

SOUTH AFRICA / JUDGMENT

Seleoane v Tshwane University of Technology (J1525/08) [2017] ZALCJHB 29 (24 January 2017) [2017] ZALCJHB 29

COURT

Labour Court Johannesburg

BEFORE

Whitcher

CASE / FILE NUMBER

J1525/08

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1525-08

In the matter between:

LEBOHANG SELEOANE Applicant

and

TSHWANE UNIVERSITY OF TECHNOLOGY Respondent

Heard: 10, 11 May; 18 June 2012; 19, 20, 21 September 2016

Closing submissions: 25 October 2016

Delivered: 24 January 2017

WHITCHER J

- [1] Applicant's claim against Respondent is for an automatically unfair dismissal ("the main claim"), alternatively an unfair dismissal based on Respondent's operational requirements ("the alternative claim").
- [2] In his statement of claim, on the main claim, Applicant alleges that the real reason for his dismissal was the fact that he had pursued a grievance against Prof Tyobeka, the then Vice-Chancellor of Respondent. In the alternative, Applicant alleges that his dismissal due to Respondent's operational requirements was procedurally and substantively unfair in that he

was qualified and suitably experienced to be placed, alternatively interviewed and appointed to 2 posts which existed at the time, namely: Director: Transformation, Employment Equity and Diversity and Director: Employee/Labour Relations and Safety, Health and Environment. Respondent further failed to consult meaningfully with him on the reasons he was not placed or appointed to one of the said two posts. Respondent further made no bona fide attempts to avoid his retrenchment.

- [3] Respondent denies Applicant's claims and contends that Applicant was dismissed due to its operational requirements, which dismissal was both procedurally and substantively fair.

The legal principles applicable to automatically unfair dismissals

- [4] In *SACWU and Others v Afrox Ltd*,^[1] the Labour Appeal Court in dealing with an automatically unfair dismissal in terms of section 187(1)(a) of the LRA (protected strike action), said the following:

"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here ... The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominate', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation ... I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable of plausible inference is drawn from circumstantial evidence in civil cases ..."

- [5] The Labour Appeal Court in *Kroukam v SA Airlink (Pty) Ltd*^[2] held as follows at paras. 28 - 29:

"In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair dismissal.

The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most like cause of the dismissal."

[6] In *State Information Technology Agency (Pty) Ltd v Sekgobela* [3] the LAC held:

"In cases where it is alleged that the dismissal is automatically unfair, the situation is not much different save that the 'the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant (employee). If the applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by s 187(1) of the LRA rests with (employer). It is evident therefore that a mere allegation that there is a dismissal is not sufficient but the employee must produce evidence that is sufficient to raise a credible possibility that there was an automatically unfair dismissal'".

[7] In a situation where there could be more than one reason for a dismissal co-existing contemporaneously, Van Niekerk AJ (as he then was) stated the following in *Van der Velde v Business and Design Software (Pty) Ltd*: [4]

- "The Applicant must prove the existence of a dismissal and establish that the underlying transaction is the one that falls within the ambit of s197.
- The Applicant must adduce some credible evidence that shows that the dismissal is causally connected to the transfer. This is an objective enquiry, to be conducted by reference to all of the relevant facts and circumstances. The proximity of the dismissal to the date of the transfer is a relevant but not determinative factor in this preliminary enquiry.
- If the Applicant succeeds in discharging these evidentiary burdens, the employer must establish the true reason for dismissal, being a reason that is not automatically unfair.
- When the employer relies on a fair reason related to its operational requirements (or indeed any other potentially fair reason) as the true reason for dismissal, the court must apply the two-stage test of factual and legal causation to determine whether the true reason for dismissal was the transfer itself, or a reason related to the employer's operational requirements.
- The test for factual causation is a 'but for' test - would the dismissal have taken place but for the transfer?
- If the test for factual causation is satisfied, the test for legal causation must be applied. Here, the court must determine whether the transfer is the main, dominant, proximate or most likely cause of the dismissal. This is an objective enquiry. The employer's motive for the dismissal, and how long before or after the transfer the employee was dismissed, are relevant but not determinative factors.

