

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Reportable
Case No: PA3/2023

In the matter between:

UMICORE CATALYST SOUTH AFRICA (PTY) LTD

Appellant

and

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA (NUMSA) obo 5 MEMBERS**

Respondent

Heard:

14 May 2024

Delivered:

29 August 2024

Coram:

Molahleli AJP,

Nkutha-Nkontwana JA, Govindjee AJA

JUDGMENT

Govindjee, AJA

Background

[1] The appellant (Umicore) is a manufacturer of catalytic converters. It acquired the business of Delphi (Pty) Ltd (Delphi) as part of a global acquisition and proceeded to operate both from premises leased by Delphi in Young Park as well as its own premises in Deal Party, Gqeberha. During 2015, Umicore decided that it did not wish to renew the Young Park lease, which was due to expire in January 2017, and that the Young Park operations could be relocated to its Deal Party premises. As

a result, however, there would be duplication of functions and automation that would affect 52 positions.

[2] Umicore embarked upon a lengthy pre-retrenchment process in accordance with s 189A of the Act.¹ This included various meetings facilitated by a CCMA commissioner. The 52 employees that were retrenched worked in various departments. In the case of laboratory employees, Umicore departed from the 'last in, first out' (LIFO) selection criteria that it adopted in respect of other departments. Midway through the consultation process, it introduced what was termed a 'laboratory assessment'. A panel comprising the laboratory manager and two senior managers from other departments (the panel) was appointed to conduct the assessment. Leaving aside two senior employees, all laboratory employees were invited to participate. The four laboratory employees who challenged the fairness of their retrenchment before the Labour Court (the employees) refused to do so. The panel conducted the assessment in their absence and, based on the outcome, dismissed the employees.

[3] The respondent (NUMSA) represents these employees as well as Mr Nogantshi, who worked outside the laboratory and who also challenged the fairness of his dismissal before the Labour Court. It is convenient to deal with his position separately. NUMSA accepted that the relocation of operations, including a duplication of functions and automation of some machinery, presented a fair economic rationale that warranted restructure and dismissals due to operational requirements. The gravamen of NUMSA's complaint was that Umicore had abused the opening provided by the restructure. It acted opportunistically by deliberately selecting employees who had historically earned higher salaries for retrenchment, an allegation denied by Umicore. NUMSA also contended that the introduction of a 'laboratory assessment' was unfair based on its subjectivity and because it was linked to Umicore's ulterior motive. This explained why the employees concerned had refused to participate in the assessment process.

¹ Labour Relations Act 66 of 1995, as amended (the Act).

[4] The Labour Court found the dismissals to be substantively unfair and ordered the reinstatement of the employees. Umicore appeals against that decision with the leave of the court *a quo*. Determining the appeal requires consideration of the parties' final pre-trial minute (the minute), as well as aspects of the evidence presented before the Labour Court.

The minute

[5] The minute summarised the central issues in dispute as follows:

5.1 Whether the true reason for the selection and ultimate retrenchment of the employees was that Umicore was trying to reduce its wage bill by retrenching generally higher paid employees;

5.2 Whether Umicore had acted unfairly towards one of the employees by declaring her position redundant and by offering her a demotion;

5.3 Whether components of the assessment were agreed to during the consultation process;

5.4 Whether any or all of the employees were unfairly dismissed based on these issues and allegations.

[6] This synopsis must be read together with two paragraphs that appear later in the minute under the separate heading 'Fairness of Selection Criteria':

6.1 'Applicant contends that the introduction of the Laboratory Assessment was unfair due to its subjective nature, and also that it was introduced in order to get rid of those employees who were traditionally earning more.'

6.2 'Respondent contends the Laboratory Assessment was necessary and fair in order to give effect to the requirement of skills retention during the selection process. Respondent also reiterates that the operational reasons set out in the Section 189 Notices were the real reasons for the dismissals.'

[7] This followed an averment in the statement of claim that the introduction of a 'behavioural assessment' was inappropriate and resulted in the selection criteria being subjective and unfair. That issue was self-standing, central to the dispute and duly articulated in the minute. The minute also included a further, solitary, point in

contention under the heading 'Fairness of Application of Selection Criteria'. This related to the alleged unfairness of Umicore's decision to conduct assessments on behalf of the employees notwithstanding their refusal to participate in the process. Umicore's stance that '*... the assessments were performed in an objective and fair manner in accordance with the agreed criteria...*' was recorded.

