

SOUTH AFRICA / JUDGMENT

Strauss v Paracon SA (Pty) Limited (JS1241/01) [2003] ZALC 24 (28 February 2003) [2003] ZALC 24

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Labour CourtBEFORE
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JS1241/01

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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS1241/01

2003.01.20

In the matter between

CHRISTINA HENDRINA STRAUSS Applicant

and

PARACON SA (PTY) LIMITED Respondent

J U D G M E N T

LANDMAN, J: Ms Christina Hendrina Strauss had undergone computer training at a college, she had acquired a wide range of skills and knowledge of various computer programmes. After completing her courses she commenced employment with an IT company in Centurion. While she was there she sent out CV's to various companies. She was induced by Mr Parker of Paracon SA (Pty) Limited to join his company. This would entail her suffering a drop in salary from R8 000 to R4 000 per month. However, certain promises were made to her in regard to the salary aspect (on her version). These promises were not incorporated in her contract of employment. This eventually gave rise to a grievance, which featured prominently in the course of Ms Strauss' employment with Paracon.

Paragraphs A and B of the contract of employment between Ms Strauss and Paracon provide as follows:

"A. Engagement and termination of services.

1. Paracon agrees to retain the services of the employee, and the employee agrees to be bound to the company indefinitely with effect from 23 August 1999, subject to one calendar month's written notice of termination of the agreement.
2. Notice may be given by either Paracon or the employee.
3. The employee will be working on a three months' probation period ending 23 November 1999.
4. After the probation period of three months the employee will be working on a contract with Paracon for a period of 21 months, during which time no notice may be given by either Paracon or the employee.

B. Remuneration

- A gross salary of R4 000 per month. Annual salary review:

The employee's salary will be reviewed on the anniversary date of the employee joining Paracon from the last increase date."

Ms Strauss was treated as a trainee programmer, or developer. She was placed with Liberty Life Properties for a fixed period. This contract or, more correctly placement, came to a premature end. It ended one month early. She was then placed with Mutual and Federal. This placement, unbeknown to Ms Strauss, was to endure for a period of six months. Ms Strauss had in the meanwhile formed the opinion that Mr Parker's promises regarding the doubling of her salary to R8 000, i.e. to what she had earned before she was recruited by Paracon were not going to be fulfilled. She was also unhappy with her increase of R100,00 per month.

After following some internal remedies Ms Strauss referred a dispute to the CCMA. The dispute could not be resolved. The dispute was referred to arbitration. The commissioner found that the parol evidence rule applied. The arbitrator examined the substance of Ms Strauss' allegations and found her evidence to be unpersuasive. It would be fair to say that the commissioner did not believe her.

Ms Strauss was unhappy with the outcome of the arbitration, and launched an application in the Labour Court to review and set aside the award. Ms Strauss was aware that her prospects were scant but she nevertheless proceeded with the matter. Pillay J dismissed the application during 2002.

Ms Strauss became pregnant during the course of her employment. She informed her employer about her pregnancy some time before the expiry of her placement with Mutual and Federal. This placement terminated on 31 March 2001. Ms Strauss was asked to take paid annual leave from 1 April to 23 April 2001, when she commenced her maternity leave. Her maternity leave was unpaid.

While on maternity leave Ms Strauss received a letter from Paracon's legal representative, who alleged she had been appointed on a fixed term contract, which would terminate on 23 August 2001. Her maternity leave would terminate on this date and she would not return to work. However, it was common cause that none of the parties regarded the contract as a fixed term contract. Paracon, although it did not provide work on 24 August (to which I shall return) accepted that the contract of employment was for an indefinite period. Paracon accepted that in the circumstances it could only fairly terminate Ms Strauss' services for operational requirements.

It is Paracon's case that Ms Strauss was dismissed after following the procedure laid down in section 189 of the Labour Relations Act 66 of 1995, because there was no work for her to do.

