THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D1174/17

In the matter between**:**

TELKOM SA LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER NGWANE *N.O* **Second Respondent**

SITHEMBISO GCABA **Third Respondent**

Heard: **31 October 2018**

Delivered: **20 December 2018**

Summary: **Jurisdiction of the CCMA to deal with an unfair labour practice dispute emanating from section 189 process.**

Section 186(2)(a) – failure to appoint the employee to a promotive position created consequent to restructuring and offered as an alternative to retrenchment.

Interpretation of section 193(4) of the LRA – remedy of reinstatement and promotion of a retrenched employee.

JUDGMENT

NKUTHA–NKONTWANA, J

Introduction

[1] Telkom seeks an order reviewing and setting aside the jurisdictional ruling under case KNDB8496-16 dated 9 December 2016 issued by the second respondent (commissioner) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of which the commissioner found that the CCMA had the powers to deal with the matter. Alternatively, Telkom seeks an order reviewing and setting aside the arbitration award under case KNDB8496-16 dated 13 July 2017 in terms of which the commissioner found that Telkom committed an unfair labour practice in terms of section 186(2)(a) of the Labour Relations Act[1] (LRA) when it failed to promote the third respondent (Mr Gcaba). Since Mr Gcaba was no longer in Telkom's employ when the award was rendered, the commissioner ordered his reinstatement with a promotion.

[2] Telkom's impugn against the jurisdictional ruling is that the commissioner incorrectly found that the CCMA had jurisdiction as the non-appointment of Mr Gcaba happened within the context of a restructuring process in terms of section 189 of the LRA. Alternatively, that the commissioner committed a reviewable irregularity in that he misconstrued the nature of the enquiry and as a result rendered an incorrect award. Mr Gcaba is defending both the jurisdictional ruling and the award.

Background

[3] Telkom embarked on a restructuring process during 2016 and duly consulted with four trade unions, CWU, SACU, ICTU and Solidarity. About 40 employees were retrenched. Mr Gcaba was one of the affected employees. He was employed as Specialist: Employee Relations, Grade 5 (S5) reporting to the Senior Manager: Employee Relations, Grade 4 (M4).

[4] Telkom abolished several positions of Employee Relations Specialists, Managers and Consultants during the restructuring. Two positions were created in the new structure, that is the Senior Specialist: Industrial Relations

[1] Act 66 of 1995 as amended.

and Senior Specialist: Employee Relations. Even though Mr Gcaba had applied for both positions, he is only challenging his non-appointment in respect of Senior Specialist: Industrial Relations.

[5] It is common cause that the new structure had limited positions. The affected employees were afforded an opportunity to be placed in one of the available positions. It is not in dispute that the placement process was meant to avoid possible retrenchment of affected employees and that those who remained unplaced were subsequently retrenched. In terms of the section 189 process, endorsed by the trade unions, the employees seeking to be placed in senior positions had to submit applications and undergo interviews, if selected. Those employees who had qualms with their non-placement could lodge an appeal, a process provided for in terms of the section 189 process.

[6] Mr Gcaba unsuccessfully applied for the position of Senior Specialist: Industrial Relations and his subsequent appeal was equally unsuccessful. He referred an unfair labour practice dispute in terms of section 186(2)(a), challenging his non-appointment as failure by Telkom to promote him. Since Mr Gcaba had not been placed in any of the positions in the new structure, he was subsequently retrenched. By the time the arbitration sat, Mr Gcaba had already been retrenched.

Jurisdictional ruling

[7] Telkom raised a point *in limine* to the effect that the CCMA lacked jurisdiction to deal with the matter as the impugned decision not to appoint Mr Gcaba to a newly created position of Senior Specialist: Industrial Relations had nothing to do with promotion. It was submitted on behalf of Telkom that Mr Gcaba's position was affected by restructuring which was the subject matter of the section 189 consultation process involving the trade unions. Mr Gcaba is also challenging his ultimate retrenchment and that matter is pending adjudication before this Court.