The evidence

[8] Umicore relied on the evidence of its human resources manager (Ms MacKenzie) and erstwhile laboratory manager (Mr Brits) in support of its case before the Labour Court. MacKenzie explained the rationale for the retrenchment and detailed the procedure followed prior to dismissal. Brits explained the decision to deviate from LIFO and the details of a behavioural assessment questionnaire, which he had authored.

[9] Umicore's intention was to reduce the laboratory staff complement from a total of 26 people to 18 people, including 12 laboratory technicians. The laboratory analysed a vast range of precious metals received from various providers by conducting a series of tests. The tests were advanced and high-tech and required a good level of skill. The laboratory served the entire organisation, for example by guiding the necessary adjustments to the process of production and aiding the quality and supply chain departments. This required the provision of real-time results on an expedited basis.

[10] The behavioural assessment was introduced only in that part of the workplace as an exception to the application of LIFO, which was the general selection criteria adopted, and skills retention. MacKenzie suggested that the behavioural assessment had subsequently been introduced because Brits '*... was going to need people that would be able to operate at a certain level, with limited resources, less people ...*'. Brits emphasised that the employees to be retained would be required to work independently and, on occasion, without supervision. He viewed the behavioural assessment questionnaire as affording incumbent employees the opportunity to

highlight aspects that might enhance their prospects of retention, and had posed the following questions:

1. Strong analytical mind
 - a. How important do you view this skill in the Lab and why?
 - b. Give an example where you demonstrated your application of a strong analytical mind and how this contributed to solving a Lab / Analytical problem.
2. Multi-tasking / Coordination of own work
 - a. How important do you view this skill in the Lab and why?
 - b. Give an example where you demonstrated / mastered the ability to multi-task in your current Lab environment. How did this improve your productivity? Has this improvement also been rolled out to the benefit of others in your area of work?
3. Communication
 - a. What do you believe to be good communication skills?
 - b. How do you handle 'difficult' colleagues and how do you make a positive contribution to the atmosphere in the Lab?
4. Initiative / innovation
 - a. How important do you view this skill in the Lab and why?
 - b. Give an example where you applied your initiative (not initiated by someone else) in the Laboratory, which led to a significant improvement in the Lab (Technical, Safety, Systems, other). Tell us how you went about to ensure this was implemented. Is this improvement still in place?
5. Enthusiasm and determination to achieve objectives
 - a. How important to do you view this skill in the Lab and why?
 - b. Give an example where you demonstrated your enthusiasm and determination to achieve a specific Lab objective. Tell us how you remained focussed on the objective i.e. not getting side-tracked or losing focus / interest. Do you generally manage to stay focused and achieve objectives on time?
6. Attendance

With regards to attendance, what do you believe your responsibilities to be relating to:

- a. Planning for normal /study leave? How do you ensure that the workload can be covered during your absence?
- b. For unexpected absences give an example of how you have assisted in the cover of the absentee to ensure that the effect on Umicore is minimised.'

[11] This occurred midway through the consultation process and after Umicore had already decided to retain Mr Dlepu, a laboratory technician, based on his skills set. The Chemical, Energy, Paper, Printing, Wood and Allied Workers Union (CEPPWAWU), who represented the employees at the time, objected to the behavioural assessment during the consultation process. In response, Umicore decided to include three additional considerations in the form of individual performance appraisals, disciplinary records, and attendance records for the previous two years, each to be afforded the same weight as the behavioural assessment.

