REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN CAPE TOWN

JUDGMENT

CASE NO: C 25/2009

In the matter between:

GLADYS NYATHI **Applicant**

and

MAKEKA DESIGN LABORATORIES CC **First Respondent**

Heard: 14, 15 March 2011 and 18, 19 June 2012

Delivered: 08 October 2013

Summary: (Trial- automatically unfair dismissal-for reasons relating to pregnancy – reason relating to pregnancy not predominant reason for termination. *In limine* point – no dismissal because dismissal purportedly 'rescinded'- unilateral action cannot be retracted without both parties' agreement-dismissal established).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant in this matter, Ms G Nyathi, was employed on 16 September 2008 as a receptionist and office administrator by Makeka Design

Laboratories CC (‘MDL’). Her appointment was subject to a three-month probation period. Before the probation period was completed, her services with the respondent terminated at the end of November or the beginning of December 2008. MDL maintained she had absconded.

[2] The applicant claimed that she had been dismissed on account of her health, which was a reason related to her pregnancy, and therefore an automatically unfair dismissal in terms of section 187 (1) (e) of the Labour Relations Act, 66 of 1995 ('the LRA'). The respondent, an architectural firm, claims that it was intending to conduct an enquiry into her poor work performance in December 2008 after retracting an earlier notice of dismissal for that reason, which it had issued, without conducting any enquiry, at the end of October 2008. There is some dispute about whether or not the applicant's services were terminated by 30 November 2008, or sometime during the following month, ostensibly on account of her alleged desertion. This will be addressed in the analysis of the evidence.

[3] The applicant herself testified on her own behalf. Mr Makeka (an architect and principal member of MDL), Ms McLeod (a receptionist at an associated firm), Ms P Brom (a member of management), Mr G Zaayman (a representative of the employer’s organisation SEESA), and Mr H Deppe (an architect and senior manager of MDL) testified for the respondent thereafter. The applicant was represented on a *pro bono* basis and the court is indebted to her attorneys for assisting her. I am also indebted to the respondent for providing copies of the transcript of part of the proceedings.

Survey of the material evidence

[4] During the three years prior to her employment by MDL, Nyathi had been employed as a personal assistant to the dean of the business faculty of a private university in Zimbabwe, and subsequently as the personal assistant of the managing director of a stationary company. She agreed that her appointment at the respondent required her to perform the functions of a receptionist and a personal assistant. Nyathi also acceded that the quality of the service provided by the busy practice was an important feature of the work.

[5] Nyathi said she discovered that she was pregnant around the end of September 2008 and notified Ms P Brom, whom she identified as the human resources manager. This occurred two days before Nyathi was called into a meeting on 31 October 2008 and was advised by the principal member of the firm, Mr P Makeka, that she was dismissed because of her health, and that she could work up until the end of November. Nyathi said the meeting was over in a few minutes. Brom agreed the meeting was short, but it was longer than Nyathi said it was.

[6] Brom confirmed being aware that Nyathi had been nauseous and was vomiting. Other staff had allegedly asked her if Nyathi was pregnant but she advised them they should keep such rumours to themselves: her view was that it was up to Nyathi to advise them if she was pregnant. She herself suspected Nyathi was pregnant. However, it was only after the meeting on 31 October, when the two of them were alone, that Nyathi confirmed that she was four months pregnant.

[7] As it emerged from the evidence, Brom was effectively the untitled office manager who had the most frequent daily contact with Nyathi, whereas Makeka appeared to be out of the office dealing with clients more often than he was in. When Brom was employed, there were only four staff at the time so she was engaged in professional work and numerous management functions including recruitment. Later, Ms L Bergh ('Bergh') was employed to perform that function as part of her HR role. Brom also performed a liaison role between Makeka and the other staff.

[8] At the time Nyathi was recruited, Bergh was running the recruitment process. Brom says she had reservations about the relevance of Nyathi's previous experience as a PA working with a dean, given the demands of the job at MDL, but was reticent about voicing these as Bergh was running the recruitment process. It was Bergh who recommended Nyathi's appointment to Makeka.

