



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: PS 27/13

In the matter between:

L NETI

Applicant

And

EBERSPACHER SA (PTY) LTD

Respondent

Heard: 11-12 March 2015

Delivered: 24 March 2015

Summary: Retrenchment. Court limited to issues that parties place before it in the pleadings, as narrowed and limited in the pre-trial minute.

Substantive fairness. Not unfair not to appoint otherwise redundant, longer serving employee to more senior position for which he was not qualified.

Procedural fairness. Where employee abandons or otherwise frustrates the consultation process cannot complain about procedural unfairness.

JUDGMENT

EUIJEN, AJ

Introduction

- [1] This is an unfair dismissal application, in which the applicant, Mr Neti, claims reinstatement into his former position as the employee relations manager of the respondent, alternatively compensation, based on alleged breaches of section 189 of the Labour Relations Act, number 66 of 1995 (the LRA).
- [2] Mr Neti was employed by the respondent company from 8 April 2008 as its employee relations manager and dismissed on 28 February 2013. The reason given was that his position had been declared redundant due to the operational requirements of the respondent. Some months prior to his retrenchment, on 1 October 2012, the respondent had appointed Mr Peter Marriott as its group human resources manager. In his statement of case (at para 5.4.1), Mr Neti contended that he ought to have “bumped” Mr Marriott from this position, since the latter was the shorter serving employee, alternatively that the position should have been combined and he be appointed to the combined position.
- [3] As far as procedural fairness is concerned, Mr Neti’s pleaded case is that his retrenchment was a *fait accompli* from the date of issue of the section 189 (3) notice, on 17 January 2013 and that, in any event, the consultation process was prematurely terminated, prior to the submission of representations from his attorney, which he had advised the respondent he wished to make.
- [4] The respondent, for its part, denied that Mr Neti had shown any interest in the human resources manager’s position, or that he was qualified to fill it, either in terms of qualifications or experience. As far as the consultative process is concerned, the respondent pleaded that Mr Neti showed no interest in the consultation process and advised the respondent that it should proceed with his retrenchment, as he wished to refer the matter to this Court.
- [5] In the pre-trial minute, in answer to the questions contained in the practice directive on retrenchments, the applicant admitted, that in general there was a need to retrench (paragraph 22.1). He also admitted that:

“respondent embarked upon a restructuring exercise and that the merit of such processes is not in dispute; and

“the restructuring exercise resulted in the redundancy of certain affected positions, including applicant’s position.” (paragraph 22.2”)

- [6] Consequently, the only issues which this Court is required to decide are:
- [7] “whether Mr Peter Marriott (the human resources manager) should have been selected for retrenchment in applicant’s place, and in particular whether applicant should have been bumped into Mr Peter Marriott’s position;
- [8] “in respect of procedural fairness, whether the consultation process ended prematurely and unfairly.” (paragraph 5.2 of the pre-trial minute)

Evidence

- [9] Mr Peter Marriott, the group human resources manager, who was appointed on 1 October 2012, was the first person to give evidence for the respondent. He testified that he possessed a BA honours degree, and that his predecessor possessed a BComm degree. In addition, he had 10 years’ experience in human resource management. Both were requirements for the position. He confirmed that at all times Mr Neti had reported to him, as had been the case with his predecessor. He said that when he first joined the respondent he had enquired whether Mr Neti was interested in being considered for his position, to which Mr Neti replied that he was not, as he preferred his current position in employee relations.
- [10] Mr Marriott said that he had found no evidence that Mr Neti had performed any of the functions of the human resources manager between July, when his predecessor Robin Fourie left the respondent’s employ and October 2012, when he had taken over the position. When it was put to him that Mr Neti had performed the same functions as those performed by the previous human resources manager, Robin Fourie, his response was that Mr Fourie had to become involved in Mr Neti’s responsibilities to rectify deficiencies in the latter’s performance in dealing with his responsibilities. This was particularly

the case with absenteeism, which had been a major problem at the company. They however remained the function and responsibility of the employee relations manager.