[12] Ultimately, however, there was no agreement on selection criteria and Umicore proceeded with the laboratory assessment unilaterally, including the behavioural assessment. The panel scored the employees by awarding a score of between one (poor), three (good) and five (excellent) for each of the 12 questions posed, so that the maximum score possible per assessor was 60. Three section heads reported to Brits and the people reporting to them worked in the laboratory, which was adjacent to Brits' office so that he interacted with the laboratory employees on an informal basis and observed some of the analytical work that occurred. Brits also had sight of individual performance assessments, which were completed by the section heads. In addition to Brits, the panel also comprised the technology development and supply chain managers. Both these departments interacted with the work of the laboratory and these managers, or their subordinates, would have had contact with the affected employees. Brits denied that the entire exercise amounted to him picking his favourites for retention:

‘And secondly, these panellists also had some, to some level prior knowledge of the incumbents, maybe not to the same extent as I had, but where they had questions they would ask me and I would truthfully answer them with regards to their question whatever they may have about that incumbent ... based on the information that we would have available at the time we would rank a person as a one or a three or a five ... That information we would then submit ... to the HR manager...Everybody conducted their own score and formed their own opinion and their own assessment of the incumbent. There was no discussion or correlation of any scores ... If it so happened then it was based on the information that we spoke about and not about saying let us give this person score X, Y or Z. The scores were never discussed.’

[13] In respect of the employees who refused to complete the behavioural assessment, the panel *‘had to use as best as possible our knowledge or prior knowledge, our experience, based on what we observed about each incumbent ... and put in our answer down for the incumbents ...’*. Brits and the other two panellists never physically completed a questionnaire on their behalf and there was no information that would be verified with the section heads. All three relied exclusively on their own recollection, understanding and experience of the person concerned:

‘I had my thoughts though and my impressions of my opinions that I had during observing work and during informal discussions, informal visits where they were working and that information I had in my mind ... I had a very clear picture in my mind ... besides my own opinion that came to the fore when these questionnaires were completed the other two panellists had some experience, to some degree, of the incumbents; either be it on a personal experience they may have had or through their departments inputs to them.’

The Labour Court judgment

[14] Umicore argued that it was faced with legitimate operational and structural needs that rendered the dismissals unavoidable. As the judgment of the Labour Court explains, that much was clear from the evidence. Umicore submitted, in essence, that the selection criteria implemented, which involved a combination of

LIFO and skills, were fair and objective, both at the level of form and at the level of formulation and application of selection criteria.

[15] Based on evidence that the employees were not the highest earning laboratory workers, NUMSA's allegation that they had been targeted for retrenchment purely because of their salary was decided in favour of Umicore. The Labour Court summarised the issues to be determined to include the question of the objectivity of the selection criteria, as well as the implementation thereof. It held as follows:

'It is common cause that the selection criteria was not decided by agreement ... The power to decide the selection criteria vested in the consulting parties. The consulting parties exercised it and took a decision that LIFO and skills retention would be used as the selection criteria. When that agreement was reached the respondent was left with no residual powers to unilaterally change the agreed criteria and introduce behavioural assessment ... The respondent's conduct of deviating from the agreed criteria particularly without valid reasons was unfair.'

[16] Considering the material before it, notably the evidence of MacKenzie, the Labour Court was correct in stating that it was common cause that the selection criteria had not been determined by agreement. There was only a proposed agreement on the issue, nothing more, and CEPPWAWU never agreed to Umicore's suggestion. The court therefore erred in basing its conclusion on a deviation from agreed selection criteria. Although NUMSA persisted with its stance that the selection criteria were designed to remove higher-earning employees, the Labour Court's rejection of that argument cannot be faulted. There was evidence that some employees earning more than those retrenched remained in employment after the process. There is also no basis to find in favour of the employees purely because the assessments had been completed on their behalf when they refused to participate in the process, which was the only challenge in respect of the application of the selection criteria. The employees were given various opportunities to complete the assessment and chose not to do so. The crux of the dispute remains the question of

the objectivity and fairness of the behavioural assessment as part of the overall laboratory assessment to determine the persons to be selected for retrenchment.²

The legal position

[17] Absent agreement to the contrary, the selection criteria for operational requirements dismissals must be fair and objective.³ The intrinsic value of 'fair and objective' criteria has been explained as follows:⁴

'The purpose of having, so far as possible, objective criteria, is to ensure that redundancy is not used as a pretext for getting rid of employees whom some managers wished to get rid of for other reasons. Excepting cases where the criteria can be applied automatically (eg last in, first out) in any selection for redundancy, elements of personal judgment are bound to be required, thereby involving the risk of judgment being clouded by personal animosity. Unless some objective criteria are included, it is extremely difficult to demonstrate that the choice was not determined by personal likes and dislikes alone.'

