



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: CA 7/12

In the matter between

GIJIMA AST (PTY) LTD

Appellant (Respondent)

and

RAYMOND HOPLEY

Respondent (Appellant)

Heard: 23 May 2013

Delivered: 07 February 2014

JUDGMENT

TLALETSI ADJP

- [1] This is an appeal against the order of the Labour Court (per Rabkin-Naicker J) pursuant to a trial involving a dispute about the fairness or otherwise of the respondent's dismissal by his erstwhile employer the appellant. The appellant contended that the dismissal of the respondent was based on its operational requirements and was fair. The respondent however, contended that his dismissal was unfair.
- [2] The Labour Court, in a judgment handed down on 9 March 2012, held that the respondent's dismissal was substantively unfair and ordered the appellant to pay the respondent compensation equivalent to six times his monthly salary at the rate of his remuneration at the time of his dismissal and costs of the trial.

- [3] The appellant is appealing against that part of the order declaring the dismissal to be substantively unfair. The respondent in return supports the order in respect of substantive unfairness but filed a cross-appeal against that part of the order awarding him compensation. The appeal is in this Court with leave of the court below.
- [4] I find it appropriate to set out the factual matrix of the dispute, followed by a consideration of the appeal, the cross-appeal and lastly the issue of costs. For the sake of convenience the respondent in the court *a quo* shall be referred to as the appellant and the applicant in the court *a quo* as the respondent.
- [5] During the trial the appellant tendered the evidence of Hendrick Stefanus Strydom and Marina Uys. The respondent testified on his behalf. The factual background in this appeal is, unless where otherwise indicated, common cause. The appellant conducts business of providing information technology services to its clients. The respondent was employed by the appellant at its Cape Town unit from 1 January 2000 until his dismissal on 12 August 2010. He was at the time occupying the position of Operations Manager¹. He had a credit service of 25 years and three months at the time of his dismissal.
- [6] The respondent was engaged in the business unit called "Distributed Computing Services" (DCS) which was a unit within the section called "Managed Services". The respondent had been the Operations Manager in the DCS for 18 months, having previously been an Availability Service Manager (ASM) for 10 years.
- [7] It is common cause that the performance of the DCS business unit was not satisfactory in 2010. There was insufficient work to justify the number of staff members employed in the business unit. There was therefore a need for the reduction in staff numbers and reduction in overhead costs. In the middle of the year 2010, the appellant implemented a restructuring

¹ His remuneration package was R45 617-42 per month together with a fuel allowance of R1 500.00 per month and a cell phone allowance of R650.00 per month.

process in the DCS business unit. The process entailed the abolishment of the old organisational structure and the establishment of a new structure. The new structure was to utilise less staff and as a result some of the positions, including that of the respondent became redundant.

- [8] On 6 May 2010, a meeting took place with the employees in order to advise them of the proposed restructuring. The respondent attended this meeting.
- [9] On 12 May 2010, the respondent was issued with a Notice in terms of Section 189(3) of the Labour Relations Acts² (the Act). The process that was put in place was that the employees had to apply for positions that were to be advertised in the new structure by submitting their curriculum Vitae. There was also an agreement on the selection criteria for the appointment of persons to the new positions. The method of selecting which employees were to be affected was recorded in the Notice of Restructuring document as follows:

“The company proposes using the following selection criteria:

- a. Skills, knowledge and/or*
- b. Relevant qualifications and experience and/or*
- c. Years of service*

This will be used to identify the employees who might be affected by the possible reduction in headcount. The business unit may consider any additional selection criteria that are proposed during the course of the consultations by you. The criteria the parties then agreed to be used to identify those who might be affected by the possible retrenchment”.

The formal process was to be commenced on 6 May 2010 and was to be completed by 12 July 2010.

- [10] It is common cause that the respondent applied for the positions of ASM and Customer Service Manager (CSM) in the financial sector.

² 66 of 1995.

Candidates were shortlisted for interviews for the two positions. The respondent was one of the candidates selected.

