



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: JS955/2011

Case No: JS 54/2011

In the matter between:

NOMALANGA ROSINA LEDWABA

Applicant

and

BP SOUTHERN AFRICA (PTY) LTD

Respondent

Heard: 11, 12 & 13 August 2014, 4 September 2014, 3 November 2014

Delivered: 12 August 2015

Summary: Restructuring – employer adopting a new organogram — employees invited to apply for new positions — employee not appointed and subsequently retrenched — new position not materially different from the previous one — employee not offered available alternative position — dismissal unfair.

JUDGMENT

MOOKI AJ

- [1] The respondent restructured its operations, including its human resources department. The restructuring resulted in a new organisational organogram. This matter pertains to the restructuring of

the respondent's human resources department. Employees were invited to apply for the new positions. The restructuring resulted in four positions for human resources manager. The applicant applied for the position of "HR Manager, Refining, Supply and Logistics". Her previous position was "HR Manager – Logistics & Supply". Both positions are at the same level. The applicant was not appointed. She was subsequently retrenched. The applicant contends that her dismissal was unfair, both substantively and procedurally. This is denied by the respondent.

- [2] Ms. Tebogo Maenetja ("Maenetja"), the respondent's Director for Human Resources, gave the following evidence in chief. The respondent decided to focus its business on South Africa and Mozambique as its two core markets. This led to a restructuring that started in November 2010. The restructuring was staggered. The process regarding employees in human resources was started after the rest of the affected business. Non-HR employees were sent section 189 notices on 24 January 2011. HR employees were sent such notices on 28 February 2011.
- [3] The section 189 notices set out various aspects to the restructuring, including that retrenched employees would be considered for re-employment within a six-month period of their retrenchment if they met the criteria.
- [4] Consultations with employees in human resources occurred on 2 March and 9 March 2011. She attended the consultation sessions, during which the consultation process and guiding principles to be followed in the restructuring were discussed. Employees were given the same reasons for the restructuring as the reasons given to non-HR employees. Alternatives were to be considered before retrenchment. She also considered alternatives outside of human resources. She considered junior roles in human resources.

Employees were advised on 16 March 2011 that the assurance sign-off was completed and that employees who were not placed on the new structure could challenge their non-placement.

- [5] The restructuring in human resources resulted in a change in the organisational structure. The respondent employed three officials in the operations being restructured that affected the applicant. The old structure was divided into the inland and the coastal regions. Two employees were responsible for the inland region, with one employee responsible for the coastal region. The new structure combined the inland and coastal regions. Refining was included in the new structure, as were logistics and supply. One official was responsible for the new structure. The work done by the incumbent in the new structure had changed, including that the incumbent was expected, unlike in the old structure, to become more involved in the respondent's business.
- [6] Employees could apply for any position in the new structure. Employees indicated their interest in the form of an expression of interest. This was then considered by a selection panel. She was a member of the selection panel.
- [7] The panel assessed candidates for the new positions with reference to a matrix that set-out core competencies. The scoring on the matrix was with reference to a "model candidate", which defined scoring expected of an ideal candidate. Each position in the new structure had its own core competencies. The applicant expressed interest only in the position of "HR Manager, Refining, Supply and Logistics". The applicant was not considered for this position because she did not meet the minimum score required for the position.
- [8] Decisions by the panel were subject to review by an assurance team made up of senior executives that included the respondent's chief

executive officer. A candidate could also approach an ombudsman, who was not an employee of the respondent.

- [9] The applicant's expression of interest contained information about her work history. That history was in relation to the logistics business. She also provided support to depots, including hiring. The applicant scored 50.5 points. She was not considered for the position that she applied for. The position was awarded to Ms. Chornelle Du Sart ("Du Sart"), who had relevant qualifications and relevant HR experience. The applicant's motivation in her expression of interest was inadequate. She also came short on most of the critical areas. She fell short on the inherent job experience, even though she had appropriate qualifications. She also had limited HR experience in relation to experience required for the revised role.
- [10] She (i.e. Maenetja) had, before the restructuring, put a performance improvement plan in place for the applicant. Performance was not a consideration in relation to the placement of employees in the new structure.
- [11] The applicant challenged her non-placement. She was advised that her challenge did not succeed. She was then given a retrenchment notice on 30 March 2011, effective on 30 April 2011 unless a suitable alternative position was found for her. The respondent would consider alternatives outside of human resources before 30 April 2011. The applicant would know of alternative positions because she worked in human resources. She could find out about alternatives by considering the respondent's vacancy tracker called the TAS System.
- [12] The applicant complained to the human resources director on 11 April 2011, in which she raised various issues including whether she was considered for available alternative positions. She (i.e. the witness) replied to the applicant's grievance on 19 April 2011. She advised the

applicant, among others, that the applicant's line manager actively reviewed vacancies regarding available positions. The applicant would have known of any available vacancies because they were publicised on the respondent's intranet.

[13] Du Sart resigned within four months of her appointment. She was unable to take up her position in Johannesburg because her personal circumstances had changed. The applicant was not considered for Du Sart's position because the respondent maintained that the applicant was not suitable.

[14] The applicant could have applied for any vacant role in the respondent after six months of her retrenchment. She (i.e. the witness) did not see any application by the applicant. The new structure included the position of HR advisor. This was a junior position to that for which the applicant applied. The applicant was not appointed to this position.

[15] Maenetja gave the following evidence in cross-examination. She maintained that the incumbent in the new role had to perform differently, including being diagnostic and operating at a higher level. The new role was not explicit regarding managerial experience. The requirement was implied. She agreed that there are instances, when comparing the old and the new role, where there are no differences in what the incumbent had to do.

