



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Not of interest to other judges

Case no: JS 68/10

In the matter between:

KARIN ELISMA VAN WYK

Applicant

and

**AE & E UNDERWRITING MANAGERS
(PTY) LIMITED**

Respondent

Heard: 2 & 3 November 2017

Delivered: 22 November 2017

Summary: Automatically unfair dismissal relating to pregnancy – onus – factual dispute whether applicant was dismissed and if so the reason for the dismissal – applicant failed to show a dismissal – application dismissed

JUDGMENT

COETZEE AJ

Introduction

- [1] The respondent appointed the applicant as Administration/Processing Assistant in terms of a written agreement dated 1 March 2009. The applicant is a major unemployed female.
- [2] The respondent is AC & E Underwriting Managers (Pty) Ltd and conducted business *inter alia*, in underwriting special engineering business and dealing in professional indemnity insurance.
- [3] The applicant left the premises of the respondent on 4 December 2010. It is in dispute whether the applicant deserted or whether the respondent dismissed the applicant. The respondent further disputed that if it were to be held that the respondent dismissed the applicant that such dismissal was related to the pregnancy of the applicant as alleged by the applicant.
- [4] It was common cause between the parties that the applicant had to establish the fact of a dismissal and the reason for such dismissal whereupon the respondent had to show that the dismissal, if any, was for a fair reason.
- [5] The applicant claimed payment of compensation equal to 24 months' remuneration amounting to R180,000.00 and payment of two weeks' notice in an amount of R 3461.52.
- [6] The applicant testified to the events of 4 December 2010. Anne-Marie Fourie testified on behalf of the respondent. So did Ms Cheryl Beverley Grobbelaar ("Grobbelaar"). The applicant testified in support of her case.

The disputes arising from the pleadings

- [7] The parties exchanged pleadings and concluded a pre-trial meeting followed by a minute of the meeting.
- [8] The applicant approached this Court for relief based on an alleged automatically unfair dismissal by reason of her pregnancy. There is no alternative claim for compensation in respect of the alleged unfair dismissal.
- [9] The respondent placed in dispute the allegation that the respondent dismissed the applicant. The respondent further contended that even if there were to be a dismissal, that a dismissal would have been related to the applicant's pregnancy.
- [10] The facts as to what exactly occurred on 4 December 2010 are in dispute.

The facts

- [11] The applicant first met Anne-Marie Fourie in a different capacity. The applicant, for reward, conveyed Anne-Marie Fourie's child to and from school.
- [12] The applicant was looking for a more permanent income and asked Anne-Marie Fourie for a job. The applicant was offered a position with the respondent which position she accepted. She continued with the arrangement to transport Anne-Marie Fourie's child to and from school for which Anne-Marie Fourie separately remunerated the applicant. According to the applicant she traded her lunchtime for this duty.
- [13] The applicant was also responsible for office and shopping and attended to various personal matters for Anne-Marie Fourie.

- [14] According to Anne-Marie Fourie she tasked the applicant with administrative duties, supporting credit control and mainly attending to reception duties.
- [15] The applicant fell pregnant in July 2009 and informed Anne-Marie Fourie of her pregnancy on 30 September 2009.
- [16] Anne-Marie Fourie from time to time enquired as to the state of the applicant's pregnancy with a view to arrange a substitute for her during her maternity leave.
- [17] The applicant admitted that Anne-Marie Fourie had said that the applicant would be welcomed back to the office after her maternity leave.
- [18] The applicant testified that she was afraid of Anne-Marie Fourie. She further said that Anne-Marie Fourie from time to time threatened to dismiss and replace her as she was a low wage earner. Anne-Marie Fourie denied this.
- [19] The above threats occurred prior to her notifying Anne-Marie Fourie of her pregnancy. The threats and the treatment at the hands of Anne-Marie Fourie intensified after she had told Anne-Marie Fourie of her pregnancy. Anne-Marie Fourie denied this.
- [20] It is common cause between the parties that on 4 December 2009 a conversation took place between the applicant and Anne-Marie Fourie in the latter's office. It is common cause that during this discussion the following occurred:
- [20.1] The applicant was counselled regarding smoke breaks;
- [20.2] Anne-Marie Fourie counselled the applicant regarding her dress code and indicated that the applicant should not wear jeans to work;

- [20.3] The applicant requested from Anne-Marie Fourie to provide her concerns in writing and failing that to issue her with a written warning or final written warning which she would take to the Commission for Conciliation, Mediation and Arbitration (CCMA);
- [20.4] The applicant became agitated and raised her voice;
- [20.5] The applicant left Anne-Marie Fourie's office in distress, angry and crying;
- [20.6] The applicant immediately packed up all her belongings in a distressed state and collected from the kitchen her belongings;
- [20.7] Anne-Marie Fourie demanded the applicant's access card and office key and the applicant complied with the demand;
- [20.8] Anne-Marie Fourie took from the applicant and office pad.
- [21] The parties differ on whether Anne-Marie Fourie first asked for the office keys and access card or whether she did so once the applicant started packing her belongings to leave the office.
- [22] The applicant testified that two of the respondent's employees informed her that Anne-Marie Fourie had a problem with the applicant's pregnancy. The applicant did not call these two witnesses to testify and also did not testify on behalf of the respondent.
- [23] The applicant also relies upon her perception that Anne-Marie Fourie increased her unacceptable behaviour towards her once the applicant had informed her of her pregnancy. The only other reason why the applicant contended that the alleged dismissal related to her pregnancy was that the pair of jeans that she wore on 4 December 2009 were designed as a maternity wear.

