



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO: JS 894-12

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| (1) | <u>REPORTABLE: YES/NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES:</u>
<u>YES/NO</u> |
| (3) | <u>REVISED.</u> |

In the matter between –

KENNETH NYAKUNHUWA

Applicant

and

TREVOR FORD

First Respondent

CAFÉ' VIBE

Second Respondent

Date of judgment: 02 May 2013

Summary: Default judgment. Automatically unfair dismissal. Dismissal because employee citizen of Zimbabwe.

JUDGMENT

MOLAHLEHI J

- [1] This is an application for a default judgment in terms of which the applicant seeks an order among others for his reinstatement following his dismissal by the respondents.
- [2] The application for a default judgment is based on the averment by the applicant that despite proper service the respondents have failed and/or neglected to file the statement of opposition to the claim against them within the prescribed legal time limits.
- [3] The applicant is a Zimbabwean who has been resident in South Africa since 2000. During 2010 the applicant entered into a written contract of employment with the respondent in terms of which he was employed as a *sous-chef*.
- [4] According to the applicant he was dismissed by the first respondent on 22 June 2012. The reason for the dismissal given by the first respondent was that the applicant "must go and get nationalised." The first respondent further issued the applicant with a copy of the letter which was addressed in the second respondent informing it that the applicant was a foreign citizen. The applicant was after receipt of the letter and after he enquired as to whether he should report for work the following day, escorted off the premises by the security guards.
- [5] The applicant further states that amongst other things the respondents knew that he was a Zimbabwean citizen at the time of concluding the employment contract and that he had documentation supporting his lawful stay in South Africa.
- [6] The applicant contends that the sole reason for his dismissal was because of his status as a foreign citizen of Zimbabwe. The applicant further contends that the reason for his dismissal amounts to discrimination based on arbitrary

grounds and was thus in breach of the provisions of section 187(1)(f) of the Labour Relations Act 66 of 1995. Section 187 (1) (f) of the Labour Relations Act provides:

“A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 54⁹ or, if the reason for the dismissal is- that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”.

[7] In WORKPLACE LAW¹ the onus of proof in dismissal proceedings was summarised as follows:

“The onus is on the employees to prove that they were in fact dismissed, and on the employer to show that the dismissal was fair. Proof that a dismissal took place requires employees to prove on a balance of probabilities that they were employees as defined at the time of the termination of employment relationship. Proof that the dismissal was fair requires the employer to prove on balance of probabilities that the employee in fact committed misconduct, or was incapacitated to the degree alleged, as the case may be. The employer must also prove on a balance of probabilities that it complied with the procedural requirements of the type of dismissal concerned.

[8] In the absence of any evidence contradicting the version of the applicant I have no reason to doubt its truthfulness. Accordingly the applicant has made out a case for a default judgment including a case that his dismissal was automatically unfair as it was based on a prohibited ground of his nationality.

¹ Workplace Law by John Grogan 9th Edition at page 123 para 5

The order

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

1. The dismissal of the applicant was automatically unfair.
2. The respondents are ordered to reinstate the applicant retrospective to the date of his dismissal on the same terms and conditions which prevailed at the time of his dismissal and without loss of benefits.
3. The respondents are to provide the applicant with a written apology in which the respondents records and confirm that the applicant has no disciplinary infraction on his employment record and that he was not dismissed for criminal activity.

E MOLAHLEHI
JUDGE OF THE LABOUR
COURT OF SOUTH AFRICA

Appearances:

Matter considered in Chambers