IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA 16/2016

LC case no C285/2014

In the matter between:

SOUTH AFRICAN BREWERIES (PTY) LTD **Appellant**

and

LOUW, RUDOLPH STEPHANUS **Respondent**

Held: **29 August 2017**

Delivered: **24 October 2017**

Coram: Coppin, Sutherland JJA and Savage AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The respondent (Louw) was employed by the appellant (SAB) as the Sales Manager, Southern Cape Region, based in George. Owing to a restructuring of the business in the Eastern Cape, among other changes, Louw's post became redundant. The functions formerly performed by him in the sales field were

subsumed into a newly created post of an "area manager", based in George. The new post embraced other management functions in addition to managing sales. It included operations, which functions were to be integrated with sales in the new business model. The new post was also pitched at a higher level of management, as determined on the Hay job grading system. SAB invoked section 189 of the Labour Relations Act 66 of 1995 (LRA) when the planning for a wide-ranging restructuring programme identified his post for abolition and absorption into the new post. Eventually, when Louw was retrenched, he was aggrieved and a trial took place into an alleged unfair retrenchment. The Labour Court found he was unfairly retrenched and reinstated him retrospectively. The appeal lies against that order.

[2] Two distinct controversies arise for decision:

2.1. First, whether the court *a quo* could legitimately make the critical factual findings underpinning its conclusion that the retrenchment was both substantively and procedurally unfair, given that those critical factual issues were, so it was argued, neither pleaded nor encapsulated in the narrowed down terms of a pre-trial conference minute.

2.2. Second, whether the critical findings of the court *a quo* could correctly be made on the evidence adduced and, upon the proper application to those facts, of the norms enshrined in section 189 of the LRA.

[3] These two controversies are addressed discretely. We hold that the first controversy must be decided in favour of the appellant, and that, axiomatically, is dispositive of the fate of order sought to be set aside. Nonetheless, the controversies in the second issue raise questions that it is appropriate to address because it appears that certain conceptual confusions exist about the proper application of section 189 to the notions of selection criteria for dismissal and the scope for legitimate and fair alternatives that an employer might propose. On the second controversy, we have also found in favour of the appellant. As a result, a peripheral matter about the propriety of reinstatement, the subject matter of a last

minute unopposed amendment at the outset of the trial, does not require attention in this judgment.

The First Controversy: The necessary discipline of orderly litigation

[4] To state the obvious, litigation is complex. Among the duties of legal practitioners is to conduct cases in a manner that is coherent, free from ambiguity and free from prolixity. True enough, the holy grail of translating what is complex into simplicity is not always attainable, but the ground rules are irrefrangible: say what you mean, mean what say and never hide a part of the case by a resort to linguistic obscurities. The norm of a fair trial means each side being given unambiguous warning of the case they are to meet. Moreover, these requirements are not mere civilities as between adversaries; the court too, is dependent upon the fruits of clarity and certainty to know what question is to be decided and to be presented only with admissible evidence that is relevant to that question. Making up one's case as you go along is an anathema to orderly litigation and cannot be tolerated by a court. Counsel's duty of diligence demands an approach to litigation which best assists a court to decide questions and no compromise is appropriate.

[5] The critical complaint in this matter is that the court *a quo* decided the case on factual issues not properly put before it on the pleadings, nor as refined in the pre-trial conference minute. The complaint had been raised during the hearing and in argument at the conclusion of the trial, considered by the court *a quo* and dismissed. In our view, the complaint is justified and the court *a quo* was in error.

[6] The two key findings of the court *a quo* are these:

6.1. The retrenchment was substantively unfair because Louw should have been appointed to the vacant post of area manager, based in Aliwal North, which would have discharged the employer's obligation to exhaust all reasonable measures to avoid a dismissal.

6.2. The retrenchment was procedurally unfair because objectively unfair selection criteria were chosen; in particular, that the past performance ratings of the candidates interviewed to fill the newly created post of area manager, based in George, were used, and Louw did not accept that his own rating as "2" was correct or fair, which factor prejudiced his prospects of selection.

