

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

**Not Reportable
Case No: D54/2017**

In the matter between:-

SITHEMBISO THADEUS GCABA

APPLICANT

and

TELKOM SA SOC LIMITED

RESPONDENT

Heard on: 13 May 2022

Delivered on: 11 July 2022

JUDGMENT

MHLANGA AJ

[1] The Applicant was employed by the Respondent as a Manager: Employee Relations (M5 Level) responsible for the Eastern and Central Regions which comprised of Durban and Bloemfontein, respectively.

[2] The Respondent commenced a restructuring process in February 2016. As a consequence of the Applicant's position being identified for abolishment, a notice in terms of section 189 of the Labour Relations Act 66 of 1995 ("the LRA"), was issued to the Applicant on the 25th of February 2016.

[3] *Inter alia*, two positions were created at S4 and M4 levels, that is, Senior Manager: Employee Relations (M4) and Senior Specialist: Industrial Relations (S4).

[4] Mid way through the section 189 process, as means to avoid retrenchment, the Respondent invited the affected employees, including the Applicant, to apply for the newly created positions. These positions were higher to the one previously occupied by the Applicant and therefore were promotional.

[5] In preparation for the placement process into the newly created positions, the Respondent developed and published the Placement Process Guidelines ("The Guidelines").¹

[6] The guidelines provided *inter alia* for the composition of the placement panel. The placement panel had to comprise of the immediate Line Manager, the Line Manager's Senior, an HR representative and an independent panel member from another business area.²

[7] Applications for the positions were opened to internal candidates who had to apply by submitting an Expression Of Interest ("EOI") together with their CV's online.

[8] The Applicant duly applied for the two positions indicated above.³

[9] In respect of the Senior Manager: Employee Relations position, the Applicant was in a tie with one Abigail Nondwe Manzi ("Manzi"). The position was offered to Manzi on the basis that she was a female. It was recorded by the panel that the Applicant is *one of the two strongest candidates, both Black African, and the alternative candidate was appointed due to gender correction.*⁴

[10] The Applicant did not challenge his non-appointment to the position of Senior Manager: Employee Relations.

[11] On the application for the position of Senior Specialist: Industrial Relations, the Applicant was the only candidate. The Applicant was again not appointed to this

¹ Page 13 to 25 of documents.

² Page 15 bullet 1 of documents.

³ Page 47 to 48 of documents is the online application for the Senior Manager: Employee Relation (M4) and Page 104 to 116 is the online application for the Senior Specialist: Industrial Relations (S4) position.

⁴ Page 49 of documents.

position on grounds that *he did not have the required experience to provide direction and applying expertise to the Industrial Relations Philosophy, Structure, Frameworks, Agreements and Practices of the Telkom Group.*⁵

[12] The Applicant discussed his non-appointment with Mr Ngubo, the Respondent's main witness, and the latter advised the Applicant to lodge an appeal. Indeed, the Applicant appealed against the decision of the placement panel in not appointing him to the Senior Specialist: Industrial Relations position. The Appeal was similarly submitted online.⁶

[13] The Applicant's Appeal was presided over by Mr Alfie Ngubo, who chaired the panel, Sayeeda Khan and Thokozani Mvelase who were members respectively. The Applicant's Appeal was declined on grounds that *he does not meet the "strategic" experience as required by the JD to provide the direction and applying expertise to the Industrial Relations Philosophy, Structures, Framework, Agreements and Practices of the Telkom Group.*⁷

[14] Following the outcomes of his appeal, the Applicant was then dismissed for operational reasons with effect from 31st August 2016.

[15] The Applicant has not challenged the fairness of the selection process itself nor has he challenged the selection criteria. His challenge is mainly to the decision taken by the placement and appeals panels for the Senior Specialist: Industrial Relations post.

[16] The scrutiny that is to be visited upon the placement process *in casu* is the one that seeks to determine whether the process put in place and the decisions taken by the employer in terms of such processes were fair.⁸

⁵ Page 56 of documents.

⁶ Page 59 to 60 of documents.

⁷ Page 61 of documents.

⁸ *Telkom SA SOC Limited vs Van Staden & Others (2021) 42 ILJ869 (LAC)*, para 33.

[17] The Court has to determine whether the placement process and decisions taken in terms of the placement process met an objective standard or fairness in the sense that they were not subjective, arbitrary, capricious or inconsistent.⁹

[18] The first consideration in the first leg of the enquiry to determine whether the placement process was fair is the actual composition of the placement panel.

[19] I have alluded to the prescribed composition of the panel as per the guidelines in paragraph 6 above. Significantly, it is common cause between the parties that the Applicant's Line Manager as well as his Line Manager's Senior did not form part of the placement panel that considered Applicant's application. On that score alone, it is clear that the composition of the panel did not conform to the guidelines. No reasons whatsoever were advanced by the Respondent why it departed from the guidelines.

[20] I accept that guidelines are by their definition, *guidelines*. There may be sound reasons to depart from any guidelines but the position remains that when an employer sets guidelines it must comply with it unless good cause exists to depart therefrom. Mrs Potgieter stated that these guidelines were binding and were designed for consistency for the entire Telkom Group so that line management would not do as they please.

