

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 727/2013

In the matter between:

PIETER SEXTUS KEET**Applicant**

And

DENEL SOC LTD**First Respondent****HERMANUS LEMMER****Second Respondent****Delivered: 20 February 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicant (Keet) commenced his employment at the Denel Personnel Services (DPS) in August 1997, which was then a separate juristic entity and a subsidiary of Denel. In November 2005 he was appointed as System Manager OSIS Corporate Reference Data (CRD). He performed his duties at the headquarters of the South African Air Force (SAAF) until the termination of his services on 30 March 2013 on account of Denel's operational requirements.
- [2] The need to retrench and procedural fairness is not disputed. It is further common cause that Denel had retrenched over 400 employees when in December 2012, SAAF terminated its long standing contract in terms of which it was supplied with skilled labour. Keet however contends that his retrenchment was substantively unfair.

The common cause facts:

- [3] The following as per the parties' signed pre-trial minutes are recorded as being common cause;

- 3.1 SAAF had entered into a skills service agreement (The AMG Contract) with Denel in terms of which the latter seconded/supplied personnel to the former to perform certain specific tasks at its bases.
- 3.2 SAAF had in December 2012 issued a notice to terminate the contract with effect from 31 March 2013. As a result, Denel embarked on a retrenchment process in terms of the provisions of section 189A of the Labour Relations Act (LRA).¹
- 3.3 Following consultations and facilitation processes, a retrenchment agreement was reached between Denel and representative unions. Keet was a member of Solidarity, which was party to those consultations. Central to this dispute is the application or non-application of clause 3 of the agreement which makes provision for the selection criteria².
- 3.4 On 27 February 2013, Denel presented a document titled; *'SAAF Positions with allocated Denel/DPS people (after selection criteria*

¹ Act 66 of 1995, as amended

² Which provides;

- '3.2 Retention of strategically important skills:
- (a) Retention of most competent skills per job specification.
 - (b) Retention of most competent skills, as reflected in paragraph 3.2 (a) will take precedence over each of the other selection criteria as formulated in paragraphs 3.3 to 3.5.
- 3.3 Due consideration to the Denel Employment Equity Plan not to prejudice ACI percentages as per department (thus, at the time; the retrenchment process will also not be used to correct the Denel transformation requirements)
- 3.4 Termination of short terms/fixed term contracts (Short-term \leq 12 months) on termination dates, without package.
- 3.5 LIFO (last in first out) 'Company continuous employment service (In the unlikely event of two or more employees having the exact same duration of continuous employment in the Company then applicable experience relating to the area will be taken into consideration).

Notes

Applicable to Paragraphs 3.2: The swop option will be considered and an applicable matrix to be developed to measure the retention of the strategically important skills)"

applicable 27 February 2013), in terms of which SAAF required 139 positions to be retained after 1 April 2013.

- 3.5 A further agreement was concluded with the Unions, in terms of which it was agreed that a total of 139 identified positions be retained as required by SAAF. Thus, if an employee held any one of the 139 positions identified as at the time of retrenchments, then he or she would be placed or retained in that post, and the selection criteria provided for in the main retrenchment agreement would not apply.
- 3.6 Keet and Lemmer were based at the SAAF at the time of the termination of the AMG contract. Lemmer instead of Keet was retained as an employee by Denel in one of the 139 positions required by SAAF subsequent to 1 April 2013. Aggrieved at his non-selection, Keet subsequently lodged an appeal.
- 3.7 In an outcome in respect of that appeal in March 2013, Denel's stance was that;
- i. Keet's position and job title was that of a 'Systems Manager'
 - ii. The position that was identified for retention by SAAF was that of a 'Codifier', and not System Manager, which position was deemed redundant.
 - iii. No selection criteria were required to be applied regarding the redundant position, and since Keet was not a Codifier, he could thus not be compared to other Codifiers or incumbents for that position.

