IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JS 625/06

In the matter between:

ZELNA CHARMAINE BLACK APPLICANT

AND

THE JOHN SNOW PUBLIC HEALTH GROUP RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction1

[1] The Applicant, Ms Black, claims that her dismissal by the respondent is automatically unfair in contravention of the provisions of section 187 of the Labour Relations Act 66 of 1995 (the LRA). She is seeking compensation only and not reinstatement.

[2] In his opening remark Adv Venter for the Applicant indicated that the dismissal was automatically unfair because she was dismissed for lodging a grievance against sexual harassment. The Respondent on the other hand contended that the Applicant was not dismissed but that her fixed term contract expired.

Background facts

[3] The Applicant who had her yearly fixed term contract renewed on a number of occasions was employed by the Respondent since May 2003.

[4] The Respondent had two divisions, one known as the red label and the other as blue label. The red label division was the profitable leg, responsible for distribution and the blue was non profitable. The Respondent has several offices in South Africa and its head office in USA-Washington.

[5] The Applicant's fixed term contract was renewed from 1st May 2005, and was to expire on 30th May 2006. With this extension the Applicant moved to the blue label division.

[6] The Applicant testified that despite what was stated in her contract particularly paragraph 1 (one) the understanding was that the contract was to be extended. She explained that the reason for the fixed term contract was because of the environment in which the NGO's operate in. They rely mainly on funding which is generally granted on an annual basis. Paragraph 1(one) of the contract reads as follows:

> "*1. COMMENCEMENT*
>
> *1.1 This is a fixed term Contract of Employment (tile "Agreement") and shall commence on May 1st, 2005 and shall, subject to the provisions below providing for earlier termination thereof, automatically terminate on April 30'f', 2006. The parties agree that this contract is concluded on a fixed term basis and the Employee has no expectation, nor does the Employer create any expectation*

that this contract would be extended past the above-mentioned fixed period."

[7] The Applicant testified that in January 2005 whilst in Kenya she received a phone call from a staff member in South Africa who told her that Rose Malumba, manager responsible for the South African region went into a furniture store and offered to buy all the furniture therein. The Applicant then addressed an email to Mr Milbrand and informed him about this incident.

[8] The Applicant had a discussion with Dr Millongo, the director of injection safety project wherein one of the agreements was that she would return to South Africa to assist in the office apparently because of the problem of Rose Malumba. She recorded her discussion with Dr Millongo in an email dated 24th January 2006 and the relevant part of that email reads as follows:

"Actions for tomorrow:

1. *Get feedback on Rose's situation from office & determine if we can do anything further for her.*
2. *Cancel all appointments for Rose & activities / training by staff for this week at least.*
3. *Speak to our lawyers to get advice on possible suspension or other cause of action (to protect us / dissociate us from possible liability or harm)*
4. *Try to change my flights to go back to SA (see the travel section for my rationale)."*

[9] The following morning after arrival in South Africa the Applicant before going to the office went o see the attorneys who gave an opinion on the matter of Rose Malumba.

[10] Apparently Dr Millongo to did not appreciate the Applicant obtaining legal opinion about the matter. In a telephone conversation he had with the Applicant on 27th January 2006, Dr Millongo, indicated that he was unhappy about her seeking the legal opinion and that he considered charging her for misconduct. The Applicant apologized for what she did and indicated that she only saw the email instructing her not to consult attorneys when she arrived in the office after consulting with them. According to her, immediately thereafter Dr Millongo told her that he *"had feelings for her."*

[11] On 16th February 2006, Dr Millongo flew to South Africa and held a meeting with staff members and at the end thereof requested the Applicant to remain behind. Once all other staff members had left the board room he raised the issue of consulting with the attorneys again and that he thought of disciplining the Applicant. After repeating her apology, Dr Millongo took off his shoes and put his foot on that of the Applicant and started stroking it against hers.

[12] The Applicant testified that she was so shocked that she immediately stood up and went to fetch a glass of water and came back with another one. On her return with the glass of which she told Dr Millongo that she had a lot of work and that there was nothing further she could discuss with him.

[13] On the 21 February 2006, the Applicant emailed her grievance to Mr Johnn Wilson. The grievance was sent with covering email which reads as follows:

"*Dear John*

I would like to report an incident to you, as COP of South Africa and the most senior JSI official.

My reasons for not filing this with HR are stated in the grievance, as well as my suggested actions with the grievance.

