IN THE LABOUR COURT OF SOUTH AFRICA

Sitting in Cape Town

Case No : C335/98

In the matter between :

D NAIDOO Applicant

and

DULUX (Pty) Ltd Respondent

JUDGEMENT

ZONDO J:

[1] This is a claim in which the applicant's complaint is that the respondent, which interviewed the applicant and other job seekers for a certain position and appointed another candidate and did not appoint the applicant, committed an unfair labour practice in not appointing the applicant on grounds of discrimination.

[2] After the matter had been called this morning I heard explanations on certain issues and arguments. I then adjourned the matter sine die and ordered the applicant's attorney (and not the applicant) to pay the respondent's wasted costs. The circumstances surrounding, and the reasons for, that order appear below.

[3] By notice of set down dated the 4th November 1998 the parties were informed by the registrar that this matter was set down for trial for today, the

19th April 1999, at 10h00. It appears that no pre-trial minute had been filed with the registrar at that time. The pre-trial minute that was filed appears to have been signed by the respondent on the 30th November 1998 whereas the applicant's attorney appears to have signed it on the 1st December 1998.

[4] On the 13th April 1999 (last week) I noticed when I read the pleadings and the pre-trial minute that had been filed in this matter that that minute was wholly inadequate. I caused the parties lawyers, as I normally do in such circumstances, to have the lawyers attend a further pre-trial conference in my Chambers. Such further pre-trial conference was held in my Chambers. I used it to highlight to the attorneys the issues which needed to be addressed which they were to go away and try and reach agreement on and prepare and file supplementary pre-trial minute.

[5] I initially indicated to the parties' attorneys that I needed such supplementary pre-trial minute to be filed on Thursday the 16th April 1999 but the applicant's attorney, Mr Van der Schyff, asked if this could be done on Friday the 17th April. I then directed that it had to filed by 09h00 on Friday. I indicated that once it had been filed, I would study it and determine whether if it properly addressed all the issues I raised. I also told the attorneys that, if it did not address all such issues adequately, I would call them for a further pre-trial conference or fax them a memorandum indicating such inadequacies as I would have found so that those could be addressed.

[6] I did all the above so as to ensure that a postponement of the matter necessitated by a failure on the part of the parties to properly address relevant

issues in the pre-trial minute could be avoided and also to ensure that at the time fixed for the commencement of the trial, namely, 10h00 today, the trial would indeed commence.

[7] On Friday morning a document purporting to be a supplementary pre-trial minute was filed by the respondent's attorneys. It was only signed by them. The applicant's attorney had not signed it. I was given the message that the respondent's attorney said that document represented only the respondent's version of the pre-trial minute. By 15h30 no document signed by the applicant's attorney had been filed purporting to be the supplementary pre-trial minute I had directed should be filed. No explanation had thus far been given to me for the failure to comply with my direction.

[8] This morning I was handed the same document which had been filed by the respondent's attorney on Friday as the respondent's version of the pre-trial minute but now signed by the applicant's attorney as well. Apparently minor amendments had been effected to the document at the instance of the applicant's attorney.

[9] When the matter was called this morning, I raised with the parties the fact that no supplementary pre-trial minute - duly signed by both parties - had been filed in accordance with my direction. From this it transpired that the respondent's attorney had taken all the steps necessary for the supplementary pre-trial minute to be filed with the registrar timeously and that the reason this had not occurred was the unavailability of the applicant's attorney.

[10] The applicant's attorney did not suggest that there was any fault on the part of the respondent or its attorneys. Indeed, he also did not suggest that this occurred because of any conduct or fault attributable to the applicant. He said on Friday his office was being painted and things were being moved around leading to some documents being temporarily not available. Later on the applicant's attorney said he was appearing in the regional court on Friday in connection with some murder trial which had been arranged a long time ago.

