IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO.: D439/15

Reportable

In the matter between:

WAYNE PRATTEN Applicant

and

AFRIZUN KZN (PTY) LTD Respondent

Heard: 16 September 2019

Delivered: 17 April 2020

Summary: Claim of unfair dismissal due to operational requirement of the company – whether psychometric test is converted into selection criteria for dismissal – whether use of psychometric test is unfair method of selecting for dismissal per s189 (2) (b) – whether being required to compete for a post is a method of selecting for dismissal – questions answered in the negative.

JUDGMENT

CELE J

Introduction

[1] This is a claim of unfair dismissal of the applicant by the respondent. The Applicant challenges the substantive fairness of his dismissal, which was effected because of the Respondent's operational requirements, pursuant to a restructuring exercise that commenced early in 2014. The Respondent contends that the Applicant's case is without merits and falls to be dismissed.

Factual Background

[2] There are two stages in which the respondent employed the applicant. The first phase lasted for 11 years and was followed by a break of 3 years. On resumption, the applicant was engaged for a period of 17 years until 24 December 2014 when he finally left his employment with the respondent. During the second phase, the applicant was initially employed as a dealer on gaming tables and subsequently promoted to various positions, until promoted to the last position he held, namely that of Deputy Tables Manager. His annual remuneration package amounted to R 1 060 959.00.

[3] Arising from its operational needs the Respondent held a presentation at the Sibaya Casino on 6 February 2014 concerning proposed restructuring which was to take place at the workplace. At that meeting, the Respondent presented those in attendance, of whom the Applicant was one, with the information contained in a document titled "Notification in Terms of Section 189 and Section 189A". At the same meeting, the Applicant and other employees were given copies of two letters dated 29 January 2014, prepared by the Respondent and containing such information as was intended to be in compliance with section 189 and section 189A, respectively, of the Labour Relations Act.[1] The Respondent subsequently held further presentations to its employees, including the Applicant, as follows:

- during March 2014, presentation titled "Consultation regarding the Rationale for the Proposed Restructure";

- during April 2014, titled "Consultation Regarding the Rationale for the Proposed Restructuring of Gaming and Ancillary Matters";

- during May 2014, titled "Proposed Rollout of Selection Process Subject

[1] Act Number 66 of 1995, as amended ("the LRA").

to Finalisation with Consulting Parties"; and

- during or about August/September 2014, titled "Changed Terms and Conditions".

[4] The Applicant agreed that he had attended every presentation and that, on occasion, there would be two presentations per day to cover the various shifts. He also assisted with the feedback to junior members of staff as to developments and the way forward as the way he saw it. During the period 25 February 2014 to 19 May 2014, the Respondent addressed a letter and various memorandums to employees, including the Applicant. In June 2014, the Respondent provided employees with a circular dealing with the minimum criteria for job titles and occupational categories, which had been decided upon, together with the applicable minimum criteria in respect thereof. In terms of the circular, employees, including the Applicant, were required to apply for the new positions, which had been created because of the re-structure and retrenchment process. As is apparent from a document issued by the Respondent to its employees on 6 February 2014, the method proposed by the Respondent for selecting employees whose positions had become redundant as a result of the restructuring, for retrenchment was as follows:

4.1 employees employed in positions which would become redundant as a result of the restructure, would be informed of the new positions for which they qualified to apply, and would be invited to apply for appointment to such positions;

4.2 employees then employed in certain job categories would be selected on the basis of psychometric testing;

4.3 in some categories, employees would be selected on the basis of historical objective data such as disciplinary records, work records and

the like; and

4.4 In some categories, the selection would be made on the basis of “last in first out”.

[5] Ultimately, employees employed in positions proposed to be made redundant, would, if redundancy indeed materialised, and such employees could not be accommodated in other available suitable positions, be retrenched. Pursuant to the re-structuring process, it was determined that Sibaya Casino was to be staffed, inter alia, by 16 (sixteen) Gaming Floor Managers. There is a dispute on whether this category would be further divided into two sub-categories, being 12 (twelve) Gaming Floor Managers - Tables and four Gaming Floor Managers–Slots, as contended by the Respondent, which is denied by the Applicant. The Applicant was one of the employees affected by the restructuring process.