[21] However, I cannot find that that the placement process was unfair only on grounds of a mere departure from the guidelines on the composition of the panel. More needs to be shown for a finding of unfairness to be made in that regard.

[22] *In casu* what really breaks the Camel's back in so far as the decision of the placement panel is concerned is the absence of admissible and acceptable evidence on what the panel considered and how it came to its decision. The Respondent was at pains to explain the score card generated by the placement panel through witnesses that neither formed part of the panel nor had any personal knowledge of the deliberations that preceded the decision of the placement panel. The

⁹ Telkom SA SOC Limited, *ibid*, para 37.

Respondent argues that none of the members that served on the panel are identifiable to give evidence on its deliberation and decision. Unfortunately, this submission flies in the face of the testimony of its witness, Mrs Potgieter, who was adamant that she had spoken to two officials who confirmed to have been part of the placement panel that dealt with the Applicant's placement. These members had been recently contacted by Mrs Potgieter and confirmed to her that, indeed, they sat in the Applicant's placement process. Mrs Potgieter was adamant that Mr JP Smith from Group Executive: Remuneration and Miss Sue Correa who is the Executive Cooperate Centre: HR Business Partners did confirm to her that they sat in the Applicant's placement process. Otherwise, according to Mrs Potgieter, the other members that sat in the placement process were Justine Hughes and Maria Luke. Mrs Potgieter insists that due to the limited number of officials that could perform these functions only these managers sat in the majority of the placement processes.

[23] Despite this revelation, the Respondent persists with its submission that it cannot identify any of the panel members that presided over Applicant's placement. The Respondent so much submits that the evidence of Mrs Potgieter about the identity and involvement of the two individuals in the Applicant's placement process is incorrect. However, this point was canvased by Counsel for the Respondent even in the re-examination of Mrs Potgieter and the response was even more emphatic. The re-examination proceeded as follows:

***"Counsel for Resp:** You said JP Smith and Sue Correa confirm that they were part of the panel.*

***Mrs Potgieter:** Yes.*

***Counsel for Resp:** I consulted with JP Smith before the start of the process/case and he said he could not recall.*

***Mrs Potgieter:** At that time you spoke to him, he said he was not sure but when I spoke to him he said he was there".*

[24] The above passage needs no interpretation: Mr Potgieter is adamant that Mr JC Smith remembered that he participated in the placement panel that presided over the Applicant's placement. Mrs Potgieter so much confirms that Mr JC Smith may have been unsure about his involvement at some earlier stage when Counsel for the

Respondent consulted him but in his latest interaction with her, his memory was fully recovered on his role as a member of the placement panel that dealt with Applicant's placement.

[25] Unfortunately, the Respondent left this issue at that level without calling Mr JP Smith or Ms Sue Correa whereas it was faced with the conundrum of the absence of admissible and acceptable evidence on the process and decision that was taken by the placement panel that presided over the Applicant's placement. This leaves the Court with no other option but to conclude that the Respondent's failure to call either Mr JP Smith or Ms Sue Correa to shed some light on their interpretation of the Applicant's EOI and CV which led to their ultimate decision not to appoint the Applicant is due to fear that such evidence will expose facts unfavourable to the Respondent, or facts that will damage the Respondent's case.¹⁰ The Court has no other option but to draw an adverse inference from the Respondent's failure to call either one of the two identified and available witnesses who participated in the placement process.

[26] This inference is not drawn merely because the Respondent must be punished for having failed to call these crucial witnesses but simply because the evidence of the placement panel is so critical in determining the rationale of its decision not to appoint the Applicant who was the only candidate for the post and whose application had to be dealt with as a measure of avoiding retrenchment.¹¹

[27] What is more worrying is the fact that the documentary evidence produced to evince the processes and decisions of the placement panel leaves more questions than answers:

[27.1] The scoring of the Applicant on the position of Senior Manager: Employee Relations fundamentally differs to his scoring on the position of Senior Specialist: Industrial Relations, whereas it is common cause that the

¹⁰ *Tshishonga v Minister of Justice & Constitutional Development & Another* (2007) 28 ILJ 195 (LC), para 112. See also: *Urban Africa Security (Pty) Ltd v CCMA & Others* (2012) 33 ILJ 2201 (LC), para 15 to 16.

¹¹ *SACCAWU v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC), para 27. See also; *NUM v Black Mountain Mining (Pty) Ltd* [2015] JOL 33457 (LAC), para 37

requirements for both these positions are materially similar. In respect of the Senior Manager: Employee Relations position, the Applicant is scored four (4) points on qualification and three (3) points on experience.¹² Yet on the Senior Specialist: Industrial Relations position, he is scored zero (0) on qualification and zero (0) on experience.¹³ This cannot be explained by anybody other than a panel member who was there.

