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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS51/08

Date Heard: 2-3 March 2009

Delivered: 5 March 2009

Reportable

In the matter between

LEFADI LUCAS MAKIBINYANE Applicant

And

NUCLEAR ENERGY CORPORATION OF SOUTH AFRICA (NECSA) First Respondent

PELCHEM (PTY) LTD Second Respondent

J U D G M E N T

PILLAY D, J:

INTRODUCTION:

1. Lefadi Lucas Makibinyane, the applicant, a black male, applied unsuccessfully for appointment as the managing director of the second respondent employer, Pelchem (Pty) Limited (Pelchem). Benjamin Johannes Steynberg, a white male, was the successful candidate.

2. When the court called the roll, Mr Seleka, who appeared for the applicant, applied to join Pelchem as the second respondent. Mr Malindi, who appeared for the first respondent, the Nuclear Energy Corporation of South Africa (NECSA), resisted the application to the extent that it impacted on his readiness to proceed to trial. The court granted the application and stood down the issue of costs to enable the respondent to assess whether it could proceed to trial. If it could not, then the applicant would have had to pay the wasted costs occasioned by the postponement of the trial, instead of paying the costs of the application for joinder only.

3. The parties reconvened in chambers. They agreed to proceed to trial but the respondents resisted starting. The court facilitated a discussion to assess what the issues in dispute were, and consequently what evidence would be needed. At the end of the facilitation, the parties agreed that the only issue that the court had to determine was which of the two candidates was more suitable for the post.

THE EVIDENCE OF DR ROB ADAM:

4. Dr Rob Adam, the chief executive of NECSA and chairman of the board of Pelchem, testified that NECSA is a public company, established in terms of the Nuclear Energy Act of 1999. The State,

represented by the Department of Minerals and Energy, is its sole shareholder. Pelchem is a subsidiary of NECSA. As a private company it pursued commercial objectives.

5. Having established Pelchem, NECSA had to appoint its senior staff. It appointed Mr Steynberg as Pelchem's acting managing director from 9 March 2007. On 1 April 2007, it appointed him as its director. It advertised the post of managing director in a Sunday newspaper. The advertisement invited candidates:

> *"who will position the company in local and international markets. The Board of Directors is looking for someone with vision and drive to manage this exciting new company and grow business and profile. The successful candidate will have a strong management and market track record as well as relevant technical experience. This should be of augmented by relevant technical and management qualifications from reputable institutions."* [1]

6. NECSA short-listed the applicant because he met the requirements for the job. Furthermore, as an equal opportunity employer, it was committed to meeting its employee targets.

7. A panel of three interviewed the applicant. They were Mr Eric Lerata, Ms Nomfuyo and Dr Adam. Of the four panellists,

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one of whom was not present at the interview, three were black, two were women and one was a white male.

8. Dr Adam testified that at the interview, the applicant presented as confident and he impressed the panel with his academic and professional qualifications. However, he lacked sufficient practical experience and technical knowledge about fluorochemicals. Dr Adams summarised the panel's assessment of the two candidates as follows in a letter to the applicant's attorney dated 18 December 2007:

> *"The following observations were made by the interview panel regarding Messrs Makibinyane and Steynberg:*
>
> ***Mr L Makibinyane:***
>
> - *Good project finance experience*
> - *Theoretical knowledge, but limited practical experience at a high level in industry*
> - *Lacks knowledge of the fluorochemical markets*
> - *Does not know the nuclear industry and related international markets*
> - *Managed at SASOL, but not at a strategic level*
> - *Not enough technical experience in fluorochemical environment to optimise plants.*
>
> ***Mr B Steynberg:***

- *30 years experience in nuclear technology especially fluorochemicals*
- *He knows the market and how to attract new investments*
- *Understands the technical processes*
- *Knows shareholder requirements*
- *Good networking skills*
- *Results orientated*
- *Engineering and management background applicable*
- *Has developed the market, knows the product, engineered everything*
- *Team player*
- *Knows the risks in terms of SHEQ;*
- *Can position Pelchem in local and international markets.*

Although NECSA does have a recruitment and selection policy that affirms designated groups, Mr Makibinyane was deemed unappointable. Had Mr Steynberg not been successful, NECSA would not have appointed Mr Makibinyane or any of the other unsuccessful candidates. We would have, instead, resumed headhunting."[2]

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9. Two issues were decisive for the panel to prefer Mr Steynberg over the applicant. The first was the applicant's overall performance at the interview. The second was his five-year vision for Pelchem. On the second issue, NECSA thought that the applicant's response had been about process and consultations with stakeholders. He did not have a clear vision for Pelchem at the end of its first five years.

10. Dr Adam's testimony narrowed the dispute further to the two decisive issues that resulted in the appointment of Mr Steynberg and the non-appointment of the applicant. Mr Seleka's cross-examination of Dr Adam was therefore surprising for two reasons.