[16] Du Sart was scored better than the applicant in various instances, including in relation to "taking the lead" because Du Sart gave more examples of her activities compared with the number of examples given by the applicant in their respective expressions of interest.

[17] Experience was not an explicit criterion in the matrix. It was however taken into account in the assessment of candidates. The applicant

was given a score of “1” in relation to HR experience. The applicant has more than eight years’ experience in human resources. She moved straight into an HR management position when she joined the respondent. Du Sart started as a training administrator, a non-managerial position, when she joined the respondent. Du Sart was appointed a manager in 2007. The applicant’s expression of interest revealed a specialty in one area and a fair knowledge in other areas. Du Sart had exposure to BP’s operational work, including exposure to low-level employees by virtue of her portfolio in finance. The applicant was lacking in some critical aspects of core HR including talent management, calibrating performance, and rewards and benefits. She had limited exposure. The focus in the new role changed from personnel administration.

[18] Performance was not a primary lens for decision-making by the selection panel. The members of the selection panel were aware of the performance of the candidates. She agreed that the reasons given to the applicant when she challenged her non-placement do not accord with her evidence concerning performance. She also agreed that performance considerations are inseparable from the matrix. She maintained that performance was kept to a minimum.

[19] Members of the selection panel brought their own perceptions about candidates in the decision-making. This was alleviated by the assurance team. Candidates were not interviewed. They were already known to members of the placement panel and information about the candidates was obtained from their expression of interest.

[20] She gave evidence that the applicant was under-performing. It was then put to her that the applicant went on a program offered by the Gordon Institute of Business Science (“GIBS”) and that the applicant was nominated for that program because she was identified as above average performer. It was also put to her that the applicant was

identified for the program because of the applicant's leadership skills. She replied that attendance at the program was an intervention to close performance gaps and that the person who nominated the applicant for the program is the one to answer the question.

[21] The applicant was assessed as meeting expectations in her performance assessment. She agreed that the applicant's performance assessment was generated bilaterally and was more authentic than what is recorded in the expression of interest. The matrix was compiled within six months of the applicant's performance assessment. She could not confirm that the applicant met her job expectation before the restructuring. She also could not confirm that the applicant's line manager signed the performance assessment.

[22] Du Sart was scored above the model candidate in relation to a number of competencies. The applicant and Du Sart received the same score for education. She denied that the applicant was prejudiced by not being scored above the model candidate in relation to education. She agreed that the panel did not always grade candidates with reference to the model candidate. She also agreed that a number of considerations were not indicated as criteria in the matrix. This included financial competency.

[23] The applicant's expression of interest showed that the applicant lacked experience in HR. The panel had objective means to verify what candidates wrote in their expression of interest. The means to verify what candidates said in their expression of interest were not included in the record.

[24] The applicant received her letter of regret on 16 March 2011. She challenged her non-placement on 17 March 2011. She was advised on 18 March 2011 that her challenge was unsuccessful. She was given her termination notice on 28 March 2011, effective on 30 April

2011. The respondent continued to have an obligation as at 30 April 2011 to minimise retrenchments.

[25] She denied that the applicant had limited opportunities for alternative positions because the selection of employees in human resources occurred after the selection of other employees. There was a list of vacant non-HR roles after the placement of HR employees. The applicant had access to the vacancy list and could apply for any vacant role. The applicant's line manager reviewed available roles and the applicant was made aware of such roles. It was put to her that the applicant's line manager did not consult the applicant on alternative positions. She replied that the line manager can confirm the consultations. She agreed that there was no document in the record that deals with attempts to find alternative positions for the applicant.

[26] The other positions in human resources following the restructuring had different matrices with different criteria. The position of HR advisor had a lower standard. The odds are that the applicant would have done better in the position of HR advisor. It is probable that the applicant would have qualified for the position of HR advisor. She did not know of any assurance given to the applicant by her line manager. There were no restrictions on positions that could be applied for in the new structure.

[27] She denied that she or the applicant's line manager did nothing to assist the applicant. The applicant's line manager engaged the applicant and she in turn was in constant communication with the applicant's line manager. She agreed that her letter of 19 April 2011 to the applicant did not refer to a joint consultation.

[28] She stated that the position of HR advisor was filled, according to her recollection, at the time when the applicant left the respondent. It was

put to her that the position was vacant. She agreed that no name was associated with the position of HR advisor in the respondent's organogram.

[29] She denied that she introduced her personal assessment into the matrix in relation to the applicant. She maintained that her assessment was based on the applicant's CV and feedback that she received from the applicant. The applicant's expression of interest revealed a specialty in one area and a fair knowledge in other areas. She denied that she was partial to Du Sart. She maintained that her evidence to the court was what the placement panel took into account and how the scores were determined. The panel compared candidates against the matrix, not against each other.

[30] She joined the respondent in the middle of 2010 and was the applicant's manager at the time. The applicant had already signed a performance review at that time. She started midyear reviews and met with each team member, including the applicant. There were problems with the applicant executing her deliverables. The applicant told her that she lacked exposure because the applicant's line manager was used to doing things. She completed her feedback with the applicant and highlighted that the applicant was performing below expectations. She told the applicant to put a plan together in order for the applicant to do things that were previously done by the applicant's line manager. She put the applicant on a performance improvement plan. The applicant made significant improvement by the end of the year.

[31] It was put to her that the applicant disputes that she performed below expectations or that she was put on a performance improvement plan. It was further put to her that the document referred to had not been adopted. She maintained that the document was adopted.