- If the reason for dismissal was not the transfer itself (because, for example, it was a dismissal effected in anticipation of a transfer and in response to the requirements of a potential purchaser of the business) the true reason may nonetheless be a reason related to the transfer.
- To answer this question (whether the reason was related to the transfer) the court must determine whether the dismissal was used by the employer as a means to avoid its obligations under s197. (This is an objective test, which requires the court to evaluate any evidence adduced by the employer that the true reason for dismissal is one related to its operational requirements, and where the employer's motive for the dismissal is only one of the factors that must be considered.)
- If in this sense the employer used the dismissal to avoid its s 197 obligations, then the dismissal was related to the transfer.
- If not, the reason for dismissal relates to the employer's operational requirements, and court must apply s 188 read with s 189 to determine the fairness of the dismissal”.

[8] Although the above matter concerned a dismissal allegedly in breach of section 197 of the Labour Relations Act, 1995, the analogy to the current matter is relevant. On this authority the Court has to determine whether “but for” the grievance, Applicant would not have been dismissed; and whether the laying and pursuit of the grievance was the main, dominant, proximate or most likely cause of the dismissal, if the facts show more than one reason may have been the reason for the dismissal.

Background

facts

[9] Respondent came into existence on 1 January 2004 out of a statutory merger of three technikons, namely North-West, Northern Gauteng and Pretoria. The merger resulted in a new employment structure negotiated with representative trade unions operating at the technikons. The new employment structure retained certain jobs, created new ones and rendered certain functions and jobs redundant.

A match and place policy, negotiated with the unions, was used to place and redeploy existing staff in the new employment structure according to their substantive posts held at the time of the merger. Sub-placement committees submitted proposals on the placement of staff to the Core Placement Committee for ratification of the proposal or a remittance to the sub-committee where the Core Placement Committee was not satisfied with the proposal of the sub-committee. Those who could not be placed or redeployed were retrenched.

[10] Applicant rendered his services to the HSRC for the period 1 November 1995 until 1 March 2003, when he was appointed to the post of Director: Promotion of Access to Information and Planning at the Technikon North-West. When Respondent came into existence, Applicant was appointed Interim Campus Director of Respondent’s Ga-Rankuwa campus as

his substantive post, Director: Promotion of Access to Information and Planning, no longer existed in the new employment structure. As Campus Director Applicant reported directly to Prof Tyobeka, the then Vice-Chancellor of Respondent.

- [11] During March 2007 Applicant lodged a formal grievance against Prof Tyobeka, alleging that Prof Tyobeka was managing him in a manner that lacked integrity, harassing him and constructing circumstances where he might become redundant. The grievance was referred to private arbitration and on 18 April 2008 the arbitrator issued an award.
- [12] The arbitrator found in favour of Applicant in respect of the first allegation, but this related to events which occurred as far back as 2005 and moreover holds no significance for the case before me.
- [13] However, relevant to the case before me, since exactly the same allegations were made before me in the context of Applicant's

claim of an automatically unfair dismissal and an unfair retrenchment, the arbitrator found no merit in the claims that Prof Tyobeka was harassing Applicant and/or constructing circumstances where he might become redundant. A summary of the evidence from the award and the arbitrator's findings follow.

13.1 In September 2006, Prof Mashego, the then Deputy Vice-Chancellor: HR proposed to Prof Tyobeka that a permanent post of Presiding Officer be created and Applicant be employed in this position. The suggestion was made out of a concern that Applicant's substantive post no longer existed in the new employment structure of Respondent. The arbitrator, reasonably in my view, found that Prof Tyobeka and Prof Mashego's successor, Ms Thabanelo correctly did not support the proposition because they did not have the authority to personally create posts, especially level 4 posts, and appoint anyone to same. Only Council had the power to create such posts and there were official standing procedures for appointing staff to said posts. The arbitrator found that the existence of this policy was not disputed by Applicant.

13.2 Applicant alleged that Prof Tyobeka had obstructed his chance of being appointed to the post of Strategic Advisor to the Vice-Chancellor in December 2006. Prof Tyobeka had encouraged him to apply for the post and he was short-listed. Applicant, however, withdrew his application when he found out that Prof Tyobeka had also initiated a head-hunt for female candidates as well. Prof Tyobeka explained that Council often complained about the under-representation of female executive employees. The arbitrator, correctly, found Prof Tyobeka's explanation reasonable. Moreover, in my view, reserving such a post for Applicant, a level 5 employee, would have constituted an unfair labour practice considering Respondent had procedures for appointing staff to level 4 posts.

