IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C 482/15

Not reportable

Of interest to other judges

In the matter between:

Vusumzi Shadrack CHITSINDE Applicant

and

SOL PLAATJE UNIVERSITY Respondent

Heard: 21 – 22 June 2018

Delivered: 29 June 2018

SUMMARY: Employment Equity Act ss 6(1), 10(6)(a) and 11(2) – alleged unfair discrimination on arbitrary ground. Complainant did not discharge burden of proof. Complaint dismissed with costs.

JUDGMENT

STEENKAMP J:

Introduction

[1] The applicant, Mr Chitsinde, applied for a job at Sol Plaatje University (the respondent). He was unsuccessful. He alleges that the refusal to appoint him amounted to unfair discrimination on an arbitrary ground, that ground being that he was the only applicant required to write an "aptitude test". The University says that he was found to be non-appointable after he had been interviewed. The interviewing panel decided to give him another chance to show that he was suitable for the role by way of a written submission. (That is what he described as an "aptitude test"). He failed to persuade them. There was no discrimination.

Background facts

[2] The applicant was employed at the National Institute of Higher Education (NIHE) in Kimberley as an asset and fleet management officer. That entity was disestablished in 2013 and he was dismissed for operational requirements. He accepted a severance package and did not challenge the fairness of the dismissal.

[3] The newly established Sol Plaatje University in Kimberley offered former employees of NIHE preference to apply for posts at the University, without offering any guarantee of employment.

[4] On 13 October 2014 the University's Chief Operating Officer, Mr Raymond Olander, sent the applicant a letter under the heading: "**Invitation to apply for a position at Sol Plaatje University**". He attached a list of available positions and added:

- "In the first instance, these positions are being advertised only among staff currently have an administrative or support employment association at NIHE-NC.
- You are expected to formally apply for your selected position(s) by 21 October 2014.
- Selection will be done by SPU and, for positions at grade 8 or above, will include a formal interview.

- Should you be appointed, you will start employment with SPU on 1 January 2015 as a new employee of SPU.
- You would have the right to refuse employment at SPU if the conditions of the position offered to you are considered unacceptable.
- At the end of this process, the positions remaining unfilled because no suitable candidates could be found among the NIHE-NC staff, will be publicly advertised and the normal selection processes will be followed."

[5] The applicant applied for one of two positions as a "Senior Secretariat Officer". The minimum requirements for the job were:

- "NQF 6. A three year relevant qualification with a minimum of 360 credits.
- At least three years relevant experience.
- Or any acceptable combination of both the qualifications and/or experience would be regarded as ideal.
- Demonstrated knowledge of the South African higher education sector."

[6] The key performance areas of the position included the provision of administrative and functional support to line function, clients and staff; processing and coordination of documents; compilation, printing and distribution of agendas and minutes; and the attendance and recording of meeting proceedings, including drafting of minutes. The advertisement stated:

> "**The University reserves the right not to make an appointment. It is the attention of the University to promote represent of it in respect of race, gender and disability through the filling of these posts."**

[7] The applicant satisfied the minimum requirements and was called to an interview. He was interviewed in October 2014 by a two-person panel comprising Mr Olander and Prof Yunus Ballim, the Vice-Chancellor. It is common cause that they asked him to set out in writing how he saw his role in the position of Senior Secretariat Officer. Whether they did so before or after his interview, is in dispute.

[8] The applicant elected to respond to the request to explain his role in writing by way of a "SWOT analysis". Although the applicant's attorneys did not prepare a bundle of documents as his previous attorneys had undertaken to do by 30 October 2015, he handed up a copy of that document at the hearing of the trial on 21 June 2018. It reads as follows:

> "**THE ROLE OF THE SENIOR SECRETARIAT OFFICER**
>
> The Senior Secretariat Officer will be working in a very strategic environment. He will assist the council to research its vision and mission to make the Sol Plaatje University a better University with in the African diaspora. The Senior Secretariat Officer should highlight following SWOT to the council. [*sic*]
>
> **Strength**
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> - It is a new university within the Northern Cape.
> - Urbanisation will decreased [*sic*] in the Northern Cape.
> - Tourism will have an impact in the Northern Cape.
>
> **Weakness**
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> The Sol Plaatje University need [*sic*] more emphasis on research and development to enhance the current and future curriculums.
>
> **Opportunities**
>
> Mining, houses, business chambers, politics plays a big role in the stakeholder management.
>
> **Threat**
>
> Sol Plaatje does not offer other faculties like finance, Logistics, Public Administration for example for students who wants [*sic*] to study in Kimberley. The (GDP) Gross domestic product of the Northern Cape will increased [*sic*] drastically if other facilities are going to be introduced in the coming future."

