

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

NOT REPORTABLE

CASE NO: C206/2007

In the matter between:

NASIEFA DE BEER

Applicant

And

ALLIES MEAT MARKET

Respondent

JUDGMENT

CHEADLE A J:

1. This is a claim for an automatically unfair dismissal on the ground of pregnancy in terms of section 187(1) (e) of the Labour Relations Act.
2. The Applicant is Nasiefa De Beer, who was employed by Allies Meat Market, the Respondent, as a second cashier, from 8th February 2007. She was also required to assist with administrative work, relating to invoicing. At the time of her employment, there were 2 cashier tills operating in the butchery, and there was one other cashier called Aisha.

3. At the beginning of March 2007, the employee learnt that she was pregnant and informed her employer of that fact. On Saturday, 3 March 2007, the Applicant attended work but requested leave to see a doctor because she was feeling ill. Mr. Kader, the owner of the Respondent, granted the request. The Applicant consulted a doctor, was diagnosed with a bladder infection, and was booked off work from 3 March 2007 to 5 March 2007. The employee returned to work that day, with the medical certificate, which she gave to Mr. Kader.
4. It was common cause that the Applicant and Mrs. R Kader, a manager and wife of the owner, had a conversation that day, much of which was said was common cause, but the Applicant concluded from that conversation that she had been dismissed because of her pregnancy (though requested to substitute for the other cashier when she took leave) while the Respondent took the view that she was taking sick leave.
5. On 5 March 2007, a new employee, a Ms Hilda Osmond, commenced work as a cashier.
6. On 7 March 2007, Mrs. Kader telephoned the Applicant. Although the precise terms of the discussion are in dispute, the upshot of the telephone conversation was that the Applicant agreed to come to work the next day – 8 March 2007. The cashier, Aisha, took leave from 8 March 2007 to at least 16 March 2007. On 15 March 2007, the Applicant refused to continue working for the Respondent. The cause and the context of the refusal is in dispute.
7. On 2 April 2007, the Applicant referred a dispute concerning her alleged dismissal to the CCMA for conciliation. The dispute was not resolved and the Applicant instituted proceedings in this Court on 29 June 2008. After

rescission and condonation applications, the dispute was finally aired on 8 February 2010.

8. Mr Farber of Edward Nathan Sonnenbergs appeared pro bono on behalf of the Applicant. Ms Le Sar of Maserumule Inc appeared on behalf of the Respondent.
9. Because there was a dispute over whether the Applicant had been dismissed as opposed to having resigned, the Applicant led evidence first. She gave evidence in support of her claim.
10. Mr Kader, the owner of the Respondent, Mrs Kader, the manager, and an employee, a Ms Peters, gave evidence for the Respondent. The Respondent's witnesses were in court when the Applicant and the Respondents' witnesses gave evidence.
11. There were two bundles of documents. The first included the pleadings and was referred to as Bundle A in the hearing. The other bundle included certain of the pleadings in the interlocutory applications and many of the documents. This was referred to as Bundle B. In this judgment, the documents and their contents are identified as follows: A or B identifies the Bundle; the next number refers to the page number of the bundle; any further number refers to the paragraph number on that page. Accordingly, the following reference A.7.7.9 refers to Bundle A, page 7 and paragraph 7.9 – the critical paragraph describing the Applicant's version of events on 3 March 2007 in her statement of case.

The two versions

12. There are two conflicting versions that are based for the most part on the same set of facts.

13. The Applicant's version is that once the Respondent had learnt of the Applicant's pregnancy, they employed another cashier to take her place. On 3 March 2007, when she presented her medical certificate, booking her off until 5 March 2007, Mrs. Kader had told her that the Respondent needed someone to 'work every day' and that they had replaced her. Her replacement was to start on 5 March and accordingly she need not come to work on the 5th. It was on the basis of this that the Applicant concluded that she had been dismissed. She did not return to work on the 5th because she had been dismissed.
14. She did return to work on 8 March 2007 and continued working there until 15 March. She explained this. She said that after dismissing her, Mrs Kader nevertheless asked her to 'stand in' for Aisha when Aisha took her leave. The Applicant said that she agreed to work as a 'temp' because she 'needed the money'. On 7 March 2007, she was telephoned and in a telephone conversation with Mrs Kader was asked to 'stand in for Aisha' from 8 March to 16 March 2007 because Aisha was taking leave for that period. She worked from 8 to 15 March 2007. On the 15th, because of abuse from Mrs Kader, she decided to no longer work as a substitute for Aisha and left.
15. The Respondent's version was that they hired a third cashier because of the growth in the business, the need to have someone to do more administrative work and the need for a system of replacement when an individual cashier was absent for reasons of leave or illness. When the Applicant reported in sick on 3 March 2007, Mr Kader told her to go home and to report back when she was better. Although there was a conversation between Mrs Kader and the Applicant concerning the new cashier, it was not in the context of replacing the Applicant but of advising her of additional support. Mrs Kader phoned on the 7th to find out how the Applicant was and whether she could return to work the next day – the 8th