13.3 Applicant pointed to another incident which he claimed showed Prof Tyobeka was engineering his redundancy. When it was decided that the executive deans would take over the management of the campuses, Applicant raised a concern with Prof Tyobeka about his future at Respondent. Prof Tyobeka told him that there was a management post in Dr Nevhutalu's

department and arranged for him to meet Dr Nevhutalu to discuss the possibility of him being appointed in an acting capacity pending the match and placement exercise. Applicant considered this a demotion and told Dr Nevhutalu and Prof Tyobeka that since it was possible that the outcome of the meeting might trigger a labour dispute, he wanted to electronically record the meeting with his recorder. Dr Nevhutalu viewed this as a blatant unreasonable show of distrust and angrily told Applicant that he did not want a person such as Applicant in his environment. Applicant responded that he too would not want to work with Dr Nevhutalu. Applicant contended that Prof Tyobeka should have called Dr Nevhutalu to order, and his failure to do so was further proof that he was trying to engineer his redundancy. The arbitrator rejected this contention. He pointed out that Prof Tyobeka had taken the trouble to arrange the meeting and Applicant had himself angrily said that he did not wish to work with Dr Nevhutalu.

[14] Before the above award was issued, Applicant received a letter dated 1 February 2008 informing him that he could not be placed. When he enquired as to why he was not placed, he was told that no post similar to the one he occupied prior to the merger, namely Director: Promotion of Access to Information and Planning, existed in the new employment structure. He was further informed that he had been referred to the redeployment committee to be considered for any other position at the same level.

[15] On 14 February 2008 Applicant lodged an appeal against his non-placement. He was informed on 9 June 2008 that his appeal had

failed and on 11 June 2008 he was advised that he could not be placed or redeployed and will be retrenched. After an interim application to the Labour Court to stay the dismissal Applicant was dismissed on 3 September 2008. He referred a dismissal dispute to the Labour Court.

[16] As stated before, in his statement of claim, on the claim of an automatically unfair dismissal, Applicant alleges that the real reason for his dismissal was the fact that he had pursued a grievance against Prof Tyobeka.

[17] In the alternative, Applicant alleges that his dismissal due to Respondent's operational requirements was procedurally and

substantively unfair in that he was qualified and suitably experienced to be placed, alternatively interviewed and appointed to

2 posts which existed at the time, namely: Director: Transformation, Employment Equity and Diversity and Director: Employee/Labour

Relations and Safety, Health and Environment. Respondent further failed to consult meaningfully with him on the reasons he was not placed or appointed to one of the said two posts. Respondent further made no bona fide attempts to avoid his retrenchment.

Applicant's closing submissions on the evidence adduced at trial

- [18] In respect of the above positions, Ms Van Heerden, testifying on behalf of Respondent, averred that Applicant does not have 5 years' experience at a management level in respective fields. His CV, however, and his evidence disclose that as campus director he managed employees for just over 3 years, he had managed a community centre from 1990 – 1994 and had been employed as an education officer by a trade union for 2 years from 1988-1990.
- [19] The only specific reason advanced by Respondent for not considering him for the Employee/Labour Relations post was that he had shown a lack of objectivity in pursuing his own grievance – Ms Tlhabanelo deposed to this fact in an interim application to this Court. However, an individual can scarcely be expected to be neutral and objective in his own case and the remarks of Prof Tyobeka about Applicant in his reply to Applicant's grievance are telling:

“It is important to point out that Mr Seleokane's role and contribution to the resolution of disputes and discipline in the

University has never been questioned by the Human Resource Division nor by me. All of us have seen this as one of his fortes and have been highly appreciative of (sic) way he has handled these cases”.

