REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No: D 582-08

In the matter between:-

NOXOLO MEMELA **First Applicant**

MANDI MNOMIYA **Second Applicant**

and

EKHAMANZI SPRINGS (PTY) LTD **Respondent**

Heard: 9 FEBRUARY 2012

Delivered: 8 JUNE 2012

Summary: The Applicant worked for the Respondent at its spring water bottling business which is in the premises of KwaSizabantu Mission (Mission) .They breached the mission's code of conduct by falling pregnant outside wedlock.
The security guards of the Mission denied them entry to the mission on 14 April 2008. They were unable to reach their work place. They asked the Manager to intervene but he refused. The refusal constituted an employer's refusal to accept employees's tender of services and a repudiation of the contract of employment which is a dismissal in terms of section 186 (a) of the LRA.

In the circumstances the first Applicant was dismissed for reasons related to her pregnancy and such a dismissal was automatically unfair. The Respondent may not abdicate its responsibility of protecting the jobs of its single women employees when they fall pregnant and hide behind the code of conduct of the mission. As the Respondent had an obligation to protect its pregnant employees irrespective of their marital status, it had the duty of making the necessary arrangements with its landlord to protect its pregnant employees, that obligation should not be shifted to employees. The law protects pregnant women against dismissal for reason related to their pregnancy irrespective of their marital status.

JUDGMENT

Lallie, J

Introducion

1] The respondent operates a business of bottling spring water from the premises of KwaSizabantu Mission (the mission). Both applicants were employees of the respondent. One of the terms of the code of conduct of the mission is that unmarried women staying or working on its premises are not allowed to fall pregnant. Both applicants are single women. They fell pregnant and in April 2008 they were prevented by security guards from entering the premises of the mission. One of the consequences of the conduct of the security guards was that the applicants were unable to reach their work stations and perform their duties. That led to the termination of their employment relationship with the respondent. They referred a dispute to the CCMA on the grounds that the respondent had dismissed them for reasons relating to their pregnancy. They claimed that their dismissal was automatically unfair as envisaged in section 187(1) (e) of the Labour Relations Act, 66 of 1995 (the LRA).

Evidence

2] The only witness for the applicants was the second applicant. The first

applicant's case was dismissed, owing to her failure to attend court. The reason for her absence could not be explained even by her legal representative. The summary of the second applicant's evidence is that as she was going to work on 14 April 2008 she was prevented by security guards from entering the premises of the mission. She asked the security guards to call Mr. Bosman (Bosman) who she referred to as the boss. Upon asking Bosman for reasons for the conduct of the security guards, Bosman informed her that she was prohibited from entering as she had breached one of the rules of the mission by falling pregnant. She asked for a letter of dismissal which Bosman refused to provide. According to the second applicant, the first applicant was also present during her discussion with Bosman.

3] The second applicant denied having been given a copy of the mission's code of conduct on employment. It was, however, her evidence that she received a copy of the code of conduct of the mission during the course of her employment. It was further explained to them, as employees of the respondent, that they would have to leave the premises is they contravened the code of conduct. When she fell pregnant, she left the premises of the mission and found herself accommodation elsewhere. She denied resigning from her job.

4] The respondent's main witness was Bosman, its manager. He testified that he set up a meeting between the applicants and the landlord on 9 April 2008. He denied speaking with the second applicant on 14 April 2008. He spoke to the first applicant only on the day she was informing him that she was being denied entry to the respondent's premises by security guards. He told her to resolve the issue with the landlord and she never reported for duty again. Thabani Hlongwane (Hlongwane) also observed the conversation between Bosman and the first applicant on her last day on duty which according to Hlongwane was in April 2008. Bosman last saw the second applicant at work on 9 April 2008 and the next time he saw her was at the CCMA at the conciliation of the present dispute.

5] Dismissal of employees for reasons relating to pregnancy is governed by section 187 of the LRA which provides as follows:

> '187 (1) A dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 5 or, if the reason for the dismissal is-
>
> (e) the employee's pregnancy, or any reason related to her pregnancy;'

6] The respondent denied dismissing the second applicant. Dealing with the question of the onus of proof in dismissals for reasons related to pregnancy, this court in *Mushava v Cuzen and Woods Attorneys*[1] held as follows:

> 'If the employee simply alleges unfair dismissal the employer must show that it was fair for a reason permitted in section 188. If the employee alleges it was for a prohibited reasons, eg pregnancy, then it would seem that the employee must in addition to making the allgation at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly on this account.'

7] In *Wardlaw v Supreme Mouldings (Pty) Ltd*,[2] the court expressed the view that it was for the applicant to demonstrate that the reason for her dismissal was her pregnancy or any reason related thereto. In *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*,[3] the court confirmed that is trite that the employee must not only prove the existence of a dismissal, the employee must also produce sufficient evidence of the existence of an automatically unfair dismissal.