[9] According to Nyathi, the only health-related issue affecting her at that time was her pregnancy, so she could only infer that Makeka's reference to her health was a reference to her pregnancy. She said that she had suffered from nausea in the week prior to the meeting and particularly on the

morning of the meeting itself. Brom had noticed this and they had spoken about it two days before the meeting after Brom asked what was wrong. There was some ambivalence in Nyathi's version as to whether she had first approached Brom or whether Brom had approached her on the issue, but she was adamant that she had discussed the matter with Brom before 31 October and not afterwards, as Brom had alleged. Nyathi assumed that Brom had spoken to Makeka about it.

[10] The firm's version of the meeting on 31 October was that, Makeka told Nyathi that she was not performing her duties properly, that he had received a number of complaints from employees and clients of the firm that she was reluctant to perform the job, and in those circumstances, the firm was not going to offer her a permanent position. Nyathi insisted that no discussion of this kind took place at the meeting and it was over in a couple of minutes. She also did not recall being asked to comment on such complaints.

[11] In his testimony, Makeka went considerably further than the version put to Nyathi. He said that he sensed she was very angry and she repeatedly asked "Are you firing me?" to which he answered that he was simply saying that the firm could not offer her a permanent position based on her performance. She in turn allegedly responded that her job at the firm was permanent, an apparent reference to what appeared in her contract of appointment. Makeka vehemently denied that he had said anything about her health. He claimed he had been unaware of any health issues and insisted that it was simply a matter of incompetence from beginning to end. Nyathi denied that she had been advised during the meeting that because of her poor performance during the probationary period it would be very difficult for the firm to make her an offer of permanent employment. She claimed that she was in too much shock to challenge what she was told and the look on Makeka's face when he told her that she could not continue working because of her health suggested to her the meeting was over and she could go. Makeka disputed that Nyathi was too stunned to respond, because of the remarks she made about being permanently employed and challenging him to confirm her dismissal. He claimed to have been completely unaware of her pregnant condition until

the notice was received from the CCMA claiming that she had been dismissed on account of pregnancy. He also denied having been advised of the applicant's condition by Brom prior to the meeting on 31 October 2008.

[12] Brom's evidence was that Makeka raised his own performance concerns with Nyathi, most of which Brom said she was unaware of. Contrary to Makeka's testimony she said he also asked Nyathi about her health. According to Brom, Nyathi did not respond to this, and Brom assumed she was not required to say anything about her condition if she did not want to. However, Brom insisted that the substantial issue raised with Nyathi in the meeting was her performance, not her health. It was only after Nyathi had left the meeting Brom said she raised the issue of Nyathi's pregnancy with Makeka. Brom says she conveyed her view that Nyathi was displaying symptoms of early pregnancy. His response was to ask why Nyathi had not told them of it, to which Brom responded that perhaps she had not because she was still in the early stage of pregnancy.

[13] When Brom was asked about Makeka's statement that he first learnt of Nyathi's pregnancy when the CCMA referral was made, she said her discussion with Makeka on 31 October about Nyathi's condition was 'speculative' and he had probably forgotten about it. She claims she encouraged Nyathi to report her pregnancy to Makeka in the days following that meeting, and that Nyathi said she was going to tell him the same day but then he had dismissed her. Brom's account of this conversation regrettably was not canvassed with Nyathi during her evidence. Brom felt Nyathi should speak to Makeka directly because he would have to discuss leave arrangements with her.

[14] On the issue of what the firm understood had transpired at that meeting, Makeka was initially equivocal about what they had intended to convey to Nyathi. However, he eventually conceded that the firm's answering statement correctly reflected the position namely, that Nyathi had been given one month's oral notice of termination on 30 November 2008.

[15] Not insignificantly, it was common cause that, whatever else transpired in the meeting on 31 October 2008, Nyathi did not raise an objection that her

only health ‘problem’ related to her pregnancy, despite her stated belief that this was the real reason she was being dismissed.

[16] Nyathi was assisted in settling into the job by her predecessor, Ms Nshozana. This took place during the first two weeks of her employment. Brom also assisted her in getting to grips with the job during that time. Nyathi was not given a formal job description as such but a list of tasks to be undertaken in the reception office. Nyathi disputed the respondent’s claims in its answering statement that she could not perform basic reception and administrative functions and that Makeka had held numerous meetings with her to address her poor performance.

[17] The alleged shortcomings in Nyathi's performance were set out in a draft letter setting out reasons for her dismissal, which was never finalised or issued to Nyathi for reasons discussed below. The reasons mentioned in the letter were:

17.1 Co-ordinating Makeka’s diary;

17.2 Filing and keeping of records of expenses;

17.3 Procurement of consumables;

17.4 Keeping a register of staff movements when they leave the office;

17.5 Taking minutes as needed;

17.6 Preparing formal letters of communication;

17.7 Monitoring and keeping safe all items of value such as software licences, lap-top computers, the office cameras, projectors, etc.