It is necessary to return to the events of 24 August 2001. Ms Strauss returned to work. What happened there is recorded in attorney Jonker's letter of 28 August 2001. Ms Strauss' testimony was consistent with this version. Paragraphs 1 to 9 of this letter reads:

"We act on behalf of Ms Strauss and confirm the following:

1. On Friday 24 August 2001, Ms Strauss reported for duty since, her maternity leave had ended.
2. She arrived at about 07:40, but was asked to wait until 08:40 for Chrissie Cordosso (financial director), who asked her what she was doing there.
3. Ms Cordosso proceeded to contact Graeme Bentley (the managing director of IT Services a division of Paracon (Pty) Limited) for further instructions.
4. While in Ms Cordosso's office, Mr Bentley spoke to Ms Strauss. He enquired whether Ms Strauss had spoken to Joanne Venter (who apparently was supposed to contact Ms Strauss and who apparently alleged that she did speak to Ms Strauss "the previous week" and left messages for her).
5. Ms Strauss indicated that she had not received any telephone calls or messages from Joanne Venter, and she enquired about why Joanne Venter was supposed to contact her. Mr Bentley replied that the reasons would be discussed at a meeting to be held at his office on Monday, 27 August 2001. He, furthermore, instructed Ms Strauss to make an appointment with his personal assistant (Marianne Drischer) for the meeting to be held on Monday, 27 August 2001, which she did.

6. Mr Bentley then informed Ms Strauss that he was giving her permission to leave work for the day.
7. While Ms Strauss was in the reception area Mark Jurgens approached her, and the following occurred:

7.1 Mr Jurgens told Ms Strauss that she can "pack her things and go". He furthermore shouted at her that he is "getting annoyed with her and the situation" and that "he is fed-up with dealing with her as a person". To which Ms Strauss replied that he has never dealt with her before. He then told her to "just pack her things and go". The above was shouted loudly enough for the entire office to hear and with the aim of humiliating and degrading Ms Strauss.

7.2 Mr Jurgens then went back into his office where he said to someone there that "he wished he could get Christina on the phone with Joanne so that they can hear how she is lying".

7.3 Mr Jurgens then came back out of his office and asked Ms Strauss if she had spoken to Joanne Venter. When Ms Strauss replied that she had never spoken to Joanne Venter, Mr Jurgens said "You are lying. We don't have a job for you. In actual fact we don't have any job for you, we are thinking of retrenching you".

7.4 After that he told her to "just go"!

8. Thereafter Ms Strauss asked Chrissie and Tracey what Joanne's surname was (as at that stage she did not know it). They did not know, so she did not know who she was supposed to speak to.
9. Ms Strauss then phoned Marianne Drischer to confirm the meeting on Monday, 27 August 2001 with Graeme Bentley."

Paragraphs 17 and 18 of the letter are also relevant. They read:

"17. It is clear from what transpired, that there was no fair or valid reason for the dismissal. Action was taken against Ms Strauss for exercising her rights in terms of unfair labour practice legislation.

18. Furthermore, none of the procedures in terms of section 189 of the Labour Relations Act, 66 of 1995, were followed, therefore Ms Strauss was unfairly dismissed by Paracon SA (Pty) Limited on 27 August 2001, and the matter is being referred to the CCMA."

Mr Bentley replied to this letter on 29 August. He did not traverse the factual allegations, rather he wrote:

"We are not going to deal with the allegations raised in the letter as we are of the opinion that it will cloud the issue."

He went on to say:

"2. Please note that your client was not dismissed. In as far as she considers herself dismissed, that is not the true situation.

3. It is true that the company does not currently have a position for. But that does not mean that she was dismissed as alleged by her. The company is actively looking for a position to accommodate her."

Ms Cordosso, Ms Venter and Mr Jurgens did not testify during the trial. Mr Bentley and Ms Dell testified, but not about the facts set out in the letter dated 28 August 2001. The result is that I accept this version of events that occurred between Mr Jurgens and Ms Strauss. It is therefore clear that -

- (a) the Paracon directors were annoyed with Ms Strauss;
- (b) this annoyance arose from the referral of her grievance to the CCMA for conciliation, and subsequently arbitration. It does not, of course, follow that because there was a degree of annoyance that this translates into victimisation;
- (c) Paracon's reason for "thinking of retrenching her" was because she lodged a grievance and because there was no job for her and no arrangements had been made to place her;
- (d) Paracon had contemplated retrenching Ms Strauss some time prior to the expiry of her maternity leave, and had not communicated this to her;
- (e) the oral notice of Paracon's intention to retrench her was communicated to her in a way which humiliated and degraded her.

