

SOUTH AFRICA / JUDGMENT

Maqengu v Servest (Pty) Ltd (JS252/20) [2024] ZALCJHB 530 (5 November 2024)

[2024] ZALCJHB 530**COURT**

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS252/20

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Source record**THE****LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case****No: JS 252/20****In****the matter between:**

NKULUMBUSO
HECTOR MAQENGU
Applicant/Plaintiff
and
SERVEST
(PTY) LTD
Respondent/ Defendant

Heard:

12 and 13 August 2024

Delivered:

05 November 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 05 November 2024)

JUDGMENT

PHEHANE, J

Introduction

[1] The applicant launched a referral in this Court seeking the following relief,[1] that:

1.1 his dismissal for operational requirements be declared substantively unfair;

1.2 his dismissal be declared automatically unfair as the respondent unfairly discriminated against him on an arbitrary ground as contemplated in section 187 (1)(f) of the Labour Relations Act[2] (LRA);

1.3 the respondent be ordered to pay his severance pay, alternatively, just and equitable compensation;

1.4 the respondent pays his costs; and

1.5 further and/or alternative relief be granted.

[2] The referral is opposed.

[3] The respondent raised an exception to the applicant's statement of claim to the effect that the applicant's unfair discrimination claim failed to disclose a cause of action. The parties intended that the exception be determined at the start of the trial hearing. However, at the start of the trial proceedings when the Court sought clarification as to whether or not the exception was opposed due to no heads of argument being delivered by the applicant in reply to the heads of argument delivered by the respondent, Mr. Mahome for the applicant informed the Court that the applicant abandoned his unfair discrimination claim. I deal with the late abandonment of the unfair discrimination claim below when I deal with the issue of costs.

[4] Mr. Prinsloo for the respondent submitted that, in view of the abandoned unfair discrimination claim that concerned an allegation that the applicant "was treated differently to the other employees regarding selection criteria as the other employees",[3] the remaining allegation by the applicant that this Court is to determine, is whether there was a fair reason for the dismissal, in other words, whether there was a genuine reason to restructure the business operations of the respondent. In addition, in light of the applicant's contention that no consultation process was held as contemplated in section 189 of the LRA, whether

his dismissal was procedurally unfair.

Evidence

- [5] It is common cause that the applicant was dismissed by the respondent for operational requirements. At the time of his dismissal, the applicant was employed in the position of senior Safety Health Environmental Quality (SHEQ) officer and he had for 20 months prior, acted in the position of National SHEQ Manager and received an acting allowance in the amount of R5 000.00 per month.
- [6] The uncontested evidence of Ms. Masuku, the Human Resources Director of the respondent and its sole witness, was that the business of the respondent is that of integrated facilities management, supplying non-core services such as security, parking, landscaping, and marine services to its clients. During 2019, the respondent sought to restructure its SHEQ division to transition from a decentralized model operating in different business units to a centralized operating model. The impact that this transition had was that divisional positions became redundant. On 20 September 2019, a consultation meeting was held with employees where they were informed about the restructuring process. On 14 October 2019, the applicant received a letter regarding the anticipated restructuring process as well as a letter in terms of section 189(3) of the LRA. The first consultation hearing took place on 24 October
2019. The impacted employees were invited during a consultation process in terms of section 189 of the LRA, to apply for roles in the new structure, with the intention to place all employees to avoid dismissal. The respondent proposed skills and qualifications as the selection criteria and no alternative proposals were made by the impacted employees regarding the selection criteria.
- [7] Ms. Masuku's evidence was that the applicant applied for two roles in the new structure – the SHEQ Area Manager role and the SHEQ Inland Regional Manager role, both based in Gauteng. The applicant was interviewed for and was not successful for the latter role. The successful incumbent for the SHEQ Inland Regional Manager role was Mr. Lucky Ncayiyana. The scorecard of the interview shows that Mr. Ncayiyana was the most suitable candidate.[4] The applicant was offered the SHEQ Area Manager role on 1 November 2019.[5] The salary package, or the cost to company (CTC) in this new role was R26 383.34,[6] which was the same CTC as his previous role as senior SHEQ officer,[7] which had become redundant. Ms. Masuku stated that the applicant refused to accept the role of SHEQ Area Manager, as he wanted to retain his acting allowance in the amount of R5000 per month. However, as the role of National SHEQ Manager in which he acted had become redundant, the respondent could not continue to pay the applicant the acting allowance attached to this redundant role.
- [8] As a consequence of refusing to accept the role of SHEQ Area Manager that was offered to him, which Ms Masuku stated was a reasonable alternative position, the applicant was not eligible to receive a severance package. He was dismissed, as the role he had occupied had become redundant. Her evidence was that no person was appointed in the role the applicant previously occupied before the restructuring, as that role had become redundant.

