

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
of Interest to Other Judges

Case no: JA 130/22

In the matter between:

**THE NATIONAL UNION OF FOOD BEVERAGE
WINE SPIRITS AND ALLIED WORKERS**

Appellant

and

**COCA COLA BEVERAGES SOUTH AFRICA
(PTY) LTD**

Respondent

Heard: 7 May 2024

Delivered: 27 May 2024 (This judgment was handed down electronically by emailing a copy to the parties. The 27 May 2024 is deemed to be the date of delivery of this judgment).

Coram: Sutherland JA, Van Niekerk JA and Govindjee AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] On 31 May 2019, after a process of consultation with representative trade unions, the second to further appellants (the employees) were dismissed by the respondent (CCBSA) on account of its operational requirements. A dispute about the substantive fairness of the employees' dismissal was referred to the Labour Court for adjudication, where the first appellant (the union) sought their reinstatement,

alternatively, the payment of compensation for an unfair dismissal. Where appropriate, the union and the employees jointly are referred to as 'the appellants'.

[2] In the Labour Court, the appellants' claim of substantive unfairness comprised three elements: first, that the retrenchments constituted a breach of certain conditions that attached to the regulatory approval of a merger in terms of which CCBSA was established; secondly, that there was an insufficient commercial rationale for the retrenchments and thirdly, that CCBSA had unfairly implemented criteria for the selection of those employees to be retrenched.

[3] The first of these elements assumed some significance in the proceedings before the Labour Court, since running parallel to those proceedings were proceedings initiated by another union, the Food and Allied Workers Union (FAWU), based on a complaint lodged against CCBSA in terms of the Competition Act.¹ Those proceedings had their origins in the same retrenchment process but specifically, a complaint that CCBSA had retrenched staff in breach of conditions that restricted post-merger retrenchments. The context of FAWU's complaint was the establishment of CCBSA in May 2016 as a subsidiary of Coca-Cola Beverages Africa (Pty) Ltd (CCBA), consequent on a merger of four previously independent authorised bottlers for the Coca-Cola Company (TCCC), a company incorporated in the United States of America and listed on the New York stock exchange. The merger conditions relevant to employment matters extended to the maintenance of the aggregate number of employees from the four operations for a period of three years, a condition that no 'bargaining unit employee' be retrenched as a result of the merger, and a limitation on the number of employees engaged outside of the bargaining unit who could be retrenched. Excluded from the application of these conditions were "*necessary steps taken by the Merger Parties in terms of section 189 of the Labour Relations Act (LRA) should operational requirements in the ordinary course of business that are not merger specific necessitate that such steps be taken*".

¹ Act 89 of 1998.

[4] On 24 October 2019, some five months after the retrenchments that form the subject of the present proceedings, and acting in terms of s 39 (1) of the Competition Act, the Competition Commission issued a notice of apparent breach, on the basis that the retrenchments were merger-specific. On 14 May 2020, CCBSA applied to the Competition Tribunal to review the notice. On 8 August 2012, the Competition Tribunal declared that CCBSA had substantially complied with the relevant merger conditions and set aside the notice of apparent breach. On 17 June 2022, during the course of the Labour Court trial, that decision was overturned by the Competition Appeal Court. The Competition Appeal Court found that the retrenchments were merger-specific. In their submissions before the Labour Court, the appellants relied substantially on the Competition Appeal Court's judgment in support of their contention that the retrenchments were substantively unfair.

[5] Shortly before the hearing of this appeal, on 17 April 2024, the Constitutional Court delivered its judgment in *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and another*.² In a unanimous judgment, the Constitutional Court concluded that there was no basis for the Competition Appeal Court to interfere with the Competition Tribunal's factual findings and that the Tribunal's analysis of the facts was cogent and disclosed neither any misdirection nor clear error. In consequence, the appeal was upheld, and the order of the Competition Appeal Court was set aside. Specifically, the Constitutional Court held that the Competition Appeal Court had failed to apply the correct test to determine whether the subsequent retrenchments were causally linked to the merger, and that there was thus no basis to interfere with the Tribunal's decision that there was insufficient evidence to establish that the merger was the principal reason for the retrenchments.

[6] On 21 September 2021, the Labour Court (per Moshoana J) delivered a judgment in which it found that, but for one of the employees,³ the employees'

² (CCT 192/22) [2024] ZACC 3 (17 April 2024).

³ The successful applicant was Mr. Raymond Mbatha, who was awarded compensation equivalent to four months' remuneration. The order made in favour of Mr Mbatha does not form any part of these proceedings; CCBSA does not contest the Labour Court's finding in respect of the unfairness of Mr Mbatha's dismissal, nor is there any cross-appeal against the remedy of compensation.

retrenchment was substantively fair. In reaching this conclusion, the Labour Court rejected the appellant's contention that the employees' dismissal was automatically unfair because the reason for dismissal was a breach of s 187 (1) (c) of the Labour Relations Act⁴ (LRA), and also the alternative claim that the dismissals were unfair for want of a substantively fair reason.

