

SOUTH AFRICA / JUDGMENT

Truter v Heat Tech Geysers (Pty) Ltd (JS40/14) [2016] ZALCJHB 83 (2 March 2016) [2016] ZALCJHB 83

COURT

Labour Court Johannesburg

BEFORE

Golden

CASE / FILE NUMBER

JS40/14

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS40/14

Not Reportable

In the matter between:

VANESSA JUDITH TRUTER

Applicant

and

HEAT TECH GEYSERS (PTY) LTD

Respondent

Heard: 26 to 28 January 2016

Delivered: 2 March 2016

GOLDEN, AJ

Introduction

- [1] The Applicant has brought a dispute to the Labour Court in which she contends that she has been dismissed by the Respondent, and that her dismissal constitutes an automatically unfair dismissal. The Applicant claims in the alternative, that her dismissal was unfair in that the Respondent did not have a fair reason to dismiss her and that she was dismissed not

in accordance with a fair procedure. The Applicant claims compensation in the amount of 24 months' remuneration in terms of s194 of the Labour Relations Act 66 of 1995 as amended ("the LRA") for the automatically unfair dismissal. She also claims notice pay in the amount of R35 519.24, commission in the amount of R65 076.81 and leave pay in the amount of R10 277.56. The Respondent contends that the Applicant was not dismissed, but that she resigned of her own accord. The matter came before me on 26 January 2016 and concluded with oral argument on 28 January 2016.

[2] It is common cause that the Applicant's employment terminated on 27 September 2013. It is in dispute how this occurred, and who initiated the termination. Regard must be had as to what occurred on 27 September 2013 and what the circumstances were which culminated in her dismissal.

[3] The Labour Court in *Marneweck v SEESA*[1] held as follows:

'[31] I align myself with the view expressed by Van Niekerk AJ above and wish to add that the enquiry into whether or not there is a dismissal goes beyond investigating whether the employee used the word "dismissal" in terminating the employment relationship with the employee. In other words it is not the label placed on the termination that determined whether or not there was a dismissal.

[32] Thus, as a matter of principle, employment can be regarded as terminated based on the objective construction of the employer's

conduct which unequivocally repudiates the contract.'[2]

[4] Because the Applicant's dismissal is disputed, she bears the onus in terms of s192(1) of the LRA to prove the existence of her dismissal.

[5] S187(1)(f) imposes an evidential burden on the Applicant to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It is then up to the employer to prove the contrary, and to produce evidence to

demonstrate that the reason for the dismissal did not fall within the circumstances envisaged in s187.[3]

Background

and material facts

[6] The Applicant was approached by Mr Johan Stander ("Stander") to work for the Respondent as a sales representative. He was the Respondent's Sales Manager at the time that the Applicant was recruited. The Applicant's employment was subsequently confirmed in a letter dated 27 May 2013. She commenced her employment on 3 June 2013. According to the Applicant, Stander had allocated to her certain sales areas which at the time included half of Pretoria, half of Johannesburg and Mpumalanga. In the interview that she had with Stander and Mrs Suraiya Noormohamed ("Noormohamed"), the owner of the company, she was

promised an amount of R30 000 a month but this involved building up her clientele which would entitle her to commission. Alternatively, she would be paid an amount of R5 000 for fuel and petrol if the amount earned was below R30 000. The Applicant informed Noormohamed that she had a backup system at home and that her mother-in-law looked after her children and collected them from school.