- [11] On 24 May 2010, interviews were conducted by the panel consisting of Phukubye, Prinsloo, Lange and Strydom. The respondent was not successful in his applications for the two positions. He was advised on 28 May 2010 that the next step in the process was that alternative positions would be sought for him in the appellant as a whole. On 12 July 2010, the respondent's employment was terminated on one month's notice. The reason for the termination was recorded as the appellant's operational requirements. The termination date was 12 August 2010.
- [12] Strydom was the Divisional Human Resources Manager based in Johannesburg. He testified that the interviews were conducted by putting questions to candidates, had discussions thereafter and the candidates were ranked on what the panel felt how they would be best suited to the position. The advertisements for the positions were communicated through the internet and were restricted to the Western Cape Province.
- [13] In response to the question how the interviews were conducted and why the respondent was not appointed, Strydom testified that:
- "...all the candidates that were on the shortlist that were interviewed could do the work. The panel of people who interviewed had to select the best person for that position and at the time the panel said that [the respondent] was definitely not first, second or third choice for the availability services manager, there were other people however he was the third choice on the client services manager but he was not the first or second choice".*
- [14] He mentioned that for managed services, the candidates selected according to the panel ranking were Ernst Fortran, Barbara Hare and Sheree Gouws respectively. For ASM (now PetroSA) it was Allison Cornelissan, Heidi Alterbury and Schalk Visagie. For Public Sector (CSM) it was Sheree Gouws, Peter Le Grange, for Finance it was Ian Van Staden, Barbara Hare and the respondent was ranked third, for Retail it was Barbara Hare, Schalk Visagie and Ernst Fortran.

- [15] Strydom testified that although some of the candidates were ranked by the panel some were changed by the Regional Executive after some other consultations. He disagreed that the respondent had more experience than all the candidates appointed. However, he could not provide the relevant years of experience for Barbara Hare and that of Ian Van Staden and how they compared to the respondent. He further disagreed that the scoring process and the interview process were not objective. His reason for this view was that he and Phukubye were from Johannesburg and they did not know the people they were to interview *"intimately"* and they selected the *"best fit for the"* positions that were advertised.
- [16] In relation to seeking alternative position for unsuccessful candidates, Strydom testified that the human resources manager for the Cape Town branch had consultations with the affected employees. He mentioned further that as there were no available positions in Cape Town he believed that a position was offered to the respondent in Gauteng and that he turned it down. He testified that he personally did not offer the respondent a position in Gauteng but only heard from someone else. In response to the contention by the respondent that bumping should have been applied and that he would not have been dismissed, Strydom testified that bumping and LIFO were not used as the criteria for selection. In response to the contention by the respondent that the positions were *"ring fenced"* and that he was not considered for other positions in the rest of the organisation, Strydom responded that the restructuring exercise pertained to Western Cape only as they were the only ones who were undergoing restructuring and that the advertised positions were limited to the Western Cape.
- [17] On the performance of the respondent in the interviews, Strydom mentioned that he did not *"interview very, very well. Apart from the two people in, here in Cape Town who knows him I had had one or two interactions with Mr Hopley, we actually worked on a project together and I was very surprised how he seemed ill prepared for the interview. His questions were not to the point, comments that were made [were] that he*

didn't answer what was really asked and he really didn't interview very well".

- [18] Under cross-examination, Strydom explained that LIFO was not used as criteria and years of service was only used to determine whether a person qualified to be shortlisted and not who had the longest service. Having been referred to the Pre-Trial Minute, he stated that years of service were taken into account by the selection panel but that it was one of the criteria that were taken into account. He clarified that there were three positions that the respondent would have been considered for in the ASM functions and one in the CSM function, all in all four positions. Ian Van Staden was appointed to CSM, Ernst Fortran to ASM within the Sanlam group and Barbara Hare was appointed to ASM Western Cape and Schalk Visagie to CSM retail. No scoring was done during interviews, only a discussion of the candidates and how they performed. He explained that *'all the applicants that came for the interviews were good candidates. They were certainly ...nothing wrong with Mr Hopley's work. The panel after interviewing the people got to a unanimous agreement of who the successful candidate for this position would be. We certainly at the interview did not compare the one candidate with the other, we compared the candidate with the job spec and the interview, the questions we asked, the responses that was given to us by the interviewee and certainly to my knowledge Mr Hopley was a good employee. I certainly don't know of any poor work performance or anything that was instituted against him. All these people that we interviewed were good employees but we could not place all of them.'*

- [19] Strydom confirmed that there was no scoring process in relation to comparing one individual employee's years of service with the other individual's years of service. He could not recall specific experiences of the candidates in relation to the positions they were interviewed for as required by the advertisements. He did not know each candidate's years of experience as compared to the respondent's 25 years of service. Neither did he know the salary of each candidate as compared to that of

the respondent. He denied that the respondent's costly salary compared to others played a role in the decision not to appoint him.

