IN THE LABOUR COURT OF SOUTH AFRICA ,CAPETOWN

JUDGMENT

Not Reportable

Case No: C151/13

In the matter between:

DEIDRE BEVERLEY FARIS **Applicant**

and

TFD NETWORK AFRICA (PTY) LTD **Respondent**

Delivered: 15 December 2016 (In Chambers)

Summary: Application for leave to appeal – application refused.

JUDGEMENT: APPLICATION FOR LEAVE TO APPEAL

MOOKI AJ

Introduction

1. The parties are referred to as in the trial proceedings. Judgement in this matter was delivered on 24 June 2015. The application for leave to appeal is dated 13 July 2015. It appears that the application was served on the applicant's representative on 13 July 2015. The respondent seeks condonation for the late filing of its application for leave to appeal. The condonation application is dated 6 August 2015. The respondent states the following in relation to that application, that: that Shai AJ handed down judgement on 24 June 2015 and that the application for leave to appeal had to have been filed by 15 July 2015 but that it was filed in court on 7 August 2015, which is 17 court days late.

2. The attorneys for the respondent (the applicant in the application for leave to appeal) wrote to the registrar on 2 December 2015 recording, among others, that the application was filed on 7 August 2015 and that there was no opposition to the application as at 2 December 2015. The attorneys recorded that they wrote to the registrar on 7 October 2015 enquiring about the outcome of the application but that the registrar had not replied to their enquiry. The attorneys requested urgent advice on when the respondent could expect to receive the outcome of the application. It appears that the registrar did not respond to both letters on 2 December 2015 and 7 October 2015.

3. The attorneys for the respondent again wrote to the registrar on 5 December 2016. They referred to the correspondence on 7 October 2015 and 2 December 2015 respectively. They recorded that they had received no response to both letters and sought urgent advise when they could expect to receive the outcome of the application.There is equally a record of the registrar responding to this letter.

4. This application thus came for my consideration after much delay,which delay has not been explained by the registrar.The notice for the application for leave to appeal was filed with the registrar on 7 August 2015. The notice to oppose the application is dated 28 July 2015. This is according to the date shown on the court stamp. The application itself is

dated 13 July 2015.there is no record of submissions opposing the application despite the notice to oppose.

5. The respondent lists the following as the grounds for its application for leave to appeal:

5.1. It is not competent to find a dismissal automatically unfair and procedurally and substantively unfair;

5.2. It is an improper exercise of judicial discretion to grant compensation for unfair discrimination in addition to compensation for automatically unfair dismissal;

5.3. The court erred in determining the incapacity dismissal when such dismissal ought to have been determined by the CCMA;

5.4. The issue of the fairness or otherwise of the dismissal did not arise because the applicant was dismissed for incapacity; whilst the fairness or otherwise of an automatically unfair dismissal in terms of section 187 (1) (f) “has little significance”;

5.5. The court erred in not finding that working on a Saturday from time to time was an essential component of the applicant’s position;

5.6. There was no automatic unfair dismissal because the applicant was contractually obliged to work on Saturdays when required. The applicant was scheduled to work on Saturdays but she refused;

5.7. The applicant was dismissed because of her inability to work on Saturdays. She was not dismissed because of her religion;

5.8. The applicant could not do her work because she could not work on Saturdays. The court misconstrued the issue that whether or not the applicant could be accommodated elsewhere or rotated to a different position was a relevant consideration in deciding whether the incapacity dismissal was unfair, when the court had no jurisdiction to decide the fairness or otherwise of the incapacity dismissal;

5.9. The court committed an error in law by considering the fairness of the applicant being dismissed for incapacity;

5.10. The court's finding that there was procedural unfairness is an error in law because the issue of whether the respondent failed to comply with section 189 was not before the court and that the unfair dismissal case was one of dismissal for incapacity;

5.11. The court erred in not referring the case for the fairness of the dismissal for incapacity to arbitration before the CCMA;

