IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 100/2015

In the matter between:

UNITED NATIONAL BREWERIES **Appellant**

and

THEOPHILUS BONISILE NGQAIMBANA **Respondent**

Heard: **2 November 2016**

Delivered: **30 November 2017**

Summary:

Coram: Ndlovu JA, Landman JA, and Savage AJA

Neutral citation: **United National Breweries v Ngqaimbana** (LAC JA 100/15)

JUDGMENT

LANDMAN JA

[1] The judgment in this appeal has been delayed on account of the unfortunate ill-health of our colleague Ndlovu JA who subsequently passed away. We offer our apologies to the parties for the delay. In terms of s 168(2) of the Labour Relations Act (the LRA) this Court was constituted before three judges. A decision to which any two judges agree is the decision of the Court under s 173(4). Having regard to s 13(3) and s 14(5) of the Superior Courts Act 10 of 2013 which although not of direct application are instructive, it appears to me that, as the remainder of the judges hearing the matter constitute a majority, this is consequently the judgment of this Court.

[2] United International Breweries, the appellant, appeals against part of the judgment of the Labour Court (Shai AJ) delivered on 5 December 2014 that found that the retrenchment of Mr T B Ngqaimbana, the respondent, was substantively fair but procedurally unfair and awarded him compensation in an amount equivalent to 18 months' wages and costs. The appeal is with leave of this Court.

[3] The appellant filed a notice of appeal. The notice does not conform to the Rules of this Court as it contains submissions in support of the grounds of appeal. Some of these submissions, paragraphs 13, 14, 15, 16 and 20 are relevant to substantive fairness which is not the subject of this appeal. The appeal is directed against:

(a) the finding of procedural unfairness;

(b) the compensation awarded;

(c) the costs of the trial; and

(d) the costs of the application for leave to appeal.

<u>The background</u>

[4] The appellant brews and distributes traditional beer. The respondent was employed by the appellant on 1 March 2006. The respondent had managed the production of beer, ie. the brewing of beer and its packaging at various plants. He was employed at the appellant's Phelindaba plant when he was retrenched. Immediately prior to this, he had been employed at the Egoli plant. According to the respondent, when it was closed down he was transferred to the Phelindaba plant. His evidence was that he would be the production manager of the brew house.

[5] Although the appellant anticipated that the Phelindaba plant would produce 12,000,000 litres of beer per month, demand for the product dropped and the appellant needed to curtail overhead costs. On 19 June 2012, the respondent was given a letter headed "Consultation for work re-organisation". The letter informed him of the reasons for the re-organisation. He was told that the envisaged re-organisation would include all the departments as well as the head office departments. The selection criteria would be last in, first out (LIFO) and demonstrable skills and knowledge. He was invited to a meeting to be held on 3 and 4 July 2012.

[6] On 19 July 2012, the respondent requested substantive reasons in writing as to why he was to be retrenched instead of his two colleagues, especially Mr Sabrumanian who had fewer years of service with the company. He said that he had been running the packaging department successfully over the past year. He said that the appellant noted that Mr Hofmeyer had volunteered for retrenchment or early retirement, but the appellant had not acted on this. He concluded his letter saying that:

> 'The procedure followed by you and your cabinet made me come to the conclusion that the retrenchment procedure was not fair. Therefore, I feel discriminated against, and this has caused a lot of emotional and psychological distress to me.'

The respondent abandoned his reliance on discrimination at the trial.

[7] On 23 July 2012, the appellant responded telling the respondent that the appellant had regarded the packaging department and the brew house as two separate departments and that only the brew house has been restructured. He was also told that it was the appellant's prerogative to allow an employee to go on early retirement or retrenchment, but that the company needed to look at its own interests before doing so.

[8] A further consultation meeting took place. On 30 July 2012, the respondent outlined his unhappiness at having been selected to leave the company. He said that the appellant had shown inconsistency and did not adhere to the Labour laws and LIFO, skills and expertise. He felt discriminated against and was made to lose his self-esteem. He was prepared to settle for payment of an amount equivalent to 18 months' wages. He set out the considerations on which this was based. These included his age that mitigated against getting employment, his emotional stress, and the commission of an unfair labour practice.

[9] On 31 July 2012, the appellant responded and pointed out that the respondent would have been retrenched after the closure of the Egoli plant, but instead, alternative employment was found for him at the Phelindaba plant. The reason for the re-organisation was again repeated. It was pointed out to him that he had accepted the post of production manager in the brew house and not in the packaging department. It was also said that the brew house and the packaging department had always been treated as separate departments. However, in view of his objections, the appellant had reconsidered its approach, and he was invited to compete for the position of production manager in the packaging department.