[9] On 18 November 2014 Mr Olander informed the applicant that his application was unsuccessful. The other applicant from NIHE, Ms Marelize van der Nest, was appointed to one of the two posts. The vacant post was subsequently advertised and filled in 2016 by Ms Nelmarie de Vries, a graduate.

[10] The applicant referred a dispute to the CCMA on 27 February 2015. His trade union alleged that the University had discriminated against him because it "requested the member to write a test during the interview" but the other applicant for the job was not required to do so. The dispute was unresolved at conciliation and on 25 June 2015 he referred a dispute to this Court in terms of s 10(6)(a) of the Employment Equity Act.[1]

The claim and the relief sought

[11] The applicant described the legal issues to be determined as follows:

> "The [University] unfairly discriminated against the applicant by:
>
> 1. requiring from the applicant to write an aptitude test, whilst appointing another official to a position similar to the position for which the applicant applied, without expecting such other official to also write an aptitude test;
> 2. appointing the other official mentioned in the previous paragraph to the position in question whilst she did not meet the minimum requirements for the position and by failing to appoint the applicant to the position in question whilst it did meet the minimum requirements; and
> 3. failing to provide the applicant with any reason for his non-appointment."

[12] The applicant asks this court to declare that the University unfairly discriminated against him by not appointing him to the position of Senior Secretariat Officer; to order the University to appoint him to the position retrospectively to 1 January 2015; and to pays costs.

The legal framework

[13] In terms of section 6 (1) of the EEA:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion,

[1] Act 55 of 1998 (EEA).

> HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

[14] The applicant alleges that the University discriminated against him on an arbitrary ground. Section 11(2) of the EEA places the burden of proof on him:

> "If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –
>
> (a) the conduct complained of is not rational;
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> (b) the conduct complained of amounts to discrimination; and
>
> (c) the discrimination is unfair."

The evidence

[15] As set out above, the underlying facts are mostly common cause. The only pertinent factual dispute is whether the interview panel requested the applicant to write out how he saw his role before or after they had interviewed him. And the legal question to be determined is whether, based on the fact that the applicant was the only one who was required to put that in writing (or, in his words, to write an "aptitude test"), amounts to unfair discrimination on an arbitrary ground.

[16] Only the applicant and, on behalf of the University, Mr Olander gave evidence.

[17] The applicant alleged that the person who was appointed, Ms Van der Nest, did not meet the minimum requirements for the job. He could not provide any further proof of that allegation and his attorneys did not ask for discovery of her qualifications.

[18] The applicant further testified that he was interviewed in November 2014 (although he states in his statement of claim that he took part "in a process of interviews and the writing of aptitude tests during October 2014"). He further testified that Prof Ballim asked him to write an "aptitude test" – something that was not required of any other candidate. He stated that Prof Ballim only asked him to answer one question, namely to describe how he saw the role of the Senior Secretariat Officer. He decided to do

that by way of a “SWOT analysis”. He did not explain the significance or relevance of the “African diaspora” that he referred to, nor could he explain why the “SWOT analysis” concentrated on the strength, weakness, opportunities and threats to the University rather than the role of the Senior Secretariat Officer. According to him, he was interviewed only after he had written the “test”.

[19] In his evidence in chief, for the first time, the applicant raised two other allegations: firstly, that he did not have a good relationship with one Mr Watson, a person who had facilitated the consultation process at NIHE during the retrenchment consultations; and secondly, that Prof Ballim had once “shouted at him” in altercation over a parking spot and refer to him as “the union guy”, and that he thought that he had been victimised because he was a shop steward at NIHE. Under cross-examination he could not explain the relevance of the role of Watson at the NIHE consultation process, given that the NIHE is not a party to these proceedings. And he could not explain why he had not raised the allegation about Prof Ballim’s bias in the interview or in the past three years leading up to this trial.

[20] Mr Olander, the University’s Chief Operating Officer, was part of the interview panel with Prof Ballim. He confirmed that Watson – against whom the applicant had belatedly raised an allegation of bias – was not an employee of the University and that there was no transfer of employment from NIHE to the University. As a special dispensation to retrenched employees of the NIHE, though, the University invited them to apply for vacant posts at the University.

