REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 574/2010

In the matter between:

ISMAIL NADIA **Applicant**

And

B & B t/a HARVEY WORLD TRAVEL NORTHCLIFF **Respondent**

Heard: **13 & 14 May 2013**

Delivered: **30 July 2013**

Summary: The Applicant sought an order that the termination of her services by the Respondent be declared an automatically unfair dismissal in terms of the LRA - The performance of the employee put to question during her probation and later on was found that the employee was pregnant- the employee and the employer entered into an agreement of termination of employment-the employee sued challenging the said agreement and claiming dismissal- Application dismissed with no order as to costs.

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction

[1] The Applicant sought an order that the termination of her services by the Respondent be declared an automatically unfair dismissal as contemplated in section 187 (1) (e) of the Labour Relations Act No 66 of 1995 as amended (The Act). The basis of her claim was that she was dismissed on account of her pregnancy. She sought maximum compensation as provided in section 194 (3) of the Act.

[2] The Respondent's contention on the other hand was that the Court lacked jurisdiction to adjudicate this dispute as the Applicant was not dismissed. It was contended that the termination of the employment relationship was by mutual agreement. This contention was raised in view of the notice of termination of the employment relationship, which was signed by both parties on 14 April 2010.

[3] It is trite that where the fact of a dismissal is disputed, it is a prerequisite in terms of section 192 (1) of the Act that an employee must establish the existence of the dismissal. Thus the evidentiary burden is on the employee to prove the fact of a dismissal. For the purposes of this trial, the parties had agreed that whether this evidentiary burden was discharged should be determined together with the entire merits of the dispute. To this end, it was agreed that if the Court were to find that there was indeed a dismissal, it followed that a further issue for determination would be whether the dismissal was automatically unfair as contemplated in section 187 (1) (e) of the Act. This being the case, the first hurdle for the Applicant to surmount was whether she was in fact dismissed.

Background and common cause facts

[4] The Respondent as the name suggests operates a travel agency. It is a small entity owned and managed by two partners who are also sisters, viz, Belinda Magua and Bernadette Munzer. It had employed the Applicant as an Intermediate Travel Consultant with effect from 22 February 2010. In terms of her employment contract, she was required to serve probation for three months.

[5] On 12 April 2010, the Applicant had taken a day's leave in order to consult with her doctor. Following consultations, she was informed by her doctor that she was three months pregnant. On 13 April 2010, she had disclosed to Magua that she was pregnant. On the same date, the Applicant was called to an office in the presence of both Munzer and Magua. The two had congratulated her on her pregnancy and had in the same token, informed her that they were unhappy with her work performance and intended to give her notice of termination of her employment contract.

[6] On 14 April 2010, the Applicant was handed a letter of notice of termination of the employment contract which she had signed. Her contract was to be terminated on 30 April 2010. It was further common cause that despite being issued with this letter of notice, the parties had verbally discussed the possibility of temporary employment for the Applicant. Other than that, the alternative position was to be offered at a reduced salary of R9000.00. The Applicant had not fully committed to these arrangements, and had continued to serve her notice.

[7] On 28 April 2010, the Applicant informed Magua and Munzer that she would not accept the alternative position and had left the services of the Respondent. A dispute was referred to the Commission for Conciliation, Mediation and Arbitration on 18 May 2010. When the dispute could not be resolved, the applicant approached this Court.

The Evidence

[8] The Applicant's testimony is summarised as follows:

At the time that she applied for the position, she had a ten months old baby. She was not aware then or at least until on 12 April 2010 that she was pregnant. During her interview, Munzer and Magua had questioned her about her experience in the industry, her family and significantly for her, whether she had any intention of having any more children in the future. She had assured Magua and Munzer that she had no such intentions.

[9] The news of her pregnancy from her doctor on 12 April 2010 came as a surprise to her as she had not planned the pregnancy. During the course of that day when she was not at the office, Magua had telephonically contacted her to establish her whereabouts. She had asked the Applicant to come to the office as there was urgent work to be done, more particularly clients' quotations. The Applicant could however not return to work after her consultation with her doctor.