11. Firstly, he started questioning Dr Adam about the process the respondents pursued after the interview. This line of cross-examination was surprising because the parties had agreed in chambers that the singular issue for determination was who was the most suitable candidate. Consequently, however flawed the process was, it did not detract from this central question. Despite the court reminding Mr Seleka about this agreement, he persisted with cross-examination on process.

12. He put to Dr Adam the content of various telephonic discussions the applicant had with NECSA's recruitment and selection official, Mr Fiedel Wiegmann. The content related to information that Mr

Wiegmann purportedly shared with the applicant about his, Mr Wiegmann's, understanding and knowledge of the NECSA board's decision following the interviews. These questions were doubly hearsay because Mr Wiegmann was not at the board meeting and would not have had direct knowledge about what transpired there. What Mr Wiegmann said to the applicant was also hearsay unless the applicant adduced Mr Wiegmann's evidence. The applicant did not call Mr Wiegmann to testify.

13. Dr Adam had no direct knowledge of these conversations. He therefore did not deny that the applicant and Mr Wiegmann conversed telephonically. However, he denied that Mr Wiegmann could have had any knowledge of the board's decision by 5 July 2007 because the minutes would not have been typed by then. He also denied informing the applicant during the interview that he would advise him of the board's decision by 4 July 2007. He had said that the board would make its decision by that date, a fact which the parties recorded as common cause at the pre-trial. Contrary to Mr Seleka's submission, the parties did not agree as a common cause fact that the applicant had been advised that he would be notified on the outcome by 4 July 2007.

14. The information the applicant purportedly received from Mr Wiegmann and the alleged delay between 4 July 2007, when he was interviewed, and 18 July 2007, when he was informed that he

was not appointed, led the applicant to suspect that something untoward had happened to his application for the job. The applicant's suspicions were therefore founded on unsubstantiated facts, upon which the court cannot rely.

15. The second reason why Mr Seleka's cross-examination was surprising was because he did not cross-examine Dr Adam fully about the second decisive issue. More specifically, the applicant testified that he was not asked during the interview about what his five year vision for the company was. That was a critical question central to the second decisive issue. The applicant's representatives neither pleaded nor put to Dr Adam that the applicant disputed that he was ever asked the question, the response to which was decisive.

16. When the court pressed Mr Seleka to explain his omission, he referred to the pre-trial minutes where the parties recorded as a common cause fact that the applicant had been asked about what his plans would be once his five year contract as managing director of Pelchem ended. Because the applicant was asked this question it did not follow that he was not asked the decisive question. Mr Seleka's response was therefore not an adequate explanation for the omission.

17. Referring to the respondent's reasons for appointing Mr Steynberg and not the applicant as summarised in the letter dated 18 December 2007 and are quoted above, Mr Seleka submitted that the court should deduce from the number of bullet points for each candidate that the panel did not ask the applicant questions about his five-year vision.

18. That inference is not one that the court can reasonably make from the number of bullet points. The more probable inference is that irrespective of what questions were put to the candidates, Mr Steynberg's answers were sufficiently detailed and relevant to the respondents' needs.

19. In response to a question in examination, the applicant replied:

"I think I did give them the vision of the company".

This response indicates that he was not sure as to whether he did give the panel his vision for the company. Furthermore, if he did give the panel his vision, then it was irrelevant whether he was asked the question.

DISCLOSURE OF DOCUMENTS:

20. During the examination of the applicant it became clear that the applicant disputed that the decision to appoint Mr Steynberg was unanimous. The court enquired from Mr Seleka why this issue was

being disputed for the first time at such a late stage of the proceedings. Mr Seleka responded that he had only just received copies of the recommendation of the interview panel and the board's resolution. According to the Labour Court file, the respondent's bundle was filed on 5 February 2009. Assuming that Mr Seleka's submission was correct, he offered no explanation why the applicant did not request or compel this information sooner.

21. In the applicant's bundle was a completed form dated 12 November 2007 in terms of regulation 6 of the regulations to the Promotion of Access to Information Act, No 2 of 2000. Precisely what the status of this request was, was not apparent. Neither party referred to it during the trial. Nor did they draw the attention of the court to any agreement reached on the status of the bundles of documents at the pre-trial conference. At the pre-trial conference they undertook to admit or reject within two weeks before the trial the documents tendered by either side. They did not inform the court whether they had reached such an agreement.