17.8 Issuing of technical documentation;

17.9 Reminding staff to fill in time sheets and requesting and filing weekly time-sheets;

17.10 Processing and preparing disbursements for invoicing.

[18] Under cross-examination, it was suggested to Nyathi that her performance as receptionist and telephonist was below standard because she had an offhand and unprofessional manner. Makeka referred vaguely to feedback from colleagues and clients who said that they had called the office and the person who answered the phone was mumbling or was grumpy, but

did not provide any specific examples. In relation to an e-mail complaint on the 23 September 2008 from Brom concerning Nyathi failing to get complete particulars from callers who left messages, Nyathi said that this was a once-off incident, which had arisen because sometimes callers simply said that the person they were trying to contact would know who they were. Brom emphasised that recording details of callers was essential, partly to sift out time wasting enquiries from salespersons. She also gave details of specific complaints about Nyathi's abrupt phone manner, but none of these details had been tested with Nyathi under cross-examination. Brom agreed that she did not counsel Nyathi on her switchboard shortcomings in a formal manner, but more on an informal daily basis. She could not understand how Nyathi could say she was surprised by the meeting given the fact that she was doing so badly and given her own interactions with her about her performance.

[19] Nyathi did not dispute that she had not assisted in typing up and executing the production of an administrative protocol document despite being expressly requested by Brom to assist. Brom said that despite further requests to Nyathi to make an input, she never provided any response.

[20] Likewise, Nyathi did not contradict the applicant's version that there had been a written complaint by a third party about unsuccessful attempts to arrange meetings with Makeka through Nyathi. Nyathi's explanation was that it only concerned one meeting and the reason for the complaint was that she had scheduled the meeting between Makeka and the CEO of Cape Africa Platform, a section 21 company of which Makeka was the chairperson, but Makeka had another meeting on the same date and could not attend the meeting she had scheduled for him. The complaint had been made when the applicant had been working for three weeks at the firm. In any event, she agreed that this did not reflect well on the firm's professionalism, but denied it was a recurrent problem. Makeka's evidence was that quite apart from the incident he had a range of similar complaints about her telephone manner, and one client had even said he didn't want to speak to her again. Makeka did not name the client nor was this specific example put to Nyathi under cross-examination. Despite the lack of detail, Makeka reiterated under cross-examination that there were a number of

complaints from third parties but these were not reduced to writing. Brom also cited an incident in which drawings had not been collected from reception and Nyathi had not notified anyone that the documents were still with her.

[21] Another complaint raised by the firm was that the applicant had failed to draw Makeka's attention to a notice from the South African Revenue Services ('SARS') warning of its intention to issue a summons against him. Nyathi claimed that she had handed the document to him as soon as he came to the office and she would have done with any other mail. Further, the applicant was questioned about an e-mail concerning a function hosted by consulting engineers to which Makeka had been invited, but which had yet to be responded to. The e-mails in question suggested that the applicant had made no attempt to book the function in Makeka's diary when the invitation was first made and, even when the reminder was sent, she merely forwarded it to Makeka without any comment. As Makeka pointed out, this was of no practical assistance to him in managing his appointments. Makeka had then enquired of the applicant whether she had responded to the invitation, implying that she had neglected to deal with it as she was supposed to. The applicant could not recall the e-mails in question and suggested that they had not been sent to Makeka via herself. When Makeka testified, he emphasised the importance of the event for the promotion of emerging black female art curators.

[22] In response to an allegation that she had failed to diarise an important fundraising meeting on 18 November 2008, Nyathi said that she had only learned of the meeting the day before and had already scheduled another important meeting for Makeka on that date. As far as she was concerned, this supported her contention that Makeka would sometimes confirm appointments without notifying her. Makeka denied that he would ever make appointments himself. Rather, he said that if there was a request for a meeting at a particular time he would ask Nyathi to confirm if it was possible or not. She would then enter the appointment in his electronic diary, which he accessed through his cell phone. In response to some probing questions testing his assertion that he never made appointments himself and always work through Nyathi, he said that the mere fact that

there was no paper trail of his communications with his PA, did not mean an appointment was not arranged with her telephonically.

