

**THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN
JUDGMENT**

Not Reportable

CASE NO: C1069/2010

In the matter between:

RAYMOND HOPLEY

Applicant

and

GIJIMA AST (PTY) LTD

Respondent

Heard: 30 January 2012

Decided: 09 March 2012

JUDGMENT

RABKIN- NAICKER, J

Introduction

- [1] Mr Raymond Hopley (Hopley) was retrenched by the respondent company on 12 July 2010. He seeks an order declaring his dismissal to have been substantively unfair and that he be reinstated and/or awarded compensation

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to the maximum amount provided for in the Labour Relations Act No.66 of 1995 (the LRA).

- [2] Hopley was credited with 25 years and three months of service with the respondent company, having been subject to a section 197 transfer. He was retrenched in terms of a process regulated by section 189A of the LRA.
- [3] In terms of section 189A of the LRA the court can find that the applicant 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;
 - (c) there was a proper consideration of alternatives; and
 - (d) selection criteria were fair and objective.”
- [4] This case turns on whether selection criteria were fair and objective. I note that a material issue in dispute recorded in the pre-trial minute was respondent's allegation that all the candidates for posts in the new structure established in the Western Cape were subjected to ‘an objective scoring process and interview’.

Background

- [5] At the time of his dismissal, Hopley occupied a senior position, that of Operations Manager. His remuneration package was R 45,617.42 per month. It was common cause that there had never been any problem with his work performance during his years with the respondent. He was employed in the Distributed Computing Services component of the respondent (DCS) in the Western Cape.
- [6] It was also undisputed that there was not enough work to justify the number of employees in DCS in the Western Cape. On 6 May 2010, respondent called a

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meeting of the employees affected by possible retrenchment advising them of a proposed restructuring to follow. A presentation was given to them depicting how a new structure would look and the posts available in it. The employees were told that the consultation period would last for 60 days and end on 12 July 2010.

- [7] In a notice of restructuring given to the affected employees, the company set out the proposed method of selecting candidates for the posts in the new structure. The document stated that:

“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 in the course of the consultations by you. The criteria the parties then agreed to will be used to identify those you (sic) might be affected by the possible retrenchment.”

- [8] It was common cause that none of the employees took any issue with, or disputed the proposed new structure, nor were additional selection criteria proposed. As a result of the restructuring, there were a reduced number of positions available. Applicant specified the posts of Client Services Manager (CSM) financial sector and Availability Services Manager (ASM) financial sector in his application for a post in the new structure. There were 11 applicants for the CSM positions and 14 applicants for the ASM positions.

- [9] After the interviews were held and on 28 May 2010, Hopley was advised that he had been unsuccessful in his application for a position in the new structure, and that the next step in the restructuring process was that alternative positions would be sought for him in the respondent as a whole.

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- [10] His curriculum vitae was sent to respondent's human resources department on 6 July 2010 informing them that he was affected by the recent DCS restructuring. On 12 July 2010, Hopley was informed that his employment would terminate on 12 August 2010.

Evidence on behalf of the Respondent

- [11] The respondent called two witnesses. Mr Hendrick Stephanus Strydom, (Strydom), divisional human resources manager at the Johannesburg headquarters of the respondent, was a member of the four member interview panel. In his evidence in chief, he dealt with the question of the selection criteria applied, and stated that each position advertised had specific requirements in terms of skills, qualifications and years of service which were elaborated in the advert. According to him the panel, two of whom were from Western Cape management, conducted "normal" interviews and discussions with the candidates, and then they ranked them in posts in the new structure in which they felt they would be best suited. The adverts had been put out on the intranet in the Western Cape only.
- [12] He testified that all the shortlisted candidates, including Hopley, could do the work required for the posts. The panel had to select the best candidates for the posts based on the interviews. After the panel had interviewed the candidates and ranked the top three for each of the available positions, there was a further discussion, and some changes were made as to their placement.
- [13] The explanation given by Strydom as to the process whereby selection took place was that decisions were made based on how people fitted the criteria, and around the normal interviewing process. The applicant had not interviewed well. He had been ill-prepared and his answers were not to the point.

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- [14] Strydom also dealt with the issue of alternative positions offered to the retrenchees. He said that he had heard that the applicant had turned down a position in Gauteng. Under cross-examination, Strydom initially testified that the selection criteria used did not include years of service- the applicable criteria were the minimum requirements indicated in the job specifications. The issue of the applicant's 25 years and three months of service was not in the minds of the panel. Pressed on the fact that "years of service" was contained as one of the criteria in the document presented to the affected employees, Strydom conceded that "years of service" was a factor to be taken into account.
- [15] Strydom also agreed that one of the successful applicants Mr Skulk Visagie, (Visagie) who was appointed into the position of CSM for the retail sector, and who had been an availability services manager (ASM) reporting to the applicant in the Sanlam account, had less than one and a half years of service. He had no knowledge of the length of service of a Mr Ernst Voordrum, (Voordrum) appointed as ASM for Sanlam, but agreed that it could have been about seven years.
- [16] Pressed on the nature of the selection methods used by the interviewing panel, Strydom conceded that there was no scoring process nor was there a process of comparing years of service of the applicants. He explained that questions were asked, and each candidate was asked about their experience. When questioned about whether Visagie was asked about his experience in general business management, Strydom said he could not remember if he was asked that specific point because they did not interview "bullet by bullet".
- [17] Strydom further testified under cross-examination that some interviews were 45 minutes in length. He could not recall whether the applicant's interview lasted 25 minutes, but that if it had it was because the panel felt that they had all the information they needed. When it was put to Strydom that there was no formal scoring and that the panel did not go through a proper comparative evaluation in