22. In Annexure A to the form, the applicant requested the following information:

"1. The Interview Process Guideline/Policy of NECSA;

2. NECSA/PELCHEM Employment Equity Document comparing Targets versus Actual;

3. *The number of applicants for the Managing Director Position of PELCHEM;*
4. *The names and racial classification of all four short listed candidates and their full Curriculum Vitae's;*
5. *The score card record for all four interviewed candidates."*[3]

23. None of these questions relate to the composition of the interviewing panel and what each panellist's recommendation was. Nor did the applicant enquire who took the decision to appoint Mr Steynberg and not the applicant and how the panel voted. In any non-appointment race discrimination dispute, establishing who took the decision to appoint the successful candidate and not appoint the applicant, and whether that decision was unanimous is foundational. Such information was especially relevant in this case because the applicant challenged the decision-making process. An employer who refuses to furnish such information would have difficulty in defending its decision to withhold such information. There was no evidence that the applicant requested this information any time before the trial.

24. NECSA responded as follows to the regulation 6 request:

"We do not wish at this stage to comment on the correctness or otherwise of the process you followed to request the information. Suffice to say that your client is

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not entitled to any of the information being requested. Without going into much detail, we do not for instance, see the relevance of your client's request for information on unsuccessful candidates. At best your client is competing with the successful candidate and not those who, like him, did not make it. Equally we fail to see what purpose would be served by disclosing the total number of candidates interviewed for the MD position.

Be that as it may, to avoid unnecessary litigation, we are, without prejudice, sending you a copy of the successful candidate's CV and interview performance assessment together with that of your client. Perhaps this will help your client understand that the selection process was open and fair. We do not see the relevance of providing the same information in respect of unsuccessful candidates". [4]

The applicant took its request for disclosure no further.

25. In chambers, Mr Seleka had raised that the applicant had requested information but that the respondents had refused to accede to the request. In the course of the facilitation, the court established what information the applicant needed and secured the respondents' willingness to share that information with the applicant. The parties agreed that only the information pertaining to the applicant and the successful candidate and not the other

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unsuccessful candidates would be relevant to the proceedings. Mr Seleka persisted in requesting the notes of the interviewing panel on each candidate. However, he did not request information about the panel and the recommendation of each of its members.

26. Mr Seleka cross-examined Dr Adam about the respondent's refusal to furnish the panellists' notes of the interviews; the applicant was not satisfied with Dr Adam's summary of all the panellists' notes in his letter of 18 December 2007. Dr Adam explained that he had declined to furnish the panellists' notes because they were private and confidential. Whether they were private and confidential to the panellists or to the interviewees, or to both, was not established clearly. Nevertheless, Mr Seleka put to Dr Adam that he could have separated the notes pertaining to the applicant and Mr Steynberg. Dr Adam denied this.

27. Now, if the applicant had asked for and, if necessary, compelled discovery of the questions that were put to the candidates during the interview and the documents on which the panellists recorded the candidates' responses, the applicant would have been better prepared to challenge the respondents' version. Moreover, the applicant would have been better prepared to assess the strengths and weaknesses of its case at a formative stage of the proceedings. It did not help the applicant to complain during the trial that he did not receive relevant information when he failed to

request it in writing, at pre-trial and to compel such information timeously before the trial. Discovery is a critical process in litigation, especially in discrimination disputes. Litigants who underestimate the importance of this process do so at their peril.

28. The applicant's rebuttal that the interviewing panel's recommendation and the board's decision were not unanimous was based on speculation and suspicion; as such, the applicant fails to discharge his burden of rebuttal.

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RACE DISCRIMATION:

29. The identity of the persons who took the decision not to appoint the applicant is critical in a race discrimination complaint. It was especially so in this case. The interviewing panel that unanimously recommended Mr Steynberg consisted of three blacks and one white. The evidence on race discrimination proceeded thus:

Mr Seleka put to Dr Adam, the only white member of the panel,
20 that the decision not to appointment the applicant was racial discrimination. Dr Adam took exception to the suggestion that he was racist. The accusation, he said, could not have been levelled at any of the other three members of the panel because they were black. He took exception, especially because he had been a member of *Umkhonto We Siswe*, the erstwhile underground army

of the African National Congress, the current ruling party in government. Mr Seleka quickly attempted to reassure Dr Adam that he was not suggesting that Dr Adam was racist.

30. The applicant testified that he was *"not necessarily"* saying that Dr Adam was racist nor was he suggesting that any of the other panellists were racist. However, *"the actions"* against him might have been racist. Furthermore, Dr Adam might have been *"motivated by racism"*. That was the applicant's evidence.

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31. At the end of the submissions for the applicant, the court sought to clarify with Mr Seleka what it should make of the confusing and apparently contradictory evidence on the issue of racism. The court enquired about who was the racist. Mr Seleka's response was that the respondents, as separate legal entities were racist. That response was not good enough. Behind every corporate entity is a human actor. A corporate entity cannot be *"motivated by racism"*. Individuals within it may be so motivated. The applicant's ambivalence and evasion about who the racist was persuades the
20 court to dismiss the claim of racism.

