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**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JS 778/15

In the matter between:

**S N**

**Applicant**

and

**SKY SERVICES (PTY) LTD**

**Respondent**

**Heard: 28 August 2017 to 30 August 2017**

**Delivered: 21 August 2018**

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**JUDGMENT**

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**MAHOSI J**

Introduction

[1] The applicant seeks an order to the effect that his dismissal be declared automatically unfair on account of discrimination.

- [2] This matter was heard from the 28<sup>th</sup> of August 2017 until the 30<sup>th</sup> of August 2017. The parties had until 8 September 2017 to file the heads of argument, however, the applicant failed to meet the deadline for the submission of the heads of argument as he only filed them on 22 September 2017.

### Background facts

- [3] The salient feature of this matter may be summed thus. The respondent employed the applicant as a picker/packer in 2009. The applicant's job was highly physical in that it involved operating a forklift to load and offload cargo from trucks, manually packing and unpacking pallets of perishable cargo and loading and offloading cargo into cold rooms. He was further required to do housekeeping of the warehouse and cold rooms.
- [4] It is common cause that the applicant was absent from work during 2014 and 2015 because of ill health. Around March and April 2015, the respondent sent the applicant for medical assessments. Following a final medical assessment by HSP Group (Pty) Ltd, the applicant was issued with the examination results dated 19 June 2015 in terms of which he was declared medically unfit.
- [5] On 27 August 2015, the applicant was invited to a meeting where he was informed of his dismissal. The applicant alleges that the reason for his dismissal was that he was HIV positive. Dissatisfied with dismissal, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was conciliated unsuccessfully and a certificate of outcome, classifying the dispute as unfair discrimination, was issued by the conciliating commissioner. This prompted the applicant to refer the current dispute.

### Issues for determination

- [6] The main issues for determination as *per* the parties' pre-trial minutes are as follows:
- '5.1 Whether or not the Court has the necessary jurisdiction to determine the dispute referred;

- 5.2 If the Court determines that it has the necessary jurisdiction to determine the dispute, whether or not the Applicant's dismissal was automatically unfair;
- 5.3 What the appropriate relief is in the circumstances, should the Court find that the applicant's dismissal was automatically procedurally and/or substantively unfair.'

### Preliminary issue

- [7] As aforesaid, in the pre-trial minute and at the beginning of the proceedings, the respondent raised a preliminary question, which the court had to consider. The preliminary point raised by the respondent was in relation to the lack of jurisdiction of this Court. The respondent contended that the applicant was dismissed for incapacity and not because of his HIV status, which deprived this Court of jurisdiction to determine the dispute.
- [8] The court ruled that because the pre-trial conference minutes did not disclose a set of facts that would have enabled it to determine whether an automatically unfair dismissal took place, it decided to hear the merits of the case. It relied on the unreported Labour Appeal Court (LAC) judgment of *Booyesen v NUMSA*<sup>1</sup> where the Court stated as follows:

'Because the existence of an alleged automatically unfair dismissal is a jurisdictional prerequisite to the Labour Court hearing a trial, it must logically follow that it is incumbent on a court to enquire into whether such a case has indeed been articulated for its adjudication, whether that question is raised by the litigants or not. This enquiry is not to be confused with an enquiry into the contested merits of the allegations and counter-allegations, which is the purpose of the trial itself.

If a proper interpretation of the pleadings and any common cause facts put before the court demonstrates the absence of a set of circumstances that can support a conclusion that a dismissal took place that was automatically unfair then the court lacks jurisdiction and ought to refuse to hear the matter.'

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<sup>1</sup> JA13/13 delivered on 13 May 2014

- [9] Having made a ruling that the merits of the matter be heard in order to determine whether an automatically unfair dismissal occurred, parties led evidence through their respective witnesses to which I now turn.

### Evidence of parties

- [10] Five witnesses led evidence for the respondent and the applicant testified in support of his case. I should mention that the testimonies of the respective parties would be limited to facts relevant to the automatically unfair dismissal claim.

### *Respondent's witnesses*

Mr Bernd Julicher

- [11] Mr Bernd Julicher testified that he is the respondent's managing director and that whilst he was not involved in the day-to-day of the respondent's warehouse, he was aware of the applicant's regular absenteeism during 2014 to 2015. The applicant's regular absenteeism was discussed in the management meetings and was also recorded in the respondent's Biometric Scanning system that monitored employee attendance records.
- [12] He further testified that he was aware that the applicant's managers were concerned about his health and that they had tried to assist him by arranging and booking his medical examinations, at the respondent's expense. However, that the applicant had refused to attend these appointments.
- [13] Furthermore, he stated that he did not know the applicant's HIV status and neither did Mr de Klerk nor Mr van den Berg mention it to him at any stage. At no stage during his employment did the applicant ever disclose his HIV status and none of the medical records indicated the reason for his ill health.
- [14] Mr Julicher testified that he was advised that the applicant had collapsed at work, though he could not recall exactly when the incident took place. The respondent subsequently placed the applicant on light duties whenever he fell ill. This included using him as an assistant truck driver even though there was no permanent position of this nature.