[7] Counsel for Louw, in the appeal, when invited to trace the thread back from these findings to the pre-trial conference minute and further back to the pleadings, properly acknowledged that there were no express allusions that could be invoked. Indeed, she was driven to invoke the mantra expressed in the statement of claim where Louw averred his dismissal was both "procedurally and substantively unfair", that this foundation had not been abandoned and was thus the "legitimising" peg upon which hang the findings. In our view, this stock phrase is hardly ever useful in communicating what exactly is the *causa* of the unfairness, which is what both court and counsel need to know in order to address it.

[8] The relationship between the pleadings and the pre-trial conference minute has been the subject of several judicial pronouncements.[1] In short, a minute of this sort is an agreement from which one cannot unilaterally resile. Also, a pleading binds the pleader, subject only to the allowing of an amendment, either by agreement with the adversary, or with the leave of the court. The case pleaded cannot be changed or expanded by the terms of a minute; if it does, it is necessary that that change go hand in hand with a necessary amendment. The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means, axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may

[1] See: *Price N.O. v Allied - JBS Building Society* 1980 (3) SA (AD) 874 at 882 D-E; *Zondo v St Marks Church* (2015) 36 ILJ 1386 (LC) at [10] – [11].

contradict the pleadings, by, for example, the giving an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pre-trial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pre-trial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the strait-jacket into which the litigants have confined themselves.

[9] A reading of the relevant passages in the pleadings and pre-trial conference minute reveal the following (tautologous material and other irrelevancies are omitted):

Statement of Case

9.1. The statement of case was crafted in bland terms.

9.2. It identifies Louw as having been employed by SAB for 11 years, latterly in the post of sales manager, Cape Southern Region, which covered George and Knysna.

9.3. In 2013, a restructuring exercise took place over some time. Insofar that process was of any interest to Louw, he was alerted on 18 September 2013 that the sales manager posts based in George and in Aliwal North had been identified for redundancy. Apparently, the Aliwal North, sales manager post was in any event vacant when the restructuring exercise began.

9.4. As part of an envisaged new structure, new posts would be created called "area Managers" in George and in Aliwal North which would incorporate the sales managerial function.

9.5. Louw averred:

9.5.1. That he was "already attending to the responsibilities of the proposed area manager [ie George]";

9.5.2. That he was treated unfairly in his recent performance review.

9.5.3. That he applied for the [George] area manager post "in good faith" and the invitation to him to do so was a sham.

9.5.4. That after 4 November [by which time he had not succeeded in getting the [George] area manager job], he "was not presented with any development opportunities, and….was also not presented with any of the alleged "various other recruitment and redeployment opportunities'" alluded to by Theresa Davidson, his immediate superior.

9.5.5. That, hence, his dismissal was procedurally and substantively unfair.

Statement of Defence

9.6. The statement of defence averred:

9.6.1. The usual consultations were held.[2]

9.6.2. Louw was assured that the redundancy of his sales manager post was not based on his personal performance.

[2] The evidence showed several meetings or telephone discussions between 27 September 2013 and the eventual dismissal. Louw put up a counter-proposal on structure on 2 October, but it was not adopted.

9.6.3. Louw applied for the new area manager post based in George, was interviewed with two other candidates, but was not chosen to fill the post.

9.6.4. After that, other potential opportunities were put to him for consideration; however, he declined what was on offer and on 13 November, agreed with Cate Band, the HR manager, that they "saw no further suitable alternatives", whereupon he was retrenched.

The Minute

9.7. The parties then met at a pre-trial conference and recorded, insofar relevant to the controversy, in their minute:

9.7.1. That it was common cause that on 4 and 13 November 2013, Louw and Band were in contact and that Louw initially said he was considering other redeployment opportunities but after considering them "neither [Louw] nor Band saw further suitable alternative positions".

