



- (1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS 419/22

In the matter between:

MOHAMED SALLY

Applicant

and

CPES (PTY) LTD T/A VIVO SA

Respondent

Heard: 10 March 2025

This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Labour Court website, and released to SAFLII. The date and time for hand-down is deemed to be on

30 January 2026

JUDGMENT

MAHALELO, AJ

Introduction

- [1] This matter concerns the intersection of religious freedom, the right to dignity, and the employer's duty to reasonably accommodate in the workplace.

- [2] The applicant, Mr Mohamed Sally, a practising Muslim, resigned from his employment with the respondent after only five days. He claims that his resignation constituted a constructive dismissal that was automatically unfair on the grounds of religious discrimination, contrary to Sections 186(1)(e) and 187(1)(f) of the Labour Relations Act¹ (the LRA). He also claims unfair discrimination on the grounds of religion in terms of Section 6 of the Employment Equity Act² (the EEA).
- [3] The respondent denies that there was any refusal to accommodate the applicant. It avers that the applicant resigned precipitately within a day of first raising the issue, failed to utilise internal remedies, and that unpaid leave (as an interim accommodation) was proposed and/or available to enable the applicant to attend at Jumu'ah.
- [4] The applicant testified and called one witness, Mufti Ahmed Laly, a Jurisconsult (a person who is skilled and qualified in the issuance of Islamic opinions) to testify in support of his case. The respondent called two witnesses, Ms Cathrine Shi, an HR and Admin Director and Mr Duan Owen, a Head of Department in the customer service department, to testify in rebuttal of the applicant's claim.

Issues for Determination

- [5] This Court is called upon to determine:

- 5.1 Constructive dismissal: Whether the applicant has proven that he terminated the employment because the employer made continued employment intolerable, as contemplated by s 186(1)(e) LRA. The onus lies on the applicant.
- 5.2 Automatically unfair dismissal (religion) (if dismissal is established): Whether the reason for the constructive dismissal was unfair discrimination on a listed ground (religion/conscience) in terms of s 187(1)(f) LRA.

¹ Act 66 of 1995, as amended.

² Act 55 of 1998.

- 5.3 EEA claim: Even absent dismissal, whether the applicant established unfair discrimination under s 6(1) EEA and, if so, the appropriate relief under s 50(1).

The Evidentiary Synopsis

Common Cause Facts

- [5] It is common cause that the applicant was offered the position of Spare Part Manager by the respondent on 2 March 2022, with a commencement date of 7 March 2022. His gross monthly salary was R 39,000.00. Prior to his employment with the respondent, he was unemployed for two years. He reported to his line manager, Mr Owen Duan (Head of Department).
- [6] It is also common cause that the applicant raised his religious accommodation request on 10 March 2022 and that he sent a resignation email at about 08h00 on 11 March 2022, and HR convened a meeting the same morning to discuss the resignation and potential accommodation.
- [7] It is further common cause that attendance at Jumu'ah on Fridays from 12h30 to 13h30 is a sincere and important obligation within the applicant's faith.

The Applicant's Evidence

- [8] On Thursday, 10 March 2022, the applicant informed Mr Duan that he had a mandatory religious obligation to attend the Jumu'ah (Friday congregational prayer) the next day. He requested 30 to 45 minutes to attend the mosque. To accommodate this, he proposed three options to Mr Duan:
- 8.1. Move his one-hour lunch break from 12:00-13:00 to 12:30-13:30.
 - 8.2. Allow him to leave and return quickly for prayer.
 - 8.3. Take the time as unpaid leave.
- [9] According to the applicant, Mr Duan refused all proposals and denied permission to attend the prayers. The applicant then escalated the matter to HR Director Ms Catherine Shi later that same day (10 March). He reiterated

his request and proposals. Ms Shi indicated that she would speak to Mr Duan and get back to him the next morning.

[10] On the morning of Friday, 11 March, the applicant met with Ms Shi seeking an answer. He testified that Ms Shi informed him that Mr Duan would not change his mind, and this was Vivo's final decision.

[11] Feeling distressed and forced to choose between his job and his faith, the applicant decided to resign. At approximately 08h00, he sent a resignation email to Ms Shi, stating that his reason was the denial of his request for prayer time accommodation.

