

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PS53/17

In the matter between:

JENNY McMAHON

Applicant

and

BDFM PUBLISHERS (PTY) LTD

Respondent

Heard: 8 April 2019

Delivered: 5 July 2019

JUDGMENT

LALLIE, J

- [1] On 1 June 1996 the applicant was employed as a Sub-Editor for the Sunday Times, a publication owned by the respondent's predecessor. She became a Production Editor of the Financial Mail, a publication of the respondent. The applicant's life changed completely when she was shot during a car high jacking which took place on 23 February 2010 as she was arriving home from work at about 20h00. She was left paralysed from the waist down and wheelchair bound. The hi-jacking had a significant effect on the applicant's working life which culminated in the litigation at hand.

- [2] The applicant was hospitalised owing to the injuries she sustained during the hi-jacking. She was on sick leave and received her full remuneration from the respondent for March to July 2010. On 1 August 2010 the applicant resumed her duties and worked about 5 hours a day owing to her disability. She realised that she had returned to work too soon as her disability forced her to take temporary incapacity leave from November 2010 until the end of May 2012. During this period she received a portion of her remuneration from Metropolitan, an insurance company (the insurer) through the respondent in terms of the respondent's incapacity policy. The correctness of the amount the applicant received from the insurer is in dispute as the applicant submitted that she received 50% of her remuneration while the respondent alleged that she received 75%. After interaction between the parties which will be dealt with later in the judgment, the applicant was declared permanently disabled and left the respondent's employ in September 2012.
- [3] The applicant submitted that she did not receive the annual salary increments for 2010, 2011 and 2012. Her temporary and permanent disability benefits were consequently erroneously calculated based on her 2009 remuneration. The applicant submitted that she was discriminated against by the respondent based on her disability and sought relief in the form of payment of the shortfall which was occasioned by the incorrect calculation of her disability benefits, compensation and damages. The respondent denied having discriminated against the applicant. It further denied that the applicant was entitled to relief.
- [4] The respondent raised a point *in limine* that this Court lacks jurisdiction to adjudicate the applicant's claims based on the incorrect calculation of her disability benefits as they had not been brought under section 77 of the Basic Conditions of Employment Act¹ (the BCEA). The applicant insisted that this Court has the necessary jurisdiction as her claims were based on discrimination owing to her disability. I deemed it appropriate to determine the point *in limine* after all the evidence had been led. In *Gcaba v Minister of*

¹ Act 15 of 1997.

*Safety and Security*² the Constitutional Court re-affirmed that jurisdiction is 'the power or competence of a Court to hear and determine an issue between parties'. The Court further referred with approval to *Chirwa v Transnet Ltd*³ where it held that jurisdiction is determined on the pleadings and not the substantive merits of the case. The applicant's evidence was consistent with the manner in which her case has been pleaded. Her entire pleaded case is based on discrimination owing to her disability. It makes no reference to section 77 of the BCEA. As the applicant is *dominus litis* she had the power to determine the nature of the dispute she wanted the court to determine. The respondent therefore did not establish this court's lack of jurisdiction. The point *in limine* can, in the circumstances, not succeed.

[5] In their pre-trial minute the parties agreed that the following legal issues had to be decided:

6.1.1 Whether the Applicant was discriminated against on the basis of her disability in respect of remuneration increases for the Respondent's financial year period 2010, 2011 and 2012.

6.1.2 Whether the Applicant was discriminated against on the basis of her disability and as a result, suffered mental and emotional anguish during the period of her temporary disability by virtue of:

6.1.2.1 allegedly being denied annual increases;

6.1.2.2 allegedly being pressured to return to work;

6.1.2.3 allegedly being pressured to work a full day under threat of a financial penalty if she did not; and

6.1.2.4 allegedly by not being reasonably accommodated as a result of her disability'.