[18] Put differently, an employer who does not use agreed selection criteria to select the employees to be dismissed may not depart from 'fair and objective' selection criteria.⁵ To do so would render the dismissals substantively unfair.⁶

[19] The onus is on the employer to prove that there was a fair reason to dismiss the selected employees.⁷ This raises the issue of the basis for selection. Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. While the use of LIFO generally satisfies the test, there are instances

² This much is evident from the record of proceedings before the Labour Court. As Mr Niehaus, for NUMSA, put it: *'It is the case for the applicants that the introduction of the behavioural assessment was per se objectively unfair and in addition it was done with the intention to basically eliminate those employees who were historically higher earners. So there are actually two components to that aspect that the applicants are placing in dispute ...'*

³ S 189(7) of the LRA.

⁴ *Williams v Compare Maxam* 1982 IRLR 83 as quoted in *Jones v KPMG Aiken & Peat Management Services (Pty) Ltd* (1995) 16 ILJ 1241 (IC) (*Jones*) at 1247.

⁵ *CWIU & others v Latex Surgical Products (Pty) Ltd* [2006] 2 BLLR 142 (LAC); (2006) 27 ILJ 292 (LAC) (*Latex Surgical Products*) at para 85.

⁶ *Ibid* at para 87.

⁷ *Ibid* at para 55.

where the LIFO principle, or other criteria, require adaptation.⁸ The Code makes mention of '*the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business*' as an example, adding that such exceptions should be treated with caution.⁹

Analysis

[20] It may be assumed, without deciding the point, that the inclusion of individual performance appraisals, disciplinary records and attendance records for the previous two years constituted fair and objective components of the chosen selection criteria, so that any subjectivity was restricted to only a quarter of the laboratory assessment.¹⁰ In *CWIU and others v Latex Surgical Products (Pty) Ltd*, this court held that selection based in part on a panel score for an interview as well as 'willingness / motivation levels', resulted in an least 20 per cent of the selection criteria being subjective. The argument that this percentage of subjectivity was insignificant, and therefore should be ignored in the overall assessment of fairness, was rejected.¹¹ Similarly, the inclusion of other fair and objective dimensions of the laboratory assessment cannot on their own cure a subjective component constituting a quarter of the final score. The key question remains whether Umicore has discharged the onus of proving that the behavioural assessment was a fair and objective component of the process to select employees for retrenchment.

[21] While 'skills' may be an appropriate way to determine which employees are to be retrenched, the fairness of this method of selection is typically intertwined with the details associated with its implementation. In the case of a questionnaire ostensibly constructed for purposes of determining the ability to work independently, matters such as the topics addressed, the formulation of the questions and their weighting

⁸ Para 9 of the Code of Good Practice on Dismissal Based on Operational Requirements (the Code). Selection criteria laid down by case law, in addition to the three factors mentioned in the Code, include the employee's competence and merit; technical knowledge or experience; conduct; service record; age and gender. See *Porter Motor Group v Karachi* [2002] 4 BLLR 357; (2002) 23 ILJ 348 (LAC) (*Porter*) at para 15.

⁹ *Porter* above n 8 at para 15.

¹⁰ Cf *Singh & others v Mondi Paper* [2000] 4 BLLR 446 (LC); (2000) 21 ILJ 966 (LC) (*Singh*) at paras 64 and 74.

¹¹ *Latex Surgical Products* above n 5 at paras 90 and 92.

are intrinsic elements to be considered in assessing the questionnaire for fairness and objectivity. Umicore cannot overcome the hurdle of fair and objective selection criteria merely by stating that their operational requirements necessitated fewer laboratory workers and that those able to work independently and without supervision were the preferred staff to be retained. Mr Brits' mere say-so that the questions posed were directed towards this outcome is equally insufficient. Rather, it is the granular examination of the method of selection, in the form of the behavioural assessment questionnaire and its contents, that determines whether the approach is fair and objective and passes muster.

[22] It may be emphasised that this enquiry focuses squarely on the issue of fair and objective selection criteria and deliberately avoids conflating that issue from a challenge based on the fairness of the application of fair and objective selection criteria. That question, including how tests have been conducted, and how results have been obtained and collated, presupposes the existence of a fair and objective basis for assessment and is, strictly speaking, a subsequent and distinct enquiry.¹²

[23] On the approach adopted, it is unnecessary to determine the matter based on the way the selection criteria were applied.¹³ The evidence presented before the Labour Court reveals several concerns regarding Umicore's chosen methodology for selection.