- [9] In response to the applicant's version that a fellow employee, Mrs Mkhize was affected by the restructuring process but was not subjected to the interview process for a suitable placement as was the case with other impacted employees, Ms. Masuku denied that Mrs. Mkhize was affected by the restructuring. Her evidence was that Mrs Mkhize was the Group Head of SHEQ and her position was not impacted and therefore, she did not undergo selection processes in the restructuring process.
- [10] The applicant's pleadings are not a model for clarity. Ex facie the statement of claim, the applicant does not plead procedural unfairness relating to the failure to hold consultations prior to his dismissal. He does not seek an order declaring his dismissal was procedurally unfair. In the pre-trial minute concluded between the parties, the applicant disputes that any consultation meetings were held, and he disputes that any selection criteria existed in the process. He maintains that there was no genuine reason for his retrenchment. As stated in the statement of claim, the pre-trial minute also records that the issue this Court is to determine is the substantive fairness of the applicant's dismissal and the appropriate relief if the applicant's dismissal is found to be substantively unfair.[8]
- [11] In oral evidence, the applicant conceded that he was notified of an anticipated retrenchment in a letter dated 14 October 2019;[9] he also conceded that a notice in terms of section 189(3) of the LRA was served on him;[10] he conceded that consultation meetings were held with him and 13 affected employees in which the respondent explained the need to restructure its operations, the proposed selection criteria, which was skills and qualifications, and the requirement to apply for positions in the new structure. He conceded that the consultations were prior to his dismissal.
- [12] The applicant pleads in paragraph 6 of his statement of claim that a meeting was held on 20 September 2019 where employees including the applicant were informed about the contemplated restructuring process.[11] Ms Masuku confirmed this in her evidence. Detailed minutes of the consultation meeting held on 24 October 2019 are contained in the applicant's bundle of documents (Bundle B).[12] These minutes are not disputed. The applicant's pleaded case is that a further meeting was held on 27 September 2019.[13] A further meeting was held with the applicant on 26 November 2019. The applicant inserted the minutes of this consultation meeting in his bundle.[14]
- [13] The applicant conceded that he was interviewed for the role of SHEQ Inland Regional Manager, based in Gauteng in October 2019, during the restructuring process in terms of section 189 of the LRA. His competitor was Mr. Ncayiyana, who was the successful candidate for the role. He did not dispute the scorecard that showed that Mr. Ncayiyana was the most suitable candidate for the role.
- [14] The applicant conceded that the CTC of his old role matched the new role of SHEQ Area Manager, however, he was unhappy that he would no longer receive his acting allowance. He tried to negotiate with the respondent to adjust the salary package attached to the new role to include R5 000.00 per month. During cross-examination, the applicant was referred

to the minutes of the meeting with the respondent before his dismissal, where he proposed that a higher salary be paid to him and in response, the respondent was willing to pay him R5 000.00 per month until January 2020. This counter-proposal was rejected by the applicant, as he insisted on being paid 80% of his previous acting allowance in his new role.

[15] The applicant conceded during cross-examination that had he retained the monthly payment of R5 000.00 he earned as an acting allowance in the new SHEQ Area Manager role, he would have accepted this alternative role.

[16] Despite being legally represented, the applicant failed to put his version to Ms Masuku, which changed frequently, and which version/s were as far from his pleaded case as the East is from the West. The applicant failed to put the following versions to Ms Masuku:

16.1 that he suggested LIFO as a selection criterion during the consultation meeting on 24 October 2019. The applicant later changed his version to state that he was unable to propose LIFO as an alternative as the duration of this meeting was less than an hour;

16.2 that Ms Masuku contacted him after his dismissal by telephone on 18 June 2018 and invited him to attend a second interview for the SHEQ Inland Regional Manager role on 26 June 2020 on MS Teams to compete against Mr. Ncayiyana who was already appointed in the role;

16.3 the names of the panel members on the scorecard are not the people who had interviewed him in the first interview;

16.4 that he did not refuse to accept the SHEQ Area Manager role for reasons of relocating to KZN – it was the SHEQ Inland Regional Role based in KZN that was offered to him which he refused to accept;

16.5 that Mrs. Mkhize was not the Group Head of SHEQ, she was a SHEQ Manager and her role was also impacted by the restructuring; and

16.6 that he had a discussion on 2 December 2019 with the Human Resources Manager, Mr. Naicker that he would receive a severance package if he undertook not to refer a dispute to the Commission for Conciliation, Mediation and Arbitration and the applicant refused to make such an undertaking.