[27.2] The justification advanced by the panel for not appointing the Applicant is because he did not have the required experience to provide direction and applying expertise to the Industrial Relations Philosophy, Structures, Frameworks, Agreements and Practices of the Telkom Group. However, all that the panel had in front of it is page 108 and 109 of the documents in which under question six (6), the Applicant stated that *he had more than ten (10) years' experience in the HR/ER/IR Environment* and under question ten (10) he stated that *he currently performs the same duties as Regional Employee Relations Manager*. It is not clear on what basis the placement panel concluded that the Applicant did not have the required experience based on those two lines in his expression of interest. Had the placement panel considered the Applicant's CV (which it did not consider), it would have been apparent to them that the Applicant exceeded the experience requirements of the job description, in particular, when one considers his combined experience from Edcon Group as well as Telkom.¹⁴

[27.3] Worse even, the score cards are unsigned for both the Senior Manager: Employee Relations and Senior Specialist: Industrial Relations positions.

[28] As correctly conceded by Mr Ngubo under cross-examination, the decision of the placement panel, absent the evidence of any person who served in that panel, is indefensible.

¹² Page 49 of documents.

¹³ Page 56 of documents.

¹⁴ Page 28 to 42 of documents.

[29] As again correctly conceded by Mr Ngubo under cross examination, the placement panel could not fairly consider the Applicant's application without considering his CV.

[30] Based on the above, it is inescapable to conclude that the decision of the placement panel that the Applicant lacked the required experience was fundamentally flawed and unfair.

[31] Similarly, when the Appeals Panel considered the Applicant's Appeal, it did not have regard to the Applicant's CV, and consequently, despite Mr Ngubo having known the level at which the Applicant applied his trade at Telkom, he had no clue what the Applicant did whilst employed at Edcon. Again, Mr Ngubo correctly conceded that the Appeals Panel could not fairly consider the Applicant's appeal without considering his CV. That concession is telling on the unfairness of the outcomes of the Applicant's appeal *in casu*. It means the decision of the Appeals Panel was subjective, arbitrary and capricious.

[32] In addition to the above, the appeal panel somewhat introduced a new term of "**strategic**" experience. A term that is not *borne out* by the job description of the position of Senior Specialist: Industrial Relations.¹⁵

[33] The job description under "*job responsibilities*" merely requires the Applicant to make an input into the Labour Relations Strategy, but not to possess strategic experience. I agree with Applicant's Counsel that, at the very least, the Applicant can only be required to implement a strategy that is set by the Executives of Telkom. It would lead to absurdity to require the Applicant to possess strategic experience as an Industrial Relations Specialist reporting to an Executive.

[34] The Applicant's CV, fairly considered, met all the qualifications and experience requirements of the position of Senior Specialist: Industrial Relations in that the Applicant had more than seven (7) years relevant experience, of which at least two (2) years was on a managerial level, and three (3) years was in Industrial

¹⁵ Page 50 to 53 of documents

Relations role which included working with organised labour. This much is apparent from the Applicant's CV together with his undisputed testimony of his duties, particularly at Edcon, in this Court.

[35] Even if what the Applicant performed at Telkom as at the date of the restructuring was not at the level required by the post, the fact that the post was a promotional position to the Applicant in itself indicates that it is expected that he would not have performed those functions before. To hold otherwise would defeat the very object of a promotion. What is key is whether the Applicant could apply his trade using his previous experience at the required level of the promotional post. I cannot see anything that would have prevented the Applicant from doing so based on his previous experience.

[36] It is therefore clear that the Respondent's failure to appoint the Applicant to the Senior Specialist: Industrial Relations position was a product of an unfair process which renders the decision ultimately reached by the placement panel and the appeals panel unfair. The Applicant's dismissal could have been avoided. A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason.¹⁶ Therefore, the dismissal of the Applicant by the Respondent for operational requirements was unfair.

[37] The Applicant has asked for retrospective reinstatement as primary relief. A lot was said about the Applicant's subsequent employment with ACSA. The Court raised this with the Applicant and the Applicant was adamant that he is more than determined to continue his employment with the Respondent as he was better-off at the Respondent than he is at ACSA.

[38] Various arithmetic proposals were made by both Counsels on the computation of his back pay to cater for the remuneration that the Applicant received from his subsequent employment as well as the amount paid to him as severance package should he be reinstated.

¹⁶ *Oosthuizen v Telkom SA Ltd* (2007) 28 ILJ 2531 (LAC), para 8.

[39] Having considered all the circumstances, I deem it fair and appropriate that from the Applicant's back pay the amount received by the Applicant as remuneration from ACSA as well as the amount paid to him as severance package by the Respondent should be deducted.

[40] In the result, I make the following order:

[40.1] The dismissal of the Applicant by the Respondent for operational reasons was unfair.

[40.2] The Applicant is to be reinstated with full back pay, such back pay to deduct the amount received by the Applicant consequent to his employment at ACSA as well as the amount paid to the Applicant as severance package by the Respondent.

[40.3] No order as to costs.

MHLANGA AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B. Mgaga
from by Garlicke and Bousfield Inc.

For the Respondent: Mr P. Maserumule
from by Puke Maserumule Attorneys Inc.