[11] The explanation proffered by the applicant's attorney was simply not acceptable because the deadline for the filing of the supplementary pre-trial minute had been extended at his request and, if the arrangement for him to appear in the regional count on a trial had been arranged long before, as he said, which I have no reason not to accept, then he should have foreseen on Wednesday that he would need to make suitable arrangements to ensure that the direction I issued was complied with. There is also nothing in the explanation given by the applicant's attorney which suggests that anything

occurred between Wednesday and Friday which had not been expected which interfered with his plans or schedule.

[12] I also asked the applicant's attorney in Court why on Friday the registrar's office or my assistant was not contacted by him to indicate what problems there were. No explanation was given for this. Another point I raised with the applicant's attorney was the fact that, when the matter was called at 10h00 this morning, the Court file had not been indexed and paginated. The applicant's attorney said he had previously instructed his secretary to come to Court and index and paginate the Court file. He had not taken any steps to confirm whether his secretary had done this.

[13] There were many areas in the supplementary pre-trial minute which demonstrated that the applicant's attorney might not have dealt with the supplementary pre-trial minute in a manner that would make it easy for the Court and the respondent to understand what the applicant's case was on certain issues. One or two examples should suffice in this regard. These are dealt with below.

[14] One of the issues the parties were required to deal with was whether there was agreement on what the requirements were for the position which had been advertised. In the supplementary pre-trial minute it is said that as far as Rademan (who, I assume, represented the respondent in the interviews) was concerned, the requirements for the position were the following :-

> **"2.1 Some experience in sales, not necessarily in paint sales, but preferably in the sale of fast-moving customer goods.**
>
> **2.2 An ability to sell respondent's products and to market both respondent and its products.**
>
> **2.3 The ability to relate well with customers, to service existing customers and to acquire new customers for the respondent. The ability, particularly, to represent the respondent and to liaise with customers, both existing and new customers, in the main, retail customers, and dealing with their various requirements.**
>
> **2.4 All of the above requirements needed to be met and evaluated in the context of the problems the respondent was facing at the time, which included lack of stock and a competitive environment".**

It is then said in par 2.5 that as far as the applicant was concerned, the requirements for the position were the following :-

"2.5.1 Sales experience in the FMCG sales field.

2.5.2 Sales experience with wholesalers and chain-stores"

[15] There is no indication in the supplementary pre-trial minute whether the applicant was admitting or disputing that the requirements for the position as given by the respondent were indeed the requirements for the position. What is stated is the applicant's own understanding of what the requirements for the position were. The parties would have had to still deal with this issue and amend the pre-trial minute to indicate the extent of their agreement or disagreement on this issue. One also does not know what the basis was for the applicant's understanding that the requirements for the position were the ones given in par 2.5.1 and 2.5.2. The question this raises is : If the requirements for the position were those given by the respondent, did the applicant meet them?

[16] In par 4 of the supplementary pre-trial minute, it is stated that the respondent held the view that the successful candidate met the requirements for the position as listed by the respondent in par 2.1 to 2.4. It is then stated that this was being disputed by the applicant. No basis is given why the applicant was disputing this.

[17] In par 5 the respondent gave the basis for alleging that the applicant did not meet most of the requirements for the position as listed in paragraphs 2.1 to 2.4. In particular the respondent singled out the requirement that the successful candidate would be required to perform **"in an environment where there would often be lack of stock or out of stock situations"**. In this regard the respondent stated that the applicant had stated in his curriculum vitae already that his reason for wanting to leave his then employer was that there was **"no back up and support from management and constant lack of stock"**. Due to this the applicant had said he felt that in the long term he was going to lose credibility with his clients. It is also said that the environment which the applicant would have found himself in if he was appointed, was similar to the one he was seeking to leave. At the end of paragraph 5 it is said that what is said

in that paragraph is disputed by the applicant without giving the basis of such dispute on the issue.

[18] One of the matters which I raised in the conference in Chambers on Wednesday related to the basis for the allegation in the applicant's statement of claim that he was discriminated against because the successful candidate and the interviewing representative of the respondent were friends. In par 8 of the supplementary pre-trial minute this is dealt with in a manner which does not make any sense. After a statement to the effect that it was not being suggested that the two were friends, the following sentence appears : **"The averment is not that there was a positive indication that they were friends or that they just knew each other"**. This makes no sense.

