



- (1) Reportable: No
- (2) Of interest to other Judges: No
- (3) Revised

Signature

10 February 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR2747/22

In the matter between:

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION (AMCU) obo MEMBERS

Applicants

and

SASOL (PTY) LTD

Respondent

Heard: 8- 10 September 2025

Hears of Argument submitted 26 September 2025

Delivered: 10 February 2026

Summary: An alleged dismissal claim on the grounds that the selection criteria of skills and competency should not apply to unskilled and blue-collar workers, and that social justice demands the reinstatement of long-serving employees.

JUDGMENT

GANDIDZE, J

Introduction

- [1] The applicant employees, namely Gideon Msiza (Msiza), David Fermiase (Fermiase) and Andrew Mahlangu (Mahlangu), represented by their trade union, the Association of Mineworkers and Construction Workers Union (AMCU), were dismissed by their employer, Sasol Pty Ltd (Sasol), for operational reasons on 30 September 2021. Sasol opposed the applicants' claim.

Issues for determination

- [2] Although the pre-trial minutes listed several issues in dispute, at trial it was clarified that the issues in dispute and those to be determined had crystallised. The rationale for the retrenchments and procedural fairness were no longer contested. The only issues to be determined were: (i) whether the selection criteria applied were agreed, and if not, whether they were fair and objective, and (ii) whether other employees, other than the applicant employees, ought to have been retrenched.

Background facts

- [3] On 18 June 2020, Sasol issued a section 189(3) notice to affected employees. The rationale for the contemplated retrenchments was the collapse in the international crude oil price and the global economic slowdown resulting from the COVID-19 pandemic, occurring at a time when Sasol had a severely constrained balance sheet and high debt levels. Although excellent progress had been made through measures implemented to address the situation, the company needed to be reshaped for the new world, and it was anticipated that this would lead to possible dismissals based on operational requirements. As recorded above, the applicants are not taking issue with the rationale for the retrenchments, and therefore nothing more needs to be said about that matter.
- [4] In terms of the Workforce Transition Framework (WFT), a document drafted in consultation with the unions, the selection criteria to be applied were specific job requirements, taking into account skills and competency, job-specific relevant qualifications and/or relevant Sasol experience, and last-in, first-out

(LIFO). Selection panels would be established to evaluate the suitability of candidates for available positions.

- [5] The WTF document also stated that positions fell into three categories. Green positions were those that remained unchanged or had no significant scope change. Yellow positions were those that had changed by less than 30% or had fewer jobs than people. In that case, the positions would be declared redundant, and only current incumbents would be affected and selected through the agreed selection criteria. Red positions were those that had changed by more than 30% or were new positions, in which case the normal Sasol recruitment process would apply, affected employees would be given preference, and the selection criteria would apply.
- [6] The positions held by the applicants were considered yellow positions because there were fewer positions than employees.
- [7] At the time of the retrenchments, Msiza had 21 years' service with Sasol. From 1 September 2015 until 30 September 2021, he was employed in the production department as a driver. However, since 2019, he had been temporarily accommodated in the Small Stores, as recommended by a medical doctor, following an ear operation. Before his appointment as a driver in September 2015, Msiza had been employed as an operator.
- [8] As a result of the restructuring, the three driver positions were reduced to two. The selection panel scored the other drivers, Mr Mathebula and Mr Nzimande, at 50%. Msiza scored 30%, the lowest, and was not appointed as a driver. Following his non-appointment, Msiza lodged a grievance, which was dismissed.
- [9] When he was retrenched, Fermiase had been employed by Sasol for 14 years. At the time of the retrenchments, he was employed in the maintenance department as a bricklayer, since 1 November 2010. The six bricklayer positions were reduced to two. Mr Musimane and Mr Dlamini, also bricklayers, were scored 70% and 60% respectively, and Fermiase scored 50%. Hence, Fermiase was not successful for the bricklayer position.

- [10] Fermiase and five other employees were also considered for the one available general worker position, and Mr Masilela, who scored 70%, was selected. Fermiase scored 50%.
- [11] Fermiase also applied for an explosives operator role, a red position. His application was rejected because he did not have a matric certificate, which was required for the role.
- [12] At the time of his retrenchment, Mahlangu had 8 years' service with Sasol. He had held the position of engineering assistant carpenter since 1 March 2012. The four carpenter positions were reduced to three. Mr Masemola, Mr Kubheka, and Mr Mhlanga all scored 70% and were appointed, which meant that Mahlangu, who scored 50% (the lowest), was unsuccessful.
- [13] Mahlangu was also considered for the general worker position for which Fermiase was considered, and, as already recorded above, Masilela was successful.
- [14] Mahlangu also applied for the red position of explosives operator. He was invited to an interview, and what happened thereafter is disputed, as discussed below.