[8] The commissioner found that it was 'common cause that there was somehow a "hybrid" situation in that whilst the process exhibited the

hallmarks of S189 Consultative process but it also bore some elements of S186 in that “promotional opportunities” were contemplated by the respondent…’ and, accordingly, Mr Gcaba’s dispute falls squarely within section 186(2)(a).

[9] Mr Gcaba asserts that the commissioner was correct in his finding as there is no way he could have referred a retrenchment dispute on 7 July 2016, the date when he referred the promotion dispute, since he was only retrenched on 31 August 2016. His counsel, Mr Mbuyisa, submitted that there was nothing untoward with challenging the unfair conduct perpetrated during the restructuring process without having to wait to be retrenched. In this instance, Telkom had envisaged that there could be a challengeable unfair conduct during the placement process hence it afforded the aggrieved non-placed employees an appeal process, so it was further argued.

[10] In my view, the crux of the matter is whether the failure to place the employees whose positions had been rendered redundant, owing to the restructuring of the employer’s business operations, to senior alternative positions amounts to a promotional dispute.

[11] Mr Maserumule, Telkom’s attorney, submitted that the fact that promotional opportunity coincided with the retrenchment process does not amount to a separate and new cause of action. I agree with this submission. Telkom was embarked in a process of implementing a structural change that saw a reduction of Employee Relations positions. Mr Gcaba accepts that his position became redundant and for him to avoid retrenchment he was offered an opportunity to compete for placement in one of the two new positions. In this regard, the recent decision of the Labour Appeal Court (LAC) in *South African Breweries (Pty) Limited v Louw*[2] referred to by Mr Mbuyisa is apposite. The LAC stated that:

> ‘[21] In this matter, what has been inappropriately labelled as the "selection criteria" is the inclusion of past performance ratings in

[2] [2018] 1 BLLR 26 (LAC) at paras 21 - 22.

the assessment process for the competitive process to select an incumbent for the new job of area manager, George. This is not a method to select who, from the ranks of the occupants of potentially redundant posts, is to be dismissed and is not what section 189(2)(b) is concerned to regulate. The fact, as illustrated in this matter, that a dislocated employee, who applies for a new post and fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal. Accordingly, in our view, it is contrived to allege that the taking into account of performance ratings in a process of recruitment for a post is the utilisation of an unfair method of selecting for dismissal as contemplated by sections 189(2)(b) and 189(7).

[22] An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2)(b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Being required to compete for such a post is not a *method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee.' (Emphasis added)

[12] Clearly, Mr Gcaba takes no issue with the competitive placement process he was subjected to, only to the extent that it was a method of avoiding his dismissal following his displacement, and the fact that it was not a selection criterion as articulated in *South Africa Breweries.*[3]

[13] Nonetheless, Mr Gcaba seems to suggest that *South African Breweries* is authority for the approach he took in challenging his non-placement as an unfair labour practice. This proposition is a clear misconstruction of this

[3] Id n 2.

decision which is, in any event, distinguishable. In *South Africa Breweries*, the LAC was confronted with the employee, Mr Louw, who was blaming his non-appointment on an unfair treatment in his previous performance assessment that gave him a lower performance rating. As a result of the poor performance record, he was found unsuitable for placement. Referring to Mr Louw's failure to challenge the performance rating, the LAC held that:[4]

> '[23] Intrinsically, a competitive process for appointment makes assessments of the relative strengths and weaknesses of the candidates. What Louw is aggrieved about is that he was uncompetitive in these assessments. This condition, so he says, derives from unfair treatment in an earlier, routine performance rating process. It is not apparent to us that this allegation was substantiated on the evidence, but assuming that such a view was plausible, he went into the interview process well knowing of this circumstance. It is common cause he could have invoked standard procedures to have a poor performance rating re-examined. He failed to exhaust those remedies.
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> [24] In the judgment *a quo*, it was held this failure to raise a grievance was irrelevant. We cannot agree; Louw cannot have his cake and eat it. The notion that using performance ratings was tantamount to intruding into the process a "fault" element is without any foundation in the evidence and does not follow from the inherent requirement of a competitive process *per se*. The interview panel cannot be faulted for dealing with his candidacy on the footing upon which it was presented.' (Emphasis added)