Factual background

[7] The factual background to the dispute is largely a matter of common cause. TCCC manufactures concentrates for the production of non-alcoholic beverages. The concentrates are distributed worldwide in terms of standard agreements, in terms of which TCCC supplies the concentrates to bottlers and licences them to manufacture and distribute its branded beverages. CCBSA is such a bottler, formed in 2016, as recorded above, after the merger of four independent bottlers.

[8] During 2017, economic conditions deteriorated. In April 2018, the Health Promotion Levy on Sugary Beverages, colloquially referred to as the 'sugar tax', was introduced. It is not disputed that in the nine months between the introduction of the tax and the end of the 2018 financial year, CCBSA paid R2.1 billion in sugar tax. In order to remain competitive, CCBSA was forced to give discounts amounting to R850 million and, in the same period, its sales volume declined by 2%. CCBSA's case was that the burden of the sugar tax and rising sugar input costs, emerging as they did in an already challenging operating environment, required it to reset the cost base to ensure the short- and long-term viability of the business.

[9] CCBSA initiated various strategies to streamline roles, introduced a moratorium on new appointments from outside the company, used natural attrition such as early retirement, *ad hoc* resignations and voluntary severance packages and the like, to reduce the impact of the challenging operating environment. Ultimately, CCBSA undertook a review of its entire business model, one of the affected areas being what was referred to as the 'route-to-market'.

⁴ Act 66 of 1995, as amended.

[10] On 21 January 2019, CCBSA issued a notice in terms of s 189 (3) of the LRA to the union and FAWU. The unions were advised that after the 'economic headwinds' experienced in 2017, the introduction of the sugar tax in 2018 had impacted on volumes due to a higher effective product price. It was expected that 2018 volume projections would only be recovered in 2021. Further, competitors continued to gain market share. In consequence, CCBSA was considering an urgent restructuring to establish more efficient and cost-effective structures. The notice further advised the unions that a total of 1072 employees were likely to be affected by the proposed retrenchment. The s 189 (3) notice specifically contemplated a restructuring across the logistics and commercial functions, where CCBSA proposed to review and optimise its route-to-market strategy, to ensure future competitiveness and sustainability.

[11] The present dispute concerns only two impacted roles, those of pre-seller merchandisers (referred to as 'pre-sellers') and merchandisers. The difference between the roles was explained by Mr Rajbally, CCBSA's commercial director, who testified that merchandisers were engaged in large retail outlets, packing fridges and shelves. One of the employees who gave evidence at the trial, Mr Mashele, testified that as a merchandiser, he was responsible for packing fridges, receiving stock, placing orders and posting sale notices. Pre-sellers, on the other hand, were engaged in smaller outlets such as spaza shops, house shops, and general dealers. The s 189(3) notice contemplated that there would be a reduction in the number of pre-seller roles ('same job, fewer roles'), in circumstances where CCBSA had identified that the outlets served by pre-sellers accounted for a small percentage of volume. The notice further contemplated that the merchandiser role in its existing form would be abolished. Specifically, CCBSA envisaged that while the title would remain unaffected, the level and structure of the role would change, and remuneration structures would be realigned to the value of the new role, calibrated against conditions applicable to employees engaged by third party service providers, who performed the bulk of the merchandising service. In essence, the existing role of merchandiser was to be abolished, a new role with the same title created, and those

employees currently engaged as merchandisers offered employment in the newly-defined role, at a commensurate (lower) salary.

[12] A consultation process was conducted in terms of s 189A, facilitated by the Commission for Conciliation, Mediation and Arbitration (CCMA). At the conclusion of the consultation process, 368 employees employed in the bargaining unit were retrenched, with effect from 31 May 2019.

[13] The dispute before the Labour Court concerned a single battle in a much broader litigious offensive that emanated from the retrenchment exercise implemented by CCBSA. The case involved only 21 employees, all previously employed either as merchandisers or pre-sellers.

The Labour Court

[14] The statement of claim filed by the appellants recorded some 13 grounds on which the appellants considered that the retrenchment was substantively unfair. The general need to retrench aside, the appellants submitted that the selection criteria for the new and significantly changed jobs were unfair and not objective, that CCBSA had failed to implement 'bumping' and the criterion of last-in first-out (LIFO), thus prejudicing employees with longer service.