I feel that this course of action (reporting a grievance) will be more beneficial to me, but the seriousness of the incidents must not go unnoticed.

Thank you."

[14] The contents of the grievance reads as follows:

"DETAILS OF GRIEVANCE:

SEXUAL HARASSMENT:

Two incidents occurred before and during Dr. Jules Millongo's visit to South Africa.

1. *Dr. Millongo phoned me on 27 January 2006 to speak to me about an update on the South African situation and the crisis we were experiencing regarding the Country Director. Dr Millongo mentioned on the phone that he always had feelings for me-*
2. *1 was called in alone to see Dr. Millogo in the big boardroom on 16 February 2006, right after a general meeting he had with all the*

MMIS staff. Dr Millogo told me that he has considered firing me & was also thinking about disciplinary action against me. The reasons for these considerations were that he and the HR Manager in Washington DC did not agree with my suggestions that I have made to them (HQ) regarding the HR procedures that MMIS should follow. Right after these threats, Dr Millogo removed his shoes & stroked his foot over my foot several times (with only his sock on). I was terrified and could not speak and at the same time I have tried to keep myself together, because he has just told me that I nearly lost my job & he still had the power to fire me. I feel that these acts are advances towards me. that Dr Millogo is misusing his power and that these acts can be regarded as sexual harassment. These actions make me feel uncomfortable and are extremely unprofessional behaviour from Dr Millogo's side would like to file this grievance with the Chief of Party in South Africa (the highest ranking JSI official), is I feel that I might be victimised if I send this to Head Office. I was severely reprimanded by Head 0ff ice because they did not agree with suggestions I made and I am afraid to loose my job. I want this grievance to stay on record and if any other incident of this nature occurs, or if I am victimized in any way, this grievance must be used I would also like the COP in South Africa to discuss this incident with the Director in

Washington DC, once she visits South Africa."

[15] On the 24th March 2006 the Applicant received an email from the Respondent in Washington indicating that they had received the grievance which she had sent to Mr John Wilson and that the matter will in line with the policies of the Respondent be handled by the Human Resource.

[16] In relation to the renewal of the contract the Applicant testified that she expected the contract to have been renewed. She further testified that she was never called to a meeting to discuss her termination nor did she know the reason why her contract was terminated.

[17] The Applicant conceded during cross examination that the signature on the fixed term contract was hers. She also testified that this was the third time she signed a contract of this nature with the Respondent. She explained that fix term contracts are a common practice in the NGO sector which is the sector in which the respondent operates in. She also conceded that she knew that this was on a one year contract but contended that she should have been told in advance that it would not be renewed.

[18] The other reason which the Applicant gave as to why she expected her contract to be renewed was that her position had been budgeted for. However, she conceded when it was put to her that the contract ended naturally because of the expiry of its time.

[19] As concerning compliance with he grievance procedure, the Applicant conceded that in terms of the disciplinary procedure she should have submitted her

grievance to the country director and not head office. She however indicated that she was uncomfortable I submitting it to the country director, Rose Malumba.

The issues for determination

[20] The issues which the court is required to determine are set out in the Applicant's statement of case as follows:

> *"13 The dismissal of the applicant was automatically unfair as contemplated in Section 187(1)(f) of the LRA in that:*
>
> *13.1 The respondent converted the fixed term contracts of employment of its other employees into permanent contracts of employment upon expiry of such employees' fixed term contracts of employment;*
>
> *13.2 The respondent failed to convert the applicant's fixed term contract of employment into a permanent contract of employment and instead advised the applicant on 13 April 2006 that her fixed term contract of employment would terminate on 30 April 2006.*
>
> *13.3 The reason for the respondent failing to so convert the applicant's contract of employment is that the applicant lodged a grievance against Millogo in which she alleged that she had been sexually harassed by Millogo.*
>
> *13.4 The respondent therefore dismissed the applicant for an arbitrary reason as contemplated in Section 187(1)(0 of the*

LRA which rendered such dismissal automatically unfair in the circumstances."

[21] In the pre-trial minutes the parties agreed that the issues to be determined by the court are as follows:

"5.8 The issues the parties request the Honourable Court to decide is whether or not the Applicant was dismissed by the Respondent and/or whether or not a dismissal occurred as contemplated in terms of the Provisions of the Labour Relations Act, as amended. If so, whether or not the dismissal of the Applicant was automatically unfair in terms of the Provisions of Section 187.