- [20] One explanation for Respondent's failure to “give” one of the posts to Applicant without him having to compete for it was that these posts were outside the redeployment process. It was put to Applicant that the two positions had been considered by the time he entered the redeployment pool and were thus no longer available to him, and that Van Heerden would depose to this fact. She did not testify to this fact but said that Applicant took himself out of the redeployment pool by appealing the decision of the placement committee.
- [21] Neither of these two reasons are consistent with the “Criteria of Placement of Staff” which prescribes that unplaced staff “...will be considered for redeployment first of all”. The contention is also at odds with what Tlhabanelo said, which is that the redeployment committee would deal with “that pool” (of people) against what they will be having (available positions).
- [22] Furthermore, placement policy prescribes internal advertisements prior to external ones. There was no evidence that this was done and the successful candidate in respect of the transformation post was an external candidate.
- [23] Van Heerden could not say whether the redeployment committee of 10 June 2008 considered Applicant for either of the 2 positions, which were not filled at that stage and no minutes of that meeting were produced. Applicant was thus not redeployed to either suitable post and this conduct is unexplained.
- [24] In addition, during October 2007, after Applicant had laid the grievance on 12 March 2007, and after he had, from a functional point of view anyway, been emasculated by Prof Tyobeka, Prof Sebara approached Dr Nevuthalu to mediate a settlement of the dispute

between Applicant and Prof Tyobeka and the reaction was that if Applicant is to be retrenched he must be retrenched. It was put to Applicant that this conversation never occurred, although Dr Nevuthalu never denied it whilst testifying. Such a reaction warrants

an inference that Respondent's management were determined to be rid of Applicant and the most probable reason is that he laid the grievance. This inference is strengthened by the fact that Applicant was the only level 5 employee to be retrenched and his name is the only one to be mentioned at the meetings of the Placement Committee during November 2007. Van Heerden could not explain why.

[25] What also indicates the motive or reason for Applicant's dismissal as being the grievance he laid is the timing and manner of his dismissal. On 15 May 2008 the Placement Appeal Committee defers consideration of Applicant's appeal until the Council of the University has considered Applicant's grievance. There is no evidence that the Council, as opposed to individual members thereof, considered the outcome of the arbitration on the grievance before the Appeal Committee on 9 June 2008 considered and dismissed Appellant's appeal on 9 June 2008. It is to be inferred from the letter of dismissal that the Redeployment Committee sat on 10 June 2008 and the letter of dismissal was signed on 11 June 2008 – without the Council considering the grievance. The natural inference is that the process was hastened to avoid having to deal with the grievance, which Tyobeka conceded was never dealt with.

[26] A further factor to be considered is that the dispute about Applicant's dismissal was not referred to the “conciliation

committee” recommended by the Sithole Commission. Van Heerden's contention that this recommendation was not implemented regarding dismissal disputes is not only inherently improbable, it was also not put to Applicant when he testified. It is submitted that the most probable reason for Applicant's dispute not being referred to this Committee is that management could not contemplate his return in the light of his successful grievance against Tyobeka.

[27] If one further considers the statement by Prof Tyobeka in his answer to Applicant's grievance, that the relationship of trust between him and Applicant had broken down beyond repair and Tlhabanelo's statement that Applicant was conducting a “bitter vendetta against management, the Vice Chancellor and the Council of the University”, the contention that Applicant's grievance was the most probable cause for his dismissal gains considerable traction.

[28] Taking all the above into account Respondent has not proven that the grievance was not the dominant or most probable cause of the dismissal.

[29] Regarding Respondent's claim that Prof Tyobeka's attempts to place Applicant in various posts are quite inconsistent with a hidden agenda to dismiss him for having laid the grievance, a perusal of the evidence shows that:

