

SOUTH AFRICA / JUDGMENT

McLaughlin v Independent Loss Consultants CC (JS166/2010) [2012] ZALCJHB 116; [2013] 1 BLLR 41 (LC) (18 October 2012)

[2012] ZALCJHB 116

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

JS166/2010

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS166/2010

In the matter between:

JAMIE McLAUGHLINApplicant

and

INDEPENDENT LOSS CONSULTANTS CCRespondent

Heard: 3 March 2012

Delivered: 18 October 2012

Summary: Automatically unfair dismissal-claim based on sexual harassment and protected disclosure. The disclosure made to the family and not the employer. Damages in terms of Employment Equity Act.

MOLAHLEHI J

Introduction

The applicant seeks an order directing the respondent pay her the equivalent of 24 months compensation in terms of section 194 of the Labour Relations Act of 1995, consequent to her alleged automatically unfair dismissal for operational reasons. The applicant further claims damages in the

amount of R500 000,00 in terms of the Employment Equity Act (EEA).

The issues for

determination

The issues for determination as set out in the pre-trial minutes are as follows:

The dismissal of the applicant was as a result of sexual harassment or disclosure thereof as contemplated in section 187 (1)(d) read with section 187(1) (f) and (h) of the LRA.

The applicant was subjected to unfair discrimination and harassment as contemplated in section 6(3) of the Employment Equity Act.

The respondent is liable for payment of damages in the amount of R500 000,00 in terms of the provisions of EEA arising from the allegation that the respondent failed to take steps to stop and protect her from the sexual harassment.

Background facts

It is common cause that the applicant who was prior to her dismissal employed as receptionist\switch-board operator commenced her employment with the respondent during October 2008 and her employment was terminated in November 2009.

On 23 October 2009 the employees of the respondent received a letter advising them that a meeting would be held on 26 October

2009. Thereafter five of the employees received a letter on 28 October 2009 informing them that they would be retrenched with effect from 30 November 2009.

The applicant being unhappy with the decision to retrench her referred a dispute concerning an alleged unfair dismissal to the CCMA and the conciliation process having failed, launched the present claim.

The respondent is involved in the business of risk assessment in the insurance sector. The fees paid for the work done by the clients are according to the respondent, determined by the insurance companies and varies from month to month.

It is common cause that during 2008 the applicant was asked by the member of the respondent, Ms Gilau (the owner), as to what she intended doing on completion of her matric in that year. It was during this discussion that the applicant was offered employment with the respondent as a receptionist and switch board operator. The owner of the respondent, Ms Gilau was family friend of the applicant and was the employer of both the applicant's grand-mother and her mother.

The applicant alleges that 15 days into her employment she was sexually harassed by Mr Dean Gilau (Dean), the son of the owner of the respondent. Dean was not an employee of the respondent but assisted her mother at the office with IT work.

The applicant in her statement of case says that during the course of 22 December 2008, she was subjected to sexual harassment by Dean who on that day was doing IT work at the respondent's workplace. According to her, it all started with Dean making jokes of a sexual nature which she simply "laughed off" as the two of them were acquaintances for a period of three years.

Dean is also alleged to have said that he never cheated in his previous relationships and wondered how it was like to cheat. He is alleged to have further indicated that he would not want to do it once he was married and invited the applicant to cheat with him. The applicant declined the request. The applicant stated that that afternoon she received a sms from Dean requesting her not tell anybody in particular her mother as to what happened during the day.

Dean arrived again the following day at the office and according to the applicant continued with his sexual harassment. He sat next to the applicant, held her hand and begged her to take her "down the passage for privacy." When the applicant enquired as to why they needed privacy, the response was that she had the most beautiful breast he had ever seen and that he wanted to play with her "boobies." The applicant says she thereafter went to the kitchen to make tea and Dean followed her and kissed her against her will.