Analysis

[17] Having considered that consultations were held with the impacted employees, including himself, and having included the minutes of such consultations in his trial bundle, the applicant's claim that no consultation was held is disingenuous.

[18] The uncontested evidence is that the rationale for the restructuring was consulted on, as well as the selection criteria, being skills and qualifications. No proposals were made by the impacted employees on the selection criteria.

[19] The applicant's version regarding him proposing LIFO was not put to Ms Masuku. In any event, the applicant changed his version to state that the meeting was too short to enable him to propose LIFO as a selection criteria. This version is not only a material contradiction to the applicant's version, but it was also not put to Ms Masuku.

[20] In *President of the Republic of South Africa and others v South African Rugby Football Union and others*[15] (SARFU), the Constitutional Court stated as follows regarding the failure to challenge a point of dispute during cross-examination:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct'.^[16]

[21] The failure by the applicant to put his version to Ms Masuku is fatal to his case and his version is accordingly rejected. In light of the abovementioned quote in SARFU, Ms. Masuku's version is accepted as correct and it is this: the respondent consulted with the affected employees, including the applicant, on the rationale for the restructuring, to centralize the SHEQ division to improve efficiency; the respondent consulted on the selection criteria being skills and qualifications and the employees did not make any counter-proposals; the applicant was interviewed for the role of SHEQ Inland Regional Manager in October 2019 and was unsuccessful for that role as Mr. Ncayiyana scored higher than the applicant and was the more suitable candidate for that role; the applicant was offered the role of SHEQ Area Manager for which he had also applied, which role was based in Gauteng, was the same CTC as the applicant's previous role which had become redundant and was a reasonable alternative role; the applicant refused to accept the respondent's offer of this reasonable alternative role due to him demanding that his acting allowance should continue to be paid to him despite being aware that this acting role too, had become redundant, the applicant was fairly dismissed, as his role had become redundant and he refused to accept an alternative role and therefore, he was not entitled to a severance package.

[22] The applicant changed his version's version regarding the location of the SHEQ Area Manager role being in KwaZulu-Natal (KZN) is not supported by the documentary evidence. The role was based in Gauteng. The applicant changed his version and stated that during his interview, he was asked if he would be prepared to relocate to KZN to perform this role and he answered in the negative.

[23] In Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others[17], the Supreme Court of Appeal was instructive in setting out how a Court is to evaluate evidence when it is presented with mutually

destructive versions.

[24] Ms Masuku was a consistent witness. Her consistent evidence is that both the SHEQ Inland Regional Manager and SHEQ Area Manager roles were based in Gauteng. The applicant's version changed at every turn. First, the SHEQ Area Manager role was in KZN, then he conceded the role was based in Gauteng and he then changed his version to state that he was asked in an interview if he would be prepared to relocate to KZN for the SHEQ Inland Regional Manager role and he further contradicted his version by stating that a SHEQ Inland Regional Manager role based in KZN was a third position advertised by the respondent in addition to the SHEQ Inland Regional Manager role and SHEQ Area Manager roles based in Gauteng. It is improbable that any SHEQ role would be located in KZN, as this would defeat the purpose of the centralization of the SHEQ division. The applicant's version is rejected in light of his contradictory versions. It is more probable that the SHEQ positions were in Gauteng, where they were centralized and it is more probable that the applicant refused to accept the SHEQ Area Manager role because the respondent was not prepared to continue to pay him a higher salary as he was no longer entitled to an acting allowance of R5 000.00 as the role he acted in had become redundant.

[25] The applicant's version that the interview and assessment process was unfair due to Mr. Ncayiyana providing interview

candidates with answers to the assessments is a red herring. Ms. Masuku's evidence is that Mr. Ncayiyana was disciplined for this offence. Her evidence is that the applicant was part of the meeting where Mr. Ncayiyana gave out interview/assessment answers. The applicant disputed that he was a part of that meeting. His denial is unconvincing as he presented the transcript of that meeting in his bundle (Bundle B), which contains a certificate of veracity by the transcriber as to its correctness. He was challenged with this in cross-examination and his persistent denial that he was not a part of the meeting is unconvincing. In any event, he did not challenge the scorecard that showed that Mr. Ncayiyana was a better candidate. His version that this scorecard pertained to an interview in June 2020 after he was called to a second interview is improbable and fanciful. It is rejected in any event, as it was not put to Ms Masuku.

