



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 305/13

SOLIDARITY obo MEMBERS

Applicants

and

DENEL (SOC) LTD

Respondent

Heard: 20 February 2014

Delivered: 9 April 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] Solidarity approached the Court to contest the fairness of the retrenchment of its members viz, DH Treeby and PJTE Venter by the Respondent. At the commencement of the trial, the Court was informed that Treeby had withdrawn from this matter, and that the dispute only concerned Venter. Displeased at this turn of events, which the Respondent only became aware of some two days prior to the trial, it was indicated on its behalf that it would pursue wasted costs in respect of preparations regarding Treeby's claim.

Background and common cause facts:

- [2] Following the retrenchments of the individual applicants, the dispute was initially referred to the Commission for Conciliation, Mediation and Arbitration. Attempts at conciliation failed resulting in a certificate of outcome being issued and this matter being brought before this Court.
- [3] Venter commenced her employment with the Respondent on or about 27 February 1998 until 7 December 2012 when her services were terminated due to operational requirements. At the time of the termination of her services she was employed as an HR Consultant. The basis of her claim as captured in the parties' signed pre-trial minute is that her retrenchment could have been avoided, as the Respondent neglected to explore appropriate alternatives.
- [4] It was pointed out on behalf of the Respondent that its correct citation is 'Denel (SOC) Ltd' and not 'Denel Group (Pty) Ltd'. For the sake of expedience, and it not being disputed that this was the case, the Court has accordingly corrected the Respondent's citation. The Respondent is a state owned company consisting of various divisions, viz, Denel Dynamics (Missile division), which is its largest part of the business, and Aviation Division. Venter was employed in the Denel Dynamics Division.
- [5] A decision was taken in July 2012 to restructure the Respondent's business based on economic and technological needs. Consultations were held between management and organised labour including Solidarity, NUMSA and UASA. The retrenchment process was finalised, including an agreement on the selection criteria. In selecting individuals for posts available, an agreed criterion was used in evaluating them with scores being tallied and compared. Venter's overall rating score was found to be low. She had appealed, and following evaluation of the procedural and substantive fairness of the evaluation outcome, it was confirmed that she lacked the necessary skills identified as strategically important for the new structure. When no alternative positions could be found she was then retrenched.

- [6] As further captured in the pre-trial minute, the applicants do not dispute that there was a general need to entrench. It was common cause that the retrenchment took place throughout the Respondent's divisions. Venter however contends that the retrenchment was procedurally unfair. Venter according to the pre-trial minute does not contend that there were alternatives to the retrenchment as there are different skills required and applied in the Respondent's business. She however contends that she should have been considered or invited to apply for alternative positions.
- [7] Venter further contends that the selection criteria were given a certain weight, which did not truly reflect the importance of certain skills in the workplace. In the same vein it is conceded that the selection criteria as agreed upon was fair, but that the manner in which it is applied was unfair. Venter alleges that another employee, Ayanda Mkatini should have been selected for retrenchment instead. Lastly, no dispute is raised in regard to the process leading up to the retrenchment, it being acknowledged that meetings took place in that regard.

The issues for determination:

- [8] The issue for determination is whether the selection criteria was applied fairly and correctly, taking into account Venter's scores, and as opposed to those of Mkatini, and whether the retention of most competent skills was afforded enough weight when the selection criteria was considered.

The selection criteria as applied and disputed:

- [9] It was not disputed that a fair and transparent panel of multi-skilled, senior personnel were used to evaluate the employees based on the selection criteria as agreed, which was as follows;

9.1 Mandatory normal retirement (>65 years without a package);

9.2 Retention of strategically important skills;

(a) Retention of most competent skills as per job specification;

- (b) Retention of most competent skills as reflected above will take precedence over each of the other selection criteria;

9.3 Due Consideration to the Denel Employment Equity Plan not to prejudice the ACI percentages per department;

9.4 Termination of short-term/fixed term contracts (short terms = < 12 months) of termination dates, without package;

9.5 LIFO.

Venter's rating:

- [10] The criteria of LIFO was not an issue in this case. The Respondent acknowledged Venter's years of service, experience and qualifications in applying the selection criteria and the fact that she scored high on these areas in her evaluation. She was however compared and rated against three other HR consultants. Even though initially Mkatini was not compared or rated as an HR Consultant as her main job output was that of HR Administration, when the two were compared and evaluated against each other, Venter's score was 30 as compared to Mkatini's 36.