[6] During or about August 2014, the Applicant, having been informed of the positions for which he qualified to apply, applied, amongst others, for the positions of Tables Manager at Grand West Casino. The Applicant was required to undergo a psychometric evaluation and attended a formal assessment process during the course of which he underwent various psychometric tests. A company appointed to do so by the Respondent undertook the tests. The Applicant was later informed by both Sibaya Casino and Grand West Casino that he complied with the minimum requirements attached to the positions, but that the application of the results of the psychometric tests he had undergone, were such that he had been unsuccessful in his applications. He therefore did not make it into any one of the sixteen Gaming Floor Managers’ posts.

[7] During the period November and December of 2014, the Applicant and the Respondent exchanged correspondence in which the Applicant raised certain queries concerning his unsuccessful application, and in particular the

role played by the results of the psychometric evaluation in his failure to secure the position, to which the Respondent duly replied. At a meeting held during December 2014, the Applicant was asked to consider accepting the positions of Gaming Floor Manager: Slots at the Respondent's Morula or Sun City Casino's, or the position of Shift Manager: Tables at the Wild Coast Sun Casino. The Applicant declined these positions. His wife was also working for the Respondent at Sibaya. Accepting any of those positions would adversely affect his family location.

[8] A letter dated 22 December 2014 was given to the Applicant at a meeting between the Applicant and a representative of the Respondent on 23 December 2014. The letter dealt with, amongst other things, the retrenchment package, severance pay and notice period. The Applicant ultimately left the Applicant's service at the end of December 2014 and was remunerated up to that date, at which time he was also paid out his remuneration in relation to the applicable notice period of six months in lieu of serving notice. Pursuant to further discussions between the Applicant and the Respondent's representative, the letter of 22 December 2014 was amended, and the Respondent's representative gave a copy of the amended letter to the Applicant on 21 January 2015.

[9] The consultation process engaged in by the Respondent was one that fell within the ambit of section 189A of the LRA. Given the provisions of section 189A (18), it follows inevitably that the Applicant is confined to challenging the substantive fairness of his dismissal, on the grounds that he pleaded. No procedural challenge is available. In any event, the Applicant voiced no material complaints about the consultation procedure.

<u>Issues raised in the pleadings and in the pre-trial minute.</u>

[10] The first primary factual dispute concerns the question of whether the sixteen positions identified as Gaming Floor Managers at the Respondent were

further divided into positions for tables and slots respectively. The Respondent contends that they were divided into twelve positions of Gaming Floor Manager: Tables and four positions of Gaming Floor Manager: Slots. The Applicant denies that such a division took place. The second factual dispute is about whether the Applicant applied at the Respondent for the position of Gaming Floor Manager or, alternatively, for the position of Gaming Floor Manager: Tables. The third and final factual dispute is whether the Applicant was not appointed at the Respondent as a result of the outcomes of the psychometric testing.

[11] Against the backdrop of these factual disputes, the parties identified two issues that arose for decision in relation to the substantive fairness of the dismissal upon resolution of the factual disputes. The first issue was whether the Respondent's failure to appoint the Applicant to either of the positions for which he had applied, in the light of the Applicant's complying with the other criteria for the position of Gaming Manager, relation to the Applicant's applications for employment, resulting in his ultimate retrenchment, was in the circumstances fair and reasonable. Secondly, whether the Respondent's failure to appoint the Applicant to a position of Gaming Manager, Sibaya Casino, after the termination during or about November 2014 of the services of Mr Daniel Mafokeng, was in the circumstances fair and reasonable.

