Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JS 105-16

In the matter between:

SERGE BAKULU **Applicant**

and

ISILUMKO STAFFING (PTY) LTD **Respondent**

SHOPRITE CHECKERS (PTY) LTD **Respondent**

ACMS CONTRACT MANAGEMENT SERVICE (PTY) LTD **Respondent**

Heard: 13-15 November 2017

Delivered: 15 November 2017

Summary: (Absolution from the instance – automatically unfair dismissal claim – race – insufficient evidence to establish prima facie case – absolution on the basis of alleged lack of employment relationship inappropriate)

REASONS FOR JUDGMENT

LAGRANGE J

Background

[1] After the applicant in this matter, Mr S Bakulu ('Bakulu') led his evidence, and after cross-examination and further evidence led by the applicant in lieu of re-examination, the respondents applied for absolution from the instance. The applicant had claimed that he had been automatically unfairly dismissed on the basis of his race. All three respondents ('Isilumko', 'Shoprite' and 'ACMS') claimed that Bakulu had failed to make out a *prima facie* case that he was dismissed on account of his race. Shoprite also contended that he had failed to make out a *prima facie* case that it was also his employer. It was common cause that Isilumko and ACMS were both employers of Bakulu by virtue of section 198(3) of the Labour Relations Act, 66 of 1995 ('the LRA').

[2] After hearing argument from all the parties the following order was made:

> "Order
>
> 1. Absolution from the instance is granted to the respondents.
>
> 2. No order is made as to costs."

Brief reasons for the judgement are set out below.

Reasons

The legal test for absolution

[3] In ***Commercial Stevedoring Agricultural & Allied Workers Union on behalf of Dube & others v Robertson Abattoir***[1] the LAC reaffirmed the general principles applicable to applications for absolution from the instance:

> *"Absolution from the instance*
>
> [16] It is important to bear in mind that this appeal is based on a grant of an order of absolution from the instance. Accordingly, the test which must be determined is whether firstly there was a dismissal and secondly whether the appellant has provided evidence which raises a credible possibility that the dismissal in question fell within the scope of s 187(1)(c) of the LRA.

[1] (2017) 38 ILJ 121 (LAC)

This approach has been confirmed by this court in Kroukam v SA Airlink (Pty) Ltd:

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

[17] This dictum, which sets out the law insofar as unfair dismissals are concerned, should be read together with the general legal position relating to an application for absolution from the instance at the end of the plaintiff's case. In this connection, the correct approach was set out by Harms JA in Gordon Lloyd Page & Associates v Rivera & another as follows:

> 'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H in these terms:
>
> "… (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T))."
>
> This implies that a plaintiff has to make out a prima facie case — in the sense that there is evidence relating to all the elements of the claim — to survive absolution because without such evidence no Court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van de Schyff 1972 (1) SA 26 (A) at 37G-38A; Schmidt Bewysreg 4th ed at 91-2). … The test has from time to time been formulated in different terms, especially it has been said that the Court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne (loc cit)) — a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The Court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable"

> person or Court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a Court should order it in the interest of justice.'
>
> This appeal must be determined on the basis of this clear statement of the law as to when it is legally appropriate to grant an order of absolution."[2]

(emphasis added – footnotes omitted)

Absolution on the basis that no case was made out that Shoprite was an employer party

[4] Shoprite's counsel, *Mr Itzkin*, argued that on the common cause facts of the pre-trial minute only the first and third respondents could be considered to be Bakulu's employers. Whereas Isilumko provided temporary labour services to ACMS and in terms of the deeming provisions of section 198 (3) ACMS was deemed to be his employer, neither the contents of the pre-trial minute nor the evidence of the applicant supported the contention that he was also an employee of Shoprite. In the pre-trial minute, Bakulu denied that there was no contractual relationship between Isilumko and Shoprite or between himself and Shoprite.

[5] It is true that he led no evidence on the contractual relationship, though he insisted that when he had applied for the position of a shift supervisor at Shoprite's Centurion distribution centre, which is managed by ACMS, he was interviewed by Shoprite. It is also true that other aspects of his evidence tended to suggest that ACMS owned and managed the distribution centre in Centurion.

[6] However, Bakulu was not challenged under cross-examination on these issues and at the very least he should have been challenged on his claim that he was also an employee of Shoprite. It was also never put to him that it was not possible to regard ACMS as a supplier of labour to Shoprite, which Shoprite argued was the only other possible basis on which it could be deemed to be his employer. It ill-behoves Shoprite to simply make

[2] At 126-7.

submissions on the issue in support of its application for absolution on this ground, particularly when dealing with a layperson. In the circumstances, I am not satisfied that Shoprite was entitled to obtain absolution on this ground, even though it obtained absolution in relation to the merits of the automatically unfair dismissal claim.

Absolution on the basis that a prima facie case of automatically unfair dismissal was not established

[7] s 187(1)(f) of the LRA reads:

> 'A dismissal is automatically unfair ... if the reason for the dismissal is - ...
>
> (f) that the employer unfairly discriminated against an employee , directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.'

[8] In a case involving the dismissal of male prison warders on account of wearing dreadlocks, one of the grounds of automatically unfair dismissal was that female prison warders were allowed to sport dreadlock hairstyles but were not subjected to any discipline. The LAC pointed out that in order to succeed on the ground of gender discrimination, "… it would need to be shown that the disadvantage the respondents suffered arose on account of their gender."[3] (Emphasis added). The court also held that:

> "[34] The respondents have rightly submitted that the explanation for the dismissal tendered or suggested by the employer (or for that matter the employee) can never without more simply be accepted as the reason postulated by the section. The reason contemplated and to be sought by the court is the objective reason in a causative sense. The court must enquire into the objective causative factors which brought about the dismissal, and should not restrict the enquiry to a subjective reason , in the sense of an explanation from one or other of the parties."[4]

[3] *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2011) 32 *ILJ* 2629 (LAC) at 2641.