- [7] The genesis of the events that unfolded after June 2013 was the Applicant querying her commission with Noormohamed.
- [8] In or about the middle of August 2013, the Applicant queried her commission with Noormohamed. Noormohamed did not like the Applicant querying the commission and told her to leave her office. The Applicant left and carried on working.
- [9] The Applicant then received an e-mail dated 20 August 2013 from Stander, addressed to all sales agents to discuss the restructuring of the sales areas. The Applicant's discussion with Noormohamed regarding her unpaid commission predated this e-mail. Stander had informed the Applicant that an additional sales agent would be joining the team.
- [10] The sales agents were informed in an e-mail dated 30 August 2013 of the restructured sales areas. In terms of the changes, the Applicant no longer had Mpumalanga, and instead was allocated outer lying areas such as Soshanguve, Mabopani and Hammanskraal, where she had never worked before. Stander confirmed these changes in an e-mail dated 2 September 2013 and confirmed that the changes were implemented by Noormohamed. Stander confirmed with the Applicant on 16 September 2013 that she still has to call on Boksburg/Benoni until the end of September, as the new sales representative would take over from 1 October 2013. The Applicant testified that the change in areas had a detrimental effect on her income which was far less as a result of the new areas which she had been allocated.
- [11] On or about 7 September 2013, the Applicant's son suffered a serious injury to the head and was rushed to hospital. The Applicant sent Stander an e-mail on 8 September 2013 to inform him of her son's injury. She remained close to the hospital but attended to e-mails, quotations and visited clients if required.
- [12] The Applicant testified that when she arrived at work on 27 September 2013, the Human Resources Manager, Ms Adiela Alli ("Alli"), requested that the Applicant accompany her to her office. Alli, Stander and the Applicant were present. In this meeting, Alli told her that Noormohamed wants her to leave the company because of complaints that were received from clients, that she was not "technical enough" and because she was a woman with three children who has no time for her clients. The Applicants' children were two, four and nine years old at the time. The Applicant was shocked. This discussion occurred less than three weeks after her son came out of his coma.

- [13] The Applicant attended a sales meeting after her meeting with Alli and Stander. Noormohamed came into the meeting, spoke to all the agents about a big project involving Builders Warehouse and proceeded to give all the sales agents documents relating to the project, except the Applicant. This upset her.
- [14] The Applicant testified that she was not paid for her notice month in October 2013, or for her leave. She confirmed that the Respondent's tender of the notice pay for October 2013 at the commencement of the trial.
- [15] The Applicant testified that she did not accept an offer of re-employment that was made by the Respondent's attorneys in 2014 a few months after she was dismissed because she no longer trusted Noormohamed.
- [16] She testified that she was forced to stop her pension fund contributions and had to look for her eldest son's biological father for a financial contribution. She lost her car and had to borrow money from her father, who is a pensioner, so that she could look for work.
- [17] According to the Applicant, Noormohamed wanted to get rid of her when she confronted Noormohamed about her unpaid commission. Noormohamed was looking for an excuse to get rid of her when she was absent for three days following her son's hospitalisation.
- [18] The Applicant claims commission in the amount of R65 076.81 for the period June 2013 to October 2013. According to the Applicant, she is supposed to receive 3% commission for independent clients, 2% commission for Build-it (Mica) clients and 1% commission for Massbuild clients (Builders Warehouse). She confirmed the commission claimed as itemised in Exhibit A2. The commission is due to her in respect of Chamberlains for purchase orders from June to October 2013 in the amount of R18 672.08, being 3% of the total sales for this period. The Applicant also confirmed that she was entitled to 3% commission in respect of Wholesale Plumbing Supply in the amount of R13 892.15 for total sales for the period June to October 2013. The Applicant was not able to obtain copies of the actual invoices to demonstrate the total sales for this period, but she contacted the client who confirmed the total sales of

R463 071.57 for the period in question. The Applicant also confirmed that she was entitled to:

18.1 3% commission in the amount of R7 188.84 in respect of W&S Plumbing Supplies (Pty) Ltd for the months June 2013 to October 2013;

18.23% commission in the amount of R21744.36 in respect of K Carrim Wholesale Hardware Distributors for the period June 2013 to October 2013 in respect of total sales in the amount of R724 812.00;

18.33% commission in the amount of R733.77 in respect of Benoni Sand & Buildware (Pty) Ltd for the period June 2013 to October 2013 for total sales in the amount of R24 459.00;

18.43% commission in the amount of R2 537.40 in respect of GLR Trading 025 CC t/a Waterways for the period June 2013 to October 2013 for total sales in the amount of R84 580.00 and

18.5commission for Bon Accord Build-it in the amount of R816.01 for the period June 2013 to October 2013 for total sales in the amount of R40 800.60.