[12] As the dismissal of the Applicant is common cause, the onus rests upon the Respondent to prove that such dismissal was fair.[2] There is an extra and more demanding burden under Section 189A than in Section 189.[3] The parties have agreed that the referral to court has been properly brought in terms of Section 191(5) (b) (ii) of the LRA. That mutual agreement is premised on the understanding that the court *in casu* is called upon to determine the substantive fairness of the dispute. The Applicant in his referral contends that

[2] Section 192 (2) of the LRA

[3] *Woolworths (Pty) Ltd v SACCAWU & Others* (2018) 39 ILJ 222 (LAC).

his dismissal was substantively unfair.[4] Section 189A (19) which at the time was operational reads.

> "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 Section (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, structurally or similar needs;
>
> (b) The *dismissal* was operationally justifiable on rational grounds;
>
> (c) There was a proper consideration of alternatives; and
>
> (d) selection criteria were fair and objective.

[13] Whereas sub-Section 19 is since deleted,[5] it was prescriptive at the date of the retrenchment exercise. Accordingly, by reason of this sub-section read with Section 192(2), the employer bears the onus of proving that these requirements have been met.[6] The submission of the Applicant is that the Respondent has failed to demonstrate that the dismissal of the Applicant was to give effect to a requirement based on its economic, technological, structurally similar needs. Nor has it demonstrated that the dismissal was operationally justifiable on rational grounds. Further contention is that the Respondent has especially failed to demonstrate the proper consideration of alternatives and more especially that the selection criteria used in the dismissal of the Applicant were fair and objective. It is trite that these

[4] Pleadings. page 3, para 5.2 read with the pre-trial minute, bundle 5A, page 73

[5] See s33 (b) of Amendment Act Number 6 of 2014, with commencement date of 1 January 2015.

[6] F*ood and Allied Workers Union v Premier Foods Ltd trading as Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) [51]. see *Woolworths (Pty) Ltd v SA Commercial Catering & Allied Workers Union & Others* (2018) 39 ILJ 222 (LAC) [23].

requirements pertain to the substantive fairness of a dismissal.[7]

The trial

[14] The trial commenced on 6 September 2016 when the Respondent led the witness of Ms Verna Robson. On the next day, the evidence of Messrs Schalk De Bruin, Robin Kennedy and Melville Vogel was called. When the trial recommenced on 10 December 2018, the Respondent led evidence of its expert, Mr Stephen Renecle who finished his evidence on the next day. The Respondent then called another expert, Ms Tredoux and two further lay witnesses, Messrs Jimmy Stewart and Vantram Harripersad. The Respondent then called a further expert, Ms Susan Ellison. In all, the Respondent led the testimony of nine witnesses.

The evidence of the Respondent:

[15] The introduction of a split between the respective positions of Gaming Floor Manager: Tables and Gaming Floor Manager: Slots, was done. Such evidence emerged from a variety of perspectives, and with reference to a range of documents that served before the Court. That evidence consistently points to the existence of two categories of Gaming Floor Manager and it came from a number of witnesses of the respondent.

[16] The position the Applicant applied for at Respondent - Ms Robson gave unchallenged evidence – referring to the application form that appears at page 211 of Bundle 1 - that this document is the application form completed online by Applicant for the position of Tables Manager Grand West. Page 213 of Bundle 1 is Applicant's electronic application for the position of Gaming Floor Manager Tables at Sibaya. Ms Robson said that the Applicant did not

[7] *Communication Workers Union v Telkom SA SOC Limited & Others* (2017) 38 ILJ 360 (LC) [42]. *National Union of Mineworkers v Anglo American Platinum Ltd & Another* (2014) 35 ILJ 1024 (LC) [20].

apply for the position of Gaming Floor Manager: Slots – though nothing had precluded him from applying for that position, if he wished to compete for that position. She said that applicants for positions knew the distinction between Gaming Floor Manager: Slots and Gaming Floor Manager: Tables because such an election had to be made when applicants applied for the specific job. Everyone would have understood that this was the case.[8]