[23] Similarly, the firm claimed that Nyathi had failed to comply with a direct instruction from Makeka to schedule a three-hour meeting with G Geddis of Work Pool on 1 December 2008. Although he did not say he had expressly given such an instruction to Nyathi, Makeka confirmed that he had agreed to the request for a three-hour meeting, subject, it being confirmed with Nyathi. Nyathi's version of events was that Geddis had initiated the meeting and she had consulted with Brom about the timing of the meeting. Brom had advised her that the only suitable time was between 4 and 5 p.m. It was only after she had scheduled the meeting for this time, that Geddis indicated that a three-hour meeting was required. When Nyathi was asked in general about the procedure for booking meetings for Makeka, she was non-comittal on his version that he would refer people that wanted to make appointments with him to her for that purpose. Makeka testified that he had instructed Nyathi to arrange the meeting and that he had discussed a three-hour meeting with Geddes.

[24] On the question of whether or not Nyathi had taken steps to obtain a safe for the safeguarding of valuable items, Nyathi claimed that she had obtained various quotations but Makeka had not decided which one to approve, so the safe had not been bought. She denied that she had been unable to obtain the necessary quotations. Makeka claimed that the exercise of obtaining quotations took far too long and eventually he referred Nyathi to the Yellow Pages and was told later by architectural staff that she had been asking them what the Yellow Pages was. Other staff were losing confidence in her and were bypassing her to get things done. Clients were also refusing to call at the reception. He disputed Nyathi's claim that he was sitting on the quotations. Brom, who said she sat at a desk near Nyathi, also provided more detailed evidence on incidents of this nature.

[25] A related issue concerned the removal of a video camera from the unlocked draw of Nyathi's desk. Although Nyathi agreed that she had been instructed to keep valuable items locked up, she maintained that the

camera was frequently required and accordingly was kept in the top drawer of her desk. If it was taken while she was on duty she would require the recipient to sign for it. Often it was not kept in her drawer, but was in Makeka's possession. Brom's evidence was that she had seen the camera on the floor next to Nyathi's desk, but could not recall if she had specifically spoken to her about it. Nyathi denied that she was negligent in safeguarding valuable items of the firm, and did not recall an alleged incident, which Brom testified on, in which a laptop had been stored precariously in a cupboard so that it would fall out when the cupboard door was opened.

[26] Nyathi denied that she had failed to capture incoming invoices properly on a spreadsheet and said that if an invoice had not been captured on a spreadsheet, then it was one that had passed through her. Deppe, who fulfilled the function of financial director, said he had asked her to improve the system of recording invoices received so that it provided a record of payments due and payments made, but she simply continued to provide a list of invoices received without modifying it. After the first month's report had shown no improvement, he spoke to her but there was also no improvement on the next occasion either.

[27] Nyathi was also adamant that Makeka had never had any counselling meetings with her to talk about her poor performance, nor had she been made aware of any complaints about her performance made by other employees. Makeka said that his philosophy of dealing with such problems was to direct the person on the correct manner of doing something and to ask them to rectify errors where those could be rectified, without resorting to written measures. He claims to have spoken to Nyathi directly on two or three occasions about complaints about her performance, but was not specific on which complaints he had raised directly with her in this manner. Makeka said that these discussions were conducted mainly by himself and Brom and agreed they did not take a formal shape. He described Nyathi's attitude towards these corrective steps as conscientious at first but becoming increasingly defensive. He felt she was not committed to the job. These issues were also not canvassed with the applicant under cross-examination. Summing up the situation as he saw it, he said his office was

adrift without a functioning secretary. His explanation why the written record of such complaints was so skimpy was that he worked in the service industry where 'email is a last resort'. Just because there was no email paper trail did not imply that Nyathi was 'a stellar performer'.

[28] One of the documents referred to by the parties during the trial was a draft letter of dismissal dated 13 November 2008, which contained the reasons for Nyathi's dismissal, which the employer claimed had been verbally communicated to her on 31 October 2008. It was never issued to Nyathi, and only came to light when the parties were engaged in settlement discussions much later. The company's version was that this letter had been drafted by Brom after Nyathi had requested written reasons for her dismissal, but that Makeka had asked Brom to obtain input from the employer's organisation, the Small Enterprise Employers of South Africa ('SEESA'), before sending the letter to Nyathi. Around 13 November 2008, SEESA advised the firm that it should not send the letter but had to follow a proper process before it could dismiss the applicant.

