IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 40/2020

In the matter between:

THEUNIS DANIEL DE BRUYN **Appellant**

and

METOREX PROPRIETARY LIMITED **Respondent**

Heard (via Teams): 30 March 2021

Delivered: (On date e-mailed to parties, deemed to be 21 July 2021)

Coram: Waglay JP, Coppin JA *et* Molefe AJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment of the Labour Court (Tlhotlhalemaje J), with the leave of that court, and in terms of which it dismissed the appellant's claim that his dismissal by the respondent was automatically unfair, declared that the dismissal, for the purposes of the respondent's operational requirements, was procedurally and substantively fair, and dismissed the appellant's other claims for a cell phone allowance, and for short-term and long-term incentive bonuses (referred to respectively as "STIB" and "LTIB").

Common factual history

[2] The respondent ("Metorex"), a mining company based in Johannesburg, has a controlling interest in the Kinsenda and Ruashi mines in the Democratic Republic of the Congo (DRC) and in the Chilumba mine in Zambia (collectively referred to as "the mines").

[3] The appellant commenced employment with Metorex on 1 July 2003, in the capacity of chief operations officer ("COO"). At the time of his parting from Metorex, his remuneration package was approximately R3.5 million per annum. Clause 7 of his contract of employment stipulated that he was to become eligible to participate in Metorex's incentive bonus schemes.

[4] Shortly before the resignation of Metorex's former executive officer, Mr Ferreira, in about April 2015, he authorised a retrospective salary increase for the appellant, apparently as an incentive to dissuade the appellant from attending a job interview at another mining company.

[5] It is common cause that at the time the mines were unprofitable, Metorex was experiencing financial challenges and that after Mr Ferriera's resignation in April 2015, the majority shareholder of Metorex's holding company, Jinchuan Group International Resources Co. Ltd ("Jinchuan"), resolved to take over the day to day business management of Metorex.

[6] Mr Dexin Chen ("Chen"), a Chinese national, replaced Mr Ferriera as CEO of Metorex, albeit in an acting capacity. Mr Fugui Qiao ("Qiao"), who is also a Chinese national, was appointed to the newly created position of "Acting Deputy CEO" of Metorex on 23 April 2015.

[7] Jinchuan took a decision to replace the general managers at its mines in the DRC and Zambia with Chinese speaking nationals, and during June 2015, through the agency of Chen and Qiao, that decision was put into effect. This was part of the implementation of the silo or "Jinchuan model" in terms of which greater autonomy was to be given to the general managers at those mines, and changing the role of staff at Metorex's head office from a day to day management role of those mines to more of a supervisory role.

[8] The appellant had been informed that his role was to change under the new structure and that he was not responsible for the daily operations of the mines. The newly appointed general managers reported directly to Mr Qiao or Mr Chen on a daily basis.

[9] During July 2015 the appellant had sent an email to Chen in which he raised concerns that he had never been consulted or engaged concerning the appointment of the general managers, even though they were supposed to have reported to him, and that it appeared as if his position had been made redundant without any input at all from him. Chen did not reply to this email.

[10] During the period 31 July 2015 to 5 August 2015 various organisational changes within Metorex were announced. By September/October 2015 it had become apparent, *inter-alia*, to Metorex's human capital executive, Ms Carolyn Hutton ("Hutton") that the position of the appellant had possibly become redundant since the general managers were working comfortably with Qiao, who was appointed as deputy CEO on 11 November 2015.

[11] On 25 November 2015 Metorex issued a section 189(3) letter to all its head office staff, including the appellant. Consultation with the appellant commenced shortly thereafter.

[12] The appellant had disputed the need for his retrenchment, contended that Qiao had usurped his duties and responsibilities as COO and that his position had not become redundant. He proposed, *inter-alia*, that instead of retrenching him, that he be "bumped" into Qiao's position as deputy CEO because (according to him) he was a better candidate and had longer service with Metorex than Qiao.

[13] By letter dated 14 January 2016 Qiao informed the appellant that Metorex had carefully considered alternative positions equal to or higher than that of the appellant, but that none had become available.