[17] The use of the psychometric test as an elimination tool in the context of the Applicant's retrenchment - The case for the Respondent as to the psychometric test is that, the Respondent identified certain qualifying criterion, as being minimum years as a hurdle to overcome. The psychometrics were used to rank the persons who sat for those tests and the persons that scored within that ranking the highest with reference to the number of vacant positions got those jobs. The constructs or competencies that were measured by the tests were relevant and useful for purposes of assessing and ranking the candidates for the specific positions. The tests were, in principle, the right tests for the purpose. There remained the question of whether the test results ought to have been combined with other factors. The Health Professions Council of South Africa had certified all three tests for use. The three tests utilized by Respondent were valid and reliable predictors of the constructs or factors that they measured:

> "So, the constructs that we said we identified to measure the competencies, these tests have been certified and have been, there's ample research to indicate that they are valid predictors of those constructs and that is partly why they were certified."[9]

[18] The tests were correctly administered and scored. The rankings of the candidates pursuant to the testing were not questionable. According to that ranking, the Applicant did not rank high enough to be appointed to either of

[8] See also evidence of Mr Stewart, the Human Resources Manager at Sibaya. Vol A page 133.

[9] See Renecle's evidence vol B p44.

the two positions. In relation to the position of Tables Manager: Grand West, he was placed third out of three candidates. In relation to the Gaming Floor Manager: Tables position at Sibaya he ranked 19th, with only 12 positions available. The tests were valid indicators of certain personality profiles. The personal circumstances of the Applicant were never considered as this was an objective assessment. His immediate superior Mr Kennedy confirmed that if he were to have determined the process, he would have looked at personal circumstances, saying, "If I had happened to make the decision, I would have looked at experience and other factors."

[19] The Respondent consulted extensively regarding the selection criteria to be used. The Respondent made it very clear in the presentations that employees would be ranked against their peers and the top individuals would be appointed for the particular roles that they were applying. Employees who participated in the assessment would be ranked according to the assessment scores and employees would be appointed according to their assessment performance in relation to other applicants. The originally proposed method for selecting employees formed part of the presentation of 6 February 2014.

[20] By the time of the March 2014 presentations, there were still no agreed-upon selection criteria. As part of the presentation during May 2014, the following was proposed:

> 'The final selection of successful applicants will be done according to the performance on the assessment. Successful employees will be considered based on their performance on the assessment tests and the relevant legal compliance (for example - EE, BBBEE and gaming floor licence conditions).'

[21] Nobody was confused about the selection tools that were going to be used during the process. All understood exactly what it was. The purpose of the assessment was to look at the behavioural competencies of every individual in relation to the position for which they applied. The Applicants for jobs could

fall out at any one of the proposed four stages, namely:

- stage 1 - the compliance with so-called minimum requirements;
- stage 2 - the application of assessment results;
- stage 3 - compliance with legal requirements, e.g. employment equity, broad-based black economic empowerment and gaming licence conditions and
- stage 4 - the required agreement to new terms and conditions of employment.

[22] All relevant information, such as job profiles, selection criteria and organigrams, were on the recruitment website. When it came to communicating the final selection criteria, it was left to the General Managers. A three-stage approach to selection criteria had been proposed by the Respondent, namely, compliance with minimum criteria, assessment and the acceptance of terms and conditions of employment. The final selection criteria were also placed on Sun International's intranet. After May 2014, the Respondent was no longer looking at selection criteria as a holistic picture and it was clear that the Respondent was going to look at what was objective and, through the consultation process, it was those criteria that were put in place. With reference to the frequently-asked questions and answers provided on the Respondent's intranet, the psychometric testing or assessment was not the only determining factor when selecting an employee, individuals still had to meet other criteria, such as experience and qualifications.