[10] On 13 April 2010, the Applicant had reported for duty. Despite her trepidation as she was still on probation, she had nevertheless informed Magua of her pregnancy. Magua had expressed shock at the news and had asked her what was to happen to her job. Magua then telephonically contacted Munzer who was not in the office at the time to inform her of the Applicant's pregnancy. Following this call, Magua had informed the Applicant that they were not happy with her performance and that the matter would be discussed with her later when Munzer came back to the office.

[11] The Applicant further testified that having informed Magua of her pregnancy, it was the first time that any issues surrounding her performance were raised. When Munzer came to the office, all three of them met in an office. Munzer had congratulated her on her pregnancy and then informed her that they were unhappy with the quality of her work. Complaints were raised regarding her competency and instances of late coming. This was the first time that these issues were raised with her since her employment.

[12] At this meeting, the Applicant was informed that her contract was to be terminated with two weeks' notice. She was also informed that she would be given a new short term contract at a reduced salary. When Munzer and Magua told her of the termination, she was assured that it had nothing to do with her pregnancy, and that the only consideration was her performance.

[13] On 14 April 2010, Munzer had presented her with a written notice of termination. She had not read the document and had simply signed it. Her contention was that she was not given a choice in the matter, and had simply signed the document as she wanted to retain the relationship. This was

moreso in view of the alternative offer of short-term employment. She was not happy with the fact that the offer was at a reduced salary, and had nevertheless informed Munzer that she would consider it.

[14] The Applicant had continued working despite the fact that the atmosphere in the office had become tense since 14 April 2010. Magua's attitude towards her had also changed. The last straw according to the Applicant was on 28 April 2010 when Magua swore at her following her interaction with a client. Magua had, following this altercation, told her to take her bag and leave. She was then issued with a UIF form which indicated that she was dismissed.

[15] Cross-examination of the Applicant revealed that it was only on 28 April 2010 that she had decided that she would not take the offer of alternative employment. Despite contending that she had done nothing or said anything about the offer of alternative employment she conceded that she had sought legal advice in that regard. In regards to the notice of termination, despite initially contending that she never at all read it, she had conceded that she had done so prior to signing it albeit not in detail. On being asked the same question again, she contended that she had not read it all. On being asked what was incorrectly reflected in the notice as against what was discussed with her on 13 April 2010, her response was that she had not agreed to anything during the discussions held with her.

[16] She conceded that she was given training on how to deal with clients even though it was not in respect of all of the Respondent's clients. She conceded that Magua always gave her feedback on how to deal with different clients and was told that she needed to improve in regard to certain performance areas. She also conceded after a long-winded response that she may have reported late for work on one occasion.

[17] In regards to the termination, her view, however, was that it was suspicious that this came up immediately after she had disclosed her pregnancy. She contended that she had five years' experience in the leisure industry to back up her performance. Her experience in the industry was sufficient to enable her to perform her duties, more specifically since the Respondent was a small

employer as compared to her previous employers. Her suspicion that the termination of her services was due to her pregnancy was based on her belief that it could not have been due to her incompetence.

[18] Belinda Magua's testimony was as follows:

She could not recall whether the Applicant was asked during her interview about her intended pregnancy. If ever there were such discussions, they were purely raised in a general context, and the Applicant was never at any stage informed that she was to be employed on condition that she did not fall pregnant. For the Respondent, which operated on a small margin and in a competitive market, service to its clients was paramount. She had realised in the second month of the Applicant's employment that she was not what they had expected of her as against her impressive CV. Despite Magua giving her constant feedback and counselling on how to deal with clients, this had not yielded the desired results as the Applicant either appeared disinterested or took no note of what she was being told. In regards to incidents of late coming, the Applicant throughout her employ only came to work on time on three occasions, and was always late by between 15 and 20 minutes. Magua had reprimanded her but the latter did not take it well.