[12] Following the email, a meeting was convened with him, Ms Shi, and Mr Duan. He repeated his proposals (move lunch or unpaid leave). Mr Duan again refused, and no accommodation was offered. He then finalised his resignation.

[13] The applicant referred an unfair dismissal dispute to the CCMA, alleging an automatically unfair constructive dismissal based on religious discrimination (Sections 186(1)(e) and 187(1)(f) of the LRA). The referral was filed 32 days late. He applied for condonation, citing his lack of legal knowledge. The CCMA Commissioner granted condonation on 13 June 2022. Conciliation on 1 July 2022 failed to resolve the dispute. He then referred the matter to the Labour Court, pursuing two primary claims:

13.1. Automatically Unfair Constructive Dismissal under the LRA.

13.2. Unfair Discrimination on the grounds of religion under the EEA.

[14] The applicant seeks relief, including reinstatement or 24 months' compensation for the dismissal, and further compensation/damages for the discrimination.

[15] The applicant also led expert evidence of Mufti Ahmed Laly, who confirmed the centrality and fixed timing of Jumu'ah and its congregational character, and explained why moving the prayer time is not feasible whereas adjusting

lunch or permitting brief absence is a workable accommodation which is commonly practiced in workplaces.

- [16] The applicant anchors his case in authorities emphasising reasonable accommodation of sincerely held religious practice: *MEC for Education, KZN v Pillay*³; *TFD Network Africa v Faris*⁴; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others*⁵; *SACTWU and Others v Berg River Textiles, A division of Seardel Group Trading (Pty) Ltd*⁶; and the Equality Act principles. He invokes *SARFU*⁷ to argue that aspects of his evidence were left unchallenged and should be accepted. Further that the respondent failed to put a version to his witness resulting in the witness not being given an opportunity for explanation. He also cites *Strategic Liquor Services v Mvumbi NO and Others*⁸ on the objective test for constructive dismissal.

Respondent's Evidence

- [17] The respondent denied that it refused to accommodate the applicant for religious reasons. It says that the applicant raised the issue of attending mosque late on 10 March, and he was referred to the respondent's time and attendance policy. He was informed that he could take unpaid leave (as he had not yet accrued annual leave) to attend Jumu'ah, pending further exploration of options.
- [18] The applicant tendered his resignation in the morning of 11 March. After receiving the resignation at 08h00 on 11 March, HR immediately convened a meeting (Ms Shi, Mr Duan, and HR assistant, Ms Vienna) to retain the applicant. HR says unpaid leave was tabled as the interim solution and that the parties reached agreement on this, but the applicant nevertheless

³ (2008) (1) SA 474 (CC)

⁴ [2018] ZALAC 30; [2019] 2 BLLR 127 (LAC).

⁵ [2013] ZASCA 189; [2014] 3 BLLR 207 (SCA).

⁶ [2011] ZALCCT 27; (2012) 33 ILJ 972 (LC).

⁷ *President of the Republic of South Africa and Others v South African Rugby Football Union And Others* [1999] ZACC 11, 2000 (1) SA 1, 1999 (10) BCLR 1059 (CC)

⁸ [2009] ZACC 17; (2009) 30 ILJ 1526 (CC).

persisted with resignation. HR even escalated to the CEO to persuade him to remain.

- [19] The respondent also challenges the timeline asserted by the applicant for an early morning discussion with HR on 11 March, attendance records place HR's clock in at 07h53, casting doubt on a prior 07h30 meeting and the assertion that "final refusal" had already been communicated before 08h00.