[29] Under cross-examination Makeka said that SEESA had been contacted within a day or two of the meeting on 31st October to ask for advice, but could not explain why, after receiving such advice, the draft letter containing the reasons for Nyathi's dismissal was still sent to SEESA for its consideration and input. As Mr Hassiem put it, it simply did not make sense that the firm would have sent the draft letter to SEESA after already receiving advice not to proceed with the dismissal of Nyathi. Similarly, Makeka could not explain why he only sent out the e-mail about the importance of monitoring Nyathi's performance on 26 November 2013, shortly before the meeting that day with SEESA, instead of doing so shortly after obtaining advice from SEESA following the meeting on 31 October.

[30] Makeka's own explanation for the drafting of the letter setting out the reasons for Nyathi's dismissal was that he felt it was necessary because of the way the meeting had proceeded on 31 October. However, he claimed that when the firm consulted SEESA they were asked if they still wanted Nyathi to work for them and he responded that if there was some way to

resurrect the relationship and if she responded positively, he would rather do that than employing someone else.

[31] Makeka was tested on the failure to communicate management's change of tack on the question of Nyathi's dismissal. He could not explain convincingly why the letter setting out the reasons for dismissal was drafted if it had already been realised by that stage that the company had gone about things the wrong way and could not proceed without following a fair procedure. His explanation that it was intended to be a record of what had transpired on 31 October, but not a reflection of the firm's real intention in mid-November not to pursue the dismissal, does not accord with the way the letter was drafted, nor with Nyathi's request for the reasons for her dismissal. He could not offer an explanation, beyond his own neglect for not simply telling Nyathi that her request for reasons was irrelevant in view of the decision not to proceed with her dismissal.

[32] In an e-mail sent by Makeka to Brom and Deppe in the morning shortly before the next meeting on 26 November 2008, he asked them to circulate the applicant's job description so that other staff could familiarise themselves with its requirements and that any poor performance on her part should be monitored and given proper attention. He further asked that all instances of non-performance should be stated in writing and he should be copied in. The e-mail concluded:

> *"I am tired of sheltering incompetence. This ends. I want us to monitor her performance very carefully."*

[33] Brom had responded to this, seeking confirmation that the applicant would be staying on, which Makeka confirmed. Under cross-examination Makeka had some difficulty explaining why this email was only sent out just before the meeting on 26 November, whereas he claimed that they had taken advice from SEESA about the correct procedure to be followed some weeks before, shortly after the October meeting. Although Makeka tried to suggest that he would also have spoken to Nyathi before that meeting to advise her that she had not been dismissed, his recollection of any meeting having taken place between himself and her prior to the SEESA

meeting was extremely vague at best. Moreover, this was also not put to the applicant when she was cross-examined.

[34] On 26 November 2008, Nyathi was summonsed to a meeting at which Mr G Zaayman, a SEESA representative, was present. Nyathi said that Makeka introduced the matter saying that because of her work performance she would have to attend a disciplinary enquiry, and she was asked to sign a document concerning a disciplinary hearing scheduled for 9 November 2008. Nyathi effectively conceded that it might have been Zaayman who spoke on behalf of the firm at the meeting. In any event she refused to sign the notice because, as far as she was concerned, she had already been dismissed on account of her health, but now poor work and performance were being advanced as reasons. She claims to have told those present that she could not be expected to come back for a hearing after her dismissal.

[35] Zaayman said he had no prior dealings with the firm and was merely assigned by SEESA to attend a consultation at MDL's premises. He met Makeka, Deppe and 'a couple of others' in the board room. Makeka advised him that they had a secretary who had performance problems and they wanted advice. He claims he asked Nyathi to be admitted to the meeting so he could deal with the issue with all parties present to avoid issues of bias arising. He advised the meeting that based on what he had been told the issue concerned poor work performance and he proposed the parties reach a settlement on an agreed termination, but Makeka preferred to follow a legal process and he then advised that a disciplinary hearing on a charge of poor work performance would have to be held. He arranged this with the SEESA office for 9 December 2008. According to Zaayman, the hearing would be conducted by another SEESA advisor.