[19] An incident took place on the Friday of 09 April 2010 when a repeat and important client, Nel, had called in to follow up on a quotation that he had requested. During the telephone conversation with Nel, the Applicant was abrupt and had put the phone down on him. The office is open-plan and Magua and the Applicant sat opposite each other. Taking exception to what she had heard and witnessed, Magua had then informed the Applicant that what she had done was not acceptable. Magua had called Nel to apologise for the Applicant's conduct. She then had a discussion with Munzer surrounding the Nel incident and the two had decided that in view of this and other incidents surrounding her performance, the Applicant's services were to be terminated. They had intended to inform the Applicant of their decision on Monday, 12 April 2010.

[20] On 12 April 2010, the Applicant did not report for duty. She had not called in to say where she was and Magua had in the afternoon telephonically contacted and informed her that some quotations needed to be done. The Applicant's response was that she was on her way to see her doctor. On 13 April 2010, the Applicant had reported for duty and told Magua that she was pregnant. She had also presented her with a copy of medical certificate from her doctor. Magua was happy for her and had congratulated her.

[21] When Munzer came to the office, a meeting was held with the Applicant and incidents surrounding her late-coming, general performance and dealing with clients were raised with her. She was informed that her services could not be retained. As the Applicant had just announced that she was pregnant, Magua and Munzer felt sorry for her since she would be without an income. They then offered her a part-time/temporary arrangement at less her normal salary. Munzer had then drafted a termination letter after the discussion which she had presented to the Applicant on 14 April 2010.

[22] Magua's contention was that the Applicant was not in any manner forced to sign the termination letter and that its contents were merely a formalisation of their previous day's discussions. After she was presented with the letter, the Applicant continued working until 28 April 2010 when she announced that she was leaving as she had secured alternative employment. She denied having sworn at the Applicant at any stage and testified that the timing of the termination and the announcement of the Applicant's pregnancy was merely a coincidence. The Applicant's pregnancy could not have been a consideration when the decision was taken to terminate her services on 09 April 2010 as they did not know at that stage that she was pregnant.

[23] Bernadette Munzer's testimony was to the effect that:

When the Applicant was interviewed, issues surrounding her role and experience were discussed. The issue of her intended pregnancy was only raised within the context of a discussion of general family issues. Munzer's view was that she could not expect the Applicant, who was of child bearing

age not to fall pregnant during her employment. They had only considered her competency and nothing else during her interview.

[24] After her employment, the Applicant was observed to be lacking in certain material respects and Magua was constantly guiding, correcting and instructing her on various things to enable her to perform according to expected standards. Even though Magua was concerned that the Applicant had not met their expectations, Munzer's view was that they should be patient with her despite the fact that she always showed dissatisfaction, scant respect towards Magua and was generally abrupt. Magua and the Applicant sat opposite each other in an open plan office and Munzer could always observe interaction between them. The Applicant's conduct had however not changed. She was always on her mobile phone, or on the e-mail attending to personal matters or not attending to clients in a manner expected. She lacked interest and enthusiasm according to Munzer.

[25] The last straw according to Munzer involved the incident with Nel. The decision to terminate the Applicant's service was long coming in view of her incompetence. Following the incident with Nel, a decision was taken on that day of 09 April 2010 to terminate her services. Munzer confirmed the meeting with the Applicant on 13 April 2010 and the discussions held surrounding the Applicant's performance and intention to terminate the contract. She had drafted the notice of termination and presented it to the Applicant on 14 April 2010.

[26] As the contents of the notice essentially captured what was discussed and agreed with the Applicant the previous day, Munzer had read the notice to her. The Applicant had on her own also read and signed the notice without saying anything or protesting. The offer of alternative employment at a reduced salary was made after the Applicant had become tearful and emotional about the intended termination. The reduced salary was offered due to the reason that in view of the problems they had noted, the Applicant did not deserve a full salary. According to Munzer, the offer of alternative employment was merely an act of kindness. At some stage after the Applicant was issued with the notice, she was granted time off to attend an interview.

On 28 April 2010, the Applicant had said that she had secured alternative employment and left. The parting according to Munzer was amicable.

Was there a dismissal?

The legal framework:

[27] Section 186 (1) (a) defines a "dismissal" as meaning that an employer has terminated a contract of employment with or without notice. In analysing this provision, this court in *Ouwehand v Hout Bay Fishing Industries*[1] held that:

> 'This formulation [s186 (1) (a)] would appear to contemplate that the employer party to the contract of employment undertakes an action that leads to the termination. In other words, some initiative undertaken by the employer must be established, which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so.'