[19] Finally the last two sentences of par 8 read thus **"the reasons that the respondent did not appoint the applicant are set out herein above. The applicant did not meet the requirements for the position"**. Thereafter is the end of the supplementary pre-trial minute and the signatures of the attorneys for both parties. Strange as it may seem, the last sentence of par 8 appears to be an admission by the applicant that he did not meet the requirements for the position. Although it may be unlikely that this is what was intended, when one has regard to the fact that what the requirements for the position were as far as the applicant was concerned differed from the requirements for the position as given by the respondent and the fact that the applicant did not indicate whether or not it admitted the requirements as given by the respondent, one is not sure of the extent of the admission or the dispute in this regard if at all there is a dispute.

[20] In the light of all the above I concluded that the supplementary pre-trial minute was not adequate - mainly, if not exclusively, because the applicant's attorney had not performed his task in the manner he was supposed to have performed it. A number of issues still needed to be properly dealt with if the trial was to run smoothly. I was not prepared to stand the matter down while attempts were made to deal with these issues as there had been ample time for that and, due to the applicant's attorney's unavailability, that time had not been put to proper use. Also this matter was set down for today and, if it was proceeded with on the basis that it would start late, there would be a risk for it to be a part-heard matter or that the time for other matters set down for tomorrow could be taken up by it. I was not prepared to put at risk other litigants' right to be heard by the Court in order to accommodate the applicant's attorney when he could easily have avoided all this by doing his work properly and timeously. The matter had to be adjourned.

[21] The adjournment of this matter could have been avoided if, in the first place, the parties lawyers' had done a proper pre-trial minute or at the latest, if the applicant's attorney had given serious, proper and timeous attention to ensuring that the supplementary pre-trial minute properly addressed all the issues it needed to address. This Court will not tolerate parties who do not take pre-trial conferences seriously and who do not make serious and bona fide efforts to agree issues and shorten proceedings. Usually any judge would easily detect from a reading of a pre-trial minute if the parties or their representatives in attending a pre-trial conference and preparing a pre-trial minute simply went through the motions because they needed to file a minute in order to get a trial date.

[22] Practitioners and all litigants have a duty to ensure that, when their matters come to be heard by the Court, they do not take one minute of the Court's time more than is necessary. Court time must be used for as many matters as possible. The holding of a proper pre-trial conference and agreeing as many issues as possible to shorten court proceedings is one very important feature in our justice system aimed at achieving that goal. I think the Court has a duty to ensure that, as far as possible, every step is taken which will help achieve that goal.

[23] I also need to say a word or two about another issue in this matter. That is that the Court file was not indexed and paginated. The indexing and paginating of the Court file are steps aimed at ensuring a smooth and uninterrupted hearing of a matter once its hearing by the Court begins. If the Court papers have not been paginated and indexed, this causes unnecessary delays and interruptions

during the hearing of a matter when attempts have to be made either to locate a document or a page in the Court file. The Court file must accordingly be indexed and paginated long in advance of the Court hearing. This is also necessary so that when the file is taken to the judge who will hear the matter, and sometimes this is a week or over a week before the day of the hearing, the judge can read a properly paginated and indexed court file. If the Court file is not paginated and indexed timeously, the parties are risking a postponement of the matter with such costs as are usually attendant upon such a postponement.

[24] On the issue of costs, the applicant's attorney conceded that fault did not lie with the applicant. Obviously it lay with him. I can see no reason why I should, in those circumstances, order the applicant to pay the respondent's wasted costs occasioned by the adjournment. Having given the applicant's attorney the opportunity to be heard, I adjourned the matter sine die and ordered that he (and not the applicant) should pay the respondent's wasted costs.

R. M. M. ZONDO
Judge in the Labour Court of S.A.

Date of Trial	:	19/4/1999
For the applicant	:	Mr Van Der Schyff
Instructed By	:	Van der Schyff Roelf & Associates
For the Respondent	:	Mr Stelzner
Instructed By	:	Perrott Van Niekerk Woodhouse