[14] On 25 February 2016 the appellant was issued with a retrenchment notice and was dismissed with effect from 31 May 2016. At his request, the appellant was not required to work the three-month notice period. He was paid one

week's severance pay for each year of completed service with Metorex. He was not paid a short-term incentive bonus ("STIB") for the period 1 January 2016 to 31 May 2016. (The appellant raised the issue of his (alleged) entitlement to a LTIB for the first time in the Labour Court).

[15] The appellant referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA"). The dispute was not resolved at conciliation and a certificate of outcome to that effect was issued. The dispute was then referred to the Labour Court for adjudication as contemplated in section 191(5)*(b)* of the LRA[1]. The appellant alleged, *inter alia*, that his dismissal by Metorex was automatically unfair, alternatively, was substantively and procedurally unfair. He sought monetary compensation under various claim headings, but did not seek reinstatement. A central plank of his case for automatic unfairness was that he was discriminated against because he was not a Chinese national or a Chinese speaking person.

[16] In his final amended statement of claim the appellant sought the following relief: (a) an order declaring his dismissal by Metorex to have been an automatically unfair dismissal, alternatively, a substantively and procedurally unfair dismissal; (b) "maximum compensation" for the automatic unfair dismissal, alternatively for the substantively and procedurally unfair dismissal; (c) the difference between the severance pay of one week for every year of service paid to him by Metorex and what he alleged he was entitled to in respect of severance pay, namely, the equivalent of one month's pay for every year of service. This difference amounted to R678 744.00; (d) payment of a STIB for the period 1 January 2016 to 31 May 2016, amounting to R437 500 – 00; (e) payment of a cell phone allowance for March, April and May 2016, totalling an amount of R4500–00; (f) payment of damages in respect of a LTIB in the amount of R5 370 270 – 62; and (g) costs.

[17] At the hearing in the Labour Court Metorex relied on the evidence of Hutton and Chen, while the appellant gave evidence in support of his claim.

[1] Labour Relations Act 66 of 1995.

[18] In its judgment, the Labour Court made short shrift of both the appellant's claim for automatic unfair dismissal and his alternative claim based on procedural and substantive unfairness. The Labour Court found that the appellant's dismissal was not automatically unfair; and that "on the totality of the evidence, the implementation of the new operating model in the respondent had resulted in redundancies, including the position of COO". The Labour Court held that the "position was phased out" and that it did not understand the appellant's case to be that the position still exists. The Labour Court held that "there was therefore no logic in having the [appellant] in a position that did not exist''.

[19] The Labour Court held that: "Accordingly, the main/dominant/approximate or more likely cause of the [appellant's] dismissal was that his position was declared redundant, and not on any discriminatory grounds as he had alleged. His selection for retrenchment and non-appointment in the position of acting Deputy CEO, in the light of the explanation proffered by Chen, cannot solely be reduced to his being non–Chinese. These conclusions also therefore dispose of any allegations of substantive unfairness."

[20] In respect of the alternative claim of procedural unfairness, the Labour Court essentially held that the claim was not well founded and ultimately concluded in that regard as follows: "even if it can be said that there were procedural flaws to the extent that Chen had formed a *prima facie* view that the [appellant] and other employees were going to be retrenched, or anything [that] could be read in [Hutton's] and Qiao's correspondence before the consultation process was completed, on the whole there is no basis for any conclusion to be reached that the process was completely flawed for the purposes of the objectives of section 189(2) of the LRA."

[21] The Labour Court essentially found in respect of the claim for severance pay that the amount paid to the appellant was justified and fair. The provisions of section 41(2) of the Basic Conditions of Employment Act ("BCEA") were strictly applied to the appellant, who was a senior employee and earned more than the junior employees who had received the 'higher' severance package in order to alleviate the financial hardship which they were likely to suffer due

to their retrenchment. Given their shorter periods of employment with Metorex the 'higher' severance was reasonable. The Labour Court criticised the appellant's reliance on the decision in *Imperial Storage and Supply Co Ltd v Field*[2], to the effect that an employer acts unfairly if it pays its senior employees a higher severance package than its junior employees. The Labour Court held that the decision was not authority for the opposite situation and that the appellant's reliance on it was misplaced.