- [19] In cross-examination, Mr Venter, who appeared for the Respondent, put it to the Applicant that there was no contract of employment which described the terms and conditions of her employment, and that there was no contractual stipulation as to which areas she would have to service as a sales agent. It was put to the Applicant that the areas were fluid, and changed according to the needs of the business. Although the Applicant accepted that she was not provided with a written contract of employment, she was firm in her view that the areas were given to her at the commencement of her employment, and that the areas had been agreed to. She accordingly accepted that these were her allocated areas. Although she did not submit a written grievance regarding the change in sales areas, she did raise it with Stander who informed her that the changes in the sales areas were done on the instruction of Noormohamed.
- [20] Alli's version was put to the Applicant. The pertinent aspect of Alli's evidence was that she was instructed by Noormohamed to address with the Applicant her dress code and that she had brought her son into the factory. The Applicant testified that she brought her child with to work on that day because it was school holidays and she was on her way to drop him off at the hospital for an operation. The Applicant remained firm that Alli had brought this up as an issue in the meeting on 27 September 2013 as one of the reasons why Noormohamed wanted her out of the company.
- [21] It was put to the Applicant that Alli would testify that the Applicant was not dismissed and that the Applicant wanted to leave the company. Further that Alli told the Applicant that she was not going to be fired, and that they just wanted to address her dress code. The Applicant remained firm that she was told by Alli in the meeting that Noormohamed wanted her to leave because she had children with no backup system to care for them, that she was not technical enough and that there were complaints from clients. It was also put to the Applicant that Alli would testify that the Applicant was told that she does not have to leave but that she has one month "to pull up her socks". It was also put to the Applicant that Alli would testify that she (the Applicant) insisted on a letter, which Alli then typed for her.
- [22] Mr Venter put it to the Applicant that Italian owners had taken over the company at the time that the offer of re-employment was made. The Applicant did not know about a new owner. According to her, Noormohamed was still the owner of the company at the time that the offer was made.
- [23] Stander corroborated the Applicant's evidence in material respects.

[24] He testified that he introduced the Applicant to Noormohamed who asked the Applicant about her technical background and whether she would be willing to work away at times. The Applicant told Noormohamed that she had three children who were looked after by her mother-in-law. Stander confirmed that the areas which the Applicant would service was discussed with her and finalised by Noormohamed. The areas were half of Johannesburg, half of Pretoria and Mpumalanga. Stander confirmed that the Applicant questioned her commission. He informed her that only Noormohamed and her son, Mr Kabeer Noormohamed (“Kabeer”), had access to the sales reports and the system to calculate commission due to sales agents. Noormohamed had called him and told him that the Applicant had queried her commission. She told him to change the Applicant’s areas to include townships which were further away. He queried this

with Noormohamed because another sales agent, Susan Buys (“Buys”), did not sleep out or visit any of the townships or informal settlements. Noormohamed told him that she wants to see if the Applicant could cope with these areas, and if she could not, she would let her go. Noormohamed told him that the Applicant should be given more difficult areas that will keep her away a day or two longer. He confirmed that the sales areas were not changed because of the death of another employee, Andries. He testified that Andries passed away before the Applicant was employed with the Respondent.

[25] Stander confirmed that the Applicant’s son was hospitalised in September 2013, and that she was entitled to three days’ compassionate leave. He confirmed that she carried on with her work and attended to her clients during the time of her son’s hospitalisation. He also confirmed that he was aware that the Applicant had brought her son to work on one occasion, and that he was asked by Noormohamed to deal with this issue, as she did not like employees to bring children to the workplace.

[26] Stander’s evidence of the events on 27 September 2013 is critical. He confirmed that Alli asked the Applicant to go to her office. Prior to 27 September 2013, he and Alli were called in by Noormohamed who instructed them to give the Applicant notice as she was not “technical enough” and had no backup system for her children. Stander told Noormohamed that he could not do so because it was unlawful. He asked Noormohamed to ask Alli to terminate the Applicant’s employment instead.

[27] The Applicant, Stander and Alli met in Alli’s office on 27 September 2013. According to Stander, Alli told the Applicant that the Applicant was not technical enough, that she had no backup system to look after her children, that there were complaints from clients and that Noormohamed wanted her to leave for these reasons. Stander confirmed that the Applicant was shocked and emotional. She asked Alli for a dismissal letter.