The dispute:

[4] The issues in dispute are whether;

- 4.1 The position held by Lemmer prior to 1 April 2013 and whether on 20 November 2013, he (Lemmer) occupied the position of Technician (Master 1- Codifier Ops Master Technician (The Codifier).
- 4.2 Whether the 139 positions required by SAAF were contained in an agreement concluded between Denel and the representative unions.
- 4.3 Whether the selection criteria agreed upon was even required to be applied in the event that Keet was a System Manager, whilst Lemmer was a Codifier.
- 4.4 Whether Lemmer in any event had the most competent skills per job specifications.
- 4.5 Whether the selection criteria were applicable.
- 4.6 Whether Lemmer would have been selected as one of the 139 positions to be retained as required by SAAF, instead of Lemmer, if the selection criteria were applied.

The evidence:

[5] In this case, and in the light of the issues to be considered, the bulk of the evidence led and the disputed facts pertained to the technical aspects of duties performed by both Lemmer and Keet whilst at SAAF before the retrenchments, and the differences between the positions of 'Codifier' and that of 'System Manager'. Johannes Jansen van Vuuren, who had a service of 30 years with Denel and had held various senior positions, testified that;

5.1 Keet and Lemmer were both seconded to SAAF at Waterkloof Air Force Base. They were later transferred to Denel's Headquarters as Systems Managers.

5.2 Keet having started as a Fitter in August 1979, became a Codifier in April 1988. At some point, his position changed from Codifier to Technical Writer. Lemmer, who had started as an Electrician in February 1979 also became a Codifier in September 1989. Effectively, Lemmer had on the whole, more length of service in Denel than Keet.

5.3 There are different levels of a Codifier, and one can ultimately become a Chief – Master Codifier I. A codifier essentially works on the Air Force system (OSIS system), and his or her task is to input certain documentation on the aircraft system. A Systems Writer however does different things on the aircraft system. In this regard, although Keet was a Technical writer (III), he always remained a Codifier.

5.4 Keet's position changed from Technical Writer to Systems Manager in September 2008. The change in status was formalised in September 2010 (even though backdated to September 2008), and SAAF was informed of this change in his status.

- 5.5 At the time that the contract with SAAF was terminated, Lemmer had as at November 2012, progressed to Technician Master I Codifier ops. That was his status at the time that he was transferred to SAAF. When SAAF gave notice to terminate the contract, an Infogram was then sent out to all employees that were to be affected by retrenchments for them to confirm and verify their personal details including positions at the time, dates of employment and years of service. This was also done jointly with the Unions, which had signed the verification together with the CEO of Denel Aviation.
- 5.6 When SAAF terminated the contract, it required 139 positions to be retained and Denel had supplied it with the names of employees that met SAAF's requirements. This was also after discussions were held with the Unions.
- 5.7 Lemmer was a Codifier with over two years' experience and the longest service record at SAAF headquarters at the time of the termination the SAAF contract. He was then selected for retention as he was the most suitable in accordance with the SAAF requirements. Keet on the other hand was System Manager (Master II). The SAAF had however classified both Keet and Lemmer as System Managers from April 2012 to March 2013.
- 5.8 Van Vuuren was also part of the appeal panel that considered Keet's appeal. When considering the merits of Keet's appeal, it was taken into account that even though he was also a Codifier, Lemmer had the longest service in doing codifying work at SAAF. Their performance rating was compared and they were both regarded as having performed beyond expected standards over a period of five years.