[14] It is not Mr Gcaba's case that his non-placement was due to some previous unfair conduct that rendered him uncompetitive. Conversely, he unswervingly submitted that he was suitable for the position of Senior Specialist: Industrial Relations and, since this newly created position is located in a grade higher than his redundant position, he was deprived of a promotion. Unfortunately, this submission is flawed. To my mind, it is inconceivable that in a restructuring process the affected employees would

[4] *Supra* n 2 at paras 23 - 24.

harbour an expectation for promotion as opposed to being placed in alternative positions available, whether senior or junior in status or rank. In this regard, I agree with John Grogan when he says:

> 'The dispute must relate to an alleged unfair failure or refusal to *promote*. A disputed failure to *appoint* an applicant to a different position, even though of a higher status, will not necessarily be classified as a dispute concerning promotion. In such cases, employees who seek relief must bring their applications under s 6 of the Employment Equity Act, which requires proof that the reason for the non-appointment was unfair discrimination, or prove by way of review that the employer's failure to appoint them was unlawful'.[5] (Emphasis added)

[15] I hasten to add that in instances such as the present one, where the employee is displaced by restructuring and is aggrieved by his/her non-placement consequent to a competitive placement process must challenge same in terms of section 189. Moreover, Mr Gcaba accepts that the competitive placement process he was subjected to took place within a context of a restructuring and was meant to avoid his dismissal following being displacement. This point is appositely articulated in *South African Breweries* as follows:[6]

> 'The fact, as illustrated in this matter, that a dislocated employee, who applies for a new post and fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal.' (Emphasis added)

[16] Mr Gcaba is not left without a remedy to challenge his non-placement. In actual fact, he has already availed himself to the section 189 process, correctly so.

[5] John Grogan *Workplace Law*, 12th Ed, 2017, ch 5-p 65.
[6] *Supra* n 2 at para 21.

[17] Tritely, the term 'jurisdiction' is defined as the power or competence of a court or tribunal to hear and determine an issue between the parties.[7] In *Makhanya v University of Zululand*,[8] the Supreme Court of Appeal (SCA) explicating this connotation had the following to say:

> '[51] The submissions that were made before us by counsel for the University, when examined, came down to asserting that proposition. That submission was founded upon the allegation in the special plea that the two claims (the claim in the CCMA and the claim in the High Court) were the same claim. In truth that is not correct, but I will assume its correctness for present purposes. Upon that supposition counsel submitted that because the claim had been disposed of finally by the CCMA the High Court had no jurisdiction in the matter. Her submission, in short, was that the court had no power in the matter because the University had a good defence to the claim.
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> [52] I have pointed out that the term "jurisdiction", as it has been used in this case, and in the related cases that I have mentioned, describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.
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> [53] The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer – because there is none.
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> [54] There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider a claim cannot be dependent upon whether the claim is a

[7] *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 26 - 27; See also *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC); *Makhanya v University of Zululand 2010* (1) SA 62 (SCA); (2009) 30 ILJ 1539 (SCA) at para 52. *Kriel v Legal Aid Board and Others* (2009) 30 ILJ 1735 (SCA) at paras 12 -18.

[8] (2009) 30 ILJ 1539 (SCA) at paras 51 - 57.

good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*, expressed it as follows:

> "It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it".

[55] I make no apology for repeating that rule of logic in various ways throughout this judgment. It has often been ignored in cases purporting to raise jurisdictional objections of the kind that is now before us.