9.7.2. That the court had to decide "whether the dismissal…was procedurally and substantively fair".

9.7.3. That Louw denied that there was a general need to retrench, and that the factual basis for the denial was that: "[Louw] was already fulfilling the role that [SAB] was allegedly creating."[3]

9.7.4. In response to the requirement to declare what alternatives to retrenchment, Louw contended existed, the answer was: "[SAB] should have appointed [Louw] in the new position without

[3] These statements were made in compliance with paragraph 10.4.2.1 (b) of the Labour Court practice manual.

retrenching him as he was already fulfilling the duties of the new post"[4]

9.7.5. In response to the requirement to state whether the selection criteria were in dispute and were alleged to be unfair, the answer given was: "The selection process was unfair as [SAB] indicated that it needed someone with more senior managerial experience to fill the position. Yet the person appointed had less experience that [Louw]".[5] [SAB] replied that Louw was one of a number of candidates and a "more suitable and experienced candidate, ie Lee Stevens, was appointed". Elsewhere in the minute, [SAB] avers that the new post was designed to "…manage both sales and operations…focussed on driving integration between operations and sales…"

9.7.6. In response to the question about the respects in which the retrenchment was procedurally unfair, the answer given was: "The proposed changes were a *fait accompli*, in that, prior to his retrenchment, [Louw] was already treated unfairly in his last performance review and that, subsequent to this performance review, he was already told by Band that he should "consider another role". The consultation process amounted to a sham.[6]

[10] It is plain that the references to the "area manager", in the minute, can only be understood to refer to the George post. Not only is the Aliwal north post not mentioned, there is no reasonable doubt that the case sought to be advanced was that the "new area manager" job was indistinguishable from Louw's old post and he ought to have been "translated" into the new post without having to compete for it. The reason he was not given the new post was the result of a

[4] See: Practice manual paragraph 10.4.2.1(c)
[5] See: Practice manual 10.4.2.1.(d)
[6] Practice manual 10.4.2.1(f).

prior *mala fide* decision to get rid of him, probably because it was thought his performance was poor, itself an unfair opinion to hold of him.

[11] The allusions to the unfair performance ratings are obscure. The mention of it in the statement of case simply hangs there without a context. Only in the minute is some flesh given, as cited above. The proper understanding of the case so formulated was that an enquiry was necessary to determine if the old post, now redundant, was, in fact. the equivalent of the new post, (ie the George Area manager) and whether Louw's performance was at all relevant to the declaration of his post as redundant.

[12] This survey illustrates that the judgment *a quo* was in error when the following findings were made which are not foreshadowed by the pleadings or the minute.:

Substantive unfairness

12.1. As regards substantive fairness at: [41] – [46], the court *a quo* held that:

> '[41] It is common cause …. that the position of the area manager in Aliwal North remained vacant for some time even after the unsuccessful application for the same position at George by the applicant. There is no evidence from the respondent as to why that position could not have been used as an alternative to either delay the retrenchment or for that matter avoiding it by either appointing the applicant in an acting position or full time into it.
>
> [42] The vacancy at Aliwal North arose not as a result of the restructuring but because the incumbent was promoted.[7] The respondent advertised for the position but could not for some time obtain a suitable candidate. The position remained vacant even after the unsuccessful application for the position at George by the applicant. There seems to be no doubt that the applicant qualified for the position as he had been shortlisted and was interviewed for the position.

[7] This is incorrect; the old sales manager post was vacant, then abolished and a new area manager post was created.

[43] There seems to be no doubt from the facts of this case that the respondent in dealing with this matter closed its mind to any alternative but focused on the fact that it had adopted the selection criteria which required the applicant to apply and compete for the position. Accepting for a moment that the George position involved other internal candidates who were affected by the restructuring, the same does not apply to the Aliwal North position. As stated earlier, the position remained vacant for some time and after several attempts at recruiting a suitable candidate. An external candidate was found some time after the applicant was notified of the intention to retrench him and after he was unsuccessful in his application for the position at George.

[44] I have already said that the applicant qualified[8] for the position at Aliwal North having been shortlisted, interviewed and obtaining position two in that interview. The interviewing panel in a sense found him a competent person to perform the function of the area manager.

[45] The respondent contended that the applicant was to blame for his dismissal in that he failed to apply for the position even after he was invited to do so. In a sense, the applicant was dismissed for failing to apply for the position at Aliwal North. In other words, at the time of his dismissal there was work that he could still d.'