[6] The respondent submitted that in 2018 the applicant amended her statement of claim in a manner that had the effect of amending the pre-trial minute signed by the parties in 2016. It was argued that the attempt to amend the pre-trial minute was impermissible. To the extent that the attempt was made, the respondent's argument is correct. A pre-trial minute is an agreement

² 2010 (1) SA 238 (CC) para 74-75.

³ [2008] 2 BLLR 97 (CC).

which the parties enter into with a view of further defining the dispute before Court. As it is an agreement, no party has the power to unilaterally amend it or resile from it. The pre-trial minute which the parties entered into is valid and binding on them. The issues that will be determined are those the parties agreed upon and any attempt to amend the pre-trial minute unilaterally is invalid and of no effect.

[7] The applicant submitted that the respondent discriminated against her on grounds of disability in not paying her remuneration increases for its financial year's 2010, 2011 and 2012. It is common cause that after the applicant was shot on 23 February 2010 she was on sick leave for 5 months. She received her full remuneration for the 5 months' period from the respondent. The applicant returned to work on 1 August 2010 but owing to her disability she took temporary incapacity leave from November 2010 until the end of May 2012. During this period she received her remuneration which consisted of a portion of her actual remuneration from the insurer. When the applicant resumed her duties on 1 June 2012 she was on her 2009 salary. She was shot a month before the 2010 salary increases at the respondent were due. The applicant testified that the respondent's practice was that employees were told at the end of March what the salary increase would be. She received from the 2010, 2011 and 2012 financial years letters from the respondent's editor, Mr Mthombothi, informing her of the 6% salary increase for each year. The increases were paid across the board based on the cost of living. The applicant testified that she thanked Mr Mthombothi for each annual increase including the increment she received in 2010 to 2012. He never told her that he had granted any increment in error.

[8] Under cross-examination the respondent challenged the applicant's version by seeking to rely on its reward policy. It was put to the applicant that in terms of the reward policy she did not qualify for annual increment for the period 2010 to 2012 as, owing to her absence, the respondent received no value from her. It was further argued that Mr Mthombothi issued the letters granting the applicant the increments in error. The respondent led no evidence. The applicant tendered evidence on this issue. She denied that the respondent

applied the reward policy strictly and stuck to her version which remained unshaken under cross examination.

- [9] Mr Williams who had worked for the respondent for years and resigned in 2010 while holding the position of deputy editor testified on behalf of the applicant. He had acted as the respondent's editor before his resignation. He corroborated the applicant's version that before his resignation the respondent did not apply the reward policy strictly in effecting annual remuneration increments. He also confirmed that increment was generally based on inflation and that editors completed standard letters similar to the one the applicant sought to rely on.
- [10] In the absence of evidence refuting the applicant's version that Mr Mthombothi granted her annual remuneration increment for 2010 to 2012, nothing precludes its acceptance. The applicant testified that the explanation she was given by the respondent's payroll section for the non-payment of her annual remuneration increment for 2010 to 2012 was that because she was medically boarded during that period, she did no work for the respondent. She submitted that the only reason for the non-payment of the increment was her disability.
- [11] Denying having discriminated against the application in not granting her remuneration increase for 2010 to 2012 the respondent relied, *inter alia*, on *Mbana v Shepstone and Wylie*⁴ where it was held that the enquiry for unfair discrimination involves three stages. The first is whether there is differentiation. The second is whether that differentiation amounts to discrimination. Finally, the court must establish whether the discrimination is unfair. The third respondent also relied on *Louw v Golden Arrow Bus Service (Pty) Ltd*⁵ where it was held that the mere averment of discrimination does not constitute proof of discrimination. The overall burden of proof remains on the employee. At the second stage the employer's obligation is to articulate a

⁴ (2015) 36 ILJ 1805 (CC) para 27.

⁵ [2000] 3 BLLR 311 (LC).

legitimate non-discriminatory reason rather than establishing by preponderance of the evidence that its proffered reason was the real reason.