[56] Even if the University indeed has a good defence to the claim along the lines that I have indicated that is irrelevant to the question whether the high court had the power to consider the claim, if only to dismiss it. The submission by counsel that the court had no jurisdiction in the matter because there is a good defence is not capable of being sustained, merely as a matter of logic. Once more it becomes apparent, on that submission, that this case is not about jurisdiction. It is about whether the University has a good defence to the claim.

[57] I might add that if courts were precluded from considering claims that are bad in law there would be no scope for the recognition of new rights and the development of the law. The very progress of the law is dependent upon courts having the power to consider claims that have not been encountered before. A court cannot shy away from exercising its power to consider a claim on account of the fact that it considers that the recognition of the claim might have undesirable consequences. Its proper course in a case like that is to exercise its power to consider the claim but to decline to recognise the rights that are asserted and to dismiss the claim as being bad in law…'

[18] Similarly in the present case, the true issue for determination was not whether the CCMA lacked jurisdiction to entertain a section 186(2)(a) dispute, but whether failure to appoint or place Mr Gcaba in the alternative

position that was ranked senior than his redundant position constitutes an unfair labour practice in relation to promotion.[9]

[19] Clearly, the commissioner's ruling in this regard is unassailable and, as such, Telkom's jurisdictional challenge must fail.

[20] Lastly, on the issue of condonation for the late filing of the jurisdictional ruling, I find the explanation for the delay reasonable and acceptable. I am also convinced that the jurisdictional point was not frivolously taken. The indulgence is accordingly granted.

Arbitration award

[21] It is an established principle that failure by the commissioner to apply his or her mind to issues which are material to the determination of the dispute constitutes a reviewable irregularity. The applicable review test in instances such as the present one is one of correctness as opposed to reasonableness and this was reaffirmed in *Enforce Security Group v Fikile and Others.*[10]

[22] Having found that the non-placement of Mr Gcaba is a section 189 dispute, the commissioner's finding that Telkom committed an unfair labour practice is untenable. The commissioner clearly misconceived the nature of the enquiry and accordingly rendered an incorrect award.

Remedy

[23] As a final point, even though I don't have to pronounce on the remaining issues, I deem it expedient, and for the sake of completeness, to address the commissioner's finding on the remedy. The commissioner ordered that Mr

[9] See *Chirwa v Transnet Ltd and Others* (2008) 29 ILJ 73 (CC); *Kriel v Legal Aid Board and Others* (2009) 30 ILJ 1735 (SCA) at paras 12 - 18; *Makhanya v University of Zululand 2010* (1) SA 62 (SCA); (2009) 30 ILJ 1539 (SCA) at para 52.
[10] [2017] 8 BLLR 745 (LAC) at para 16, see also *SA Rugby (Pty) Ltd v SARPU and Another* [2008] 9 BLLR 845 (LAC) at paras 39 - 40.

Gcaba be reinstated with a promotion to the position of Senior Specialist: Industrial Relations, an order vehemently impugned by Telkom.

[24] The commissioner, despite being aware that Mr Gcaba had already been retrenched and was challenging that retrenchment, viewed the retrenchment litigation as distinguishable and that it could not fetter his discretion to award reinstatement in accordance with section 193(4) of the LRA. Mr Gcaba supports this finding. He argued that his promotion could not have been possible without an order reincarnating his contract of employment.

[25] I need to explore the viability of Mr Gcaba's construction of section 193(4). The provision states that:

> 'An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering re-instatement, re-employment or compensation'. (Emphasis added)

[26] Whilst section 186(2) states that:

> 'Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving –
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> (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
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> (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
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> (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
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> (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.'