[23] At the time of the February 2014 presentation, psychometric testing was proposed in certain job categories, whereas in other job categories historical objective data was proposed, furthermore, in respect of other job categories,

LIFO was proposed and, lastly, there were positions proposed to be made redundant. An applicant could fall out at any one of the four stages, with reference to the presentation of May 2014, which the Applicant attended. Either minimum qualifications or experience would suffice and this happened through the consultation process. This occurred because it became apparent during the consultation process that there might be suitable candidates with all of the technical qualifications, but who lacked tertiary qualifications. The Applicant signed an attendance register when he attended the presentation regarding the recruitment and selection strategies. An attendee would be expected to know that Applicant's for jobs would be ranked. The Applicant was described as a very solid and reliable employee with quite a lot of experience in the gaming field.

[24] As a result of consultations, the Respondent decided to allow the Inspector Pitbosses to compete for the Gaming Floor Manager positions. This was around September to November 2014. By virtue of the tasks routinely performed by Inspector Pitbosses, they could realistically compete for Gaming Floor Manager positions. That being so, it would have been inherently unfair to preclude them from doing so. Had the Respondent precluded them from competing, it would have faced the cogent accusation that it had unfairly excluded Inspector Pitbosses from potentially saving their employment by competing for the Gaming Floor Manager positions.

Applicant's version

[25] The Applicant gave evidence and thereafter his expert, Ms Sonja Hill testified and the Applicant then closed his case. His was a short version. The Applicant does not complain that the psychometric tests are not valid indicators of certain personality profiles. Rather, the case presented for the Respondent does not in any way demonstrate that the tests as an elimination tool present a fair and objective selection criterion. The Respondent unfairly relied on the results of the psychometric testing in concluding that the

Applicant was unsuitable for the appointment to the position of Gaming Floor Manager at Sibaya Casino. Respondent's witnesses conceded that the personal circumstances of the Applicant were never considered. In matter of fact, his immediate superior Mr Kennedy had confirmed that if he were to have determined the process, he would have looked at personal circumstances. To quote:

> "If I had happened to make the decision, I would have looked at experience and other factors."

[26] The Respondent made the Applicant to believe that his personal circumstances would be considered. The Respondent's intranet to which the employees were directed confirmed:

> "Assessment is simply the gathering of information and the matching of evidence against a profile. The assessment information is always integrated with other critical information such as work experience and qualifications if necessary."

[27] The Respondent did not consider reasonable alternatives before deciding to retrench. Such alternatives as were put to the Applicant were unreasonable given the personal circumstances of the Applicant of which the Respondent was fully aware. His wife was also working at Sibaya, which made relocation to far places difficult.

[28] At the time of the termination of the Applicant's employ, the Respondent had available a position which the Applicant could fill. In the alternative, the Respondent was aware that there was every likelihood that such position would become available. The Respondent failed to offer such position to the Applicant, or to hold over the termination of his employment until it had ascertained whether the position in question will indeed become available, as it indeed did. Thus, the Respondent failed to take reasonable steps to ensure

the security of tenure of the Applicant and, in particular, failed to consider him for employment in and to other positions as an alternative to his retrenchment. Consequently, the Respondent failed to engage in proper planning and to act with proper foresight, which resulted in the retrenchment of the Applicant which, but for such failure, need not have occurred.

[29] Ms Sonia Hill, the expert who testified for the Applicant, advocated for a holistic assessment based on the candidate's individual competencies, experience, qualifications and the like. She classified the Respondent's chosen method as unfair. She said that the minimum criteria and the psychometric assessment should be stage one of the process, followed by the holistic appraisal of the individual based on the individual's personal characteristics.

Analysis.

[30] In the process of resolving factual disputes identified by the parties in the pre-trial process, concessions made by the applicant or lack of strong counter evidence, have reduced such disputes to a point where they are no longer seriously disputed facts. The consequence is, inter alia, that evidence of experts of the Respondent is essentially not in issue, save the question whether subjective considerations were to play any part after the results of the psychometric testing were considered.

[31] In respect of the psychometric tests, I accordingly find that:

- The psychometric tests were correctly administered and scored;

- The rankings of the candidates pursuant to the testing were not questionable;

- The tests were valid indicators of certain personality profiles;

- According to that ranking, the Applicant did not rank high enough to be appointed to either of the two positions.