- [15] Mr Julicher further testified that whilst the applicant had initially refused to medical assistance, he (the applicant) eventually advised him in June 2015 that he had become too ill to continue working. He, in turn, advised the applicant that it would be necessary for the respondent to follow a proper process. It was in that regard that the applicant agreed to go for a full medical examination at respondent's expense.
- [16] Under cross-examination, Mr Julicher conceded that the applicant had not stated that he wanted to resign nor that the respondent forced him to resign. Mr Julicher thereafter involved Paul Rautenbach, the respondent's Human Resource Manager, and requested that he set up all the necessary medical appointments.
- [17] The applicant was attended to at the HSP Group on the 19th of June 2015 and went for further medical examinations on the 19th of June 2015. The medical results were received in late August and they indicated that the applicant was unfit for duty as a packer.
- [18] A meeting was scheduled around the 27 or 28 August with Mr Julicher, Mr Rautenbach, Mr van den Berg, Mr de Klerk and the applicant to discuss the results. A colleague, Pearl Sigasa, was called to assist the applicant and interpret for him. Mr Julicher further testified that the managers were called to the meeting because they had been involved with the applicant over the years.
- [19] At the meeting, the applicant was advised that he was declared unfit to work as a packer; that there were no alternative positions for him because the "assistant driver" position was not a permanent position. He was further advised that his services would, therefore, be terminated. The applicant was requested to sign relevant documentation and to take his UIF documents, which he refused to do.
- [20] Mr Julicher testified that the applicant referred a dismissal dispute relating to incapacity to the CCMA. However, at the CCMA, the applicant stated that he had been dismissed due to his HIV status. Mr Julicher indicated that that was the first time he had heard that the applicant was HIV positive.

Andre De Klerk

- [21] Mr de Klerk, testified that he was the respondent's Warehouse Manager and that he was the applicant's direct line manager. He confirmed Mr Julicher's evidence that the applicant was ill during the course of 2014 to 2015, usually taking off a substantial amount of time and on occasion not informing management.
- [22] He testified that the applicant's absence had a detrimental effect on the team and the respondent occasionally had to employ casuals to fill in for him. Further that the respondent had offered to assist the applicant by providing medical assistance at its own expense, which assistance he refused.
- [23] Mr de Klerk denied the allegation that the respondent wanted to do so in order to establish the applicant's HIV status. Neither did the respondent force the applicant to go for medical examination. He also testified that he first heard of the applicant's HIV status when the matter proceeded to this Court.
- [24] The applicant had collapsed at work sometime during December 2014, a peak period in the respondent's line of business. As a result, the applicant was admitted at the hospital and was given additional 10 days leave earlier than anticipated. He only returned to work on 4 January 2015. He remained ill in 2015 and had been placed on light duties.
- [25] Mr De Klerk further testified that the applicant approached Mr Julicher in June 2015 as he decided that he wanted to stop working due to his ill health. The applicant thereafter agreed to go for medical examinations and subsequently declared unfit to continue with his work. A meeting was held with the applicant in August 2015 where he was advised that he was not fit for duty, as per the medical results.
- [26] Mr De Klerk testified that it would have been a risk to the respondent to allow the applicant back at work, particularly as he drove the forklift and could have injured himself or others. He was also not aware of the applicant's HIV status

and that was not mentioned at the August 2015 meeting.

- [27] He testified that although the applicant initially refused to take his UIF documents, Mr de Klerk later contacted him and told him to collect them. The respondent arranged for their driver to take the applicant to the Department of Labour to assist him with his UIF claim. The respondent generally did this for its personnel to help them with these matters.