Sasol's oral evidence

Mr Gabriel Ranyawa (Ranyawa)

- [15] He is employed as the Senior Manager, Human Resources (HR). Sasol employed about 2,000 employees worldwide, and in June 2020, it embarked on a retrenchment exercise. At the time, he held the position of Principal Specialist for the WFT. He was involved in the retrenchment process, known as Governance Structure 2.0 (2.0 process), which led to the dismissal of the applicant employees. He was responsible for ensuring that all processes were followed to the 'T' across the different businesses. The retrenchment commenced at the Group Executive Committee (GEC) levels 1-3, which are

executive positions. Thereafter, a section 189(3) Labour Relations Act¹ (LRA), notice was issued to all employees at GEC4 level 4 and below. The rationale for the restructuring was primarily due to COVID-19, which led to a drastic drop in brent crude prices and to Sasol's significant indebtedness. It was anticipated that about 1200 employees would be affected.

- [16] The August 2020 WFT document was prepared in consultation with the unions in the group partnership forum, which include AMCU, CEPPWAWU, NUM, NUMSA, SACWU and Solidarity. The WFT was intended to guide the 2.0 process. It outlined the process to be followed, the selection criteria, and the methods for selecting employees by position colour.
- [17] Sasol has distinct business units, each with its own Vice President. The Vice President of HR was responsible for ensuring that each business unit had a selection panel comprising employees from the relevant business unit and an independent member sourced externally from that unit. Fair and objective selection criteria, which were communicated to the unions and not objected to, were applied. To ensure Sasol's stability, it was important to consider job-specific skills.
- [18] The panel selection panels confirmed the incumbents in the green positions. In respect of yellow positions, the selection panels considered and selected the successful candidates, applying the agreed selection criteria. He was not involved in any yellow panels but was coordinating the process at the group level. Red positions were advertised, and the affected employees were prioritised. Employees in yellow positions who had not been placed were also allowed to apply for a red position if they met the minimum requirements for the position.
- [19] A wellness programme was introduced to assist employees with, *inter alia*, managing stress. Employees were also assisted with CV writing, as some had been with Sasol for several years. They also had a programme to assist employees who decided to start their own businesses.

¹ Act No 66 of 1995, as amended.

- [20] Under cross-examination, Ranyawa confirmed that the applicant employees were below GEC level 4 and, therefore, engaged in blue-collar work and operations. Retrenchments for employees below GEC level 4 occurred after those for employees at GEC levels 1-3. During the 2.0 process, internal training continued while external training was halted. Ongoing training was allowed to continue, but new applications were not considered. He has been with Sasol for 18 years. He could not recall when the requirement to hold a matric certificate was introduced, but Sasol sponsored those who wanted to further their studies.
- [21] For yellow positions, employees did not need to apply. For red positions, employees had to apply. Red positions were advertised for three days, and where people did not have access to the system, such as blue-collar employees, they would hand in their hard copy CVs and applications. At the time of the trial, there were vacant positions at Sasol. He could not say whether Fermiase and Mahlangu would be suitable candidates for the positions, but all retrenched employees were informed that, in the two years following their retrenchment, they could apply for vacant positions.

Ms Megan Cooley (Cooley)

- [22] She is the HR Manager for Chemicals, Utilities, and Support Services at Sasolburg. From June 2020 to September 2021, she served as an HR Business Partner. She served on the yellow panels as an HR representative, participating in those that dealt with Fermiase and Mahlangu. The other panel members were the Area Manager and the Site Services Manager.
- [23] Fermiase did not hold a matric certificate. He was employed as an engineering assistant bricklayer in the maintenance department. As part of the 2.0 process, the department was optimised. Initially, there were twenty-two positions, which were streamlined to twelve. The bricklayers' positions were reduced from six to two. Fermiase was eligible for one of the two positions. He did not have to apply and was considered automatically. All six candidates were assessed on skills, relevant qualifications, competency and Sasol experience. The panel worked from a score sheet. They also considered the

training matrix document, which linked the activities of the bricklayer and carpenter positions and was validated by the Area Leader or Foreman. The panel members reached consensus on the successful candidates. As a last resort, LIFO was considered.