[4] Ät 2645.

[9] Thus, in order to establish a basis for his case of automatically unfair dismissal, Bakulu needed to adduce some evidence that would tend to suggest that the real reason for his dismissal was not incapacity, which was the reason given by Isilumko, but was possibly his race.

[10] Bakulu's problems with the first and third respondents started when he successfully applied for a job as a shift supervisor with ACMS. Without relating all the detail of this process, it is sufficient to say that the contract he felt compelled to sign appointed him only as a supervisor and instead of being offered R 45-00 per hour was only offered R 33-14 per hour. It was during one of these interactions with management personnel of Isilumko and ACMS that Bakulu asked if he did not qualify for a better wage because he was black. Shortly after that he received a warning for sleeping on duty and later other disciplinary action for different conduct followed. One of the incidents concerned him reporting physical stock shortages which did not match inventory records of the distribution centre directly to Shoprite by email without sending the same communication to the first and third respondents.

[11] When Bakulu arrived late for an incapacity enquiry on 6 August 2015 an altercation arose when he was informed by Isilumko's HR manager, Markus van Loggerenberg ('van Loggerenberg'), that he would forfeit a week's pay for arriving late at the enquiry resulting it in it being postponed. Bakulu claims he told him he was heartless and wicked. He claims that van Loggerenberg then threatened to destroy his career and that in their business, "blacks do not talk to us like this, blacks beg." He further threatened to suspend Bakulu's next payment and told him to get out of his sight.

[12] Despite this, the incapacity hearing resumed on 13 August 2 015, Bakulu testified that van Loggerenberg said that he was hard-working and capable. Furthermore, at that hearing Isilumko tabled alternative proposals to accommodate Bakulu in one of two positions. One alternative was for Bakulu to go back to his previous position as an inventory clerk, and the other was for him to move to another centre because his relationship with his immediate supervisor had allegedly deteriorated badly. Bakulu was not

willing to accept what he understandably saw as a demotion if he went back to his former position and did not want to accept the alternative posting unless he was paid a higher hourly rate of pay in order to make up for the fact that he would be working shorter hours at the other venue. The incapacity hearing adjourned and on 21 August 2015 it reconvened and Bakulu was told that he was "guilty of incapacity" (as he expressed it) and the alternative positions were again offered to him. Allegedly, it was agreed that he would be offered the other supervisory post at R 80-00, but that subsequently Shoprite rejected this and he was dismissed.

[13] In Bakulu's pleaded case, which was set out in great factual detail, no mention was made of van Loggerenberg's alleged racist outburst. This was despite the fact that Bakulu had amended his statement of claim and had been given an opportunity to plead his case in even greater detail. In so far as race was mentioned as a cause of his dismissal, Bakulu perceived it to be the reason because he had asked for a rate of pay commensurate with his qualification (a diploma in Supply chain Management) and he interpreted their failure to offer him a better rate to be because he was a black person. During his evidence he repeatedly asserted that, by comparison with himself, van Loggerenberg was paid a salary commensurate with his position as an HR manager. Even if the pleaded version of the alleged racial discrimination as the basis of his dismissal is considered, no evidence was advanced to show that any white person occupying a supervisory post in the distribution centre on the same level to that which Bakulu aspired had been employed on a permanent basis or at a better rate. Had he done that there might have been some evidentiary foundation laid for his claim that when a black person like himself sought similar treatment, making such a demand would result in dismissal.

[14] I do appreciate that much of Bakulu's frustration and anger was directed at Shoprite for whom he had effectively worked for 17 years without ever being afforded permanent employee status because he was always engaged through labour brokers. The absurdity of being treated as a temporary employee for such a length of time might well have provided the basis for a claim for unfair discrimination in relation to his terms and

conditions of employment. However, his evidence in this regard did not suggest a link between his employment status and his dismissal, let alone a link between his race and his dismissal, even on the most generous interpretation of it.

[15] In relation to the alleged racial outburst by van Loggerenberg as evidence of race as the reason for his dismissal, his own evidence in that regard does not support an inference that race was a factor in his dismissal. This is because it is clear that under the first option offered to Bakulu in the incapacity enquiry, Isilumko effectively offered to retain him in his previous position. That is simply incompatible with any intention to dismiss him on account of his race. It may well be that he has an arguable case that his dismissal for incapacity was nonetheless unfair, but he has brought his case to this court on the basis that the real reason was because of his race and he needed at least to provide sufficient evidence to raise a credible possibility that his dismissal in question fell within the scope of s 187(1)(f). Moreover, his evidence of that outburst is difficult to accept as credible, given that it was never mentioned once in all the versions of his case which he elaborated on in his amended pleadings and in the pre-trial minute. Had he wished to make out his case on a racially based reason for dismissal relating to that alleged incident he had ample opportunity to amend his pleaded case accordingly.

[16] In the circumstances, I am satisfied that the applicant did not make out a *prima facie* case that his dismissal was for a reason related to his race in the sense that a court might find in his favour on the basis of his evidence alone.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

Applicant:	In person
First and Third Respondents:	L Erasmus instructed by Kirchmanns Inc.
Second Respondent:	R Itzkin instructed by ENS Africa