[22] The appellant's claim for a cell phone allowance was also dismissed, but since the appellant did not pursue that aspect on appeal nothing more needs to be said about it. The Labour Court also found that the STIB claim had no merit because no targets had been set for the period claimed by the appellant and he had not asked for them to be set; his contention that the conditions for the STIB had been fictionally fulfilled were without merit because he had not worked for a six-month period in 2016 and had asked to be released from his obligations to work the notice period of three months. The Labour Court also found that the appellant inappositely tried to equate his situation regarding the STIB claim with that of one Le Roux.

[23] Lastly in respect of the LTIB claim, the Labour Court, in essence, found that no decision had been taken to implement the scheme because of a drop in share price. It further found that this claim was an afterthought and had not been raised by the appellant before he instituted the claim in court. It found that, in any event, this claim was not sustainable in light of the provisions of the King III report.

[24] On appeal, the appellant, in essence, contended that the Labour Court had erred in dismissing his claims (i.e. with the exception of the cell phone allowance claim, which he abandoned). On the other hand, the respondent, in essence, supported the judgment of the Labour Court. The claims the appellant is persisting with will be discussed in turn.

[2] (1993) 14 ILJ 1221 (LAC)

Discussion/Evaluation

Automatic unfair dismissal

[25] In terms of section 187(1)*(f)* of the LRA a dismissal is automatically unfair (*inter alia*) if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to (*inter alia*) race, ethnic and social origin, culture or language. However, section 187(2)*(a)* provides that a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the particular job.

[26] In *TFD Network*[3] this Court held that section 187 "imposes an evidential burden on the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary by producing evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal."[4]

[27] Regarding the issue of fairness, this Court held there that "in the context of the LRA, the fairness enquiry coincides in most respects with the determination whether the discriminatory job requirement falls within the exemption in section 187(2)*(a)* of the LRA. Relevant considerations in regard to fairness and the inherent requirements of the job include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which rights and interests of the victim of the discrimination have been affected, whether the discrimination has impaired the human dignity of the victim and whether less restrictive means are available to achieve the purpose of the discrimination."[5]

[28] In *TFD Network* this Court referred with approval[6] to the decision of the Supreme Court of Appeal in *Department of Correctional Services & another v*

[3] *TFD Network Africa (Pty) Ltd v Feris* (2019) 40 ILJ 326 (LAC).
[4] Para 27.
[5] Para 35.
[6] Para 36.

Police and Prisons Civil Rights Union & others[7], in particular where it stated: "an inherent requirement of the job has been interpreted to mean 'a permanent attribute or quality forming…an essential element…and an indispensable attribute which must relate in an inescapable way to the performing of the job."

[29] This Court then held that the test whether a requirement was inherent or inescapable in the performance of the job is essentially a proportionality enquiry; because of the exceptional nature of the defence, the requirement must be strictly construed and a mere legitimate commercial rationale will not be enough; and that the requirement must be rationally connected to the performance of the job, in the sense that the requirement should have been adopted with a ''genuine and good faith belief that it was necessary for the fulfilment of a legitimate work–related purpose and must be reasonably necessary for the accomplishment of that purpose."[8]

[30] However, this Court also held in *TFD Network* that even if that was shown that would not be the end of the enquiry. In addition, the employer would have to show that it was "impossible to accommodate the individual employee without imposing undue hardship or unsurmountable difficulty." In that regard this Court referred with approval to what the Labour Court had held in *Clothing &Textile Workers Union & others v Berg River Textiles – A Division of the Seardel Group Trading (Pty) Ltd*[9], namely that "ultimately the principle of proportionality must be applied."

[31] Turning to the facts of this case – counsel for Metorex, in essence, conceded that the substantial reason for Qiao's appointment related to language and culture and that a *prime facie* case of discrimination had been made out. However, Metorex relied on the proportionality defence. The argument basically, was that it had found itself in dire financial circumstances and something had to be done to save the company. If the Jinchuan model had not been implemented, and if Qiao had not been appointed, but the appellant

[7] (2013) 34 ILJ 1375 (SCA) para 23.
[8] *TFD Network* (above) para 37.
[9] (2012) 33 ILJ 972 (LC).

had been appointed in his stead, the financial problem Metorex found itself in would merely have been perpetuated. Hence it was contended that even though there was discrimination it was not unfair and was reasonably justified. The argument advanced on behalf of the appellant was that the discrimination was unfair and based on race, ethnic and social origin, culture or language, and that, as a consequence, the dismissal was automatically unfair.

