

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

JS 684/06

In the matter between:

MARY SIBIYA

APPLICANT

And

ARIVIA.KOM (PTY) LTD

RESPONDENT

JUDGMENT

Cele AJ

1. The claim of the applicant is one of unfair discrimination, unfair labour practice and a breach of section 197 of the Labour Relations Act 66 of 1995 (the Act) read with the Employment Equity Act 55 of 1998. The claim was opposed by the respondent.

Background Facts

2. In 1998 the applicant was in the employment of Eskom in the position of a Communication Officer in the department of distribution. Her work was project orientated.
3. On 20 December 2000 a sale of business agreement was entered into between Eskom and the respondent. In terms of the aforesaid agreement, the employees of Eskom, including the applicant, were transferred to the respondent. Such a transferral was within the contemplation of section 197 of the Act. The transfer of the services of the applicant took effect

from 1 January 2001. The letter informing her of such transfer stated that she was transferred in her present position and with her present duties. Her grading was then C upper and her package was R181 657.00 per annum. Her transfer had been delayed due to projects which she had to complete with Eskom.

4. The respondent embarked on a skills verification process for its staff and the applicant participated therein. The result for her is that she was, on 18 June 2002, placed in the role of a Service Desk Consultant with grade AO, with effect from 1 April 2002. During 2002 the respondent was engaged in the population process exercise and when the process was finalised, the applicant was appointed into the position of a Customer Feedback Analyst with effect from 18 February 2003. In August 2003 the applicant made a successful request to be transferred to the Finance Department of the respondent. The transfer was effected on 15 August 2003 and she was seconded to the Procurement Department for about 6 months. She wanted to gain exposure in financial and procurement matters. Her position was Team Member Procurement.

5. In May 2004 the respondent advertised the position of a Communication Co-ordinator within the HR Department. The job profile of the incumbent included an appropriate qualification in English, Communication or Journalism. The applicant, together with others, responded to the internal advertisement. At that time the position of HR Executive was vacant but was about to be filled. The respondent took the position that the new HR Executive who was to be appointed might need to restructure the department and it then withdrew recruitment exercises to fill the position of a Communication Co-ordinator.

6. In July 2004 the respondent appointed Ms Ann Tsepo Ngutshane as its HR Executive. Ms Ngutshane convened a 2 day strategic breakaway session which included management achelon of her department. At the end of the session a document was produced which proposed the restructuring of the HR Department. The position of Communication Co-ordinator was split into 2 positions. One was to deal with general communication and the other was to develop, design and maintain a web for the HR Department. The proposed structure was approved by the executive committee of the respondent and was thereafter populated. The withdrawal of the recruitment exercise and the restructuring of the HR Department were communicated to the employees of the respondent through its internal publication medium. Two Coloured ladies Mrs Mirriam Rapai and Ms Jeni Prince were appointed as Communication Co-ordinators.
7. In August 2004 the applicant took up the position of a Financial Officer and in November 2005 she became a Time Controller Administrator. In April 2006 she accepted the position of an Office Administrator in focused business solution as a result of a restructuring which had taken place within the respondent.
8. On 24 July 2006 the applicant raised the issue of unfair labour practice. She then had a discussion on her complaint with Ms Ngutshane. The respondent then received a communication from Infinity, Labour and Consumer Protection CC which stated that a dispute for unfair discrimination would be referred. On 27 September 2006 the Commission for Conciliation, Mediation and Arbitration (the CCMA) unsuccessfully conciliated the dispute and issued a certificate of outcome. The dispute was subsequently referred to this court through a statement of claim. The

relief sought was couched in the following terms:

That the applicant seeks the following order:

- (1) That the applicant was unfairly discriminated by the respondent;
- (2) That the respondent had breached the provisions of section 197 of the Act read with the provisions of Employment Equity Act 55 of 1998;
- (3) That the respondent reinstate the applicant to her position as a Communication Co-ordinator;
- (4) That the respondent properly grades the applicant and to pay her the appropriate remuneration and benefits and/or shortfall in salary;
- (5) That the respondent pays the costs, only in the event of opposing the claim.