[21] Olander’s recollection was very clear that he and Prof Ballim first interviewed the applicant before they asked him to set out in writing how he saw his role. They did so in order to give them a second opportunity to put down in writing how he saw his role and what he could bring to the post. There was simply no question of discrimination; in fact, they treated the applicant more beneficially than any of the other people who applied for posts at the University. Despite that, he was found not to be appointable. Even his written “SWOT analysis” did not address his envisaged role in the post.

[22] Olander further testified that, contrary to the applicant evidence, there was at least one other job applicant who was not appointed – one Leonard Mogorosi. Under cross-examination, he was said fast and clear that the applicant was first interviewed. He and Prof Ballim both formed the view that he was not appointable; yet they decided to give him a second chance.

[23] Under cross-examination Olander also explained that the successful appointee, Ms van der Nest, satisfied them that she possessed the requisite combination of qualifications or experience for the post, as specified in the advertisement. She had been the faculty manager and the personal assistant to the Chief Financial Officer at the NIHE. She had, as Olander stated, "overwhelming experience" and could add significant value to the post. In fact, she is still employed in that post.

Evaluation

[24] The technique to assess the probabilities where there is a factual dispute is well known, as set out by Nienaber JA in *Stellenbosch Farmers Winery*:[2]

> ""The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or

[2] *Stellenbosch Farmers Winery v Martell et cie* 2003 (1) SA 11 (A) par 5.

observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[25] It is against that background that the evidence must be assessed, bearing in mind that the applicant bears the onus of proof.[3]

[26] The applicant's credibility was undermined by the fact that at the trial, for the first time in three years since he referred this dispute to this court, he raised new allegations of victimisation or discrimination against Prof Ballim. Neither did he mention Watson's alleged bias, either in his referral to the CCMA or to this court. Under cross-examination he was also asked to go through his statement of case again in order to point out anything that was not correct. After the court had adjourned for some 20 minutes for him to peruse a statement of claim again – comprising six pages – he confirmed that everything in the statement was true. Yet both he and his counsel conceded that it was not true, as stated in his statement of claim, that "it was resolved that employees of NIHE will be granted an opportunity to apply for positions at the respondent as an alternative to retrenchment".

[27] The applicant was not a credible witness; nor were his answers under cross-examination clear and direct. This will play a role in the courts assessment of the probabilities.

[28] Olander, on the other hand, was a credible and straightforward witness. Where he could not recall specific events, he said so. He readily conceded that, as far as he could recall, Ms van der Nest had only a matric

[3] EEA s 11(2).

qualification; but her vast experience far outweighed that of the applicant and she was a far more impressive candidate.

[29] The main factual dispute to be decided on the probabilities is whether the applicant was asked to explain the envisaged role as Senior Secretariat Officer in writing before or after he had been interviewed. On the probabilities, I accept the University's version that it was after he had been interviewed. Firstly, as set out above, Olander was a more credible and reliable witness than the applicant. And on the probabilities, that version is far more probable. They would simply have been no need for the University to ask the applicant at the outset to put it in writing. It is far more probable, as Olander testified, that the applicant was found wanting in the oral interview; and, in order to give him a second chance, the interview panel gave him the opportunity to also set out in writing how he saw his envisaged role. As Olander testified, they felt that he may have been nervous in oral interview and decided to give him and on opportunity to reflect on the question and to set out his answer in writing in a more leisurely and less pressurised fashion. That also accords with the one aspect on which both the applicant and Olander agreed: that is, that he was simply asked to set out in writing how he saw his role as Senior Secretariat Officer as opposed to an "aptitude test" by way of a questionnaire or other means.

[30] It is against that factual background that the legal question must be decided whether the applicant has discharged the burden of proof is required in s 11(2) of the EEA. I shall deal with each of those elements separately. But firstly, what is an "arbitrary ground"?

[31] I am in respectful agreement with the authors in Du Toit et al, *Labour Relations Law: A Comprehensive Guide*[4] when they note that the Employment Equity Amendment Act of 2013 reintroduced the concept of 'arbitrary' grounds of unfair discrimination by adding 'or on any other arbitrary ground' to the listed grounds in s 6(1) of the EEA. They add:

> "'Other' may be read as suggesting that the defining characteristic of all prohibited grounds, including listed grounds, is henceforth to be

[4] 6 ed (LexisNexis 2015) at 683.