At paragraph 15, the court further added that;

> 'It is accordingly incumbent upon an employee to establish on a balance of probabilities, where the employee claims to have been dismissed in terms of s186 (1) (a), some overt act by the employer that is the proximate cause of the termination of employment. A dismissal in this sense must be distinguished from a voluntary resignation (where a contract is terminated at the initiative of the employee), and the termination of the contract by mutual and voluntary agreement between the parties. The latter is not a dismissal for the purposes of s186 (1) (a). In this regard, see *CEPPWAWU and Another v Glass Aluminium 2000 CC* [2002] 5 BLLR 399 (LAC).'

[28] Molahlehi J in *Marneweck v SEESA Limited*[2] aligned himself with the views expressed in *Ouwehand* (supra) and further added that it is not even necessary to enquire into whether the term "dismissal" was used in terminating the employment relationship. Thus a contract of employment could be regarded as terminated based on the objective construction of the employer's conduct which unequivocally repudiates the contract.

[1] [2004] 8 BLLR 815 (LC) at para 14.
[2] [2009] 7 BLLR 669 (LC) at para 31.

[29] Section 192 of the Act provides:

> "Onus in dismissal disputes.-
>
> (1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
>
> (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

In unpacking the provisions of section 192 of the LRA, Mlambo JP in *State Information Technology Agency Ltd v Sekgobela*,[3] stated the following;

> 'It is clear that section 192 provides for a two stage process in dismissal disputes. First the employee who alleges that he/she was dismissed must prove that there was in fact dismissal and once the existence of the dismissal is established then the employer must prove that the dismissal was fair. It is clear therefore that the onus to prove the existence of the dismissal lies first on the employee. The word "must" in section 192 means that the provisions of the section are peremptory (*CWU v Johnson and Johnson (Pty) Ltd* [1997] 9 BLLR 1186 (LC) as cited by D du Toit el al Labour Law Through the Cases (2011, LexisNexis Durban) at 8-103; see also *De Beers Consolidated Mines Ltd v CCMA and Others* [2000] 9 BLLR 995 (LAC) at para 50.)The employee must set out the facts and legal issues which substantiate his assertion that a dismissal occurred. Once the employee has proved that dismissal did take place, the onus is shifted to the employer who must prove that the dismissal was for a fair reason such as for instance misconduct.
>
> In *Kroukam v SA Airlink (Pty) Ltd* ([2005] 12 BLLR 1172 (LAC) at paras 27 and 28 as per Davis AJA) this Court held that it is not for an employee to prove the reason for dismissal but to produce evidence sufficient to raise the issue and once this evidentiary burden is discharged, the onus shifts to the employer to prove that the dismissal was for a fair reason. See also *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* (2002) 23 ILJ 358 (LAC) a case where the employer contended that the employee had not been dismissed but that the contract of employment was terminated by mutual consent, the court at para 15 held that the arbitrator erred in not considering

[3] [2012] 33 ILJ 2374 (LAC) at paras 13-14.

> that there was an onus on the employee to prove that he had been dismissed before there rested an onus on the employer to prove that the dismissal was fair.'

[30] In instances where the employer in the face of an allegation of dismissal relies on consensual termination of the employment relationship, the onus is on the employer to prove that termination was indeed by mutual consent. Mr. Voyi on behalf of the Respondent in his written heads of argument, had made reference to the seminal decision of *Springbok Trading (Pty) Ltd v Zondani and Others*[4] where Jafta AJ held that;

> 'As the appellant has pleaded that the termination of the respondent's employment was effected in terms of an agreement, it bore the onus to prove not only the parties' common intention to enter into the agreement but also its specific terms.…'

Evaluation

[31] The Respondent's contention was that the termination was long coming in view of issues surrounding the Applicant's general performance, and general attitude in the less than two months she was employed. The incident of 09 April 2010 surrounding Nel was raised with the Applicant during her cross-examination. Her response was that she could not recall the incident at all. It must be said at the onset that I had found the Applicant to be selective in her testimony in regards to what she could and could not recall. At times, she was evasive, argumentative and long-winded in her responses. To extract a simple concession out of her during cross-examination proved to be an arduous task. The basis of this conclusion is evident from her evidence as summarised above and further dealt with below.