The Trial Issues

Applicant's positions

9. It was the evidence of the applicant that at Eskom she was a Communication Liaison Officer. She said that due to her delayed transfer, the position that should have been given to her was given to a Ms Erika Oosthuizen. She said that she was instead given the position of a Liaison Communication Officer, where she did work that was different from that which she did in Eskom. Soon thereafter an outside company came to assess skills of the employees. She reported to the company that she was not happy with the position given to her. After the assessment she was given the position of a Service Desk Consultant after spending 3 months with the respondent. Thereafter she was given the position of a Customer Feedback Analyst. That entailed telephoning customers as a follow up check if they were happy with the service of the respondent. She said that that position was not stimulating her enough.

10. When a Ms Lona Levy was employed as a Communications Manager it gave the applicant a feeling that her dignity was lowered as she was not

doing the work she had done. She took the matter up with a Ms Marte Bijman, who told her that there was no work for her (applicant) in her department. In her view, the business of the respondent concentrated more on IT services unlike the business of Eskom. She said that she considered a change in her career and to that end, she registered with Damelin for a course in finance as she had been told that there would be no position for her in the communication department.

11. As a Team Member Procurement, she was worried because her manager was in the process of learning the work with her. She felt that she would not be properly appraised and would as a result get no salary increase. While she was a Time Controller Administrator in 2005 four (4) positions were advertised. She did not apply for any of them as it was required of the incumbents to have IT skills which she did not have. She approached Ms Ngutshane who told her that she had no positions for her in the Communication Department. She consulted Mr Nicky Mogorosi, the CFO of the respondent who told her to resign as she had no job. She decided against taking that advice. At her request and in April 2006, she was moved to the Time Controller Administrator's position.

12. The evidence of the respondent, in this regard was that the applicant was getting her yearly salary increases and that the move from one position to the other was therefore not a financial disadvantage.

Discrimination:

13. It was common cause that positions of Communication Coordinator in Marketing Development and in HR Communication were advertised for in 2004. She applied for both. She said that

she never heard what became of the position in Marketing Development. For the position in Communication she said that she received copies of letters communicated between one Tersia, an HR Consultant and one Nicky Visser. She learnt that her name was to be added to the candidates who were to be interviewed. She waited for the interview which for reasons unknown to her never came to fruition. She sent an e-mail to ask what was going on only to be told that the relevant Manager was busy with short listing. Thereafter she heard nothing till the day she testified in court. When she was cross-examined she however conceded that she saw correspondence published to the staff in which the recruitment of the positions was halted. She later heard, with disappointment, of the appointment of 2 Communication Coordinators. She said that she had hoped she would also be interviewed for the position as she had better qualifications and experience to any of the other 2 appointed staff. She ascribed her exclusion from the post to being racially discriminated upon.

14. The applicant conceded when she was cross-examined that she had not raised any complaint or grievance with the respondent based on racial discrimination. She said that the dispute referred for conciliation was based on unfair labour practice but upon advice at the CCMA proceedings, she then characterized the dispute as based on racial discrimination.
15. The version presented by the 2 witnesses of the respondent confirmed the withdrawal of the recruitment process so as to accommodate ideas that the new HR Executive might come with. It became common cause between the parties that Ms Ngutshane had not known the applicant when

she took office as an HR Executive. The 2 day break away strategic session and a restructuring of the HR Department were confirmed. It was denied that there was any racial discrimination perpetrated against the applicant. The evidence was that a decision had been taken to restructure within the HR Department so that the staff would be placed where they were best suited. Underpinning the restructuring was a policy taken by the respondent that there would be no retrenchments.