[36] He gave Makeka a pro-forma notice of a disciplinary enquiry to fill in. When asked how a charge of misconduct was described as poor work performance, he says he got confused. It was at this point Nyathi joined the meeting. When he explained the notice to Nyathi she said she had been dismissed and he told her that the employer could not do that without following a process. It was on his own initiative he told Nyathi she was not

dismissed. Nyathi refused to sign the notice. He claims he could not recall Nyathi saying she had been dismissed on account of her health.

[37] The firm's version was that the applicant was told that her dismissal had been 'rescinded', which Nyathi denies. She agreed that the question of her pregnancy was not raised at this meeting, although she did mention that she had already been dismissed on grounds of health. Nyathi then left the meeting and sent an e-mail to Makeka in which she stated:

> *"On Friday, 31 October you inform me of my dismissal from work at Makeka Design Lab, and mentioned I was to work for one month prior to leaving the company, meaning that I was supposed to work up to the end of November 2008.*
>
> *Today, Wednesday, 26 November 2008, I received a letter in our (Mokena, Holger, Tsokolo and myself) meeting with your representative from SEESA, stating I am supposed to attend a hearing on 9 December 2008 at 11.00 am.*
>
> *I am now confused.*
>
> *Kindly let me know now, whether dismissed from work, or I am still employed (since I have received the letter for a hearing).*
>
> *Am I supposed to report for work on Monday, 1 December 2008?*
>
> *Please respond before 12pm on Thursday, 27 November 2008. Failure to do so will mean that I've been dismissed from working for Makeka Design Lab."*

[38] Under cross-examination it was suggested to Nyathi that there was no reason for her to have been confused at the meeting because she was told that the firm was "moving away" from what happened in the meeting on 31 October 2008 and was now intending to follow a "proper process". Nyathi said it was confusing because she had been told she was dismissed for health reasons on one month's notice and then was told that there would be an enquiry concerning her work performance, without being told that she was no longer being dismissed, contrary to what the firm claimed. Deppe could not confirm any member of management

saying to Nyathi at the meeting that she was not dismissed, but could only recall Zaayman conveying to her that she would continue working.

[39] Makeka's interpretation of the meeting was that Nyathi was advised they would follow the right procedure and she was reassured that she was still part of the office, but she displayed no interest and kept insisting that she had been fired. Despite Makeka dramatising Nyathi's alleged insistence that she had been fired, surprisingly she was not cross-examined about this. Likewise, this did not feature in Brom's account of the meeting. Although Makeka sought to portray what was conveyed at the meeting in a positive light, there was no response by management to Nyathi's e-mail.

[40] It was the lack of response to her e-mail which prompted Nyathi to phone Makeka on 27 November. Nyathi said Makeka simply said that he 'did not work on ultimatums', which ended the conversation. Makeka denies having said this. Rather, he says he could not understand her confusion and confirmed she was not dismissed and should report for work on Monday as usual. Nyathi denied Makeka said this. She further denied that she had received any telephone calls from the firm about her whereabouts on 1 December. Makeka could not provide a plausible explanation why a simple and short written response clarifying the situation unequivocally could not have been given to Nyathi's email.

[41] Ms L McLeod, was a receptionist employed by an associated business of the firm, called Arch Station. She worked in an adjacent reception office to that of the firm. She testified she was asked to help out at the respondent's office when the applicant did not come to work on 1 December 2008. On 2 December, she was instructed by Brom to phone the applicant. She says she spoke to the applicant and advised her that she was still employed by the respondent until the end of December and should report for work the next day. She could not recall the applicant's response. When the applicant did not report for work the following day, she phoned her again but the phone was not answered and she left a voice message repeating what she had conveyed to Nyathi the day before. She followed this up with an SMS to the same effect. Under cross-examination McLeod confirmed that she could not be sure that the woman

she spoke to was the applicant. No written record of any of these calls was produced.

Was the applicant dismissed?

[42] The respondent persisted in arguing that the applicant was not dismissed. The legs of its argument rested on two propositions. Firstly, notice of termination may firstly only be given following a pre-dismissal hearing. Secondly, employment may only be terminated in a manner considered valid in law.