[32] In substantiation of this claim, the appellant had essentially testified that Metorex had appointed Qiao as the acting deputy CEO in order to displace him and replace him with a Chinese national. Much was made of a concession made by Chen in his evidence that the appellant would not have been retrenched if he was Chinese speaking. The concession has to be understood in the context of all the evidence that Chen and Hutton gave. The legitimacy of the business rationale for appointing Chinese speaking mine managers and a Chinese speaking CEO could not really be rebutted.

[33] Efficient communication between the general managers, the CEO, and the Chinese banks and other shareholders in Hong Kong, was clearly an imperative, given the seriously adverse financial situation Metorex found itself in. Chen explained in detail why Qiao was a more suitable candidate for the acting CEO position. It did not begin and end with the fact that Qiao was Chinese speaking. Qiao and Chen also had experience and knowledge of mining in accordance with the Jinchuan model. Qiao did not only act as deputy CEO, but effectively had to do the work of CEO after Chen had left South Africa. On the probabilities, his appointment (instead of the appellant) was genuine and in the belief, held in good faith, that it was necessary for the financial recovery of Metorex, which is a legitimate purpose, and that his appointment (in the context of the implementation of the Jinchuan model) was necessary for the accomplishment of that purpose.

[34] Qiao's appointment as acting deputy CEO and subsequently as deputy CEO was genuine and its aim and purpose was not to "bump-out" the appellant or to displace him. The redundancy of the appellant's position appears to have been a consequence, although not the purpose, of the implementation of the Jinchuan model and the appointment of the Chinese general managers at the

mines. Qiao as deputy CEO may have taken over certain of the duties and responsibilities of the COO, but that was in addition to those, effectively, of the CEO.

[35] Chen had explained the need for a Chinese speaking CEO, not only to facilitate communication with the general managers, but more vitally, to facilitate the raising of finance with the Chinese shareholders, banks and financial institutions. The South African banks, which had been financing Metorex were threatening to call in their loans and Metorex was obliged to seek additional/alternative financing from its Chinese shareholders and from Chinese financial institutions.

[36] Chen and Hutton, inter alia, testified to the effect that the implementation of the Jinchuan model was rational and justified and that was not contested by the appellant. Chen, a Chinese national, replaced Ferreira, the previous CEO of Metorex. The appointment of the Chinese nationals as general managers at the mines in the DRC and Zambia followed as part of the implementation of the model. Appellant did not suggest that those appointments were not justified, nor does the appellant seem to suggest that their direct communication with him (i.e. COO) would have been in the best interest of Metorex, given the fact that he was not Chinese speaking. He also did not suggest that his direct communication with the Chinese shareholders and Chinese financial institutions would have been in the best interest of Metorex.

[37] On a conspectus of all the evidence the appellant's employment with Metorex was terminated because his position, i.e. as COO, had become redundant because of structural changes affected for operational and financial reasons. The appellant ironically did not contest the fact that his position as COO had become redundant, but he claimed that he ought to have been appointed to the position to which Qiao had been appointed, namely, that of acting deputy CEO, and that he had not been appointed to that position because he was not Chinese speaking. This clearly ignored the fact that in the scheme of things Qiao was a more suitable candidate for that position.

[38] The evidence of Chen and Hutton, was uncontested, that Metorex retained numerous employees who are not Chinese nationals or Chinese speaking at executive, office and operational level; that the implementation of the new model resulted in about 22 retrenchments at its head office and also in retrenchments at the mines. The appellant was not the only casualty of the implementation of the model. In respect of the position he was contending for, namely acting deputy CEO, the ability to speak Chinese had essentially become an inherent requirement of the job in order to facilitate direct communications with the general managers of the mines, Chinese shareholders, and with Chinese financial institutions. On the probabilities, it is hard to contend that the retention of the appellant (merely to accommodate him), and retrenching Qiao, would not have imposed undue hardship and insurmountable difficulties on Metorex. The retention of Mr Peter Albert, an Englishman, as CEO of Jinchuan in Hong Kong, cannot serve to undermine those difficulties, because, unlike the appellant, he was CEO of Jinchuan, and Chinese speaking as well.

[39] The Labour Court cannot be faulted in its conclusions in respect of this claim.