- [19] Ms Marina Uys was the Human Resources Consultant for Western Cape area. She was involved in the administration, consultation process for restructuring and logistics around the interviews that had to be set up. She was also present at the consultation meetings that took place on 6 and 12 August 2010. She was however not part of the selection panel and therefore is unable to comment on the comparison between Van Staden, Fortran, Visagie and the respondent with regard to years of service, experience and qualifications. After arranging for interviews, her involvement was to prepare letters on the instructions of Lange to be sent to both successful and unsuccessful candidates.
- [20] Ms Uys confirmed that the respondent was unsuccessful, and she communicated with him telephonically as he was on leave at the time. She testified that if she *"remembered correctly"* she phoned the respondent *"just asking if he [had] seen that there [were] positions available on the ABSA intranet that could be suitable to him. He enquired about the location and I informed him that it was in Johannesburg, all the positions and ABSA Towers if I remember correctly and he then said no and I asked if I should pursue this and he said no it is not necessary because it is in Johannesburg so he don't see it as a suitable alternative"*. She confirmed that Cape Town was a small office and it did not have sufficient positions as compared to Johannesburg. She further testified that the respondent never mentioned *"bumping"* to her, neither did he complain to her about LIFO. Under cross-examination, she could not recall if the respondent told her that the reason why he could not accept the position in Johannesburg was because he had a daughter in matric and could not move at that moment.
- [21] The respondent challenged the experience and capacity of the three people who were appointed to the positions that were advertised as compared to him. He had been in ASM for 10 years until he was promoted to the position of operations manager function. He mentioned

that, Van Staden was not doing any management responsibilities but purely service coordination functions with service delivery teams. Schalk reported to the respondent as an Availability Service Manager on the Sanlam account. As his Operations Manager he had to mentor and coach him and according to him there was a wide area of development that Schalk still needed. He testified further that Fortran always struggled as ASM and was a good service delivery manager but needed improvement in logistics and financial management.

- [22] The respondent testified that after the interview he was called by Lange who informed him that he did not make it because he had a bad interview without elaborating on what he meant. Lange and Uys at a later stage told him that there was a position at ABSA in Johannesburg and he told them that due to his personal circumstances with his children he was unable to relocate at that point in time. Had they spoken to him after his daughter had finished matric he would have considered that position. He did not raise the issue of bumping with the appellant's officials because he was not aware of that possibility at the time.
- [23] The respondent did not understand why he did not get any of the positions as he was more qualified than the others and asked for scoring awarded in the interviews. Lange refused to provide him with the scoring report or record. Although he accepts that there was a financial difficulty faced by the appellant he held the view that he could have been selected for retrenchment because he carried a bigger salary package compared to others. He was never approached for a discussion on salary reduction. He testified that it had been difficult to find other employment in Cape Town, Eastern Cape, Bloemfontein and Johannesburg. He had however been offered a position by an IT company and was on probation, earning a salary of R23 000.00 a month. He was seeking reinstatement.
- [24] Under cross-examination, the respondent testified that his main challenge to his dismissal was that the selection criterion was not correctly applied. He could not understand why he was not appointed as

he was well qualified for the positions. He did not have any problem with the selection criteria *per se* as it was agreed upon.

- [25] In evaluating the evidence, the court below recorded that, the material dispute that it had to consider was whether the dismissal of the respondent was for a fair reason taking into account in particular, whether the appellant had met the *onus* of proving that selection criteria were fair and objective. The court having remarked that substantive fairness requirements set out in section 189(7) provides that employers must select employees to be retrenched according to criteria that have been agreed upon by the consulting parties, or if no criteria have been agreed upon, criteria that are fair and objective, found that there was no such distinction found in section 189A. The court below then held that:

“Simply put, to pass muster, the selection criteria applied in large scale retrenchment must be fair and objective”.

