THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 610/16

In the matter between:

SPHIWE MWELI **1st Applicant**

OLGA NAKEDI **2nd Applicant**

And

MTN GROUP MANAGEMENT SERVICES (PTY) LTD **Respondent**

Heard: **06 – 10 May 2019**

Delivered: **22 May 2019**

Summary: A referral in terms of section 191 of the Labour Relations Act, 1995. It remains the duty of an employer to avoid a no-fault dismissal.

Dismissal for operational requirements is a no-fault dismissal and should be applied as a measure of last resort. Where an employer has vacant positions at the time of dismissal, it cannot be said that the dismissal is the measure of last resort. Held (1): The dismissal of the applicants is procedurally fair but substantively unfair. Held (2): The respondent is ordered to re-employ the first applicant to a post equivalent to the one he held prior to his dismissal. Further to pay as compensation to the second applicant an equivalent of 12 months' salary. Held (3): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is a referral in terms of section 191[1] of the Labour Relations Act[2] (LRA). The respondent dismissed the two applicants following a restructuring process of its Group Business Risk Management (GBRM) division. Following an assessment by Ernest and Young, the respondent embarked on a process aimed at improving the efficiency of the GBRM. A new structure was proposed and consulted upon. Ultimately, a new structure with more positions was adopted by the respondent. Through a scientific tool known as mapping[3], the two applicants could not be absorbed into the new structure. After failing to secure alternative

[1] Section 191 (5) (b) (ii)-the employee may refer the dispute to the Labour Court for adjudication if the employee has alleged that the reason for dismissal is-based on the employer's operational requirements.
[2] No 66 of 1995, as amended.
[3] Mapping is also known as competence mapping. Competence indicates the required abilities. Knowledge and skills that enable an employee to perform his work in any organisation. Therefore, mapping is the combination of both observable as well as measurable attributes of an employee or an organization.

positions for them, the two were dismissed for operational requirements reasons. Aggrieved by their dismissal, they approached this Court for a relief. Their referral is opposed by the respondent.

Background facts

[2] The respondent is a mobile technology network company. One of the strategic imperatives of the respondent was to focus on strengthening its building blocks. Resultantly, the respondent's GBRM was identified as one of the divisions that should be reviewed and assessed in order to ensure that the business model and strategy supported its needs and inefficiencies.

[3] The respondent then procured the services of Ernst and Young on 29 May 2015 for the purposes of performing a quality assurance review of the division's functions; benchmark and evaluate the then operating model and agreeing on a future date to address gaps and develop a roadmap for transforming the division's function. Ultimately, Ernst and Young identified certain weaknesses and made suggestions. One of the suggestions made was to change the structure and operations of GBRM. Upon reflection on the suggestions, the respondent resolved that, because of its evolving business model and strategy and as the then ways of working did not support the business, it was not efficient and effective to retain the structure of the division. It sought to propose a new structure with a view to realign the division's function to the needs of its business and to execute a risk management function that meets the expectations of its Audit Risk Committee and its shareholders.

[4] Following the acceptance of the recommendations of Ernst and Young by the Audit Committee on 27 November 2016, a section 189(3) of the LRA notice was issued to the staff on 5 February 2016. Three consultation meetings were held thereafter. After producing a final structure, a meeting was held where mapping was discussed. The discussed mapping was to compare the positions in the old structure with the positions in the new structure. If the mapping of the position in the old

and new structure was less than 60% then the position in the new structure would effectively be considered to be a new role.

[5] A mapping exercise was then engaged in. It turned out that few of the roles could successfully be mapped into the new structure of the division. The affected employees were advised to apply for the positions in the new structure. The applicants before me applied for some positions and were found to be unappointable. No other positions could be identified for the two applicants and they were given notices of dismissal, with 30 May 2016 being their last day of employment. The pair, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. After failure of conciliation, the pair referred the dispute to this Court for adjudication.

Evidence Led

[6] Dismissal is common cause. In order to justify the dismissal of the pair, the respondents led the evidence of two witnesses; namely Mr Varun Singh and Mr Ebrahim Kahn. What was placed in dispute by the applicants was the fairness of their dismissal and lack of meaningful consultation. With regard to substantive fairness, the applicants alleged that there was no need to retrench them and their selection for dismissal was unfair. With regard to procedural fairness, the applicants alleged that there were no consultations held, since there are no minutes for the meetings that were held. Parties called upon this Court to decide whether there was a fair reason for the dismissal of the applicants and whether the dismissal was substantively and procedurally fair or not? Further, the Court was called upon to decide on the relief that is appropriate. In this judgment, the Court shall not recount the evidence of all the witnesses that testified before it in any detail. The two applicants testified in their own case.