[10] The appellant also explained why it felt the need to retain the proven skills and experience of Hofmeyer who also had longer service than the respondent. It made no business sense to retrench Hofmeyer. The respondent was also told that the appellant felt that he had some way to go in his development as a brew

house manager before he would be able to successfully manage the brew house at the Phelindaba plant.

[11] As regards the respondent's complaint that the company was not adhering to the labour laws of the country, the appellant pointed out that LIFO applied as between him and Hofmeyer but the appellant was prepared to disregard LIFO when the skills and expertise were required by the company.

[12] The respondent responded on 6 August 2012 stating that he had been provided with the new organogram and pointed out that it did not provide for a senior production manager position. He pointed out that the Egoli brewery was closed down after he had left it. He repeated that he went to the Phelindaba plant to replace Hofmeyer who was serving his notice. He was told that he was a senior production manager and that he would be the production manager in the brew house and Sabramanian would be production manager packaging. He knew that Hofmeyer had indicated his preference for retrenchment. He did not want voluntary retrenchment. He required the company to comply with section 189 of the L RA. He said he has experience, knowledge and skills in running the production department as a whole and that he had made a valuable contribution to the company. He declined the offer to be assessed for the post of packaging manager.

[13] The appellant responded on 10 August 2012, restating why it intended to retain the skill and expertise of Hofmeyer. It told the respondent that he has a subjective view of his own skills and expertise as do the other incumbents and that is why it was preferable that an external assessment should be made. He was again invited to participate in the external assessment.

[14] The respondent replied four days later saying, *inter alia*, that the appellant must comply with section 189 of the LRA and that he thought it was unreasonable to go through all the pain and stress of repeating the exercise that he has done ie an external assessment.

[15] The appellant went ahead and reassessed both Hofmeyer and Sabramanian. Although the respondent did not take part in the assessment his previous assessment was put into the mix.

[16] On 26 September 2012, the appellant wrote to the respondent, stating that his previous assessment had been used. There were some areas in which he fell short and that he would be retrenched on 31 October 2012. The company offered to pay him two weeks' salary for every completed year of service, payment of all leave credits, and repayment of his provident fund contributions. A sum equivalent to his basic salary would be made available for him to take any course of his choice. All affected retrenched employees would be re-employed preferentially if a vacancy arose and they were found suitable for the position. This provision would be valid for 18 months from the effective date. He was asked whether he wished to consult any further.

[17] The respondent was then retrenched. The appellant later advertised a position for a production manager at the Phelindaba plant. This came to the respondent's attention. On 20 March 2013, his attorney wrote to the appellant claiming that the respondent was entitled to be employed in the advertised post. The appellant's responded and confirmed that an internal post had been advertised for the post of production manager and that it is not yet been filled. The names of two internal applicants were mentioned. The respondent was advised that although he may be considered favourably that the two candidates had equivalent, if not stronger expectations, than he had. But notwithstanding this he was invited to apply for the post of production manager at the Phelindaba plant and compete with other candidates. For this purpose, he would be regarded as the internal candidate.

The grounds of appeal

[18] The appellant's complaints may be summarised as follows. The court *a quo*:

(a) did not appreciate the relationship between the selection criteria of LIFO and skills and experience;

(g) failed to make a credibility finding when it should have done so;

(h) exceeded its powers in ordering compensation in the amount that it did;

(i) should not have awarded the costs of the trial to the respondent as he was only partially successful; and

(j) should have awarded the costs of the application for leave to appeal to the appellant as the appellant's application should have succeeded.

Evaluation

[19] At the outset, I observe on the court *a quo*'s finding that the procedure was unfair, this ought to have led the court *a quo* to find that the dismissal was substantively unfair. However, as there is no cross-appeal this aspect may not be explored.

[20] A retrenchment is brought about by the operational requirements of the employer. When the need arises, in these circumstances, to dismiss employees, it has been found that fairness requires the use of neutral selection criteria unless the parties involved agree on different criteria. The last in, first out (LIFO) rule is an acceptable neutral selection criterion. However, at the same time that the employer is reducing its staff, it must maintain its business and fairness recognises that the employer may depart from LIFO and retain the skills of experienced employees, even though they may have shorter service than other employees.