- [26] The court below continued that it was not necessary to consider whether there was in fact ulterior motive for the non-appointment of the respondent to one of the positions available because there was no discernible objective criteria that were used to select the candidates on the appellant’s own case. The court below continued thus:

“The method of selection on [appellant’s] own version at trial was based on the subjective feelings of the panel as to the way in which the candidates performed at the interview. Selection was not based on ‘an objective scoring process and interview’ as claimed by the [appellant] and reflected in the pre-trial minute. I find therefore that the dismissal of the [respondent] was substantively unfair”.

- [27] As regards the remedy, the Labour Court held *inter alia*, that the position the respondent occupied was abolished during the restructuring process and that it was not possible to restore the employment contract, and that compensation was the appropriate remedy. The Labour Court noted that the respondent received an equivalent of 5.83 months of salary and part of his severance package. The court recorded further that it does not take into account the fact that the respondent indicated that he was not

interested in the position on the appellant's intranet based in Johannesburg as it was not the appellant's case that he was offered that position, but merely informed of the vacancy. In conclusion, the court below ordered the appellant to pay the respondent an amount equivalent to six months of his salary at the time of his dismissal plus costs. In computing the amount of compensation, the Labour Court took into account the extent to which the appellant failed to apply a fair selection criteria, the long service of the respondent and his efforts to mitigate his loss.

[28] In this Court, it was contended on behalf of the appellant that the parties had agreed to a particular process that was to be followed namely, that all posts in the new structure would be fully defined, described and then advertised; all employees would then apply for the posts they were interested in; employees shortlisted for the posts applied for would be interviewed by an interview panel; the interview panel would determine which employee it considered best suited for the post applied for; the person found to be best suited will be appointed to that post; the employees not appointed by the interview panel would be considered for alternative positions elsewhere in the appellant and; the employees who are then not accommodated in such alternative positions would be retrenched. It was contended that in essence the respondent agreed to the process and method of selection and only disagrees with the outcome which is simply a matter of his opinion.

[29] It was further argued that the respondent's opinion does not in itself render the selection unfair as the appellant was entitled in terms of the agreement, to conduct the selection as it happened. As such, goes the argument, the respondent clearly waived any reliance on fair and objective criteria.

[30] The first issue for consideration in this appeal is the selection criterion applicable in determining employees that were to be retrenched. The respondent contended in the court below that the agreed selection criteria were not properly applied by the appellant. He argued that had

the agreed selection criteria been properly and fairly applied he would not have been retrenched.

- [31] Section 189(7) of the Act provides that the employer must select the employees to be dismissed according to selection criteria that have been agreed to by the consulting parties; or if no criteria have been agreed, criteria that are fair and objective. This Court in *Super Group Supply Chain Partners v Dlamini and Another*³ had the following to say:

“It is trite that an employer is permitted to dismiss an employee for its operational requirements. However, for the employer to do so successfully, it is obliged to have a bona fide economic rationale for the dismissal and to comply with the provisions of s 189 as well as s 189A of the Act where applicable. Section 189 imposes an obligation on the employer to consult the employee or its representative on the matters listed in subsection (2). There is a duty on the employer not only to consult the affected employee(s) but to take appropriate measures on its own initiative to avoid and minimise the effect of the dismissal. The consultation envisaged by the Act is a 'meaningful joint consensus-seeking process' in which parties to the process should attempt to reach some agreement on a range of issues that may best avoid the dismissal and where not possible to ameliorate the effects of the dismissal for operational requirements.”⁴

- [32] Section 189A(19) of the Act provides that:

“In any dispute referred to the Labour Court in terms of section 191 (5) (b) (ii) that concerns the dismissal of the number of employees specified in subsection (1), the Labour Court must find that the employee was dismissed for a fair reason if-

- (a) the dismissal was to give effect to a requirement based on the employer's economic, technological, structural or similar needs;*
- (b) the dismissal was operationally justifiable on rational grounds;*

³ *Super Group Supply Chain Partners v Dlamini and Another* (2013) 34 ILJ 108 (LAC) at para 24.