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selecting the candidates, weighing up the criteria in a proper systematic way, Strydom did not agree. He stated that although there was no scoring, the panel had gone on the impression the candidates made in the interview and their track record. The candidates whom the panel had measured against Hopley were better than him.

- [18] Under re-examination, Strydom confirmed that although Hopley had specified only two positions in his application letter, they had interviewed him on the basis that all the ASM positions were available. Regarding the length of applicant's interview, he remarked that a candidate should do 80% of the talking which didn't happen because the applicant had not elaborated and this was the reason for the short interview. Strydom denied that cost to company of the applicant's package was any consideration in the decision to retrench him.
- [19] The second witness called by the respondent was Ms Marena Uys, (Uys), HR consultant for the respondent based in the Western Cape. She testified that she was involved with the administration of the retrenchment consultations, and logistics around the interviews. She attended the presentation on the new structure made to the employees. It was agreed that there would be adverts for the posts in the new structure and all the employees could apply. The issue of bumping was never discussed.
- [20] Uys testified that the adverts had been compiled by management. She could not say whether years of service of the applicants had been considered by the panel as she was not on the panel. She knew that of the successful candidates, Ian van Staaden (van Staaden) had about 18 years of service, Barbara Hare had about 20 years and Visagie had been appointed in 2008. Regarding her involvement in the preparation for the interviews she stated that: "I was the post box". Her colleague at head office sent the applications to her and she forwarded these onto the management team who decided who was shortlisted. Under cross-

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examination, she agreed that the proposed method of selecting the candidates included years of service with the respondent.

- [21] Uys referred to an e-mail dated 6 July 2010 she had sent to Respondent's HR management consultants regarding possible alternative positions, attaching Hopley's CV and stating that he had been affected by restructuring. She said she had done this with all the affected employees.
- [22] She further testified that she had seen by means of respondent's intranet that there was a position available in the ABSA account in Johannesburg and had phoned Hopley and asked him if he seen it. Hopley enquired where it was but said it was not suitable because it was in Johannesburg. She stated that he had made it clear he was not interested in a position in Johannesburg.
- [23] Under cross-examination, she agreed that van Staaden who was appointed as CSM, had been a customer services coordinator before. She could not comment on his experience in business management because she was not part of the panel. Regarding the telephone call she made to applicant about the ABSA account position in Johannesburg, she said she could not recall that he told her had a daughter in matric at that time and couldn't move to Johannesburg at the moment. She stated that it was two years ago and she could not remember the conversation exactly.

Hopley's testimony

- [24] Hopley testified that he had had 10 years of experience as an ASM before he was promoted to the operations manager function in the old structure. Van Staaden was not engaged in management and had played a pure customer services coordinator function. Visagie had reported to Hopley as ASM in the

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SANLAM account. He had mentored and coached Visagie as part of his responsibilities and there was a wide area of development needed by him.

- [25] Hopley further gave evidence that he had been headhunted by management in March 2009 to apply for the operations management position, he had held prior to the retrenchments. In that position ASMs had reported to him. He was successful in the application as opposed to other candidates such as Voordrum. He was very experienced as an ASM. He knew of nobody who had longer service as an ASM in the region.
- [26] Regarding the telephone call from Uys, she had mentioned that there was a position advertised on the intranet in the ABSA account in Johannesburg. At that time due to personal circumstances with his children he couldn't apply. His daughter was in matric. He stated he would have considered any other options in within the Western Cape.
- [27] Hopley said that he did not consider the panel to be 'external', he knew all the people on it and two of them were from management in the Western Cape. It was difficult for him to believe that he was unsuccessful based on his experience and history in the company. He had asked Mr Lange who was on the panel to make the scoring available to him and he was told that he could not do that. He knew that the company was under financial pressure in the region and could only guess that he was retrenched because he earned a big salary.
- [28] He testified that he had recently found employment and was currently serving a probationary period of three months as a service delivery manager earning R23,000 per month, half of his old salary. He sought reinstatement and compensation.
- [29] Under cross-examination Hopley emphasised that he did not have a problem with the new structure proposed by the respondent, but with the way the selection

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criteria were applied. He still had no insight into how the selection panel did their work. His understanding was that years of service would have an impact. He stated that looking at who was appointed to the posts, he could not believe that the panel looked at the skills of the individuals concerned for the benefit of the company. It was difficult for him to accept that he had a bad interview and was ill-prepared. He had been through many interviews.

