IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: CA02/2009

In the matter between:

G E SECURITY (AFRICA)	Appellant
and	
ROGER AIREY	First Respondent
DAVID DENOON-STEVENS	Second Respondent
VINCENT WATTERS	Third Respondent

JUDGMENT

Waglay DJP:

[1] This is an appeal and cross appeal against the judgment of Cele J in terms of which it was found that the retrenchment of the first to third respondents was procedurally unfair because of the appellant's failure to follow an agreed selection criteria. The relief granted by the Court *a quo* was to order the appellant to pay each respondent compensation that was equal to the salary they would have earned over five months had they remained in the appellant's employ.

[2] There was no dispute between the parties about the fact that the appellant had a genuine need to restructure its business, nor was there a dispute about the fact that the parties had reached an agreement about the application of the selection criteria. The dispute between the parties was about the terms of the agreement relating to the selection criteria.

[3] The court *a quo* found the respondents dismissal to be procedurally unfair on the basis that the appellant did not comply with the agreed selection criteria because of its failure to consider the respondents for posts for which they did not apply. The Court said that the appellant's action amounted to a failure to consider reasonable alternatives to respondents' dismissals.

[4] The issues in this appeal and cross appeal are therefore substantially narrow. They are the following:

4.1 Was the appellant obliged in terms of the agreement, to consider the respondents for all positions to which they were eligible in its new structure, irrespective of whether they applied for any position or not? The appellant answers the question in the negative while the respondents answer it in the positive. The appellant argues that, in terms of the agreed selection criteria, it had no obligation to consider the respondents for positions for which they did not apply unless the position had not been filled by a successful applicant.

4.2 If the appellant did breach the agreement concerning selection criteria, did this render the dismissal substantively unfair, as submitted by the respondents in the cross appeal, rather than procedurally unfair as found by the Court *a quo*? The second issue need only be considered if the appellant fails on the first issue.

[5] In consequence of the fact that the issues are substantially narrow, it is not necessary to set out the general background facts concerning the retrenchment of the respondents. These facts in any event appear in the judgment of the Court *a quo*. It is, however, necessary to set out those material facts bearing upon the issues in this matter which were emphasised in this appeal.

[6] All of the respondents were employed in the appellant's Engineering Department. The first respondent was employed in the position of a Certification, Validation and Test Manager. The second respondent was employed in the position of Technical Director in charge of the technological development of new products. The third respondent was employed in the position of Engineering Manager.

[7] During the latter part of 2004 and the early part of January 2005, the appellant' s Human Resources Manager, Ms Susan Berrington (Berrington), conducted a *"brown paper exercise"* with the staff in the appellant's Engineering Department in order to develop a new staff structure for that Department. There is no dispute that there was a commercial rationale for the appellant to change its staff structure in that Department.

[8] As a consequence of that exercise on 29 June 2005, the appellant issued a formal section 189(3) notice to all affected employees.

[9] In the section 189 notice, which was received by each of the respondents, the appellant *inter alia*, informed its employees that employees would have to apply for posts in the new structure which would be filled on the basis of competencies assessed by way of an interview and the best fit for the job requirement as defined. The letter stated:

> "*Those employees who do not succeed in securing a position within the new structure through the recruitment exercise will, unless otherwise employed through the recruitment exercise be retrenched due to redundancy. It will accordingly be important to apply for the posts as and when they are advertised. Failure to apply or failure to secure a position may lead to retrenchment.*"

[10] At the initial consultation meeting, employees were reminded that they must apply for every post that may be of interest to them as their failure to apply for a post will possibly result in retrenchment.

[11] Each of the respondents only applied for the new engineering position in the new structure and not for any other position. None of them were successful. The appellant communicated its decision to them and also informed them that no position was found for them in the new structure and that it had filled all positions in the new structure. Subsequent to being told that the appellant had filled all positions in the new structure and in response to a request by the appellant to

identify any other alternatives, the first and second respondents applied to be considered for the position of Product Manager which fell outside the new structure. This position was located within the General Electric organization in Europe. The appellant is part of the General Electric group.

[12] The first and second respondents were not successful in their application for the position of Product Manager.

[13] Having failed to secure a position within the appellant's new structure the respondents were dismissed. They challenged the fairness of their dismissal claiming their dismissal to be both substantively and procedurally unfair.

[14] In the pre-trial minute, filed in preparation of the trial, the parties recorded the following fact to be common cause:

> "*In the event that an employee was not successful in securing a position in the new structure. He/she would be placed in a pool of employees who had not obtained positions and Appellants management would evaluate all other possible alternatives with a view to placing him/her in any remaining vacant positions."*

[15] One of the persons who testified at the trial, Berrington, the appellant's Human Resources Manager, gave evidence that, at the consultation meeting held on 26 July 2005, the employees were informed that there would be a single interview process, with unsuccessful applicants being considered for positions thereafter. Her testimony was also that at the meeting on 23 August 2005, she emphasised that those applicants whose applications were not successful, would be

considered for alternative positions. Adding that what she had meant was that the unsuccessful applicants would only be considered for those positions which have not been filled through a successful application.