[24] Firstly, by using the questionnaire as the basis for the selection, Umicore decided to focus on the employees' personality characteristics, including initiative, enthusiasm and determination, instead.¹⁴ These are inherently subjective

¹² Cf *NUM & others v Anglo American Research Laboratories (Pty) Ltd* [2005] 2 BLLR 148 (LC) where the real issue was the application of selection criteria, in the form of a skills inventory matrix prepared by the section head, that the parties agreed was fair. As indicated above, in the present circumstances the challenge regarding the application of the selection criteria was restricted to a single issue.

¹³ Cf *Kenco Engineering CC v National Union of Metalworkers of South Africa obo Members* [2017] ZALAC 84 at para 23.

¹⁴ *Chemical Energy Paper Printing Wood & Allied Workers Union obo Gumede & others v Republican Press (Pty) Ltd* (2006) 27 ILJ 335 (LC); [2006] 6 BLLR 537 (LC) at para 37.

considerations and, absent agreement, ought not to have been included in the circumstances.¹⁵

[25] Secondly, although past performance was a consideration, there was no on-the-job evaluation performed on an individual basis to test the ability to work independently and without supervision in the laboratory.¹⁶ Despite this being the stated objective of the behavioural assessment questionnaire, the nature of most of the questions posed bore no real correlation to the objectives of independent work and multi-tasking.¹⁷ That is self-evident and on its own was unfair to the employees.

[26] Thirdly, the way the questions were crafted was inherently problematic. To cite some examples, ten of the twelve questions were double-barrelled, seeking responses to more than one issue but permitting only a single answer. A third of the questions required employees to attempt to explain their perception of the importance of one or other issue for laboratory work. In effect, rather than assessing employees for their competence in performing that work, Umicore chose to emphasise their ability to explain the importance of certain skills. The required example to demonstrate enthusiasm turned the focus to the outward manifestation of the spirit with which laboratory work was completed, rather than the results of the work. Similarly, one dimension of the question related to communication appeared to assess an employee's contribution to workplace ambience based on their personal approach to communication. As for the questions pertaining to attendance, the way the questions were framed suggests that employees would receive an adverse score simply because they had exercised their statutory or contractual rights to annual or study leave without sharing Umicore's burden of minimising the effect on operations.

[27] There is a difference between grading employees based on the opinion of their superiors and an assessment based on observations of their actual

¹⁵ Cf *Singh* above n 10 at para 59.7: 'willingness to co-operate' and 'personal relationships' could not be established objectively. In respect of criteria such as 'aptitude' and 'personality', see *SACCAWU & others v Game Discount World* [1994] 7 BLLR 108 (IC) at 113.

¹⁶ *Latex Surgical Products* above n 5 at para 27.

¹⁷ *Latex Surgical Products* above n 5 at para 93. Cf *Thekiso v IBM South Africa (Pty) Ltd* [2007] 3 BLLR 253 (LC) at para 32: redundant employees seeking appointment to an alternative post were requested to rate themselves in respect of the advertised requirements for the position.

performance.¹⁸ Rather than focusing on facts and measurable, verifiable information pertaining to laboratory skill, the behavioural assessment utilised a series of open-ended, double-barrelled questions to elicit employees' opinions, feelings and personal experiences. As MacKenzie conceded during cross-examination, the approach and personal belief system of panel members would necessarily impact on their interpretation and analysis of any responses received.¹⁹ In short, the behavioural assessment was overwhelmingly subjective in nature. Indicative of the mismatch between the questions posed and the purpose to be achieved was Brits' admission that the other panel members were forced to consult with him to arrive at their own scores for the affected employees. That they seemingly managed to do so without completing questionnaires for each of the employees who refused to participate is also suggestive of a 'thumb-suck' approach to selection, based primarily on Brits' opinion of the skills and attributes of the employees, rather than one based on an objective assessment of skills.²⁰