The evidence:

- [11] This matter in my view should be disposed of based solely on the evidence of Venter, more specifically in the light of her concessions under cross-examination. However for the sake of completeness, the evidence of witnesses called upon by the Respondent is summarised in order to place Venter's claim in perspective.

- [12] The evidence of Jasmina Keshwar, the Respondent's Executive HR Manager and Transformation (Denel Dynamics) was useful in pointing out that Denel Dynamics took over the HR Consulting contract to another division (DeniProp, which is the Respondent's property owning company. Venter's position as HR Consultant consisted of three parts, viz, HR Consulting for DeniProp at the Irene campus (40%); Skills development in respect of apprentice contracts for DPS (35%) and Industrial Relations (25%). This position however became

redundant as a result of Denel Dynamics taking over the HR Consulting contract to DeniProp. The fact that Venter's position had become redundant as a result of this restructuring was not placed in dispute. Keshwar further added that ratings were done by looking at individual's curriculum vitae and skills. She conceded that Venter's performance assessment was not looked at.

[12] Natasha Davies is employed as the Respondent's Group HR and Transformation Executive and Keshwar reported to her. She was involved in the restructuring process. The Respondent has offices in Irene and Kempton Park. After the integration of divisions, some offices of the Respondent scaled down whilst some of individual employee's functions were integrated in other offices. Davies further testified that there were four candidates for three HR positions available after the restructuring process. Mkatini was not at that stage compared with other HR Consultants as her position as HR Administrator was not affected then.

[13] Davies had participated in the appeal evaluation and had explained Mkatini's position during that evaluation process after Venter had raised that as an issue. Thus Venter could only be compared and evaluated against other employees and candidates whose functions were HR related. Areas looked at in the evaluation process included minimum years of service and each candidate's role. Davies under cross-examination conceded that the panel that did the ratings looked at CVs and did not work with Venter. She further conceded that performance assessment was not taken into account when ratings were done. In regards to a position of PA, which was raised as an alternative to retrenchment, Davies' response was that this was not considered, as Venter had not shown any interest in it.

[14] Thulani Mahlinza is employed as the Executive HRM for Denel Land Systems, and his division was equally affected by the retrenchments. He had sat on the appeal panel and had evaluated Venter and Mkatini on the basis of the agreed criteria, job descriptions, and CVs. The line managers of the individuals were also called upon to sit in these evaluations, as the CVs on their own were not sufficient for the purposes of a fair evaluation.

- [15] Rani Padayachee is the General Manager at the Denel Tech Academy, and Venter reported to him from 2009 until December 2012 in his capacity as HRM, DeniProp. As a result of the integration of Denel Personnel Solutions into Denel Aviation, DenelProp reverted into Denel Dynamics and 40% of the HR functions fell away. Venter's role in Industrial relations became redundant. As she was a HR Consultant, her role had to be compared with other HR consultants in Denel Aviation. Padayachee was consulted and had given his input on the selection criteria. Venter had scored low as compared to other candidates. Her score in relation to the minimum required competencies/skills critical to execute outputs (i.e. inherent job requirements/demonstrated ability) was 28 as compared to others who had scored 31 and 30. He also confirmed that Mkatini could not be included in the comparisons as she was responsible for HR functions at DeniProp.
- [16] Padayachee further testified that Venter was not keen on a position related to data capturing as she viewed it as demeaning. Venter's qualifications were more specialised and suitable for Industrial Relations duties, whilst Mkatini's was relevant for the purposes of HR Administration or consulting. He conceded that Venter had more experience but this was not sufficient to assess whether she added value to the company, as compared to Mkatini, whose qualifications were relevant, had performed HR functions and enjoyed a good relationship with other employees and external clients.
- [17] Venter testified that she had 24 years in the field of HR, with 12 years in administration and 12 as HR Consultant. Since the dispute is more in relation to the manner of evaluating her as against others in ultimately deciding whether the selection criteria was fairly applied, her contentions in this regard were as follows;
- 17.1 The individuals who evaluated her and other candidates did not know them and did not ask her in particular to make representations before coming to their conclusions.
- 17.2 The evaluations were done on the basis of CVs that were currently in their files. Her CV at the time was in summarised version and had she

