



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case No: CA 11/20

In the matters between:

FRED ENGELBRECHT

Appellant

and

THE DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

THE MINISTER OF CORRECTIONAL SERVICES

Second Respondent

THE NATIONAL COMMISSIONER OF

Third Respondent

CORRECTIONAL SERVICE

THE MINISTER OF LABOUR

Fourth Respondent

THE PUBLIC SERVICE ASSOCIATION (PSA)

Fifth Respondent

M C BREAKFAST

Sixth Respondent

J KLAAS

Seventh Respondent

A TSETSANE

Eighth Respondent

T MOKOENA

Ninth Respondent

Heard: 25 August 2022

Judgment: 15 September 2022

Coram: Waglay JP, Sutherland JA and Kathree-Setiloane AJA

JUDGMENT

SUTHERLAND JA

- [1] Disputes that reach a court of law succeed or fail depending on whether the case sought to be made out can be proven. It is not always within the reach of an aggrieved litigant to know all the relevant facts. Often the facts known to a litigant and are provable are not sufficient on their own to perfect the case pleaded. In such cases, success is dependent on teasing out evidence from the adversary's witnesses, or from their documents, and building up a thesis founded on inferences that, when assessed holistically, provides the substratum of a proven case. In this case, that threshold was not reached.
- [2] This case is about the unhappy, and in several respects, tragic experience of Mr Fred Engelbrecht to advance in a career in the Department of Correctional Services (DCS) to which he dedicated his entire working life. After many years of exemplary service, and having been recognised as a fine officer reaching the rank of deputy regional commissioner, Western Cape, his advancement stalled. He, together with several other persons, were interviewed as a candidate for regional commissioners' posts throughout the country. The outcome of the interview was that the interviewing panel found him 'unsuitable' to be promoted to a higher rank. This was also the fate of most of the other candidates, save for Mr Breakfast, who was found to be suitable and promoted to regional commissioner, Eastern Cape. The other vacant posts were left vacant, among which was the Northern Cape/ Free State post (NC/FS) for which Mr Engelbrecht had been specifically shortlisted.

- [3] After leaving the posts for NC/FS, Gauteng and Limpopo vacant, the DCS decided, with ministerial authority, to seek fresh candidates from outside the DCS. This was undertaken in a process glibly styled as “head-hunting”. This label is dangerous because it can be used in more than one way. The original meaning related to giving a specification to a personnel recruitment firm and leaving it entirely to that firm to exploit its own confidential sources of connection within a commercial sector to seek out a notional ideal candidate. However, the sense in which it is used here seems to be no more than an external recruitment process with the aid of an auditing firm, Deloitte, who did the legwork on producing persons supposedly appropriate to consider for the regional directors’ posts. This exercise produced several candidates who were interviewed by a panel of public officials which included the commissioner of the DCS and two cabinet ministers. Appointments of persons followed. Axiomatically, none had any prior experience in the DCS, the very premise of the headhunting exercise; what was sought was a particular managerial expertise and not experience in the DCS.
- [4] There was some debate about whether different criteria were used to vet the internal candidates, inclusive of Mr Engelbrecht, and the external candidates in the head-hunt. This is an irrelevance. By definition, the criteria could not be the same, save in one crucial respect. The reports of the internal interviews which contain the recordal of the reasons why the several candidates were declared unsuitable all speak to a common theme – the need for the candidate to exhibit an ability to function at a high managerial level in the implementation of DSC policy which hitherto had been stalled through inadequate action. Although not expressly stated, it is plain that this perspective was an implicit criticism of the previous incumbents of the vacant posts. The persons being sought were expected to show the acumen to promote the policy initiatives, ostensibly not shown by their predecessors. Plainly, the mandate to Deloitte was to provide a shortlist of persons who *prima facie* exhibited the talents required. Also, significantly, the personal attributes of a candidate that could evidence the skills-set sought after would be recognisable only through a qualitative assessment. The mandate to the members of the panel who interviewed the candidates could not, therefore, be based on a set of tick-box criteria, but rather,

involved an exercise in judgment based on impressions created by the candidate in the exchanges which would take place in the interview.

- [5] This is the relevant context in which Mr Engelbrecht articulated his grievance about not being recommended and not being promoted to the NC/FS regional director's post. His case is twofold: first, his race as a Coloured person explains his non-appointment, alternatively, it is explained by a designed and corrupt plot led by the national commissioner to manufacture vacancies that could not be filled internally so that an external exercise could be followed in which nepotistic and political loyalist considerations would dictate the selection of the appointees.
- [6] The crux of this appeal is whether the court *a quo* was presented with evidence that justified such an outcome.
- [7] The court *a quo* is, in my view, correctly to be criticised for adopting the view that the case could be decided by an evaluation of the internal interviews phase only and that the head-hunting phase was irrelevant. The error lay in the stance that Mr Engelbrecht did not compete against Mr Klaas who got the NC/FS post. However, that comparison was an irrelevant factor; the true relevance of the head-hunting phase was its evidential value, if any, in the course of a holistic appreciation of the case, and whether inferences could be drawn from that later episode which could colour the assessment of the integrity of the internal interviews. However, even on the premise that the court *a quo* was in error on this aspect, it does not follow that the body of evidence about the second phase did actually make a material difference to the result.¹

¹ A misdirected debate ensued about the effect of the judgment in *Solidarity v Department of Correctional Services* (2016) 37 ILJ 1995 (CC). This is the decision about race discrimination which held that in a EEP, regional demography is relevant, and the use of national demography alone was unlawful, being the very EEP 2010-2014, used by the DCS in this case. In dealing with several individual aggrieved employees, relief was granted to all except Mr Jonkers. His case failed the race discrimination claim because he had failed to be selected in the first place, in contrast to all the others. Because the EEP was applied only post-selection, in that case his claim was said to be unsustainable. A similar staged process was applied by the DCS in this case. In any event, the reference to the peculiar circumstances of Mr Jonkers in that case was a finding of fact not the laying down of a principle.