Varun Singh

[7] At the relevant time, he was the Human Resources Business Partner for the division. He testified about the Ernst and Young report and its

recommendations. He was present in the consultation meetings which took place on 11 February, 25 February and 10 March 2016. Presentations were made at these meetings and shared with the affected employees. All the concerns raised by the employees were responded to in writing. The required documents and information were disclosed during the currency of the consultation meetings. Mapping as a process was discussed in the first consultation meeting. The first applicant did not make any suggestions. Nobody questioned the need to have a new structure. Employees who had been mapped were still allowed to apply for the available positions if they did not like the mapped position. All employees, including Mr Basson were appointed after an interview process. The interviews were for the set standard period of sixty minutes. The applicants made no proposal that could have saved their jobs.

[8] In cross-examination, he was referred to the respondent's retrenchment policy and he testified that it was followed. He disputed an assertion that whilst the restructuring process was unfolding, members of PWC were employed. In the new structure there were more positions and others were newly created. The respondent, despite having more positions, did not use LIFO because the situation to enable its usage did not present itself. The available positions were ring-fenced for the affected employees at the division. The only method used to select employees for dismissal was retention of skills and the tie breaker LIFO did not arise.

Ebrahim Kahn

[9] He is a General Manager Human Resources: Organizational Development and Performance. He testified about the *rationale* to restructure the division. He also explained the mapping process and its application. He received feedback and also acted on issues that arose at the consultation process. The purpose of the restructured positions was to be more specialists driven than being generalists. The position of the two applicants were not mapped because they were not specialists but more generalists. GBMR being a critical part of the business, it was necessary to change it as and when the business changed. At the time, it

was necessary to diversify into the financial space. The relief of reinstatement is not available to the two applicants because their positions were made redundant and do not exist. It was not possible to map them into the new structure. He confirmed that the old structure had lesser positions as opposed to the new structure. In order to avoid possible dismissal, employees had to apply for the available positions. Should an employee not apply, he or she would face dismissal. Employees could challenge their non-mapping on a one on one basis with the Human Resources Division.

Olga Nakedi

[10] She is the second applicant. She testified about her skills and work experience. At the relevant time, she had seven years' experience in governance and risk. As far as she is concerned there was no consultation in that the respondent ignored other subsections of section 189. At the first meeting, the General Manager was present but was not afforded an opportunity to say anything. At the second meeting she was booked off sick. In a one on one discussion, she asked to be placed in any of the available positions, inclusive of lower positions. This was not acceded to. She had the capabilities to function in the positions of a senior auditor and an auditor. She was not given the results of her mapping exercise. According to her, mapping is a simple process. She met the sixty percent match in her position. She could literally perform any position in the structure. She applied for two positions.

[11] One at the General Manager level and the other at Senior Manager level. Owing to the fact that the structure grew from 14 positions to 34 positions, the respondent could have offered her and the other applicant positions. Other employees were offered demoted positions. On 22 April 2016, she received a letter notifying her of her retrenchment. She did not have a good relationship with the General Manager. In cross-examination, she testified that it was the duty of the respondent to have avoided her dismissal.

[12] It was not easy for her to make any written suggestions as she felt threatened. She is currently employed at Telkom and no longer seeks reinstatement as a relief. She did not apply for junior positions as she expected the respondent to offer those positions to her in order to avoid her dismissal.

Sphiwe Mweli

[13] He amassed 17 years' experience in risk, governance and compliance. He commenced employment with the respondent as a Senior Risk Manager and Support. However, for the better part of his work, he developed policies and trained Operating Companies (OPCOs) of the respondent. Ernst and Young was uncomfortable with his presence because he designed policies and asked a lot of questions. The 5 billion fine was an operational issue for the Nigerian OPCO.