of March. On the 15th, it was her negative and aggressive attitude that provoked Mrs. Kader to ask her if she wanted to continue working with the Respondent. The Applicant replied that she no longer wished to work for the Respondent and left the Respondent's employment that day.

16. Although I was pressed by Mr Farber to make a finding of credibility against the Mrs Kader, the Respondent's main witness, I have decided not to do so for the reasons below. Because the matter has to be determined on the probabilities, it is necessary to set out the main elements of the versions in more detail.

The notification of pregnancy

17. It is common cause that the Applicant advised the Respondent at the beginning of March that she was pregnant. It is also common cause that Mr Kader told her not to worry – that she would be 'put on UIF' which presumably meant that she would be paid during her maternity leave by the Fund.
18. It was also common cause that the Applicant had said to Mrs Kader: 'My husband said I must be lucky that Allies is still keeping me as staff because in most companies when you tell them that you are pregnant they don't keep you on' (A25/6.3).

The events of 3 March

19. It is common cause that the Applicant reported for work on 3 March and requested permission to see a doctor. Mr Kader gave her permission and she went off to see a doctor. She returned with a medical certificate (B23) booking her off from 3 March to 5 March 2007 for a urinary tract infection, referred to by the witnesses as a 'bladder infection'. It is common cause

that she gave the certificate to Mr Kader. The Applicant's version is that he told her to wait for her money, which was prepared by Mrs Kader – Saturday being payday. That is also Mr Kader's version.

20. It is common cause that there was then a conversation between Mrs Kader and the Applicant. The Applicant's version is as follows:
 - 20.1. Mrs Kader was dismissive of her need to be booked off. She inferred this from Mrs Kader's statement to the effect that she, too, had had a bladder infection when she was pregnant and yet continued working.
 - 20.2. Mrs Kader told her that she did not need to come in on Monday because she already had some one in her place.
 - 20.3. Mrs Kader said that 'she had got someone in my place because she needed someone every day' and because the respondent was concerned that it might be liable for any injury at work while she was pregnant.
 - 20.4. Mrs Kader told her that she might need the Applicant to stand in for the cashier Aisha when Aisha took her leave and that Mrs Kader would phone the Applicant when she needed her to substitute for Aisha.
 - 20.5. After collecting her wages, she left believing that she had been dismissed on grounds of her pregnancy.
21. Respondent's version of the conversation commences with an admission that Mrs Kader had told the Applicant that she had a bladder infection while pregnant and that despite this she had continued to work. When asked under cross-examination why she mentioned this, Mrs Kader said that she was sharing her 'experiences' with the Applicant and that this was in the context of a previous conversation to the effect that being pregnant did not mean that an employee cannot work.

22. Mrs Kader denied stating that the Respondent had employed another person to 'replace' the Applicant. Her version was that the third cashier was employed in addition to the Applicant because the business was growing, there was a greater need for administrative work and having three cashiers would allow for the more orderly rotation of shifts between the cashiers to take account of contingencies such as sickness, leave, etc. Under cross examination she was asked why she mentioned the hiring of an additional cashier and her answer was that she did so to convey to the Applicant that her duties, given the Applicant's pregnancy, would be 'alleviated' – 'to put her mind at ease'.
23. Mrs Kader denied telling the Applicant not to come in on Monday. She stated that Mr Kader had told her to 'go home and telephone us when you are better'. This was also Mr Kader's evidence. Under cross examination, Mrs Kader was asked why an employer would not just simply require an employee to return to work on the date stated in the medical certificate. Her answer to this was that a sick person was not always better by that day.
24. The Applicant did not return on the 5th March 2007, which is, of course, consistent with both versions.