[32] Arguments advanced on behalf of the Applicant were to the effect that neither Magua nor Munzer had ever raised the issue of her competence prior to the announcement of her pregnancy nor had they expressed any unhappiness with her. It was argued on behalf of the Applicant that the Respondent was very vague about when either Magua or Munzer had determined that she was

[4] [2004] 25 ILJ 1681 (LAC) at para 46.

not coping, and further that the Respondent was vague about exactly what it had done to assist her. It was further argued that there was no evidence of any evaluations that were done by either Magua or Munzer of her performance; that there was no proof of any training undertaken, nor was there any proof of correspondence between Magua and Munzer over the Applicant's alleged incompetence.

[33] Contrary to these arguments however, the Applicant had conceded under cross-examination that at a meeting held with her on 13 April 2010, issues surrounding her performance and competencies were raised. Her contention that these issues were raised only after she had disclosed that she was pregnant is rejected on the ground that she had conceded, albeit grudgingly that Magua had constantly afforded her counselling and feedback on certain clients and how to deal with those clients. She had also grudgingly conceded that the issue of her late coming was also discussed with her in the past. The arguments surrounding the lack of a paper-trail to substantiate evidence of training and counselling are unsustainable in view of the concessions made. The Applicant's concession that such training and counselling took place on an informal basis does not detract from the fact that it did take place.

[34] Items 8 and 9 of Schedule 8: Code of Good Practice: Dismissal as contained in the Act provide guidelines in regard to dealing with probationary employees and instances of poor work performance. Item 8 (1) (b) identifies the purpose of probation as being to give an employer an opportunity to evaluate the employer's performance before confirming the appointment. Item 8 (1) (e) requires employers to give probationary employees "reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render satisfactory service". Item 9 (ii) of the same Code requires an employee to have been given a fair opportunity to meet the required performance standard. It follows that where an evaluation of the employee's performance has been done, and despite being afforded a fair opportunity to meet the required performance standard, the employee is still found to be lacking, it is for the employer to decide as to the continuity of the employment relationship. In instances where such an employee is still on probation, less

compelling reasons for the termination will be accepted as envisaged in Item 8 (1) (j) of the Code.

[35] There is no strict formula prescribed in the Code as to the nature of training, evaluation, instruction, guidance and counselling to be afforded to employees whose performance is in question, and this includes probationary employees. It would not be in every instance or every workplace that it would be required that such measures should follow a detailed, structured or formalised manner. The reference to "reasonable evaluation, instruction, training, guidance or counselling" in the Code can only be in relation to *inter alia*, the nature and size of the business, the specific needs of the employee as identified by the employer, and most importantly, the skill and experience that the employee purportedly possesses at the point of entry or at the time that any shortcomings in performance are identified. It would be these considerations that would determine how, when and to what extent such training, counselling, guidance or evaluation should be afforded.[5] Furthermore, it being common knowledge that issues surrounding training, development, evaluation and guidance are on-going, it could not have been envisaged by the drafters of the Code that there would be a prescriptive way of implementing these measures.

[36] With small employers as in this case, where there is only one employee in an open-plan office, it would not be necessary for the employer to be required to formalise training, evaluation, feedback or counselling and record each and every instance where the one employee is subjected to such performance measures. To require otherwise from the small employer would place an onerous burden on it. All that is required is that the employer must have identified the short-comings in the employee's performance and ensured that the employee is made aware of such shortcomings. Thereafter, reasonable measures sufficient enough to rectify those short-comings must then be taken by the employer, and the employee must be given sufficient opportunity to improve and meet the required performance standards. When all else fails, it is for the employer to decide on the continuity of the employment relationship. As far as the facts of this case are concerned, nothing further could have

[5] See *Boss Logistics v Phopi and Others* [2010] 5 BLLR 525 (LC) at 526 and 529.

been expected of the Respondent to address the problems associated with the Applicant's performance, and I am satisfied that she was subjected to reasonable measures to address her lack of performance.