- 5.9 Van Vuuren further made reference to a request made by SAAF in 2011 before the retrenchments for someone to replace one Mr Brits who was due to retire. The individual selected was to assist the systems manager by standardising data; expected to have in depth knowledge of the system utilised by SAAF, be a technical codifier and competent to operate in all spheres of the system. At the time, Lemmer was then transferred to SAAF as a codifier.
- 5.10 Under cross-examination, van Vuuren confirmed that he was responsible for the management of the contract between Denel and SAAF, and was stationed at the latter's premises.
- 5.11 He also confirmed that he was involved in discussions with SAAF in regards to which employees needed to be retained when the contract came to an end, particularly since SAAF was more concerned with the retention and transfer of skills. It was SAAF that decided on which employees or positions it wanted to retain.
- 5.12 He conceded that a person classified as a Codifier and a Technical Writer has better skills than one who is only a Codifier, and that a Systems Manager ran the whole system whilst a Codifier only did input and looked after all the aircraft parts on the system. He further acknowledged that a Systems Manager with codifying background could still do codifying, whilst an employee who was simply a Codifier without system management background could not do the reverse.
- 5.13 His contention however was that since there was only one Codifier required, and further since Lemmer was the most suitable, there was no need to look at the initial selection criteria. Lemmer according to van Vuuren had always remained a Codifier as per his job title.

5.14 Van Vuuren further confirmed that what was required foremost from a suitable candidate were skills. He conceded that Keet was a better performer, and however that the selection committee made no skills assessment when finally making a selection. He further testified that even if there was an overlap between the positions of Lemmer and Keet, the former would still have been appointed to the position as he had a longer service as Codifier.

[6] Lemmer was also called upon to testify on behalf of Denel. Having been retained after the initial retrenchments, he was subsequently retrenched in April 2015. His testimony was that;

6.1 He was a Codifier since 1988 after completing a training course in that regard. He confirmed that he had performed similar tasks as Keet when they were both based at Voortrekkerhoogte (Thaba Tshwane), until Keet was moved to another base.

6.2 At some point he was also moved to Waterkloof Air Force Base and had continued as Codifier. In July 2001 he had completed a course in OLCIMS, which was a new codification electronic system, and a software programme that belonged to National Codification Bureau. He testified that Keet had not done that course.

6.3 Having completed that course, he was then responsible for the training of other employees from the Navy, the National Defence Force and the Airforce. Between 2005 and 2011 he had done mainly codification at Waterkloof Air Force base. In February 2011 he had done further training through the SAAF. He denied that he was ever appointed as Systems Manager, and that his correct title was Technician: Master I (Codifier ops Master Technician). A System Manager according to

Lemmer is the head of any system in the SAAF (which could be head of Gripen system, weapon system or radar system).

- 6.4 Lemmer confirmed that Keet had also done a codification course in 1989. Lemmer took over the position of System Manager from Brits at the time of retrenchments, and contended that the position was open to everyone. He confirmed however that he took over the position in his official title as Codifier.
- 6.5 Upon taking over the position, he had continued with other duties such as duplications and item identification, which formed part of system management rather than codification, which duties were the same as Keet's. He trained two other people and was subsequently retrenched in April 2015 at which time he was qualified Master Codifier.
- 6.6 Under cross-examination, Lemmer confirmed that a selection board was set up to decide on who should be retained or not, and that it was the SAAF that had advised Denel as to which employees should be retained.
- 6.7 He confirmed that Keet had seven years' experience at SAAF headquarters, and that even though his skills and experience was on par with that of Keet, it was Col. Kirsten who had asked for a codifier from the item identification section.
- 6.8 He conceded that he was trained by Brits and Keet even though he also helped them. He had taken over Brits' position which was called system manager.

6.9 He confirmed that after Keet was retrenched, he had continued to perform the same tasks as him and also his tasks, except that he also had to do codification and train two other people. He conceded that whether the position in question was classified as Codifier or System management, the duties were essentially the same.

[7] Keet's testimony was that;

7.1 He was a codifier as Lemmer since 1998, and that his functions at SAAF entailed receiving information from a codifier, checking it and feeding it into the system (configuration). He confirmed that codification was however only done at Waterkloof.

7.2 He had performed the same tasks and duties as Lemmer and Brits. Lemmer took over from Brits even though he (Keet) had trained him. He contended that their technical skills were not the same, and further confirmed that his title was that of 'Systems Manager', OSIS Corporate Reference Data' as confirmed by his letter of appointment. He denied that the post required of them to do codifying.

