



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Not reportable

CASE NO JS 532/13

In the matter between:

LOU-ANNDREE JOHN

Applicant

and

AFROX OXYGEN LIMITED

Respondent

Application heard: 12 June 2014

Judgment delivered: 3 July 2014

JUDGMENT

VAN NIEKERK J

- [1] This is an interlocutory application in which the applicant seeks to strike out a portion of the respondent's statement filed in response to her statement of claim, in which she contends that she was dismissed for a reason that is automatically unfair.

- [2] The clause that the applicant seeks to have struck out reads as follows:

'22.3 Applicant was consulted and presented with a termination proposal before Respondent could terminate her employment. One of the terms of the proposal was that Respondent would pay an equivalence of three months' salary to the Applicant. Applicant rejected the particular proposal and demanded to be paid an equivalence of 24 months' salary, which she later reduced to 12 months at the meeting with Mr. Kimber and Mrs Makwela. Respondent increased the offer to a maximum of an equivalence of 6 months' salary. Applicant rejected the second offer.

This is a response to the following averment in the statement of claim:

'18. On 19 March 2013 the applicant was summarily dismissed by the respondent...

18.3 without prior consultation.'

- [3] The applicant contends that the contents of clause 22.3 of the statement of response ought to be struck out on the basis that they disclose the content of settlement negotiations which by their nature are privileged.
- [4] The applicable rule can be simply stated – statements made, either expressly or impliedly, without prejudice in the course of bona fide negotiations for the settlement of a dispute may not be disclosed in evidence unless both parties consent (see Zeffertt and Paizes *The South African Law of Evidence* (2nd ed.) at 700. It is well-established that the words 'without prejudice' hold no particular magic; what matters is whether the statement forms part of genuine negotiations for the compromise of a dispute (Zeffertt and Paizes (*supra*) at 703).
- [5] In the present instance, it is not disputed that on 14 March 2013, the respondent addressed a letter to the applicant proposing a basis on which the applicant's employment would terminate, by mutual consent. This letter, and the terms of the proposal, are annexed to the statement of claim. What transpired afterward

appears from the respective statements to have been an engagement between the applicant and a Mr Kimber and Mrs Makwela at which various counter-proposals were made. This is what appears to be captured in the first (unnumbered) paragraph contained in clause 22.3 of the respondent's statement. What follows, in the second and again unnumbered paragraph of clause 22.3 is a reference to later correspondence conducted between the parties' respective attorneys at which during which further proposals were made and responded to. Indeed, copies of letters from the applicant's attorney to the respondent's attorney on 24 April 2014 specifically marked 'without prejudice' and a response, dated 26 April 2013 in which a counter-proposal is made, is attached to the statement of defence.

- [6] In my view, there is a clear distinction to be drawn between the first and second paragraphs of clause 22.3. The first directly addresses the averment that the applicant's termination of employment had been effected without any consultation, and suggests that prior to the termination of the applicant's employment and prior to any dispute between the parties, an attempt was made to secure a termination by mutual consent. This attempt was initiated by the respondent's proposal, to which the applicant referred in her statement of claim, and to which she responded prior to the termination of her employment. These were not proposals made in the context of any negotiation to settle a dispute between the parties; rather, they were negotiations on the terms of a mutually agreed separation.
- [7] The second paragraph concerns events that occurred subsequent to the termination of employment and once both parties had instructed attorneys. The content of the correspondence referred to and annexed to the statement of defence clearly reflects genuine negotiations in an effort to settle the dispute between the parties. In respect of this averment, the applicant's submissions stand to be upheld and it follows that the relevant portion of clause 22.3 ought to be struck out.

I make the following order:

1. The second paragraph in clause 22.3 of the respondent's statement of defence, commencing with the words "Applicant later persisted with the demand for ..." is struck out.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Representation

For the applicant: Adv I Posthumus, instructed by Senekal Simmons Inc

For the respondent: Mr J Baloyi, Baloyi Attorneys