- [24] Fermiase scored 50% and was ranked fourth. The successful candidates, Harold Mashego (Mashego) and Lucky Masemula (Masemula), scored 70% and 60%, respectively. Mashego was employed as a plumber, not a bricklayer. Masemula was also not a comparator, as he was a carpenter. They assessed employees within their own disciplines, 'apples with apples', not across disciplines.
- [25] Fermiase was also considered for a general worker position (yellow) but was unsuccessful. Instead, Masilela was successful in securing the general worker position. She was unsure whether Fermiase had applied for any red position, as she was not part of the red panels.
- [26] Mahlangu's tenure ran from 1 March 2012 until 30 September 2021. He was employed as an assistant carpenter. The four carpenter positions were reduced to three. She was also part of the selection panel, together with the Area Manager and the Senior Manager, which selected the successful carpenters. They considered qualifications, skills and competence. Of the four carpenters, Mahlangu was the lowest-ranked.
- [27] Like Fermiase, Mahlangu was also considered for a general worker position but was unsuccessful. Masilela was successful in securing a general worker position due to his competency.
- [28] How long it takes an employee to do a new job depends on the line manager's interpretation of the employee's abilities. It could take three months for general workers, but longer for skilled jobs. Generally, a year is sufficient to do a new job well.
- [29] She confirmed the applicants employees' training certificates in the bundle. After the Sasol Career Path for General workers was approved, possibly in 2010, the matric certificate was thereafter required for all external candidates.

- [30] On whether the applicants, who were engaged in blue-collar work, required a matric certificate to perform their jobs, she responded 'not at the time'. She also stated that she could not speak about Msiza, but could speak about Fermiase and Mahlangu.
- [31] Employees could only move across disciplines if they possessed the necessary qualifications. Regarding Fermiase, who was capable of bricklaying, fencing, plumbing, and box packing, she explained that the yellow panels worked with disciplines as per the WFT document. If any employee missed out on a discipline position, they were not considered for other yellow positions but were considered for general worker positions or had to apply for red positions.
- [32] She confirmed that with yellow positions, employees did not provide input and were not consulted about their other skills. The selection panels relied on the information in the HR files. In her view, the process was fair and agreed.
- [33] Mahlangu could do the job, but there were fewer positions than people. He had below-minimum competency, meaning 'maybe not as good as the others'. He had a matric certificate but no trade or qualification.
- [34] Fermiase scored lower than two employees and the same as two others. He could not interpret drawings but was good at execution. On the fact that, given his long years of service, Fermiase would testify that he wanted to be trained and, in fact, applied to be trained, which would have been done in the short term, the witness stated that she had no knowledge of this. On the fact that, despite having a standard three qualification, he would testify that he was very experienced, she responded that the Foreman was best placed to comment. She confirmed that Fermiase was not scored on LIFO. He was considered for the one general worker position available and was the second-highest scorer. He was the longest-serving, but they considered years of service only when there was a tie. The main criterion was competency.
- [35] She could not comment on the contention that AMCU did not sign the WFT document, and that Rangwanya was best placed to answer the question, as he was involved in the negotiations with the unions. She denied that

emphasising competency had the effect of excluding blue-collar employees on the basis of underperformance. They took into account experience and the individual's training matrix. On whether employees were not selected because their competency was low, she stated that there were gaps.

- [36] Under re-examination, she stated that the fact that an employee could be trained was not among the selection criteria.

Mr Michael Mabisela (Mabisela)

- [37] He was employed as an HR Manager and was involved in the 2.0 process and the yellow panels. The other panel members were a Senior Manager and the Vacancy Manager. He knew Msiza, who was one of the drivers. During the 2.0 process, Msiza had been temporarily placed at Small Stores since 2019 due to a medical condition. The three driver positions were consolidated into two. Two drivers, including Msiza, worked shifts. The third driver drove to Secunda. Msiza was considered for the driver position and scored the lowest points. The driver who spent more time driving to places such as Secunda and elsewhere was retained even though he did not have a matric, but he scored highly in terms of competency. Therefore, not having a matric certificate was not a disqualifying factor. LIFO was also not applied, as the contestants did not tie.

- [38] Msiza's comparators, namely Zanele Mahlangu, Piet Msiza, and Norman Shai, were all employed as Small Stores Clerks, whereas Msiza had been temporarily assigned to the Small Stores.

- [39] The other comparator, Josina Moketsi, was employed as an explosives operator and was temporarily accommodated at the Small Stores before Msiza. Initially, she was not placed. However, during the second round of yellow placements, Moeketsi was placed as an explosives operator following the departure of another explosives operator.

- [40] Zodwa Masuku was an explosives operator and therefore not a comparator.

- [41] The Career Centre was established, inter alia, to assist unplaced employees in applying for red positions. Employees in the Career Centre worked

overtime, assisting employees with CVs, applications, and counselling. On 31 March 2021, Msiza and about 7 other employees attended at the Career Centre. Union representatives were also in attendance. Msiza did not want to participate. He was very emotional and left. He felt he was supposed to be placed in an operator position. Mabisela had to go after him, trying to persuade him to stay so that they could see how to assist him. He also claimed that the union advised him not to participate. When he realised that Msiza no longer wanted to speak to him, Mabisela sent a colleague to speak to him. Msiza did not apply for any red position. They succeeded in helping several employees find positions, even after multiple interviews.