[27] The principles of interpretation summarised in *Joint Municipal Pension Fund v Endumeni Municipality*[11] are trite. The SCA, per Wallis JA stated:

> 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Emphasis added)

[28] The historical context to section 193(4) is important. Prior to the amendments to the LRA in 2002, the definition of the residual unfair labour practice was contained in Part B of Schedule 7 to the Act. The amendments removed unfair labour practices from Schedule 7 and placed them in section 186(2). The amended definition of an unfair labour practice is similar to the

[11] [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para [18].

one in Schedule 7, save that it now includes probationary issues and occupational detriments in terms of the Protected Disclosures Act.[12]

[29] In terms of item 4(2) of schedule 7 arbitrators had the powers to determine unfair labour practice disputes in terms of item 3, other unfair discrimination disputes, on 'reasonable terms' without expressly providing for a remedy of reinstatement or re-employment. As a result, there was confusion as to whether arbitrators had the power to order reinstatement as a remedy when dealing with unfair labour practice disputes. In *Sajid v Mahomed NO and Others,*[13] dealing with that dilemma, this court, per Zondo J, as he was then, stated:

> '[98] If it is correct that an arbitrator who determines a dispute in terms of item of item 4(2) of schedule 7 has no power to order reinstatement, that would mean that in the case of a dispute such as is referred to in the preceding paragraph, an arbitrator would have no power to order the employer to comply with the agreement by reinstating the employee - the most natural and reasonable way of determining such a dispute - even if to determine the dispute on those terms would be eminently reasonable.
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> [99] In fact if it were justified to invoke the *unius inclusio alterius exclusio* maxim in these circumstances in respect of the issue whether an arbitrator has the power to reinstate under item 4(2) of the schedule, then the same reasoning would apply to the question whether under item 4(2) an arbitrator has power to order compensation. I say this because compensation is also specifically mentioned in respect of powers of the Labour Court under item 4(1) but, like reinstatement, it is not mentioned among the powers of arbitrators under item 4(2).
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> [100] If then an arbitrator, faced with the case I have referred to above, could arbitrate the dispute but could neither order reinstatement nor order payment of compensation, what effective relief could the arbitrator be said to have power to make in order to determine such a dispute?

[12] See the editorial note to section 186 of the LRA by D du Toit et *al* in *Labour Law Through the Cases.*
[13] (2000) 21 ILJ 1204 (LC) at para 94 - 103,

Simply for the arbitrator to give a declarator that the employer's refusal to reinstate the employee constitutes an unfair labour practice and to stop there would not amount to determining the dispute because to determine the dispute means to put to an end the dispute (see *Trident Steel (Pty) Ltd v John NO & others* (1987) 8 ILJ 27). The employee would end up with a piece of paper in his hand which said the employer's conduct constituted an unfair labour practice but which he could not enforce if the employer decided to ignore the declarator of the arbitrator.

[101] For the above and other reasons which I do not consider necessary to go into as the above is by itself a good enough reason, I am of the opinion that the *unius inclusio alterius exclusio* maxim cannot be invoked in this matter, and that an arbitrator dealing with a matter referred to in item 2(1)*(b)*, *(c)* and *(d)* of schedule 7 has power under item 4(2) to order reinstatement.

[102] Having said the above about the power of an arbitrator to reinstate under item 4(2) of schedule 7, I must say that in the case of a suspension dispute, if one can speak of reinstatement, it can only be the reinstatement not of the employee to his employment of the employer because that applies to a case where an employee has been dismissed but it can only be the reinstatement of the terms, conditions, privileges and benefits of the employee which got suspended when the suspension was effected. It may be argued that the distinction is academic but I do not intend to go into that debate because I am satisfied that it is necessary to bear the distinction in mind.

[103] Whether the court orders the reinstatement of all the terms, conditions, privileges and benefits of the employee or it sets the suspension aside, in the end the order that is made must be one which has the effect of ending or lifting the suspension.'

[30] In my view, by inserting section 193(4), the legislature intended to expressly clothe the arbitrators with the power to award reinstatement or re-employment in any unfair labour practice instances that are short of

dismissal, provided that it is reasonable. This point was stressed by the Court in *Sajid*[14] as it clearly distinguished reinstatement to previous employment from reinstatement in the context of unfair suspension, which may include restoration of benefits, terms and conditions of employment that had been temporarily suspended.