[14] When he received a section 189(3) notice, he requested documents and such were not provided. To his knowledge, the restructuring ought to have been approved by the Risk Committee. He was not provided with documents in support thereof. He was part of the employees who addressed a letter of complaint to the President, Mr Phutuma Nhleko. He had issues with an Executive role at the General Manager level as depicted in the final structure. Given the fact that for a period of 2 years, he was doing something unrelated, his position did not match the 60 % requirement for mapping purposes. He was not mapped and when he wanted reasons for that, he was told not to worry and was encouraged to apply for the vacant positions.

[15] He applied for three positions as he was of the view that he qualified for any of those positions. People were employed during the restructuring process and others were young and inexperienced. He was interviewed for the positions he applied for and was told that he was not successful. He was not offered any position. The two positions that he applied for were still vacant as at the time of his testimony in court.

[16] The respondent had the responsibility to find alternative employment for him. He did not have qualms with mapping as a principle. However, he is unhappy with the process and the outcome. He is not averse to the principle of interviewing persons for positions. The new structure had more headcounts and he was optimistic that he would be placed.

The applicable legal principles and evaluation.

[17] It remains the duty of an employer to demonstrate that its decision to retrench is commercially rational. It is not the duty of this Court to second-guess a business decision of an employer. For as long as the decision is clothed with commercial rationality, the Court must accept it as being fair. The mandated test is not that of correctness of the business decision but its fairness. In this matter, I am satisfied that the respondent needed to restructure its business in order to achieve effectiveness of the division. The evidence of the respondent's witnesses remains unchallenged on this front. The Labour Appeal Court (LAC) in the matter of *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*,[4] said:

> '… 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.'

The issue of selection for dismissal.

[18] The starting point is the provisions of sections 189 (2) (b) read with section 189 (7) (b) of the LRA. The method of selecting employees to be dismissed is placed high on issues to be consulted upon. The legislature obliges the consulting parties to first engage in a meaningful joint consensus-seeking process and secondly attempt to reach consensus on the method. The reason is pretty obvious, a proper selection method if properly applied would ensure job security. In a no-fault dismissal

[4] (2001) 22 *ILJ* 2264 (LAC) at para 19.

situation job security is key. Therefore, the method of selection is as important as measures to avoid dismissal or minimize the number. This Court must be more vigilant on issues of selection criteria given the potential of abuse and unfairness.

[19] The LRA places primacy on an agreed selection method. To my mind, an employer must double its efforts during a consultation process to reach an agreement on the method. Failure to do so, simply means that an employer actually invites the Court's scrutiny on any method it employs. Might I add, the LRA is designed in such a way that it would not countenance a situation where an employer seeks to avoid agreeing on and/or applying a selection criterion. In a dismissal for operational requirements where more employees are affected there must be a selection criterion.

[20] Section 189 (7) (b) is clear. First, it enjoins an employer to select employees to be dismissed according to a selection criterion. In this regard, an employer has no discretion but must select for dismissal using a selection criterion. If there are no criteria agreed upon the criterion must be a fair and objective one. Such entails that once the criterion is employed to select employees, the Court must be satisfied that such criterion is fair and objective. This will involve, firstly, the scrutiny of the criterion itself-form and shape and secondly its application. The requirement for objectivity and fairness is not one to be compromised. Back to basics. The dictionary meaning of the word fair is one that is free of blemishes or stains, clean and pure, unsullied or equitable. The word objective means uninfluenced by emotions or personal prejudice, existing independently of perceptions or some individual conceptions. Once the word fair is used together with objective, it simply means that the standard is higher than normal. If, for any reason, a criterion is stained, blemished or sullied to even a lesser and negligible degree, then it is not one that is contemplated in the section.

[21] As a matter of principle, any criterion that does not pass the muster renders a dismissal that follows, using it, substantively unfair. I conclude

that an employer has no option but to employ a selection criterion when selecting employees to be dismissed for operational requirements. Once the Court is satisfied that the criterion is fair and objective, the Court must be told how it was applied on the employees dismissed using such a fair and objective criteria.

[22] Such entails evidence being led by the employer as to how it applied the criterion. Yet again objectivity and fairness at this stage entails amongst others consistency and transparency. If no satisfactory evidence is led that the criteria was applied consistently and transparently, then the court must conclude that the criterion was not fair and objective on application. Such equally renders the dismissal that follows to be substantively unfair.

What types of criteria are fair?