- [42] As the custodian of the WFT principles, the team had done its best to support affected employees, as evidenced by the number of people who were not retrenched. Ultimately, only three people were retrenched, while the rest opted for voluntary severance packages.
- [43] Under cross-examination, he stated that Msiza had previously been an explosives operator. He was then appointed a driver in 2015. In 2019, he was accommodated at Small Stores due to an ear injury. At Small Stores, he sorted raw materials before they were sent to the plant. During the 2.0 process, Msiza was not considered for the Small Stores Clerk position because he was not employed as a Stores Clerk. He was only considered for the driver position.
- [44] With reference to the score sheet, Msiza scored 1 out of a possible 5 for qualifications because he did not hold a matric certificate. Competency was assessed based on skills, as determined by the Senior Manager and the Foreman. Mathebula was one of the successful candidates because he had extensive driving experience in all directions. He also did not hold a matric certificate.
- [45] He had no knowledge of the discussions Msiza had with Njabulo Sithole (Sithole) and 'Zibru' regarding the requirement for a matric certificate, but found it strange, as he had explained to Msiza on several occasions that a matric certificate was not required. Regarding the contention that the ESS System, where employees applied for jobs, rejected applicants without a

matric, he stated that he is not familiar with the ESS System, but the Career Centre was assisting employees with applications.

- [46] In re-examination, he stated that during his discussions with Msiza, the issue of training did not arise. Msiza approached him about the requirement for a matric certificate, and he explained that they were considering skills, experience, and competency. Msiza did not participate in the second round of yellow placements because he had lodged a grievance.

Zebo Nemaheni (Nemaheni)

- [47] She is employed by Sasol as an HR Consultant. She was involved in the 2.0 process. She received CVs and participated in interviews for red positions. Msiza did not apply for any red position. Fermiase applied for the explosives operator position and was not interviewed because he did not have matric. He misrepresented in his CV that he had matric. Mahlangu applied for a red position, was invited to an interview, but did not attend. She telephoned Mahlangu, but he did not answer. She also phoned Mahlangu's line manager to establish his whereabouts, and he stated that he could not find him.
- [48] Under cross-examination, she stated that Fermiase was not considered for the explosives operator position he applied for because the job specifications required a matric certificate. Regarding the version that Mahlangu arrived for the interview and was told he had come at the wrong time, she responded that she had given Mahlangu the correct time. Mahlangu could have approached her later, but he never did. She denied that Mahlangu's supervisor would have given him the interview time, as such information was conveyed to employees by HR. She telephoned Mahlangu about his interview time and spoke to him in English. She would have spoken in Mahlangu's language of choice if she had known he had difficulties with English.
- [49] In re-examination, she testified that matric was required for red positions but not for yellow positions.

The applicants' case

(a) Mahlangu

- [50] At the time of his dismissal, he had 10 years' service with Sasol.² He was employed as an assistant carpenter. He could also perform bricklaying, paving, and plumbing duties, and had worked in several sections where his assistance was required. He obtained his matric qualification in 1989. He was born in 1966. He could not say whether he had received a retrenchment letter. He did not understand the concept of yellow and red positions. He applied for a position but could not remember which one. He went to the interview on the date and time his supervisor provided, but no one was there. He tried to open the door, but it was locked. He told his supervisor, who said they would phone him, but no one phoned him. There was also a document on the notice board listing interview dates and times.
- [51] Since his dismissal, he has been struggling to support his wife and children. His wife has since left him. He seeks reinstatement.
- [52] Under cross-examination, he stated that he was highly skilled despite not having undergone training or holding qualifications. He believes he was not successful for a carpenter position because they said they wanted qualifications. Before joining Sasol as an assistant carpenter, he was a contractor for Sasol due to his skills. Had he been informed that qualifications would be required at some stage, he would have upskilled himself. He scored 50% because of his age. He did not understand the process, but he concedes that he did not have the qualifications. He did not know that he was also considered for the general worker position. The process was rushed, and he was hesitant to approach HR to explain the process. He learnt about the interviews from a notice on the notice board. He would not have received Nemaheni's call because he switches his phone off while at the plant, as cell phones are not allowed there. He also prefers not to take calls while working. At his age, he cannot find another job. If there were vacancies at Sasol, he would plead with them to consider him. After his dismissal, he left the area and did not receive any information about vacancies.

² It is common cause that he had 8 years' service.

- [53] Under re-examination, he testified that he did not read any of the documents in the bundle before the Court, did not know about selection panels, and did not know what a section 189 LRA process is.

