



THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case no: D 1584/17

In the matter between:

ZANDILE JALI

Applicant

and

WITS HEALTH CONSORTIUM (PTY) LTD

Respondent

Heard: 29 to 31 July 2024

Final closing argument delivered: 25 February 2025¹

Delivered: 4 March 2025

JUDGMENT

WHITCHER J

Introduction

- [1] The applicant instituted an action against the respondent based on a claim that her retrenchment by the respondent was substantively and procedurally unfair. Her case at trial though ultimately centred on her claim that her dismissal was substantively unfair because her post of Quality Assurance Officer had not

¹ This judgment was delayed because there was confusion as to whether the respondent had filed their closing argument. As a result, their closing argument was re-submitted on 25 February 2025.

become redundant, alternatively she should have been appointed to the 'vacant' post of Quality Assurance Officer, which would have discharged the respondent's obligation to exhaust all reasonable measures to avoid a dismissal. If the court finds in her favour, she claims she is entitled to compensation equivalent to 12 months' salary (R227 976.00).

The background facts

- [2] The Respondent is a support operation through which the University - primarily its Faculty of Health Sciences - conducts behavioural, operational and clinical research *via* donor funded research units and projects.
- [3] In terms of a letter of appointment, the applicant came to be employed by the respondent on 1 October 2014 in the Maternal, Adolescent and Child Health Research Unit (the March Research Unit) and as a Data Capturer. On 1 June 2015, she was promoted to the position of Quality Assurance Officer in the Unit.
- [4] It is stated in paragraph 4 of a signed addendum to the letter of appointment that:

The Wits Health Consortium is a donor funded organisation and the duration of this contract is dependent on the renewal and/or availability of project funding. Should operational requirements become necessary in this regard, the legislated process will be instituted as stipulated in the Company's retrenchment policy.
- [5] According to the evidence of Professor Beksinska, the executive director of the March Research Unit, each research project in the Unit is separately donor funded. As to staff, they are appointed for a particular project and the duration of their employment is generally dictated by the lifespan of the project's funds.
- [6] According to Professor Beksinska, the applicant was employed because the Match Research Unit's Female Condom Evaluation project needed a Data Capturer.
- [7] As to why the applicant's contract did not spell out that she was specifically employed for the Unit's Female Condom Evaluation project and that its term was fixed to the lifespan of that project's funds, Professor Beksinska said the contract was formatted that way in case at the end of the project suitable work

for the employee becomes available in another project or unit and because contract staff at the University generally are afforded less benefits.

- [8] The applicants' own version anyway points to the fact that she had been aware that she was specifically employed to work on the Female Condom Evaluation Project. In this regard, she pleaded as follows:

During the latter part of 2016 the applicant, being aware that the Female Condom Evaluation Project was coming to an end, discussed this with her line manager, Ross Geena...

- [9] Further, on her own evidence, although she had worked on other projects and was trained on the ECO project, she had mostly worked on the Female Condom Evaluation project and did so exclusively from January 2016. In this regard, the evidence of Professor Beksinska was that sometimes staff are requested for a time to assist on other projects when the exigencies of the project (such as urgency) require same.

- [10] On 1 February 2017, the applicant was furnished a notice in terms of section 189(3) of the LRA. The notice (in part) reads as follows:

As you may be aware, Match Research Unit is a donor funded organisation which relies on external funders for financial support and project work to sustain the organisation. The existing contract with Female Condom Evaluation ends on the 31 March 2017 and the contract will not be renewed or extended and will terminate effective 31 March 2017.

This mean we may have to retrench staff and you could be affected. For this reason we need to consult you on...

- [11] It was undisputed that the funding for the Female Condom Evaluation study was fixed for a period of approximately three years and ended at the end of March 2017.