[15] CCBSA called three witnesses, the financial director Mr Leonhardt, the commercial director Mr Rajbally, and the employee relations and governance manager Mr Pheta. Leonhardt testified that in 2018, in comparison to 2017, sales had dropped by some 5.6 million cases. Discounts passed to maximise sales increased by R850 million and R2.1 billion was paid in sugar tax, an expense incurred for the first time in the 2018 financial year after the introduction of the tax in April 2018. The result was an increase in the total cost of goods of 11.5% and a decrease in profitability of some R293.8 million. None of this evidence was seriously challenged in cross-examination.

[16] Mr Rajbally gave evidence regarding the impact of CCBSA's operational requirements on the merchandisers and pre-sellers. Merchandisers serviced the top-end grocer outlets (e.g. Pick n Pay, Spar, and Checkers), packing fridges and shelves, facilitating trade visits to ensure that merchandising standards were met, and the like. Merchandisers were not in the original organisational design of the business, since the role had been outsourced to a third party. However, at the time of the 2016 merger, a number of what were described as the 'legacy entities' employed merchandisers, who were absorbed into CCBSA. The restructuring contemplated by CCBSA envisaged that the role of merchandiser would fall away and a different role would be created. Rajbally explained that the new role would be aligned to the actual value of work performed, and reflect a commensurate, lower rate of pay. That rate would reflect what CCBSA paid to its third party supplier to perform the merchandising function. The pre-sellers were focussed on smaller establishments, visiting each outlet in the form of spaza shops, general dealers and local liquor stores in what he described as 'a township-like environment'. Rajbally testified that at the time, CCBSA was servicing approximately 190,000 customers on a weekly basis in circumstances where 80,000 of those customers provided 90% of the volume. The result was an over-investment in a large part of the customer base that was responsible for a small stream of revenue. The strategy proposed was to reduce costs with respect to small outlets and invest in the bigger revenue outlets, thus maintaining volumes and increasing market share. The impact on the pre-sellers was to reduce the number of posts within the organisational design, with consequent redundancy.

[17] Mr Phetha testified about the s 189 (3) notice and the subsequent consultation process. His evidence was that selection criteria were discussed during consultation, and agreed upon. What is clear from his testimony is that CCBSA did not agree to bumping within job categories on a national, geographic basis, on account of the disruption that it would cause. But otherwise, employees were selected on the basis of the application of LIFO, subject to the retention of skills.

[18] For the appellants, Mr Mbatha, a pre-seller previously employed in Bedfordview and servicing outlets in Daveyton, Etwatwa, testified that he was

retrenched from the position of pre-seller, that he was the only pre-seller from Bedfordview who had been retrenched, and that he did not know how or why he had been selected for retrenchment. A second witness, Mr Mashele, then testified that he had been employed as a merchandiser at a salary of R11 436 per month. The position of merchandiser in the new organisational structure was offered to him, at a lower salary of R5 090 per month. He refused the offer.

[19] In its judgment, the Labour Court identified three issues in dispute. The first was the union's claim that the retrenchment constituted a breach of the merger conditions; the second, the claim of automatically unfair dismissal in terms of s 187 (1) (c); and the third, the substantive unfairness claim. In regard to the first claim, the Labour Court rejected the appellants' submission that the judgment of the Competition Appeal Court to the effect that the retrenchments bore some nexus to the merger demonstrated that the asserted rationale for the retrenchments was a sham. The Labour Court did not itself conduct any analysis of the facts to determine any causal link between the merger and the subsequent retrenchments; the union's claim was dismissed on the basis that even if the retrenchments had been effected in breach of any conditions that attached to the merger, provided that the dismissals were effected for a fair reason related to CCBSA's operational requirements, there was no unfair dismissal for the purposes of the LRA. Put another way, the Labour Court considered that any merger-specific condition did not preclude CCBSA from seeking to justify any post-merger retrenchment on account of its operational requirements. The issue was whether, for the purposes of the LRA, the dismissals were substantively fair.

[20] The Labour Court also rejected the submission that the employees' dismissal was automatically unfair because the reason for dismissal was a refusal to accept a demand in respect of a matter of mutual interest between them and CCBSA. To the extent that the union had submitted that the offers of alternative employment were designed to compel the employees to accept substantially reduced wages and other conditions of employment, the Labour Court held that making an offer of alternative employment "*is not akin to making a demand in respect of a matter of mutual interest*". Further, the Labour Court found that there was no credible evidence of any

demand made by CCBSA followed by any refusal on the part of the employees. On the contrary, CCBSA had made offers of employment in alternative positions in order to avoid retrenchments. In any event, the ensuing dismissals in the form of the retrenchments that followed, viewed objectively, were not the result of any refusal by the employees to accept any demand made by CCBSA.

