

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 1 SEPTEMBER 1999

CASE NO. J2653/98

In the matter between:

VAN DER WALT, P J

Applicant

and

BURGER SCHOLTZ

Respondent

J U D G M E N T

—
BRASSEY, AJ:

[1] The applicant in this matter was employed by the respondent firm in June or July 1997 as a cashier at a University tuckshop at a monthly wage of R790,00.

[2] It is common cause between the parties that the relationship that she had with the proprietors of the respondent, Mr and Mrs Scholtz, was a good one.

[3] Towards the end of 1997 she became engaged and took up residence with her fiancé, whose salary at the

time was about R1 200,00 per month. In February 1997 she discovered that she was pregnant. She was proud of the fact and she discussed it with Mrs Scholtz, who,

the applicant says, was pleased for her. Mrs Scholtz, who testified before me, confirmed that this was indeed her attitude.

[4] In the conversation the question arose, as to what would happen about the applicant's future employment. The applicant asked whether the employment would continue and, according to her, Mrs Scholtz said that they would have to see what happens.

[5] The applicant continued in employment with the respondent throughout the period until 26 June, when her employment terminated. The issue that I have to decide is whether she terminated the employment of her own free will or whether the respondent dismissed her. She says that she was dismissed whereas the respondent says that she resigned. If I find that she resigned, I must dismiss this application since the claim that she brings, which is based on an automatically unfair dismissal, will be without substance.

[6] According to the applicant she had a discussion in May with Mrs Scholtz. Mrs Scholtz herself was by no means clear about the contents of this discussion, but the applicant most certainly was. According to her she asked Mrs Scholtz what was to happen to her in the light of her pregnancy and Mrs Scholtz said that she

had discussed the matter with her husband and that the applicant should leave the employment as from 26 June 1997, that date being the close of the university term. When she heard the news, the applicant says, she consulted family members about the respondent's standpoint, but did nothing further concerning her dismissal.

[7] On 26 June she was handed her final pay cheque together with a covering note, written on a compliments slip by Mr Scholtz, to the following effect:

"Dankie vir al jou hulp en bydrae gelewer. Voorspoed met dit wat volg. Bye."

[8] While Mr Scholtz was giving her a lift home that evening, there was a discussion about her future, in

which it is common cause, Mr Scholtz invited her to continue to work for the respondent firm on a casual basis. The applicant, however, was going on holiday to the coast and it is common cause that she declined the offer.

[9] When she returned from the coast she referred the matter to the CCMA for conciliation on the basis that she had been "dismissed because she was pregnant". That, at any rate, was what is recorded in a certificate of outcome of dispute that has been signed

by the CCMA commissioner. From that certificate it appears that the dispute was referred on 14 July 1998.

[10] The applicant gave birth on 7 September 1998. About seven or so days later she received a visit from Mrs Scholtz, who came bearing a gift of baby clothes, during which the latter made an offer ,the exact terms of which were properly not disclosed to me, in order to resolve the dispute between the parties. Mrs Scholtz said that she explained to the applicant that litigation was expensive and sought to put an end to the problem between them. The applicant's standpoint

was that she would have to discuss the matter with her lawyer and the issue was left there.

[11] In evidence it was the respondent's case that the applicant , before she left the respondent, was given time off in order to seek another job with Sterns Jewellers, a firm in the area for which her mother worked. Suggestions were made to the respondent's witnesses, which were rejected, that she had in fact taken time off to visit the clinic. For the purposes of this judgment I find it unnecessary to enter upon the merits of that dispute which appears to me collateral to the question I have to decide.

[12] It was accepted by the applicant that others within the

respondent's employ had taken maternity leave and that she was aware of that fact prior to her departure from the company. When she was asked why she did not likewise request maternity leave, she said that she thought there must be a distinction between the way that whites and blacks were treated within the firm. There was some evidence that another employee had

ceased to work at the time when she was nearing confinement and a suggestion was made, albeit only tentatively, by counsel for the applicant that she too had been the victim of a policy of firing people as their confinement approached. The respondent's witnesses made it clear, however, that the engagement of this employee had been on a casual basis and her case provided no parallel for the one with which I am concerned.

[13] During argument I put it to counsel for the applicant that one or other of the parties must be found to have lied in the case. That, on reflection, appears to be an overstatement of the position. It is enough for me to conclude that the onus of proof has not been discharged. I am satisfied that it has not.

[14] So far as the demeanour of the parties is concerned, I found nothing in the applicant's testimony with which

to quarrel. She made a good impression on me. She

answered the questions firmly and directly. She was not evasive and she was both sensible and candid. The same

must be said for the witnesses for the respondent. They too made a good impression on me. There was nothing in the manner of their giving evidence or the manner in which they answered the questions under cross-examination that might suggest to me that they were lying.