[23] Criteria simply means methods. So any method can be used as it were. There is no prescribed method. However, the Code of Good practice states the following:

> "(7) If one or more employees are to be selected for dismissal from a number of employees, this Act requires that the criteria for their selection must be either agreed with the consulting party or if no criteria have been agreed be fair and objective criteria
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> (8) Criteria that infringe a fundamental right protected by this Act when they are applied, can never be fair. These include selection on the basis of union membership or activity, pregnancy, or some other unfair discriminatory ground. Criteria that are on the face of it neutral should be carefully examined to ensure that when they are applied, they do not have a discriminatory effect. For an example, to select only part-time workers for retrenchment might discriminate against women, since women are predominantly employed in part-time work.
>
> (9) Selection criteria that are generally accepted to be fair include length of service, skills and qualifications. Generally, the test for

> fair and objective criteria will be satisfied by the use of the "last in first out" (LIFO) principle. There may be instances where LIFO principle or other criteria needs to be adapted. The LIFO principle for an example should not operate so as to undermine an agreed affirmative action programme. Exceptions may also include the retention of employees based on criteria mentioned above which are fundamental to the successful operation of the business. These exceptions should however be treated with caution."

[24] It seems to me that length of service (experience) may be used as an independent criterion. Similarly, skills and qualifications may be used as such. But retention of experienced, skilled and qualified employees is an exceptional criterion, which must be treated with caution. The reason for that is that such criteria are not easily capable of objective justification. Selecting inexperienced, unskilled or unqualified employees may mean that they are being dismissed for poor performance. In *casu*, the respondent proposed retention of skills that are best suited to the positions available in the new structure and, where potential candidates are considered equal in terms of skills and suitability for a limited number of positions, to apply LIFO. The respondent chose a method of applying for the vacant positions in order to determine the skills to be retained.

[25] The criterion chosen by the respondent falls within the exceptions and thus require to be treated with caution. Unlike LIFO, this criterion is not capable of easy objective justification. It carries with it at all times the element of subjectivity. Treating it with caution implies an in depth scrutiny of the criterion to firstly establish whether it is fair or objective and secondly whether it was fairly and objectively applied. Had the respondent reached an agreement on this exceptional criteria, the duty of the Court would have been limited to a fair and objective application of the criteria.[5]

Does making employees to apply for vacant positions a fair and objective method?

[5] See: Gijima Ast (Pty) Ltd v Hopely [2014] 35 ILJ 2115 (LAC) at paragraphs 35 and 36.

[26] This issue has bedeviled this Court on a number of occasions. As far back as 2001, the writer, Professor Rycroft, sitting as an arbitrator in the matter of *Grieg v Afrox Ltd*[6] had the following to say:

> "The declaration that all jobs were redundant avoided the need to decide selection criteria up front for those who would ultimately be retrenched …The onus was on employees to apply for jobs. Ultimately the selection criteria for retrenchment were that (a) an employee's old job as previously defined was declared redundant and the employee either (b) failed to apply for a job, or (c) failed to be appointed to a job."

[27] I fully agree with this view. I may add that in such situations, employees are technically dismissed when their positions are made redundant. Making them apply for positions is a manner of delaying the eventual effect. Once a position of an employee is declared redundant and if he or she is not placed in another position shortly thereafter, such an employee would eventually be dismissed. When that eventuality arises, it would have happened without a fair selection criteria being applied. Therefore, making an employee to apply for a position is not a selection criterion *per se*.

[28] Later on, in the matter of *Wolfaardt v IDC*[7] Landman J had the following to say on the criterion of not being appointed:

> "[25] Two points need to be made. The first is that advanced by Prof Rycroft namely that the employer must not use the restructuring as an exercise to dismiss employees on a no-fault basis where the employer cannot dismiss them by reason of misconduct or incapacity. This does not apply only where the employer uses restructuring as a sham or stratagem but also where the employer cannot show that the non-employment is fair, e.g. where the employees are not afforded an opportunity to deal with perceptions of their incapacity.
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> [26] The second point which should be made, which Prof Rycroft[8] touches on is that it should be easier to retrench an employee

[6] [2001] 22ILJ 2102 (ARB).
[7] Case number J869/00 handed down on 01 August 2002 (LC)

> where restructuring is involved. I would add that a retrenchment involving a process of restructuring whereby an employee applies for his or her own job must be closely scrutinized because it ignores, sometimes unconsciously, that an existing employee enjoys job security which will be protected against no-fault terminations. But placing an employee in the position of an applicant for a job, or worse merely on a waiting list, creates a supplicant of the employee."

