IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C781/14

In the matter between:

PUMEZA MKOKO **Applicant**

and

NHRBC **Respondent**

Date heard: 8 November 2018

Delivered: 6 February 2019

JUDGMENT

RABKIN-NAICKER, J

[1] The applicant claims she was unfairly discriminated against on an arbitrary ground. Section 11 of the EEA provides as follows:

"11 Burden of proof

(1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

(2) 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;

(b) the conduct complained of amounts to discrimination; and in terms

(c) the discrimination is unfair."

[2] The applicant bears the onus in terms section 11(2) above, and I will first examine whether on her version alone, she has made out a case in this matter. I therefore deal with her evidence in chief and submissions made on her behalf. She was led in chief by means of a witness statement she had prepared for the purposes of trial. I record this statement in material part below:

"1. I was in the employ of the National Home Builders Registration Council ("the NHBRC") from March 2007 to August 2011. I joined the organization as a Registration and Renewals Administrator. My duties entailed, inter alia, issuing and processing of renewal applications and related administrative work.

2. On 14 July 2010. I along with other employees received an email from Werner Beukes of the Human Capital Division informing us of the intention to enter into a restructuring exercise, called an Organizational Redesign Process. Shortly thereafter several positions were advertised for which I applied. Interviews were held in January 2011.

3. On 21 January 2011, I was told that I was successful in my application for the position of Customer Services Consultant and I received an addendum to my contract advising me of my new job title as a Customer Services Consultant, effective from 1 February 2011. I was also informed that my remuneration would remain unchanged.

4. In terms of the restructuring exercise, the functions of Registrations Administrators, Renewals Administrators and Enrolments Administrators were aligned to form a single position of 'Customer Services Consultant', effective from 1 February 2011. Despite the fact that my job title changed I continued to perform largely the same function as I had under my previous title of Registrations and Renewals Administrator. In this regard I had already been performing two out of the three main functions of a Customer Service Consultant since March 2007. As a result of the alignment the organization required fewer employees and embarked on a retrenchment exercise during 2011.

5. During 2011 restructuring remained ongoing and several employees who were not successful in their applications for alternative positions were in line for retrenchment in July 2011 I applied for, and accepted, a Voluntary Severance Package (VSP) and my last day at work was 31 August 2011.

6. As the restructuring phase took more than a year to conclude, there was a lot of uncertainty and tension, general staff morale was low and the environment was not conducive to my growth and development.

7. A motivating factor in entering into the VSP was to prevent two of my colleagues Hazel Madolo and Buyiswa Mhlaba, from facing retrenchment as they were more exposed than I was in relation to the criteria applicable during the retrenchment process. A further motivating factor in entering into the VSP was so that I could study towards an Mtech Business Administration

(Entrepreneurship) at Cape University of Technology. I anticipated the from my provident fund for which I would have been eligible as a result of the VSP, e.e termination of employment.

8. After taking the VSP I was unemployed from 1 September 2011 until I got a temporary job at Old Mutual as a Retirement Funds Administrator in July 2012. As I was out of the financial service industry for five years I could not successfully negotiate for a good salary, so I settled for significantly less remuneration with no benefits. It was also a fixed term contract position. In June 2013 I was made aware of a Customer Service Consultant vacancy at the NHBRC office in Bloemfontein. I applied and was invited for an interview on 4 July 2013. In my view, the interview went well, but exactly three weeks later I received feedback from Johannes Booysen a recruitment, that I was unsuccessful. I asked him to furnish me with reasons and his response was that I did well but another candidate scored better. He then encouraged me to check the NHBRC website for further vacancies.

9. I immediately checked the website and noticed that there were a number of the same and similar positions available in various Provinces. I sent in my applications, the closing date being 31 July 2013. In about October 2013 after not receiving any response I called the Human Capital division and spoke to Ntombifuthi (a Recruitment Consultant). She acknowledged receipt of my applications and advised me they were still busy with the technical vacancies.

10. In January 2014 I met a former colleague and during our conversation it came up that the vacancies had been filled and I was informed who got the job for the interview I attended on 4 July 2013……

13. I felt so aggrieved and mislead, I started to question the sincerity of the feedback I got from Johannes Booysen. I then called the NHBRC's Human Capital Division and spoke to Bathabile Dlamini, who told me that I was not

considered for the positions because the NHBRC considered me ineligible for re-employment. I enquired about the reason for this and was informed that clause 5.2 of the VSP ostensibly renders me ineligible for re-employment."