- In relation to the position of Tables Manager: Grand West, he was placed third out of three candidates.

- In relation to the Gaming Floor Manager: Tables position at Sibaya he ranked 19th, with only 12 positions available.

- The personal circumstances of the Applicant were never considered.

[32] Further, I find that the positions of Gaming Floor Managers were initially split between the respective positions of 12 Gaming Floor Manager: Tables and 4 Gaming Floor Manager: Slots. Later it changed to 13 for the former and 3 for the latter. This left the Applicant with 12 chances as opposed to 16 chances in the position of Gaming Floor Manager: Tables. The Respondent received an online application form completed by the Applicant for the position of Tables Manager Grand West and for the position of Gaming Floor Manager Tables at Sibaya. The Applicant did not apply for the position of Gaming Floor Manager: Slots.

[33] The dismissal of the Applicant was to give effect to a requirement based on the Respondent's economic and structural needs as demonstrated in its presentation of March 2014 entitled "Consultation regarding the Rationale for the Proposed Restructure" and during April 2014, entitled "Consultation Regarding the Rationale for the Proposed Restructuring of Gaming and Ancillary Matters". It remains to be seen whether the selection criteria were fair and objective and whether there was a proper consideration of alternatives.

[34] The specific context within which the issue of selection arose in the present matter is that of an employer deciding to do away with a number of existing positions within its organisational structure, and to introduce a number of new positions. Pursuant to the new positions being filled, some employees were likely to find themselves without a position, and thus at risk of being retrenched, absent other alternatives. In such a circumstance, two types of situations usually arise. In *South African Breweries v Louw*[10] the Labour Appeal Court had an occasion to say:

> "[18] Typically, retrenchments result from one of two main reasons. Often, there is believed to be a need to cut costs by reducing staff; i.e. the very objective is to dismiss some staff and a decision has to be made whose posts will be declared redundant and which incumbents will be retrenched. This scenario intrinsically envisages job losses. The other main reason that results in retrenchments is the restructuring of businesses to achieve various aims related to efficiency and the like. Unlike the former example, it is not the very aim of the exercise to reduce staff numbers. However, by restructuring the way the business is to operate, the risk exists that some existing posts are no longer required because, either the need falls away or the functions are distributed among other new posts or subsumed into fewer functionally broader posts. The result is dislocation of the incumbents of such affected posts. In a restructuring exercise, the performance of an incumbent of a post is irrelevant to the declaration of redundancy. In the present case that is plainly what happened.
>
> [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."

[35] Therefore, where the other main reason that results in retrenchments is the restructuring of businesses to achieve various aims related to efficiency and

[10] (2018) 39 ILJ 189 (LAC).

the likes, it is not the very aim of the exercise to reduce staff numbers. However, by restructuring the way the business is to operate, the risk exists that some existing posts are no longer required, whatever the reason is. This is precisely what eventuated with the Respondent. In its quest to restructure its businesses to achieve economic growth and efficiency, it had to reduce staff numbers. Understandably, an employer that has created new positions in its organigram usually prefers to fill those new positions with the candidates who are most likely to optimally discharge the functions attached to the new positions. Since the positions are new, it is inevitably necessary to assess the candidates as to ascertain whether they meet the minimum requirements for the new positions. Moreover, in the event of there being more eligible candidates than available positions, it will be necessary to rank the applicants pursuant to a reliable process of assessment, to prefer the best-suited candidates to the others.