[43] The first proposition rested on an assertion that notice of termination may only be given after a pre-dismissal hearing. The authority relied on in support of the proposition that a dismissal without a hearing would be unlawful were the cases of ***Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA)** and **Boxer Superstores *Mthatha and Another v Mbenya* 2007 (5) SA 450 (SCA)**. To the extent that either of these authorities might have supported a proposition that, a pre-dismissal hearing is a pre-requisite for a lawful termination in common law, those decisions have been superseded by the later decision of South ***African Maritime Safety Authority v Mckenzie* 2010 (3) SA 601 (SCA)** in which the SCA found no constitutional basis for importing an implied right to a pre-dismissal hearing into the contract of employment.[1]

[44] The second proposition rested on the assertion that since Nyathi was only given oral notice on 31 October, that notice should have been in writing in terms of section 37(4)(a) of the Basic Conditions of Employment Act, 75 of 1992. Clearly a breach of that requirement is a breach of the Act and might render the dismissal unlawful. However, what is at issue here is not the lawfulness of the termination but whether the applicant's employment was terminated, lawfully or otherwise. For the purposes of adjudicating unfair dismissals and automatically unfair dismissals, the only requirement of a dismissal is that "...an employer terminated a contract of employment with or without notice".[2] The fact that the legislature specifically

[1] At 620-622, paras [32]-[37].

[2] S 186(1)(a) of the LRA.

contemplates dismissal without notice clearly shows that a termination need not be lawful before its fairness can be scrutinised.

[45] Accordingly, these legal arguments must be dismissed.

[46] From a factual point of view, it is clear that the applicant was given oral notice on 31 October 2008 that her employment would end on the last day of November 2008. I am satisfied that when she was summonsed to another meeting on 26 November 2008, the employer had realised it had erred in not having any sort of hearing before giving the applicant notice. It sought to rectify matters by 'rescinding' the original dismissal. However, as the respondent itself pointed out in counsel's heads of argument," (n) otice is a unilateral and final act and does not require acceptance and cannot be withdrawn without the other party's consent.

[47] Nyathi was confused by what transpired at the November meeting, which is understandable. She was not asked if she agreed that her original notice of dismissal could be regarded as ineffective: she was simply told that the firm believed it could not dismiss her as it had, and wanted to convene an inquiry so she was no longer dismissed. Whether she should have spoken in the meeting or not, she promptly sought clarity in writing the same day. It would have been the simplest thing for the firm, assisted as it was by SEESA, to have replied in writing, but rather than trying to clarify any ambiguity about her status it avoided doing so.

[48] The accounts of what transpired on the phone between Nyathi and Makeka thereafter are mutually exclusive. I am inclined to accept Nyathi's version that Makeka had simply refused to be held to the ultimatum she had given the firm. Having observed Makeka's testimony, and his forthright and direct way of expressing himself, such a response by him would seem to be entirely in keeping with his character. In the circumstances, I am satisfied that Nyathi received no greater clarity about the status of her original notice of dismissal before 30 November came and went. It seems more probable to me that the firm had been advised of the difficulty it was in as a result of giving Nyathi notice, without first holding an inquiry of any sort, and hoped that if she attended the inquiry it would be able to say that she had at least tacitly consented to

abandonment of the original dismissal. However, Nyathi was clearly not consenting to the withdrawal of the original notice but wanted an unambiguous written statement from the company about the status of that dismissal. The failure to respond unequivocally in such situations, where the situation cries out for a clear response can only be explained by the firm preferring to keep matters fluid at least until the hearing of 9 December had been concluded.

[49] What is important for present purposes is that there was no consensus between the applicant and the respondent that the dismissal notice of 31 October was accepted by both parties as being nullified. Consequently, it still stood and the applicant's services terminated on 30 November 2008.

Was the applicant dismissed for her pregnancy or a reason related to it ?

[50] The law affords special protection to an employee who is dismissed for a reason that can never be legitimate. The only legitimate reasons for dismissal are ones related to misconduct, incapacity (which includes ill health and poor performance) or operational needs. If an employer dismisses an employee for a reason relating to her pregnancy that is an illegitimate reason and is automatically unfair in terms of s 187(1)(e) of the LRA. The approach of the court in such cases is set out in **Kroukam *v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC)**:

> *"[27] The question in the present dispute concerned the application of this test. The starting-point of any enquiry is to be found in chapter VIII of the Act. Thus, if an employee simply alleges an unfair dismissal, the employer must show that it was fair for a reason permitted by s 188. If the employee alleges that she was dismissed for a prohibited reason, for example pregnancy, then it would seem that the employee must, in addition to making the allegation, at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly based on this condition. Some guidance as to the nature of the evidence required is to be found in Maund v Penwith District Council [1984] ICR 143, where Lord Justice Griffiths of the Court of Appeal held at 149 that:*

'[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal.'