- [32] She gave evidence that there was no record of a grievance by the applicant against Ms. Maela, the applicant's line manager ("Maela"). She was aware of a troubled relationship between the applicant and Maela. The applicant copied her in an e-mail dated 18 April 2011. She was unaware that there was a pending grievance by the applicant against Maela. She was asked whether she was aware whether the grievance was resolved. She replied that she wrote to the applicant and that she was aware of a verbal response to the applicant. It was put to her that there was no response. She agreed that it would be inappropriate for Maela to be on the panel if the grievance was pending.
- [33] Maenetja maintained, during her re-examination, that she had a performance counselling session with the applicant and that the performance improvement plan was adopted.
- [34] Ms. Pamela Holness ("Holness"), the respondent's human resources operations manager, gave the following evidence. She was a member of the project team during the restructuring. The project team was responsible for the coordination and facilitation of the restructuring process.
- [35] Employees in human resources were considered at a later stage. The restructuring in human resources followed the same process as in the rest of the business. The expression of interest was the main tool used in considering placements. The respondent also used the competency matrix. The matrix is a global tool that was tailored to local conditions. It was updated by line managers. The matrix was aligned to job descriptions. She was not involved in the design of the matrix.
- [36] She does not recall anyone questioning the process followed during the restructuring. The project team documented questions that it

received and a formal response was sent to the HR community. Staff had various avenues to raise concerns; namely line managers, the assurance team, and an external ombudsman.

[37] She did not attend consultation meetings. She could not say whether such meetings were structured to explain to employees the selection tools that would be used. She was asked whether employees were told who would be making the selections. She replied that there was a document that outlined the criteria to be used. Employees were told that there would be an expression of interest and that the matrix would be used.

[38] The respondent decided on the selection process. She agreed that different selection tools could be used, including performance assessment. Performance ratings were not used in the selection process. She was not involved in the decision to use the matrix as a tool. The respondent opted for a tool that would result in desired outcomes. Management decided how to proceed. There was no agreement with employees in the use of the matrix as a tool. It was put to her that the matrix was not explained and that it was not discussed as a selection process. She replied that the matrix was not included in the pack during the consultation process. The applicant was familiar with the matrix process because the applicant is in HR.

[39] She gave evidence that the presence of more people in a panel minimised bias and that those on the panel would comment if they had experience with a particular individual. The panel included the applicant's line manager.

[40] The position of human resources manager was generic. The applicant was the only person who applied for the position that was given to Du Sart. She denied that it was unfair to ignore the preference of

employees. Preferences were considered but the business also considers were skills are needed.

- [41] There was no provision for further consultations when a candidate was unsuccessful. An individual was now at risk. Such an individual had to consult with the line manager. There is a duty on the employer during the risk period to continue to consult. She could not comment whether there were no consultations with the applicant during the risk period.
- [42] Du Sart was appointed in May 2011. The position is based in Johannesburg. Du Sart was based in Cape Town. Du Sart resigned in August 2011. Phakamile Bhengu ("Bhengu") was appointed following Du Sart's resignation. There was an interval before Bhengu was appointed.
- [43] The position of HR advisor remained vacant for months after 30 April 2011. She could not comment whether the respondent gave any consideration to placing the applicant in that position. It was put to her that the respondent should have placed the applicant in the position of HR advisor to minimise the applicant being retrenched. She replied that it was a different position and that it was at a lower level than that occupied by the applicant.
- [44] The applicant enquired on 11 April 2011 about positions in general. A vacancy was announced on 18 April 2011 offering the HR advisor position. The position was advertised by way of an email that was sent to all staff. The applicant received a response to her enquiry of 11 April on 19 April 2011. She was advised that there were no positions. The position of HR advisor was not mentioned in the response to the applicant on 19 April 2011. The applicant was not offered the position of HR advisor as a temporary measure. The

position is a type of an alternative to minimise retrenchment. The applicant did not apply for the position of HR advisor.

[45] The applicant gave the following evidence. She attended consultative meetings on 2 and 9 March 2011. She was told on 2 March 2011 that positions had been reduced from 7 to 4. The organogram was presented on 9 March 2011 and she was invited to apply on that date. There was no explanation of how the selection process would be done. She was told on 9 March 2011 to send an expression of interest but was not given further information regarding the selection process. The job profiles were available on the web. She applied for the position of manager, human resources, in logistics.

[46] She was sent a letter of regret on 16 March 2011. The letter did not record the reasons why she was unsuccessful. She did not know how her expression of interest was evaluated. She challenged her non-appointment on 16 March 2011. She received a response to her challenge on 18 March 2011. The response did not deal specifically with the points that she raised in her challenge. She received a retrenchment notice on 30 March 2011 effective at the end of April 2011. She refused to sign the retrenchment notice because the notice did not give reasons nor dealt with alternative positions.

[47] She wrote to the respondent on 11 April 2011, raising various issues concerning her non-appointment including the issue of alternative positions. She received a response from Maela on 19 April 2011. The response referred to the matrix. She did not know about the matrix before receiving the response. She knew of the selection criteria but did not know of the matrix and the scoring on the matrix.

[48] She also did not know that she was rated a total of 50.5. She had not been consulted on any of the issues mentioned in paragraph 2 of Maela's letter of 19 April 2011.

- [49] She was not consulted on the position of HR advisor and was not offered the position. The position was vacant. She asked about alternative positions in her letter of 11 April 2011. There were no further consultations with her after her letter of 11 April 2011. She was not told about alternative positions. She investigated alternative positions on her own. She expressed an interest in the position of scheduling manager, a position in logistics but outside of HR. She was advised on 28 April 2011 that her request to be considered for the position of scheduling manager was unsuccessful. Nothing happened after 28 April 2011.
- [50] She never received a response from Maela, her line manager, concerning alternative positions. Maela treated her unkindly. She escalated her complaint against Maela to Maenetja, Ms Raseroka and to the industrial relations manager. She later filed a grievance in December 2010. Maenetja replied to the grievance indicating that she wanted to meet with her and Maela. Maenetja suggested that the meeting take place in January because the applicant was going on leave. A meeting took place in January 2011. She insisted that the proceedings be recorded but Maenetja and Maela refused to have the meeting recorded. The grievance meeting did not take place because of this refusal.
- [51] Maenetja and Maela were part of the selection panel. She did not know the composition of the panel when she submitted her expression of interest. The process to be followed by the selection panel in evaluating the matrix was not discussed during the consultations. She would have objected had she known in advance that Maenetja and Maela were members of the panel. There was a standing grievance against Maela and Maenetja was privy to that grievance. She sensed bias on the part of Maenetja when Maenetja refused to have the grievance recorded.