Substantive fairness

[40] The appellant's claim under this heading was essentially based on his allegations that his retrenchment was due to the fact that Qiao had taken over his responsibilities as COO, alternatively, because he, and not Qiao, ought to have been appointed to the position of deputy CEO.

[41] Much of what was said in dealing with the issue of his alleged automatic unfair dismissal is also applicable to the issue of the alleged substantive fairness of the appellant's dismissal. As pointed out earlier, the implementation of the Jinchuan model had fundamentally changed the way Metorex's mines and its head office operated, communicated and were required to communicate. According to Hutton, retrenchments at Metorex's head office could not have been considered until the model had been successfully implemented. The model was initially implemented in the mines in 2015. Conceivably,

retrenchments at head office could only be considered once the model had been fully implemented.

[42] It was not shown that the implementation of the model and the appointment of Chen had been illegitimate and unwarranted. It is also not disputed that Metorex was in a dire financial situation and that a remedy for that situation could legitimately have required operational and structural changes in order to, inter-alia, raise finances and reduce operating costs.

[43] It became clear after the implementation of the model that the position of the COO had become redundant. There was also a general need to retrench all those at the mines and at head office whose positions were similarly affected.

[44] It is noteworthy that the appellant's main gripe with the process, was not so much about the fact that his position as COO had become redundant, but that he was not the one appointed as the acting deputy CEO. He did not seriously dispute the commercial rationale for consolidating the COO position with that of the deputy CEO (or CEO). He considered himself a more suitable candidate for the position to which Qiao had been appointed. So effectively, in the appellant's estimation, it was Qiao and not him who ought to have been retrenched, thereby implicitly acknowledging the general need to retrench in respect of the COO position.

[45] Metorex would have had to consider, essentially, whether to retrench Qiao and promote the appellant, who held the position of COO, to the higher position of deputy CEO. This consideration would conceivably have involved an assessment to determine who the better candidate was for the position of deputy CEO within the Jinchuan model. The appointee was not only required to do what the COO did previously, but was required to deputise for Chen and act as CEO in Chen's absence. In addition, this person was supposed to be able to communicate effectively with the general managers of the mines, the Chinese shareholders and the financial institutions in order to raise the necessary financing.

[46] Chen testified that Qiao was the better candidate and this was not only because he was Chinese speaking or a Chinese national, but essentially

because of his experience and knowledge, including of the newly implemented model. The incumbent's ability to communicate directly with the general managers of the mines as well as with the Chinese shareholders and Chinese financial institutions, was another important factor. The appellant also fell short in that regard.

[47] The appellant's aspiration to be "bumped into" a higher position, simply because he had longer service with Metorex and because his duties as COO had been assimilated into that position, was misplaced. The appellant did not claim to have had experience as deputy CEO or CEO, let alone that he had more experience than Qiao in such positions, or in respect of the Jinchuan model.

Procedural fairness

[48] The appellant contended that his retrenchment was *a fait accompli*, and had been decided upon before commencement of the consultation process with him. According to him, Metorex merely "went through the motions" in respect of the consultations. He alleges that his position as COO had become redundant in June or July 2015 and that he should have been consulted at that stage already. Metorex denies that his position became redundant as he alleges and according to both, Chen and Hutton, this only occurred after the successful implementation of the Jinchuan model in November 2015. The Labour Court held that Metorex only contemplated the retrenchment of the appellant after the successful implementation of the changes at the mines.

[49] In terms of section 189(1) of the LRA an employer is to consult with employees (or those representing them) when it "contemplates" dismissing one or more of its employees for reasons based on its operational requirements. This court accepted that the prevailing legal position is that, for purposes of section 189, the word "contemplates" refers to dismissal as the preferred and most likely option from the employer's point of view rather than the mere possibility; and that it follows that an employer is entitled to engage

in a process of weighing up various alternatives before it can be said that dismissal is contemplated[10].

[50] On the probabilities Metorex contemplated the retrenchment of, in particular the appellant, as the preferred or most likely option after successful implementation of the Jinchuan model at its mines and at its head office, i.e. sometime in November 2015. In any event as submitted on behalf of Metorex, no prejudice was shown to have been suffered by the appellant because of the time when consultations were commenced with him.

