REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT PORT ELIZABETH

Case no: PR 79-15

In the matter between:

TRUPIK RESTAURANT CC	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
FREDERICK SAULS *N.O*	**Second Respondent**
NICOLA VAN NOORT	**Third Respondent**

Heard: 3 November 2016

Delivered: 4 November 2016

Summary: (Review – jurisdiction – existence of a dismissal or demotion – employee appointed under new contract of service as a manager on probation – contract terminated during probation period)

JUDGMENT

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LAGRANGE J

Introduction

[1] In this matter, the arbitrator had decided that the employee Ms N van Noort ('van Noort'), the third respondent, had been unfairly dismissed when her employer told her that she could no longer be a manager owing to her personal issues, mainly pertaining to time off to attend to the needs of children, becoming a problem for the business, a Wimpy outlet. The arbitrator accepted that at the time the dispute arose van Noort was on probation as a manager from 20 January 2015. She had previously been engaged under a contract of service as a cashier on 1 December 2013.

[2] According to van Noort's testimony when she returned to work on 1 March 2015, after a day's absence necessitated by having to take her son for an emergency appendicitis operation, she was told after a discussion with the owners that she was longer manager and could be a cashier, which was her previous position. After the discussion she was asked to hand back the keys. She took it that she was dismissed and did not return to work. Managers normally kept the keys to the business.

[3] About three days after she left the employer sent her a letter informing her that if she failed within 24 hours to give reasons why she did not report for duty the employer would accept that she had dismissed herself without any further remuneration. Van Noort did not respond to this letter which she only received some two weeks after the date on the letter. She claimed to have been surprised to receive it as she believed she had clearly been dismissed as a manager.

[4] The arbitrator accepted that Noort had been on a probationary period as a manager, and took the view that she had been removed as a manager without any of the normal steps being taken by the employer before dismissing a probationary employee. The arbitrator was understandably sympathetic to the employee about the employer's apparent unwillingness to accommodate the employee's parental commitments and commented that such conduct bordered on discrimination. However he accepted that a claim of discrimination was not an issue in the case before him. He

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concluded that the employer had dismissed the third respondent whilst she was on probation as a manager.

Amendment of citation

[5] In the arbitration proceedings the applicant had been cited as 'Wimpey Jeffreys Bay Oosterland' and in the review application also cited itself as 'Wimpy Jeffreys Bay Oosterlund (Pty) Ltd'. It belatedly applied to amend the citation and all other references to either of these two trading names of the applicant to 'Trupik Restaurant CC' on the basis that all previous citations were incorrect. The application to amend the citation was unopposed and was granted when the matter was heard. Presumably, the CCMA would also amend the citation of the applicant in the arbitration award if necessary.

Condonation

[6] The award was handed down on 5 May 2015 and the review application was filed on 14 July 2015. Consequently, the review application was filed about a month late. The reason for the delay was attributed to the fact that the parties were engaged in settlement discussions for about six weeks, regrettably without success. Van Noort does not dispute this and does not oppose the condonation application. In view of the lack of opposition and the reason given for the delay, quite apart from the merits of the application, the late filing of the review should be condoned.

Grounds of review

[7] The crux of the matter, and the only ground of review, concerns whether the arbitrator correctly decided that the employee had been dismissed rather than simply reverting to her former position as a cashier.[1] The

[1] See at *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others* (2008) 29 *ILJ* 2218 (LAC) on the proper test of review of jurisdictional rulings at 2230:

> "[41] The question before the court a quo was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA

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applicant contends that even on van Noort's own version at best it amounted to a demotion but could never have amounted to a dismissal.

[8] When van Noort was employed as a manager she entered into a new employment contract containing a probation period of eight weeks. In terms of clause 2.2, the employer was entitled to extend the probation period or terminate the service contract during the probation period if the employer's requirements were not met. The contract says nothing about the employee reverting to her previous contract as a cashier and appears to be a self-standing employment contract. Mrs T Viljoen, apparently a co-owner of the business with her husband, also confirmed that the two contracts were separate.