[37] In the light of the above, it follows that the decision to terminate the Applicant's services was taken in view of problems surrounding her performance, and had nothing to do with her pregnancy. When dealing with the question of the onus of proof in dismissals for reasons related to pregnancy, this court in *Mushava v Cuzen and Woods Attorneys*[6] held as follows:

> 'If the employee simply alleges unfair dismissal the employer must show that it was fair for a reason permitted in section 188. If the employee alleges it was for prohibited reasons, e.g. pregnancy, then it would seem that the employee must in addition to making the allegation at least prove that the employer was aware that the employee was pregnant and that the dismissal was possibly on this account.'

[38] In the light of Munzer and Magua's evidence, I have no reason to doubt that at the point that the decision to terminate the employment contract was taken on 09 April 2010, they were not aware of the Applicant's pregnancy. The issue of the Applicant's pregnancy came about at the same time that the Respondent had already taken a decision to terminate the Applicant's services for reasons alluded to. Although she had raised the issue of her intended pregnancy having been discussed during her interview, nothing much turned on this in the greater scheme of her evidence. Notwithstanding her contention that she was dismissed consequent upon disclosing her pregnancy, in the same token, she had conceded that Munzer and Magua had assured her on 14 April 2010 when she was presented with a notice of termination that her pregnancy had nothing to do with the decision to terminate the contract. I did not understand her evidence to be that these assurances were disingenuous.

[39] Her only reliance in asserting that she was dismissed on account of her pregnancy was her belief that the timing of her termination was suspiciously

[6] *[2000] 6 BLLR 691 (LC*) at para 23.

close to the disclosure of her pregnancy. The test in discharging the onus is not that of suspicion but that of a balance of probability. It is therefore for the Applicant to produce evidence sufficient enough to connect the termination of her employment to her pregnancy. Mere suspicion on its own cannot lead to a conclusion that the issue of her pregnancy was the dominant or more likely reason for the termination of the employment relationship. On these conclusions alone, the application should fail. However, there were other arguments which were raised on behalf of the Respondent which needs further evaluation. These arguments further put paid to the Applicant's case.

[40] The decision to terminate the Applicant's services as at 09 April 2010 remained unilateral as elucidated in *Ouwehand (supra)*. However, once discussions were held with the Applicant and thereafter there was a verbal agreement which was formalised into writing that the relationship had to end, it put a different picture to the nature of that termination for the purposes of establishing a dismissal as defined.

[41] It follows from the dictum in *Springbok Trading (Pty) Ltd (supra)* that if it is found that there was a termination which was by indeed mutual agreement, it cannot in the main be argued that there was unfairness. Various authorities were referred to in the Applicant's heads of argument in contending that the termination was not mutual. The first was that in *Voster v Rednave Enterprises CC t/a Cash Convertors Queenswood*,[7] it was held inter alia that;

> 'Where the facts show that more than one reason may have been the reason for the dismissal, the Court will have to examine whether pregnancy was the dominant or more likely reason for the dismissal…'

[42] The Respondent's main argument that there was no dismissal was premised on the verbal agreement reached of 13 April 2010 that the employment relationship is mutually terminated. This agreement was confirmed in a letter that was signed by the Applicant on 14 April 2010. In countering this assertion, it was further argued on behalf of the Applicant that regard should

[7] [2009] 30 ILJ 407 (LC) at para 27.

be had to the *dictum* in *Wallace v Du Toit*,[8] where the court in dealing with similar issues held that;

> 'The fact that the Applicant accepted and in that sense agreed to that termination, even though she would have preferred to remain in employment, does not change the nature of the act from one of dismissal to one of consensual termination.'

[43] The facts of *Wallace (supra)* are clearly distinguishable from those *in casu*. In *Wallace (supra),* the employer had upon congratulating the employee (an *au pair*) on her pregnancy, also informed her in clear and unequivocal terms that she would have to go. A suitable date for her to leave was also discussed with her and the employer had also secured an agreement from her not to disclose the pregnancy to his own children. Furthermore, the employer had specifically informed the employee during her interview prior to the commencement of her employment that if she were to have children during her employ, she would not be regarded as suitable. The court in that case gave little regard to the alleged agreement to terminate the relationship based on *inter alia* the obvious reasons for the termination of the contract of employment.