8] In *Kinemas Ltd v Berman*,[4] it was held that the employer's refusal to accept an employee's tender for services constitutes a repudiation of the employment

1 [2000] 6 BLLR 691 (LC) at para 23.
2 [2004] 6 BLLR 613 (LC) at para 11.
3 [2008] 1 BLLR 1111 (LC) at para 26.
4 1932 AD 246 at 247.

contract and section 186 (1) (a) of the LRA defines a dismissal as the termination of the contract of employment with or without notice.

9] The basis for the second applicant's version that she was dismissed on 14 April 2008 for reasons related to her pregnancy was that Bosman failed to intervene when security guards denied her access to her work place.

10] I have rejected the respondent's version presented during the trail that the second applicant resigned on her own volition on 9 April 2008. Firstly, because, in the respondent's response to the applicants' statement of case the following averments are made:

> '12.3 In terms of Kwa-Sizabantu Mission's code of conduct unmarried women staying and working on the premises are not allowed to fall pregnant;
>
> 12.4 Any breach of this code of conduct will result in a person being refused entry on the premises;
>
> 12.7 During on or about the latter part of 2007/2008 the 1st and end applicants fell pregnant;
>
> 12.8 Because they had breached the code of conduct of KwaSibantu Mission by being pregnant while unmarried the 1st and 2nd applicants were denied entry to the premises by the security of KwaSizabantu Mission during April 2008;'

11] Under cross-examination, Bosman denied having knowledge that the second applicant left her job of her own accord. All the applicants' papers, from their CCMA referral documents, reflect that the applicants were dismissed on 14 April 2008. I have considered the clocking documents the respondent sought to rely on to prove that the second applicant's last day on duty was 9 April 2008. They are inconsistent with the respondent's response to the statement of case. They constitute a departure from the respondent's case as pleaded and may therefore

not be relied upon to prove the second applicant's last day on duty. I have also rejected Hlongwane's evidence that on the first applicant's last day on duty she had a discussion with Bosman in the absence of the second applicant. His evidence is inconsistent with the respondent's pleaded case. Hlongwane was unable to identify the day in April 2008 he was referring to and I am not convinced that as he was performing his duties as a cleaner, he was in a position to observe all the discussions Bosman had with his subordinates on the last day he saw the first respondent at work.

12] Bosman tried unsuccessfully to divorce himself from the events which led to the termination of the applicants' services. He, however, conceded that the second applicant was denied entry by the landlord's security guards because she was pregnant whilst an unwed woman. Bosman testified under cross-examination that he arranged a meeting between the applicants and the landlord for 9 April 2008 for them to resolve their problems. On Bosman's own version, he could not communicate with the second applicant because she did not understand English and he did not understand Zulu. This version is consistent with the second applicant's version that she spoke to Bosman through the first applicant. It confirms the second applicant's version that she was present and spoke to Bosman through the first applicant when the discussions regarding breaching the code of conduct of the mission were held. In the statement of defence, the respondent pleaded that any breach of the code will result in the person being refused entry to the premises.

13] For these reasons, I am satisfied that the second applicant discharged the onus of proving that she was dismissed by the respondent. Her dismissal took the form of Bosman's refusal to intervene when the second applicant was being denied entry to the workplace by the security guards of the mission. One of the duties of the employer is to receive an employee into service. By entering into an employment relationship with the second applicant, the respondent acquired the obligation to receive her into the workplace. It cannot be allowed to abdicate that responsibility by hiding behind the rules of the mission. Bosman's refusal to intervene when requested to do so by the second applicant, when she was

prevented from entering the workplace, constituted the termination of the contract of employment by the respondent and therefore a dismissal.

14] Having proved her dismissal, the second applicant was required to prove that her dismissal was related to her pregnancy. In *Mashava (supra),*[5] the court expressed the view that if an employee alleges that her dismissal was for a prohibited reason, e.g. pregnancy, then it would seem that the employer was aware that the employee was pregnant and that the dismissal was possibly on this account. In *De Beer v SA Export Connection CC t/a Global Paws*.[6] the court relied on the decision in *Kroukam v SA Air Link (Pty) Ltd*[7] in dealing with the question of proof and expressed it as follows:

> 'The issue that needs to be decided by this Court is whether the applicant was dismissed for any reason related to her pregnancy in terms of section 187(1)(e) of the LRA. It was held in *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC) that section 187 of the LRA 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 the contrary, i.e. is to produce evidence to show that the reason for dismissal did not fall within the circumstances envisaged in section 187 of LRA for constituting an automatically unfair dismissal. In my view, the onus to prove that the dismissals was not automatically unfair rests on the employer. The applicant must adduce some evidence to raise the issue whether the dismissal is for a reason related to pregnancy. Once this is done, the respondent must refute this in the course of establishing a fair reason.'