5.12. The court became embroiled in irrelevant considerations such as whether or not the applicant was, in the past, placed on the roster to work on a Saturday; an issue with "no significance", and that "in terms of the specific terms of her contract of employment, the [applicant] is entitled to be so rostered";

5.13. The court did not enquire as to why the applicant's contract of employment did not specify that the applicant could not work on Saturdays;

5.14. The applicant's views about her religion were her opinion. She was obliged "to prove the terms and conditions" relating to her religion by presenting evidence of a church official or pastor or church leader, but failed to do so;

5.15. The applicant did not comply with section 60 of the Employment Equity Act and that, as a result, the respondent cannot be liable for Smith's conduct;

5.16. The court erred in awarding costs in favour of the applicant; and

5.17. the court erred by not accepting evidence on behalf of the respondent and for being "unduly influenced by considerations of sympathy for the [applicant], following her testimony in court."

6. The grounds are essentially that:

6.1. The court was not competent to make a finding that the dismissal was automatically unfair and that the dismissal was procedurally and substantively unfair;

6.2. The court could not grant compensation for unfair discrimination in addition to compensation for an automatic unfair dismissal;

6.3. The applicant was not entitled to compensation, in relation to the conduct by Smith, because the applicant did not comply with section 60 of the Employment Equity Act;

6.4. The applicant was dismissed for incapacity because the applicant could not work on a Saturday and the court lacked jurisdiction to determine a dismissal based on incapacity;

6.5. The applicant was required, but failed to present evidence about her religion

6.6. The court was "unduly influenced following the Applicant's evidence;

6.7. The court erred in awarding costs in favour of the applicant.

7. The respondent essentially states that the court had no jurisdiction because the dispute before the court dealt with dismissal for incapacity which should have been heard by the CCMA. The respondent did not raise this as a preliminary issue during the trial. Equally, the respondent did not take this as a law point in its submissions at the conclusion of the trial.

8. Paragraph 5 of the pre-trial minute records the issues for determination by the court. The court was not called upon to determine if the court were competent to determine the matter or to refer the matter to the CCMA. A pre-trial agreement obliges the court "to decide only the issue set out therein."[1]

9. The pre-trial minute records, under "common cause facts, that the "respondent was satisfied with the manner in which the applicant was carrying out her work". The following is recorded in the pre-trial minute in relation to facts in dispute: whether the dismissal of the applicant "for her inability to work on Saturdays was dismissal for incapacity or it was dismissal for operational requirements on prohibited (sic) ground"; "whether the above Honourable Court has no jurisdiction to consider the fairness or not of a dismissal for incapacity and whether only the bargaining Council can do so. Whether the above Honourable Court can only determine if the dismissal of the applicant was based on her religious belief and thus be automatically unfair as contemplated by section 187 (1) of the LRA".

10. The applicant sought an order that, among others, her dismissal was "automatically unfair" in terms of section 187 (1) of the LRA. The applicant alleged that she was dismissed because of her religion. She did not allege that she was dismissed because of her incapacity.

[1] National Union of Metalworkers of South Africa and Others v Driveline Technologies (Pty) Ltd and Another (2000) 21 ILJ 142 (LAC) at para 16

11. The court found that the applicant was discriminated against because of her religion. The Court is competent to make this determination. There is no substance to the complaint that the court lacked jurisdiction. It bears noting, in passing, that a court is called upon to determine the real dispute between the parties. Reference to “incapacity” in the pre-trial minute is not determinative. It is common cause, in any event, that the “respondent was satisfied with the way the applicant was carrying out her work.” The respondent cannot, on the face of this common cause fact, seek to pitch the dispute between it and the applicants as an “incapacity” dismissal.