[28] After their meeting with Alli, he and the Applicant attended a sales meeting in the boardroom. Noormohamed joined the meeting and handed out documents to all the sales representatives except the Applicant.

- [29] After the Applicant's employment was terminated, Noormohamed told him that Buys did not have baggage, no small children and no husband. Noormohamed told him not to employ any more female staff. He testified that only male sales agents were appointed after the Applicant left.
- [30] He confirmed that the Applicant worked the month of October 2013, and that she was entitled to be paid for that month.
- [31] When Alli returned from the bargaining council, she told him that he would have to testify and say what he is being told to say if the matter is referred to arbitration.
- [32] He confirmed that Alli dismissed the Applicant in the meeting on 27 September 2013 without prior warning. He was not aware of any formal complaints from clients, and heard about a complaint for the first time when Alli raised it in the meeting.
- [33] He confirmed that the Respondent terminated the Applicant's employment on one month's notice.
- [34] Stander confirmed the commission structure, and in this regard fully corroborated the Applicant's evidence. He confirmed, in particular, that Chamberlains and K Carriem were the Applicant's clients and that she was entitled to 3% commission for sales generated by these companies.
- [35] Stander stood firm when he was cross-examined. He confirmed that the Applicant had good technical ability, and that this was only used as an excuse by Noormohamed to get rid of her. He testified that he had no choice but to attend the meeting on 27 September 2013 as he was fearful of being fired, "it was either my job, or someone else's". He confirmed that Noormohamed told him that she had an issue with the Applicant and her children.
- [36] Noormohamed told him to make things as difficult as possible for the Applicant so that this could be a reason to dismiss her.
- [37] Attempts to discredit Stander in cross-examination failed.
- [38] Alli was the only witness for the Respondent.
- [39] She testified that Noormohamed asked her to speak to the Applicant about her dress code and that she had brought her child to the factory. The Applicant came to work in a mini skirt, which Noormohamed did not like. Alli noticed that the Applicant's clothes were "frazzled".
- [40] Her version as to what transpired at the meeting on 27 September 2013 directly contradicts the evidence of the Applicant and Stander in material respects. On the morning of 27 September 2013, she, Stander and other staff were standing outside smoking when the Applicant arrived. She asked the Applicant whether they could meet in her office. Alli, Stander and the Applicant then met in her office. She proceeded to tell the Applicant that they had a few complaints which they wanted to discuss with her, at which time the

Applicant jumped up and said “I told my husband ... because Noormohamed [do not] like me because I am a woman!”. She testified that the Applicant became emotional. She told the Applicant that they were there to discuss work, her dress code and the fact that her child was brought into the factory. She discussed the issue of uniforms with the Applicant. The Applicant left her office hysterical. She then saw the Applicant speaking outside on her phone. She and Stander left her office and also went outside. While outside, the Applicant came to her and said “Adiela, I need to speak to you”. They returned to her office. The Applicant told her that she did not like working for the company and that Noormohamed did not like her. The Applicant asked her for a letter because she wanted to leave. She typed the letter for the Applicant, on the Applicant’s instruction. Alli gave the Applicant one month to think about whether she really wanted to leave. She told the Applicant not to be stupid and to think about her actions. She did not want the Applicant to leave, and had nothing personal against her. She did not include the words “notice period” in the letter dated 27 September 2013, which was a mistake on her part. Alli denied that the Applicant was dismissed, or that Noormohamed instructed her to dismiss the Applicant.

[41] Alli admitted that she spoke to Stander upon her return from the bargaining council but denied that she told him to lie for the

company.

[42] She was requested to assist the Respondent a couple of days before the matter was initially enrolled at the Labour Court in August 2015, and had to go to the Respondent’s offices to obtain the file with the necessary documents pertaining to the Applicant’s matter. She confirmed that the documents in the Respondent’s trial bundle came from the Respondent’s file.

[43] Alli confirmed that both she and Noormohamed were still with the company when the Statement of Case and Response to the Statement of Case (“the Response”) were filed at the Labour Court in January 2014 and on 6 February 2014 respectively. She confirmed in cross-examination that Noormohamed was still in control of the company at this time.