Paul Rautenbach

- [28] Paul Rautenbach, the respondent's Human Resource Manager, confirmed evidence led by both Mr Julicher and Mr de Klerk. He denied being the person who had approached the applicant in March/April 2015 regarding doctors' appointments. He testified that the applicant had not laid any complaint against him about discrimination or anyone in management, despite the respondent having a Grievance Procedure.
- [29] He further testified that he was not aware of the applicant's HIV status at that stage. He advised the applicant that he could not be allowed him to continue working once he had been declared medically unfit as this would be a risk to both him and the respondent. Mr Rautenbach confirmed that there was no discussion, at the meeting, about blood spilling on products. He denied that he had said that even President Zuma would not be able to overturn the certificate of fitness and therefore the respondent had to comply with the doctor's findings.
- [30] He further stated that there were no other suitable positions for the applicant as he had already been on light duties. Mr Rautenbach denied that the applicant had begged him for an alternative job. Further that Pearl Sigasa had been called to the meeting to assist the applicant and interpret for him. He confirmed that the parties at the meeting had a good relationship with each other and the purpose of having the management there was due to them all having been involved throughout his ill health.
- [31] In relation to the procedure followed in dismissing the applicant, he testified that the meeting was not a formal disciplinary hearing where witnesses would

be present as the process was an incapacity process, not a disciplinary process.

- [32] He confirmed that the applicant refused to sign the termination letter documents and left the meeting without it. He denied that there was any intent to “trick” the applicant into signing any documents;
- [33] He also testified that the first time he became aware that the applicant was HIV positive was at the CCMA. Under cross-examination, it was put to Mr Rautenbach that the applicant suspected that Mr John Ramotsaetsi had told him about the applicant’s HIV status, an allegation that Mr Rautenbach denied.

#### Pearl Sigasa

- [34] Pearl Sigasa, the respondent’s Administrative Clerk, testified that the applicant was very ill during the years 2014 and 2015. She also confirmed that she had heard about the applicant’s collapse at work.
- [35] Further that she was a close friend of Mr. John Ramotsaetsi, but he had at no stage advised her of applicant’s HIV status. She, therefore, did not know the cause of applicant’s illness.
- [36] She was called to a meeting in August 2015 to assist the applicant with interpretation. The letter declaring him unfit for duty was read to him at the said meeting. There was no discussion about HIV or blood spilling on products at the meeting. She also confirmed that she was not called as a witness for the applicant. The applicant was given a copy of the documents, which he took with him. Further that applicant was advised to come to work to collect his UIF documents but he refused to do so.

#### Jaco Van Den Berg

- [37] Jaco van den Berg, the respondent’s Branch Manager, confirmed evidence led by Mr Julicher, Mr de Klerk, Mr Rautenbach and Ms Sigasa. In particular, that the applicant was ill and that he had initially refused to go to doctors. Further that the applicant was placed on light duties and that this happened

prior to the meeting in August 2015.

- [38] He denied all statements that were made in the applicant's pleadings regarding his knowledge of the applicant's HIV status and denied that Mr John Ramotsaetsi had approached him at any stage to discuss the applicant's HIV status and/or HIV medication. The meeting held in August 2015 was to discuss the applicant's medical fitness and the respondent offered to assist the applicant with UIF, an offer that the applicant refused. No mention was made of HIV or of contamination of fruit and vegetables at the said meeting.

*Applicant's testimony*

- [39] The applicant confirmed that his duties included all the duties listed in the Pre-trial Minute. However, at the trial, he added that he was an assistant driver on a regular basis.
- [40] He testified that he shared a locker with Mr John Ramotsaetsi and that he disclosed his HIV status to him. Further that none of the other employees knew of the applicant's HIV status.
- [41] The applicant stated that he initially refused medical assistance because his illness was his secret. He eventually changed his mind when Paul Rautenbach approached him and told him he would be given strong medication for his illness. The applicant admitted going to the HSP Group for testing.
- [43] He further testified that he was called to a meeting on 27 August 2015, where Mr Julicher, Mr Rautenbach, Mr de Klerk and Mr van den Berg were present. He was requested to sign documents but he refused and instead requested copies thereof. He was only given a copy of the medical report. He also asked that he be assigned lighter duties but Mr Paul Rautenbach told him that he would contaminate produce with his blood. Mr Rautenbach pressurised him to consult a doctor and that led him to suspect that Mr John Ramotsaetsi told him about his HIV status
- [43] He testified that he was dismissed on 27 August 2015 and not 31 August

2015 as stated by the respondent.

[44] The applicant stated that he is fit for work and that he seeks reinstatement.

#### Legal principles and Evaluation

[45] As indicated above, the applicant seeks relief arising from his alleged automatically unfair dismissal on the ground of his HIV status. In terms of section 187(1)(f) of the LRA, 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-

(f) 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.'

[46] The question is whether the applicant's dismissal was automatically unfair. If so, this Court has the jurisdiction to hear the matter and the next issue for determination will be the appropriate relief that should be granted. If the applicant was dismissed for incapacity, his dismissal dispute must be arbitrated by the CCMA in terms of section 191(5)(a)(i) of the LRA.

[47] It is common cause that the applicant was absent from work during 2014 and 2015 because of ill health. It was further common cause that the respondent subjected the applicant to a medical assessment and that following final medical examination by HSP Group (Pty) Limited, he was declared medically unfit to continue working. These factors must be considered against the applicant's claim that the main reason for his dismissal was because he was HIV positive.