been advised that her CV was to be used for her evaluation, she could have re-submitted a detailed one.

- 17.3 Her evaluation was not signed off by Padayachee and the Managing Director as her direct superiors. Furthermore, despite having scored high in her performance appraisal, this was not used in evaluating her.
- 17.4 In terms of qualifications, Mkatini had recently completed an HR Management course, and had not completed her diploma. Mkatini only had one year experience in consultancy.
- 17.5 The fact that she was suitable for another position in Bredarsdorp was not considered, nor was she invited for consideration for that position despite having submitted an application. She was only made aware of that position by an external source, and she holds the view that given her experience and qualifications, the position would have been suitable for her. There was also another position of HR Business Partner in Pretoria at the Denel Dynamics division, and she was not informed of it nor invited to apply.

Evaluation:

[18] It needs to be said at the onset that Venter's case however collapsed under cross-examination as can be gleaned from the following concessions made:

- 18.1 Her position and job specification was different to that of Mkatini. They performed different tasks, and the other three HR Consultants she was compared with also had different job specification to hers.
- 18.2 She did not dispute that her position had become redundant even though her contention was that this was not applicable within the whole of Denel, and that she should have been moved to another unspecified division. She however conceded that redundancy justified retrenchments in the absence of alternatives.
- 18.3 She had complained that no interviews were held in terms of selections and retrenchments in respect of all candidates, and contended that the

Respondent should have held such interviews. She ultimately however conceded that there was no obligation on the Respondent to hold interviews, as management knew the affected individuals and gave input in that regard when evaluations were conducted, and further that no interviews were held with the other individuals she had competed with.

- 18.4 Her source of discontent was the ratings she had received, more especially as she was not compared with Mkatini. This was despite having conceded that her job specification was different to that of Mkatini.
- 18.5 She conceded that notwithstanding her protests, she was compared with Mkatini¹, and that she had obtained 2 exceptional scores as against 7 obtained by Mkatini. In this regard, she further conceded that Mkatini had scored better than her at 36 as compared to her rating of 30. She further conceded that the evaluating panel was independent, and that four individuals who had assessed her had concluded that her scores should be low. She further conceded that she had appealed and the outcome of that appeal was that Mkatini was a better candidate.
- 18.6 She further conceded that she obtained her BA degree late in her career and that only its labour law component was relevant when evaluated. In regards to the failure to take her performance appraisal into account, she also conceded that even if reliance were to be placed solely on her performance appraisal or even jointly with her CV, Mkatini would still have rated above her.
- 18.7 In regards to the position of HR Business Partner, she conceded that she was not invited to be considered, as she did not meet the entry level requirements.

[19] Despite the best efforts made in the applicants' written closing arguments in attempting to portray a sustainable case, the above concessions as made by

¹ See page 37 of the indexed bundle

Venter should dispose of her case. There is no basis for a finding to be made that the Respondent had unfairly applied a selection criteria when Venter conceded that there was indeed a need to retrench; that her position had become redundant; that all the other candidates she had competed against for available positions fared much better than her when evaluated and compared against her, and that the evaluations and assessments were conducted by independent and impartial panels. Even when compared to her source of discontent, Venter had conceded that despite her role and job specification being different to that of Mkatini, the latter had fared much better than her even if their CVs and performance appraisals were taken into account and compared independently or jointly.