It is common cause that the applicant did not immediately report the incident she complaint about to the respondent. It took about ten months before the alleged incident was brought to the attention of the respondent. The applicant says she was scared to report or inform anybody about the incident for fear of losing her job which she had secured in order to save money for the purposes of going on holiday in New Zealand.

The applicant took her holiday during October 2009 which contrary to what is stated in the statement of case was in Durban and not New Zealand. On 12 October whilst the applicant was away on holiday Ms Gilau convened a meeting with employees and requested them to place any complaint or grievances they had on the table.

Ms Joan Gilau (Joan), daughter-in-law of the owner of the respondent indicated during the meeting that she had something to report but that it was of a very sensitive nature and that she preferred to discuss it in private. The applicant's grand-mother then interjected and stated that she was aware of the sensitive issue which Joan was referring to and that it was about the sexual harassment that Joan's husband had perpetuated on the applicant.

On her return from her holiday, the applicant received a letter informing her that she was retrenched as from 30 November 2009.

The key question in this matter is whether the applicant's dismissal was automatically unfair. The applicant did not plead in the alternative should it be found that the dismissal was not automatically unfair. In other words the applicant did not plead unfair dismissal in terms of Section 188(1) of the LRA as an alternative to the automatically unfair dismissal. It therefore means that if it is found that the dismissal was not automatically unfair then that is the end of the matter, no further inquiry need be conducted. The other issue to consider is whether the respondent is liable for damages in terms of the provisions of the Employment Equity Act (the EEA). This issue entails investigating firstly whether the respondent was aware of the alleged discrimination and if she was not what she did to ensure safety at the workplace arising from the alleged sexual harassment.

Legal Principles

The relevant parts of section 187 of the LRA for the purposes of this judgment are subsections (1) (d), (f) and (h). In terms of section 187 (1) (d) and (f) and (h) a dismissal is automatically unfair if the employer in dismissing the employee, acts contrary to the provisions section 5 of the LRA.¹ In terms of section 187 of the LRA a dismissal is automatically unfair if the reason for the dismissal is:

‘(d) that the employee took action, or indicated an intention to take action, against the employer by -

(i) exercising any right conferred by this Act; or

(ii) participating in any proceedings in terms of this Act;

(e)

(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.

(g) ...

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.’

The applicant's claim in the present instance is also founded on the provisions of the EEA. In terms of Section 5 of the EEA an employer has a duty to take positive steps to ensure promotion of equal opportunities for all employees by eliminating unfair discrimination at the workplace. Section 6 of the EEA deals with the prohibition of unfair discrimination and reads as follows:

‘(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.’

It is apparent from the above that in terms of the EEA the issue of sexual harassment is governed by section 6(3) which specifically states that harassment constitutes discrimination. It is trite that the court has the power where it has been proven that sexual discrimination within the definition of discrimination has occurred to make an order that is just and equitable in the circumstances and this may include payment of compensation by the employer to the affected employee, award of damages to the affected employee, or an order that the employer should take preventative steps to eliminate the discrimination.²

In *Mokoena and Another v Garden Art (Pty) Ltd and Another*,³ it was held that the employer became liable in terms of section 60 of the EEA where the alleged harassment had been brought to the attention of the employer and thereafter the employer failed to take proper steps to prevent such harassment in the future. The Court further held that where the employer had reacted to employee's report of sexual harassment by issuing a written warning, and where no further incidents had occurred, the employer was not liable in damages to the employees.

Section 187 (1) (h) of the LRA governs dismissal based on occupational detriment which renders automatically unfair a dismissal as a result of an employee having made a protected disclosure. Section 4 (2) (a) of the Protected Disclosure Act (PDA)⁴ also provides that any dismissal in breach of section 3 is deemed to be an automatically unfair dismissal as contemplated in section 187 of the LRA.

A protected disclosure is governed by section 9 of the PDA which reads that:

‘(1) Any disclosure made in good faith by an employee—

who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if—

- (i) one or more of the conditions referred to in subsection (2) apply; and
- (ii) in all the circumstances of the case, it is reasonable to make the disclosure.’