[28] Umicore placed emphasis on the decision of the Labour Court in *NUMSA obo Mdeleleni and Others v Faurecia Emission Control Technologies (Pty) Ltd*²¹ (*Faurecia*) in support of its position, so that it is necessary to consider that judgment in some detail. The operational requirements of the employer in that instance were such that it needed to be able to work with a small number of artisans, with diverse skills. The case turned on a skills assessment relied upon by the employer for purposes of selecting the employees for retrenchment. Affected individuals were rated according to their level of competence and ability on a particular workstation, known as a polyvalence qualification. The object of the rating was to develop employees' ability to master several workstations. The method of assessment encouraged multi-skilling instead of evaluating the competency of an artisan in the specific field for which they were qualified. The rating process was akin to a performance appraisal. It was completed by department managers or team leaders

¹⁸ The most objective way of assessing skills is by the individual undergoing a practical test: *NUMSA & others v John Thompson Africa* [2002] 7 BLLR 634 (LC) at paras 262 and 266.

¹⁹ See *Gijima AST (Pty) Ltd v Hopley* [2014] ZALAC 9; (2014) 35 ILJ 2115 (LAC) at para 38.

²⁰ *Jones* above n 4 at 1247–1248. *Shezi & others v Consolidated Frame Cotton Corporation Ltd (1)*; *Nxumalo & others v Consolidated Frame cotton Corporation Ltd (2)*; *Zuke & others v Consolidated Frame Cotton Corporation Ltd (3)* (1984) 5 ILJ 3 (IC) at 12.

²¹ Unreported Labour Court decision (Cape Town) (Case Nos C790/19 and C1099/18).

without any input from employees, who were restricted to querying the assessment after the fact.

[29] Following a grievance process, the employer added 13 additional skill categories that were not part of the original ranking exercise, bringing the total number of skills rated to 39. Some of the additional criteria were machine specific. Others were more general, including 'interpreting engineering drawings' and 'work ethic and attitude'. The central question was whether this method of selecting employees for retrenchment was fair and objective.

[30] The Labour Court accepted that artisans with experience of working on a variety of machinery, and fixing faults on different machines, would be of greater value to the company in relation to the objective of reducing the number of maintenance personnel per shift.²² To the extent that such diversity and depth of expertise in machine-specific skills could be measured, it would provide an objective and fair way of identifying the artisans to be retained. NUMSA's complaints included that the employees had not participated in the polyvalence assessment, and that the criteria failed to consider their qualifications and inherent versatility, particularly in the case of millwrights who could perform the roles of fitter, turner and electrician.

[31] The Labour Court considered it to be significant that polyvalence assessments were not a novel measurement of skill and were utilised as a standard practice at the company.²³ Importantly, the assessment had not been devised solely for the purpose of selecting individuals for retrenchment. The assessment was an uncontroversial, pre-existing method of skills assessment. The selected methodology had not been questioned initially, and no principled objection had been raised when the additional 13 categories of skills had been included as part of the assessment, leaving aside the contention that artisans could acquire the skills over time.²⁴

[32] In contrast to the position in the current instance, the conclusion was that the selection method matched the operational objective. Its acceptability was predicated

²² Ibid at para 60.

²³ Ibid at para 63.

²⁴ Ibid at para 65.

on its status as an existing methodology applied to assess which artisans demonstrated the greatest variety and proficiency in specific maintenance skills relevant to the company's production facility.²⁵ Although the department manager's involvement rendered the assessment somewhat subjective, '*it is an assessment made with respect to four standard, fairly simple, limited and well-defined parameters in relation to each task*'. As a result, the score attributed to any artisan in respect of specific work could easily be debated and shown to be demonstrably erroneous.²⁶

'Whether an employee satisfies all four parameters is a matter that can be debated with reference to factual information, and is not simply a matter of personal perception or impression.'

[33] Properly understood, there was no real challenge to the objective nature of the criteria in *Faurecia*.²⁷ In that context, despite being dependent on the manager's evaluation, the polyvalence method of assessment was held to be '*sufficiently objective as an assessment method*':²⁸

'An existing assessment method was used to directly address a reasonable operational need and it contains no gratuitous or irrelevant elements, which might suggest some other undisclosed improper motive that might render it unfair.'