(b) Fermiase

- [54] At the time of his retrenchment, he had been employed by Sasol for 14 years. He worked as a bricklayer in the maintenance department and also performed duties in fencing, paving, painting, plumbing, and bricklaying. At some point, he also worked in the Water Gel plant as a box packer. He does not have a matric qualification, and his highest qualification is grade 4. He was born in 1968. He did not require a matric qualification for his job. He did not have any Sasol trade qualifications. He did not know that his colleagues, who also lacked matric certificates, had trade certificates. He did not need a trade certificate to do the job. If given the opportunity, he would have obtained a trade certificate. He did not know about the training that Sasol offered.
- [55] He could not recall receiving a retrenchment letter. He was aware of the green, yellow and red positions but did not understand them. He applied for the explosive operator grade 1 position. He sent his CV to HR and did not use the ESS System. He was told they needed people with a matric certificate. He has been unemployed since his retrenchment. Following his retrenchment, his children did not return to school because he could not afford it. His wife died because he could not afford her treatment. He seeks reinstatement so that his children can return to school.
- [56] Under cross-examination, he stated that he did not know the WFT document had been drafted in consultation with the unions, including AMCU. He agreed that AMCU represented him. He did not understand how the scoring was carried out. He had no comment on being considered for a general worker position but being unsuccessful. He also had no comment on Nemaheni explaining the yellow and red positions. Mashego, who was retained as a plumber, was employed after him. He had done plumbing before Mashego was employed. Masemula, the carpenter, was also employed after him.

- [57] He was permanently employed by Sasol in 2010. Before that, he had worked for Sasol for four years as a contractor.
- [58] In re-examination, he stated that the documents before the Court were unknown to him. He can read a little English, but he will not understand everything.

(c) *Msiza*

- [59] At the time of his retrenchment, he had 22 years' service with Sasol. He was employed as a driver. He was then moved to Small Stores as a clerk. He was unhappy about this move. He had a discharge from the ear and underwent an operation. He wore earplugs in the plant. He did not need them when driving or at Small Stores. At Small Stores, he worked the morning shift, sorting raw materials that would then be transported to the plant. He was also an operator, meaning he sat on the machine. He also assembled detonators. He has no matric certificate. If he had finished school, he would have matriculated around 1992. He was born in 1976.
- [60] He does not recall receiving the section 189(3) notice. He was told about the yellow and red positions but did not understand. He remembers receiving the retrenchment letter. He went to Sithole, who was in charge of the plant, to ask why he was being retrenched after 22 years. At this point, Msiza became emotional and broke down in tears. When the court resumed, he continued that this was the first meeting with Sithole, who responded that he did not know what was going on and would find out. Sithole also said he knew that Msiza knew the machines but did not have a matric certificate, and that management had decided that a matric certificate was now required. Sithole informed him that he needed assistance to be considered for other positions. He felt hurt losing his job. He was 45 years old³ and, without a matric, was unemployable. He had three children, aged twenty-one, twelve, and eight. When he lost his job, he wondered how he would support them. The eldest was in college and had to drop out. He was now divorced, but he continued to

³ At the time of the trial, he was 48 years old.

support the children with the little he had so that they knew he still cared for them.

- [61] He knew about the ESS System when applying for sick leave, not when applying for jobs. He requested a shop steward to assist him in applying for a position on the ESS System, and he was informed that he had been rejected, probably because he did not have a matric certificate.
- [62] He lodged a grievance with HR after the second meeting with 'Zibu', who advised him that he could not be assisted. He felt it was unfair that those who came after him were retained. He worked independently and did not require supervision, despite not having a matric certificate. He regrets not completing his matric, but Sasol knew he did not have one.
- [63] He should have been retained as the driver, as he knew the job well and had been trained for it. He could also have been retained in the Small Stores, where he worked well and knew what to do. He observed the operators at work.
- [64] He seeks reinstatement so that he can support his children again and so that the one who dropped out can return to college. The other two children are now in high school, and his siblings help support them when they can.
- [65] Under cross-examination, he testified that he was a driver from September 2015 to September 2021. It was put to him that, although he was unfit for driving duties, he was considered for the position. He did not receive the section 189 LRA notice, although he does not deny that it was served on all employees and that it was also sent to him by email.
- [66] He approached Sithole after July 2021, when he received the letter about the severance package. He could not recall whether he lodged the grievance in April 2021 or whether it was finalised that month. He denied refusing to participate in the process after losing his grievance. He attended meetings, including one at which it was explained that assistance would be provided with applying for positions and starting businesses.
- [67] He did not know whether the selection criteria had been agreed, whether LIFO had been applied, or about the selection panels.