[21] In respect of the substantive fairness of the retrenchment, the Labour Court concluded that there was “*overwhelming and uncontested evidence*” that the sugar tax impacted CCBSA’s profitability. The extract from the 2018 income statement produced in evidence established that sales volumes had declined by 2%, discounts to remain competitive had increased by R850 million, and gross profit had decreased by R300 million. All these factors, together with other adverse circumstances, had led to a decline in profit for three consecutive years. There was thus a commercial rationale for the retrenchments. The Labour Court considered that it was not for the Court to determine whether the decisions made by CCBSA were correct – the test to be applied was whether the solution adopted by CCBSA was fair and commercially rational. To the extent that the union had argued that CCBSA erred in restructuring only the positions of merchandisers and pre-sellers, the Court held that for it to second-guess CCBSA’s decision in these circumstances would be to apply a test of correctness. The Court accepted “*without hesitation*” that CCBSA had a fair reason to dismiss based on its operational requirements.

[22] In respect of the selection criteria adopted by CCBSA, the Labour Court considered that, since all of the merchandisers’ posts were no longer part of the new organisational structure, all of the merchandisers would be selected for retrenchment and the question of fair and objective selection criteria thus did not arise. In the case of the pre-sellers, the number of posts was reduced, with selection to be implemented on the basis of LIFO, skills, qualification and experience, or a combination of these. With regard to the merchandisers, the Court rejected evidence that the posts were never redundant and that the new posts were, for all intents and purposes, the same as those abolished. On that basis, the Court concluded that “*the*

*Merchandisers position that was occupied by the Merchandisers ceased to exist, selecting them for dismissal after not being placed was fair”.*⁵

[23] The Labour Court then turned to the evidence of Mbatha, who had testified that he was a pre-seller, part of a team of eight, who was selected for retrenchment. Phetha’s evidence had been that where fewer jobs existed after the restructuring (as in the case of the pre-sellers), fair and objective criteria would be utilised, including but not limited to LIFO, location of the job and CCBSA’s organisational diversity objectives. While that evidence was accepted, the court considered that CCBSA had failed to produce evidence to explain why Mbatha had not been successful in his applications for appointment in alternative positions in Wadeville and Midrand. In particular, Mbatha had not been afforded an opportunity to respond to the assessment of his skills and qualifications. For that reason, the Court concluded that *“the objective and fair selection criterion was not fairly applied to Mbatha”*. As recorded above, Mbatha was awarded compensation in an amount equivalent to four months’ compensation. The Labour Court dismissed the balance of the appellants’ claim of unfair retrenchment, with no order as to costs.

In this Court

[24] In these proceedings, with the leave of this Court, the appellants pursue three grounds for appeal. The first is that, despite the Constitutional Court’s judgment, the retrenchments constituted a breach of the merger conditions and that for that reason, the retrenchments were substantively unfair. The second is that the Labour Court erred when it found that the retrenchment was not automatically unfair because the true reason for dismissal was a refusal by the employees to accept a demand in respect of a matter of mutual interest between them and CCBSA. Thirdly, the appellants submit that the retrenchment was substantively unfair because it lacked a sufficient commercial rationale and because the selection criteria were neither fairly nor objectively implemented. Each of the grounds of appeal is addressed below.

⁵ Judgment of the court *a quo* at para 49.

The alleged breach of a merger condition

[25] The judgments of the Competition Appeal Court and the Constitutional Court were concerned only with the review of a ruling made by the Competition Tribunal in relation to a notice of apparent breach issued in terms of Rule 39 of the Commission Rules. The fairness or otherwise of the retrenchment effected by CCBSA was not a matter on which any of the competition regulatory authorities were required to express any view, nor was it an issue that came before the Constitutional Court for decision. Although much of the evidence adduced in the Labour Court concerned an endeavour by the appellants to establish a breach of the merger conditions, the judgment of the Constitutional Court, to which both parties referred in these proceedings, is of neutral effect in the determination of the central issue that serves before us, i.e. whether the employees' retrenchment was unfair either for a reason that is automatically unfair, alternatively, for want of substantive fairness. Mr Haffejee, who appeared for the appellants, conceded that there were no factual findings made by the Constitutional Court that might assist this Court and that it was thus not necessary for this Court to engage with that Court's judgment in any determination of whether the employees' dismissal was automatically or substantively unfair.

Automatically unfair dismissal – s 187 (1) (c)

[26] The appellants' submissions in respect of the application of s 187 (1) (c) affect only the merchandisers, who consequent on the restructuring of CCBSA's business operations, were offered but refused employment in what CCBSA contended were new posts, on less favourable terms and conditions of employment. The appellants submit that their dismissal was automatically unfair because the reason for dismissal was a refusal to accept a demand in respect of a matter of mutual interest between them and their employer. Specifically, the appellants contend that retrenchment was designed to compel the employees to accept lower salaries for the same work, in essence, a stratagem to compel the employees to accept new, less favourable wages and other terms and conditions of employment and that the true reason for their dismissal was their refusal to accept those terms.