[34] As explained, the evidence before the Labour Court in the current matter was of a vastly different texture. Umicore has failed to prove that the employees were selected based on fair and objective selection criteria so that the appeal against the order of the Labour Court must be refused.

Mr Nogantshi

[35] Mr Nogantshi was employed by Umicore in various capacities and was dismissed on 30 November 2016. NUMSA averred that Umicore had committed a range of unfair actions that resulted in Mr Nogantshi being selected for retrenchment.

²⁵ Ibid at para 75.

²⁶ Ibid at para 76.

²⁷ Ibid at para 77.

²⁸ Ibid at para 78.

Although there was no direct response to this in Umicore's statement of defence, the final pre-trial minute concretised the issue as follows:

'In respect of Nogantshi, the applicant contends that the respondent acted unfairly by failing to reinstate him in the position of wash coat operator (as per the terms of an Arbitration Award and subsequent Labour Court judgment in Nogantshi's favour), which position was unaffected by the section 189(3) process and instead placed him in an affected position as storeman and thereafter acted inconsistently relevant to the application of LIFO in order to secure his dismissal by way of applying LIFO to his section only and not to storemen in the company as a whole ... The respondent denies this.'

[36] The Labour Court held in favour of Mr Nogantshi and ordered his reinstatement, based on the following reasoning:

'It is common cause that when the consultation process commenced Nogantshi had been dismissed by the respondent which was trying to have the award reinstating him reviewed. Nogantshi's name appeared as a storeman in a document pertaining to August 2015. When he returned to work in October 2015 MacKenzie knew that some employees at the stores would be retrenched. When placing Nogantshi at the stores she did not warn him that he would be retrenched. The respondent submitted that placing Nogantshi at stores was in compliance with the reinstatement order. However, the respondent's failure to bring it to the consulting party's attention that Nogantshi would be placed at the stores on his return to work and be selected for retrenchment was unfair. So is MacKenzie's failure to inform Nogantshi that being placed at the stores exposed him to the risk of being selected for retrenchment, a danger he would have been protected from had he been placed in [a] wash coat operator position ... The respondent failed to prove the fairness of the selection criteria which resulted in Nogantshi's retrenchment. The dismissal was therefore unfair.'

[37] These findings are supported by the evidence before the Labour Court. MacKenzie admitted that Mr Nogantshi had been dismissed while employed as a wash coat operator. The section 189A process commenced on 12 August 2015. At

that point in time, wash coat operators were unaffected but store employees were affected. Mr Nogantshi at that stage had not been reinstated. He had been excluded from the workplace for some time and only returned to Umicore on 2 October 2015, by which time the s 189A process was a reality. Despite the arbitration award ordering his reinstatement, he was placed in the position of storeman, on the same terms and conditions of employment, on the basis that there was no wash coat operator position available at the time.²⁹

[38] In effect, instead of placing Mr Nogantshi into his previous position as wash coat operator, Umicore placed him into a storeman position knowing that this was an area affected by the retrenchment process. Moreover, on its own evidence, it did so without notifying Mr Nogantshi of the reality of his situation, purely on the basis that it was dealing with a 'mass retrenchment'.

[39] In fact, the evidence suggests that Mr Nogantshi was placed at stores as an interim measure and without a formal change to his designation, pending the resolution of his reintegration and various payment issues. Although Mr Nogantshi received payslips reflecting his position as 'storeman', Umicore never completed the applicable form that would have indicated a permanent change in designation. Initially, he was advised to return to the Deal Party site, which accorded with his prior work in wash coat operations. On the eve of his return, he was advised to attend a meeting with human resources and placed at the warehouse in Korsten. He was not informed that there were no wash coat positions available, or that he was now a storeman, and always assumed that he would eventually be returned to his former occupation.

[40] Mr Nogantshi was unaware that his position was declared redundant so that he was identified for retrenchment a fortnight after acceding to the instruction to perform duties at the warehouse. He only became aware that he was to be retrenched approximately a year later. To add salt to the wound, Umicore advertised wash coat operator positions shortly thereafter.

²⁹ The arbitration award provided for reinstatement '*... with effect from 16 August 2013 to the same or similar position on the same terms and conditions that existed prior to the dismissal on 16 August 2013...*'. An application for review of the arbitration award was unsuccessful.