- [68] When put to him that the Small Stores Clerk comparators were permanently employed there, he responded that he was part of the team. It was also put to him that the Small Stores Clerk position required a matric certificate as a minimum and that one was required to operate a computer and order materials, which he could not do. He responded that only one person, Zanele, who worked from 7 am to 4 pm, operated the computer. He did not know anything about Josina Moketsi's situation.
- [69] When he submitted his CV to apply for positions, it was accepted. He received a severance package.

Analysis

- [70] The main bone of contention was the fairness of the selection criteria, which led to the retrenchment of the applicants. There was also the issue of whether other employees ought to have been retrenched instead of the applicant employees.

(a) Were the selection criteria agreed upon?

- [71] It was submitted on behalf of the applicants that 'it was not conceded that AMCU had agreed to the selection criteria.' The question is whether AMCU agreed to the selection criteria or not.
- [72] Ranyawa testified that the selection criteria set out in the WFT document had been agreed with the unions. He was not challenged on this evidence. After Ranyawa had been excused as a witness, questions were put to Cooley about whether AMCU had participated in the discussions that led to the WFT document, and she responded that Ranyawa was best placed to answer. She was correct. Therefore, the convoluted submission that AMCU did not concede that it agreed to the selection criteria, rather than a submission that it did not agree to the selection criteria, cannot be taken seriously. In fact, it is rejected as amounting to clutching at straws.

- [73] In addition, the section 189 notice recorded that the proposed selection criteria had been agreed with the unions. Therefore, the selection criteria were agreed.
- [74] Section 189(2)(c) of the LRA requires an employer and the consulting parties to engage in a meaningful joint consensus-seeking process and to attempt to reach consensus on, *inter alia*, the method of selecting the employees to be dismissed. Section 189(7)(b) of the LRA provides that the employees to be dismissed must be selected according to selection criteria that have been agreed, or, if no criteria have been agreed, to criteria that are fair and objective.
- [75] It was submitted on behalf of the applicants that while the preservation of skills, competencies and relevant qualifications are fair and objective criteria for higher-level employees, they were a 'patently absurd benchmark' for unskilled and lower-level employees. It was further submitted that the applicant employees performed in a variety of roles for several years without complaint, that those roles did not require specialist skills, qualifications or even a matric, and yet they were not appointed on the basis of competency. The question posed was how competency was assessed, and that tenure speaks to competency. It was also submitted that competency was not sensible, and that experience and LIFO were not applied at all, when they should have been.
- [76] The applicants relied on a decision of this court in *Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Gumede and Others v Republican Press (Pty) Ltd*⁴, which held that skills cannot be a fair selection criterion for unskilled or low-skilled jobs.
- [77] The challenge with the submission is that section 189(7)(b) of the LRA provides that selection criteria must be agreed, and if not, they must be fair and objective. Therefore, where the selection criteria are agreed, the parties are bound by them, and it is unnecessary to determine whether they were fair

⁴ (2006) 27 ILJ (LC).

and objective. It is only where a selection criterion is not agreed by the consulting parties that the court can scrutinise it to determine whether it is fair and objective. The Labour Appeal Court confirmed this legal position in *Chemical Workers Industrial Union v Latex Surgical Products (Pty) Ltd*⁵, and in *Umicore Catalyst SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*⁶.

- [78] The agreed selection criteria were intended to apply to all employees, regardless of GCE level. If AMCU believed that different selection criteria should apply to different categories of employees, as it now seeks to argue, it should have tabled such a proposal. It did not do so. It ought to have sought legal advice on the fairness of applying the same selection criteria to all employees, regardless of level, before agreeing to them. Therefore, the applicants are precluded from contending in these proceedings that the selection criteria were unfair to unskilled workers.

(b) The comparators

- [79] The next question is whether the comparators identified should have been retrenched rather than Msiza, Fermiase, and Mahlangu.
- [80] Clause 10.4.2.1 of the Practice Manual of the Labour Court of South Africa (Practice Manual), which applied at the time that the pre-trial minute was filed provides as follows:

‘(e) If the applicant(s) contends that someone else should have been selected for retrenchment in his/her/their place, he/she/they should give the respondent the name of such a person and why such person should have been selected, and the respondent must give a response thereto;

- [81] As regards Msiza’s comparators, the applicant’s heads of argument challenged the retention of Mathebula and Nzimande as drivers. In the pre-trial minute, Mathebula and Nzimande were not named as comparators, and

⁵ [2006] 2 BLLR 142 (LAC).

⁶ (2024) 45 ILJ 2545 (LAC).

therefore the applicants are precluded from arguing that Msiza ought to have been retained ahead of them.