[27] Section 187 (1) (c) is located in a section of the LRA that lists reasons for dismissal that are automatically unfair. In other words, if the reason for dismissal is one of those identified in the subsection, and unless one of the defences established by s 187 (2) applies, the dismissal must be found to be unfair, and the enquiry is then limited to an appropriate remedy. Section 187 (1) (c) provides that the dismissal is automatically unfair if the reason for dismissal is “*a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer*”. It is incumbent on an employee alleging that a dismissal was effected for a reason that is automatically unfair, to at least lead evidence that establishes a credible possibility that the true reason for dismissal is one that is listed as an automatically unfair reason.

[28] Section 187 (1) (c) has a long and not uncontroversial history. The section was the subject of recent consideration by the Constitutional Court in the matter of *National Union of Metalworkers of SA & others v Aveng Trident Steel (A division of Aveng Africa (Pty) Ltd) & another*.⁶ That matter, not unlike the present, concerned the fairness of a dismissal following a consultation process initiated by the employer in terms of s 189 of the LRA, and an offer by the employer of alternative employment within a new occupational structure. The employer afforded affected employees the opportunity to be engaged in the new ‘redesigned’ positions at the (lower) rate on offer as an effort to avoid contemplated retrenchments, stating that should the offer be rejected, the employees would be retrenched. The offer was rejected and the employees were retrenched. The union contended that the dismissals were automatically unfair since the true reason for dismissal was the employees’ refusal to be placed in the redesigned jobs.

[29] In granting leave to appeal, the Constitutional Court noted that it was called on to decide how s 187 (1) (c) was to be interpreted in the context of the LRA read as a whole, with regard to the section’s structural integrity, as well as the

⁶ [2020] ZACC 23; (2021) 42 ILJ 67 (CC) (Aveng Trident).

jurisprudential force of the existing case law.⁷ The Court split evenly on the question of the test for causation, but the following extract from the first judgment reflects a common position on the interpretation of s 187 (1) (c). In response to NUMSA's submission in that case, that the section should be interpreted to mean that dismissal was automatically unfair if employees are dismissed for rejecting a demand that arises from or as a result of the employer's operational requirements, the Court said the following:

[67] A careful analysis of the wording of the section, alongside the explanatory memorandum, demonstrates that the interpretation contended for by NUMSA is incongruous with the section. What that contention boils down to is that an employer considering operational requirements may never resort to retrenchments without contravening the section. This, in my view, would undermine an employer's right to fair labour practices as entrenched in s 23 (1) of the Constitution, since it would take away its right to resort to retrenchments where operational requirements render them necessary. The fallacy in NUMSA's submission can best be described in the following scenario: employers are allowed to retrench for operational requirements during a protected strike, including a lock-out, but not in a normal retrenchment situation where job losses could be minimised or avoided. In my assessment, the purpose of amending the provision was to deal with the anomaly created by case law which had the detrimental effect of precluding employers from offering alternative positions, short of dismissal, to employees, or from offering any dismissed employee reinstatement on amended terms and conditions of employment following a restructuring process.

[68] NUMSA's submission is startling because it would perpetuate the anomaly that the amendment sought to cure. On that interpretation, employers engaged in s 189 consultations would be wary of proposing any changes to the terms and conditions of employment which may, if accepted, address their operational requirements and save jobs, for fear of facing automatically unfair dismissal claims if changes are rejected and

⁷ *Aveng Trident* at para 36.

retrenchments follow. NUMSA's construction would render such consultations nugatory and undermine the fundamental purpose of s 189, which is to encourage engagement regarding viable alternatives to retrenchment.'

[30] Put another way, it is not an automatically unfair dismissal for an employer to dismiss an employee who refuses to accept an offer of alternative employment made in the context of a retrenchment process, where the reason for dismissal is the employer's operational requirements. As the Constitutional Court observed,⁸ it does not necessarily follow that, simply because a proposed change to terms and conditions of employment is refused by an employee and a dismissal ensues thereafter, the reason for dismissal is the refusal to accept the proposed change.

[31] The sole enquiry under s 187 (1) (c) therefore is into the reason for dismissal and specifically, whether the reason for dismissal was a refusal by the employee to accept a demand made by the employer concerning terms and conditions of employment. On the approach endorsed in the first judgment in the Constitutional Court, the factual and legal causes of the dismissal ought to be determined by asking first whether the dismissal would have occurred had the employees not refused the demand (a 'but for' test), and secondly, whether the refusal was the main, dominant or proximate cause of the dismissal.⁹

[32] The application of these principles assumes that a proper factual foundation for the application of s 187 (1) (c) has been laid. An employee claiming to have been dismissed for a reason that is automatically unfair is required to adduce some evidence to establish at least on a *prima facie* basis that a reason for dismissal that is automatically unfair is the main for dismissal. In *Kroukam v SA Airlink (Pty) Ltd*¹⁰ Davis AJA said:

'In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an

⁸ *Aveng Trident* at para 69.