The subsequent meeting between Mr Bentley, Ms Dell and Ms Strauss and the offers to hold further consultations and communications between the parties were attempts to control the damage after Mr Jurgens, managing director, had let the cat out of the bag. Paracon was annoyed with her. Paracon did not want her services.

The dismissal of Ms Strauss was effected, at best for Paracon, for mixed motives, i.e. because she had exercised her statutory right to seek redress in respect of what she believed to be her grievance, or because Paracon did not have a placement or a position for her and did not wish to find one for her. Ms Strauss' dismissal, once it is possibly tainted by a reason which, left unexplained, leaves the dismissal one which is automatically unfair, brings into play the onus resting on an employer to show that the dismissal was fair. The onus rests upon Paracon to dispel this reason, that she was dismissed for complaining about her grievance, and to prove that the real reason for her dismissal was the retrenchment. Paracon did not lead evidence to show the contrary.

I am therefore satisfied that Ms Strauss' dismissal was one which was automatically unfair.

This brings me to the appropriate remedy.

Ms Strauss does not seek reinstatement or re-employment. It is therefore necessary to consider whether compensation is appropriate and, if so, what amount would be fair and reasonable. Section 194(3) of the Labour Relations Act 66 of 1995 has been amended. It allows the court a wide discretion to remedy the situation, at least insofar as this section refers to ordinary dismissals.

When it comes to an automatically unfair dismissal, section 194(4) applies. The platform, which should ordinarily be observed once it has been decided to award compensation, has not been materially affected by the amendments to section 194.

In my view the result of this amendment means that even in the case of an automatically unfair dismissal the court has a discretion as to the amount of compensation that should be awarded. This discretion must be exercised judicially, and take into account the considerations and factors which have been set out in *Chemical Energy Paper Printing Wood and Allied Workers' Union and Another v Glass and Aluminium 2000 (CC) (2002) 23 ILJ 695 (LAC)*. The award of compensation must also take account of the limit on compensation which may be awarded for automatically unfair dismissal.

In this case I also take into account the following factors:

- (a) Paracon infringed the rights of Ms Strauss to utilise the procedures of the LRA to address her grievance.
- (b) Paracon in effect victimised her for doing so and for participating in the statutory processes.
- (c) Dismissals which are not automatically unfair attract the possibility of a compensatory award of up to twelve times the employee's monthly remuneration.
- (d) An award of reinstatement, although not clearly indicated in the facts of this case, would not necessarily have meant that Ms Strauss would have earned a great deal more than the upper limit on the permissible quantum.
- (e) Other bona fide retrenchments were being considered or had been implemented by Paracon.
- (f) The dismissal is aggravated because it followed on a period of unpaid maternity leave.
- (g) The dismissal caused some patrimonial loss, although this was not specified.
- (h) Ms Strauss was humiliated and degraded in the process.
- (i) A punitive element, as indicated in the *Chemical Energy Paper Printing Wood and Allied Workers' Union's* case is indicated, as a matter of policy and fact.
- (j) Some weight must be given to the commissioner's doubts about the credibility of Ms Strauss, and accordingly the bona fides of her complaint.

- (k) Some account must be taken of Ms Strauss' decision to persist with her review in the absence of prospects of success. It is quite clear that she had been advised and knew that she had a dismal case.

Taking all this into account I am of the opinion that compensation in an amount of thirteen months' remuneration would be just and equitable.

O R D E R

In the premises -

1. the respondent is ordered to pay compensation to the applicant in the amount of R63 440,00, together with interest thereon at the prescribed rate, which is to run from the date of filing of the statement of case.
2. The respondent is to pay the costs of this application.

SIGNED AND DATED AT BRAAMFONTEIN ON 28 FEBRUARY 2003

A A Landman

Judge of the Labour Court of South Africa

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