[51] The appellant tried to extract some mileage from documentation that had suggested that he had been retrenched before the consultation process, but Hutton's explanation that the documentation had been erroneous and how that occurred was reasonable and not discredited. Taking into account all of the evidence the appellant's retrenchment was procedurally fair.

The LTIB claim

[52] The appellant alleges in his final statement of claim that the parties agreed that he would participate in a LTIB scheme which took the form of a share option scheme; and that "there was a contractual obligation on [Metorex] to timeously approve and to implement the [LTIB] scheme and afford [him] share options in terms thereof"; and further, that Metorex "breached the contract by failing to timeously approve and to implement, alternatively extend" the LTIB scheme to him. He then goes on to deal with the modalities of the scheme. He alleges *inter alia*, that in terms of the scheme he was to receive share options equivalent to 50% of his guaranteed annual package on 1 January of each year. Later in the statement of claim he alleges the number of share options he was to receive and dates upon which he was to receive them. His claim is for damages allegedly flowing from the said alleged breach of contract, and is in the amount of R5370270 – 62. At this stage one should point out that in the statement of claim neither the date of the alleged breach is specified, nor is there an allegation specifying whether the agreement was oral or in writing.

[10] *SACCAWU & others v JDG Trading (Pty) Ltd* (2019) 40 ILJ 140 (LAC) para 26- quoting with approval from Du Toit et al *Labour Law Through the Cases* (Lexisnexis October 2017 Update) LRA Chapter 8, Commentary on s 189(1).

[53] From the appellant's evidence it was clear that he was not relying upon or referring, i.e. in respect of the LTIB claim, to the incentive benefits clause (clause 7) in the offer of employment made to him by Metorex, which became a term of his employment contract, but was relying upon an alleged oral agreement. According to his evidence, the scheme and his participation in it was (orally) discussed with him by Hutton and Ferreira, and it relates to share options in the parent company of Metorex, namely Jinchuan. He testified that the board of directors of Jinchuan approved a share incentive scheme at an annual general meeting (i.e. of Jinchuan) on 2 June 2015. His calculation of the options that were allegedly due to him pertained to shares in Jinchuan.

[54] The case the appellant purported to make out in his evidence was clearly different to the one that had been pleaded. Metorex, as a subsidiary of Jinchuan, could not control the shares of the latter. The appellant's employment was with Metorex and not with Jinchuan. In any event, he did not testify when and how Metorex breached the contract which he referred to in his statement of claim. He also did not give evidence to the effect that he had notified Metorex of the alleged breach and what Metorex's response was.

[55] Besides those fundamental difficulties, it is hard to fathom how the appellant had to be allocated Jinchuan shares if he was not its employee, let alone shares in it for 2014 and 2015 if the Jinchuan board only adopted and approved the share incentive scheme on 2 July 2015, as he alleges.

[56] In any event, the appellant never demanded this allocation before. He claimed it for the first time in his statement of claim in court. He could not explain why he had not done so at any earlier stage. Hutton and Chen denied the alleged agreements relied upon by the appellant and denied that any such schemes have been implemented at Metorex or at Jinchuan, and it appears to have been common cause that no other employee at Metorex had received the LTIB benefits contended for by the appellant. The appellant's claim in this regard was not only contradictory, but was based on what Jinchuan allegedly did and not on what Metorex did. One would expect his claim to have been against the former and not the latter.

[57] The Labour Court's conclusion that this claim was an afterthought, had not been proved, and lacked merit, also taking into account the King III report, in terms of which bonuses are to be contractual and not discretionary, is unassailable.

The STIB claim

[58] The appellant alleges in his statement of claim, in essence, that in light of his employment with Metorex he qualified for participation in its STIB scheme, which is based on his performance and individual performance as per the performance management system. He then selectively quotes from clause 15 of Metorex's Group Reward and Recognition Policy ("the bonus policy"). He alleges, *inter alia*, that in terms of the bonus policy a minimum of three months' service during the measurement period is required in order to qualify for the STI, which will be pro-rated for periods of less than six months and that the STI equated to 30% of his guaranteed package. His claim is for a STIB for the period 1 January 2016 to 31 May 2016 in an amount of R437 500 – 00.

