified "several obstacles" which he said were on the way of the endeavours of the applicants to persuade court in this regard. I have looked at each such "obstacle" but I am not persuaded by his submissions in this regard. The first of such, he said was the fact that the version testified to

by the applicants was never their pleaded case. In my view it did not have to be their pleaded case seeing that, it infact was the promise of the respondent to the applicants that it would start first with the top structure and then populate the proposed structure below. I refer here to the questions and answered numbered 37 to 39, dated 28 July 2005. the relevant answer given by the respondent reads:

> "Management would like to *start by filling the proposed top structure first and then populate the proposed structure below.* (my emphasis) Interviews will begin as soon as the structure is finalized through consultation whereafter advertisements will be placed. Management proposes, if no viable alternative is forthcoming, to implement the new structure by 01 September 2005."

64. No evidence was led of any viable alternatives after this, forthcoming from the applicants. The respondent was consequently obliged to keep the promise it made to the applicants who were in top positions, applying for a top position. From this layer by layer population of the structure, the applicants would have been considered for alternative placement. If not, they would be in the pool for further consideration. Had the respondent followed this process as promised, which by the way was very logical, it would have been better positioned to decide whether, in respect of them, further interviews were necessary and if so, to carry them out. By not following this process, it placed the applicants in an awkward position where they suddenly could not be considered for reasonable alternatives. They were then, indeed, faced with retrenchment as a *fait accomplii* without any fault on their part. No wonder they were at a loss and could not cry foul. As unsuccessful applicants in the top post, they should have, in addition been considered for positions at the next level of seniority. When all documentation of the parties pertaining to the population of the structure, is seen against the background of the promise made by the respondent, it becomes abundantly clear that a layer by layer structural population ought to have been followed by the respondent. The failure of the

respondent to keep to the promise it made to the applicant result in them being prejudiced. The consequence of this is that the respondent failed to retain the applicants' services in the new structure or in the position within itself. Had it made an attempt , it might have found that there were reasonable alternatives that it could successfully have offered to the applicants. I am not able to find on evidence that the respondent was at fault in failing to keep the applicants within the GE organization. The undisputed evidence of the respondent was that it forwarded the CV's of the applicants to Europe, in terms of their request.

65. Linked again to the issue at hand, is the question of whether the respondent carried out the interviews of the applicants, following the agreed selection criteria. I found the evidence of Ms Berrington and Ms Steenkamp to have been of high probative value. For me to have to reject the material evidence of Ms Steenkamp, it needed the applicants to have contradict it with credible evidence of another Human Resources personnel. In the absence of such contradictory evidence, I have to accept that she applied and followed an acceptable technique in conducting the interviews with the applicants. The same cannot be said of Mr Mintjens. Unlike Ms Steenkamp, he did not draw up a standardised questionnaire which would have guided him in the interviews. While the assessment of candidates by Ms Steenkamp can be determined on her questions and answers given thereto, I have to be guided by the say so of Mr Mintjens on questions put to the applicants. It does not help the respondent's case to say that the applicants could not remember the questions Mr Mintjens put to them. It was for the respondent and therefore Mr Mintjens to have testified to the adequacy thereof in compliance with the competency-based interview promised to the applicants.

66. When it however comes to the issue around the technical knowledge that Mr Mintjens had regarding fire detection services, I am persuaded by the submission made by Mr Oosthuizen. Both Messrs Airey and Denoon-Stevens

were found to be technically competent while Dr Watters admitted to not being possessed of any particular experience in fire detection system. A suggestion was put forward that Mr Mintjens' lack of experience in fire detection meant that he would not have understood the reasons which the applicants put forward as to why many of their projects were not completed in time. The understanding of such a reason did not depend on the experience in the fire detection as testified to by the applicants. Such reasons included the inter departmental co-ordination in the finalization of the product to avoid delays. I have noted though that the respondent guaranteed the fairness in the selection process by promising to appoint an external consultant to hold interviews in conjunction with a person from the GE Group with fire detection and EN knowledge. Mr Mintjens ought to have been such a person from the GE Group. As already shown the first and second applicants were found to be technically competent, while Dr Watters did not have such experience in fire detection. It has therefore not been shown to me that the lack of experience in the fire detection of Mr Mintjens disadvantaged them with prejudicial consequences.

Failure of respondent to consult with the first applicant on a CVT Manager positon

67. It is common cause that further changes to the new structure were effected on 23 September 2005. The consequence was the upward merging of a position CVT Manager to one of Engineering Project Manager. The incumbent of the CVT Manager post at the time was the first applicant. He had up until then been told that his position would not be affected. The undisputed evidence of Ms Berrington was that the respondent consulted with the first applicant. Such consultation was between him, Ms Berrington and Mr McKechnie on 23 September 2005, where he was handed a s189 notice. The first applicant went overseas to return in early October 2005. Further consultations were held with him. The final structure was adopted on 7

October 2005. I am persuaded by the evidence of both Ms Berrington and Mr McKechnie that the respondent did consult with the first applicant before it later declared his post redundant. It however, remains an unfair procedure adopted by the respondent not to have considered the applicants for this post as well, in its obligations to search for a reasonable alternative to retrenchment.

68. A proper conspectus of all the evidence in this matter informs me that the respondent failed to comply with the agreed selection criteria thus resulting in the dismissal of each applicant being procedurally unfair. They are entitled to compensation. In considering a just and equitable amount, I am guided by the salient facts of this matter. These include the attempts made by the respondent to comply with s189 and that it offered fixed term employment to the first and second applicants after they were retrenched. It has not been shown to me that the respondent was vindictive in not assisting the third applicant. There remains a probability that he was not available for such services. The applicants are not entitled to any additional severance pay. The law and fairness of this case dictates that the costs should follow the results.

69. I then proceed to issue the following order:

1. The respondent is ordered to compensate each of the applicants in an amount equivalent to five (5) months of the remuneration earned by each applicant on the date of his dismissal. Such payment is to be made within 10 days from the date hereof.
2. The respondent is to pay the costs of this claim.

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Cele AJ

Date Last Heard: 23 January 2008
Date of Judgment: 3 October 2008

Appearances:

For the Applicant:	Adv F Rautenbach instructed by A R Irish
For the Respondent:	Adv A C Oosthuizen SC, Adv G Leslie instructed by Cliffe Dekker Inc