32. That still left the relative suitability of each candidate for the job. As a non-appointment grievance, the applicant should have ventilated it at arbitration. However, as the court is seized with the matter, it

will dispose of it finally and make an appropriate costs order, if necessary.

33. The court invited Mr Seleka to state crisply why the applicant thought he should have been appointed and why Mr Steynberg should not have been appointed. He responded that the applicant should have been appointed because:

a. He had experience at executive management level, not only in one company but in various entities.
b. He was a vice-president of a company.
c. He managed at a senior level.
d. He served as a director and therefore had board experience.
e. His qualifications were superior in that he had an MDP in project management and he was registered as a chartered chemical engineer.
f. He had knowledge and experience of fluorochemicals.

All in all, in the applicant's opinion, he was more qualified than Mr Steynberg.

34. As to why Mr Steynberg should not have been appointed, Mr Seleka responded as follows:

a. Mr Steynberg was in the same job for 30 years with the same company.

b. He had less managerial experience than the applicant.

35. The applicant's core competence was in his professed ability to manage. He deliberately set out to acquire managerial experience in a wide range of jobs. That also enabled him, he said, to register as a chartered chemical engineer in the United Kingdom. To the applicant's credit, he had worked hard to acquire academic qualifications and management and technical skills. However, his skills were not the most suitable for the post of managing director of Pelchem.

36. Whereas the applicant regarded his varied employment as an asset, it worked against him in this instance. In the respondents' opinion, having eight jobs in 17 years was not commendable. In contrast, Mr Steynberg had 30 years loyal service with the same employer, namely NECSA and its predecessor.

37. The applicant, in response to questions put to him under cross-examination, described himself as *"an enviable asset"*, that he was *"tactful and wise"*, that he was *"a precious metal awaiting discovery by an explorer"*. In contrast to his opinion of himself, the applicant did not demonstrate that he had the degree of exposure to fluorochemicals of the standard that the respondents required.

38. On the other hand Mr Steynberg's exposure to fluorochemicals over 30 years' employment with NECSA was undisputed. NECSA was emphatic in its advertisement that it was in the fluorochemical business, as the following extract from the advertisement shows:

> *"The NECSA group of companies has recently been restructured and its fluorochemical businesses are now located within Pelchem. These businesses include the production and sale of hydrofluoric acid and fluorine gas, as well as of specialized gases used in the international semiconductor industry such as nitrogen fluoride, xenon difluoride and tungsten hexafluoride, and the provision of a wide range of fluorination services.*
>
> *Pelchem is at the heart of the Government-driven Fluorochemical Expansion Initiative (FEI). The FEI exploits the fact that South Africa has the largest deposits of fluorspar in the world as well as significant related technical know-how to create a raft of industries in the chemical sector. Furthermore, Pelchem will inevitably play a key role in South Africa's future nuclear fuel industry."*[5]

Fluorochemicals are therefore Pelchem's core business. Management was the applicant's professed core capability. The applicant's talents did not match Pelchem's needs.

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39. As a new business and one that strived to position itself in local and international markets, the respondents weighted knowledge and technical experience and experience in fluorochemicals more than managerial experience. This preference is manifest from the respondents' choosing Mr Steynberg. With no more insight into Pelchem's business than what was presented to the court during this trial, it will be imprudent for this court to second-guess the respondents' preference for technical experience over managerial experience.

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40. The underlying thrust of the applicant's grievance was that as a black person who met the minimum requirements, the respondents should have affirmed him. The Labour Appeal Court and several decisions of the Labour Court consistently stated that there is no right to affirmative action. *(Dudley v City of Cape Town & Another (2008) 29 ILJ 2685 (LAC); Public Servants Association on behalf of Karriem v SA Police Service & Another (2007) 28 ILJ 158 (LC); Abbott v Bargaining Council for the Motor Industry (Western Cape) (1999) 20 ILJ 330 (LC); FAGWUSA & Another v Hibiscus Coast Municipality &*
20 *Others (2003) 24 ILJ 1976 (LC).* To have appointed the applicant instead of Mr Steynberg would, in the circumstances, have discriminated against Mr Steynberg on the grounds of his race.

41. With his qualifications and skills which are relatively scarce in the labour market, the applicant should theoretically have no difficulty in

finding employment anywhere in the world. Surprisingly, he is currently job hunting. Whatever the reasons are for him being currently unemployed, having eight jobs in 17 years is not an advantage. This judgment too, might also prejudice his job prospects in future; however, that is a consequence of the applicant's election to litigate.

In the circumstances, **the applicant's claim is dismissed with costs**.

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Pillay D, J

Date of Editing: 17 March 2009

Appearances:

For the Applicant: Mr Seleka – Mogaswa Attorneys

For the Respondent: Mr Malindi – Ruth Edmonds Attorneys

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