[12] The respondent submitted that it was under no obligation to grant annual increases. The applicant, on the respondent's view therefore had no contractual right to a yearly increase. It instead had the prerogative to decide when and how to implement its salary increase including attaching conditions thereto. The respondent denied that the applicant proved that she was a victim of discrimination as envisaged in section 6 (1) of the Employment Equity Act⁶ (EEA). It further submitted that she failed to establish a link between the differentiation of not being granted the salary increase on a listed or analogous ground. The respondent argued that the applicant conceded that she was informed that she did not qualify for salary increases because she was not at work for the better part of the period in question. It submitted that the differentiation had nothing to do with her disability but was occasioned by her absence and inability to perform her duties which were considerations for salary increases.

[13] The respondent's arguments are not supported by evidence. When the test in *Mbana*⁷ is applied, it proves that there was differentiation between the applicant and her fellow employees who received annual increases during the impugned period. Her evidence that they received the annual increments based on the inflation rate was not challenged. The respondent argued that the differentiation was legitimate in that the applicant did not work during the impugned period and therefore did not qualify for the increase in terms of the reward policy. The respondent sought to rely on the evidence tendered by Mr Williams that the respondent considered the provisions of the reward policy in granting increases. It argued that such application supported its version that the applicant did not qualify for the increases. The respondent's argument overlooks the evidence of both Mr Williams and the applicant that the reward policy was not applied strictly and that the respondent relied on the inflation rate in granting increases across the board. If further fails to take into account

⁶ Act 55 of 1998.

⁷ Id fn 4

the evidence that the editor had the power to determine increases, *albeit* they had to be ratified by the respondent's head office. The applicant's evidence that she was granted increases and thanked Mr Mthombothi for them for the impugned period was not challenged under cross-examination. Further, no evidence was led to refute it.

[14] The applicant proved a link between the differentiation which was the non-payment of her salary increases and her disability. She proved that Mr Mthombothi took the decision that they be paid with the necessary authority. The pay-roll section of the respondent refused to implement the decision on the grounds that owing to her paralysis and disability from being shot she was unable to perform her duties for the better part of the impugned period. Had the applicant not been disabled, she would have received her annual increases as she did before she was disabled. As the applicant established the causal link between the differentiation and her disability the respondent had to show that it was fair. It, however, elected not to tender evidence and therefore failed to seize the opportunity of proving the fairness. In the premises, the applicant proved that the respondent's non-payment of her salary increase between 2010 and 2012 constituted unfair discrimination.

[15] The applicant submitted that the respondent disregarded her complaint that the insurer paid her 50% instead of 75% of her salary during her temporary disability leave. She sought the respondent to pay her the difference between the amount that was due to her and the actual amount paid. As she alleged that the amount was due to her she had to discharge the onus of proving her claim.

[16] The applicant's version faltered under cross-examination as she did not deny that she was paid in terms of the respondent's temporary disability policy. She based her claim that she was underpaid on a pension document employees received annually. She presumed that the document was part of the pension policy. It was, however, not tendered as evidence. I therefore accept the version put by the respondent to the applicant that she received the full amount which was due to her in terms of the temporary disability policy.