[41] 'Reinstate' means to put an employee back into the same job or position that they occupied before dismissal, on the same terms and condition. Reinstatement is aimed at placing the employee in the position they would have been, but for the unfair dismissal.³⁰ While the Labour Relations Act³¹ remedy of re-employment encompasses the employee's return to the employer's service '*either in the work in which the employee was employed before the dismissal or in other reasonably suitable work*', there is no such discretion in cases of reinstatement.³² While placement in stores may arguably have amounted to 'other reasonably suitable work', this was not what was ordered by the arbitrator.³³

[42] Had he not been unfairly dismissed, Mr Nogantshi would have remained as a wash coat operator and his position would have been unaffected by the retrenchment exercise.³⁴ From the evidence, it is apparent that this is not one of those instances where the entire function of wash coat operator had been dissolved after the unfair dismissal and prior to the reinstatement order. Instead, it appears as if Umicore simply did not keep Mr Nogantshi's position open once he had been dismissed. The gamble backfired once he succeeded at arbitration and Umicore's review was unsuccessful. In the circumstances, the concerns expressed by this court in *General Food Industries Ltd t/a Blue Ribbon Bakeries v FAWU & others*,³⁵ in the context of branch transfers, bear repeating:

'I can see no justification for an employer to retrench an employee who has served him loyally for, for example 20 years, and retain one who has been employed for only a few months to perform work that the one with a longer service period can also perform. Certainly in this case nothing that was said by the appellant or its witnesses seems to me to justify such conduct. On the contrary, allowing that approach in the absence of a really sound reason or

³⁰ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* 2009 (1) 390 (CC); [2008] 12 BLLR 1129 (CC) at para 36.

³¹ Act 66 of 1995, as amended.

³² S 193(1) of the Labour Relations Act, 1995 (Act 66 of 1995).

³³ *Myers v National Commissioner of the South African Police Service and another* [2014] ZALCCT 1; [2014] 5 BLLR 461 (LC) at para 17.

³⁴ *National Commissioner of the South African Police and another v Myers* [2018] ZALAC 13; [2018] 9 BLLR 882 (LAC) at para 39 and following.

³⁵ [2004] 9 BLLR 849 (LAC); (2004) 25 ILJ 1655 (LAC) at para 36.

explanation could lead to abuse. An employer who wants to get rid of an employee (but lacks legitimate grounds to do so) could transfer such employee to a branch which he knows is likely to embark upon a retrenchment exercise in due course if he thought that such employee would be a likely candidate for retrenchment in that branch on the basis of LIFO which is applied only the affected branch. In that way the employee could be selected for retrenchment at that branch and be retrenched despite the fact that in his old branch there are employees who have shorter service periods than him who perform work that he can perform. Obviously, if it was to be shown that the employer transferred the employee in order to get such employee retrenched and not because of any genuine reason, the dismissal would be unfair. However, in my view there would be cases in which the employer could give a reason that appears to be genuine. That is the case that gives me grave concerns ...'

[43] Umicore was obliged to reinstate Mr Nogantshi in compliance with its legal duty emanating from the arbitration award.³⁶ Considering the context, it was unfair to place Mr Nogantshi in a position that was affected by the restructure when he ought to have been reinstated to his previous position, which was unaffected. Even if his conduct suggested acceptance of his changed circumstances, Mr Nogantshi was simply unaware of the ramifications of the change. Absent clarification regarding the precarity of his situation, the argument that his failure to complain should be held against him must be rejected. Contrary to Umicore's submissions, the basis of his challenge to his dismissal was foreshadowed, albeit somewhat vaguely, in the statement of claim and concretised in the final pre-trial minute. The Labour Court's order that his dismissal was substantively unfair and that he be reinstated must be upheld.

[44] The following order is issued:

Order

³⁶ *National Commissioner of the SA Police Service and another v Myers* [2015] ZALAC 105 at paras 8, 10.

1. The appeal is dismissed.
2. There is no order as to costs.

Govindjee AJA

Molahleli AJP *et* Nkutha-Nkontwana JA concur.

Appearances:

For the Applicant: FE Le Roux
Instructed by: Joubert Galpin Searle

For the Respondent: M Niehaus of Minnaar Niehaus Attorneys