12. The next primary ground of appeal is that the court could not consider whether the applicant’s dismissal was substantively and procedurally unfair once the court found that the dismissal was automatically unfair. This ground of appeal is contrary to paragraph 5 of the pre-trial minute, in which the parties defined the issues for determination by the court, namely:

> “5 ISSUES THE LABOUR COURT IS REQUIRED TO DECIDE
>
> The above Honourable Court will be required to determine whether
>
> 5.1 Applicants’ (sic) dismissal was substantively unfair,
>
> 5.2 Applicants’ (sic) dismissal was procedurally unfair,
>
> 5.3 Applicant was discriminated against, if so, whether that discrimination was unfair,
>
> 5.4 The appropriate remedy, and
>
> 5.5 The above Honourable Court has jurisdiction to determine if the applicant’s dismissal was either substantively or procedurally unfair”.

13. It is manifest, regarding paragraph 5 of the pre-trial minute, that the court was called upon to determine both the substantive and procedural aspects leading to the dismissal of the applicant. It bears repeating that the respondent did not take the point, during the proceedings, that the court lacked jurisdiction.

14. I now consider the application in relation to the court's findings pertaining to the applicant's religion. The respondent submits that the applicant's religion was not the "dominant reason" for her dismissal and that the applicant failed, in any event, to lead expert evidence to prove the tenets of her religion. It is common cause between the parties that "part of the reason for the applicant's refusal to work on a Saturday when she was asked to is that she is a Seventh-day Adventist and Saturday was part of a Sabbath and she is prohibited by her religion from working on a Saturday". It was also common cause that "the applicant never agreed to work on Saturdays. The applicant could not and would not agree to work on Saturdays".

15. The respondent refers the case of Dlamini and Others v Green for Security[2]. This case is not authority for the proposition that a person who asserts an impediment based on religion must prove the tenets of such religion, and that such proof be advanced through expert evidence. The court did not, in addition, say that the religious tenet can only be proved through expert evidence.

16. Courts should adopt a sensible approach in matters where a litigant asserts religious convictions. That is because courts are not arbiters of what is or isn't a religion. The applicant gave evidence that she was raised by her grandmother subscribing to beliefs of members of the Seventh-day Adventists faith. She gave evidence that that has been her faith throughout her life. The respondent did not contest this evidence. The very conduct of the applicant demonstrates, as far as the court is concerned, her convictions regarding her religious beliefs. She has never worked on a Saturday, having been employed for almost a year. The court did not require expert evidence to be satisfied that Seventh-Day Adventists consider Saturdays as their Sabbath, a day on which those who subscribe to that faith are forbidden to work but for dispensations such as for doctors and nurses.

[2] (2006) 27 ILJ 2098 (LC)

17. The respondent submits that the applicant, in any event, failed to establish the existence of discrimination and that the applicant was dismissed because she refused to conduct stock-taking on weekends, which she was contracted to do as a manager and that she was obliged to work with all other managers. The applicant's contract does not mention stock-taking. The contract refers to the applicant having to work overtime as and when it was necessary to do so. Her contract does not stipulate that overtime is worked on Saturdays.

18. It was common cause that the applicant:

18.1. Started working for the respondent on 9 January 2012;

18.2. Worked overtime outside the Sabbath ;

18.3. Was involved in stocktaking on days outside the Sabbath; and

18.4. Her contract does not specify that stock- takes were scheduled for Saturdays or that she was to work overtime on Saturdays.

19. The respondent relies on Food and Allied Workers Union v Rainbow Chicken Farms[3] in support of its application. This case is not on point. The court found in that decision that the individual applicants were specifically employed because they are Muslim and that it was an operational requirement for them to be at work on a religious holiday. The applicant was not specifically employed to do stocktaking. Her contract stipulated that she undertook and agreed "to perform such overtime duties as may be reasonably required of [her] from time to time." She was not obliged to take part in stocktaking on Saturdays. She was equally not obliged to work on Saturdays.