[16] The respondents dispute Berrington's evidence persisting that the agreement was that they had to be considered for all vacant positions notwithstanding the fact that they did not apply for those posts and pointed to two pieces of evidence that they submit was subversive of appellant's averments:

16.1 In a letter dated 20 July 2005 and in response to questions posed by employees which asked: *"If you do not apply for a position will it mean that you are automatically retrenched, or will you be put into the pool that management will look at for other positions?*"; the appellant response to that was: "*Not necessarily, a person may be offered a reasonable alternative or may be placed in a pool until all other alternative positions have been considered and then if there is no other suitable alternative the person will be retrenched*." and,

16.2 The cross-examination of the appellant's CEO, Mr. R J McKenzie contains this important testimony:

> *"I am saying your evidence was to the effect that before there is a pool, employees who have not applied for a position for a particular position must be assessed for that position. Isn't that so? That was your evidence – as a suitable alternative?*
>
> *As a suitable alternative, yes. But the answer is Yes?-Yes*

> *That being so, Mr McKenzie , I put it to you that on your version the applicants should have been considered for that position of engineering manager, which later changed to team leader Correct?- Correct"*

[17] Both the appellant's written answer to the employee's questions as well as McKenzie's concessions are, in my view, ambiguous. There are two possible interpretations. Firstly, as contended for by the appellant, the respondents would only be considered for positions not filled through an application process: that is, for any remaining vacant positions. The other possible interpretation, as supported by the respondents, is that an employee who had failed in his application for a senior position, would automatically have to be considered for a junior one, even if he did not apply for it.

[18] In my view the first interpretation is far more probable and makes common sense. If the respondents are correct in their interpretation it would mean that an employee who may have applied for a post and who was found suitable, could still not get the job simply because there was another employee that may be able to be fitted into the position, but who did not apply for it. Such a process would make no sense when viewed within the context of the express requirement that people should apply for posts. The interpretation sought by the respondents is also at odds with the wording of the section 189 notice, as well as what took place at the initial consultation meetings referred to earlier. The process contended for by the respondent would have led to manifest confusion. Ordinarily

an employer is entitled to assume, in the context where this method of selection is agreed upon, that an employee who does not apply for a position is not interested in such position.

[19] The appellant's contentions are in addition strengthened by the fact that other employees who were interested in more than one position applied for and were considered for all such positions.

[20] More fundamentally, however, the respondents' contention is at odds with what was agreed to in the pre-trial minute referred to above. The pre-trial minute belies the suggestion that if any of the respondents did not succeed in a senior position for which they had applied, the appellant would have an automatic obligation to consider them for a lower position even though they did not apply for it. In short, the pre-trial minute made it clear: if an employee failed to apply for a vacancy, he or she would be placed in a pool from which appellant would try and place them in the event of any remaining vacancies. The key issue before this Court had therefore been settled in the pre-trial minute and the respondents were bound by the admission they made therein. See in this respect **Filta-Matix (Pty) Ltd v Freudenberg and others** 1998 (1) SA 606 (SCA) at 614B–D) and **Shoredits Construction (Pty) Ltd v Pienaar NO & others** [1995] 4 (BLLR) 32 (LAC) at 34C–F

[21] The respondents' counsel submitted, relying on the matter of **Shill v Milner 1937 AD 101**, that the issues in the pre-trial minute had been broadened because of a

lack of an objection to the questions put to McKenzie. Apart from the fact that I have found that McKenzie's concessions are at best ambiguous, I reject this submission for two additional reasons.

21.1 Firstly, there was never any formal application made to withdraw the admission.

21.2 Secondly, the appellant's counsel was not obliged to object to questions which sort to elicit an answer to a common cause fact which had been settled and was entitled to remain silent and argue at the end that the Court could ignore the answer of a witness that was at variance with what were the agreed facts. A Court does not have the power to go beyond the agreed common cause facts in the absence of fraud or the granting of an application to withdraw an admission. See also **HosMed Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & Others** 2008 (2) SA 608 SCA where it was held that the parties are bound to their pleadings and that pleadings could not be amended or changed simply because of answers that were solicited during the conduct of a trial.

[22] In these circumstances, I find that the appellant, in terms of the agreed selection criteria, had no obligation to consider the respondents for positions for which they did not apply. In the circumstances the dismissal of the respondents was neither substantively nor procedurally unfair.

[23] As the first issue has been answered in the appellant's favour, it is not necessary to consider the cross-appeal.

[24] This then brings me to the issue of costs. In determining this I must look at the record filed in this appeal. The issues in this matter were quite narrow and there was simply no reason to produce the record the appellant has produced. The record runs to almost 2000 pages added to this are the respondents rambling heads of over 64 pages as well as the additional paper handed in during argument. This meant that this Court had to wade through pages and pages of documents most of which had no bearing on this appeal. This sort of conduct apart from being unacceptable should be visited by some penalty lest this practise continues. While I am of the view that only about 20 percent of the record filed was necessary, both parties suggested that only 7 of the 21 volumes filed were irrelevant for the appeal. I do not agree. In this matter the appellant filed the record and there was no objection by the respondents so both are equally at fault in so far as this aspect of the matter is concerned. This notwithstanding, I believe that the appellant although successful and who in my view is entitled to its costs in terms of law and equity must however suffer a penalty for not ensuring that a proper record is filed. In this regard it appears just and equitable that the appellant be disentitled to the costs of preparing and perusing 75% of the record.

[25] In the result I make the following order:

(i)**The appeal is upheld with costs which costs shall not include the preparation and perusal costs of 75% of the record.**

(ii) The order of the court a quo is set aside and in its stead the following order is substituted:

> **"*1. The dismissal of the applicants was both substantively and procedurally fair.***
>
> ***2. The applicants are ordered to pay the respondent's costs."***

(iii) The cross appeal is dismissed with costs.

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Waglay DJP

I agree

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Mlambo JP

I agree

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Davis JA

Date of hearing: 08 September 2010

Date of Judgment: 028 April 2011

For the Appellant: Adv A.C Oosthuizen SC

Assisted by Adv G.A Leslie

Instructed by: Cliffe Dekker Hoffmeyer Inc

For the Respondent: Adv N.F Rautenbach

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