[44] Alli confirmed that she would have been involved in the drafting of the Response because the company depended on her for the events that transpired on 27 September 2013. She testified that she was told in November 2013 that the Applicant was paid for the month of October.

[45] Alli testified that she did not speak with Noormohamed after her meeting with the Applicant and Stander on 27 September 2013. She only spoke with Noormohamed the next day.

[46] She testified that she did not calculate commission for sales agents, did not know what the percentages were for the sales agents or what the Applicant was told. She testified that Kabeer gave the percentages to her.

[47] The Respondent's version was fraught with material contradictions and glaring deficiencies. It starts with the pleadings.

[48] In paragraph 11 of the Response, the Respondent denies that the Applicant worked for the month of October 2013 and that she never

attended the Respondent's premises to tender her services after 27 September 2013. Stander and Alli independently testified that the Applicant worked in October 2013, and that she was entitled to be paid. That she worked for the month of October is also borne out by the e-mail trail between Alli and Stander on 1 November 2013 where Alli confirms that 30 October 2013 was the Applicant's last day at work.

[49] In paragraph 27 of the Response, the Respondent denies that Stander assured the Applicant that her work performance was up to standard,

yet this was not borne out by the Respondent's evidence. Stander testified that the Applicant had the necessary experience and good technical ability in the plumbing field and that to his knowledge, no formal complaints were filed against her by clients.

The first time that he knew of an alleged complaint was at the meeting on 27 September 2013.

[50] The letter of 27 September 2013 authored by Alli and addressed to the Applicant is extraordinary. It is not only lacking in clarity, but does not at all support the Respondent's version that the Applicant had resigned in the meeting on 27 September 2013. The letter does not even refer to the Applicant's resignation, and is headed "Notice Employment". The letter records that the Applicant's notice period will start on 1 October 2013 until 31 October 2013. At no stage however did Alli testify about a notice period which was discussed at the meeting on the 27th nor was this aspect of the evidence addressed with the Applicant and Stander in cross-examination.

[51] Alli's version of the meeting on 27 September 2013 is unconvincing. Both the Applicant and Stander contradicted her version of events in material respects.

[52] Her evidence as to the wording of the letter does not make sense. She testified at one stage that she told the Applicant to use the month as a "probation" period. This aspect of her evidence was also not put to the Applicant or Stander.

[53] On her own admission, Alli never dealt with commission and sales. This was done by Noormohamed and Kabeer, and Kabeer did all the

calculations. She sat with Kabeer [on one occasion] and saw how the commission was calculated. Alli was not privy to the source

documentation and/or supporting documents which underpins the calculation of commission. She was not able to say why certain entries on the sales sheets were crossed out. One such example was the sales made by Chamberlains. She admitted that her evidence in this regard was hearsay as she can only calculate the commission due to the Applicant based on what was

recorded on the sales sheets and what was given to her. The Applicant's case is that certain sales were made by her clients in the period June to October 2013 for which she was not paid. Alli was not in a position to testify to this at all. She admitted in cross-examination that the Applicant was entitled to certain commission, in particular, commission in respect of sales made by Chamberlains.

[54] Other aspects of Alli's evidence also remain unconvincing. She testified that she did not sign the Applicant's Bargaining

Council referral form as she wanted the Applicant to return to work. However, her signature appears on the cover of the referral form.

[55] Alli also testified that the Applicant was e-mailed to attend the meeting on 27 September 2013 with her and Stander. This was not put to the Applicant or Stander, nor was the e-mail presented as evidence.

[56] Alli testified that she and Stander both spoke to the Applicant about a complaint from a client in the meeting on 27 September 2013. This was also not put to Stander or the Applicant in cross-examination. In fact, Stander testified that Alli did all the talking in the meeting. No details of the complaint or the identity of the complainant was addressed in evidence.

[57] Given the material contradictions and inadequacies in the Respondent's case, the Applicant's version must prevail.

[58] The Respondent's evidence in relation to the dismissal was seriously lacking in substance. Most notably, there was no explanation proffered by Mr Venter why Noormohamed or Kabeer did not testify on behalf of the Respondent, or why they could not be subpoenaed to testify. I must accordingly infer that they would not have been able to support the Respondent's defence.