⁴ *Ibid* para [24]

- (c) *there was a proper consideration of alternatives; and*
- (d) *selection criteria were fair and objective.* “ *[emphasis provided]*”

A view was expressed that since reference is made to the selection criteria that were fair and objective, the parties are precluded from agreeing on selection criteria to identify employees to be retrenched.

[33] In my view, there is no justifiable reason why s189 (7) should not apply to dismissals referred to in section 189A. The two sections must be read together since they both apply to dismissals for operational requirements. Further, the overall obligation imposed by the two sections is for consultation on the matters referred to in s189. It is also significant to note that s189A process is initiated by the very same s189(3) notification issued for retrenchments. The items that form the subject of consultation are only listed in s189(2) which include the method for selecting employees to be dismissed. Such a provision is not found in s189A.⁵ Furthermore, the objective of the process in both provisions remains one of ‘*meaningful joint consensus seeking*’. It would therefore make no sense to prohibit consulting parties from reaching agreement on the selection criteria in cases of mass retrenchments and only allow it in retrenchments not covered by s189A when the object in both sections is ‘*meaningful joint consensus seeking process*.’ Reaching agreement on the selection criteria should rather be encouraged instead of being discouraged because the purpose is where possible, to avoid no-fault dismissals and where not possible ameliorate the effects thereof.

[34] It would not make sense to declare a selection criterion 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 as stipulated in s189A. If the consulting parties are precluded from agreeing on selection criteria it would mean that it shall be in the prerogative of the employer in all mass dismissals under s189A to decide on selection criteria and his or her selection would be insulated if it is found to be fair and objective. That in

⁵ See *De Beers Group Services (Pty) Ltd v National Union of Mineworkers* (2011) 32ILJ1293 (LAC) at paras 31-32.

my view cannot be the object of the Act which seeks to encourage *inter alia*, consultation, fairness, participatory engagement and openness.⁶ The same test that applies in assessing the fairness or otherwise of a retrenchment under s189 should not be different from the retrenchments under s189A except on the additional obligations imposed by s189A.⁷ 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.

[35] Having found that nothing prevented the parties from agreeing to a selection criteria as they did in this case what needs to be determined is whether the agreed selection criteria was applied. To recap, the selection criteria agreed to were (a) skills knowledge, and/or (b) relevant qualifications and experience and/or (c) years of service. The s189(3) notice stated expressly that *“this will be used to identify the employees who might be affected by the possible reduction in headcount. The business unit may consider any additional selection criteria that are proposed during the course of the consultation by you. The criteria the parties then agreed to will be used to identify those who might be affected by the possible retrenchment”*. It is common cause that there

⁶ Section 1 of the Act provides that:” The purpose of this Act 3 is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-

(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; 4

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can-

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote-

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.”

⁷ See *Chemical Energy Paper Printing Wood & Allied Workers Union v Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics* (2012) 33 ILJ 2386 (LC) at para114; *National Union of Mineworkers v De Beers Group Services (Pty) Ltd and Another* (2009) 30 ILJ1880 (LC); *National Education Health and Allied Workers Union on behalf of Members v National Home Builders Registration Council* (2011) 32 ILJ 365 (LAC); *Continental Tyre SA (Pty) Ltd v National Union of Metalworkers of SA* (2008) 29 ILJ 2561 (LAC).

was no additional selection criteria agreed to by the respondent's business unit and as such the criteria proposed in the s189(3) was applicable.

[36] The appellant bore the *onus* to prove that the agreed selection was applied and that its application was done fairly. Strydom who was one of the selection panellists was called specifically to deal with the process followed. When he gave evidence in chief he appeared not to have been alive to the agreed selection criteria. He testified that the selection panel did not apply years of service as criterion. Although he later during cross-examination suggested that regard was had to years of service, he conceded that the panel did not establish how many years of service each candidate were credited with. Neither did the selection panel interrogate the candidates' credentials in respect of the itemised requirements stipulated in the job specifications. Further, the selection panel did not conduct a comparative exercise of the candidates' credentials. Although the appellant's case in the pre-trial minute was that the candidates were subjected to an objective scoring process and interview, the particulars and results of such scoring process were not available despite the respondent's specific challenge to the process. There was no evidence of the particulars relating to the questions and weighting or ranking given to the questions or elements for consideration. It was later conceded that no numerical scoring was made by any of the panellists.