- (a) Prof Tyobeka's conduct in relation to the presiding officer's position was not transparent nor in accordance with the objective realities. Despite apparently giving Professor Molefe carte blanche to proceed with the appointment on 12 September 2006, he had reservations about the transition at the top post of the Human Resources Department to Tlhabanelo. The matter then ran aground because Tlhabanelo did not want another high level employee in her department, despite the recommendation being that the post be at the same level then occupied by Applicants. The reason advanced by Prof Tyobeka for not implementing this suggestion by Prof Molefe was never discussed with Applicant.
- (b) The strategic advisor post was lost because of an unfortunate hear-say communication to Applicant. But when Applicant sought Prof Tyobeka's input on his concerns, he was given the run-around.
- (c) The post in Dr Nevuthalu's department was lost when Applicant sought to record the meeting with Dr Nevuthalu and Prof Tyobeka. What Prof Tyobeka singularly failed to do was to admonish Dr Nevuthalu and point out that there was nothing wrong with Applicant recording the proceedings.
- (d) There is a conflict in the evidence about whether Prof Tyobeka suggested Applicant apply for a Campus Director post at one of the satellite campuses and for other available Director's posts. What is clear, however, is that none of these posts were suggested to the Redeployment Committee so that they could treat Applicant like all other employees and place him in one of if they deemed it appropriate. This probably was because Applicant was taken out of the redeployment pool due to his appeal in conflict with the negotiated procedures which Van Heerden conceded did not provide for such an event and because Prof Tyobeka and Dr Nevuthalu wanted to rid themselves of Applicant because of the grievance.

[30] Lastly, Respondent's document, "Retrenchment for the 'Match and Place' reads, in part:

"The TUT will make all reasonable efforts to redeploy staff whose positions are redundant to suitable alternative employment. Retraining of staff will be considered where appropriate within a reasonable period and in accordance with the match and place criteria".

[31] In terms of the above, Respondent, at the very least, should have appointed Applicant to the Transformation Post when it's

selected external candidate declined it.

Analysis

of the evidence and arguments

- [32] The question is: Would Applicant's dismissal have taken place but for Applicant laying the grievance? In my view the answer to this question is undoubtedly yes – the evidence adduced by Respondent established that Applicant's dismissal naturally and logically arose out of an objective application of the new employment structure and the match and placement policy negotiated with the unions.
- [33] The new employment structure retained certain jobs, created new ones and rendered certain jobs redundant. A match and place policy - "Criteria for Placement of Staff (Post Levels 5 – 18)"
- was used to place post levels 5 – 18 staff in post appearing in the new employment structure. The substantive posts of the employees were used as comparators in the match and placement exercise. To be placed in a post appearing in the new structure, the job content of the new post had to be "significantly the same as previously." Van Heerden said the committee looked for at least a 50% match between the substantive post of an employee and a post in the new structure, which, in my view, does not go against the test of 'significantly the same as previously'.
- [34] In terms of Scenario G in the policy, a "new post in structure is a combination of several responsibilities which were performed by several staff members within that department".
- Regarding "criteria for placement of staff" in new posts, the "position should only be open to those staff members holding "several responsibilities." So, in order to qualify for placement in a new post in the employment structure, the employee, in his or her substantive post must have "held "several of the responsibilities" included in the new post, i.e. in his substantive post he must have performed at least 50% of the functions contained in the new post.
- [35] According to Scenario H of the policy, where an employee's substantive post "is not in the new structure", the employee "will be referred to the redeployment pool, i.e. the staff member will be considered in terms of the functions they performed and not only the post that they held".
- [36] Employees had the right to appeal against decisions by the placement committees and ask the appeal committee to place them in a particular permanent position.
- [37] According to the policy, employees who could not be placed or redeployed were retrenched.
- [38] It is common cause that Applicant's substantive post, namely Director: Promotion of Access to Information and Planning, did not form part of the new employment structure. This meant that his case fell under Scenario H. The placement committee thus correctly decided that he could not be placed and had to be referred to the redeployment pool. Applicant, however, decided to appeal against that decision.
- [39] I agree with Van Heerden's averment that the lodgement of the appeal meant that Applicant could not be considered in the redeployment phase. Although there is no reference to the effect of an appeal against the decision of the placement committees, it is common logic that

any further implementation of that decision should be stayed pending the appeal. That is the normal course of events in the case of appeals. The redeployment pool follows from the placement. If an employee cannot be placed, i.e. put in a permanent position in the new structure, he goes to the redeployment pool where the committee looks for a position for him. An employee who is unhappy about the decision of the placement committee appeals against that decision and asks the appeal committee to put him in a specific permanent position. If such an employee, whilst the appeal is pending goes into the redeployment pool he might be placed into another position, whilst the appeal committee is still considering whether he should have been placed in the said position. That would result in the possibility of such employee being placed and redeployed in two different positions at the same time by two different committees.