- [8] The first leg of the case is to decide whether there was racial discrimination. That proposition simply has not been proven. The race discrimination case could only begin to gain traction if every coloured person was rejected. Despite the perspective held by Mr Engelbrecht on this aspect, the body of evidence adduced by him offers no cogent, concrete and persuasive evidence that the internal interviews were manipulated with racial discrimination as the target. It is true that the commissioner's view, and by extension that of the DCS, on the application of employment equity was detrimental to Coloured people in general who were domiciled in the Western Cape and the Northern Cape provinces, places where the numerical preponderance of Coloured people is higher than the average for the entire country. Their view was shown to be wrong five years later when in 2016 the Constitutional Court held that regional demographics were indeed relevant. However, the conventional wisdom in 2011, including, regrettably the decisions given in this Court, were supportive of the wrong premise. It is a necessary part of Mr Engelbrecht's case that the internal interview panel was, on the issue of race, *mala fide*. However, that inference cannot be drawn in the context of all the evidence.
- [9] The alternative case put up by Mr Engelbrecht was that he was, *ad hominem*, targeted for exclusion. This case was premised on his visible resistance to the use of national demography in the Equity Employment Plan (EEP).
- [10] There are a number of common cause facts which are consistent with such a thesis. However, more than correlation of some facts is necessary to demonstrate that, on the probabilities, there was a motive and rationale to victimise Mr Engelbrecht which was acted on by the DCS. The issue does not turn on the onus, as suggested, because the proven facts were all common cause. The question, rather, is located in the universal enquiry in every trial; in this instance - can these proven facts be interpreted to mean that the thesis of personal discrimination is the most probable explanation? Regrettably for Mr Engelbrecht, they do not.
- [11] There are allusions in the evidence that there are other people who could have made important material contributions had they come to testify. This Court

cannot take account of anything not on the record. Were it to be so that what was unsaid might have changed the outcome, any discomfort with the result must be attributed to the strategic decision not to present that evidence, not to the outcome reached. The process of the courts must be true to the courts' commitment to uphold the rule of law.

- [12] I deal with the leading aspects of the evidence which could plausibly be argued to correlate with Mr Engelbrecht's thesis.
- [13] First, there is the fact that he and the national commissioner were at loggerheads over the use of regional or national demographics to apply the EEP. It is plain that a sour relationship developed. That manifested itself by the spiteful decision to deny Mr Engelbrecht the opportunity to act as regional commissioner when the incumbent was absent, a role he had routinely fulfilled in the past. Given the fact that the need arose to appoint four regional commissioners at the same time when the DCS was in a policy developmental stage concerning employment equity, this clash is a salient factor which casts a shadow over the relevant events.
- [14] Second, it is notable that every candidate declared unsuitable failed on the same theme: an inability to articulate a coherent grasp of the policy imperatives and how they might be implemented. Is it odd they all tripped over the same step?
- [15] Third, when the fruits of the head-hunt are examined what is revealed is telling. The extreme example to which I confine this narration is that of Mr Klaas, who got the NC/FS regional commissioner post for which Mr Engelbrecht had been shortlisted. Mr Klaas is a much younger man who has no degree whilst Mr Engelbrecht has an Honours degree. Moreover, his CV discloses that he is an ANC insider, at various times an employee of the ANC, later assistant in one or another capacity to political officer bearers or heads of state departments, and immediately before his selection for the regional Commissioner's post, was the political adviser to the Premier of the Free State. In addition, he was the brother of the Chief Operations Officer of the DCS, Ms Joligona. He is classified as

'African'. To finesse the perspective held by Mr Engelbrecht, six months later when the Regional Commissioner's post in the Western Cape fell vacant, Mr Klaas was transferred to fill it, thereby blocking any prospects that Mr Engelbrecht as the deputy regional commissioner might have nursed.

[16] What do these facts offer? It is plain that they are consistent with the thesis advanced by Mr Engelbrecht, but are also compatible with alternative innocent explanations. The Commissioner's disenchantment with Mr Engelbrecht is not proof that he suborned the rest of the panel to rubbish Mr Engelbrecht. The fact that several internal candidates were all excluded on the same premise is also explicable by the consideration that the echelon of senior staff were all equally at sea over the innovations to be implemented, their prior experience not usefully preparing them for the novelty of the new vision. Mr Klaas's connections, personal and political may indeed raise an eyebrow, but there is no basis to conclude that nepotism is the most probable explanation for why he was chosen. He may have been an exceptionally capable manager regardless of his affiliations. There is no suggestion he was anything less. In all of these examples, a fair analysis leads to the conclusion that the case advanced did not reach beyond a suspicion.²

[17] In the result, despite the reek of something sinister, the body of evidence is not conclusive and the second leg of the case must also fail.

[18] Accordingly, the appeal must fall to be dismissed.

[19] In the circumstances of the case it is our view that no costs order should be made.

² There was also a view that Mr Mokoena, who was headhunted and was appointed to the Gauteng Post and then, only a few months later, was to be transferred to head office, and about two years after that be transferred to another state department of which the national commissioner had been moved to become its head, all constituted an indication of nepotism. Again the suspicion, which is weak in any event, does not reach the threshold of proof of the thesis.

Order

The appeal is dismissed.

Sutherland JA

Waglay JP and Kathree-Setiloane AJA concur

APPEARANCES:

FOR THE APPELLANT:

D Groenewald

Instructed by Serfontein, Viljoen and Swart

FOR THE RESPONDENT:

M Moerane SC, with him B Lecoge SC

Instructed by the State Attorney