REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no. D 407/10

In the matter between:

FREDDY PILLAY	**Applicant**
and	
SOUTH AFRICAN POST OFFICE LIMITED	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION	
AND ARBITRATION	**Second Respondent**
ALMEIRO DEYZEL N.O	**Third Respondent**

Heard: **In chambers**

Delivered: **March 2012**

Summary: Application for leave to appeal against the whole judgment handed down on 15 November 2011.

JUDGMENT

REDDY AJ

Introduction

[1] This is an opposed application for leave to appeal against the whole judgment handed down on 15 November 2011.

[2] The applicant raises four grounds of appeal which I will deal with below. I do not intend repeating the factual issues and grounds of review raised in the main review application as these are comprehensively dealt with in the main judgment.

Review vs appeal

[3] The applicant submits that I incorrectly applied the test on appeal rather than for a review in determining the review application.

[4] A reading of the judgment reveals a clear application of the review test as enunciated in the *Sidumo* matter. I accordingly find that there is no prospect of the Labour Appeal Court finding that the incorrect test was applied. .

Mens rea and touchy mannerism

[5] The applicant submits that he did not have the requisite intention to commit sexual harassment because he was not aware that he was touching the complainants in a sexually overt manner.

[6] The applicant defined his touchy mannerism to be limited to touching people on their shoulders. The complainants did not take offence and were not uncomfortable with his touching them on their hands or shoulders.

[7] The other touching by the applicant on more intimate parts of the complainants'

bodies was the source of complaint and discomfort. It is clear from the evidence of the applicant that he knew that the actions complained off were sexual in nature. The applicant on several occasions described himself as a reserved person and would not touch women in that manner. The complaints pertained to his touching them on their breasts, thighs and pelvic area and were effected by way of touching or brushing against, pressing or rubbing those parts of their bodies. These are objectively sexually overt actions. The complainants were offended, uncomfortable and wished that they would not be subjected to further invasions of their personal space and dignity.

[8] The applicant did not testify that he may have such a mannerism but was not aware of it, rather he testified that he did not touch them in that manner or did not recall touching them in that manner (my emphasis).

[9] It was a reviewable irregularity for the commissioner to have suggested to the applicant that he may have such a mannerism and may not be aware of it. The applicant denied this, nonetheless and surprisingly, the commissioner, found that this was indeed the case.

[10] The lack of intention to commit sexual harassment is not established by the mere say-so of the perpetrator. Whether he had the necessary intention to sexually harass the complainants must be objectively assessed. The evidence before the commissioner repeatedly supported the conclusion that the applicant knew what he was doing and intended to sexually harass the complainants.

[11] The applicant submits that the following evidence was disregarded in the judgment:

1. The incidents with Jones happened several years earlier;

2. It was a social occasion where alcohol was consumed;

3. Jones was unsure whether the touching had a sexual element;

4. A number of people were present at the occasion.

I will deal with each in turn.

The incidents with Jones happened several years earlier:

[12] The LAC decision of *Mzi Gaga v Anglo Platinum Limited and Others* (unreported case number JA 21/08 and referred to in my judgment) holds that it is irrelevant when the harassment occurred and whether the relationship between the complainant and the perpetrator continued at the time of the hearing. I found no reason to depart from this decision when deciding the matter and I am not persuaded that the Labour Appeal Court will arrive at a different conclusion.

It was a social occasion where alcohol was consumed

[13] The consumption of alcohol was irrelevant for various reasons.

[14] The applicant was touching people inappropriately whether he consumed alcohol or not.

[15] On all the occasions that the applicant touched Behrmann there was no consumption of alcohol. At the year end social function in the park when he did not protest to female colleagues sitting on his lap whilst he sat on the swing, he did not consume alcohol. His behaviour on the swing was contrary to his evidence that he is a restrained person who does not encourage physical contact with people.

[16] The applicant touched Jones when alcohol was being consumed by all, if not many of, the workers. He was not the only employee who had consumed alcohol but he was the only employee who touched Jones inappropriately. His touching her inappropriately is not justified or excused by the consumption of alcohol.

[17] The applicant did not testify that the consumption of alcohol diminished his ability to see right from wrong.

[18] The applicant denied touching people in a sexually overt manner, there was therefore no merit in the argument that the consumption of alcohol had in some

way influenced him to touch them or released him from any social inhibitions. In the absence of any evidence that he could not remember what he did because he had consumed alcohol, the consumption of alcohol did not remove any blameworthiness on his part.

[19] I was further not convinced that because two occasions were social functions where alcohol was consumed, that the applicant could be sexually overt with a colleague when she was not comfortable with such attention and did not encourage it in any way. This Court cannot condone unwarranted sexual behaviour in the work environment (including social functions) where a measure of respect and dignity is required between colleagues.

[20] There is no prospect of the Labour Appeal Court arriving at a different conclusion in this regard.

Jones was unsure whether the touching had a sexual element

[21] I have dealt with this contention in detail regarding the two occasions and three incidents that occurred *apropos* Jones in the main judgment and I am not persuaded that the Labour Appeal Court will arrive at a different conclusion.

A number of people were present at the occasion

[22] The fact that a number of people were present does not discount the probability of the applicant touching the complainant and I am not persuaded that the Labour Appeal Court will arrive at a different conclusion. .

Sanction

[23] There are no grounds in the application for leave to appeal to persuade me that the Labour Appeal Court will arrive at a different conclusion in respect of sanction.

[24] In the circumstances, I make the following Order

1. The application for leave to appeal against the judgment handed down on 30 August 2011 is dismissed with costs.

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Reddy AJ

APPEARANCES:

None