[44] The notice of termination issued to the Applicant in this case read as follows;

> '14th April 2010
>
> Notice of termination of Employment
>
> Dear Nadia
>
> As discussed and agreed on Tuesday, 13th April 2010, we are giving you two weeks notice that your employment with our Travel Agency – Harvey World Travel Northcliff – will come to an end on the 30th April 2010. As from 1st May 2010 the contract you signed becomes null and void. (Sic)
>
> We wish you every success in your future
>
> Kind regards
>
> Bernadette Munzer (Signed)

[8] [2006] 8 BLLR 757 (LC) at para 16.

General Manager

I, Nadia Ismail, confirm that I have received from Harvey World Travel Northcliff, notification, both verbally and written (as per this letter) of the termination of my employment as from 30th April 2010, and that I am in agreement with the terms of the termination.

(Signed)'

[45] As compared to *Wallace (supra),* in this case, nothing turned on the alleged discussions surrounding the Applicant's intended pregnancy during her interview as there is no evidence to suggest that she was to be employed on condition that she would not fall pregnant. Secondly, as already indicated, her assertion to link the termination to her pregnancy was based on her suspicions and nothing else. Thirdly, the basis of the termination was discussed with her, and this was reduced to writing for her to confirm agreement in that regard. Fourthly, the only issue raised by the Applicant in regard to this notice was that she had no choice but to sign it and that it did not constitute a consensual termination of her contract.

[46] The notice is in a form of normal notices issued to employees upon termination of the employment relationship. The only difference is that in this notice, the discussions of 13 April 2010 were referred to and most significantly, the Applicant had signed the agreement to confirm agreement with its terms. The terms referred to in the notice are standard, and the discussions of 13 April 2010 as already indicated elsewhere in the judgment were in relation to the Applicant's competence. It follows that the "agreement" referred to in the notice can only be in relation to the termination. If this was not the case, it is inexplicable as to the reason the Applicant would voluntarily sign the document. Her contention that she had not read the document is found to be improbable if not fallacious.

[47] As was correctly pointed out on behalf of the Respondent, the Applicant is not illiterate. She did not give an impression of someone who did not know her rights as an employee and it is inconceivable that she would have attached

her signature to something she did not agree with. Furthermore, she had on her own version, testified that she had signed the document in view of the offer of alternative employment which she was still going to consider. It is thus inexplicable that she would sign the notice with that understanding and yet not concede that it was also with the understanding after the discussions held with her that her employment would be terminated.

[48] Significantly, the Applicant could not point to any issue in the notice of termination that was not raised, discussed and or agreed with her. The only issue which is of significance that was not raised in the notice is the offer of alternative employment. The Applicant had conceded that this was discussed and, as she had not made any commitments in that regard, it could not have been mentioned in the notice as there was no agreement on that issue as at 14 April 2010.

[49] A further issue that was raised on behalf of the Applicant was that the offer of alternative employment was not made out of any feelings of empathy or sympathy for the Applicant and that it was made at a lower salary and only to be valid until the Respondent found a replacement. In this regard, it was contended that it was not a legitimate offer but that it was purely made to short-change the Applicant and for the convenience of the Respondent.

[50] It was common cause that after this offer was made, the Applicant had undertaken to revert to the Respondent about whether she would accept it or not. On her own version, she had signed the notice of termination in view of this offer having been made. It is unknown at what stage she had realised that the offer was not legitimate nor genuine, safe for the fact that she had decided not to accept it on 28 April 2010 and to leave immediately.

[51] Nothing turned on the Respondent's witnesses' evidence that the Applicant had secured alternative employment hence she had left on 28 April 2010. This material version was not put to the Applicant during her cross-examination. The contention that the Applicant had left sooner than expected on account of Magua having sworn at her is equally spurious as it was not pursued with Magua as being the reason that the Applicant had left as against her main

claim that she was dismissed on account of her pregnancy. This allegation was denied by Magua out of hand, and I am of the view that it was merely an afterthought to bolster the Applicant's case. In the light of these factors, there is no basis for a contrary conclusion to be reached that the offer was made as a result of the Applicant having become emotional after she was informed of the termination and the Respondent felt sorry for her. In view of the issues raised surrounding the Applicant's performance, there was nothing untoward with the offer being made at a reduced salary.