- [11] Mr Marriott also testified that he had dealt exclusively with Mr Neti during the consultation process. This began with handing over the section 189 (3) notice dated 17 January 2013; attending both meetings which were held with Mr Neti on 25 January and 5 February 2013; as well as writing all correspondence addressed to Mr Neti from the respondent.
- [12] The first meeting held between Mr Marriott and Mr Neti took place on 25 January 2013 at the Beach hotel in Port Elizabeth. The meeting was largely formulaic in that Mr Marriott went through his prepared written response dated the previous day, to a list of questions he had received from Mr Neti, by email on 21 January 2013, in response to the section 189 (3) notice. He confirmed that Mr Neti proposed at that meeting that he should rather have been appointed as the human resources manager instead of Mr Marriott. Mr Marriott reminded Mr Neti that he had stated previously that he was not interested in the human resources manager position, to which Mr Neti responded that this had not been said in the context of his pending retrenchment. Instead, Mr Neti was offered a more junior position as the industrial relations officer (consultant), which would result in a salary cut of more than half his salary. In response Mr Neti said two or three times “don’t insult my intelligence”.
- [13] There was a further meeting which took place on the 5th of February 2013, also attended by Mr Neti’s wife, at which Mr Marriott went through a further prepared written response, again dated the previous day, also dealing with the same questions which Mr Neti had submitted 21 January 2013 and in particular the proposal that Mr Neti be appointed as the human resources manager. In his response he pointed out that Mr Neti could not be considered for the position since he did not possess a degree or sufficient human resources management experience. Mr Marriott gained the impression at that meeting that Mr Neti wanted to get the process over with as soon as possible so that he could refer this matter to the Labour court. Mr Neti said that he

wanted to get “everything behind him” and that he felt a decision had already been made about his fate, which Mr Marriott denied. Neither party had any further proposals to make at the meeting.

- [14] The meeting ended with Mr Neti saying that he would consult his attorney who would communicate his formal response to the respondent by the end of the week. It was put to him that Mr Neti did not and could not have committed himself to that time-frame, because he did not know at that stage whether his insurer’s would appoint attorneys to take on his case. Mr Marriott was however adamant that Mr Neti had indeed given such an undertaking, as is confirmed by the contemporaneous note which he made at that meeting.
- [15] When Mr Marriott heard nothing further from Mr Neti or his attorneys, by 15 February 2013, he telephoned Mr Neti to enquire when that response would be forthcoming. Mr Neti just said that he was on extended sick leave. That was the end of the conversation. Believing the consultation process to have run its course, he drafted Mr Neti’s dismissal letter dated 18 February 2013 which gave him notice that his last working day would be 28 February 2013. In the event Mr Neti remained on sick leave until then.
- [16] On 18 February 2013, Mr Marriott also telephoned Mr Neti to ask where the letter should be delivered, to which Mr Neti replied that it should be delivered to the FNQ boardroom (where the 5 February meeting had been held), which was done. During neither telephone conversation had Mr Neti protested that the consultation process had been terminated prematurely, or that he or his attorney still wished to make proposals or representations. He did not interpret the letter subsequently received from Mr Neti’s attorneys dated 21 February 2013 as an invitation to reopen negotiations; particularly since Mr Neti had not shown much interest during the consultation process in any event.
- [17] Mr Nikolaas Zerbst also gave evidence via Skype link up from Germany, by agreement between the parties. He was the managing director of the respondent at the time of Mr Neti’s retrenchment. He testified that after the resignation of Mr Robin Fourie as the human resources manager during July 2012, he had taken over the more essential tasks allotted to that position and

the remainder had gone unfulfilled until the appointment of Mr. Marriott. It was put to him that he had asked Mr Neti to “run with the position of human resources manager”, which he denied. He was adamant that none of the functions of the human resources manager were performed by Mr Neti in the interim. He confirmed the previous testimony of Mr Marriott that where there were instances of Mr Fourie performing the same functions as those also performed by Mr Neti, particularly those relating to absenteeism, this was because of deficiencies in Mr Neti’s performance which necessitated this intervention. However these functions and particularly those relating to absenteeism, remained the functions and responsibility of the employee relations manager.

[18] Mr Zerbst confirmed that the position of human resources manager was a more senior position to that of the employee relations manager, with the latter reporting to the former. Mr Neti could not be considered for appointment as the human resources manager because he did not possess the requisite tertiary qualification, nor the requisite 10 years’ experience in a similar post. It was not possible to relax either of these requirements as it was a senior managerial position which would not have been permitted by the parent company in Germany. He added that Mr Neti had never shown any interest in the human resources managers job as that was the function he had left at his previous employment with Rocklands Poultry to take up the position with the respondent in employee relations, which he said he preferred.

[19] Mr Neti testified in support of his case. He stated that he was shocked to receive the section 189(3) notice on or about 20 January 2013 as there had been no prior discussions at which any possible retrenchment was raised at any management meeting of which he was a part. He did not see any need to retrench him and that was the thrust of the questions directed to the respondent in his email of 21 January 2013. He viewed the process as a *fait accompli* from the outset as his position was already identified as redundant in the section 189(3) notice.

[20] He confirmed that at the meeting at the Beach hotel on 25 January 2013, Mr Marriott went through the contents of the respondent’s letter dated 24 January

2013. He also confirmed that he was offered the junior position of an industrial relations officer which he rejected. To everyone's surprise, he denied that he made the proposal that he be placed into the human resources manager's position rather than Mr Marriott. In support of his denial, he stated that this proposal would have been premature as the respondent had not yet satisfied him on the need to declare his position redundant and did not do so throughout the consultation process. Therefore the discussion never moved from this point.