[29] I believe these observations are still true to this day[9]. I must add, until dismissed an applicant for own job retains job security that calls for protection under the Constitution and the LRA. To then subject such an employee to a stressful process that threatens his or her job security is imminently unfair to my mind. This torturous process should not be received with open arms by this Court. I am acutely aware that Professor Rycroft suggested that the acceptance of such "selection criterion" should be dependent on whether it is clear and transparent.[10]

[30] It seems to me that the LAC in *Gijima supra* accepted this selection criterion on the basis that it was agreed upon. The court said:

> "[34] It would not make sense to declare a selection criteria agreed to by the parties unfair only because it was agreed to and that it does not comply with the requirement of being fair and objective…In my view, the court *a quo* erred in so far as it may have found that s189A should be interpreted to limit the method for selection to criteria that are fair and objective only.
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> [36] Having found that nothing prevented the parties from agreeing to selection criteria as they did in this case what needs to be determined is whether the agreed selection criteria was applied."

[31] I am however, still of a firm view that this method of making employees with job security to apply for their own positions should not be accepted

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[8] Corporate Restructuring and "Applying for your own job" [2002] 23 ILJ 678.
[9] See Law@work 4th Edition, November 2017 by Van Niekerk et al page344
[10] This suggestion was adopted by my brother Van Niekerk J in *Van Rooyen and others v Blue Financial Services SA (Pty) Ltd* delivered on 11 May 2010. Later in *Numsa v Columbus Stainless (Pty) Ltd* Case JS 529/14 delivered on 30 March 2016.

as a selection criterion let alone a fair and objective one. I am in favour of the approach in *SA Breweries (Pty) Ltd v Louw*[11] when the Court said the following:

> "[21] In this matter what has been inappropriately labelled as the 'selection criteria' is the inclusion of past performance ratings in the assessment process for the competitive process to select an incumbent for the new job of area manager, George. This is not a method to select who, from the ranks of the occupants of potentially redundant posts is to be dismissed and is not what section 189 (2) (b) is concerned to regulate. The fact, as illustrated in this matter that a dislocated employee who applies for a new post fails, and by reason thereof remains at risk of dismissal if other opportunities do not exist, does not convert the assessment criteria for competition for that post into selection criteria for dismissal, notwithstanding that broadly speaking it is possible to perceive the assessment process for the new post as part of a long, logical, causal chain ultimately ending in a dismissal. Accordingly, in our view, it is contrived to allege that the taking into account of performance ratings in a process of recruitment for a post is the utilization of an unfair method for selecting for dismissal as contemplated by ss 189(2) (b) and 189(7)
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> [22] An employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses ss 189(2) (b) or 189(7). The filling of posts after a restructuring process in this manner cannot be faulted. Being required to compete for such a post is not a method of selecting for dismissal; rather it is a legitimate method of seeking to avoid the need to dismiss a dislocated employee."

[32] Having said that the LAC, had, earlier, in the same judgment, said the following:

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[11] [2018] 39 ILJ 189 (LAC). Followed by this court in Moipone Gare v T-Systems and another Case number JS 426-11 delivered on 21 November 2018.

> "[19] Axiomatically, an incumbent of a redundant post is not automatically dismissed; that person is merely dislocated and only after the opportunities to relocate that person in another suitable post have been explored and exhausted, may they be fairly dismissed.
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> [20] When, as typically is the position, several employees who occupy posts of similar function find themselves in a predicament that only some of a number of existing posts are to be retained, a selection method that is fair must be chosen to decide who is to stay and who is to go."[12]

[33] It is then my understanding of this judgment that making the employees to apply for position is part of an obligation to avoid a dismissal as opposed to a method of selecting employees for dismissal. Therefore, an employer who failed to place a number of employees is still required to choose a method to select those employees for dismissal. The chosen method must either be agreed upon or be one that is fair and objective. In such a situation an employer may still choose an exceptional method of experience, skills and qualifications. However, the process of attempting to avoid the need to dismiss cannot be equated to the selection method. The applicants before me were dislocated and not to be dismissed. The process which the respondent termed as part of a selection method was nothing but a means to avoid dismissal. The evidence demonstrated that about 9 out of 15 employees were dislocated. Only 2 were subsequently dismissed. That being so, it can hardly be said that those who were placed were subjected to a selection method. The selection is for dismissal and not for placement. Appropriately called, the process of placement was not a selection method but an attempt to avoid dismissal.