Legal Framework

- [20] *Constructive dismissal*: In order to succeed in a constructive dismissal claim (s 186(1)(e), the applicant must show that: he terminated the contract, continued employment had become intolerable, and the employer made it so. The test is objective, examining the cumulative effect of the employer's conduct, resignation must be a last resort.
- [21] *Reasonable accommodation and discrimination*: Where a listed ground (religion) is implicated, the employer bears a positive duty to take reasonable steps to accommodate unless this causes undue hardship or conflicts with an inherent requirement of the job (EEA s 6(2); LRA s 187(2)(a)). Cases like *TFD Network Africa v Faris*⁹, *Kievits Kroon v Mmoledi*¹⁰; *SACTWU v Berg River Textiles*¹¹ emphasise proportionality and practical solutions, discouraging rigid policies that marginalise sincere religious observance.
- [22] *Burden of proof*: The employee must first establish facts that give rise to a credible inference of discrimination; the employer must then prove that discrimination did not occur or was not unfair/otherwise justifiable¹². Under the LRA, if a constructive dismissal is proven and the reason is a listed ground, the dismissal is automatically unfair unless justified.
- [23] *Causation and remedies*: *Afrox*¹³ sets out a two-stage factual and legal causation analysis for "reason" in dismissal disputes; *ARB Electrical*¹⁴ and

⁹ [2018] ZALAC 30; [2019] 2 BLLR 127 (LAC).

¹⁰ [2013] ZASCA 189; [2014] 3 BLLR 207 (SCA).

¹¹ [2011] ZALCCT 27; (2012) 33 ILJ 972 (LC).

¹² Section 11 of EEA.

¹³ *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2012] ZALAC 2; (2012) 33 ILJ 1381 (LAC).

*BMW*¹⁵ guide overlap and quantum in LRA and EEA awards, cautioning against double recovery while ensuring just and equitable compensation for patrimonial and non-patrimonial loss.

Evaluation

Credibility Findings

- [24] The central factual dispute in the matter is binary and it is the following: did Vivo refuse any accommodation, or did it offer the unpaid leave accommodation (at least as an interim measure) and seek to engage further?
- [25] The applicant relied on *SARFU*¹⁶ to argue that aspects of his evidence were not put in cross-examination and are therefore unchallenged. Having reviewed the parties' summaries of evidence, I accept that the religious centrality of Jumu'ah and the applicant's sincerity were not challenged in any material way. However, the dispositive factual points, what was proposed, by whom, when, and whether an offer of unpaid leave was made were contested. There are internal contradictions within the respondent's case notably, between Ms Shi and Mr Duan concerning attendees and whether any "agreement" was reached. Those contradictions do not, however, inexorably establish the applicant's version. They must be weighed against the timeline and objective probabilities.
- [26] The timeline strongly matters for intolerability. The request was first raised by the applicant on 10 March, and he resigned at 08h00 on 11 March before the HR convened meeting could run its course. The respondent then immediately engaged and, on its version, put forward unpaid leave as the interim arrangement. Even accepting that the minutes are unsigned by the applicant, it is undisputed that HR called the meeting promptly and escalated the matter to the CEO to retain the applicant. These objective steps are inconsistent with a closed door or a pre-determined refusal to accommodate the applicant to attend the mosque.

¹⁴ *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* [2015] ZALAC 34; (2015) 36 ILJ 2989 (LAC).

¹⁵ *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and Another* [2020] ZALAC 22; [2020] 11 BLLR 1079 (LAC).

¹⁶ *Supra*

- [27] The attendance or clock in record placing HR's arrival at 07h53 on 11 March also undercuts the applicant's claim of a prior 07h30 exchange in which a final refusal was allegedly conveyed, moments before he sent the resignation at 08h00. The closeness of these times, while not conclusive, renders the applicant's sequence improbable.
- [28] Balanced against this are policy references that suggested rigidity. Ms Shi appears to have pointed the applicant to the Time and Attendance Policy and spoken in terms of "fairness" and uniformity (i.e., lunch adjustments "only for business engagements"). A rigid reliance on policy in the face of a religion based request would be problematic in terms of the judgment of *Faris*¹⁷ if persisted in. But the record shows that the respondent did convene an immediate engagement meeting after the resignation, and the respondent's consistent stance is that unpaid leave was (and is) the interim solution pending fuller discussion. On the probabilities I am not persuaded that the respondent closed the door to accommodation.

