

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

**CASE NO.: JS  
913/ 05**

In the matter between:

**LYNETTE FERNANDES  
APPLICANT**

**AND**

**LEZMIN 1081 CC T/A JAZZTIME CAFÉ  
RESPONDENT**

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**JUDGEMENT**

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**MOLAHLEHI J**

**Introduction**

[1] This matter concerns an alleged automatically unfair dismissal as contemplated in terms of Section 187 (1) (g) read in conjunction with Section 197 of the Labour Relations Act (“the Act”).

- [2] At the beginning of the hearing the respondent applied for a postponement of the hearing because it alleged that its counsel was away overseas. The applicant opposed the application.
- [3] The matter stood down to afford the respondent an opportunity to find out as to when the notice of set-down was served on it and why counsel went overseas without making appropriate arrangements with regard to the postponement.
- [4] It turned out that the person who the representative of the respondent said was overseas was not a counsel but the chairperson of the Professional Caters Association (“PCA”). The respondent was again offered an opportunity to contact the PCA to come to court and assist in the proceedings. The representative then indicated that the only person he had contact with at PCA was the chairperson and that there was no other person he knew at the offices of PCA. The other reason which the respondent advanced was the fact that the attorney who earlier dealt with the matter passed away.

- [5] The reason given for the application to postpone was not convincing and accordingly the application was dismissed.

### **Background facts**

- [6] Jazztime Café and Café Gitano were jointly prior to their sale owned by the respondent, Lezman 1081 CC, whose sole member was Mr Swanepoel. It is common cause that Mr Swanepoel sold his interests in Café Gitano and remained with Jazztime Café.
- [7] The applicant, Ms Fernandes, was employed during July 2003, by the respondent and was initially based at Café Gitano. She was paid R9000-00 per month in terms of the contract concluded during July 2003. The amount was increased to R11 000, 00 in January 2004 and increased again to R13000-00 in February 2005. The February 2005 increase was accompanied by a share incentive in the Jazztime Café. The share incentive was to take effect as from 1 July 2006.

[8] The applicant testified that at the beginning of 2005, Mr Swanepoel informed her that he intended selling Café Gittano and that she would be transferred to Jazztime café. Pending the finalization of the sale, the applicant was required to assist in running Jazztime Café and Café Gitano. However, as from February 2005, she devoted her time for the entire day at Jazztime Café.

[9] At some point during the course of her employment at Jazztime Café the applicant noticed two men who were frequenting the café. She was suspicious that they may be negotiating the purchase of Jazztime Café and confronted Mr Swanepoel in this regard who assured her that there was no plan to sell the café.

[10] However, on 31 July 2005, Mr Swanepoel addressed a letter to the applicant advising her that he had sold his interests in the respondent to both Mr Nicolaus Bibis and Carlos dos Santos effective 01 August 2005. It would however appear that the letter was brought to her attention after her dismissal. The letter went further to say:

*“Lezmin 1081, trading as Jazz Time Café Kensington, will continue*

*to operate as a going concern after the effective date, and in terms of the Sale Agreement, the Purchaser has taken over all staff and liabilities towards staff employed by the business on the effective date.(my underlining)*

*As your outgoing employer, I wish to thank you for your loyal service with Lezmin since July 2003. Although you did not achieve the incentives documented in your employment agreement, I have nevertheless deposited an amount of R40, 00 into your account in addition to the salary due to you for July 2005...”*

- [11] The applicant was also issued with a reference letter also dated 31 July 2005. The relevant part of the letter read as follows:

*“I wish to confirm that Lennette Brenda Fernandes was employed by Lezmin 1081 CC as a Senior Manager at Café Gitano Eastgate since the acquisition of the business as a going concern from Jet Foods on 01 July 2003. Prior to that Lynnette was employed by Jet Food, at Café Gitano, in a similar capacity. On 01 January 2005 Lynnette’s responsibility was increased and she was placed in charge of two restaurant outlets, namely Café Gitano Eastgate and Jazz Time Café Kensington. On 01 June 2005 there was a change in members interest of Lezmin 1081 CC.”*