[31] Nonetheless, section 186(2)(c) expressly deals with dismissed employees who seek to enforce the agreement that guaranteed them reinstatement or re-employment. Mr Maserumule is correct in his submission that this is the only instance where reinstatement may be ordered to a dismissed employee in terms of section 193(4). This is so because reinstatement effectively resuscitates the pre-existing employment relationship. It stands to reason, therefore, that arbitrators are barred from fashioning a new contract or different terms when ordering reinstatement of a dismissed employee.[15]

[32] In the present case, it is clear from the LRA 7.11 referral form that Mr Gcaba sought to be promoted and get the necessary benefits attached to the post of Senior Specialist: Industrial Relations, a position he sought in order to avoid retrenchment because his position had been declared redundant and was extinct. Assuming that the commissioner could order reinstatement, his order of reinstatement could only resuscitate the position that Mr Gcaba occupied prior to his retrenchment. Since that position is extinct, the commissioner's award patently fashioned a new employment contract with different terms and, in so doing, exceeded his powers.

[33] Mr Mbuyisa submitted that, but for the unfair labour practice, Mr Gcaba would not have been retrenched. Telkom knew that he had referred an unfair labour practice dispute but still took a risk and retrenched him in order to frustrate the grant of an appropriate relief, so it was further argued. Clearly, these submissions are misplaced. I have already addressed the issue of Mr

[14] Supra at para 102.
[15] *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at paras 118 - 149; see also *University of Pretoria v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 183 (LAC) at paras 16 - 21. It must be mentioned that in the two decisions the courts were dealing with a renewal of fixed term contracts and they were decided before the 2014 amendments to the LRA which inserted Section 198B. However, the principle is still applicable in all other instances.

Gcaba's non-appointment and the subsequent retrenchment. Save to state that, even though, the arbitrators have a wide discretion in terms of section 193(4), it must be exercised judiciously. In my view, given the fact that Mr Gcaba had already been retrenched, a compensatory remedy, at best, could have sufficed as a reasonable term in accordance with section 193(4).

[34] Based on a consideration of the factors stipulated above, the interpretation advocated by Mr Gcaba that a remedy of reinstatement is envisaged in section 193(4) in cases of unfair labour practice concerning promotion must be rejected as, it is not only irrational, but does not accord with the purpose of section 193(4).

Conclusion

[35] In all the circumstances, I have no doubt that the commissioner clearly misconceived the nature of the enquiry and accordingly rendered an incorrect award. Consequently, the award stands to be reviewed and set aside.

[36] There is no merit in remitting the matter back to the CCMA in the light of my finding that the true nature of the dispute pertains to retrenchment. Nothing turns on the fact that the alternative position was on a higher grade than Mr Gcaba's redundant position. Mr Gcaba must avail himself to the section 189 dispute resolution machinery; which, in any event, has already been triggered.

[37] I need not express a view on the merits and demerits of Telkom's decision not to appoint Mr Gcaba to the new position of Senior Specialist: Industrial Relations as that is a matter that falls within the ambit of section 189 litigation.

Costs

[38] The only issue remaining is that of costs. The parties agreed that costs should not follow the result given the fact that the matter raised intricate and novel legal issues. I see no reason to disagree with the parties.

[39] In the premises, I make the following order:

Order

1. The review application in relation to the jurisdictional ruling under case KNDB8496-16 dated 9 December 2016 is dismissed.

2. The arbitration award under case KNDB8496-16 dated 13 July 2017 is reviewed and set aside and replaced with the following order:

    2.1 Mr Gcaba has failed to prove that his non-placement to an alternative position during the restructuring process constitutes an unfair labour practice in relation to promotion.

    2.2 The application is dismissed.

3. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Mr P Maserumule from Maserumule Attorneys
For the third respondent:	Advocate Mbuyisa
Instructed by:	Garlicke and Bousfield Inc.