[59] The only inference that can be drawn is that Noormohamed wanted to get rid of the Applicant. When her attempts to engineer the Applicant's

dismissal by changing her sales areas failed, Noormohamed used the incidents relating to her children and an alleged complaint by a client, to terminate her employment, which she instructed Stander and Alli to do.

[60] No plausible explanation was provided by the Respondent as to why the Applicant's sales areas were unilaterally changed in the course of July 2013. This, together with Stander's uncontroverted evidence that Noormohamed wanted to get rid of the Applicant and that Alli had terminated the Applicant's employment in the meeting on 27 September 2013, lead to the inescapable conclusion that the Applicant was indeed dismissed by Alli in the meeting on 27 September 2013.

[61] The Applicant's family responsibilities and the fact that she was a woman clearly played a significant role in why Noormohamed wanted to get rid of her.

[62] Given what had preceded the meeting on 27 September 2013, I accept that the Applicant being a woman, together with her family responsibilities,

was very much an issue for Noormohamed. I accept, on the probabilities, that the real reason for the Applicant's dismissal was indeed because she was a woman, and because of her family responsibilities. These two factors played a pivotal role in why Noormohamed wanted to terminate her employment.

[63] In the absence of any credible evidence by the Respondent, I find that the Applicant's dismissal constitutes an automatic unfair dismissal as contemplated in s187(1)(f) of the LRA.

[64] The Respondent has not at all presented a defence to the Applicant's claim for notice pay for October 2013 and the commission. In fact, Mr Venter conceded in the course of legal argument that the Respondent had put up no defence whatsoever against the Applicant's claim for commission.

The Relief Sought

[65] The Applicant seeks maximum compensation of 24 months' salary for the automatically unfair dismissal to be calculated at an agreed remuneration of R35 519.25 per month. Alternatively, she seeks 12 months' compensation if I am to find that her dismissal was unfair. In respect of the latter, I am satisfied that I may make any order that a commissioner or arbitrator would have been entitled to make in terms of s158(2)(b) of the LRA, provided that in relation to the question of costs, the provisions of s162(2)(a) of the LRA are applicable.

[66] I have already found that the Applicant was automatically unfairly dismissed. In this instance, the maximum compensation is 24 months'

remuneration.

[67] This Court has confirmed in several judgments that in cases of automatically unfair dismissals, compensation attracts a punitive

element (see *Chemical Energy Paper Printing Wood and Allied Workers Union & Another v Glass & Aluminium 2000 CC (2002) 23 ILJ 695 (LAC)*).

[68] Appropriate compensation raises the issue of the offer of re-employment. Whilst an offer of re-employment or reinstatement does not detract from a determination that the dismissal was unfair, it may impact on the compensation to be awarded. The Labour Appeal Court dealt with this issue in *Kemp t/a Central Med v Rawlins (2009) 30 ILJ 2677 (LAC)* where the LAC held that factors such as the lapse of time between the dismissal and the offer of reinstatement; whether the offer was unconditional or subject to conditions; whether it gave

the employee certain assurances that he or she would not be victimised and whether the offer was bona fide, are considerations which would impact on the compensation ultimately awarded.

[69] I am not convinced that the offer of re-employment made by the Respondent in the letter dated 30 January 2014 was genuine. Firstly,

why was the offer not made at the time that the dispute was referred to the bargaining council in October 2013? The offer was also made at a sensitive time when the new owners were about to take over the business. This suggests that the offer was made in order to avoid placing the takeover of the company by the new owners in a precarious position, and not because the company was genuine about the offer.

[70] I accept the Applicant's statement that she did not trust Noormohamed who, to her knowledge, still owned the company at the

time that the offer was made. She would have walked back into the same workplace environment with the same manager who wanted to get rid of her because she was a woman, and because she was a mother of three small children.

[71] Alli testified that she left the Respondent in November 2014, and that Noormohamed left after her. Noormohamed was clearly still with the company for some time after the offer was made. Had the Applicant accepted the offer of re-employment, she would, needless to state, have had to work with Noormohamed as the Manager and owner of the company.