5.9 If the Honourable Court finds that the Applicant was dismissed, whether or not the reason for the dismissal relate to the fact that the Respondent dismissed the Applicant on subjective and abstract considerations and that the Applicant was discriminated against by the Respondent, as a result of the Applicant exercising her right in terms of the Respondent's Grievance Procedures."

[22] It is further stated in the pre-trial minute under the heading dealing with discrimination that:

"20.1 The Applicant alleged direct discrimination in that the Respondent contravened Section 187(1) (f) of the Labour Relations Act, as amended, and/or the Provisions of Section 6 of the Employment Equity Act in that the Respondent has

discriminated against the Applicant on the grounds of that the Applicant exercise her right in term of the Respondent's Grievance Procedure and on subjective and abstract consideration, purely because the Applicant accused a director of the Respondent to have sexually molested the Applicant. The Applicant therefore basis her claim on discrimination based on the unvested ground in that her dismissal was arbitrary in terms of Section 187(1) (f) of the Labour Relations Act read with and subject to the test for unlisted grounds laid down in Harkson vs Lane & others 1998 1 (SA) 300 (CC).”

Absolution from the instances

[23] Respondent applied for absolution from the instances immediately the Applicant closed her case. In support of the application, Ms Prinsloo for the Respondent argued that the Applicant’s testimony focused on the renewal of the contract and not discrimination. She further argued that the Applicant did not at any stage during her testimony make reference to discrimination and further that her case from her testimony seem to be based on section 186 (b) of the LRA. She did not adduce evidence that linked the non-renewal of her contract to the sexual harassment.

[24] Mr Venter for the Applicant argued that the issues as defined in the pre-trial minutes relates to the circumstances of termination of non renewal of the contract. He argued that there was *prima facie* evidence that there was an

expectation that the contract of the Applicant would be renewed. He further submitted that the Applicant was dismissed because she filed a grievance. When invited by the court to explain whether or not the Applicant's claim does not fall under section 187 (1)(d) of the LRA, Mr Venter contended that there is authority that says that dismissal for exercising a right under section 187 (d) could constitute discrimination as envisaged under section 187(f) of the LRA. He could not however provide the authority and thus requested that the matter stand down for him to go and look for that authority over the weekend.

[25] In relation to the step taken by the Respondent of applying for absolution from the instances Mr Venter argued that this step was inappropriate and not in line with the authorities. In this respect he relied on the cases of in the cases of (2006) 27 ILJ 2627 (LC) and (2007) 28 ILJ 2041 (LC)

Application to amend

[26] This matte came back before the Court on 16th March 2009. In addition to arguing about the possible overlap between subsections (d) and (f) of Section 187 of the LRA, Mr Venter lodged an application to amend the Applicant's statement of case. In terms of the application to amend which was made from the bar, the Applicant seeks to substitute subsection (f) with (d).

[27] Ms Prinsloo, for the Respondent argued that an amendment could not be granted at this stage of the hearing. She further argued that even if an amendment was granted the case of the Applicant would still be unsustainable

because a grievance is not a right envisaged under section 187 (1) (d). Section 187 (1) (d) provides:

> *"(d) that the employee took action, or indicated an intention to take action, against the employer by-*
>
> *(i) exercising any right conferred by this Act; or*
>
> *(ii) participating in ay proceedings in terms of this Act."*

[28] I do not agree with Ms Prinsloo's view. In my view the right not to be victimised for lodging a grievance can be inferred from the broader frame work of the LRA, but more particularly Section 115 which deals the function of the CCMA. Section 115(3) (d) provides:

> *"(d) preventing and resolving disputes and employees' grievances."*

[29] Reverting back to the issue of the amendment, it is generally accepted in our law that the Court has a discretion which is to be exercised judicially taking into account, the facts and the circumstances of the case. See Van *Winsen Cilliers Loots, The Civil Procedure of the Supreme Court of South Africa (4th ed) 515.* An amendment can be granted any time before a judgment is made.

[30] In general, the Court will grant the amendment where the other party would not suffer prejudice because of it. In *National Union of Metalworkers of SA & Others v Driveline Technologies (Pty) Ltd & Another (2002) 21 ILJ 142 (LAC),* the Court per Zondo AJP, as he then was, found that an amendment to the appellant's statement of claim to the effect that the dismissal was an automatically unfair dismissal would not introduce an new dispute but would

simply be an allegation of another reason for dismissal or would be reason relied upon by the appellants in the place of, or as an alternative to, the reason for operational requirement. The Court further found that even with the amendment the dispute remained the same as the one which was referred to the CCMA, namely the dispute about the fairness of the dismissal of the employees.