[52] It was argued on the Applicant's behalf that she was forced into signing the agreement as "she had no choice". I fail to appreciate in what material respects the Applicant was forced into signing this notice of termination, more specifically since the issues that were captured in that notice were a proper reflection of what was discussed and agreed with her. Thus the common intention of the parties and the terms of the termination were properly captured in the agreement. It was plain from the facts that the applicant had voluntarily signed the written agreement terminating her employment relationship with the respondent. She had been aware of her rights when she acted in that way.

[53] A further argument advanced in support of the proposition that the termination was consensual was that the consequences of an individual signature on a document were well-known. Reference in this regard was made to *Blue Chip Consultants (Pty) Ltd v Shamrock*[9] for the principle that a person cannot escape the consequences of his signature. Ms. Stroom during her closing arguments had submitted that the fact that the Applicant had signed the notice was immaterial. I cannot, however, agree with this dismissive approach in view of established legal principles surrounding the *caveat subscriptor* rule, which is that a person who signs a document is taken to have assented to what appears above his signature.[10]

[9] [2002] (3) SA 231 (W) at 239F.
[10] See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) which was also referred with approval in *JZ Brink v Humphries Jewel (Pty) Limited* [2005] 2 All SA 343 (SCA).

[54] In dealing with this legal principle in *Khulekile Dyokhwe v De Kock and Others*,[11] Steenkamp J stated as follows;

> 'Our law recognises that it would be unconscionable for one party to seek to enforce the terms of an agreement where he misled the other party, even where it was not intentional. Where the misrepresentation results in a fundamental mistake (iustus error), there is no agreement and the 'contract' is void ab initio. The purpose of this principle is to protect a person if he is under a justifiable misapprehension, caused by the other party who requires his signature, as to the effect of the document he is signing(*Brink v Humphries and Jewel (Pty) Ltd* 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA)) It has also been held that the caveat subscriptor principle will not be enforced if the terms of the contract have been inadequately or inaccurately explained to an ignorant signatory(*Katzen v Mguno* [1954] 1 All SA 280 (T)).'

[55] I did not understand the Applicant's case to be that she had signed the notice under some form of misrepresentation or that she was misled as to the contents of the notice. Her version that she had signed the agreement without reading or had no choice in the matter has been found to be improbable moreso in view of her contradictory responses to questions in that regard. As the Applicant had not committed herself to the alternative offer of employment, there is no basis for a conclusion to be reached that she may have been misled. Furthermore, in view of the conclusion that she was not illiterate, and the fact that she was fully aware of her rights and the discussions of 13 April 2010, it cannot be said that she could not have known what she was attaching her signature to.

Conclusions:

[56] To summarize then, flowing from the *dictum* in *Ouwehand (supra),* it is found that the Respondent had undertaken some initiative which had the consequence of terminating the contract. This termination however was not remotely linked to the Applicant's pregnancy, and was by mutual consent. The termination can further not constitute a dismissal as contemplated in section 186 (1) (a) of the Act.

[11] [2012] 10 BLLR 1012 (LC) at para 59.

Costs

[57] Mr. Voyi on behalf of the Respondent had submitted that the issue of costs would not be pursued albeit it was an issue which should not be overlooked. Costs are either pursued or not and ultimately, it is for the court to decide whether a cost order is appropriate or not having had regard to considerations of law or fairness. Even though this application was clearly misguided, a cost order is not deemed appropriate in view of it not being pursued.

Order

1. The application is dismissed.
2. There is no order as to costs.

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Tlhotlhalemaje, AJ

Acting Judge of the Labpur Court

Appearances:

For the Applicant:	L. Stroom
	Of the Wits Law Clinic
For the Respondent:	N Voyi
	Of Ndumiso Voyi Incorporated