⁹ *Aveng Trident* at para 76. The test, as it applied in the Labour Courts, has its roots in *SA Chemical Workers Union & others v Afrox Ltd* [1999] ZALAC 8; (1999) 20 ILJ 1718 (LAC).

¹⁰ [2005] ZALAC 5; [2005] 12 BLLR 1172 (LAC) at para 28.

automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.'

[33] The only witness to testify about the retrenchment process and its effect on the merchandisers, Mashele, proffered no evidence of any demand made by CCBSA in respect of a matter of mutual interest or otherwise, nor did he testify concerning any refusal of any demand. What he said was that after being advised that he had been selected for retrenchment, he was advised of a number of alternative positions, including positions as a merchandiser and as a cleaner. He refused the offers of alternative employment on account of the drop in remuneration that he would suffer. What is significant is that nowhere in his evidence does Mashele make reference to any 'demand' – the questions put to him in evidence-in-chief and his responses all refer to 'offers' of alternative employment and his reasons for declining those offers. Moreover, there is no evidence by Mashele of any refusal of any demand made by CCBSA as being the true reason for his dismissal. The offers that he refused, for his own reasons, were exactly that – offers of alternative employment to avoid the prospect of dismissal and not demands that changes to terms and conditions of employment be accepted on pain of dismissal. For these reasons alone, the claim of an automatically unfair dismissal was correctly rejected, since the necessary factual basis for the claim had not been established.

[34] Even if the claim were to be determined by applying the test for causation referred to above, the application of the 'but for' test leads to the conclusion that the merchandisers would not have been dismissed had they accepted the new, less favourable terms that attached to what CCBSA stated were 'new posts'. With regard to legal causation, it is not in dispute that the restructuring occurred in a context where CCBSA had initiated a consultation process in terms of s 189A in the face of adverse economic conditions, a process that was facilitated by a CCMA commissioner. CCBSA had proposed to remedy its deteriorating financial position by revisiting the occupational structure and redesigning job descriptions, with a view to ensure increased competitiveness and improved market share. During the course of

the facilitated consultation process, attempts were made to accommodate the redundant merchandisers elsewhere within CCBSA's occupational structure, and it was in this context that suitable alternative employment opportunities were identified. Affected employees were afforded the opportunity to apply for appointment in those roles. Among the obligations on an employer that s 189 of the LRA contemplates is precisely the identification of alternatives to retrenchment, specifically, offers of suitable alternative employment. The evidence discloses that certain of CCBSA's employees affected by the restructuring took advantage of the offers made, and retained their employment, albeit on less favourable terms. Others, including the employees party to these proceedings, did not.

[35] To the extent that the appellants contend that the restructuring was a chimera and that there was no substantial difference between the posts occupied by the merchandisers and the new posts on offer, the evidence of Phetha and Rajbally establishes CCBSA's case that its constrained economic circumstances necessitated a transition to a more efficient and cost-effective operational structure. The appellants did not seriously dispute the substantial evidence proffered by CCBSA regarding the primary reasons that it advanced for the retrenchments – the poor economic climate, the introduction of the sugar tax and the increase in the prices of raw materials.

[36] CCBSA's operational requirements were thus the main or dominant cause for the dismissals of the merchandisers who did not accept the offer of appointment into the new posts. The affected merchandisers were not dismissed by reason of any refusal to accept any demand made by CCBSA related to matters of mutual interest and specifically, not any refusal by the affected employees to accept any proposals to change their terms and conditions of employment. CCBSA did no more than notify displaced employees of available opportunities within the restructured organisation for them to consider, should they so wish, and for which they could apply. The offer of alternative positions was made in the course of a facilitated consultation process, and in the discharge of the obligation on an employer in the course of that process to

engage with consulting parties on appropriate measures to minimise the number of dismissals.¹¹

[37] The appellants' claim of an automatically unfair dismissal thus stands to be dismissed.

The substantive fairness of the retrenchment

[38] Section 188 of the LRA provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason is a fair reason based on the employee's conduct or capacity, or on that employer's operational requirements and that the dismissal was effected in accordance with a fair procedure.