[15] Given that, it is necessary for me to examine the facts of the case to consider where the probabilities take us. The first difficulty that I have with the applicant's case is to discover why she should have been singled out for dismissal when, she herself accepted, others in the employ of the respondent were not dismissed in consequence of their pregnancy. I can find no basis on which the respondent might be taken to have discriminated between black people and white people in dealing with matters of pregnancy. It may be that the applicant's condition caused the respondent some embarrassment. It might have felt that, while she could well continue in her employment behind the scenes, she could not do so as a front of house employee. That proposition was not put to the respondent's witnesses, however, and it seems, in any event, to be inconsistent with the tenor of the evidence. It is clear, from the evidence of the

applicant herself that Mrs Scholtz expressed pleasure when told by the applicant of the pregnancy. The applicant was in any event engaged to be married and so there was little reason why she would feel shame or why others should feel embarrassed.

[16] Secondly I cannot understand why the applicant did not complain in May when, according to her, she was notified that her employment would be terminated at the end of June. The applicant seeks to convey the impression that she was an innocent abroad, but her insistence on speaking to her lawyer before considering the settlement proposed by Mrs Scholtz hardly suggests a person who is naive in the ways of the world. It is conceivable that somebody who is illiterate may be unaware of the kinds of rights, so far as the equality is concerned, that the Constitution entrenches and endeavours to promote. But it is not easy for me to accept that the applicant is in the same position. She said in answer to questions from me that she was angry at the way she was being treated. In those circumstances, it seems to me, she would have complained about her treatment.

[17] The third difficulty I have, which is related to the second, is to know why she did not seek to obtain professional advice during the period from May through

to 26 June. If she was angry at the way she was being treated, she could have been expected to have solicited advice, if not from a lawyer, then certainly from an advice centre of the sort that is available to listeners to radio, to correspondents of newspapers and through such offices as Legal Aid Board. She does say that she spoke to members of her family about her plight; if she herself did not have the initiative to seek advice, one could have expected that they would have encouraged her to do so.

[18] The fourth factor that counts against her version is that Mr Scholtz gave her an open ended offer of continued employment, albeit as a casual employee. On her version, one would have expected the Scholtz's to be happy to sever ties with her completely. She admits, however, they were content to continue their relationship with her and went so far as to make an offer to do so on a casual basis. The point, of course,

is not that she was obliged to accept the offer (casual employment is obviously not to be compared with permanent employment); the point is that the offer was made in circumstances where it appears that the respondent, far from being desirous of terminating its relationship with her as she asserts, was willing to continue it.

[19] Finally, what strikes me as strange, given the good relationship that both sides testified to, is why she did not return to the respondent once she discovered that she had been illicitly dismissed, explain to the respondent that what had been done was wrong and unlawful and ask it to reinstate her . The respondent would have been able to take her back since it had not filled her post. That she should have preferred instead to lodge a complaint with the CCMA and proceed to launch a case that would culminate in a claim for compensation provides some support for the contention that she was seeking to profit from what had happened. It is unnecessary for me, however, to go that far. It is enough for me to record the fact that, despite the good relationship that existed between the

parties, she did not return to the respondent to take up the fact of the illegality.

[20] Against those factors must be set the argument, which was tellingly pressed by her counsel, that it is improbable that she should have left at that stage when to do so would expose her to added financial hardship. The combined earnings of the applicant and her fiancé were scarcely more than R2000,00 per month, of which the applicant was contributing R800,00 per month. It does seem strange that she should have been willing to forego her earnings at the stage she did.

[21] The strangeness, however, is not so acute once one appreciates that in any event she would shortly be going on maternity leave. Also relevant is the fact that she wished to take a vacation with her parents and leaving work at that stage would have given her the option to take it at her sole discretion. What has to be borne in mind, moreover, is that during the period of her unemployment the applicant derived support from her father-in-law. The degree of the support and the basis on which it was given were not explored before me in evidence and so too much should not be made of this

point. Nonetheless, the fact that outside support was available to the couple goes some way to explain why she left when she did.

[22] In the circumstances I find that the applicant has not discharged the burden of proof that rests upon her to demonstrate that she was dismissed. Accordingly her application must be dismissed.

[23] So far as costs are concerned, it appears from the papers that attorneys were from time to time employed by the respondent in order to act for it in its defence. Before me the matter was argued by an official of an employer's organisation of which the respondent is a member. The organization is not entitled to costs, whether in relation to travelling or otherwise, but the

attorneys who previously acted are entitled to costs and in so far as they may seek them, they should get them.

[24] In the circumstances I dismiss the application with such costs as may have been incurred by legal advisers prior to the hearing of this matter.

BRASSEY AJ

LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANT : **MR A VAN ZYL**

: **Mr N Vorster**

ON BEHALF OF RESPONDENT : **MS R SERRAO**

: **GENBA**

DATE OF HEARING: **1 SEPTEMBER 1999**

DATE OF JUDGMENT : **1 SEPTEMBER 1999**