- [52] She denied that Maenetja put her on performance counselling in August 2010. She disputed the performance improvement plan referred to in the evidence by Maenetja. She pointed out that the document was unsigned and that it was not in the correct template. She also pointed out that she had been assessed as meeting expectations in her performance assessment conducted approximately six months before commencement of the restructuring.
- [53] The applicant pointed out that she would not have been selected for the GIBS program, which started in January 2010 and finished in December 2010, if her performance was below par. The rationale for the GIBS program was to develop employees for senior positions within the respondent.
- [54] The applicant pointed out that she had, unlike Du Sart, been in a managerial position in human resources for a period of 10 to 12 years whereas Du Sart had been a manager for approximately three years. The applicant worked in human resources at various companies including Edcon and MTN. This notwithstanding, she was scored 1 out of 3 for experience in the matrix.
- [55] Du Sart had a certificate on oil which was irrelevant to human resources. She, on the other hand, studied for two years at Technikon Northern Gauteng and at Vaal Triangle Technikon.
- [56] She had great exposure in logistics whereas Du Sart came from a finance background with no exposure in logistics. She referred to an instance where Du Sart asked the applicant to join Du Sart in interviews for positions in logistics. Du Sart was meant to conduct the interviews on her own, but requested the applicant to join her in conducting the interviews. Du Sart asked the applicant to join her because Du Sart did not know what line to take during the interviews.

She told Du Sart that candidates would be scared should they find themselves being interviewed by two HR managers. It was put to the applicant that it was reasonable for Du Sart to request the applicant to join her in the interviews because Du Sart was new in logistics. The applicant replied that the request was reasonable but that it showed that there were gaps in Du Sart taking over logistics.

[57] The applicant gave evidence that a score of 50.5 underrated her to a great extent. She had many years' experience in HR when she applied for the position in the new structure. She understood HR tools and had been a project leader on a number of projects. She would have graded herself more than the score allocated to her, but would not have graded herself beyond the scoring for the model candidate. She would have scored better in relation to various competencies, including foundation skills and HR functional competency.

[58] There is a close comparison between the old and the new role. She pointed out that the requirements of "business partnering" manifests in many forms; such as in relation to abuse of expenditure, identifying talent, and resolving disputes; the "people plan" requirement is part of performance management; "resourcing talent" was part of performance management, and activities such as future planning were not new. She was involved in rewards and performance.

[59] The applicant did not challenge the restructuring of human resources as a whole but challenged the restructuring of her position. She contended that the restructuring did not impact her position. She admitted that the change from three individuals to a single individual was a significant reduction. She however denied that she could not cope in the new position. She was the only person in the inland area who was running the logistics and supply department. Refining was always under logistics. The respondent had closed about four terminals before the restructuring. Refining was a small business unit.

It would not result in much of an increase in the logistics headcount. Adding approximately 20 people was not much of a burden. She covered coastal areas and she was expected to assist in Cape Town. The Cape Town terminal was smaller than the inland region. The East London depot had no human resources. There was a dedicated person in Cape Town but she assisted in Cape Town. The respondent saw potential in her and that is why she was asked to help in Cape Town even though Cape Town had a dedicated person. The respondent appointed her as a manager because of her experience and potential.

[60] The description for the new job was not specific. It was general to logistics. The job description did not change. The headcount changed from 3 to 1, except that the headcount had already changed to 2 during the restructuring. She ran the inland area whilst Glenys ran the coastal area.

[61] She was unaware of the selection criteria that was used. She was told that a matrix was used. She asked her attorneys to request the matrix and an explanation of how the matrix was applied. She did not approach anyone after 2 March 2011 to ask about the selection criteria. The job description was put on the website on 9 March 2011. Her line manager told her that her position was secured.

[62] She did not raise any other challenge before challenging her non-placement. She would not have known to make a challenge because her line manager had told her that her job was secure. She was not given all information to raise a challenge. She was taken aback by the letter of regret.

[63] She criticised the use of the matrix in scoring and evaluating candidates. Du Sart was scored above the model candidate, including in relation to "suitability for the role" and "taking the lead". Du Sart was

scored “4” in relation to consulting skills. She could not have been scored a “4” because “4” was not a given parameter.

[64] She cannot score herself above the model candidate because the score for a model candidate is a defined parameter. There is compensation if the scores are above the maximum. The respondent overcompensated in scoring Du Sart above the model candidate. The scoring given to Du Sart indicate a seasoned person working outside of the HR scope. It is inappropriate to score beyond parameters. There is no rationale in the matrix to allocate scores above parameters. She (i.e. the applicant) was prejudiced because the respondent gave Du Sart scores beyond defined parameters.

[65] Du Sart had no managerial skills. She (i.e. the applicant) had managerial skills and dealt with the respondent's international business. Ms. Raseroka selected her for the GIBS program. The program served a developmental purpose and not a remedial purpose. Participation in the program was expensive. Only four participants were selected for the program. A participant in the program must be a performer. The respondent must be of the view that such a person deserves a senior position.