7.3 He testified that he had a better performance rate and his skills were higher than Lemmer's as he could do more things. His view was that since Lemmer could not do other things he could, he was in a position to train other people that SAAF required to be trained, and should thus have been retained. He further contended that prior to Lemmer's retention, Denel had not interviewed them or assessed their skills.

7.4 Under cross-examination, Keet confirmed that the SAAF was Denel's client and had made its own choices in terms of its own requirements as to who and which positions should be retained.

7.5 He confirmed that according to Denel's own system, the only person identified as Codifier was Lemmer, and further conceded that Lemmer had more codifying experience than him. He could not dispute it when it was put to him that there was nothing from the SAAF's system that showed that Lemmer was a system manager.

7.6 Keet confirmed that SAAF required posts to be retained per base, and in accordance with its requirements; that SAAF did not require or request a systems manager, and that an agreement had been reached between Denel and Solidarity that the selection criteria would be applied according to SAAF's base requirements. He conceded that he and Lemmer had to compete for the position (of Codifier) requested by SAAF, but contended that there was a mistake with the list issued by the SAAF in regards to the positions to be retained.

7.7 He further testified that even though Lemmer's tasks after his retention was to *inter alia* train and transfer skills to the two employees identified by SAAF as codifiers, these individuals were nonetheless system managers and not codifiers.

[8] Col. Charlie Kirsten (Kirsten), the Airforce's Senior Staff Officer was or is based at OSIS Airforce, Pretoria since January 2011, and was responsible for the CRD section where Brits was a system manager. He was subpoenaed by Keet and testified that;

8.1 Keet was also in the same section as system manager. The system managers had started as codifiers and where then transferred to the CRD section.

- 8.2 The SAAF only needed system managers and not codifiers according to Kirsten. According to Kirsten, Lemmer never worked on the OSIS system, unlike Keet, who was more qualified than Lemmer as the latter was only trained as a codifier.
- 8.3 He further testified that his section did not need a codifier, and he did not know how a request for a codifier ended on the SAAF list compiled in February 2013 that was furnished to Denel.
- 8.4 He testified that even though he knew van Vuuren and met regularly with him, he never called him to clarify the lists furnished to Denel. He conceded however that van Vuuren would not have known that a codifier was not needed.
- 8.5 He further testified that what was required was someone who could work on the OSIS system, and Keet fitted that profile due to his experience and skills, and could also have trained other personnel.
- 8.6 In regards to SAAF's desire to retain skills or to do a skills transfer, Kirsten confirmed that no specific request was made in respect of any particular person. He however confirmed that Lemmer was indeed competent, had transferred some skills by training individuals in the CRD section, and further had experience on the OSIS system.
- 8.7 Under cross-examination, he confirmed that the list of 121 (139) positions required by SAAF was sent to Denel. He further confirmed that as per his memorandum dated 14 August 2012, which was drafted before the retrenchments, he had indicated that both Lemmer and Keet were needed due to their experience and skills. He had however not raised the matter directly with Denel, even though such recommendations were made long before the retrenchments.

The legal framework and evaluation:

- [9] Central to this dispute is whether Keet or Lemmer should have been retained in accordance with the SAAF requirements and in terms of the list of positions it sought to be filled. Aligned to that question is whether the selection criteria ought to have been applied or not in the light of the agreement reached after SAAF had provided Denel with a list of positions to be retained.
- [10] The provisions of section 189(7) of the LRA require an employer to select the employees to be dismissed according to selection criteria that was agreed to with the consulting parties; or where no criteria was agreed to, criteria that are fair and objective. The use of selection criteria that are not fairly and objectively applied renders a dismissal unfair³. Ultimately, a decision on or application of any of the criteria must be fair, consistent, objective, clear and transparent, and serve its purpose, and must not be meant for any other ends. The duty to show that the criteria adopted was both objective and fair in its definition and application rests on the employer.
- [11] As already indicated, the parties had agreed on a selection criteria, which Denel contends was not applicable to Keet in the light of the post required to be filled by SAAF. There is no dispute about whether the criteria was fair or not. The issue is whether it was applicable or not.
- [12] Denel's position was that since SAAF required a Codifier, and further since Lemmer was the only qualified codifier with longer service and experience at SAAF according to its own data base, there was no need to apply the selection criteria as agreed between the parties.