> characterised as 'arbitrary'. Such a reversion to the framework of Schedule 7 to the LRA, however, is excluded by the fundamental principle that it is not 'lack of reason' but violation of human dignity that forms the essence of 'unfairness' in all forms of discrimination proscribed by the Constitution and, hence, by the EEA.
>
> Thus, in terms of Schedule 7, demonstrating that an employer's conduct was not 'purposeless' but was motivated by commercial rationale was potentially a good defence against a claim of unfair discrimination.[5] In the context of the EEA it is evident that a 'commercial reason' in itself, of whatever magnitude, can never outweigh the fundamental right to dignity. By the same token, the reintroduction of the prohibition of discrimination on 'arbitrary' grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. To avoid redundancy, 'arbitrary' must add something to the meaning of 'unfair discrimination'. Giving it the meaning ascribed to it by Landman J in *Kadiaka* – that is, 'capricious' or for no good reason – would broaden the scope of the prohibition of discrimination from grounds that undermine human dignity to include grounds that are merely irrational without confining it to the latter."

[32] The only authority that Ms *Mokhaetsi* relied on in her argument was *Watchenuka.*[6] She did so in order to argue that the applicant was deprived of his human dignity when he was not appointed to the post. In this regard she quoted the following dictum:[7]

> "The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what is to be human – is most often bound up with being accepted as socially useful."

[33] But that quote should be seen in context. Nugent JA went on to say the very next paragraph that the protection even of human dignity – that most fundamental of constitutional values – is not absolute and section 36 of the

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[5] See *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LC); *Lagadien v UCT* [2001] 1 BLLR 76 (LC); *Germishuys v Upington Municipality* [2001] 3 BLLR 345 (LC) 361.

[6] *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA).

[7] Par 27.

Bill of Rights recognises that it may be limited in appropriate circumstances. And it was indeed justifiably limited in the context of that case, that had nothing to do with discrimination in the employment law context, but comprised a challenge to section 2 of the Refugees Act[8]. The SCA directed the Standing Committee for Refugee Affairs to consider and determine whether to asylum seekers should be permitted to undertake employment and to study pending the outcome of an application for asylum. It certainly did not establish a principle that an applicant for employment has the right to be appointed.

[34] I turn then to the specific requirements to overcome the burden of proof in s 11(2) of the EEA.

Was the conduct complained of rational?

[35] In terms of s 11(2), the applicant must prove that the conduct complained of was not rational. The conduct complained of was that he was required to write a "test", and no one else was.

[36] On a balance of probabilities, I have already found that Mr Olander and Prof Ballim asked the applicant to set out how he saw his envisaged role after he had failed to impress them in the oral interview. If anything, he was treated more beneficially than any other applicant for the post. It was done, as Olander testified, to give him a second chance. And the decision by Olander and Prof Ballim to give him that chance was entirely rational. It was certainly not arbitrary in the sense of being purposeless, capricious or for no reason.[9]

Did the conduct complained of amount to discrimination?

[37] The applicant was treated differently to other job applicants. But that was to his benefit. He was given a second opportunity to convince the interviewing panel that he was appointable; the others were not. Although it amounts to differentiation, it does not amount to discrimination. He has

[8] Act 130 of 1998.

[9] Cf Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6 ed 2015) at 698.

not proven discrimination in the 'pejorative' sense accepted in terms of constitutional jurisprudence and ILO Convention 111.[10]

Was the discrimination unfair?

[38] Given that the applicant has not proven discrimination in the pejorative sense, there was no unfair discrimination. He did prove differentiation; but that differentiation was beneficial term, was not unfair, and did not amount to discrimination.

Conclusion

[39] The applicant has not discharged the burden of proof set out in s 11(2) of the EEA. He was treated differently, but it was not 'arbitrary' in the sense of being irrational. The interviewing panel took a rational decision to give him another opportunity after he had failed to impress them in the oral interview.

[40] The applicant fails in his complaint. That leaves the question of costs. Both parties asked for costs to follow the result. I see no reason to differ. The University is a newly established entity without significant funds or any established network of donor alumni. The applicant sought to pursue a meritless case. He should be the costs.

Order

The applicant's claim is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

[10] *Ibid.*

APPEARANCES

APPLICANT:	Ms M Mokhaetsi Instructed by Fixane attorneys (Bloemfontein).
RESPONDENT:	Mr Leon Joubert of C M de Bruyn & partners (Kimberley).