[34] The respondent succeeded in doing that for about 12 employees and failed in respect of the two applicants. The two applicants then became candidates for dismissal. The respondent was therefore obliged by law to choose the two by applying some selection criteria. It cannot be correct

[12] My own emphasis and underlining.

to suggest that the process that was aimed at retaining can also be used as a selection method. To my mind it cannot be open to an employer to say: Guess what! The process I used to place employees with the intention to avoid their dismissal was actually the method I was using to select employees for dismissal and therefore, I have complied with the requirements of section 189 (7) of the LRA. Such would be unfair and inconsistent with what the LAC said in *SA Breweries*.

[35] I therefore conclude that making an employee to apply for a position is not a selection method but a means to avoid that employee's dismissal. Therefore, the issue of fairness and objectivity does not arise in such a situation.

What then was the method and is such a method fair and objective?

[36] It is apparent to me that the method applied is one of the applicants not being appointed to the available positions in the new structure. This criterion is the one that was used in *Wolfaardt supra.* This Court had the following to say about it:

> "[24] …Mr Maserumule continued: "**Employees were selected for retrenchment using one and only one criteria: failure to be appointed to a position in the new structure**. These (this) criteria was fair and applied to all employees who were retrenched, and not just the applicant."

[37] The Court was critical of this criterion[13]. In seeking to distinguish the case before court and *Clive Naicker v Q Data Consulting*[14], the court had the following to say:

> "[29] This case is distinguishable from the present one. IDC did not invite its employees to compete for positions in the new IDC. Rather the new management handpicked the key staff and also made block appointments

[13] Paragraphs 25-26.
[14] [2002] 23 ILJ 730 (LC) per Pillay J

[30] I am of the opinion that the process of filling the posts in the new IDC was open to the charge of arbitrariness. The process denied existing employees the right to present facts in support of their retention. It was inherently flawed. So much so that it could lead to the unfair dismissal of existing employees.

[31] When it comes to selection the procedure was simply a choice by management. The procedure and selection criteria remind one of schoolboys picking a team by calling out names until the less desirable players are left and discarded reluctantly. This is not objective. It is probably unfair. Indeed, Mr Mathlape said that he did not need to interview his staff for positions in the new IDC, he knew what they could do."

[38] In my view the selection method applied in this matter is not a fair and objective one and the Court was not appropriately appraised of its fair application. The persons who made a decision that the two applicants were not appointable did not testify before this Court. All the court knows is that a panel interviewed the applicants and found them to be unappointable. On what basis they were unappointable, the Court was not told. Whoever made the decision, if he or she was guided by skills retention and best suitability, concluded that the applicants are unskilled and not best suited. One wonders how persons such as the applicants before me, with vast experience in risk and governance, would be without skills and not suited.

Was the dismissal of the applicants the only viable option?

[39] The uncontested evidence was that as at the time of the applicants' dismissals, there were about 22 vacant positions[15].

[40] It must be mentioned upfront that the duty to avoid dismissals rests with the respondent. It is for that reason that I do not accept the notion that existing employees should apply for internal jobs in order to survive dismissal. Before even proposing dismissal, an employer is obliged to

[15] Pages 186-7 of Bundle A.

consider alternatives[16]. It has not been suggested that prior to proposing dismissal an attempt was made to place them without having them apply. This Court cannot simply accept the *ipse dixit* of an employer that the applicants are not skilled and/or suited. If they are, why not upskill them? The court would be failing in its duties if it were to accept the *ipse dixit* of the respondent in this regard.