[31] In the present instance I am mindful that the application to emend is brought very late when the pleadings have closed and the Applicant has closed its case. However, I do not believe that granting the amendment would cause the Respondent any prejudice. In a sense the amendment incorporates paragraph 13.3 of the statement of case and paragraph 5.8 and 5.9 of the pre-trial minutes.

[32] In addition to taking into account the issue of prejudice, I have also taken into account the fact that the amendment would not change the nature of the dispute which was conciliated by the CCMA. The dispute which was conciliated falls within the broader category of automatically unfair dismissal in terms of section 187 of the LRA.

[33] It is therefore my view that despite the late application to amend, the scales of justice favours the granting of the amendment. Accordingly the application to amend the statement of case is granted.

The principles relating to absolution from the instances.

[34] I now proceed to deal with the principles governing the granting or refusal of application for absolution from the instances. The general principle relating to

absolution from the instances is that the Court may, in exercising its discretion judicially grant absolution from the instances. It has been said that absolution from the instances can only be granted if the onus rests on the plaintiff and not on the respondent.

[35] Unless it is apparent that the witnesses of the plaintiff or the Applicant in the present instance are lying, the Court will not take into account their credibility. See *Harms, Civil Procedure in the Supreme Court (Issue 37) at B39.7.*

[36] The test to apply in considering whether or not to grant absolution from the instances was formulated in *Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H as follows:*

> *"When absolution from the instances is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173, Ruto Flour Mills Pty Ltd v Adelson (2) 1958 (4) SA 307 (T)."*

[37] The above test was quoted with approval by Harms JA in *Gordon Page & Associates v Rivera & Another 2001 (1) SA 88 (SCA) at 92H-93A*. The Learned Judge, went further to say:

> *"This implies that a plaintiff has to make out a prima facie case –in the sense that there is evidence relating to all the elements of the claim –to*

survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91–2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93)."

The Learned Judge went further to say:

"The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice."

[38] It is clear from the above authorities that the plaintiff must make a *prima facie* case for absolution from the instances to be granted. In labour matters the onus of prove is governed by section 192 of the LRA which provides:

"1. In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

2. If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

[39] In the present instance, the evidenciary burden to show that there was a dismissal rests with the Applicant. The term "dismissal" is defined in section 186 of the LRA which reads as follows:

> *"(1) Dismissal means that-*
>
> *(a) an employer has terminated a contract of employment with or without notice.*
>
> *(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."*

[40] In *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd (2008) 29 ILJ 1564 (LC),* this Court relying on the authorities cited therein held that in order to assertain whether a dismissal constitutes an automatically unfair dismissal in terms section 187 of the LRA one must assertain the true reason for such a dismissal. The Court went further to say:

> *"[48] The starting-point in this enquiry according to Davis AJA, is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidenciary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as*

provided in terms of s 192 of the LRA that the dismissal was for a permissible reason as provided for in terms of s 188 of the LRA."

[41] In the present case the inquiry is whether the Applicant has adduced sufficient evidence showing that her dismissal arose from the non-renewal of the contract, in terms of section 186(b) including evidence that shows causal connection between the non-renewal of her contract and her lodging of the sexual harassment grievance.

[42] The evidence led by the Applicant so far confirms that she had a fixed term contract with the Respondent. She accepts that in general this type of contract is common in the NGO sector. She further testifies that she had expected her contract to be extended firstly, because her position was included in the budget beyond the expiry period. She secondly, relies on the email which had advised all employees of the Respondent that their contract would be converted into permanent appointment.

[43] This evidence in my view is sufficient to call on the Respondent to answer to the allegation that the dismissal was automatically unfair and show that it was not.

[44] In light of the above, the following order is made:

(i) The case of the Applicant remains closed.

(ii) The Applicant statement of case is amended to read section 187(1)(d) of the LRA whenever section 187(1)(f) of the LRA appears.

(iii) Application for absolution from the instances is dismissed.

(iv) The costs are reserved.

(v) The matter is postponed to _____

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Molahlehi J

Date of Hearing : 12th March 2009

Date of Judgment : 19th March 2009

Appearances

For the Applicant : Adv R Venter

Instructed by : Schoeman & Associates

For the Respondent: Adv C Prinsloo

Instructed by : Rooth, Wessels & Maluleke