- [40] In any event, Van Heerden and Prof Tyobeka testified that the posts of Director: Transformation, Employment Equity and Diversity and Director: Employee/Labour Relations and Safety, Health and Environment were new posts. In terms of Scenario G, which dealt with new posts, Applicant could not have been placed in or redeployed to either because the posts did not constitute “a combination of several responsibilities which were performed” by Applicant in his substantive post and another employee from the same department and there was not a 50% match between either post and his substantive post. Applicant, in his substantive post (and other jobs he held at Respondent, even temporarily), had not performed any of the functions contained in the two posts.
- [41] Outside of the placement process, Applicant applied for the two positions, namely Director: Transformation, Employment Equity and Diversity and the Director: Employee/Labour Relations and Safety, Health and Environment.
- [42] Applicant claims that the only specific reason advanced by Respondent for not considering Applicant for the post of Director:

Employee/Labour Relations and Safety, Health and Environment was that he had shown a lack of objectivity in pursuing his own grievance and that Tlhabanelo deposed to this fact in an interim application to this Court.

- [43] This submission is incorrect. In her affidavit, Tlhabanelo testified that the main reason for the non-appointment of Applicant lay in the fact that he did not meet the advertised requirements for the posts, namely a human resource and employment law specialist with at least five years’ experience in these fields at a managerial level. It is convenient to note here that during the trial Van Heerden offered the same reasons for the non-appointment of Applicant. In her affidavit, Tlhabanelo then went on to say that it should be further noted that the Employee/Labour Relations post required a person who will be objective and neutral in his or her dealings with employees and management but that Applicant had waged a bitter vendetta against management, the VC and the Council.

[44] In my view, Respondent's main reason for not appointing Applicant to either post was rationally connected to the advertised

requirements for the posts. Applicant contended that he qualified for both posts because as campus director he managed employees for 3 years, he had sat on a health and safety committee, had managed a community centre from 1990 to 1994 and had been employed as an education officer by a trade union from 1988 to 1990. It is self-evident that these credentials fall abundantly short of the minimum requirements of the posts. In any event, the outcome of the arbitration award established that Applicant had waged an unfounded bitter vendetta against the Vice-Chancellor and is antagonist and distrustful in his dealings with management as illustrated by his encounter with Dr Nevuthalu, and so not suited to either post.

[45] The other posts in issue, namely that of Presiding Officer, Strategic Advisor to the Vice-Chancellor and Campus Director were not in the employment structure open to consideration by the placement committee. The placement and redeployment policy was restricted to placement and redeployment to post levels 5 to 18 only - the posts of Strategic Advisor and Presiding Officer were level 4 posts. The post of Campus Director no longer existed after the rationalisation process since the functions contained in these posts were absorbed by the respective executive deans. After the merger, campuses became faculty based and their management fell under the executive deans of the relevant faculties. The post of Presiding Officer did not officially exist.

[46] It is significant that the allegations raised in this trial in respect of these posts and the post in Dr Nevuthalu's

department were pertinently raised and fully ventilated with detailed evidence at the arbitration referred to earlier on, and a final determination was made on these claims by the arbitrator. As indicated earlier on, the arbitrator found no merit in the allegations against Prof Tyobeka, Dr Nevuthalu and Respondent in respect of these posts. In other words, Applicant's claim that Prof Tyobeka and Dr Nevuthalu deliberately frustrated other attempts to secure positions at Respondent was found to have no merit whatsoever.

[47] Applicant contends that Prof Sebara attempted to mediate a settlement in the dispute between Applicant and Prof Tyobeka and that this attempt was met with a rebuff from Dr Nevuthalu to the effect that if Applicant was going to be retrenched he would have to be retrenched. According to Applicant that reaction warrants a finding that Respondent's management were determined to get rid of him. The actual evidence of both Prof Sebara and Dr Nevuthalu reveals that Prof Sebara at a funeral, in effect asked Dr Nevuthalu to take steps to ensure that Respondent kept Applicant in Respondent's employment. In other words, Respondent's management was effectively been asked to treat Applicant preferentially outside of Respondent's placement and appointment policies negotiated with the trade unions. The evidence also reveals that, contrary to Applicant's version, Dr Nevuthalu's response was that Applicant cannot be treated differently to other employees and that if the application of the placement and retrenchment policies of Respondent

resulted in retrenchment, so be it. In my view, this was a legitimate response and any agreement to the suggestion would have constituted an unfair labour practice against other employees on the part of Respondent.