[39] In the case of a dismissal based on an employer's operational requirements, there must necessarily be some objective link between the dismissals and some economic, technological or similar need on the part of the employer. This Court has held that while employers have the prerogative to restructure their operations to maximise profits and operational efficiency, the courts do not have to accept the employer's proffered rationale at face value, nor do the courts defer to employers. Earlier decisions by this Court limited intervention to those instances where the employer was unable to demonstrate that the ultimate decision arrived at by the employer was not genuine, or was merely a sham, or put in a positive sense, that the dismissal was operationally and commercially justifiable on rational grounds. On this approach, the Court's function is not to decide whether the employer's decision was the best decision in the circumstances; rather, the Court's enquiry is limited to whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process.¹² A different approach was later adopted in *BMD Knitting Mills (Pty) Ltd v SA Clothing & Textile Workers Union*¹³

¹¹ Section 189 (2)(a)(ii).

¹² *SA Clothing & Textile Workers Union & others v Discreto—A Division of Trump & Springbok Holdings* [1999] ZALAC 8; (1998) 19 ILJ 1451 (LAC).

¹³ (2001) 22 ILJ 2264 (LAC) (*BDM*). For a discussion on the jurisprudential evolution of the test for substantive fairness, see R le Roux '*Retrenchment Law in South Africa*', LexisNexis at pp 191-198.

where Davis AJA rejected the test for fairness predicated on the approach to judicial review of administrative action and said the following:¹⁴

‘The word ‘fair’ introduces a comparator, that is a reason which must be fair to both parties affected by the decision. The starting-point is whether there is a commercial rationale for the decision. But, rather than take such justification at face value, a court is entitled to examine whether the particular decision has been taken in a manner which is also fair to the affected party, namely the employees to be retrenched. To this extent the court is entitled to enquire as to whether a reasonable basis exists on which the decision, including the proposed manner, to dismiss for operational requirements is predicated. Viewed accordingly, the test becomes less deferential and the court is entitled to examine the content of the reasons given by the employer, albeit that the enquiry is not directed to whether the reason offered is the one which would have been chosen by the court. Fairness, not correctness, is the mandated test.’

[40] In *SA Transport & Allied Workers Union v Old Mutual Life Insurance Co SA Ltd*,¹⁵ the Labour Court said the following:¹⁶

‘...[A]s stated in *BMD Knitting Mills*, the court is entitled to look at the content of the reasons given to ensure that they are neither arbitrary nor capricious and are indeed aimed at a commercially acceptable objective. The second leg of the enquiry is directed at the investigation of the proportionality or rationality of the process by which the commercial objectives are to be achieved. Thus, there should be a rational connection between the employer’s scheme and its commercial objective, and through the consideration of alternatives an attempt should be made to find the alternative which least harms the rights of the employees in order to be fair to them. The alternative eventually applied need not be the best means, or the least drastic alternative. Rather it should fall within the range of reasonable options available in the circumstances allowing for the employer’s margin of appreciation to the employer in the

¹⁴ *BDM* at para 19.

¹⁵ [2005] ZALC 50; (2005) 26 *ILJ* 293 (LC).

¹⁶ *Ibid* at para 85.

exercise of its managerial prerogative. The formulation of the test in this way adds nothing new. It simply synthesises what has already been said in *Disreto* and *BMD Knitting Mills*.'

[41] To the extent that the appellants pursue the submission that there was no general need to retrench and that the retrenchment was substantively unfair for that reason, this is not a submission that can be sustained by reference to the evidence. The economic case for restructuring and the consequent redundancies in particular occupational posts was made in the s 189 (3) notice and elaborated on in detail in the evidence given by Leonhardt, Rajbally and Phetha. Although certain of the English authorities to which the Labour Court referred in its judgment may reflect an overly deferential approach, the Labour Court acknowledged that fairness, rather than correctness, was the applicable benchmark and that the Court was obliged to determine the rationality between the retrenchment and CCBSA's commercial objectives and in particular, whether the decision to retrench was a reasonable option in all the circumstances. This approach cannot be faulted.

[42] To the extent that the appellants challenge CCBSA's decision to abolish the existing positions of merchandisers and replace them with new posts, the differences in the posts and the rationale for the restructuring was the subject of evidence by Rajbally, who testified that historically, the post was a 'legacy' post, one that was continued to be done in-house in circumstances where, in respect of the bulk of the business operation, the function was undertaken by a third party. There is nothing irrational nor unreasonable in a decision to the effect that considerations of business efficiency would be better served by bench-marking and aligning the remuneration attached to the post with industry norms, and to restructure the business organisation to give effect to these considerations. In the case of the pre-sellers, CCBSA's analysis indicating that only 80 000 of its outlets produced 90% of its volume and revenue and that the existing route-to-market structures were over-invested in 110 000 outlets that produced minimal volume and revenue, was not contested. There is nothing irrational or unreasonable in CCBSA's decision in these circumstances to reduce the number of pre-sellers, employed as they were in over-invested outlets that provided little by way of return.