Procedural unfairness

12.2. As regards procedural fairness at [33] – [37], the court *a quo* held the following:

'[33] Turning to the inclusion of the performance rating in the selection criteria, it is common cause that the interview panel took that into account in assessing the applicant's application. ….

[34] ….

[34] ….

[8] What 'qualified' means in this context is not clear; it is probable that it is used in the sense of eligible, or that Louw was a credible candidate. That fact that Louw was ranked second of three candidates for the George post gives the context.

[35] Although, Ms Band sought to down play the use of the performance review by the interviewing panel, it is apparent from the record of the interviewing panel that the performance rating of the applicant was not simply an observation made in passing. In my view, the performance review formed part of the evaluation and the comparison between the candidates ….

[37] In my view, subjectivity crept into the selection criteria through the use of performance rating in evaluating the candidates. This also brought into the selection criteria the element of fault on the part of the applicant. It is as though the applicant brought on himself the retrenchment because of his failure to perform at the required standard. The fact that he did not appeal against the performance rating is, in my view, irrelevant in the assessment of the fairness of the selection criteria and its application. The respondent was aware long before it formulated the selection criteria that the applicant was unhappy with the rating that he received. The respondent should for this reason not have included this factor into the selection criteria before affording the applicant the opportunity to be heard in that regard.'

[13] In argument, and in the judgment *a quo*, it was emphasised that the pleadings and the minute must be read together. This is true but unhelpful in these circumstances. The judgment *a quo* proceeded from the premise that the averment that the procedural and substantive unfairness of the dismissal pleaded in the statement of case had not been "abandoned" by anything stated in the minute. The court *a quo* held as follows:

'[27] In the present matter, the pre-trial minutes provide the following under the heading: "4. ISSUES THE COURT IS TO DECIDE:"

'Whether the dismissal of the Applicant was procedurally and substantively fair.'

[28] The essence of the respondent's contention is that the applicant challenge to the selection criteria has to be limited to the issue of whether Mr Stevens had less experience than him and not to the other issue of his appointment.

[29] It is apparent from the reading of the pre-trial minutes and the pleadings in general that it can never be said that the applicant abandoned his cause of action

> in relation to both substantive and procedural fairness by signing the pre-trial minutes. There is nowhere in the pre-trial minutes where the applicant can be said to have abandoned issues relating to the cause of action set out in the pleadings, mainly the alleged substantive and procedural fairness of the dismissal.'

[14] That is an incorrect approach. Those issues were indeed not abandoned, but the premises upon which the issues were to be advanced had been refined and limited by the terms of the minute, which is the very purpose of the minute and more particularly, the very purpose of the directives in the practice manual. It was therefore inappropriate to fall back on the generalities of averments about procedural and substantive unfairness. Were that approach to be permissible, there would be no point at all to efforts to narrow issues and trim down the scope of contestations. It was suggested in argument on behalf of Louw that the contention on behalf of SAB was that Louw had narrowed his cause of action; that understanding is incorrect. The argument, properly understood, was that the terms of the minute narrowed the permissible grounds upon which the cause of action was to be presented.

[15] Accordingly, the judgment cannot be sustained because its findings are based on issues not put to it for a decision. If the court a quo took the view that the case as pleaded and refined was not proven, the order ought to have been a dismissal of the application. If a litigant pleads a bad case, it must lose, and it cannot be rescued from failure, because it is possible to conceive and construct a better case.

[16] On those grounds, the appeal must succeed.

<u>The second controversy: was the retrenchment unfair anyway?</u>

[17] Nevertheless, we deal with the merits of the allegation of unfair dismissal itself. For reasons of clarity, we address first the issue of "selection criteria" mentioned in section 189(2)(b). Section 189(1) and (2) provide:

‘189 Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-….

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on-

(a) appropriate measures-

(i) to avoid the dismissals;

(ii) to minimise the number of dismissals;

(iii) to change the timing of the dismissals; and

(iv) to mitigate the adverse effects of the dismissals;

(b) the method for selecting the employees to be dismissed; and

(c) the severance pay for dismissed employees.”