[20] As it was correctly pointed out in the Respondent's written heads of argument, the methodology used in selecting candidates for retrenchment was agreed upon by labour during consultations. Five senior managers had rated Venter poorly as against three of her equals and Mkatini, who was not in any event comparable to her. These ratings and evaluations were confirmed by a panel, which Venter conceded was impartial. She was afforded an opportunity to challenge the assessments and evaluations, and it was always going to be difficult for her to show that the evaluations were unfair when she did not dispute the impartiality of the panels.

[21] It is accepted that the duty to show that the agreed criteria as used was both objective and fair in application rests on the Respondent. Even if Venter's complaint appears to be that she was not called for an interview during the evaluations, it is not clear how this would have assisted her since inputs were sourced from Padayachee and her immediate superiors already, over and above her CV and performance appraisal. The exclusion of interviews cannot have resulted in unfairness, and even if Venter had contended that this was the case, it is not known in what material respects this had occurred.

[22] Venter's complaints about not being considered for alternative positions are equally without merit in that she either showed no interest in the post of PA which ultimately was given to Mkatini, and furthermore, she could not have been appointed to the post of HR Manager or HR Business Partner as she did

not meet the requirements of those posts. Furthermore, I did not understand her to dispute Padayachee's testimony that there was a position of data capturer that was on offer, which she did not even consider as she deemed it to be demeaning.

- [23] In the light of the above considerations, it follows therefore that Venter or Solidarity for that matter have not established on a balance of probabilities that she deserved not to have been retrenched, or that the Respondent had applied the agreed selection criteria unfairly. In the circumstances her claim should fail.

Costs:

- [24] In the light of the common cause issues, the concessions made by Venter and the conclusions reached that there is no basis for a finding that Venter was treated unfairly, it is my view that this application was clearly a non-starter and should not have seen its day in Court. Despite it having been conceded that there was indeed a need to retrench, and that Venter's position was redundant, she nevertheless sought an order of reinstatement and/or compensation. It is apparent that this application was motivated by financial gain rather than pursuing the interests of fairness. The Court having taken into account considerations of law and fairness must show its displeasure at such conduct with an appropriate cost order. It is accepted that the Court in considering a cost order should take into account the on-going relationship between the parties as it exists in this case. Notwithstanding that relationship, this Court cannot however condone nor sanction litigation that borders on frivolous and vexatious, because this amounts to an abuse of its process.

- [25] The Respondent as indicated earlier in this judgment also sought a cost order in respect of the sudden withdrawal of Treeby from this matter. In the written heads of argument, it was submitted that the Respondent was timeously informed of Treeby's withdrawal, and that the basis for withdrawing from the matter was allegedly that an Afrikaans/English interpreter could not be found and arranged, and that Solidarity had on its own attempted to arrange for such an interpreter without success. It must be said that this is indeed the

most implausible and lame excuse a party can give for withdrawing from proceedings, and it probably the first time that this Court has ever come across such an excuse.

- [26] It has always been practice in this Court that even if parties have for some reason not made proper arrangements for an interpreter to be available, the Court has always indulged parties and secured the services of an interpreter where one is required. This excuse is pathetic in the extreme, and it can only be confirmation that Treeby saw no merit in pursuing a case that was doomed to fail from the beginning. It is trite that a party cannot simply withdraw from a matter without making a tender of costs. To this end, I can see no reason why the Respondent should not be entitled to its costs in circumstances where it had opposed and prepared its defence to Treeby's claim.

Order:

- i. The Applicant's application is dismissed with costs;
- ii. Such costs shall be inclusive of those associated with the opposition and preparation for trial in respect of the DH Treeby's claim.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicants:

Ms. I Labuschagne & Mr H Perry
(Union Officials - Solidarity)

On behalf of the Respondent:

Mr. J Crawford of Crawford & Associates

LABOUR COURT