[26] Without question, the evidence before this Court – documentary and oral, inclusive of the aforesaid concessions by the applicant, overwhelmingly proves on a balance of probabilities, that the dismissal of the applicant was substantively and procedurally fair.

[27] In view of the afore-going, I find that the respondent discharged its onus.

Costs

[28] In *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*[18], the Constitutional Court repeated that in this Court, costs do not follow the result, unless circumstances exist that warrant an order as to the payment of costs.

[29] Section 162 of the LRA provides as follows in relation to an order for the payment of costs:

‘(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.’

[30] The applicant approached the Court with a frivolous claim. He abandoned his unfair discrimination claim at the start of proceedings when the respondent had already incurred costs in defending such a claim by raising an exception. The applicant persisted with his unfair discrimination claim in circumstances where he ought to have withdrawn it long before the start of the hearing.

[31] The remainder of the applicant’s claim is also frivolous. There was a consultation prior to his dismissal and the selection criteria as proposed by the respondent were fair and objective in view of no counter-proposals being presented by the employees. He conceded that if he had been paid more money he would have accepted the role of SHEQ Area Manager. This concession obliterates his entire claim that his dismissal was both procedurally and substantively unfair and makes his claim frivolous. The conduct of the applicant in approaching this Court in persisting with a frivolous claim warrants an order for the payment of costs.

[32] In *Kabe v Nedbank Limited*, [19] this Court, per Moshoana J, stated the following with reference to *Zungu v Premier of the Province of KwaZulu-Natal and Others*[20] and *MEC for Finance: KwaZulu-Natal and another v Dorkin NO and another*[21] relating to an order as to the payment of costs:

‘... To my mind if the evidence is overwhelming that the case is frivolous the scale must tip in favour of making an order as to costs. Allowing parties to bring frivolous cases does not only affect the opposing party but it also affects the administration of justice, the business of the court and judges. The resources of this court, judges that is, are thinly spread country wide. If this court were to allow those thinly spread resources to be abused, then the provisions of section 34 of the Constitution will be severely compromised.’

[33] I am of the view that there is no merit in the applicant’s claim. Pursuing a frivolous claim has affected the administration of justice. The thinly spread resources of this Court could have been utilised to adjudicate disputes that are meritorious as opposed to the present referral. The respondent has incurred costs in defending a frivolous referral. I therefore exercise my discretion

to make an order that the applicant should pay the costs of this referral.

[34] In view of the afore-going, the order is as follows:

Order

1. The referral is dismissed.
2. The applicant is to pay the costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. Frans Mahome

Instructed by:

Okafor Attorneys

For the Respondent/Defendent: Adv Cobus Prinsloo

Instructed by:

De Villiers Du Plessis Attorneys

[1] Pleadings, statement of claim, para 33 at p 9.

[2] Act 66 of 1995, as amended.

[3] Pleadings, statement of claim, para 31 (a) at p 8.

[4] The scorecard appears at Bundle A, p 3.

[5] The contract for the SHEQ Area Manager role appears at Bundle B, pp 1 to 6.

- [6] The CTC for the SHEQ Area Manager appears at Bundle B, p 7.
- [7] The applicant's salary slip for the role of senior SHEQ officer showing a CTC of R 26 383.34 appears at Bundle A, p1.
- [8] See: pre-trial minute, pp 23 to 24 and pp 28 to 31.
- [9] This letter appears at Bundle B, pp 25A to 25B.
- [10] The letter in terms of section 189(3) appears at Bundle B, pp 26 to 28.
- [11] Pleadings, statement of claim, para 7 at pp 2 to 3.
- [12] pp 30 to 43.
- [13] Pleadings, statement of claim, para 10 at p 3.
- [14] Bundle B at pp 49 to 54.
- [15] [1999] ZACC 11; 2000 (1) SA 1 (CC).
- [16] SARFU at para [61].
- [17] [2002] ZASCA 98; 2003 (1) SA 11 (SCA).
- [18] [2021] ZACC 26; (2021) 42 ILJ 2371 (CC).
- [19] [2018] ZALCJHB 173; (2018) 39 ILJ 1760 (LC) at para [43].
- [20] [2018] ZACC 1; (2018) 39 ILJ 523 (CC).
- [21]
- [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC).

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