16. The position taken by the respondent was that if any staff outside the HR Department was included in the restructuring, some of the people with that Department might be left without positions. Ms Ngutshane did say that she had not been aware of the interest of the applicant to the HR Department when populating positions with the HR Department. Ms Ferhnsen said that she took the initiative to investigate why the curriculum vitae of the applicant had not been included in applications before the recruitment process was stopped. She said that if she had had any intentions of excluding her in the consideration of applicants, she would not have initiated that investigation.

17. The case of the respondent is also that the population of the structure in the HR Department was published for the information of all staff in an article "who is who", but no objection was lodged against 'it' by anyone including the applicant. Instead there was a majority support for the restructuring and placement of personnel.

Submissions by the parties:

18. Mr Masinga for the applicant placed reliance on section 197 (2) (b) of the Act to correctly say that all rights and obligations

between the old and a new employer at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee. He submitted that the parties could not waive the provisions concerning the continuity of service and referred to a decision in Foodgro (A Division of Leisurenet Ltd) v Kriel (1999) 20 ILJ 2521 (LAC). He said that the transfer of employment contract does not interrupt the employee's continuity of employment. He was correct in submitting that the new employer may employ the transferred employees on terms and conditions that are "on the whole" not less favourable to the employees than those on which they were employed by the old employer unless the employees' conditions of employment are determined in terms of a collective agreement.

19. He conceded rightly so, that it is the employee who must prove discrimination alleged and thereafter the employer may have to prove that it did not discriminate unfairly.
20. He said that the applicant had a Bachelor of Arts in Communications and about 4 years experience in communication when she joined the respondent. She was moved to different positions within a short space, some suggested by herself because she was frustrated. These moves, he said were despite the assurance given to her, during the transfer of business, that no one would be better off as a result of the transfer.
21. He submitted that the applicant was frustrated by the withdrawal of the advertised positions for which she has applied. To add to that frustration the positions were later given to people she knew did not qualify and lacked in appropriate experience.

He said that according to the applicant discrimination against her started immediately when she joined the respondent in 2001. He asked for the granting of the relief prayed for.

22. Mr Moshwana for the respondent submitted that if there was a breach of section 197 the employee affected ought to take steps against the breach within a reasonable time and not wait for 7 years as applicant did. He submitted that there was paucity of evidence of a breach. He said that the placement of the applicant in various positions did not alone prove a breach as an employee may be transferred from the initial position at which she was on the date of the transfer of business for her benefit for instance on promotion. He pointed out that the statement of claim failed to allege the circumstances of the breach. He argued that this court was never told what her duties at Eskom were and what they were at respondent when she came. He said that the applicant produced no evidence of whether or not her employment was governed by a collective agreement.

23. He submitted that the evidence of the applicant was wanting in terms of what discrimination she sought to place her reliance on. He said that in all correspondence that applicant sent to the respondent complaining about her placement, she never complained about discrimination. He said that as there were 2 posts that were advertised for, in Marketing and Communication Departments, no evidence was led on what became of the Marketing position, while the evidence of the respondent was that the Communication post was withdrawn. He asked the court to find that no case was made for discrimination.

24. In respect of the allegations on a proper grading or appraisal, he submitted that the complaint is one of unfair labour practice which belongs to the CCMA and hence this court has no jurisdiction to entertain it.

Analysis

Section 197

25. Mr Masinga correctly outlined the important principles governing the employer-employee relationship when a business is transferred as a going concern in terms of section 197. I therefore will not revisit them. What is however left is to infuse these principles into the facts of this case. The first position given by the respondent to the applicant in 2001 was one of Communications Liaison Officer, which effectively was the same position she had had at Eskom during the transfer of the business. The applicant appeared not to have been satisfied with the content of her duties in that position. Her evidence was that she did the work which was different from that which she did in Eskom. It was her evidence that she complained to a private company that came to do skills verification of the staff about the work she was doing. She was then moved to the position of Service Desk Consultant. The applicant clearly contributed to being moved from her initial position with the respondent. The move was based on an objective skills verification by a private company and not on arbitrary or speculative exercises of the respondent. The nature of the business run by the respondent might differ to that run by Eskom. With all these considerations in mind it cannot lie in the mouth of the applicant to say that there was a breach of s197. As a matter of fact, the respondent reciprocated to her complaint by transferring her. She was a

willing employee for the transfer. It does not appear that the transfer placed her in a worse position than the one she had held. If it is worse, she did not say so.