The telephone conversation on 7 March 2007

25. The Applicant was telephoned on the 7th March 2007. The Applicant's version is that Mrs. Kader asked her to come in because Aisha would be going on leave the next day. The Respondent's version is that she asked the Applicant how she was feeling and whether she was well enough to return to work the next day. Mrs Kader denied having asked her to return to her work because of Aisha's pending absence.

The events of 15 March 2007

26. The Applicant worked for the Respondent from 8 to 15 March 2007. On the 15th March 2007, the Applicant stated that Mrs. Kader called her “stupid” for putting the wrong amount of sugar into her coffee. She was highly upset as a consequence. At the end of the working day, she said that Mrs. Kader asked her to work the next day because Aisha was not returning from leave the next day. Because she was so upset she told Mrs Kader that she would not.
27. Mrs Kader’s version is that she did not call the Applicant stupid, and would not do so for something as trivial as a spoonful of sugar. She did say, however, that the Applicant displayed a negative and aggressive attitude, that she raised it with the Applicant and in that context asked whether she wanted to continue working for the Respondent. The Applicant answered that she did not and that she was finishing off that day.

Credibility of the witnesses

28. The Applicant was a credible witness. She gave her evidence in a confident and spirited manner. If anything she gave an impression of being impulsive and headstrong. Although she was not cross-examined on the issue, there was a glaring inconsistency between what was stated in her statement of claim and what she said in court in respect of the telephone call on the 7th of March. In her statement of case she stated that Mrs Kader telephoned her and ‘left a message for the Applicant requesting her to come in to work’ (A7.7.12) while in her oral testimony she said that her husband had answered the phone, had passed the phone to her because Mr Kader was on the line, that Mr Kader had then passed the phone onto his wife and that they then had a conversation, the content of which is in dispute. These are very different versions of what took place

and it is difficult to contemplate any explanation that would bridge the difference. But despite this I find that she was a credible witness.

29. Both Mr and Mrs Kader were on the whole credible witnesses. There were contradictions but not any that seriously attacked their credibility as a whole. Mr Farber attacked Mrs Kader's credibility on two grounds. *Firstly*, Mrs Kader stated in the Respondent's Reply that she had been pregnant and suffered heartburn but had carried on working (A28.17a) whereas in her oral testimony, she confirms making the statement but referred to a bladder infection rather than heartburn. It is an inconsistency, which she was unable to explain, but I do not believe it affects her credibility as a whole. She had nothing to gain from the difference because she still had to explain the reason for the statement given the context and the Applicant's allegations that the statement supported the Applicant's version of what took place that day.
30. *Secondly*, Mrs Kader stated in her founding affidavit in the rescission application that her husband had told the Applicant to go home and 'give us a call when she...was ready to return to work' and in the following paragraph stated that the Applicant 'phoned on 7 or 8th of March 2007 to say that she was ready to return to work' (B3.5 and 6). In her oral testimony, Mrs Kader stated that she had phoned the Applicant on the 7th to find out how she was and whether she could come to work the next day. Mr Farber stated that the exigencies of seeking an application for rescission had led Mrs Kader to deliberately lie about who called who on the 7th in order to ensure a version consistent with the her husband's statement on the 3rd that the Applicant should go home and call when she was better. I am not persuaded that that this contradiction taints her evidence as a whole. It should be borne in mind that there are contradictions too in the Applicant's version of the telephone call.

31. The only disturbing issue was Mrs Kader's insistence that her call on the 7th was not in any way associated with the fact that Aisha commenced her leave the next day. The overwhelming probabilities are that this was what must have motivated the call. This suggests a willingness to bend the truth in order to give the best possible gloss on the Respondent's version. But against this must be weighed the fact that so much of her evidence confirmed the Applicant's version even in so far as statements that were not in the Respondent's favour and to which there was no witness other than the Applicant. Accordingly, although there were contradictions, Mrs Kader was on the whole a credible witness.

The probabilities

32. The probabilities favour the Respondent. It was common cause that the Applicant informed the Respondent of her pregnancy in early March – that is a few days before the alleged dismissal on Saturday the 3rd of March. Accordingly, the appointment of the third cashier must have taken place before the 3rd of March because both the Applicant and Mrs Kader confirm that the appointment formed part of their conversation on the 3rd.
33. It is unlikely that Respondent would have in that short period sought and found a replacement for the Applicant, particularly given the positive response from Mr Kader on being informed of her pregnancy. It is also unlikely that there would be such a desperate rush to replace her immediately given that she was still in the first stages of her pregnancy. It is more likely that the reason for the appointment was the one advanced by the Respondent, namely the operational need for a third cashier given the growth in the business. This is supported to some extent by the fact that, after the Applicant left, a third cashier was appointed albeit sometime later. Given that the appointment of the third cashier must have taken place before the conversation on the 3rd, the issue of the Applicant's

reliability could not have been a reason for the appointment of the third cashier.