- [17] A further legal issue the parties presented for determination was the applicant's submission that the respondent discriminated against her on the basis of her disability and as a result she suffered mental and emotional anguish during the period of her temporary disability by virtue of not being reasonably accommodated as a result of her disability. Section 6(1) of the EEA prohibits direct and indirect unfair discrimination in employment policy or practice on a number of listed grounds which include disability. Section 11 of the EEA provides that when unfair discrimination is alleged, based on a listed ground, the employer against whom the allegation is made bears the onus of proving its fairness.
- [18] It is common cause that while on temporary disability leave in mid May 2012 the applicant was contacted by an employee of the respondent's pay roll section and told to return to work by 1 June 2012 or she would have no job to return to. The reason for the instruction was that the disability insurance had expired. She obeyed although she was not strong enough to resume her duties. The applicant started by working a 3 hour day. She then doubled the hours. Although there was at some stage a flexibility in working hours at the respondent, Mr Mthombothi, acting within his powers as the editor insisted that employees work a full day at the respondent's offices and leave at 17h00.
- [19] The applicant approached Mr Mthombothi and requested to not to work from the respondent's premises until 17h00 but work from home for a portion of her working day. Mr Mthombothi refused on the grounds that granting her request would be a security risk. The applicant was disappointed as she had set up a home office in anticipation of having her request acceded to. She felt discriminated against because it was common practice that staff members from the respondent's Cape Town office were allowed to work from home. Ms Bisseker, the economic editor was permitted because she had young children. Mr McNulty, the section head also worked from home. The security risk that the respondent would have been exposed to had the applicant's request been granted was not disclosed because Mr Mthombothi neither told her nor testified. Both the applicant and Mr Williams testified that granting the request

would not have posed a risk to the respondent. They testified that documents were sent by fax and later via e-mail all the time and the respondent suffered no prejudice as a result. Mr Williams added that until his resignation in 2010 forwarding documents via email was not an issue.

- [20] The applicant submitted that the respondent failed its duty of granting her reasonable accommodation and effect the necessary adjustments which included allowing her to work from home for a portion of her working hours to enable her participate in its employment and retain her job.
- [21] The respondent submitted that the applicant had failed to establish a *prima facie* case of discrimination as she conceded that she was not doing the same duties as the employees who had been granted permission to work from home. This argument has no basis in the absence of evidence by Mr Mthombothi disclosing the risk the respondent would have been exposed to, had the applicant's request been granted. Ms Bisseker was permitted to do all her work from home based on her personal circumstances of having young children. The applicant requested even less than what Ms Bisseker was granted.
- [22] The applicant sought to rely on *Standard Bank of South Africa v CCMA and others*⁸ in arguing that the respondent failed in its obligation to grant her reasonable accommodation and retain her in its employ. The respondent denied and submitted that the *Standard Bank* case is of no relevance as it dealt with unfair dismissal for incapacity when in the matter at hand the applicant was not dismissed. While I acknowledge the distinction the respondent based its argument on, I find the following dictum from the *Standard Bank* case relevant:

'The Constitution, several statutes including the EEA and the NRA and Codes of Practice protect employees with disabilities as a vulnerable group because they are a minority, with attributes different from mainstream society;

⁸ [2008] 4 BLLR 356 (LC).

unemployment, lower wages, poor working conditions and barriers to promotion plague people with disabilities, here and abroad’.

- [23] Item 6.1 of the Code of Good Practice: Employment of People with Disabilities (the code of good practice) provides as follows:

‘6.1 Employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person’s capacity to fulfil the essential functions of a job.’

The respondent submitted that it fulfilled its statutory obligations in that at all reasonable times during the period of gradually allowing the applicant to return to work it consulted and was kept abreast with the applicant’s condition. It relied on meetings which were held on 17 and 19 August 2012 and on 5 and 26 September 2012. The applicant argued correctly that what was discussed in the meetings falls short of constituting the respondent’s fulfilment of its duty to reasonably accommodate her. The applicant complained about her exclusion from the meetings of 5 and 26 September 2012 between the respondent and her occupational therapist. The exclusion did not have the effect of reducing the meetings from being attempts by the respondent to accommodate her as their agenda was about how the respondent could accommodate her.