[12] After opening the Jazztime Café, on 1<sup>st</sup> August 2005, the applicant was summoned to an office where Mr Swanepoel who was with Mr Dos Santos, thanked her for the contribution she had made to the respondent and informed her that he had sold the business. Mr Dos Santos then confirmed the purchase and that he would not need her services as the business would from then on by Mr Bibis. The applicant further testified that she later received a call from Mr Swanepoel enquiring from her *“how did she like it being given one days notice of termination of her employment.”*

[13] The respondent’s witness testified that the respondent had made it clear to Mr Swanepoel that Mr Bibis would be the person to run the business. The witness blamed Mr Swanepoel for not disclosing that the applicant was an employee.

### **Applicable legal principles**

[14] Section 197 of the Act provides:

*“(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -*

*(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;*

*(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;*

*(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and*

*(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new*

*employer as if with the old employer.*

*(e) The new employer complies with subsection (2) if that employer employs 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.”*

[15] Section 187(1) (g) of the Act renders a dismissal by reason of a transfer as a going concern automatically unfair. The employee has to show that the dismissal was in terms of s187 (1) (g) in that the dismissal was either the transfer itself or “reasons related to the transfer.” In the cases of *NEHAWU v University of Cape Town & others* (2002) 4BLLR 311 (LAC) and *Molaba v Minaco Stone Germiston (Pty) Ltd & another* (2000) 10 BLLR 1191(LC) the Courts found that the applicants had failed to prove that the dismissal was as a result of the transfer as a going concern.

[16] The issue to determine in the current case is whether or not the applicant was dismissed as a result of the transfer of a business as a going concern itself, as contemplated in s187 (1) (g) read with s197



of the Act dismissal for reasons related to the transfer.

[17] The applicant conceded during cross examination that all other employees except for the applicant were taken over as part of the going concern. The respondent contended that the applicant was not taken over because “*she was not part of the deal.*” In its further argument the respondent argued that the applicant was not an employee but a shareholder having been granted a 5% shareholding by Mr Swanepoel.

[18] Mr Swanepoel was not called to testify about the transfer of the applicant from Café Gitano to Jazztime Café. The evidence of the applicant that she was transferred from Café Gitano to Jazztime Café remains uncontested. There is also no evidence that the respondent terminated her services after the sale of Café Gitano. The respondent’s witness did not deny that the applicant was running Jazztime Café at the time of the sale.

[19] The balance of probabilities favors the version that the dismissal of the applicant was a direct result of the transfer as a going concern of

Jazztime Café. The applicant was accordingly on the evidence before this court an employee of the respondent at the time of her dismissal in the August 2005.

[20] There was no written agreement between the old employer represented by Mr Swanepoel and the respondent as the new employer as contemplated by Section 197 (6) (a), or otherwise between the old employer, the new employer and the applicant in which case the effect of s197 would have been dispensed with.

[21] The provisions of s197 (2) (a) - (d) therefore applies and the respondent as the new employer is therefore substituted in the place of the old employer. The dismissal of the applicant was therefore automatically unfair as provided for in s187 (1) (g) of the Act. Thus what then remains to be determined is compensation for the automatically unfair dismissal of the applicant having indicated that she does not wish to be reinstated.

[22] Section 194 (3) of the Act, provides that compensation awarded to an *employee* whose *dismissal* is automatically unfair must be just and

equitable in all the circumstances, but not more than the equivalent of 24 months' *remuneration* calculated at the *employee's* rate of *remuneration* on the date of *dismissal*. I see no reason why in the circumstances of this case, the maximum compensation should not be granted.

[23] I also see no reason why the costs should not follow the result.

[24] In the premises the following order is made:

1. The dismissal of the applicant was automatically unfair.
2. The respondent should compensate the applicant for a period of 24 months calculated on the salary of R 13 000, 00 per month.
3. The costs should follow the result.

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**MOLAHLEHI J**

**DATE OF HEARING** : 13 AUGUST 2007

**DATE OF JUDGMENT** : 02 NOVEMBER 2007

**APPEARANCES**

***For the Applicant : Clifford Levin of Clifford Levin Attorneys***

***For the Respondent: Mr Do Santos of Jazztime Café***