[28] In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.

[29] The further question then arises as to the approach to the evidence led by the respective parties. The answer can be illustrated by way of the following example: Assume that an employee can show that she was pregnant and dismissed upon the employer gaining knowledge thereof. The court would examine whether, upon an evaluation of all the evidence, pregnancy was the 'dominant' or most likely cause of the dismissal. Within the framework of this approach, it is now possible to return to the facts of this case and the key finding of the court a quo, that the argument that appellant was dismissed for union activities was completely without merit." [3]

(emphasis added)

[51] In this instance, it is apparent that Brom knew Nyathi was pregnant or that she was probably pregnant, before the meeting on 31 October 2008, either because Nyathi told her or because she suspected it on account of Nyathi showing symptoms of early pregnancy and other staff had asked her about it. What is more contentious is when Makeka first knew of Nyathi's condition.

[3] At 2207

[52] On Brom's version he was at least conscious that she appeared unwell by the time of the October meeting, because Brom did recall him raising the question of Nyathi's health with her at that meeting, albeit almost as an aside. Brom also testified, contrary to Makeka's own evidence, that she had raised with him her suspicions that Nyathi might be pregnant after Nyathi had already left the meeting, but insisted that their discussion about her pregnancy was speculative at that stage.

[53] Although they differ on when this transpired, Brom and Nyathi concurred that Nyathi had broken the news of her pregnancy to Brom when Brom had asked her about her condition after noticing Nyathi having symptoms of pregnancy. Given that Brom acknowledged that Makeka had mentioned Nyathi's health in the October meeting, it is most likely that Makeka raised the issue because Brom had either conveyed such a conversation to him or that she had conveyed her suspicions to him, based on her displaying signs of pregnancy at work. Thus whether Nyathi disclosed her condition to Brom before or after the meeting on 31 October, it seems most likely that Makeka was aware of Nyathi's possible pregnancy which he described as a 'health' issue. It also seems likely this was a concern to him when that meeting took place. Accordingly, it seems fair to say that Nyathi's pregnancy was an issue which may have played a role in Makeka giving notice of her dismissal at that meeting.

[54] The critical question is whether it played a preponderant role in the firm's decision to dismiss Nyathi. On Nyathi's account it was the only issue mentioned by Makeka as the reason for her termination. Did the respondent provide sufficient grounds for believing that the real or at least, the predominant reason for Nyathi's termination was her work performance? On an evaluation of the evidence, it must be said that there was little evidence to suggest that testimony of Nyathi's shortcomings was fabricated. It may be that Makeka exaggerated the extent of the complaints about her receptionist skills, but there did seem to be a number of instances in which her manner of dealing with callers left much to be desired. Likewise, a number of instances of her reactive and narrow, rather than pro-active approach to the performance of her tasks were related in sufficient detail to infer that they were probably not simply

contrived as a smokescreen to obscure the true reason for her dismissal. The overall impression gained is one of frustration on the part of management with the performance of her PA and receptionist duties. What was sought was someone who took more initiative in performing her functions and did not require constant supervision and direction and it seems the applicant was not meeting those expectations.

[55] Having said that only means that I am satisfied that whether or not Nyathi's pregnancy was seen as another complicating factor, there seems to have been ample reason in the employer's view to end Nyathi's probation on account of her unsatisfactory progress. Consequently, I cannot confidently say that the predominant reason for her dismissal was any reason related to her pregnancy.

[56] Of course that does not mean her dismissal was substantively or procedurally fair on account of poor work performance. However, but that is not a matter for the court to determine as the only issue before it, whether the dismissal was automatically unfair and s 158(2) of the LRA does not apply.

Costs

[57] I appreciate that the respondent went to considerable expense, but it did not pursue a claim for costs in argument. In any event, having found that the applicant's pregnancy may have been a consideration in terminating her probation, albeit not a predominant one, I accept that the applicant was *bona fide* referring her claim of automatically unfair dismissal, so it would not be fair or equitable to mulct her with costs.

Order

[58] The applicant's claim of automatically unfair dismissal in terms of s 187(1)(e) is dismissed.

[59] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	R Hassiem and G H Williams of Malan, Lourens, Arendse Inc. (*pro bono*)
FIRST RESPONDENT:	N De Jager instructed by Maseremule Inc Attorneys