- [30] It was put to Hopley that he had an opportunity to apply for the Johannesburg job and that it was unreasonable to him to refuse to accept a new position. He reiterated his testimony in chief in this respect. It was put to him that his severance package was very high and that this belied his argument that he was retrenched because he was being paid a higher salary than others by the company. Hopley replied that retrenchment is a one-off and the respondent would have got a return in the second year after his retrenchment. His retrenchment package was thus a cost saving to them.

Evaluation

- [31] Based on the material dispute between the parties in this matter, I must consider whether the dismissal of applicant was for a fair reason taking into account the provisions of section 189A(19) of the LRA, and in particular, whether the respondent has met the onus of proving that "selection criteria were fair and objective" (189A (19) (d)).
- [32] The cumulative requirements for substantive fairness set out in Section 189A of the LRA, which deals with large scale retrenchments, fall to be distinguished from those contained in section 189(7). 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. No such distinction is found in section 189A. Simply

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put, to pass muster, the selection criteria applied in large scale retrenchments must be fair and objective.

[33] In an article dealing with corporate restructuring, Prof Alan Rycroft has noted that:

"The Code of Good Practice: Dismissal warns of the use of subjective selection criteria when it says: 'The less capable these criteria are of measurement against objective standards other than the opinion of the person making the selection, the less likely they are to be fair. The less objective the proposed criteria for selection, the more important the obligation to consult over selection criteria becomes.' It remains my contention that the criteria for appointment to the restructured position have to be clear and transparent. The tendency to use vague, subjective criteria, such as 'team player', 'adding value to the company' and 'corporate fit' are vague and often subjective. The vaguer the criteria, the more likely it is that in reality the selection committee is really relying on each applicant's track record and reputation within the company, often viewed through the subjective lens of a supervisor or colleague."¹

[34] It is not necessary for me to consider whether there was in fact an ulterior motive for the non-appointment of Hopley to one of the posts available. This is because no discernible objective criteria were used to select the candidates on Respondent's own case. It is therefore unsurprising that no scoring took place or that, as Strydom put it, there were no 'bullet point questions' put to the candidates.

[35] The method of selection on respondent'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 respondent and reflected in the pre-trial minute. I find therefore that the dismissal of applicant was substantively unfair.

¹ Rycroft. A. "Corporate restructuring - applying for your own job" 2003(24)ILJ 68 at 73-74

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[36] Hopley seeks reinstatement into the employ of the respondent with no loss of benefits. Respondent submits that it would be impractical to reinstate the applicant given the restructuring, and the fact that Hopley's old position was in effect made redundant. I note that the only reference to the current financial health of the respondent's Western Cape operation in evidence, was to the effect that after Hopley's retrenchment, Gerhard Lange the regional manager that headed the first restructuring was also retrenched.

[37] In *Equity Aviation Services (Pty) Ltd v CCMA and Others*² the Constitutional Court held that:

"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....."

[38] In this matter, it is undisputed that the post that applicant occupied was abolished in the restructuring. It is not possible therefore to restore the employment contract. I am therefore of the view that compensation is the appropriate remedy in this matter. On the issue of compensation, respondent argues that given the severance package awarded to applicant of R532 310.59 (being 2 weeks for each completed year of service, and amounting to an amount equal to 11.66 months), that he should not be entitled to compensation at all. This submission takes no account of section 195 of the LRA which provides that:

"An order or award of compensation made in terms of this Chapter is in addition to, and is not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment".

² (2008)29 ILJ 2507(CC) at para 38

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- [39] There is no evidence to suggest that the two week per year of service severance paid to retrenchees was effected in terms of a contract of employment, or collective agreement. In terms of the BCEA, the applicant would be entitled to one week salary per year of service. Respondent has calculated that applicant's severance pay equalled 11.66 months of salary. For the purposes of my order, I therefore take into account that applicant has received equivalent to 5.83 months of salary as part of his severance package.
- [40] I do not take into account the fact that applicant indicated he was not interested in the position on the respondent's intranet based in Johannesburg. It was not respondent's evidence that he was offered that position, merely that he was informed that it was vacant.
- [41] Given the extent to which the respondent failed in its duty to apply fair selection criteria, the long service of the applicant and his efforts to mitigate his loss, I consider it just and equitable to award him an amount of six months compensation for his unfair dismissal.
- [42] I see no reason why costs should not follow the result.
- [43] I therefore make the following order:
1. The dismissal of the applicant was substantively unfair;
 2. The respondent is ordered to pay the applicant an amount equivalent to six months of his salary at the time of his dismissal;
 3. Costs to be paid by the respondent.

RABKIN-NAICKER J

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Date of Hearing: 30/1/2012

Date of Judgment: 09 March 2012

Appearances:

For the Applicant: Louis Van Zyl Attorney

For the Respondent: Snyman Attorneys

LABOUR COURT