[21] The court *a quo* may not have fully appreciate this. In my view, it erred in holding that an employer may choose between LIFO and skills and experience between the two and that once the employer has made its choice, it would be held to that choice. LIFO and skills and experience are criteria that may be applied at the same time and do not require an employer to elect one of the other. When regard is paid to the purpose of section 189 of the LRA, which requires consultation with the view to reaching an agreement in respect of retrenchment, it was fair for the

appellant to examine the respondent's claim that he had greater skills and experience. This explains why the appellant, after selecting the respondent in preference to his senior colleague Hofmeyer, decided that the respondent should have an opportunity for his skills and experience to be tested for the posts of brew house manager and packaging manager. But, even while it considered this latter possibility, the appellant maintained, as it was entitled to do, that LIFO could be supplanted by skills and experience. It was for this reason that the employer proposed that the three employees be assessed externally.

[22] Paradoxically, the court itself accepted that skills and experience could come into play at the same time. It expressed the view that:

> 'The criteria will be used as follows. Firstly, the last in first out principle will be applied and if two or more employees came at almost the same time or date the further principle relating experience and skill will be applicable'.

The court *a quo* went on to say that:

> 'I do not think the employer would be allowed to pick and choose criteria to suit its wishes. That might be prejudicing another employee, pitting employees against each other.'

[23] Although an employer must avoid prejudicing its employees, it is acceptable for a business to survive the event, that employees, with skills and experience that it requires, may be retained even though other employees have longer service.

[24] The respondent, for his own reasons, was not prepared to engage in an external assessment of his skills and experience. But, as I have indicated, in a bid to assist him the appellant evaluated his previous external assessment and found that his skills did not equal those of the other two employees. In short, the appellant cannot be faulted for its stance that skills and experience trumped LIFO as a selection criterion. The appellant was satisfied that the respondent's skill and experience were of a lesser standard than the other two employees.

[25] The appellant's complaint that the court *a quo* did not make a credibility finding as regards the respondent is relevant to the finding of substantive fairness. The respondent's account of how he came to learn that he would be on the retrenchment list does not significantly affect the retrenchment process and does not show that the process was unfair.

[26] It was submitted, on behalf of the respondent, that when the appellant agreed to evaluate Hofmeyer and Sabramanian, these employees should have been given letters inviting them for consultation. This submission is made in the context of the further submission that the proposed assessment of their skills and expertise and that of the respondent was to cover up irregularities in the process that have been followed to date. For reasons set out above, I am satisfied that there had been no irregularity in the retrenchment process and that the invitation to be assessed was an action flowing from the process of consultation.

[27] It was also contended that the appellant's initial intimation that the re-organisation would include all the departments as well as the head office departments meant that the packaging department would also be targeted. I do not think that the intimation was intended to be taken literally. It was only if the appellant could save on overheads that a department would be re-organised.

[28] With reference to section 23 one of the Constitution of the Republic of South Africa of 1996, dealing with the right to fair labour practices; article 13 of the International Labour Organisation Convention 158, Termination of Employment Convention of 1982; and the similar wording of section 189 of the LRA, it was correctly contended that the retrenchment process must be put in operation when an employer contemplates termination for reasons of an economic nature. This was followed by a submission that the retrenchment letter of 19 June 2016 followed after retrenchment had been contemplated. It was contended that none of the affected employees, including the respondent, would have been able to change the appellant's corporate mind. This was not a finding made by the court *a quo*. In the absence of a cross-appeal, it cannot be raised now.

[29] I am satisfied, for the reasons expressed above, that the court *a quo* erred in finding that the appellant had not shown that the procedure followed was a fair one. It follows that the compensation award must fall away.

Costs

[30] The appellant has been successful but it does not necessarily follow that costs should follow the result. Costs in this Court and the court *a quo* are awarded in accordance with the law and fairness. The appellant lost his employment through no fault of his own. It would not, in my opinion, be fair to saddle him with the costs of the appeal, or indeed with the costs of the trial and the application for leave to appeal.

Order

[31] In the result, I make the following order:

1. The appeal is upheld.

2. The order of the court *of quo* is replaced with an order reading:

   'The dismissal of the applicant was substantively and procedurally fair and the application is dismissed. There is no order as to costs.'

3. The cost order made by the court of quo as regards the application for leave to appeal is set aside and replaced with an order that reads:

   'No order is made as to costs of the application for leave to appeal'.

4. No order is made as regards the costs of the appeal.

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A A Landman

Judge of the Labour Appeal Court

Savage AJA concurs in the judgment of Landman JA.

APPEARANCES:

FOR THE APPELLANT:	Mr J Crawford of Crawford and Associates Attorneys
FOR THE RESPONDENT:	Mr N E Kubayi of Noveni Eddy Kubayi Attorneys Inc.