[66] She knew that there would be a selection criteria. She consulted the website for the selection criteria. The criteria were based on experience and qualification. There was no reference to a matrix. There was no mention that there would be scoring. She was unaware that there would be a competency matrix. There was a deviation in relation to human resources compared with the rest of the business. The matrix was introduced for human resources. The matrix was not mentioned for the business.

[67] The procedure on restructuring was not followed to the letter. She was not told why she was not placed. There were deviations in the

procedure leading to her receiving the letter of regret. The letter did not consider her motivation, qualification or performance. The calendar for HR was the same as for the rest of the business. Things went wrong after 9 March 2011. Her expression of interest was not fully considered; her line manager never explored alternative positions with her; two of her colleagues expressed an interest in a package. They were no longer interested in HR.

[68] She expressed an interest in one position because she had been assured. She considered herself suitable for the position. She expected to be automatically considered for an alternative position if she were not successful. She was not considered for the HR advisor position which was vacant. She should have been considered for that position because the respondent indicated that she was not qualified for the HR manager position.

[69] Applying for positions on the TAS means applying externally from human resources. Employees from other business units could apply for the same positions. She expressed an interest in two positions outside of human resources, namely scheduling manager and scheduling supervisor. The respondent had to meet its promise to find a suitable vacancy for her, including placing her in a junior position.

[70] She enquired about available alternative positions and was told that there were no alternative positions on human resources. This notwithstanding, a job in human resources was advertised on 18 April 2011. She should have been automatically placed in the position of human resources advisor. It was put to her that she did not refer to the human resources advisor role in her letter of 11 April 2011. She replied that the respondent delayed for seven days in responding to her letter and did not address her concerns. The respondent did not indicate that she was unsuitable for the position of human resources

advisor. She decided to consider alternatives outside of human resources on receipt of Maela's letter on 19 April 2011.

[71] She was asked whether she received the communication dated 18 April 2011 about positions on TAS. She replied that she raised her challenge on 11 April 2011 and that she received a regret later on 19 April 2011. The letter of regret stated that the position advertised on 18 April 2011 was not available. The letter did not specify alternatives. The placement process should have entailed seeking alternatives in human resources and then placing positions in TAS if there was no position in human resources. A letter such as that from Maela dated 19 April 2011 means that the respondent stated that there were no alternative positions in human resources. This explains why she applied for a position of scheduling manager, which is outside of human resources.

[72] There was a deviation in the restructuring process when it came to employees in human resources. Interviews were held in the restructuring of the rest of the business. There were no interviews in relation to human resources.

[73] She disputed that she could not demand an interview because she scored low on the matrix. She contended that the placement was subjective. It is a stretch between a score of 50 and 90. She had been in the position and there was no reason why she got a dismal score. She does not contend that she should have exceeded all candidates but that she was comparing herself with Du Sart. The respondent had to consider location, experience, and academics. She knew logistics.

[74] Maenetja was not her direct line manager. Maenetja joined the respondent in June and had hardly been with the company to rate her. She denied that she had a performance improvement plant with

Maenetja. She denied having a conversation with Maenetja about her performance. There was no document confirming that she had such a conversation. She could not have been subjected to a performance improvement plan when she was attending the GIBS program.

[75] She does not know the document in which Maenetja rated her performance. The document was a total fabrication by Maenetja: she did not have a discussion with Maenetja and she had not seen the document before. She does not understand why her performance was discussed in her absence.

[76] She was asked why Maenetja would have a motive to collude with Maela when Maenetja had been with the respondent for three months at the time of the document contended for by Maenetja. She replied that she did not know but that there is evidence that she was a good performer and that the respondent was grooming her for a senior position.

[77] Maela treated her badly. She launched a formal grievance on 22 December 2010. She escalated the grievance to Maenetja, Mr Ncobo and Ms Raseroka. The content of the grievance is not in the bundle. She denied that she escalated the grievance on a by-the-way basis in sending an email. She was asked why Maela became an enemy by 15 March 2011 when Maela gave her a rating of meeting expectations in 2010. She replied that she launched a grievance at the beginning of December and that the grievance was not heard. She escalated the grievance to Maenetja.

[78] It was put to her that Maenetja was unaware of the grievance concerning Maela and that Maela would not have sat on the panel had Maenetja been aware of the grievance. It was also put to her that her evidence about Maela was not put to Maenetja. She denied that her evidence on Maela was not put to Maenetja, pointing out that

Maenetja had the opportunity to comment on her evidence because her counsel (i.e. applicant's) put to Maenetja that Maenetja was copied on an e-mail indicating that the grievance was unresolved.

[79] She denied knowing that Maela and Maenetja would be on the selection panel. The identity of members of the panel was not disclosed. Employees were not told, during the consultations, the names of members of the selection panel. She would have objected to Maenetja and Maela sitting as members of the panel had their names been mentioned. Maenetja knew of the dispute between her and Maela and should have recused herself from the selection panel. She denied attributing a slur to Maela and Maenetja.

[80] She took up employment with Lanxess SA (Pty) Ltd, a chrome mining company, as its head of human resources following her retrenchment. She should have been selected over Du Sart. She had more experience in the field of logistics. She had better qualifications and education. She seeks compensation over a period of 12 months.

[81] The position of "HR Manager, Refining, Supply and Logistics" undoubtedly had new elements compared with the position of "HR Manager – Logistics & Supply". Refining was one such new element. The new position also combined the work that was previously carried out in relation to the coastal and inland areas operating as separate regions. The new function was being carried out by one employee. A primary issue in this matter is whether the change was so fundamental that the assertions by the applicant could be said to be unmeritorious.