[41] It is true that an employee whose position has been made redundant will ultimately be dismissed if no vacancy is found for him or her. In *SAA v Bogopa and Others*,[17] Zondo JP (as he then was) had the following to say:

> '[60] The question, which arises, is what the obligation of an employer is in relation to the dismissal of employees for operational requirements when it does away with an old structure and adopts a new structure (for operational requirements). An employer has an obligation to try and avoid the dismissal of an employee for operational requirements. This obligation entails that an employer may not dismiss an employee for operational requirements when such employer has a vacant position, the duties of which the employee concerned can perform with or without at least minimal training… Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the ensuing dismissal would be without a fair reason. Where however, the employer offers the employee such a vacant position and the employee, having accepted the offer, fails to perform the duties attached to that position satisfactorily, the employer can deal with the case as a case of poor performance." [My own underlining and emphasis]

[42] Similar sentiments were echoed in the *Oosthuizen v Telkom SA*[18] matter where Zondo JP (as he then was) again said:

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[16] Section 189(3) (b) of the LRA.
[17] (2007) 11 BLLR 1065 (LAC) at para 60.
[18] [2007] 28 ILJ 2531 (LAC).

> "[19] The fact that the respondent did not place any evidence before the Court to explain why it did not give one of the positions to the appellant and gave positions to other employees means that the respondent has failed to justify the dismissal of the appellant. In other words, the respondent selected employees from the redeployment pool to remain in its employ by virtue of appointing them to certain positions and selected those to be retrenched by not appointing them to any vacant posts. The respondent was obliged to explain the basis of such selection criteria applied and should have complied with the Act. And that means that if such criteria have not been agreed, they should be fair and objective. In the end one is left in the dark as to why the appellant was in effect selected to be among those who did not get any of its available positions and had to be retrenched."

[43] Similarly, in this matter the Court is left in the dark as to why the applicants could not be placed in any of the 22 available posts. Like in *Oosthuizen*, the respondent failed to explain, through evidence, the basis upon which it chose to not retain the applicants. I cannot accept a submission that the case as pleaded by the applicants is not one that behooved the respondent to show that their dismissal was avoidable. The policy adopted by the respondent stated as its purpose, to ensure that retrenchment processes are fair and transparent. One of the guiding principles of the policy is the following:

> "3.3 All possible alternatives to retrenchments should be explored and offered to employees prior to final decision being taken to retrench employees. Where vacancies exist in other business units, employees facing the possibility of retrenchment will be given preference."

[44] On any interpretation of this clause, it is suggested that all possible alternatives ought to be offered to employees facing retrenchment. A vacant position is an alternative to a dismissal. The applicant's statement of case, although not a model of clarity, makes reference to this clause and allege non-compliance with it. The vague evidence of Singh in cross-examination was simply that clause 3.3 was done. In any event, the

applicants contended that their dismissal is substantively unfair. Where dismissal is not shown to be a measure of last resort, dismissal is bound to be substantively unfair.

[45] I therefore conclude that the dismissal of the applicants before me was not the only viable option. Therefore, on this basis too, the dismissal of the applicants could have been avoided and therefore substantively unfair.

Is the dismissal procedurally unfair?

[46] The obligation to consult arises when an employer contemplates to dismiss an employee for reasons based on its operational requirements. The applicants' view is that there was no consultation because there are no minutes for the meetings of 11, 25 February and 10 March 2019, those are not consultation meetings. I do not agree with this view. There is no dispute before me that what transpired in those meetings was recorded in a number of documents. Although the applicants suggest that there was no joint consensus seeking process, the evidence of the respondent as to what was discussed was not placed in dispute. The Act contemplates dual responsibility. It remains the duty of the applicants to seek consensus as well. The attitude adopted by the applicants was that of seeking to challenge the process at its infancy.

[47] Clearly, that attitude is not consonant with a joint consensus seeking process. In my view, it was a destructive attitude, one that is not contemplated in the section. With that attitude, the respondent was entitled to proceed in the manner in which it did. Although I am not satisfied that mapping as part of the selection method, as submitted, was properly consulted upon, I cannot on that account find that there was procedural unfairness. The applicants in a pre-trial agreement agreed to confine its challenge for procedural unfairness to certain issues. That was the case to be met by the respondent on process. Accordingly, the dismissal is procedurally fair.

The issue of relief

[48] The first applicant persisted with reinstatement as a relief. The second applicant did not wish to be reinstated. It is uncontested that the position which the first applicant occupied does not exist as the new structure introduced new titles and roles. The applicant testified that the position that he applied for is effectively his position barring the change of title. Further, he testified that that position is still vacant to this day. His evidence on this score was not sufficiently challenged. It is indeed so that such a version was not put to the witnesses of the respondent. However, this Court was not told in any certain terms that the position of Senior Manager: Risk Management was filled. It was one of the vacant and available positions.