[21] Mr Neti testified further that at the meeting of 5 February 2013, held at the FNQ boardroom, it became clear to him that the required legal assistance in the matter. Therefore he told Mr Marriott that he would be contacting his legal insurers to apply for an attorney to assist him in the matter. He would not and could not have undertaken to do so by the end of the week. Thereafter he was booked off on sick leave.

[22] Mr Neti confirmed that Mr Marriott telephoned him on 15 February asking when he would provide feedback to the company's letter of 4 February 2013, as discussed at meeting of 5. He told Mr Marriott that he was still waiting to hear whether an attorney would be appointed on his behalf and so was not in a position to commit to a date by when this would be done. He was again shocked to receive his dismissal letter dated 18 February 2013 which he immediately handed over to his insurers. The attorneys were appointed on his behalf shortly thereafter and after an after-hours consultation, they drafted the letter dated 21 February 2013 which was sent to the respondent. By then it was too late to make further representations as he had already been dismissed.

[23] Mr Neti was asked repeatedly by his counsel what in particular he regarded as unfair about his retrenchment and he repeatedly answered that he did not believe that his position as the employee relations manager with the respondent had genuinely become redundant. He felt that there was no need to have retrenched him from his position and that his retrenchment was a sham. He also stated repeatedly that he wanted to continue as the employee relations manager and denied expressing any interest in the human resources

manager's job; save that at the end of his evidence in chief he stated that he felt he should have taken over the position after Robin Fourie left in July 2012.

[24] Mr Neti also testified that after the resignation of Mr Robin Fourie, he was requested by Mr Zerbst to "run with the position", which he did. Despite not having the requisite tertiary qualification, he was well able to perform the tasks associated with this position. In addition to his experience as a human resources manager of Rocklands poultry, he had gained extensive human resources management experience at the respondent, since he was often required to assist Robin Fourie with the performance of his tasks, since it was in fact Mr Fourie's deficient performance which needed assistance, and which he provided.

[25] Mr Neti gave extensive evidence of the various tasks which he performed during that 3 month period, which he stated were the functions of the human resources manager. This, in its turn, attracted an inordinate amount of cross-examination. However, in the light of the unchallenged evidence that Mr Neti could not be considered for the position because he was not qualified for it and his steadfast disavowal of any suggestion at any stage of the consultation process that he take over this position, I do not deem it necessary to traverse this evidence in any detail. Suffice to say that it does not appear that Mr Neti performed any different tasks during that three month period to those which he had performed during Mr Fourie's tenure. This was not the case advanced on his behalf during the cross-examination of the respondent's witnesses; that was specifically limited to the three month period during which the human resources manager's post was vacant.

Substantive Fairness

[26] As stated at the outset of this judgment, the parties have in the pleadings and in particular, the pre-trial minute, limited the issue which this Court is required to decide in regard to substantive fairness, to the single issue of whether Mr Marriott ought to have been bumped out of the position of human resources manager to make way for Mr Neti or not.

[27] In *NUMSA v Driveline Technologies (Pty) Ltd & another* [2000] 1 BLLR 20 (LAC), Conradie JA said the following about the binding effect of admissions made in the pre-trial minute: (at p 26, para [16])

“It is true, of course, that a pre-trial agreement is a consensual document which binds the parties thereto and obliges the court (in the same way as the parties’ pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (*Shoredits Construction (Pty) Ltd v Pienaar NO & others* [1995] 4 BLLR 32 (LAC) at 34C–F). The agreement in *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC) was not a pre-trial agreement which served to further define issues in a set of pleadings; it was an agreement that the fairness of the sanction imposed on an employee would not be challenged before a CCMA commissioner. It was, quite correctly, held that the commissioner exceeded her powers in then redetermining the sanction. It was an agreement limiting the issues which is usually binding (*Filta-Matix (Pty) Ltd v Freudenberg and others* 1998 (1) SA 606 (SCA) at 614B–D).”

[28] In the present case too, the applicant expressly abandoned, in the pre-trial minute, any reliance on challenging the need for his redundancy and instead limited his challenge under the heading of substantive fairness to the issue of whether he should have bumped the incumbent from the human resources manager’s position, Mr Marriott. Admissions can be withdrawn and pleadings amended, but this would require an application in each case and no such application was made here. (*Driveline* at p 42, paras [93-94]).

[29] This renders it unnecessary to consider Mr Neti’s complaint in his evidence about the necessity for his retrenchment.