[82] The applicant's evidence is that she assisted with work to be carried out in the coastal regions even though she was based in the inland region. She asserted that she had experience in logistics and supply. She maintained that the addition of refining as part of the

responsibilities of the human resources manager would not result in an intolerable change in the headcount. The case for the respondent was that the new role required more of a “higher-order” functioning by the incumbent, and not only managing of people.

[83] A considerable amount of time was taken up in the evidence by the applicant seeking to show that she was up to the task and by the respondent seeking to show that this was not the case. The applicant complained that the respondent underscored her and overcompensated the score given to Du Sart. There is merit to this complaint. This is illustrated by the fact that the applicant had, undoubtedly, superior formal qualifications in human resources compared with Du Sart; together with the fact that the applicant has more managerial experience than Du Sart.

[84] The new role encompassed logistics as part of the functions to be carried out by the incumbent. The applicant maintained that she was seasoned in logistics. Her evidence was not challenged, nor was it shown how Du Sart was the better candidate in relation to logistics. Du Sart’s immediate position was to support the respondent’s finance business. This is to be contrasted with the applicant’s position which was in logistics and supply. The applicant illustrated that Du Sart considered herself unequal to the task of operating in logistics when Du Sart requested assistance in conducting interviews for a depot manager. The respondent did not appear to appreciate the irony of the proposition put to the applicant in cross-examination that it was reasonable for Du Sart to seek the applicant’s assistance because Du Sart was new in logistics. That request was made some time in April 2011. This was after the applicant had been told that she was not considered for the position that was given to Du Sart.

[85] The case for the respondent included that a selection panel took decisions on whom to consider for positions in the new structure and

that such decisions were subject to review by an assurance panel. The respondent did not put up minutes recording deliberations by the selection panel. I highlight this aspect in the light of the evidence by Maenetja that her evidence entailed considerations taken into account by the selection panel in not appointing the applicant and in appointing Du Sart. The respondent is a company of international note. It would be expected to have a formal record of its proceedings, more so were such proceedings might become disputed in the future, as is typical of a retrenchment process. The court was therefore surprised that the respondent did not put up documents to support evidence on its behalf about contemporaneous decision-making as it pertained to the applicant.

[86] I also mention the absence of contemporaneous material to support evidence on behalf of the respondent in the light of exchanges between Mr Nowosenetz, counsel for the applicant, and Maenetja. My impression of Maenetja's evidence is that she was interpreting documents, including the content of Du Sart's expression of interest, during her evidence and that her evidence was primarily based on the interpretation given during the trial as opposed to her evidence being a statement on deliberations by the selection panel. Maenetja maintained during cross-examination that the selection panel had objective means to verify what candidates wrote in their expression of interest, but that such objective means were not included in the record. It is puzzling that such important material was not introduced as part of the record given the nature of the dispute between the parties.

[87] It is material that the respondent did not call any other person to confirm Maenetja's evidence concerning the non-selection of the applicant. The evidence by Holness did not take the matter further. She was not involved in the selection of candidates. A number of critical aspects to the evidence by Maenetja pertained to Maela.

Maela was the applicant's line manager and a member of the selection panel. Maenetja, during her evidence, justified the conduct of the respondent with reference to steps taken by Maela leading to the retrenchment of the applicant. This was the case particularly in relation to whether or not the respondent took steps to seek alternative positions for the applicant. Maela's evidence was also material in relation to whether or not the applicant signed a performance improvement plan with Maenetja. The respondent did not call Maela as a witness. The respondent would have been entitled to oblige Maela to give evidence, including by issuing a subpoena if necessary. This was not done. It is inexplicable that the respondent did not call Maela as a witness in the circumstances.

[88] The applicant maintained that she would have protested had she known that Maela and Maenetja were members of the selection panel. This would have been a fair apprehension by the applicant. Maenetja had formed the view that the applicant's performance was below par. This view influenced Maenetja's decision-making in the selection panel.

[89] The respondent's formal position, as communicated to the applicant in explaining why the applicant was not considered for the new role, was that performance was not a selection criterion. This was clearly not the case. Maenetja gave evidence that members of the selection panel were familiar with the performance of the candidates and that performance was considered albeit it was not a primary determinant in the decision-making.

[90] Maenetja sought to underplay the issue of performance in the decision-making by the selection panel when she stated that performance was not a primary lens in the decision-making by the panel. She indicated that members of the panel were familiar with the performance of candidates but that this was ameliorated by the

presence of the assurance team. This can only mean that the selection panel did take performance into account. Maenetja agreed, in any event, that the issue of performance was inseparable from selection considerations. She did not provide evidence on how the assurance team ameliorated the taking into account of performance in the decision-making by the selection panel.

[91] I find that there is merit to the proposition put to Maenetja that the selection panel took personal considerations into account in relation to the decision-making concerning the applicant. Maenetja had formed the view that the applicant was not a performer. This coloured her view of the applicant at the time of the decision-making. The applicant had raised a grievance regarding Maela. The meeting to discuss a grievance was held in January 2011. The grievance remained unresolved when Maela sat as a member of the selection panel that decided that the applicant did not qualify for the new position. The fact of the grievance coloured Maela's decision-making. I am not persuaded by the submission on behalf of the respondent that the applicant is not earnest in her apprehension concerning Maela being a member of the selection panel. Mr. Malindi, counsel for the respondent, questioned why Maela was said to have become an enemy in March 2011 when she rated the applicant as meeting expectations in the previous year. The applicant's evidence that this was due her grievance against Maela is credible.