[37] In my view, the appellant has failed to show on a balance of probabilities that the agreed selection criteria were applied. On the contrary, the appellant has shown that it applied a selection criteria which was not agreed or based, according to Strydom, on " *track records, and performance at the interview*". There was an obligation on the selection panel to apply the agreed selection criteria and do so fairly. There was no agreement between the consulting parties that the selection panel had the so-called "blank cheque" to decide how and on what basis were the candidates for dismissal to be identified. By agreeing to the interview process, the respondent cannot be said to have waived his right to have

the agreed selection criteria applied. The appellant's evidence to the effect that he was best suited to be appointed if the selection criteria agreed to were applied was not controverted. According to him, he had more experience and was senior to those appointed. None of the appellant's witnesses could testify otherwise since they did not interrogate the experience of the candidates. In fact, according to Strydom, he took it that the agreed selection criteria had already been applied when the candidates were selected for interviews. His assumption was a mere speculation since no credible evidence was presented to that effect.

[38] Even on the narrow approach that the appellant had to show that the selection criteria was fair and objective, the court below was in my view correct in finding that the selection criteria was, on appellant's version, based on the subjective feelings of the panel as to the way in which the candidates performed at the interview and was not based on an "objective scoring process and interview" as claimed by the appellant and reflected in the pre-trial minute. Furthermore, the selection panel may not have had the final say since some of its recommendations were changed by the Regional Executive. No evidence was tendered to explain the reasons and circumstances why the recommendations had to be changed. I therefore find that the dismissal of the respondent was substantively unfair and the appeal should be dismissed.

[39] It was contended on behalf of the appellant that the court *a quo* erred when it found that the position that the respondent was informed about in Johannesburg was not taken into account because it was not offered to him. It was submitted that it was the respondent who had difficulty with this position as he was not prepared to relocate from Cape Town to Johannesburg, and that no mention was made during the trial that the position was not a genuine offer or that it was not a very real possibility of alternative employment.

[40] The respondent's evidence was that Uys who was assisting in taking the retrenchment forward and was assisting him with the relevant financial

and pension fund arrangements mentioned that there was a position on the intranet in Johannesburg. He testified that Lange also told him that he was unsuccessful and told him about this position. He informed them that he was unable to relocate at that point in time since he had just gone through a divorce process and his daughter was in matric at the time. His circumstances were well known to his employer. After that there was no further interaction with him about the said position. He mentioned further that his daughter completed her matric in the same year and as such his circumstances changed.

[41] It is notable that in terms of paragraph seven of the s189 notice presented to the respondent, the appellant undertook to assist employees likely to be retrenched in seeking alternative positions either within the appellant or with another company. However, the respondent was merely informed of the existence of the position in Johannesburg without being offered the position. No details pertaining to that position were communicated to him. Although the respondent did not reject that position but reminded them of his personal circumstances, he was nevertheless dismissed on 12 July 2010 being four days later after the telecommunication with Uys. It also not correct as it was submitted on behalf of the appellant that the respondent withdrew from the consultation process therefore making it impossible for the appellant to consult him on alternative employment. It is common cause that upon the respondent's return from his prearranged holiday he was required to work from home for a month before his retrenchment. The court *a quo*'s conclusion that the respondent was not offered but merely informed of the existence of the position on the appellant's own version, cannot, in my view, be faulted.

[42] I now proceed to consider the cross-appeal. The respondent contended that the court below erred in fact and in law in determining that it was not possible to restore the employment relationship between the appellant and the respondent. It was submitted that the term "reinstate" as provided for in s193(2) of the Act should not be limited to the restoration of the employment relationship into a specific post previously occupied

by an employee. The term, it was argued, allows for the reinstallation or re-establishment of the contractual employment relationship on the same terms and conditions of employment that prevailed prior to the unfair dismissal. It was further contended that even in circumstances where the respondent's previous post was abolished and even where it is found that reinstatement is not possible to that specific post, the court *a quo* erred in not applying the other primary statutory remedy available, namely "re-employment" as provided for in s193(2) of the Act.