[30] On the bumping issue, there is no evidence to gainsay that given by both of the respondent’s witnesses that Mr Neti could not be considered for the position, since he was possessed of neither the requisite qualifications nor experience; and that any attempt to relax such qualifications would not have been allowed by the respondent’s parent company in Germany. In addition there is Mr Neti’s disavowal of this as his proposal during the consultation process. (See. *Kock v Enviroserve Waste Management* [2001] 7 BLLR 765 (LC))

- [31] This renders it unnecessary to consider respondent's counsel's additional argument that bumping can only apply horizontally and vertically (downwards) and cannot apply to what amounts to a promotion as in this case. (Cf. *Unilever S.A. (Pty) Ltd v Salence* [1996] 5 BLLR 547 (LAC); *Associated Biscuits (a division of National Brands Ltd) v Munsamy* [1997] 9 BLLR 1121 (LAC) at 1124)
- [32] For these reasons, I conclude that the respondent has proved that the dismissal of Mr Neti for operational requirements was substantively fair.

Procedural Fairness

- [33] The consultation process has, with the authority of the Labour Appeal Court, been described as a "joint consensus-seeking process", during which a mechanical or 'check-list' approach is to be avoided. (*Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) at 1216, para [29])
- [34] Mr Marriott's approach at both meetings can, possibly, be criticised as falling into the check-list category. What is clear however is that Mr Neti had no proposal's to offer at either meeting, including, on his own version, the bumping proposal, which Mr Marriott said he had made at the meeting on 25 January 2013 and which is dealt with in the letter of 4 February 2013.
- [35] What is equally clear is that at the end of the meeting on 5 February 2013, the consultation process was still in progress and was adjourned for the purpose of Mr Neti seeking legal advice and assistance. Whether Mr Neti had undertaken to do so by the end of the week or not, it was at the very least incumbent upon him, at that stage, to keep the respondent informed of his intentions and by when these would be communicated. On either version, he took sick leave and did not communicate with the respondent until telephoned by Mr Marriott on 15 February 2013. At no point was either his absence from work or his illness offered as reasons why he could not do so.
- [36] Mr Neti's version of that telephone call was not put to Mr Marriott when he gave evidence. It is also improbable in my view, that Mr Marriott, expecting to have heard from Mr Neti by the end of the week of 5 February; not having

heard from Mr Neti for ten days after the last meeting; and specifically telephoning him to enquire by when he would be submitting representations or proposals if any, would have been satisfied with an indefinite answer that Mr Neti was still waiting to be told whether an attorney would be appointed on his behalf. In the circumstances, I find that it is more probable that Mr Neti was merely mute when asked this question, as Mr Marriott testified.

- [37] Although an employer bears the onus of proving that the consultation process is fair, this requires co-operation from both sides. Where one party withdraws from the process, or otherwise frustrates its purpose, then the other party is not expected to persevere beyond what is reasonably expected in the circumstances. (*Johnson & Johnson at 1221, para [47]*).
- [38] In these circumstances, it seems to me that Mr Marriott cannot be faulted for issuing Mr Neti's termination letter on 18 February 2013, in the belief that Mr Neti was making good on his earlier threats to refer the matter to the Labour Court and that the consultation process had effectively ended. It was put to Mr Marriott and argued at the end of the hearing on the applicant's behalf, that even if this was so, then his attorney's letter of 21 February 2013 ought to have dispelled that perception and persuaded the respondent to withdraw its dismissal letter and reopen the consultation process.
- [39] I do not read the applicant's attorney's letter of 21 February 2013 as an invitation to re-open the consultation process at all. The letter itself says that it is pointless for the applicant to make any proposals in the light of his dismissal and that the matter is to be referred to the Labour Court. Thereafter the letter goes on to make 6 points which were styled as "proposals" in cross examination of Mr Marriott and in argument. In truth, they are no more than a list of reasons why the retrenchment of Mr Neti is considered unfair. It is the sort of pointless sabre rattling that often accompanies a letter of demand. At no point does the letter call for the reversal of the dismissal or the re-opening of the consultation process.
- [40] In my judgment, whatever deficiencies that may have existed in the consultation process were vitiated by Mr Neti's abandonment of it, or at least

conveying that impression, after the respondent had done what could reasonably be expected of it to secure Mr Neti's engagement in the process until its proper conclusion. In these circumstances, it does not seem to me to lie in the mouth of Mr Neti to complain about whatever procedural unfairness may exist, since he was instrumental in the process's termination at that point.

[41] For these reasons, I find that the dismissal of Mr Neti was also procedurally fair.

Order

[42] Mr Partington did not seek any costs of these proceedings on behalf of the respondent. In the result, I make the following order:

- a. The application is dismissed.
- b. There is no order as to costs.

Euijen AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr M Grobler
Instructed by:	Lessing, Heyns, Keyter & van der Bank Inc
For the Respondent:	Mr J Partington
Instructed by:	Chris Baker and Associates