- [24] The applicant conceded that at no time did Anne-Marie Fourie personally indicate that she had a problem with the applicant's pregnancy or the fact that she had to go on maternity leave in a few months.
- [25] The applicant relies upon the conduct of Anne-Marie Fourie to prove her dismissal. The applicant conceded that at no time did Anne-Marie Fourie tell her that she had been dismissed.
- [26] According to the testimony of Anne-Marie Fourie, she had counselled, on an informal basis, the applicant about wearing jeans to the office. Because the applicant did not stop doing so she decided to have a more formal discussion to bring home the importance of wearing proper clothing in the corporate environment. The applicant disputed this.
- [27] The applicant conceded that in a telephone discussion between Grobbelaar and the herself after she had left the offices, Grobbelaar advised her that she had not been dismissed.
- [28] The applicant admitted that after leaving the respondent's offices she went to the offices of PCBS and badmouthed Anne-Marie Fourie.
- [29] The applicant, later during the day on 4 December 2009 sent an email to Anne-Marie Fourie in which she enquired as to what her position with the respondent was. She went on to say that she was under the impression that Anne-Marie Fourie had terminated her services because she phoned security to remove her and took away her access card and office keys and told her not to enter the building. She concluded the email by saying that unless she heard from Anne-Marie Fourie regarding her future at the respondent by 7 December 2009 she would report for duty because she had not received any formal notice regarding her position.
- [30] She stated unequivocally that had she not received any reply from Anne-Marie Fourie she would have reported for duty on Monday, 7 December 2009.

[31] Anne-Marie Fourie replied with a fairly long email also on 5 December 2009. The more relevant part relied upon by the applicant is the following:

"I trust that you understand that it is now impossible for me to allow you access to the clients of AC & E or to the office environment as you have already tried to damage the company by your actions are not broken your position of trust in the company (sic). I also strongly suggest you do go and read the email you have sent me again and to ensure that all your allegations are correct as I will take legal action on all written and verbal allegations that is not true and defamatory in nature."

[32] The respondent issued a notice to the applicant on 7 December 2009. The notice advised the applicant of a pending disciplinary enquiry into a number of aspects. It further advised the applicant that the applicant was suspended pending the disciplinary enquiry. The suspension was with full benefits.

[33] The applicant did not attend the disciplinary enquiry. The enquiry was then postponed and the applicant did not attend the enquiry of the postponed date.

[34] The applicant obtained legal advice from 4 December 2009 onwards from a senior advocate, the CCMA and a Labour consultant. Nonetheless she remained uncertain as to whether the respondent terminated her services.

Analysis of the facts

[35] There is no reason to find that the evidence of any of the witnesses has been fabricated. The events occurred almost 8 years ago. Memories fade. The exact sequence of events of the meeting of 4 December 2009 will remain shrouded in doubt.

[36] The respondent's conduct after 4 December 2009 is consistent with its position that the respondent did not dismiss the applicant.

- [37] On the other hand, the applicant at least on 4 December 2009 when she wrote the email to Anne-Marie Fourie, was in doubt as to her status. Subjectively she believed that she could report for duty on Monday, 7 December 2009. The only reason why she would not report for duty would be if the respondent before 7 December 2009 informed her not to come to work.
- [38] It is probable that when the applicant received from Anne-Marie Fourie the reply on 5 December 2009, she interpreted that part which said that it was impossible for the respondent to allow her access to its clients or the office environment as confirmation that she had been dismissed.
- [39] Read in context, all that the respondent said was that having regard to the applicant's visit to the respondent's customer and badmouthing Anne-Marie Fourie, the respondent had to protect its business in this way.
- [40] It is for the applicant to persuade the Court that the respondent dismissed her. It is not for the respondent to prove that the applicant absconded.
- [41] Having regard to the uncertainty as to the exact sequence of events on 4 December 2009, the applicant has not discharged the onus to show that the respondent dismissed her. This is amplified by the applicant's subjective belief on 4 December 2009 when writing the email that unless otherwise informed, she would attend the office on Monday, 7 December 2009 to continue with her duties.
- [42] From the above, the Court has not been presented with evidence to support the applicant's claim that she was dismissed by the respondent. It follows that the applicant's claim of an automatically unfair dismissal should fail.

[43] The respondent did not ask for a cost order as the applicant was represented pro bono. Having regard to all the relevant factors, it is appropriate that I do not make a cost order.

[44] I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate J D Napu

Instructed by: Wits Law Clinic

For the Respondent: JD Crawford of Crawford & Associates
Attorneys

LABOUR COURT