[9] The employer's version at the arbitration was that when the owners had a discussion with the employee about her parental commitments creating a problem for her managerial duties, Mr Vijoen simply told her that she would revert back to being a cashier and that she had to hand over of the keys of the store because only managers held keys to the store. It was claimed that the employee said she would not be interested in becoming a cashier again and she simply never returned despite them sending her a letter. Later in the employer's testimony it was said that the employee had agreed to reverting back to being a cashier but went home and never contacted the employer again.

[10] The employer sent a letter to van Noort dated 4 March 2015 giving her 24 hours to explain why she should not be dismissed, failing which she would have been assumed to have dismissed herself. However, the employee claims she only received the letter on 18 March. Van Noort testified that after she had taken time off to attend to her son's appendicitis she had been called in by the owners who started the conversation saying that she had said her children would not be a problem now they were. Then she was questioned about other issues such as her cell usage talking to visitors to the store. She testified that after the conversation had gone back and forth about various issues Mr Viljoen had stood at and said she

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jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary."

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was no longer the manager “and” and that he did not make any remark as to her going back to be a cashier. She also claims she said that she did not want to be a cashier as she was a manager and worked hard for that position and had a contract as a manager and they had not given her any valid reasons (for terminating that contract) she claimed that after that Mr Viljoen walked out. When she was told to hand back the keys she felt that confirmed the fact that she was convinced it was her last shift and that she had been dismissed.

[11] Considering the evidence, if the employer had genuinely intended that she would return to her work as a cashier it is strange that it made no attempt to contact her when she did not return to work and chose rather than phoning her to write her letter which only reached her three weeks later. However, this is not something that was canvassed with Mrs Viljoen in the arbitration and accordingly, must be regarded as an indeterminate factor in deciding if a dismissal took place.

[12] Nevertheless, it does seem clear that the issue of van Noort reverting to being a cashier did come up, and that the employer might have intended simply to demote van Noort back to her former position. What it cannot avoid though is that it terminated van Noort’s appointment as a manager during her probation period. That appointment had been entered into in terms of a distinct self-standing employment contract terminable under certain conditions. The employer’s actions effectively terminated van Noort‘s employment under that contract on the basis that it was not meeting its requirements during her probation. Nothing in the wording of the contract suggests that if her appointment as a manager was terminated during her probation period she would simply revert back to her previous employment. Any revival of her former appointment as a cashier would require a new agreement between the parties. The employer could not simply terminate her appointment as a manager unless it did so in the terms of the employment contract. That entailed a termination of her contract of service. Unless the parties agreed otherwise that was the effect of terminating her appointment. They plainly did not agree that she would resume employment in her former position. Van Noort did not accept reverting to her former appointment as she believed she should be given

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an opportunity to complete her probation because she had worked hard for appointment as a manager.

[13] The employer contends that it was common cause that the employee had been demoted, but on the evidence the probabilities show that this was its unilateral decision, not a consensual one. It could not do this without unavoidably terminating van Noort's employment as a manager during the probation period because the terms of her appointment as a manager were governed by the new contract. It was for van Noort to elect whether to agree to resume employment as a cashier or to challenge the termination of her employment contract as a manager. Any reversion of van Noort to being employed as a cashier would mean concluding a new contract of employment. There was nothing on the face of the contracts to suggest that her former engagement as a cashier under a separate contract continued to subsist beneath the new managerial contract of employment, even if her service was uninterrupted.

[14] In conclusion, I am satisfied on a balance of probabilities that van Noort's contract of employment as a manager was terminated during the course of her probation. Any further employment relationship between the parties would have entailed the conclusion of a new contract.

Order

[15] The citation of the applicant in all pleadings in this matter is amended to read 'Trupik Restaurant CC' and all references to Trudie Viljoen and are amended to read Trumie Viljoen.

[16] The applicant's late filing of its review application is condoned.

[17] The review application is dismissed with costs.

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Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

APPLICANT:	M Grobler instructed by Van Wyk Attorneys
THIRD RESPONDENT:	R de Lange instructed by Tasso Antoniou Attorneys

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