[49] Reinstatement and re-employment are primary remedies for unfair dismissal. Section 193(2) (c) excludes the primary relief if it is not reasonably practicable for the employer to effect it. The evidence of the respondent is simply that the old positions do not exist. It must be borne in mind that the positions were made redundant by applying mapping. The results of the mapping process were not placed before the court. Regard being had to the mapping process, all it implies is the combination of roles to produce a position. Therefore, this court was not told that the roles and or functions of the applicants became obsolete for the respondent. This Court accepts that the old positions as they appeared on the old structure ceased to exist due to the restructuring process. The first applicant's position in the old structure was labelled SM: Group Risk Support.

[50] The court has not been provided with the job profile of this position. Having had regard to the job profile of the position Senior Manager: Risk Management, it is apparent to me that the duties involve risk management. Other than being told that the positions do not exist, the court was not told that the duties involving risk management ceased to exist. In the circumstances, I find nothing that would prevent this Court to order the respondent to re-employ the first applicant and place him in any

of the vacant positions carrying some if not all his functions. A similar approach was taken in *Oosthuizen*. In there the LAC had the following to say:

> "[25] The appellant can be reinstated – not in the position which he occupied before he was put in the redeployment pool – but to the position he was in when he was in the redeployment pool. I do not understand that to have been a specific position. When he and other employees were in the redeployment pool, they were given tasks while the respondent was trying to redeploy them. Upon reinstatement the appellant can be dealt with the same way that he was or could have been dealt with when he was in the redeployment pool. That means that, if the appellant can be put in a certain position and he is happy with such position that would be the end of the matter. If, however, the respondent cannot find such a position or the two parties cannot agree, the respondent must consider itself to have a surplus of employees. It could be having one employee more than it needs. If that is the position, the respondent must then deal with that situation as the law requires it to when faced with such a situation…"

[51] Accordingly, I am not convinced that re-employment as a relief is excluded within the contemplation of the sub-section.

[52] In the absence of the exclusion, re-employment as a relief is not ousted. There is no reason why the first applicant should be denied the primary remedy in the circumstances where his dismissal could have been avoided. I must of course deal with the date of the re-employment, I intend ordering. Section 193(1) (b) provides that it may be from any date not earlier than the date of dismissal. In my view, had the first applicant been offered any of the vacant position, he could not have been dismissed. That being the case, it is appropriate to order his re-employment from the date of his dismissal. That implies that the first applicant should be treated as an employee from the date of his dismissal to the date on which he is re-employed as per the order of this court. This court is not reviving a contract of employment since the

position was declared redundant but orders re-employment for reasons that the functions or roles remained. Since it shall be from the date of dismissal, the employer would be compelled to pay to the first applicant a salary that the first applicant would have earned in the re-employed post from the date of his dismissal. It is common cause that the first applicant was paid severance pay. In terms of section 41 of the Basic Conditions of Employment Act[19], an employee who unreasonably refuse an offer for alternative employment forfeits severance pay. Regard being had to such statutory imperatives, if the first applicant is re-employed as ordered, it shall be inappropriate for him to retain the severance pay. Accordingly, the first applicant is to return the severance pay made to him, now that he shall be in an alternative position and his job security remains intact.

[53] With regard to the second applicant, I must state that since her dismissal was substantively unfair she qualified for a primary relief but she did not wish to be afforded same. Therefore, there is no reason why she should not be awarded maximum compensation for her substantively unfair dismissal.

[54] In the results I make the following order:

Order

1. The dismissal of the applicants is procedurally fair but substantively unfair

2. The respondent is ordered to re-employ the first applicant in any of the suitable position including any of the vacant positions within the GBRM division effective from the date of his dismissal.

3. The first applicant is ordered to return the severance pay made to him once the respondent pays to him the salary he would have earned from the date of his dismissal.

[19] Act 75 of 1997

4. The respondent is to pay to the second applicant as compensation, an amount equivalent to twelve months' salary at the rate applicable to her at the time of her dismissal.

5. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa.

Appearances:

For the Applicants: Mr F Makhanya of Floyd Makhanya Inc, Sandton.

For the Respondent: Mr F Malan of ENSafrica Inc, Sandton.