- [82] In relation to the driver position, the appointment of Mathebula as a driver, despite his not having a matric certificate, supports Sasol's submission that not having a matric certificate did not disqualify an employee from being considered for a yellow position in which they were already an incumbent. In other words, Msiza was not disqualified from consideration for the driver position because he did not hold a matric certificate.
- [83] The named comparators in respect of Msiza were Zanele Mahlangu, Piet Msiza, and Norman Shai. All these comparators were employed as Small Stores Clerks. The other named comparators, Josina Moketsi and Zodwa Masuku, were employed as Explosives Operators.
- [84] The comparators for Fermiase were Harold Mashego and Lucky Masemula. Mashego was employed as an engineering assistant plumber, and Masemula as an engineering assistant carpenter. Despite not holding a matric certificate, both Mashego and Masemula were successfully placed in the plumber and carpenter positions, respectively. This further indicates that not having a matric certificate was not a disqualifying factor when employees were considered for appointment to a yellow position.
- [85] The named comparators for Mahlangu were Mr Elias Mahlangu, Mr Oscar Rasebola, and Simon Masilela.
- [86] The WFT document provided as follows regarding yellow positions:
- '8.3 Where positions have changed, but less significantly in scope or reporting line (Yellow positions) i.e30%, or there are fewer jobs than people- the agreed selection criteria must be applied. In this scenario, positions would be declared redundant, and only current incumbents will be affected and selected through the agreed selection criteria, otherwise they may also elect to apply for severance pay.'
- (Own underlining)
- [87] It is evident from the above provision that only the current incumbents of an affected yellow position could be considered for that yellow position.

Therefore, only drivers would be considered for a driver position, only Small Stores Clerks for a Small Stores Clerk position, and only explosives operators for an explosives operator position, and so on.

- [88] Msiza was considered for a driver position because he was employed as a driver. He was not considered for either the Small Stores Clerk or the Explosives Operator positions because, at the time of the retrenchments, he was not incumbent in either position. This is what the WFT document stated.
- [89] It follows that the contention by Masilela and Nemaheni that Msiza refused to participate in the placement and application process after he lodged the grievance in April 2021 is not the reason he was not placed. Employees were considered for a yellow position only if they were already incumbents of those positions, not because they had applied to be considered for those positions.
- [90] Fermiase was considered for the two bricklayer positions, the role he held at the time, but was unsuccessful. The comparators, Mashego and Masemula, were employed as plumber and carpenter, respectively, and were retained. Fermiase was not considered for either a plumber or carpenter position because he was a bricklayer.
- [91] Mahlangu, employed as an assistant carpenter, was considered for one of the three carpenter positions but was unsuccessful. According to the applicants, Elias Mahlangu and Oscar Rasebopela, the comparators, were not on the list of unplaced employees, and it was unclear what happened to them. On behalf of Sasol, it was submitted that, in his evidence, Mahlangu did not refer to these comparators or explain why they should have been retrenched in his place. The applicants were required to specify why the comparators, rather than Mahlangu, ought to have been retrenched. The only basis put forward in the pre-trial minute was that Mahlangu had more years of service than both Elias Mahlangu and Oscar Rasebopela. Sasol's undisputed evidence was that skills, competency, and qualifications were considered first, and that LIFO applied only as a tiebreaker. There was no tie among the carpenters, and therefore years of service did not become a consideration.

- [92] The third comparator, Simon Masilela (Masilela), was not considered for a carpenter position but was considered for the general worker position, an issue addressed later in the judgment.
- [93] Whether yellow positions were filled in a fair and objective manner is not a matter for the Court to concern itself with, given that Sasol and the unions had an agreement on how and by whom they would be filled. This finding renders academic all submissions about the applicant employees' ability to do the job, that they should have been considered for other held positions before the positions they held when the retrenchments were implemented, that their long years of service ought to have been a consideration, that Sasol should have considered training the applicant employees to upskill them, and that bumping ought to have been applied. In any event, bumping could be resorted to if LIFO applied.⁷ The undisputed evidence was that LIFO applied only as a tie breaker and was not resorted to in respect of the applicant employees.
- [94] The applicant employees have failed to demonstrate that the comparators ought to have been retrenched rather than them.

(c) The general worker position

- [95] Employees unsuccessful in a yellow position were considered for the single general worker position. Fermiase and Mahlangu were considered for the general worker position, but both were unsuccessful. The successful candidate was Masilela.
- [96] It was submitted on behalf of the applicants that Masilela had only six years' service, compared with Fermiase and Mahlangu, who had fourteen and eight years' service, respectively. The agreed selection criteria were skills, competency and qualifications. LIFO applied only as a tie-breaker. In this case, Masilela was considered the successful candidate, taking into account his skills, competency and qualifications, and scored 70%. Fermiase and

⁷ In *Porter Motor Group v Karachi* (2002) 23 ILJ 348 (LA), the court determined that bumping is situated within the 'last in first out' (LIFO) principle.