[59] It is notable that the appellant did not refer to the fact that a six-month bonus period was applicable; that the bonus policy required an employee to be at work (or on leave) during the six-month period; and that any person who left the employment of Metorex, through dismissal or resignation, "during the bonus period will not qualify for any incentive payment." A person must be in service and not be serving a notice period at the date on which the incentive period concludes in order for that person to qualify for such an incentive (clause 15.2).

[60] The appellant also did not refer to the fact that the bonus policy required targets to be set in respect of a participating employee. According to clause 15.8 of the bonus policy, "targets shall be set at the beginning of each bonus period based on the staff member's key performance areas"; and the "targets shall clearly state what level of performance is required for each employee."

[61] It is common cause the appellant did not request targets to be set for 2016 and that no targets were set; he did not work for the required six-month period, he was on notice from March to May 2016, but at his request, he did

not work during this notice period. He was not at work when the six-month period, commencing in January 2016, would have concluded. In terms of the very policy he purported to rely upon, he did not qualify for the bonus he claimed.

[62] Metorex did not act unreasonably, inconsistently, or unfairly by paying a STIB to Le Roux, and not to the appellant. Their circumstances in respect of the bonus differed substantially. In the case of Le Roux, the required targets had indeed been set; he worked for the six-month bonus or incentive period, and had achieved the targets. In any event, in terms of the King III report the remuneration policies and practices applicable to a company's executives has to be linked to the executive's contribution to the company's performance. On his own version, the appellant made no contribution to the performance of Metorex in 2016.

[63] Counsel for the appellant submitted that it should have been found that the conditions for the payment of the bonus to the appellant had been fictionally fulfilled because they had not been fulfilled due to Metorex's conduct in unfairly dismissing him. Even though this argument stands to be dismissed merely because his retrenchment was correctly found not to have been unfair, there was, in any event, no duty on Metorex to keep the employment contract of the appellant alive in order to enable him to earn the bonus. Further, without targets having been set, which not even the appellant requested or insisted on, how could his performance be judged. It would have been incumbent for the appellant to show what targets would have been set and that he would have met them. Hutton did not concede at all that the appellant had met any of the targets that would have qualified him for the STIB he claimed. In conclusion, in view of all of the difficulties, the Labour Court correctly dismissed the STIB claim of the appellant.

The Severance pay claim

[64] The Labour Court's criticism of the appellant's reliance on *Imperial Storage* is justified. It is a decision that applies to a situation contrary to that of the

appellant and is not authority for the position of the appellant in respect of severance pay. It is not disputed that junior employees retrenched with the appellant were paid a severance of four weeks' remuneration for each completed year of service, while the appellant was paid one week's remuneration for each completed year of service. Hutton explained the rationale for this distinction. Junior employees had shorter periods of service and were earning much lower salaries than the appellant at the time of their retrenchment, and the payment to them was to alleviate the hardship that they were to experience as a result of being retrenched. The appellant, on the other hand, was high earner that did not face such hardship relative to those junior employees. Another factor was that the appellant had been given three months' notice, whereas those junior employees (who, generally, had shorter periods of service) had only been given one month's notice.

[65] The minutes of a consultation meeting held by representatives of Metorex, which included Hutton and Ms Hunter, with the appellant on 25 February 2016 show that the disparity in the severance pay was discussed with the appellant and that the rationale for the payment was explained to him. It was pointed out to him, in essence, that he was effectively to receive close to 4 months' salary as severance and not one month and one week as the junior employees and that the cost of his severance pay "makes up for approximately 60% of the total severance figure of all affected corporate employees." Further, it is recorded that the payment made to him was far more than what junior staff were receiving, and also noteworthy, that he was invited to make other proposals on the matter, which he refused to take up. The Labour Court's conclusion, effectively, that this claim was without merit, cannot be assailed.

[66] In the circumstances the appeal stands to be dismissed. The Labour Court made no costs order and there was no cross-appeal against that order. However, in respect of the actual appeal there is no reason why the costs of this appeal should not follow the result. However, the use of two counsel by the respondent was not justified.

[67] In the result:

67.1 The appeal is dismissed;

67.2 The appellant is to pay the costs of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Waglay JP and Molefe AJA concur in the judgment of Coppin JA.

APPEARANCES: (via TEAMS)

FOR THE APPELLANTS:	Riaz Itzkin
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FOR THE RESPONDENT:	A Redding SC with MJ Van As
	Instructed by Solomon Holmes Attorneys