Constructive dismissal

- [29] The applicant bears the onus to prove that continued employment had become objectively intolerable due to the respondent's conduct and that resignation was the last resort.¹⁸ The respondent contended that the applicant failed to exhaust internal remedies or allow a reasonable period for accommodation efforts before resigning, and that a single disagreement or policy reference does not amount to intolerability caused by the employer.
- [30] The brief interval between the first request and resignation by the applicant (less than 24 hours), the immediate scheduling of a meeting, and the proposal (on the respondent's version) of unpaid leave as a workable short-term accommodation all weigh heavily against a finding that the respondent made continued employment intolerable for the applicant.

¹⁷ *Faris* [2018] ZALAC 30; [2019] 2 BLLR 127 (LAC).

¹⁸ *Solid Doors (Pty) Ltd v Theron NO and Others* [2004] ZALAC 14; (2004) 25 ILJ 2337 (LAC), *Jordaan v CCMA and Others* [2010] 12 BLLR 1235 (LAC)

- [31] I accept that a refusal to accommodate religious observance, particularly where little operational hardship would result, can render employment intolerable (see *Faris, Berg River*). But on these facts, the applicant did not afford the respondent even a minimal opportunity to implement a solution (including the very unpaid leave option he himself proposed). Nor did he invoke a grievance. Caution that constructive dismissal should not be found where internal mechanisms were reasonably available but not used unless such recourse would be objectively futile.
- [32] In circumstances where the employer promptly engaged, sought to retain the employee, and on the probabilities, did place unpaid leave on the table as an interim accommodation, the high threshold for intolerability is not met. The applicant has therefore failed to establish a constructive dismissal as contemplated by s 186(1)(e).

Automatically unfair dismissal (religion)

- [33] Given my conclusion above, it is unnecessary to determine automatic unfairness under s 187(1)(f). For completeness, however, I record that where an employer offers a reasonable interim accommodation (e.g., unpaid leave bridging the Jumu'ah period until annual leave accrues or schedules are re-worked), and invites further engagement, it becomes difficult to characterise the employer's conduct as unfair discrimination under the LRA rubric. That conclusion would of course depend on whether the accommodation was real and not illusory; but on this record, the probabilities point to ongoing engagement rather than a flat refusal to accommodate.

The EEA unfair-discrimination claim

- [34] The applicant also pleads a stand alone EEA claim. To succeed, he had to establish facts raising a credible inference of discrimination on the listed ground (religion), whereupon the onus shifts to the employer to show that discrimination did not occur or was not unfair/otherwise justifiable.
- [35] I accept (and the respondent effectively concedes) that Jumu'ah observance is a sincere religious obligation and that reasonable accommodation is

required. The question is whether the applicant has established on the facts that the respondent refused accommodation or otherwise penalised him for observing his religion.

[36] On the probabilities and for the reasons given under constructive dismissal, I find it more likely that the respondent did not refuse accommodation but sought to put unpaid leave in place immediately, with a view to exploring longer-term adjustments. The applicant's immediate resignation before any arrangement could take effect precludes a finding that the respondent applied a rigid policy to exclude or penalise Jumu'ah observance in practice. Put differently, the applicant has not discharged the initial evidentiary burden to show facts from which unfair discrimination can reasonably be inferred in the actual conduct of the respondent during the tiny window in question.

[37] The EEA claim, therefore fails on the facts. This is not to condone any rigid policy application going forward: employers are reminded that neutral rules (e.g., fixed lunch slots) may operate indirectly to marginalise religious adherents if applied inflexibly; reasonable accommodation, including minor schedule adjustments, unpaid leave, flex-time, or make-up time, is expected unless it entails undue hardship or conflicts with an inherent requirement. On this record, however, the respondent's conduct fell on the compliant side of that line because it engaged promptly and proposed a workable interim solution.

Costs

[38] This matter raised issues of principle concerning the interface between workplace scheduling and religious rights. In the exercise of the Court's discretion and the requirements of law and fairness, there will be no order as to costs.

[39] The following order is made:

Order

1. The applicant has not established a constructive dismissal as contemplated by s 186(1)(e) of the LRA.
2. The claim of automatically unfair dismissal under s 187(1)(f) is dismissed.
3. The claim of unfair discrimination under s 6 of the EEA is dismissed.
4. No order as to costs.

MB Mahalelo

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv M Moolla

Instructed by ARM Attorneys

For the Respondent:

Ms A Black

Instructed by GDPEO Organization