The conditions in subsection (2) that are relevant for the purpose of this matter are found in paragraph (c) which read:

‘(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to:

- (i) his or her employer or
- (ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure.'

The effect of these provisions is that the disclosure would be protected if the employee who made the disclosure acted in good faith; reasonable believe that the information disclosed and the allegations made by him or her were substantially true, was not made for personal gains and that one or other of the conditions in section 9 (2) (c) and (d) of the PDA was satisfied.

The approach to adopt when dealing with the issue of automatically unfair dismissal received attention in *Kroukam v SA AirLink (Pty) Ltd*,⁵ where the court in dealing with the alleged automatically dismissal of a shop-steward held per Zondo JP as he then was, that even if the activities of the shop-steward were not the dominant or principal reasons for the dismissal the dismissal would have still been automatically unfair if it was to be found that such reasons played a significant role in the dismissal of the shop-steward. In the same judgement. Davis AJA, arriving at the same conclusion as that of Zondo JP but reasoning differently, held that the inquiry into the reason for the dismissal in an alleged automatically unfair dismissal is an objective one and entails an investigation into both the factual and legal causation. At paragraph 103 Zondo JP had the following to say:

'[103] However, even if the reasons that I have found to constitute the dominant or principal or reason or reasons for the dismissal did not constitute the principal or dominant reasons for the applicant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the applicant. In my view for policy considerations, where such reasons have influenced the decision to dismiss to a significant degree, the dismissal should be dealt with as an automatically unfair dismissal in order to deter as many employers as possible from entertaining such illegitimate matters as, for example, racism and the exercise of rights conferred by the Act as factors in their decisions to dismiss employees.'

Davis AJA in his judgment at paragraph 28 had the following to say:

'[28] In my view section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that that the reason for the dismissal did not fall within the circumstance envisaged in section 187 for constituting an automatically unfair dismissal.'

In *SA Chemical Workers Union & others v Afrox Ltd*,⁶ Froneman DJP formulated the approach to be adopted when dealing with automatically unfair dismissal as follows:

[32] The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law, should not also be utilized here (compare *S v Mokgethi & others* 1990 (1) SA 32 (A) at 39D–41A; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34).'

The authorities are in agreement that for an employee to succeed in a claim of automatically unfair dismissal, he or she has to produce sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Thus the onus is on the employee to show that the true reason for the dismissal is one prohibited in terms of the law.⁷ It is also generally accepted that once the employee discharges the evidentiary burden of showing that the dismissal was for an

impermissible reason, it is upon the employer to discharge its onus of proving that the dismissal was for a permissible reason as provided for as provided for in terms of s188 of the LRA.

The versions of the parties

- [28] Turning to the facts in the present instance the respondent says that the applicant was dismissed due to operational reasons. The essence of the applicant's case on the other hand, is that she was dismissed because of the complaint or disclosure of the sexual harassment perpetrated by the son of the owner of the respondent on her.
- [29] It is trite that in cases of this nature the applicant bears the evidentiary burden of producing evidence sufficient to raise a credible possibility that an automatically unfair dismissal exists. The applicant must produce sufficient evidence to satisfy the court that there is a causal connection between the dismissal and the alleged act of discrimination.
- [30] The main witness of the applicant was her grandmother who testified the owner told her on the way to the meeting of 12 October 2009, how she was tired of rumours and that must come to an end.
- [31] As stated earlier, during the course of the meeting Joan, the daughter-in-law of Ms Gilau, stated that she had sensitive information which she needed to raise. As a consequence of the comment by Joan, Ms Gilau arranged a meeting where the so-called sensitive information was to be discussed.
- [32] At the meeting Dean, stated that he heard about the rumours that he was sexually harassing the applicant. The grandmother then enquired as to what he said to the applicant. Joan then laughed at the allegation. The applicant's grandmother indicated that this was not a laughing matter. She further indicated that there was no way that the matter could be resolved and that seems to have been the end of the meeting.