[48] There is not a shred of even circumstantial evidence suggesting that the placement committees had in mind the fact that Applicant had pursued a grievance against Prof Tyobeka or Prof Tyobeka's statement in the arbitration that Applicant's accusations

against him had broken down the trust relationship between them because in his view the accusations were serious and unfounded. There was also no evidence that the actual placement committee charged with making proposals on the placement of Applicant – the administrative/support staff sub-committee - included members with a special biased connection to Prof Tyobeka.

[49] The composition of the placement committees was agreed between Respondent and the unions. The standing members of the relevant

sub-committee (the administrative/support staff sub-committee) consisted of Prof Molefe (Deputy Vice-Chancellor), executive deans,

an HR officer and members from representative trade unions. The committee was thus a collective from a cross-section of Respondent,

which included members from the representative trade unions. The minutes of the meetings actually indicate that the chair of the

committee, Prof Molefe, a Deputy Vice-Chancellor, was well-disposed to Applicant in the meetings, and the arbitration award on the grievance reveals that Prof Molefe testified for Applicant in the arbitration proceedings. It is significant that decisions by the committees were made by consensus, meaning that Applicant's own trade union, the first applicant in these proceedings, agreed with all the decisions made in respect of Applicant.

[50] Applicant claimed that Respondent had determined to dismiss him before the match and placement exercise. In this regard, he relied on a letter dated 6 December 2007, addressed to him from Prof Molefe and signed by Dr Nevhutalu. Under his name, the word "bus driver" appears. The letter states that the "match and place committee met on 4 December 2007 and after having considered all alternatives, a suitable redeployment option could not be secured and that he was going to be retrenched. Applicant emphasised that the letter was signed by Dr Nevhutalu, with whom he had had an angry disagreement during 2007.

[51] During his testimony, Applicant conceded that that the letter was never issued to him. It was pointed out to him that the minutes of the placement committee show that his placement was pertinently discussed and determined. Moreover, the letter was not issued by Dr Nevhutalu who, in the ordinary course of his functions, had merely signed letters issued by Prof Molefe, the same Prof Molefe who testified on behalf of Applicant at the arbitration and who, according to the minutes of the placement meetings, was well disposed

to Applicant.

[52] Applicant suggested that the timing of the dismissal was hastened and manipulated to avoid Council dealing with Applicant's

grievance. There is no evidence that indicates the placement committees on their own or on instruction from Respondent manipulated

the placement calendar to hastily deal with Applicant's matter. Council dealt with the grievance by having it referred to

arbitration. The arbitration award did not oblige Council or Prof Tyobeka to do anything which may have potentially prevented the

dismissal of Applicant.

[53] Applicant argued that in terms of the Sithole Commission, his retrenchment dispute should have been referred for special conciliation. There is nothing in the Sithole recommendations which placed an obligation on Respondent to refer Applicant's dispute for special conciliation and settle the dispute.

[54] In light of all the above, the grievance played no role at all in the fact that Applicant was not placed or redeployed to any posts. He would have been retrenched even if he had not lodged a grievance. His retrenchment could not have been avoided by giving him preferential treatment in the two posts he applied for because his credentials fell far short of the minimum requirements. Regarding the other posts mentioned, they did not exist or in terms of Respondent's standing rules had to be created by Council or opened to other applicants, including external applicants or Applicant by his conduct made himself unavailable for consideration.

Order

[55] In the premises I make the following order:

55.1 Applicant was dismissed due to Respondent's operational requirements.

55.2 Applicant's dismissal by Respondent was substantively and procedurally fair.

55.3 There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For Applicant: Adv RG Beaton, SC, instructed by Kedibone Molema Attorneys

For Respondent: Adv H Gerber, instructed by Clarinda Kugel Attorneys

[1]

(1999) 20 ILJ 1718 (LAC) at para 32.

[2]

(2005) 26 ILJ 2153 (LAC).

[3]

(2012) 33 ILJ 2374 (LAC) at para 15.

[4]

(2006) 27 ILJ 1738 (LC) at 1748J-1749G.

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