Mahlangu each scored 50%. There was no tie and therefore LIFO did not apply.

- [97] Fermiase and Mahlangu have not demonstrated that Masilela ought to have been retrenched.

(d) Consideration for red positions

- [98] Mahlangu, who holds a matric certificate, applied for the explosives operator grade 1, a red position, but was not considered because he did not attend the interview. The pleaded version was that when Mahlangu attended the interview, he was advised of a scheduling issue and told he would be contacted to arrange a new date, but he was never contacted. That same version was put to Sasol's witnesses in cross-examination. However, when Mahlangu testified, he stated that he arrived at the interview venue and found the door locked. The two versions are irreconcilable.
- [99] Mahlangu's version that he was invited to the interview by his line manager is improbable. There was no evidence that line managers were involved in the interviews for red positions. To complicate matters further, Mahlangu testified that he knew the date and time of the interview from a notice posted on the noticeboard. Either his line manager told him about the interview, or he saw the notice on the noticeboard. During Nemaheni's cross-examination, it was put to her that Mahlangu understood very little English, suggesting that if Nemaheni telephoned Mahlangu about the interview date and time, he would not have followed the conversation. Mahlangu's version was incomprehensible. If he had confused the interview dates and times, he could have followed up with HR. He did not do so. The reason Mahlangu was not interviewed for the red position he applied for cannot be attributed to Sasol.
- [100] Mahlangu also testified that he was told to go home and would be recalled, which is another improbable version. He was issued a retrenchment letter and paid a retrenchment package. Therefore, he would have known that his employment with Sasol had ended. On his own version, he left the area after

his retrenchment and did not contact anyone at Sasol, because he understood that his employment with Sasol had come to an end.

[101] There was a factual dispute about whether Msiza applied for a red position. His account was that he submitted a CV and was told a matric certificate was required. Both Masilela and Nemaheni testified that Msiza did not apply for a red position. However, Nemaheni also testified that a matric certificate was required to be considered for a red position. Therefore, Msiza would not have been considered for a red position because he did not have a matric certificate. Msiza wanted to be appointed as an operator, which required a matric certificate, which he did not have.

[102] Fermiase applied for an explosives operator post, a red position, but was disqualified for lack of a matric certificate.

[103] The WFT document provided as follows regarding red positions:

'8.4 For new positions or where positions have changed significantly (Red positions) i.e ...30%, the normal Sasol recruitment process will apply, and the affected employees will be given preference, selection criteria to apply.'

[104] Those occupying positions that had changed significantly and were red positions were to be preferred. The positions occupied by the applicants were not red positions, and therefore the applicants did not have to be given preference.

[105] The Sasol recruitment process applied to red positions. Nemaheni testified that a matric certificate was required to fill a red position. The requirement to hold a matric certificate was introduced after all the applicant employees had already been employed by Sasol. Therefore, if AMCU had required an exception for employees who did not hold a matric certificate to be considered for red positions, this should have been negotiated when the WFT document was drawn up. This was not done.

[106] Mahlangu was not appointed to a red position because he did not attend the interview. Msiza and Fermiase were not considered for the explosives

operator position because neither had a matric certificate, which was a requirement for the job, as per the normal Sasol recruitment process.

Concluding remarks

[107] Before and during the retrenchment process, the applicant employees were represented by their union, AMCU. This explains why they could not testify about the documents, the processes followed, or the reasons those processes were followed. They trusted that their union would act in their best interests. If they had questions or concerns, they were free to approach their union for explanations. The selection criteria applied were agreed with the unions. Similarly, the process followed, including the establishment of selection panels, was agreed with the unions. How the yellow and red positions were to be filled was also agreed with the unions. No provision was made for consulting employees during the process. On those facts, it is not open to the applicants in these proceedings to challenge what their unions agreed to.

[108] It follows that the submission that the applicant employees were unfairly retrenched under a flawed section 189 process, characterised by unfairness and insufficient regard for their contributions, must be rejected.

[109] On the facts, the call for the Court to deliver social justice, taking into account the applicant employees' long service and the abruptness of their dismissals, which caused them significant personal and financial strain, must likewise be rejected.

Costs

[110] The applicants sought costs in the event of success. They were unsuccessful. Sasol left the issue of costs in the court's hands. Each party must bear its own costs.

[111] In the result, the following order is made:

Order

1. The applicants' unfair dismissal claim is dismissed.
2. Each party must pay its own costs.

T Gandidze
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate S Saunders
Instructed by: Nicole Musiker of LDA Attorneys

For the Respondent: Advocate P Kirsten
Instructed by: Johanette Rheeder of JR Attorneys Inc

LABOUR COURT