[92] Maenetja admitted that it would have been inappropriate for Maela to participate as a member of the selection panel when the applicant's grievance against her was pending. Maenetja sought to underplay the issue of the grievance in her evidence. She gave evidence that she believed that the grievance had been resolved. She must have known that this was clearly not the case. This is illustrated by the applicant's reference to the grievance in the applicant's e-mail to Maela in April

2011. The applicant indicated that the grievance was unresolved. Maenetja was copied on this e-mail.

[93] The respondent did not adopt a coherent approach when making selections for the position of “HR Manager, Refining, Supply and Logistics”. Maenetja maintained in her evidence that candidates were considered for positions in the new structure with reference to competencies set out in the matrix and that candidates were not compared with each other. The bulk of her evidence; however, was an attempt to demonstrate why Du Sart was a superior candidate compared with the applicant.

[94] It is evident that the selection panel had latitude in applying the matrix. This is illustrated by the fact that the selection panel saw it fit to give points above points expected of a “model candidate”. In addition, the decision-making included considerations that were not explicit in the matrix as part of the criteria for assessing candidates. For example, Maenetja gave evidence that Du Sart scored more points because she gave more examples. It was not a consideration in the expression of interest that a candidate would receive more points if a candidate gave more examples. Maenetja agreed in cross-examination that assessments were not strictly limited to criteria recorded on the matrix. Her evidence was that some of the considerations were implied in the matrix.

[95] Candidates would not have known that additional considerations, not explicit in the matrix, would be taken into account as part of the assessments for the various positions. This is more so because candidates did not know that they were to be assessed against competencies set out in the matrix. Similarly, candidates would not have known in advance that they stood a better chance of gaining a bigger score by relating more examples of their activities in their expression of interest. It is, in any event, unclear what might

constitute “more examples” for purposes of a candidate receiving a bigger score from the selection panel.

[96] I find that Maenetja’s evidence as to why Du Sart was the superior candidate was based primarily on her interpretation at the time when she gave evidence. I am fortified in this view because Maenetja, in her evidence regarding Du Sart, would reflect on the content of Du Sart’s expression of interest before answering questions put to her. I also find that her evidence concerning why the new role differed from the previous one rested on clichés concerning what was expected of the incumbent, such as the incumbent having to operate at a “higher level”.

[97] Maenetja was also determined to paint Du Sart in the most favourable light, and the opposite concerning the applicant. This is illustrated by Maenetja’s insistence that Du Sart’s LOE certificate was equivalent to a junior degree. Du Sart did not, in her expression of interest, equate the LOE certificate with a junior degree. She described the LOE certificate as associated with Wits Business School for the year 2010. It is unclear how Maenetja could possibly have considered the LOE certificate as equivalent to a junior degree.

[98] I find that there was no serious challenge to the applicant evidence that she was more experienced than Du Sart and that there was no fundamental change to the substance of work to be done by the incumbent in the new role. There was no serious challenge to her evidence that she was competent in logistics. Her job before the restructuring entailed supply. She was not challenged that she assisted the coastal regions even though she was based in Johannesburg. She was not challenged that refining was a minor component. She had superior managerial experience compared with Du Sart. She had superior formal qualifications in human resources compared with Du Sart.

- [99] Du Sart's formal qualification is an LOE certificate (obtained in 2010) and an "HR Management certificate" from IPM (obtained in 2011). Both qualifications are described as obtained during a single year. It is unclear whether the qualifications entailed full-time study or not. Du Sart's formal qualifications are to be contrasted with the applicant's. She obtained a national diploma in human resources from Technikon Northern Gauteng (1990-1992) and a B. Tech degree in human resources from the Vaal Triangle Technikon (1995-1996). Du Sart was a training and development administrator at Multichoice pay TV in 1995-1997. The applicant was an HR employment practice specialist at MNET in 1996-1999. Du Sart was an HR generalist with Mweb in 1997-2003.
- [100] The applicant was the better candidate compared with Du Sart. The applicant was not challenged in any serious way during cross-examination when she maintained that she was equal to the task and that there were no fundamental changes to what she was expected to do in carrying out her functions as a manager.
- [101] I am of the view that the respondent proceeded with undue haste to dismiss the applicant. The respondent had a duty to minimise the possibility of the applicant being retrenched. The respondent had to consider alternative positions if that meant avoiding retrenching the applicant. The applicant made independent enquiries about possible alternative positions outside of human resources. She was advised that those positions were not available.
- [102] The respondent did not consider alternatives to retrenching the applicant. The applicant enquired on 11 April 2011 whether the respondent considered alternatives to her retrenchment. Maenetja replied on 19 April 2011. She did not set out alternatives that were considered by the respondent.

[103] Maenetja could not show an instance of consultations with the applicant regarding alternatives to retrenchment. She told the applicant on 19 April 2011 that there were no alternative positions, despite the fact that the respondent had advertised the position of HR advisor on 18 April 2011. Maenetja is the Director: Human Resources for the respondent. It must be taken that she is familiar with positions that are available in the respondent's human resources department. It is thus inexplicable that she told the applicant on 19 April 2011 that there were no alternative positions in human resources without mentioning the fact that the position of HR advisor was available.

[104] Maenetja had no first-hand knowledge of whether or not the respondent made alternative positions available to the applicant. She maintained that Maela did so. This was disputed by the applicant. The respondent did not call Maela regarding whether or not she consulted with the applicant on alternative positions.

[105] The respondent was duty-bound to consult with the applicant on the position of HR advisor as an alternative to retrenchment. The position was never made available to the applicant. Maenetja gave evidence that the applicant would in all probability have been appointed to this position because the requirements for the position were less stringent compared with the requirements for the position of "HR Manager, Refining, Supply and Logistics".