- [12] It is also common cause that in the course of the consultation process, the applicant was informed the respondent would be able to employ her on the IBIS project until 30 April 2017 and the applicant worked on that project.
- [13] She was further assessed (interviewed and subjected to a written test) along with another employee, Ntutuhuko Khumalo, who also faced retrenchment in his research unit² for the temporary positions of Quality Assurance Administrator (QAA) and Quality Assurance Officer (QAO) in the ECO project. Around the end of February 2017, the Match Research Unit determined that the ECO project needed these positions, but for a fixed term because the project was due to end at the end of June 2018.
- [14] On 15 April 2017 the applicant was informed that she was not successful in her application.
- [15] She was informed that the reason she was unsuccessful is that she did not have experience in quality control in complex clinical trials which use iDatafax as a means of data capture. Her experience was limited to consent forms. Also, according to Professor Beksinska, the position needed a person who could work under pressure and in a large team, but the applicant indicated otherwise during her interview.
- [16] In the end, however, to save money it was determined that a QAA which came in at a lower level was sufficient for the needs of the project, so the position of QAO was not filled. Khumalo was appointed to the position of QAA because he scored higher in the assessments, and the applicant was offered an alternative position, that of Research Administrator in the ECO project, which she declined because it came in at a lower level (it paid R5000 less than her original salary).
- [17] Following the above, the applicant's retrenchment came into effect on 31 April 2017. She was paid up to 31 May 2017 and severance and leave pay.

The issues

² The applicant failed to substantiate her pleaded claim that Khumalo was an external candidate.

- [18] Two distinct controversies arise for decision: whether the advertised position of Quality Assurance Officer was the same as the post the applicant held prior to her dismissal; and, if not, whether the applicant could reasonably have expected to be placed into the position of Quality Assurance Officer/ Quality Assurance Administrator in the ECO project.

Analysis

- [19] The answer to the first question is simple. The applicant failed to substantiate her claim that the positions were the same. The evidence of Professor Beksinska established that the posts were sufficiently different in that the advertised post fell within a different research project and methodology, the ECO research project which involved quality checking clinical trials as opposed to quality checking survey data as in the Female Condom Evaluation project.
- [20] It thus follows that the applicant's post was rendered redundant when the Female Condom Project ended.
- [21] The next issue is whether the applicant should have been appointed to the post to avoid her retrenchment.
- [22] In *SA Breweries (Pty) Ltd v Louw* (2018) 39 ILJ 189 (LAC), the Labour Appeal Court held that an employer, who seeks to avoid dismissals of a dislocated employee, and who invites the dislocated employee to compete for one or more of the new posts therefore does not act unfairly, still less transgresses sections 189(2) (b) or 189(7). Being required to compete for such a post in these circumstances is not a *method of selecting for dismissal*; rather it is a legitimate method of *seeking to avoid the need to dismiss* a dislocated employee.
- [23] And, more recently, in *Telkom SA SOC Limited v van Staden and others* [2020] JOL 49323 (LAC), the LAC held that where a legitimate operational justification exists, there is nothing innately unfair in requiring an employee whose position is affected to compete in a fair and objective process for placement into an alternative position.
- [24] This is more so, in my view, where there are other employees in the same situation (that is, facing possible retrenchment) and the difference in job content

between the 'old' and 'new' profiles of the positions in question is "*sufficiently significant to justify the requirement that the affected employee/s be assessed for their suitability for appointment to the new position.*"³

[25] In the applicant's case, there is no evidence that her non-placement was made on an unreasonable, arbitrary, subjective or inconsistent basis.

[26] The respondent's undisputed evidence was that Khumalo was an internal candidate who faced a similar fate to the applicant; the applicant was given a fair opportunity to compete for the posts but in the end to save limited donor funds the post of QAO was not filled and Khumalo was appointed to the post of QAA because he fared better in the assessments.

[27] It is noted that the applicant was offered an alternative position of Research Administrator but rejected the offer because it came in at a lower salary level. The position of QAA also came in at a lower level.

Conclusion

[28] For all these reasons, I find that the dismissal of the applicant by the respondent was not unfair.

Order

1. The applicant's referral is dismissed with no order as to costs.

B Whitcher

Judge of the Labour Court of South Africa

Appearances

³ See: *Van Rooyen and Others v Blue Financial Services SA (Pty)* (2010) 31 ILJ 2735 (LC) at para 22.

For the Applicant: The Applicant

For the Respondent: Mr. Posthuma from Snyman Attorneys

LABOUR COURT