[18] Typically, retrenchments result from one of two main reasons. Often, there is believed to be a need to cut costs by reducing staff; ie the very objective is to dismiss some staff and a decision has to be made whose posts will be declared redundant and which incumbents will be retrenched. This scenario intrinsically envisages job losses. The other main reason that results in retrenchments is the restructuring of businesses to achieve various aims related to efficiency and the like. Unlike the former example, it is not the very aim of the exercise to reduce staff numbers. However, by restructuring the way the business is to operate, the risk exists that some existing posts are no longer required because, either the need falls away or the functions are distributed among other new posts or subsumed into fewer functionally broader posts. The result is dislocation of the incumbents of such affected posts. In a restructuring exercise, the performance

of an incumbent of a post is irrelevant to the declaration of redundancy. In the present case that is plainly what happened.

[19] Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed.

[20] When, as typically is the position, several employees who occupy posts of similar function, find themselves in a predicament that only some of a number of existing posts are to be retained, a selection method that is fair must be chosen to decide who is to stay and who is to go. That is the precise objective of sections 189(2)(b) and 189(7). However, when, as often is the case with managerial posts, the redundancy of a particular post, which is one of a kind, the circumstances do not in any way trigger the need for "selection criteria" in any meaningful sense. The reason is plain. No "selection" for redundancy takes place when only one post is made redundant. In this matter, the post of Sales Manager, South Cape Region, based at George is one of a kind. Of course, there are doubtless many "sales managers" in other regions, but the redundancy of this post in this region is the outcome of the restructuring. The circumstances where cross-geographical bumping may fairly occur were not raised in this matter, correctly so in our view, and do not require our attention in this judgment.

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

[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.

[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.

[25] However, independently of these considerations, the issue of the so-called selection criteria is wholly academic because, even taking Louw's self-perception as a point of departure, the successful candidate, Stevens, in any event, had been rated higher than Louw believed he himself ought to have been. The purpose to be served by raising the selection criteria in whatever guise was therefore stillborn, on the facts. Moreover, it was one of several factors and not an obviously determinative consideration.

[26] To move to the impact of this issue on the substantive fairness contention, the so-called unfair selection criteria issue could have had no bearing at all on the failure to be appointed to the Aliwal North Area Manager post. Louw never applied for that post, despite an invitation to do so. The premise of the judgment *a quo* is that he should have been given it without competing. That finding is without foundation on the facts or on the law. If Louw applied for the George area manager post, he had no good reason not to apply for the Aliwal North post if he wanted the post. The evidence discloses that he declined the prospect of taking up the Aliwal North post by failing to apply for it. Moreover, as already addressed, a competitive process to seek to avoid retrenchment is not unfair.

[27] The judgment a *quo* is premised on the Aliwal North post remaining unfilled for some time after the George post had been awarded to Stevens. However, if there was a difficulty in attracting candidates, perhaps not wholly unrelated to the chilling prospect of actually living in Aliwal North not being at the top of anyone's list of priorities, that fact cannot metamorphize into an obligation to give it to Louw on a platter. But, to belabour the point, it is academic, because the evidence discloses that although Louw said, at one point, that he would 'consider' applying for it, he ultimately chose not to do so. The finding that Louw was dismissed for failing to apply for the Aliwal North post is therefore unsustainable. By contrast, the corroborated and common cause evidence which shows Band making opportunities known to Louw, establishes that SAB did comply with its obligations in terms of section 189 in this regard.

Conclusions and Costs

[28] The appeal must succeed.

[29] Both parties seek costs. Accordingly, costs shall follow the result.

The Order

(1) The appeal is upheld.

(2) The order *a quo* is set aside and substituted with an order as follows:

"The application is dismissed with costs".

(3) The costs of suit of the appeal shall be borne by the respondent.

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Sutherland JA

Sutherland JA (with whom Coppin JA and Savage AJA concur)

APPEARANCES:

FOR THE APPELLANT: Adv G. A. Leslie,

Instructed by R. Carr of Bowmans.

FOR THE RESPONDENT: Adv T. Golden SC,

Instructed by F. Schroter of Schroter Attorneys,