[106] Maenetja and Ms. Holness maintained that the position of HR advisor was a junior position to that for which the applicant had applied. They implied that that is the reason why the position was not offered to the applicant. Both Ms Holness and Maenetja agreed that the respondent had a duty to attempt to prevent a retrenchment up until 30 April 2011. The applicant's retrenchment became effective on 30 April 2011. The position of HR advisor remained vacant after 30 April 2011. The

respondent had a duty to have offered the applicant the position of HR advisor as an alternative to the applicant being retrenched. The respondent could not take a unilateral view that the position was not to be offered to the applicant because it was a junior position to that sought by the applicant. Consultation is not a unilateral process.

[107] The respondent brought an application to reopen its case. The purpose was to introduce into the record a document that the respondent contends is a signed performance improvement plan referred to by Maenetja during her evidence. The applicant opposed the application. She challenged various aspects of the documents, including that she did not sign the document. She set out why she disputed the signature as not being her's. Maenetja stated, in her affidavit in support of the application, that the applicant signed the document in the presence of Maela. Maela did not confirm the allegations attributed to her by Maenetja. I am of the view; however, that the document should be admitted as part of the record. Both parties raised the issue of performance during their evidence. I find however that the document does not take the case for the respondent any further. That is because the case for the respondent is that performance was not a selection criterion. Maenetja, in any event, gave evidence that the applicant's performance had improved.

[108] The applicant had brought a related application under case number JS 54-11, in which she sought relief in terms of section 189A (13) of the LRA. The respondent opposed the application and brought a Rule 11 application to dismiss that application. The respondent recorded in the pre-trial the minute that it does not persist with its Rule 11 application. The parties agreed that the pleadings in case number JS 54-2011 are to serve as pleadings for purposes of the dispute on procedural issues in this application.

- [109] The dismissal of the applicant was procedurally unfair. The selection criteria were unfair. The evidence shows that the respondent took performance into account in making selections for the position of “HR Manager, Refining, Supply and Logistics”, notwithstanding the respondent’s disavowment that performance was not a selection criterion. The selection criteria were also unfair because the respondent took account of “implied” criteria in selecting applicants for positions in the restructured organogram. Applicants could not have known to anticipate the content of such implied criteria.
- [110] The dismissal was procedurally unfair also because the respondent did not offer the applicant the position of HR advisor, which remained vacant after 30 April 2011. “...An employer may not dismiss an employee for operational requirements when such employer has a vacant position the duties of which the employee concerned can perform with or without at least minimal training [...]. Where the employer has a vacancy and the employee can perform the duties attached to that vacancy, the employer would be acting unfairly in dismissing the employee without offering the employee such a position and the ensuing dismissal would be without a fair reason.”¹
- [111] I find that the dismissal was substantively unfair. The respondent has not shown that the position of “HR Manager, Refining, Supply and Logistics” was so fundamentally different from that of “HR Manager – Logistics & Supply”. The respondent also failed to demonstrate that the applicant could not have carried out the duties expected of “HR Manager, Refining, Supply and Logistics”.

¹ South African Airways v Bogopa and Others (JA 36/05) [2007] ZALAC 10 (3 August 2007), at para 60.

[112] The respondent appointed Phakamile Bhengu (“Bhengu”) to the position of “HR Manager, Refining, Supply and Logistics” following Du Sart’s resignation in August 2011. There was an interval before Bhengu’s appointment. Du Sart resigned within six months of the dismissal of the applicant. The section 189 notice to the applicant recorded that she could be considered for positions within six months of a retrenchment. Manetja gave evidence that the applicant was not considered for the position following Du Sart’s resignation.

[113] The respondent included Bhengu’s CV as part of the record. Bhengu’s CV records that she had one tertiary qualification, being a national diploma in municipal administration obtained from Mangosuthu Technikon in 1995. Bhengu’s CV does not record her employment history for the period 1996 to 1997. Bhengu was an “administrator” at IMATU during the period 1998 to 1999. She was an “HR officer” at SARS during the period May 2002 to January 2006. This background is to be contrasted with that of the applicant during the similar periods. The applicant was an “HR employment practice specialist” at MNET during the period 1996 to 1999. She was a recruitment specialist at the RAF and R&H Communications during the period 2000 to 2007. There was no evidence as to why the respondent considered Bhengu more suitable for the position of “HR Manager, Refining, Supply and Logistics”, unlike the applicant.

[114] The applicant does not seek reinstatement. She is entitled to compensation. The applicant may well have accepted the position of HR advisor had that position been offered to her. This was not done. The position was an alternative to dismissing the applicant. Maenetja and Holness agreed that the respondent continued to have a duty to secure alternative positions to the applicant as at 30 April 2011. “The main objective of the consultation process is to either avoid the dismissal or to minimise its consequences on the employee. Any of

the parties who frustrate this process must take full responsibility and live with the consequence thereof".² I consider that compensation equivalent to twelve months of the applicant's monthly salary as at the time of her dismissal is fair in the circumstances.

[115] The parties did not abandon the application in case no. JS 54/2011. The parties agreed that the pleadings in that case are to be considered for purposes of the procedural dispute. It is fair that the costs in that application be in the cause in case no. JS 955/2011.

[116] I make the following order:

116.1. The dismissal of the applicant was unfair, both procedurally and substantively.

116.2. The respondent is ordered to compensate the applicant in the amount equivalent to the applicant's remuneration over a period of 12 months, calculated at the rate of R46 000,00 per month.

116.3. The respondent is ordered to pay costs, including the costs of the application to introduce further evidence.

O Mooki

Judge of the Labour Court (Acting)

² Tetley v Caterplus (Pty) Ltd (JS286/09) [2010] ZALC 166 (27 October 2010), at para 23.

Appearance:

On behalf of the applicant: L Nowosenetz

Instructed by Morare Thobejane Inc.

On behalf of the respondent: G Malindi SC

Instructed by Hogan Lovells (SA) t/a Routledge Modise Inc.

LABOUR COURT