20. The respondent submits that, if the applicant was discriminated against, that such discrimination was justified considering the respondent's

[3] (2000) 21 ILJ 615 (LC)

business and the essential requirements of the job itself. The applicant took part in stock counts other than those that fell during her sabbath. Her contract of employment, as recorded above, does not prescribe that she is obligated to conduct stock counts on Saturdays. The court does not see how participating in stock counts on Saturdays is an "essential requirements" of the job itself when, on the evidence, the applicant never participated in such stock counts and the respondent was satisfied with the applicant's performance as an employee.

21. The respondent submits that the court made errors of fact, including the court's finding in relation to the conduct of Smith towards the applicant about her religion. The respondent submits that such conduct did not impair the applicant's dignity because the conduct "happened in one meeting". The respondent can hardly suggest that it is permissible for Smith to have abused the applicant, as found by the court, because it was a "once off". Whether a person's dignity is impaired cannot be a function of the duration of the event or circumstances that are said to have led to the impairment. There is no reason why a once-off event cannot impair a person's dignity.

22. The respondent agrees that Smith was derogatory towards the applicant. It is incomprehensible, this notwithstanding, that the respondent equally submits that the applicant's dignity was not impaired because the event was a once-off episode. The decision in Lewis v Media 24 Ltd[4] does not support the point being advanced on behalf of the respondent. The Lewis decision is distinguishable. It dealt with harassment, which is not the case in this matter. I refer to paragraph 40 and 41 of the main judgement that Smith was abusive towards the applicant; including degrading her in public about the applicant being a Seventh-day Adventist.

23. The next ground is that the applicant did not meet the requirements of section 60 of the Employment Equity Act and that this disentitled her to compensation because conduct of Smith's, and that the court was

[4] (2010) 31 ILJ 2416 (LC)

punitive in awarding compensation in the amount of R60 000 after making the finding that the dismissal was automatically unfair. The applicant's claim is not based on the EEA.

24. The applicant sought compensation "in respect of unfair discrimination". The court determined that the applicant was unfairly discriminated against because of her religion. This entitled the applicant to compensation. The respondent's reliance on Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd[5] is not on point. That decision concerned a claim for compensation and/or damages against the employer "in terms of s 50 (2) (a) and (b) of the EEA…". The respondent in this matter did not, in any event, plead that the applicant failed to comply with the requirements of section 60 of the Employment Equity Act. The pre-trial minute is silent on this point.The stated non-compliance was not raised as a preliminary point.

25. The applicant sought relief on the basis of section 187 (1) of the LRA, specifically section 187 (1) (f). The Court is competent to award damages and/ or compensation, as contemplated by section 193 (1) (c) read with section 193 (3) of the LRA.

26. I am not persuaded that the court committed errors of fact as contended for by the respondent; including the contention that one such fact pertains to the court's determination concerning Smits conduct towards the applicant in relation to her religion. The respondent's submission that all that transpired was that the applicant "… was distraught and upset because Smith did not want to accommodate her" underplays the import of the evidence.

27. The respondent did not make submissions on the cost order despite this being raised as one of the grounds for the application for leave to appeal. Similarly, the respondent did not make submissions in relation to its other grounds for the application,including that the court's decision was arrived

[5] (2015) 36 ILJ 1111 (LC)

at on the basis of the court being sympathetic to the Applicant following her evidence.

28. I am not persuaded that the court's finding on the procedural and substantive and unfairness of the dismissal is incompatible with the finding that the dismissal was automatically unfair. That finding, at best for the respondent, would amount to a *brutum fulmen.* The order by the court in relation to payments to be made to the applicant remain competent even if one were to discount reference in the order to the dismissal being substantively and procedurally unfair. That on its own does not merit this application succeeding.

29. I have considered the application for condonation. The late filing of the application is condoned. I am not persuaded that there is a reasonable prospect of another court coming to a different conclusion.

30. I make the following order:

    30.1. Condonation is granted for the late filing of the application for leave to appeal.

    30.2. The application for leave to appeal is refused.

Omphemetse Mooki

_____

Judge of the Labour Court (Acting)