- [33] Thereafter five employees including the applicant received notices that they would be retrenched. According to the grandmother the respondent informed them that she was not going to use LIFO in selecting those to be retrenched but would use merit and skill. The applicant's grandmother contended that there was no basis for the retrenchment because employees including the applicant received increases during September 2009.
- [34] As to the reason for not raising the issue with the respondent prior to the 12 October the grandmother stated that the issue was not raised because the applicant had just come out of school and had been advised by her grandfather not raise the issue of an alleged sexual harassment with any person.
- [35] The applicant testified that her mother and grandmother filed grievance on her behalf. She also stated that she was afraid to report because Dean was about to get married to Joan and was afraid to break their relationship. When asked what she expected the respondent to do in the context of having not raised the issue earlier, the applicant testified that she did not expect the respondent to do anything as she did not inform her about the allegations. She further testified under cross examination that the respondent could not be blamed for failing to provide a safe working environment because she did not know prior to October about the sexual harassment allegations.
- [36] The relationship between the applicant and Dean continued without any difficulty after the alleged incident according to the applicant. She also stated that at the time of raising the issue of retrenchment, the respondent was not aware of the allegations of sexual harassment.
- [37] Ms Gilau, testified that she was not aware of the sexual harassment allegations at the time she contemplated the retrenchment and also, when she called the meeting on 12 October 2009. It was at the end of the meeting that Joan indicated that there was sensitive information she had to raise and that led to the grandmother of the applicant making allegations regarding the sexual harassment.
- [38] As concerning the salary increase of Ms Gilau, testified that the reason for the increase was that at the time of the increase the applicant had been with the respondent for period of about seven months and that the increase was to bring her in line with other employees. She also stated that at the time of giving the increase she had anticipated an increase in the insurers claims which did not materialise.
- [39] As concerning the selection criteria Ms Gilau, testified that she used merit in selecting those who were to be retrenched. She retained her daughter-in-law, who at the time was employed on a temporary basis because according to her she (the daughter-in-law) had skills which the others did not have. The applicant could, according to Ms Gilau, have achieved the necessary skill only after some training and further that she was trainable.

- [40] The second witness of the respondent was Dean who testified that he had a friendly relationship with the applicant and the two of them would always joke about things. He disputed the allegation that he had sexually harassed the applicant and that he was not aware of the allegations until somewhere in October when someone called him and told about those rumours.
- [41] During cross examination Dean testified that he could not provide the reason why the applicant spread the rumours about him. He stated that the applicant had a problem about self confidence and was always worried about her body. It is possible according to him that he may in comforting her may have said to her not to worry because she had beautiful "boobs".

Evaluation

- [42] In analysing this matter it is important to note that the applicant has based her two claims; automatically unfair dismissal and damages, on three causes of action which are:

she was dismissed because she exercised her right in terms of section 187 (1) (d) of the LRA.

The dismissal was automatically unfair because she made the disclosure to the following the alleged incident of sexual harassment.

The respondent failed to provide a safe working environment and contravened the provisions of section 187 (1) (f) and section 6 (1) of the EEA.

- [43] The first question to answer in as far as the alleged automatically unfair dismissal is concerned is whether the applicant has put sufficient evidence to show a causal connection between the dismissal and the alleged discrimination which arose from the alleged sexual harassment. I accept for the purposes of this judgment that the applicant was sexually harassed by Dean. Except for the bare denial the version of the applicant was not seriously challenged by the respondent. Although Dean did not make a full concession to the allegation he did testify that he may at some point have made comments which had sexual connotations concerning the physical appearance of the applicant. He testified that he made those comments in the context of comforting the applicant who according to him had a problem of self-confidence about her body. It would seem on his version that women who lack confidence can be affirmed by tarnishing their dignity and subjecting them to unsolicited sexual harassment. It was not his testimony that the applicant consented to his sexual comments about her body.
- [44] In as far as the issue of the protected disclosure is concerned, the critical question is not so much whether or not the harassment occurred but rather whether it was a disclosure, which the applicant made in good faith, believing it to be true that led to her dismissal. In other words the enquiry is whether the dismissal was as a result of the disclosure or put in another way, "but for the disclosure" by the applicant of the sexual harassment the respondent would not have dismissed her.