34. If the probabilities are that Mr Kader had sought, interviewed and appointed a person for operational reasons before the 3rd and the Applicant's reliability could not have been a reason for the appointment of the third cashier, Mrs Kader's version of her conversation becomes more probable namely that she mentioned the new cashier in the context that the Applicant's work would become less onerous during her pregnancy as a result.
35. It is also common cause that the Applicant did not raise her dismissal with either Mr or Mrs Kader at the time or thereafter. When asked why she had not raised it with either Mrs Kader or Mr Kader, she simply said that she thought that they had made up their minds. The Applicant is a strong personality – this could be seen from the spirited manner in which she gave her evidence. She had an opportunity to raise it with Mr Kader – it was common cause that he was on the premises at the time. It is out of character and therefore improbable that she would not have raised her dismissal with Mr Kader - particularly given his positive response to her advising him of her pregnancy a few days earlier and particularly because she testified that being dismissed on grounds of her pregnancy upset her greatly.
36. It is common cause that the Applicant worked from the 8th of March to the 15th March. The Applicant stated that this was as a result of a separate arrangement to work as a substitute while Aisha was away on leave. The Respondent's version is that it thought that the Applicant was continuing to work under her contract of service after returning from her sick leave. These versions feed into the probability assessment as to whether she was dismissed on the 3rd. I have accordingly sought to assess the

probabilities of the two versions of her working on 8 to 15 March independently of that assessment. Critical to the probabilities of the two versions is the parting statement made by Mr Kader on the 3rd, the telephone call on the 7th, and whether the Applicant was needed to come into work because of Aisha's taking of leave.

37. According to Mr Kader, he told the Applicant to go home and get better and when she felt better to phone. Mr Farber argued that it was inherently improbable that an employer would allow an employee who was booked off until the 5th to remain on sick leave beyond that. But given that a new cashier was to begin on the 5th and Aisha was not yet on leave, it is not so far fetched to allow an employee to remain on sick leave until she is better particularly given the personal nature of a small business and the fact that she was pregnant. I do not consider the statement itself to be inherently improbable in the circumstances.
38. According to the Applicant, she was told to stay at home until called. The fact that Mrs Kader called on the 7th is consistent with that statement. But the fact that Mrs Kader called does not necessarily contradict Mr Kader's statement that it was for the Applicant to call when she felt better. Mrs Kader's testimony was that she phoned in order to find out how the Applicant was and when she would be returning to work. That is what a reasonable and prudent employer would do after a few days of absence beyond that certified by the doctor – again given the personal nature of a small employer and the impending absence of one of the cashiers. Although Mrs Kader denied that Aisha's impending leave was a reason for the telephone call, the overwhelming probabilities are that she phoned to secure the Applicant's return to work if she was better given Aisha's pending departure the next day. Of course that is also consistent with the Applicant's version, namely that she was phoned in order for her to work as a substitute during Aisha's period of leave.

39. Accordingly on balance, and for the reasons outlined above when dealing with Mrs Kader's credibility, I consider that the probabilities favour the Respondent's version that it regarded the Applicant's work from 8 March to 15 March as a continuation of the Applicant's employment rather than as temporary employment as a substitute.
40. The Respondent's version of what took place on the 3rd and the 7th of March are mutually reinforcing. Accordingly, when all put together, the Respondent failed to prove, on the probabilities, that she was dismissed on the 3rd of March. It follows that the probabilities are that she resigned on the 15th of March.
41. Although the Respondent succeeds, it is not equitable that the Applicant pay the Respondent's costs. Costs orders against individual applicants will stifle poor and out of work employees from pursuing their rights, particularly in a matter such as this.
42. The claim is dismissed with no order as to costs.

CHEADLE AJ

Date of Hearing : 9-10/02/2010

Date of Judgment : 29/03/2010

Appearances

For the Applicant : Mr Faber

Instructed by : Edwin Nathan Sonnenburgs

For the Respondent : Ms Le Sar

Instructed by : Guy & Associates