[48] In *IMATU v City of Cape Town*,<sup>2</sup> the Court stated as follows;

'80. The approach to unfair discrimination to be followed by our courts has been spelt out in *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC). Although the *Harksen* decision concerned a claim under section 9 of the Constitution (the equality clause), there is no reason why the same or a similar approach should not be followed under the EEA.

81. The *Harksen* approach contains a specific methodology for determining discrimination cases. The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two staged analysis. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown. In the context of the EEA section 6(2)(b) also permits justification on the basis of an inherent requirement of a job, in which event the discrimination is deemed not to be unfair. The onus in this respect is also on the employer.'

[49] The question is whether the respondent discriminated against the applicant, and if so, whether it was based on his HIV status. For the applicant to

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<sup>2</sup> [2005] 11 BLLR 1084 (LC).

succeed in his claim, he has to show that the real reason for his discrimination was that he was HIV positive. The applicant's legal representative, Advocate Matome Sehunane, relied on *Kroukam v SA Airlink (Pty) Limited*<sup>3</sup> where the LAC dealt with the evidential burden in automatically unfair disputes and stated as follows:

'In my view, section 187 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 to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.'

[50] In *Wardlaw v Supreme Moulding (Pty) Limited*<sup>4</sup> the LAC stated as follows:

[23] The significance of sec 191(5)(a) and (b) seems to be this. What is contemplated by the scheme of the Act is that, if the employee has alleged a certain reason as the reason for dismissal and that reason is one that falls within sec 191(5)(b) and the Court does not at any stage think that that reason is not the reason for dismissal, the Court proceeds to adjudicate the dispute and delivers a judgement. Where as a reason for dismissal, the employee has alleged a reason that falls within sec 191(5)(b), the Court provisionally assumes jurisdiction but, if the Court later takes the view or it later becomes "**apparent**" to the court that the reason for dismissal is one that falls under sec 191(5)(a), it then declines jurisdiction and follows the sec 158(2)(a) or (b) route.

[24] In the light of the above it seems to us that the employee's allegation of the reason for dismissal as contemplated in sec 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to finally resolve the dispute on the merits. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that

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<sup>3</sup> (JA3/2003) [2005] ZALAC 5 (26 September 2005) at para 28.

<sup>4</sup> [2007] 6 BLLR 487 (LAC).

dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon it not later becoming “**apparent**” to the Court within the contemplation of sec 158(2) of the Act that the reason for the employee’s dismissal is one that falls within sec 191(5)(a) of the Act. We say it is provisional or conditional because if it later becomes “apparent” that the dispute is one that ought to have been referred to arbitration, the Court will decline jurisdiction and have the dispute referred to arbitration.

- [51] In the current case, the applicant’s case is that he was dismissed because he was HIV positive. His allegation was based on the assumption that his colleague, Mr John Ramotsalets, informed the respondent’s management of his HIV status. Although the applicant submitted proof that he was HIV positive, he could not show that the respondent was aware of his HIV status.
  
- [52] There is no indication on the pleadings or evidence that Mr John Ramotsalets informed any of the managers and colleagues that the applicant was HIV positive and most importantly that he was dismissed for being HIV positive. In his own words, the applicant testified that he initially refused medical assistance from the respondent because he viewed his illness as a private matter.
  
- [53] From the medical report the respondent relied on, it appears that the applicant was declared medically unfit to work. The applicant took issue that the said certificate was issued by a midwife and not Dr Stuart. But my view is that nothing turns on that. The applicant conceded that on 27 August 2015, he refused to sign the termination notification for incapacity due to ill-health. It is, therefore, apparent that the reason for the applicant’s dismissal is incapacity.
  
- [54] The applicant’s argument that he was dismissed without any formal hearing and/inquiry speaks to the merits of the matter which can be properly ventilated at arbitration. His dispute must be referred to the CCMA for arbitration in terms of section 158(2)(a) of the LRA, where he will have a full and fair hearing. At the arbitration, both parties will be afforded an opportunity to lead

evidence for the arbitrator to determine whether the applicant's dismissal was fair or not.

### Costs

[55] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

### Order

[56] Accordingly I make the following order:

56.1 The proceedings are stayed in terms of section 158(2)(a) of the Labour Relations Act and the dispute is referred to arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration.

57.2 There is no order as to costs.

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Mahosi J

Judge of the Labour Court

Appearances:

For the applicant: Adv M. Sehunane

Instructed by Sehunane Attorneys

For respondent: Adv M. Pye

Instructed by Pearson Attorneys