³ *CWIU and Others v Latex Surgical Products* [2006] 2 BLLR 142 (LAC) at paras 94-6.

- [13] It is my view that any enquiry into whether Keet or Lemmer should have been retained requires an examination of the requirements and needs of SAAF as a client following the termination of the AMG contract. From the list provided to Denel⁴, SAAF required three positions of a Codifier to be retained, and it was not clear from van Vuuren's evidence on how ultimately it was decided that SAAF only needed one Codifier. This dispute however ultimately turns on the positions held by Lemmer and Keet at the time of the retrenchments in relation to SAAF's requirements.
- [14] Van Vuuren had testified that his understanding from the list supplied by SAAF was that it wanted a Codifier. The evidence of Kirsten was that what the SAAF needed was a Systems Manager, and not a Codifier. He had nonetheless conceded that what was required in terms of the SAAF's list was a Codifier, and I failed to appreciate any dispute surrounding this issue in the light of an agreement reached on that list between SAAF and Denel. Furthermore, that list, despite being discussed with the unions (where Keet was present) remained unchanged, and there does not appear anywhere in the evidence that either Keet, Solidarity or Kirsten for that matter, had taken issue with it. To complain after the fact that the list was not correct in regards to what SAAF required is in my view clutching at straws.
- [15] Too much time and effort was spent under cross-examination of witnesses on both sides in an attempt to prove or disprove whether either Keet or Lemmer were Codifiers or system managers. What is apparent however is that SAAF needed both a codifier and a systems manager Co-ordinator (with the appointment title of A/C Simulator)⁵. It is therefore not correct for Kirsten to suggest that SAAF did not need one as the list indicates otherwise.

⁴ Page 110 – 112 of the Amended Trial bundle

⁵ Pages 26 (line 60) 29, (Annexure 'PK2')-Index to the bundle; and also page 112 of the same bundle

- [16] On the evidence of Lemmer, which remained undisputed, there were different kinds of system managers that were heads of different systems, i.e., Gripen, weapon or radar systems, and to the extent that this was the case, it was not clear from that evidence as to which Keet considered himself suitable for the purposes of retention. However, this case is not even about the position of systems manager, as Lemmer was ultimately retained in the position of codifier.
- [17] The SAAF in accordance with its final list, which it can safely be assumed that it was discussed and agreed to with all decision makers in SAAF had decided on a Codifier amongst other positions to be retained. Lemmer in accordance with Denel's data base was the only Codifier, and it would not have been in fulfilment of SAAF's requirements for Denel to have retained any other person for that position other than a codifier.
- [18] Keet conceded that Lemmer was a Codifier. His primary contention however was that since both him and Lemmer were Codifiers and had done the same functions at SAAF, he deserved to have been retained on the basis that he had a longer service at SAAF. Other than the fact that as at the time of the retrenchment he was not classified as a codifier, to the extent that he had any background in codifying, the issue however remains that during the period that he was at SAAF, his experience and length of service as codifier was less than that of Lemmer.
- [19] Even if the overall length of service was to be a consideration for the purposes of LIFO and the application of the selection criteria, Lemmer would still have been retained given his longer period of service. For the purposes of Keet's appeal, all these factors, i.e., qualification, experience, number of years, performance assessment and SAAF's requirements were looked at. Whether this exercise was conducted fairly or not is moot, as it was in any event unnecessary in the light of the automatic consequences flowing from

the agreement reached with the unions after SAAF had furnished Denel with a list of posts to be retained and filled.