15] The second applicant made it clear that her basis for alleging that she was dismissed for reasons related to her pregnancy is that she was prevented from gaining access to the workplace because she had breached the rule of the mission against falling pregnant outside wedlock. When she asked Bosman to intervene, he refused to come to her assistance and she was left without access

5 Above n 1 at para 23.
6 [2008] 1 BLLR 36 (LC) at para 13.
7 [2005] 12 BLLR 1172 (LAC).

to the workplace. In its response to the applicants' statement of case, the respondent concedes that the applicants were denied entry to the premises by security of the mission because they had breached the code of conduct of the mission by falling pregnant whilst unmarried.

16] When the respondent became an employer, it acquired rights and obligations of employers. One of the obligations is compliance with employment legislation. The law is clear; it protects employees against dismissal for reasons related to pregnancy. Bosman sought to pass the buck to the mission by testifying that the respondent does not dismiss employees for falling pregnant, it even grants them maternity leave. It is the landlord that does not want unmarried pregnant women on its premises. It was argued for the respondent that the mission has a constitutional right to lay down a code of conduct for people entering its premises. The flaw in this argument is that no constitutional right is absolute. Constitutional rights can therefore be limited. The respondent cannot be allowed to abdicate its responsibility towards its unmarried women employees by allowing its landlords to violate the rights of its unmarried women employees. The responsibility the respondent owes to its unmarried female employees endures for the duration of the employment relationship.

17] Bosman was evasive when dealing with the respondent's obligations towards the second applicant in April 2008. In his evidence in chief, he testified that on 9 April he set up a meeting between the landlord and the 2 ladies. He did not attend the meeting. He gave no further material evidence on the involvement of the respondent in the problem of the applicants' denial of access to the workplace by reasons of pregnancy. Under cross-examination, Bosman testified that he told the first applicant to resolve her issue with the landlord. He denied knowledge of the issue the first applicant had with the landlord. This denial is in contradiction with his evidence in chief that he set up a meeting between the landlord and the ladies. He must have known the reasons for the meeting which had been set up by him. Surprisingly, under cross-examination he conceded knowing that the second applicant was pregnant. He also conceded that the second applicant was denied access by the landlord. He added that 'we tried to

resolve it in a meeting of 9 April'.

18] To prove that the version the respondent presented in court is a fabrication, Bosman testified under cross-examination that even before the applicants were denied entry, he had arranged a meeting between the landlord and the applicants. He had no knowledge that the second applicant had resigned. These responses are consistent with the second applicant's case that she was denied entry on 14 April 2008. They do not support Bosman's evidence in chief that the second applicant's last day on duty was 9 April 2008. By Bosman's own admission, the meeting he had arranged was on 9 April 2008 and the second applicant was denied entry on 14 April 2008.

19] The applicant led sufficient evidence to prove that the reason for her dismissal was related to her pregnancy while she was an unmarried woman. What was found objectionable was the second applicant's pregnancy outside wedlock. The labour legislation of this country protects unmarried women employees from being punished with dismissal when they fall pregnant. Protection from dismissal by reason relating to pregnancy is not a preserve of married women. All women enjoy legal protection of not losing their jobs when they fall pregnant. It is the employer that has the obligation to negotiate with the landlord the manner in which its women employees can be protected against dismissal for reasons relating to pregnancy. That responsibility cannot be shifted to the employees. Had the second applicant not fallen pregnant, the security guards of the mission would not have denied her entry to her work place. The only reason the second applicant was denied entry to her work place was that she fell pregnant outside wedlock. In the circumstances, I find that the second applicant was dismissed unfairly by the respondent for reasons related to her pregnancy.

20] The second applicant sought 24 months' compensation. I have considered that the second applicant was unfairly dismissed through no fault on her part. The gravity of this kind of dismissal is expressed by the doubling of the maximum amount of compensation that can be granted to general victims of unfair

dismissal. I have considered the second applicant's length of service and that she has not found proper alternative employment since her unfair dismissal. She does odd jobs from time to time. It would be just and equitable to award the second applicant compensation in the amount of R7945.50, which is equivalent to remuneration she would have earned over a period of 10 months.

21] I could find no reason, both in law and fairness, for costs not to follow the result.

22] In the premises. the following order is made:

22.1] The second applicant's dismissal is automatically unfair in terms of section 187(1)(e) of the LRA;

22.2] The respondent is to pay the second applicant compensation in the amount of R7945.50, which is equivalent to remuneration she would have earned over a period of 10 months;

22.3] The respondent is to pay the costs of the second applicant.

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Lallie, J

Judge of the Labour Court

Appearances:

For the Applicant: Mr. Ponoane of Ponoane Attorneys:

For the Respondents: Adv. Gerber

Instructed by: Clarinda Kügel Attorneys