[3] In submission, the applicant referred to Clause 5.2 of the VSP contained in the bundle before court which reads as follows:

> 'Ms Mkoko specifically undertakes and agrees that no claim, action or right of action against the NHBRC for re-instatment, re-employment, remuneration, salary, notice pay, the value of accrued leave pay, unfair dismissal, severance pay, or for any amount or remedy for having been subjected to an unfair labour practice, or for any amount or remedy whatsoever, howsoever arising, other than what is contained in the agreement."

[4] It was submitted on behalf of the applicant that the only sensible interpretation to be given to the Clause above is that the parties agreed that there would be a full and final settlement of all claims arising out of the applicant's employment. They did not agree that the applicant would waive or compromise any and all claims, of whatever nature, she might have had against the respondent in the future. This approach suggests that despite the undertaking that the employee cannot lay a claim for re-employment, she can in future lay a claim for damages arising from a refusal by the respondent to re-employ her. I find the interpretation given to the Clause by the applicant far from sensible or business-like.[1]

[5] Mr Bosh for the applicant also tackled the interpretation of Clause 20.2.1 of the respondent's 'Recruitment, Selection and Placement Policy' which deals with the reappointment of former employees, and on which the respondent relied. It reads as follows:

[1] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18 on which applicant relies.

"A former NHBRC employee may not be re-appointed where:

20.2.1 The former employee left the organization earlier on the condition that he or she would not accept or seek reappointment, for example, former employees who accepted a Voluntary Severance Package".

[6] He argued that: "Former employees are precluded from seeking re-appointment with the respondent where they left early **on condition** that they would not seek reappointment. That can only be read as requiring that the former employee has agreed that he or she would not seek reappointment. There is no other sensible interpretation.

[7] The next step in these submissions also deserves recording:

"The applicant did not agree that she would not seek reappointment with the respondent. Her evidence was that this was never explained to her when the agreement was concluded and she would not have entered into the agreement if its effect was that she could not apply for reappointment with the respondent.

None of the respondent's witnesses was present when the VSP agreement was concluded and were thus in no position to contradict the applicant."

[8] The applicant did not plead, nor submit, that she entered into the VSP under duress or misrepresentation. Her witness statement reflects the reasons that she accepted the offer to accept the severance package. The Court is expected to accept her evidence on how she understood the contract, without reference to the law of contract.

[9] The supplementary pre-trial minute in this claim summarizes the material issues in dispute as follows:

"16. Whether the Respondent acted rationally by the employing the Applicant in circumstances where the Applicant, relative to the successful applicants, possessed higher qualifications and had better experience in respect of the advertised positions.

17. Whether the failure of the Respondent to appoint or employ the Applicant despite her experience because she entered into a VSP, amounts to discriminatory conduct and if so, whether such conduct amounts to unfair discrimination as contemplated in sections 6(1) and 9 of the Employment Equity Act 55 of 1998 ("the EEA").

18. If it is proven to exist, whether the 'policy'[2] referred to by S Raphela in his response to the Applicant dated 12 August 2014 is lawful, rational and justified."

[10] Only from the vantage point of an ivory tower, could it be considered irrational and unlawful for a company or organization to preclude re-appointment of a person who has accepted a voluntary severance package. From a commonsense standpoint it is imminently rational to avoid a situation in which employees choose to take a severance package during a restructuring of the organization, only to apply for employment with the company/organization at a later stage. Not only would that undermine the rationale for the restructuring, it would also be prejudicial to other applicants for a post (previously occupied by the employee who took a VSP), whether they be internal to the organization or new to the Company or organization.

[2] This is the Recruitment, Selection and Placement Policy.

[11] I am of the view that this ill-founded claim deserves no further interrogation by the Court. On applicant's case alone, I find no basis for the remedy that she seeks i.e. patrimonial and non-patrimonial damages in the amount of R860,000.00. The applicant was assisted pro bono and for this reason, although I am sorely tempted to award costs in this matter given the expenses incurred by the respondent in defending it, I will not make a costs award. I make the following order:

Order

1. The claim is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: CS Bosch instructed by Bradley Conradie Halton Cheadle

Respondent: Abraham Kiewitz Inc