[43] In short: CCBSA's response to the crisis precipitated by the introduction of the sugar tax, increased costs and a declining market was a rational response to arrest the economic decline that it experienced, and its decision to restructure the commercial division, and in particular the structure within which merchandisers and pre-sellers were engaged, is not unreasonable having regard to its operational requirements.

Selection criteria

[44] The appellants submit that the retrenchment of the pre-sellers was unfair on account of the failure by CCBSA to implement LIFO fairly and objectively. Specifically, the appellants contend that in respect of the pre-sellers, there was no evidence presented by CCBSA's witnesses as to how they chose the pre-sellers to be retrenched and that CCBSA did not show that it applied the selection criteria fairly and objectively. It will be recalled that the Labour Court found the application of selection criteria unfair only in the case of Mbatha, who had testified that on CCBSA's invitation, he had applied unsuccessfully for alternative employment at CCBSA's Midrand and Wadeville operations. The basis of the Labour Court's finding was that Mbatha ought to have been afforded an opportunity to respond to the assessment of his skills and experience and that in the absence of that opportunity, *"the objective and fair selection criterion was not applied fairly to Mbatha"*.¹⁷ As recorded above, the Labour Court's finding is not the subject of challenge in these proceedings, nor is the limited remedy of compensation afforded to him. The sole issue for determination is what the appellants contend to be the unfair application of the selection criteria employed by CCBSA.

[45] The pre-trial minute identified the fairness and objectivity of the selection criteria as an issue in dispute. Phetha testified that the criterion of LIFO subject to skills was agreed upon during the consultation process. In response to a question regarding the requirement that displaced employees attend interviews for alternative

¹⁷ Judgment of the court *a quo* at para 59.

roles, he explained that if the role in which appointment was sought was the same role, no interview was required; if the role was different or presented a promotional opportunity, the affected employee would attend an interview for the position. During the course of the trial, it emerged that the criteria themselves were not in dispute; rather, what was placed in issue was the implementation of those criteria. Mbatha testified that he was not aware why he had been selected for retrenchment from the group of pre-sellers employed in Bedfordview, but conceded that he had been advised of other opportunities within CCBSA, particularly in Wadeville. He had applied for a position there as a picking administrator. He was called to an interview and learned later that he had not been appointed on account of the fact that his background was in sales.

[46] This is not one of those case where an employer restructures its business and then invites existing employees in a competitive process to apply for positions in the new structure, and where non-placement becomes the criterion for retrenchment.¹⁸ In those cases, this Court has held that the placement process and in particular, decisions on placement, must meet the objective standard of fairness. In respect of the redundant pre-sellers this is a case, no more and no less, where alternative employment in the form of opportunities within the organisation were drawn to the attention of employees already selected for retrenchment on the basis of agreed criteria, and where they were free to seek appointment to those positions. An employee seeking to claim an unfair retrenchment in these circumstances must at least plead the fact of the exclusion and the grounds on which the employee asserts that the exclusion was unfair.

[47] In the present instance, this was not the case pleaded by those employees previously engaged as pre-sellers. Further, as the Labour Court observed, only Mbatha, of the 14 affected pre-sellers, and for reasons that were not apparent, gave evidence of his exclusion from the alternative employment for which he had applied. There was no evidence before the Labour Court to the effect that Mbatha's

¹⁸ See, for example, *MTN Group Management Services (PTY) Ltd v Mveli & another* (2021) 42 ILJ 775 (LAC); *Telkom SA SOC v Van Staden & others* (2021) 42 ILJ 869 (LAC).

circumstances were the same or similar to any of the other pre-sellers selected for retrenchment. The Labour Court noted in respect of those employees that:

‘It would engage in a realm of speculation in respect of their respective case, particularly in an instance where the applicants alleged in the pre-trial agreement that CCBSA’s insistence that the employees be interviewed for alternative jobs introduced a subjective criteria (sic). Without knowing that the 13 applicants were interviewed or not, how could the Court investigate the alleged subjectivity?’

[48] The Labour Court was correct to refuse to extrapolate Mbatha’s circumstances to those employees previously engaged as pre-sellers and who failed to plead a case of unfair exclusion from alternative employment, or give evidence at the trial.

[49] In the result, the submissions advanced on appeal do not call into question the correctness of the order made by the Labour Court, and the appeal thus stands to be dismissed.

Costs

[50] Neither party sought an order for costs, and none will be granted.

The order of this Court is as follows:

1. The appeal is dismissed.

A van Niekerk JA

Sutherland JA and Govindjee AJA concur.

APPEARANCES:

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FOR THE RESPONDENT: Adv. G. Engelbrecht SC

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