[72] The wording of the offer of re-employment also seems to me contradictory. The letter records that the company is not in a position to reinstate the Applicant since she was never dismissed. However the company offered her re-employment on the same terms and conditions that applied prior to the termination of her employment. In my view, this offer does not constitute an offer of a complete restoration of the status quo ante.

[73] I also note that the offer was made six days after the Statement of Case was served on the Respondent, and that the Applicant was given one working day to report for duty after which the offer would lapse in its entirety, not to be repeated. The offer seemed rushed in order to avoid the progress of the claim, and perhaps also to avoid to have to explain to the new owners the pending litigation.

[74] The Applicant was dismissed on a prohibited ground in terms of s187(1)(f) of the LRA based on sex and family responsibility. This must attract a punitive element in the award of compensation.

[75] Compensation must always be just and equitable in all the circumstances of the case. I am mindful that the Applicant was employed by the Respondent for less than six months at the time of her dismissal. This is not to detract from the nature of the dismissal and the hardship that the Applicant suffered as a result of the dismissal.

[76] The compensation thus payable to the Applicant as a result of her automatically unfair dismissal is the sum of R852 462.00,

equivalent to 24 months' remuneration calculated at R35 519.25 per month. Ms Erasmus, who appeared for the Applicant, submitted this as the Applicant's agreed average monthly income prior to her dismissal.

[77] The Applicant seeks a punitive costs order against the Respondent.

[78] The Respondent persisted in its denial that the Applicant was not owed notice pay for the month of October 2013 yet on the Respondent's

own version, the Applicant worked the month of October 2013 and was entitled to be paid. Alli testified that she knew in November 2013 that the Applicant was due to be paid for October 2013. It should have been abundantly clear to the Respondent at the time when the Response was drafted that this was a bona fide claim which had to be paid immediately. The fact that a belated tender was made for the payment of the notice pay does not detract

from the fact that the Respondent persisted in its denial until the first day of trial. The Respondent's opposition to this claim was clearly vexatious.

[79] The claim for commission was uncontested. Mr Venter could provide me with no explanation as to why Noormohamed and/or Kabeer were not called to testify on behalf of the Respondent. Mr Venter could also not provide me with any explanation as to why the Respondent continued to pursue its opposition to the claim for commission, having known well in advance that it was not in a position to rebut the claim at the trial. The only evidence that it did present on the issue of commission was speculative and hearsay. Alli conceded that the Applicant was entitled to certain commission payments. In my view, the opposition to this claim was equally vexatious. I am also reminded that Mr Venter conceded the claim for unpaid commission during oral argument at the closure of the trial.

[80] The Applicant's dismissal was driven by malice when Noormohamed initially attempted to orchestrate the Applicant's dismissal

when she instructed that her sales areas be changed to make life more difficult for her, and to take her away more often, knowing that she was a mother of three young children. The Respondent's conduct was malicious, and cannot be overlooked.

[81] For all the reasons that I have addressed above, I consider it appropriate that the Respondent pay the Applicant's costs on an attorney and client scale.

Order

[82] For all the reasons herein, the following Order is made:

- (1) The Applicant was dismissed by the Respondent, which dismissal constitutes an automatically unfair dismissal as contemplated in

s187(1)(f) of the LRA;

(2) The Respondent is ordered to pay the Applicant compensation in the amount of R852 462.00 equivalent to 24 months' salary for the automatic unfair dismissal, which amount shall be paid to the Applicant by the Respondent within 14 days of the handing down of this judgment;

(3) The Respondent is ordered to pay the Applicant an amount of R64 768.60 for unpaid commission for the period June 2013 to October

2013. This amount excludes the amount of R816.01 which is due in respect of Bon Accord Build-it. This amount is to be paid with interest calculated from 31 October 2013;

(4) The Respondent shall pay the Applicant's costs on an attorney client scale which costs shall include the cost of counsel.

Golden AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Erasmus

Instructed by:

Du Randt Du Toit Pelser Attorneys

For the Respondent: Adv. F Venter

Instructed by:

DP Du Plessis Inc.

[1] (2009) 30 ILJ 2745 (LC)

[2] At para 31 and 32

[3] Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC).

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