[36] In the present matter, once the Applicant failed to secure the positions of Gaming Floor Manager: Tables and Tables Manager, that failure did not automatically signify his dismissal. Instead, he was offered alternative positions within Sun International's operations, but he declined those positions. Only at the stage when those alternatives had been offered and rejected could it be said that the Applicant would be retrenched, unless further alternatives emerged. A four-step approach was thus adopted and followed by the Respondent, namely:

I. The creation of a new organigram;

II. The population of the organigram, relying on minimum requirements for the job to determine who has the requisite skills and the ranking of the applicants pursuant to a reliable process of assessment so as to prefer the best-suited candidates to the others;

III. The consideration of alternatives for all dislodged employees and

IV. The retrenchment process.

[37] The evidence of the Respondent, which I accept, is that it did not disregard qualifications, experience or other requirements. It considered such aspects very important, since they needed to be present to satisfy the technical competencies associated with the new positions. If a candidate who made a favourable impression during the interview has made the good impression on account of genuine behavioral ability, then the psychometric test should detect that ability and reward the candidate with a high score. Similarly, if many years of experience have caused a candidate to develop exceptional ability, making that candidate worthy of being preferred to others, then the psychometric testing should reflect that exceptional level of ability, resulting in a high score.

[38] If, on the other hand, the candidate is merely very good at making a good impression, or has for many years managed to do just enough to scrape without being dismissed, then the limited caliber of that candidate will be reflected in a low score pursuant to psychometric testing. Such a candidate may be lacking in intuition and ambition contributing to the very reasons justifying a restructure of the company.

[39] What was further said by the LAC in *SAB v Louw*[11] is of significance in this matter. It then said:

> "[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 and fails, and by reason

[11] (2018) 39 ILJ 189 (LAC).

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 of selecting for dismissal as contemplated by sections 189(2) (b) and 189(7).

[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 sections 189(2) (b) or 189(7). The filling of posts after a restructuring 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."

[40] Reference to 'past performance ratings' in *SAB v Louw*[12] is equal reference to the psychometric test in this case. Clearly therefore, the use of a psychometric test by the Respondent was 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 and 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. We are educated by *SAB v Louw*[13] that 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 of selecting for dismissal as contemplated by sections 189(2)(b) and 189(7).

[12] Supra.

[13] (2018) 39 ILJ 189 (LAC).

[41] When the Respondent invited the Applicant to compete for new posts in its organigram therefore did not act unfairly, still less did it transgress sections 189(2) (b) or 189(7). The filling of posts after a restructuring in this manner cannot be faulted. Further, 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.

[42] The Applicant questioned why he was not appointed as a Gaming Floor Manager: Tables, when Mr Mofokeng was dismissed. Undisputed evidence of the Respondent was that a mistake had been committed by the Respondent in not appointing Mr Harripersadh who scored 2632 thus attained position 6 and therefore scored better than the Applicant who scored 2014 and position 19 in the list. It follows that the scores indicated that Mr Harripersadh was to be preferred to the Applicant in relation to the position of Gaming Floor Manager: Tables. This is directly relevant in relation to the eventual decision by the Respondent to appoint Harripersadh to a Gaming Floor Manager: Tables position once Mr Mofokeng was dismissed. The Respondent was duty-bound to remedy the error it had made in not appointing Mr Harripersadh to such a position at the outset.

[43] Finally, the Applicant was asked to consider accepting the positions of Gaming Floor Manager: Slots at the Respondent's Morula or Sun City Casino's, or the position of Shift Manager: Tables at the Wild Coast Sun Casino. The Applicant declined these positions. He did not indicate why relocation would be unreasonable. It is not uncommon for members of the family to split their residence to the convenience of their place of work. In relation to some posts, he might have to take a salary cut, which while it would be unpleasant, it was not demonstrated to be unreasonable offer. This is not a case of retrenchment consequent upon unfavourable results of a psychometric test. It is a retrenchment case following a refusal to accept alternative job offers.

[44] In the premises, I make the following order:

I. The dismissal of the Applicant by the Respondent in this matter was in all respects fair.

II. The claim of the Applicant is dismissed.

III. No costs order is made.

_____

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT**:** Advocate I Pillay SC

Instructed by Andrew Inc. Attorneys

FOR THE RESPONDENT: Advocate B van Zyl

Instructed by van Zyl Rudd Inc**.**