[43] It is in my view appropriate to record what remedy the respondent sought in the court *a quo* in order to put the cross-appeal in its correct perspective. In the reply to the appellant's statement of claim the relief sought by the respondent is "*re-instatement of his contract of employment and compensation to the maximum provided for in the Labour Relations Act.*" In the pre-trial minute the relief sought is "*reinstatement; and or compensation*". In the court *a quo* the respondent testified that "*Yes I seek reinstatement and compensation for...*"

[44] By seeking reinstatement the respondent wanted the Labour Court to put him back into the same job or position he occupied, on the same terms and conditions, before his dismissal.⁸ He wanted to be placed back in his position as if he was never dismissed.⁹ The court *a quo* considered his

⁸ Section 193(1) and (2) provides that: (1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may -

(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure.

⁹ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* 2009 (1) SA 390 (CC) at para 36, *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 26. *Dunwell Property Services CC v Morgan Sibande and Others* (2011) 32 ILJ 2652 (LAC) at para 30.

request and found that it was not possible to restore the employment contract because the position he occupied was abolished as part of the restructuring process. By this finding the court below found that it was impractical to reinstate the respondent and awarded him compensation. In short, the court did not deviate from what the respondent requested and although it could not give him the first price he demanded the court gave him what he prayed for in the alternative.

[45] In essence, the purpose of the cross-appeal is not necessarily directed against the court *a quo*'s finding that reinstatement was not possible in the circumstances of the case but that the court *a quo* should have ordered that he be re-employed as the other remedy available to him. It is clear, without any doubt whatsoever, from the record of the appeal that the respondent never requested that he be re-employed. Neither did he present any evidence whatsoever on the position and terms of re-employed he requires. It is only a claim that he makes out in the appeal process without affording the respondent an opportunity to deal with his claim. The court *a quo* which is accused of having erred did not have the opportunity to consider re-employment as an option simply because that was never part of the respondent's case before it. It is improper for the respondent to use the appeal process to introduce a new claim. Such practice should not be countenanced.¹⁰

[46] Re-employment claim would suffer the same fate as reinstatement in the circumstances of this matter. The respondent's position has been abolished and Lange who was the regional manager was retrenched as part of further restructuring. It is common cause that there was a need for the appellant to restructure as it experienced financial hardships. There

¹⁰ In *Mediterranean Textile Mills (Pty) Ltd (supra)* this Court held that: "Needless to mention that the appeal court is not a forum to consider issues which were not raised in the pleadings or dealt with by the trial court, save in exceptional circumstances such as those involving legal issues, where this is found to be appropriate and not unfair to the other party. In *Road Accident Fund v Mothupi*, the Supreme Court of Appeal stated:

'Subject to what is said below, a Court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings... A party will not be permitted to do so if it would be unfair to his opponent (cf *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290E-H). It would be unfair to the other party if the new point was not fully canvassed or investigated at the trial.' At para [29].

is no evidence to suggest that respondent could be accommodated in any other position as re-employment in the Western Cape as it was never canvassed. Consideration of re-employment would also require at this very late stage a revisit of the entire selection process. The selection process has already taken place and the appellant has come to terms with the result thereof and structured its business accordingly. The respondent on the other hand has been compensated for the unfairness that he suffered.

- [47] It is not necessary for this Court to define what re-instatement means. We are bound by the definition ascribed to the term by the Constitutional Court in the *Equity Aviation* matter that:

“[36] The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.”¹¹

- [48] In the result, the cross-appeal must fail. It would be in accordance with the requirements of the law and fairness that there be no order as to costs. The following order is consequently made:

1. Both the appeal and the cross-appeal are dismissed.
2. There is no order as to costs.

Tlaletsi ADJP

¹¹ At para [36]

Waglay JP and Coppin AJA concur in the judgment of Tlaletsi ADJP

APPEARANCES:

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Labour Appeal Court