[20] Lemmer's employer (Denel), had classified him as a Codifier as was further confirmed in the information and his particulars in the Infogram. In the end, for the purposes of retention in accordance with SAAF's requirements, the information in the Infogram was pertinent. Once SAAF had decided on certain positions to be filled, it was not for Denel or anyone else to question that decision as SAAF was a client. It was either Denel filled those positions with SAAF's requirements or not. It does not assist Keet to now complain that Denel used outdated personal information for the purposes of retention in circumstances where all the affected employees' information was verified by way of Infogram with the assistance of their unions after SAAF terminated its contract.

[21] Even though Keet did not say so in many words, central to this application is the position that was occupied by Brits. As far back as 2011, SAAF had planned in anticipation of his retirement. The responsibilities and requirements associated with that post were identified, including that the identified replacement must *inter alia*, be a technical qualified codifier⁶. In January 2011, and further in anticipation of Brits' retirement, in correspondence⁷ from Lt Col de Beer to van Vuuren, it is again reiterated that there is a need to find a replacement for Brits when he retired, and significantly, Lemmer was identified as having the attributes, and met the requirements and standards of the post.

[22] The argument that the correspondence referred to above fortified Keet's contention that what SAAF sought was a systems manager rather than a codifier is misplaced. When the transfer at the time was ultimately formalised, Lemmer was transferred as a codifier, and not systems manager. To the

⁶ Page 58 – 59 of the Trial Bundle

⁷ Page 198 id the Trial Bundle

extent that the correspondence indicated that Brits retired at the time that his post was classified as Technical Support Process Integration, there is further merit in Denel's contention that Keet cannot lay claim to that post, as it was not classified as System manager in any event.

[23] In conclusion in regards to the issues to be determined, the position held by Lemmer prior to 1 April 2013 and as at 20 November 2013, was that of Technician (Master 1- Codifier Ops Master Technician (The Codifier).

[24] The 139 positions required by SAAF were contained in an agreement concluded between Denel and the representative unions, and that list of positions was agreed to by all the parties. Furthermore, at paragraph 6 of his Statement of Claim, Keet had conceded that when the list of positions sought to be retained was shared and discussed with the unions, there was an agreement on those positions as required by SAAF. There is therefore no merit in the complaint that the list was not accurate. In any event and as already pointed out, there was a position of systems manager required to be retained, and it was for Keet to compete for it rather than that of Codifier, as he was not classified as one as at the time of retrenchments. Even more significant is that upon the positions being filled as required by SAAF, that process was also agreed upon between Denel and the unions, and Keet cannot in my view suddenly be aggrieved by what his own union had agreed to. The fact that Solidarity is not a party to these proceedings or acting on his behalf is telling.

[25] The enquiry into whether Keet and Lemmer performed the same tasks at SAAF headquarters is equally moot as both positions of codifier and systems manager were required by SAAF. Since Lemmer was identified as the only Codifier according to Denel's records, there was no need to apply the selection criteria agreed upon insofar as Keet laid claim to that position. Any comparison with Keet even if he was previously a codifier would in any event have ended with Lemmer being the ultimate choice by virtue of his skills, and experience per job specifications.

[26] Keet had conceded that according to Denel's own system, the only person identified as Codifier was Lemmer, and further conceded that in regard to codifying experience, Lemmer had more experience than him. In the circumstances, Keet's complaints of unfairness as a result of his non-selection for retention for the position of codifier at SAAF has no merit and ought to be dismissed.

[27] I have had regard to the considerations of law and fairness and do not deem it appropriate to make an order of costs.

[28] Accordingly, the following order is made;

Order:

1. The applicant's claim is dismissed.
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

W P Bekker

Instructed by:

Serfontein, Viljoen & Swart Attorneys

For the Respondent:

JD Crawford of Crawford & Associates

LABOUR COURT