- [45] The period of 10 months before the disclosure is indeed a significant period but that however does not detract from the fact that the applicant was subjected to unwarranted harassment.
- [46] Turning to the issues arising from the facts of this case the first enquiry to be conducted, based on the above authorities is whether the applicant has presented sufficient evidence to connect her dismissal to the disclosure of the sexual harassment. The applicant's case in the pleadings is that she made the disclosure herself to the respondent.
- [47] Accepting that the dismissal was after the disclosure, it does not however follow to the alleged automatically unfair dismissal was due to that disclosure. The evidential burden to show causal connection between the dismissal and the disclosure rested on the applicant. The applicant's case is that even though, the reason for the dismissal is stated by the respondent as being for operational reasons, the true reason for her dismissal is because of the alleged disclosure of the sexual harassment to the third respondent.
- [48] In answering the further questions posed by the respondent in the pre-trial minutes and specifically in answering the question as to who was the disclosure made to, the applicant states that she made the disclosure to the owner. She however conceded during cross examination that she never made any disclosure herself to the third respondent. She testified that she made the disclosure to her family. The applicant further conceded that she never lodged a grievance regarding the allegations of sexual harassment with the respondent. She also conceded that she never exercise any right in terms of the law.
- [49] And with regard to the alleged contravention of the provisions of section 6 (1) of the EEA the applicant conceded during cross examination that the work environment was never unsafe and that she never sought any protection from the respondent. She further conceded that she never brought the allegations of the sexual harassment to the respondent's attention and therefore the respondent could not have been expected to have taken any action in terms of addressing those allegations or making the working environment safe.
- [50] It is common cause that the respondent was not until the meeting of October aware of the allegations and as soon as she became aware she immediately arranged a meeting to deal with those allegations. The meeting unfortunately produced no results except that the applicant's grandmother indicated that she intended instituting legal action regarding the matter. The other step which the owner took after receiving the information regarding the incidents was that she suspended her son from attending at the workplace pending the resolution of the problem.
- [51] In light of the above discussion, I am of the view that the applicant's claims stands to fail. In the context of the nature of the applicant's claim and the fact that she brought the claim as an individual I do not belief it would be fair to allow the costs to follow the results.

Order

[52] In the premises the following order is made:

1. The applicant's claim that she has automatically dismissed is dismissed.
2. The applicant's claim arising from the alleged discrimination is dismissed.
3. There is no order as to costs.

Molahlehi J

APPEARANCES:

FOR THE APPLICANT: Geldenhuys C J at Law Inc

FOR THE RESPONDENT: Mr Fred Vogel of Vogel Malan Attorneys

1Section 5 of the LRA provides: '(1) No person may discriminate against an employee for exercising any right conferred by this Act.'

2See Rochelle le Roux et al Sexual Harassment in the Workplace (LexiNexis, Butterworth's 2005) page 19.

3[2007] ZALC 90; [2008] 5 BLLR 428 (LC).

4Act no 26 of 2000.

5 (2005) 12 BLLR 1172 (LAC).

6(1999) 20 ILJ 1718 (LAC), at paragraph [32].

7See State Information Technology Agency (Pty) Ltd v Pasela Johannes Sekgobela soon to be reported case of the LAC under case number

J53/08, Viney v Barnard Mellet Security (Pty) Ltd (JS 14/05) (2007) ZALC 102 (20 December 2007), SS Maimela v University of South Africa(JS 1255/0 (2009) ZALC 52(LC) and Van der Velde v Business & Design Software (Pty) Ltd & another (2006) 27 ILJ 1738 (LC).

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