- [24] In the report on the meeting of 29 August 2012 with the respondent’s representatives, the occupational therapist stated that the applicant undertook to work 29 hours a week which constituted 72.5% of her full hours of work. She added that she would review the applicant’s progress at the end of September 2012. She added that the applicant was in consultation with her doctor to try and reduce medication which made her drowsy. She was also seeing a psychologist weekly to address her emotional and psychological issues. At the meeting of 5 September 2012 the applicant reported that she was coping with working 29 hours a week. The respondent intimated that the applicant was expected to return to work on a full term capacity from October 2012. It was argued that the situation would be reviewed at the end of

September 2012. By 10 September 2012 the respondent had informed the applicant that her salary would be cut if she did not work return to work on a full time basis. The last meeting was held on 26 September 2012. The applicant expressed her inability to return to work full-time. The option of allowing the applicant to perform certain tasks from home was discussed but the respondent expressed the view that it was not feasible.

[25] The respondent argued that the possibility of having the applicant work from home was considered but could not be accommodated owing to the nature of her duties which included competition and a security hazard. It was further argued that allowing the applicant to do some of her work from home would impose an unjustifiable hardship on the respondent's business. In the absence of evidence by the respondent's employee who took the decision that granting the applicant's request to do part of her work from home would expose the respondent to risks and the evidence of those who took the decision that it was not feasible, the respondent's argument that granting the request would constitute an unjustifiable hardship has no basis. The risk was never disclosed so were the reasons for the infeasibility.

[26] On 26 September 2012 when the respondent conveyed to the applicant the news that she had to return to work full time and that deductions would be made for her salary for each hour she was not at work the applicant was shocked and disappointed. It must be noted that the respondent took the decision before the end of September 2012 against the decision taken with the occupational therapist on 29 August 2012 that the applicant would work 29 hours weekly until the end of September 2012 when her progress would be reviewed. The applicant's capacity was due to be reconsidered at the end of September 2012, however, the respondent took a final decision on the feasibility of her performing part of her duties from home and on the consequences of her inability to do so before then.

[27] The respondent failed to accommodate the needs of the applicant. It expected the applicant to perform her duties like all the other able bodied employees. The applicant's evidence that she was assisted by security guards to get out

of her car on her return to work at the behest of the respondent was not challenged. The respondent took a decision that she would not be allowed to do part of her work from home and struck to it notwithstanding decisions it reached with the occupational therapist. The applicant proved that the respondent discriminated against her based on her disability. But for her disability the applicant would have continued working for the respondent and earning an income. Her evidence that she was a hard working dedicated employee who loved her job was not challenged. The applicant was squeezed out of her job by the respondent when it threatened to reduce her salary by making deductions for each hour she was not at work forcing her to access her permanent disability benefit. The respondent's argument that it accommodated the applicant by offering to pay her for the hours she was able to work at the workplace is untenable. It defeats the purpose of accommodating employees with disabilities which is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job. No valid reasons were given for not accommodating the applicant by allowing her to do part of her work from home. In September 2012 when the applicant was informed that deductions would be made from her salary for each hour she was not at work the applicant was receiving her 2009 salary. Owing to her disability she had to employ 2 people to assist her. She could not take care of herself and needed hours to prepare for going to work. The respondent did not justify its conduct of discriminating against the applicant. Her discrimination was therefore unfair.

[28] The applicant sought the maximum compensation. I am satisfied that the applicant justified the amount of the compensation as the applicant had no reason to discriminate against her and force her out of her gainful employment after enjoying the benefit of her long service. The applicant sought damages. She, however, led no evidence to support her claim for damages. The applicant sought a costs order against the respondent. Both the law and fairness justify the granting of the order as the applicant should not be out of pocket for seeking relief for the violation of her rights.

[29] In the premises, the following order is made:

Order:

1. The respondent discriminated against the applicant on the basis of her disability.
2. The respondent is ordered to pay the applicant compensation equivalent to twenty four months remuneration (R495 212.36) per annum multiplied by two equalling R990 426.72 plus the remuneration increases granted by the respondent in April 2010, 2011 and 2012 compounded multiplied by 24.
3. The respondent to pay the applicant's costs

Z. Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr J. D Crawford of Crawford and Associates

For the Respondent: Mr N Mbuyisa of Puke Maserumule Attorneys