

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JS278/07

Heard and delivered on 2008/08/21

## **REPORTABLE**

In the matter between:

ANNIE ZABALA

Applicant

10and

GOLD REEF CITY CASINO

Respondent

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## J U D G M E N T

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PILLAY D., J:

This discrimination claim based on section 187(1)(f) of the Labour Relations Act No 66 of 1995 ("LRA") was prefaced with several points *in limine*. The court heard the parties and directed that as both  
20parties were ready to proceed to trial, the real issues should be canvassed; the court accordingly declined to make any ruling on the points *in limine*.

For the record, the points *in limine* related to an application for amendment which was filed late by the respondent employer, a complaint

that the applicant employee needed to apply for condonation for the late referral of its claim and an objection to jurisdiction on the basis that the case was one for unfair dismissal and not for discrimination. The opinion of the court was that it was up to the applicant to prove that she was discriminated and that her dismissal was for that reason; if she did not get past that hurdle then her claim must fail.

In those circumstances, the court directed the parties to proceed to trial. The evidence and argument commenced at about 11H00 and when it was 10completed at about 16H45, the court gave its judgment.

The applicant was charged for unauthorised removal of and being in possession of the respondent's property in that around July 2006, she removed the respondent's Motorola V3 Cellular telephone from its premises and kept it at her home without her manager's knowledge and authorisation.

The background to the charge was that the applicant's manager, Mrs Claudia Crooney, had asked her for a cellular telephone charger 20because her cellular telephone battery needed charging. Mrs Crooney instructed the applicant to get a charger from the storeroom. The applicant asked another employee to get the charger. That employee returned with a box containing both a charger and a new cellular telephone.

Crooney took the charger and told the applicant to keep the cellular telephone. The applicant kept the cellular telephone in her handbag and, on her version, travelled to work with it everyday. When she went on leave, she left her handbag with the cellular telephone at home. When she returned from leave, she came to work directly from Harare. She therefore did not have the handbag with the cellular telephone.

Crooney informed her that there was an investigation about stolen cellular  
10 telephones. The applicant, who had already heard from other employees about the investigation, disclosed that she kept the cellular telephone at home. She brought it to work the next day. She was charged as indicated above.

The chairperson of the enquiry found that the cellular telephone had been used. He found the applicant guilty. Her appeal was unsuccessful. She referred a dispute at the CCMA and it remained unresolved.

The applicant alleged that at the CCMA conciliation she indicated to the  
20 Commissioner that her claim was based on discrimination because the real motive for her dismissal was her belief and conscience. She believed that having an extra-marital affair was improper.

The background to her claim was that Crooney had called her into her office about a month or two before requesting the cellular telephone, that

is, around about May or June. On the applicant's version Crooney told her that she could not believe Luke Cloete's wife would accuse her of having an affair with Luke Cloete (Cloete). Crooney allegedly told the applicant that she had a boyfriend and that she did not want to continue with a relationship with Cloete.

That evidence of the applicant was not altogether clear but she understood Crooney to confess to her that she had been having an affair with Cloete. That disclosure, according to the applicant, led to a souring of relations between Crooney and the applicant.

Even though, according to the applicant, it was widely rumoured that Crooney had been having an affair with Cloete, she was the only one who witnessed her confession. She also made her disapproval of the affair well known to Crooney. Crooney allegedly held that against the applicant. She was unhappy that the applicant was critical of her conduct.

That was the background and the basis for the alleged discrimination complaint.

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The basis of the discrimination was not pleaded, was not raised at the disciplinary enquiry, at the appeal or in the referral to the CCMA as it should have been because that was the foundation of the applicant's case. Even if the court were to accept that it did not occur to her at the disciplinary enquiry or the appeal, but that this was the true motive for her

dismissal, then she must have, by the time she made the referral to the CCMA, been aware of what the basis of her case for discrimination was.

Crooney denied all the allegations pertaining to the affair, that any conversation occurred between her and the applicant about the affair, and that the reason for the dismissal was motivated by the applicant's opinion about the affair.

The applicant submitted that the true reason for her dismissal was discrimination that the grounds of her opinion, her belief, her conscience and her culture, all of which amounted to disapproval of extra-marital affairs.

Counsel for the respondent disputed that the ground of discrimination alleged, namely, that her opinion against extramarital affairs was a listed ground of discrimination. The court takes a generous view of the applicant's evidence and accepts that the ground of discrimination is a listed ground, because her opinion about extramarital affairs is a belief and a belief, whatever it may be about, falls within the specified grounds of discrimination. This does not resolve the applicant's difficulties.

Having established a listed ground of discrimination, the applicant had first of all to prove that there was differentiation. The court invited both parties to address it on the formula prescribed for analysing discrimination cases in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (1997 (11) BCLR

1489. The union official, Mr Sebola, who appeared for the applicant, submitted that *Harksen v Lane* did not apply to this case because that case related to the vertical application of section 8 of the Interim Constitution of 1993.

The submission is entirely without merit. *Harksen v Lane* has been followed consistently by the Constitutional Court, the High Court and whenever the Labour Court and the Labour Appeal Court were referred to it. That test has not been set aside and this court is obliged to follow it.

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The court then invited the parties to address it on whether there has to be a comparator in a case where the applicant alleges a listed ground of discrimination. Mr Sebola had great difficulty in responding to the court's question and the court did not understand his submissions.

Mr La Grange correctly pointed out that it was up to the applicant to establish that there was differentiation and what the comparators were. It was not up to either the court or the respondent to speculate what the comparators were.

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In this case, the comparators might well have been a difference of opinion between Crooney and the applicant or between the applicant and other employees. The court simply does not know.

In the circumstances, having failed to establish that there was

differentiation, that the differentiation related to the alleged grounds of discrimination, which the court accepts were specified grounds, the applicant's claim must fail at the first stage of the discrimination analysis.

The applicant also asked the court to make an order that her dismissal was unfair. However, the entire case was constructed on an unfair discrimination claim. The applicant did not plead in the alternative that she was dismissed unfairly, that the finding of misconduct was substantively or procedurally unfair, that the penalty was too high or that the dismissal was 10unfair for any other reason. Her claim was based exclusively on the assertion that she was discriminated. Without an alternative claim for unfair dismissal for misconduct, the court could not look into any other reason for finding that her dismissal was unfair.

In the circumstances the claim is **dismissed with costs**.

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**PILLAY D, J**

**Judge of the Labour Court**

Date of Hearing: 21 August 2008

20Date of Judgment: 21 August 2008

Date of Editing: 15 September 2008

## **APPEARANCES**

For the Applicant : M.S. Sebola – Union Official

For the Respondent : Adv W.G La Grange instructed by Deneys Reitz