26. There is no evidence by the applicant that she was against her appointment as a Customer Feedback Analyst or that the move put her in a worse position than that of a Communications Liaison Officer. She accepted the transfer. It was only once she had started working that she found the work “not to be inspiring”. According to her, she again, complained about her position and said she wanted to go back to the Communication Department. In my view, the respondent cannot be faulted for not heeding to her complaint. She wanted to go back to a Department she had already pronounced her dissatisfaction with. She was moved to the Finance or Procurement section and willingly tried to adapt herself to it. Thus far, the evidence led did not prove any breach of section 197 of the Act. What then followed was the advertisement of a position of a Communication Coordinator which is the main basis for her claim of discrimination. In respect of the 2 transfers thereafter she failed to produce evidence of a breach of section 197.

Discrimination:

27. It is difficult to conceive of how the respondent would have discriminated against the applicant while she was finalizing her projects with Eskom. The appointment of Ms Erika Oosthuizen would probably have been a business decision at the time. When the applicant came over and then complained, the position was given back to her. If there was any exclusion of her amounting to discrimination up to 2004, she failed to testify in respect thereof.

28. In 2004 the position of a Communication Coordinator was advertised and the applicant applied for it. In her initial evidence she testified that the last she heard of the post was when she was told that a Manager was busy with short-listing. Later she conceded that she was informed by the respondent, with other staff, that recruitment for that position had been halted. She did not seek to make out a case that the stopping of the recruitment was itself an act of discrimination perpetrated against her. The respondent is a company with very many employees. About 6 or 7 applicants had shown interest in the advertised post. It would therefore make no sense at all to say that the recruitment process was stopped as a discriminatory tool that was being used against the applicant. This finding alone is enough to dispose of the discriminatory claim of the applicant. However, it might assist her to look further as she is still in the employ of the respondent.
29. Ms Ngutshane, as the HR Executive, did not know the applicant and her interest in being placed in the Communication Department. She could not probably have therefore discriminated against the applicant in the circumstances. Ms Ngutshane initiated a strategic breakaway session which resulted in a proposal for the restructure of the HR Department. The proposal was later accepted by the executive committee of the respondent. The structure was thereafter populated and publication of who was placed where was circulated to the staff. The restructuring was intended to be limited within the HR Department to obviate any staff therein being retrenched. The applicant produced no evidence to gainsay all these facts. The respondent has produced hard objective facts to contradict a

claim of discrimination.

30. A proper conspectus of the evidential material before me points towards a high probability that the respondent did not execute any act of a discriminatory nature towards the applicant. By the time the 2 Communication Coordinators were appointed, the applicant had been eliminated from consideration through an objectively fair procedure which was never aimed at her as an individual or as a member of a vulnerable group.

31. The allegation of improper grading or appraisal relate to an unfair labour practice dispute which the respondent would not consent to being dealt with by this court. Nor was any evidence, in any event, led by the applicant to substantiate the claim. I uphold the view that this court has no jurisdiction to entertain this allegation.

32. The following order will accordingly issue:

- 1) The claim of the applicant is dismissed in its entirety.
- 2) No costs order is made.

CELE AJ

Date of hearing: 12th, 13th & 19th November 2007

Date of Judgment: 9 January 2008

On behalf of the Applicant: Mr. Masinga

On behalf of the Respondent: Mr. Moshwana