REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA2/13

In the matter between:

EKHAMANZI SPRINGS (PTY) LTD **Appellant**

and

MANDI MNOMIYA **Respondent**

Heard: **27 February 2014**

Delivered: **13 May 2014**

Summary: Dismissal dispute. Employee denied access to the workplace by the security guards employed by the employer's landlord. Whether the court *a quo* correctly concluded that the employee had established her dismissal and that the dismissal was automatically unfair as contemplated in section 187(1)(e) of the LRA; whether the court *a quo* correctly found that the employer failed to accept the employee's tender of services. On appeal, held, that the employee had established her dismissal. Held, that the unique circumstances of the case were such that the employer's failure to intervene in its landlord's discriminatory practice of denying the employee access to the workplace on account of pregnancy was tantamount to a refusal to accept the employee's tender of services and thus constituted a repudiation of the employment contract. Appeal dismissed with costs.

JUDGMENT

MOLEMELA AJA

[1] This is an appeal against the judgment of the Labour Court (Lallie, J) in which it found that the respondent, Ms Mnomiya, was dismissed by the appellant and that the reason for her dismissal was her pregnancy. The court *a quo* ordered the appellant to pay the respondent twelve months' compensation, which amounted to R7 945.00 (seven thousand nine hundred and forty five rand), plus costs.

[2] The respondent was employed by the appellant as a general assistant at its factory ("the workplace"), where spring-water known with the brand-name of *Aquelle* was bottled. She was one of 150 (one hundred and fifty) employees employed by the appellant. The springs from which the water in question was sourced by the appellant are located on the premises of its landlord, viz KwaSizabantu Mission ("the Mission"). In order to gain access to the workplace, an employee would first have to enter the Mission's premises through a gate that is manned by security guards that are in the landlord's employ. In terms of the Mission's code of conduct, access to the Mission's premises is conditional, as certain acts and forms of behaviour by any person would result in the Mission's security guards preventing such a person from entering the landlord's premises, which in turn prevented access into the workplace. The code of conduct in question inter alia prohibits 'amorous relationships between any two persons outside of marriage'. I will return later to this aspect.

[3] The main factual issue in dispute is whether the respondent is one of the employees that were denied access into the landlord's premises by the Mission's security guards on 14 April 2008 and whether the appellant's manager, viz Mr Bosman dismissed her on that day. According to the respondent, she was with her co-employee, Ms Memela, when the Mission's

security guards denied them access into the Mission's premises on 14 April 2008. Ms Memela was also an applicant at the proceedings in the court a *quo*, but her application was dismissed on account of her absence at the proceedings. The respondent testified that upon being denied access into the Mission's premises, she asked the security guards to call Mr Bosman to the gate. Mr Bosman obliged. She asked Mr Bosman why she was being denied access into the leased premises and he told her that she was prohibited from entering as she had breached one of the rules of the Mission by falling pregnant. She remarked to him that he was effectively dismissing her and asked him to furnish her with a letter of dismissal. He told her that he could not provide her with such and mentioned that she could obtain it from Mr Stegen, the Mission's pastor, who also happened to be serving on the board of directors of the appellant as well as the Mission.

[4] The respondent denied having signed the Mission's code of conduct upon assumption of employment and maintained that she was only furnished with a copy during the course of her employment. She and other employees were then verbally informed that they would have to leave the Mission's premises if they contravened the code of conduct by falling pregnant outside of wedlock. When she fell pregnant, she vacated her accommodation at the Mission and found herself accommodation elsewhere. She denied having resigned from employment. Although she had maintained that Mr Bosman had dismissed Miss Memela and her on 14 April 2008, when pressed by the court *a quo* on whether Mr Bosman had specifically told them that he was dismissing them, she responded as follows: 'He did not say exactly or articulate that he was dismissing us, but he conveyed a message from the mission that we are no longer welcome at the mission. So we concluded by saying or taking the step that as he is also an employer of the mission…[indistinct] he is also dismissing us *(sic)'*. She went on to state that 'the reason why I say that Nico [Bosman] was dismissing us, is that he could not have a solution…[indistinct] or enter in any way in making sure that I did enter the workplace'.

[5] The appellant's version as presented by Mr Bosman at the hearing was that the respondent was not present at all at the gate to the Mission's premises on

14 April 2008. According to Mr Bosman, Ms Memela was alone at the gate of the Mission's premises when she was denied access by the Mission's security guards. He denied seeing or speaking with the respondent on 14 April 2008 and maintained that the only employee that was denied access into the leased premises on that day was Ms Memela. He testified that when she told him that the security guards were denying her access into the leased premises, he told her to resolve the issue with the landlord. Ms Memela never reported for duty again ever-since. From the appellant's point of view, they considered her as having resigned from employment and accepted her resignation.

[6] Mr Bosman testified that he had set up a meeting between the respondent, Ms Memela and the landlord on 9 April 2008. He was, however, adamant that he did not know what was to be discussed at that meeting. In order for the respondent to be allowed access to the leased premises, she had to "resolve her issues with the landlord". When asked what that issue was, he testified that the respondent had breached the Mission's code of conduct but he was unsure of the details.

[7] Under cross examination, Mr Bosman stated that all he knew was that the respondent had a problem with the landlord and he advised her to resolve the problem with the landlord so that she could be allowed into the leased premises. He further stated that it was not his business to know exactly what the respondent's problem was. Mr Bosman testified that he was a member of the church run by the Mission and also stayed at the Mission's premises. He had accordingly signed the Mission's code of conduct and adhered to its provisions.

[8] Although he had maintained that he was not aware whether the Mission's code of conduct prohibited unmarried women from falling pregnant, Mr Bosman later testified that the code of conduct prohibited "amorous relationships" and if an employee's pregnancy emanated from an "amorous relationship" then the Mission's code of conduct would have been breached. After a lot of evasiveness about his awareness regarding what the Mission's code of conduct stipulated with regards to pregnant employees and what it did

in such circumstances, he eventually stated the following in response to the court's questions: "*If a lady is not married and she is pregnant, there is obviously some amorous relationship like the code of conduct says. This is just my deduction."* He testified further that in 2009 a lady named Hlengiwe fell pregnant and he thought that would be a problem. He approached the Mission and thereafter the issue was resolved and Hlengiwe was allowed to carry on working. In his view, the issue was not the pregnancy itself but rather the attitude of the employee in question, which could result in a conflict between the employee and the Mission.

[9] When asked whether the respondent had signed the Mission's code of conduct, Mr Bosman stated that he was not sure whether she had done so. When asked whether it was possible for an employee to work for the appellant if he/she did not subscribe to the code of conduct, he said that would be up to the landlord. When pressed further on the same question he responded as follows (at p76 line 9-11 of the record): '*That is really between her and the landlord. With the company I sign a terms of employment contract (sic) and with residents, the* ***employer has another contract, a code of conduct.*** *That is between them*'. (My emphasis).

[10] Mr Bosman testified that there were two other female employees who had fallen pregnant in the past. They discussed the matter with the landlord and came to some agreement, after which they were allowed access into the Mission's premises.

[11] In response to the court's questions, Mr Bosman testified that the reason why the appellant subjected its employees to the Mission's code of conduct was that their business was to bottle water sourced from the spring situated on the Mission's premises. In terms of regulations, mineral water had to be bottled at the source. The Mission required the appellant to adhere to its code of conduct and if the appellant was not content to adhere to the code, then it had to move its business elsewhere. The appellant could not do so, given that the regulations required that the bottling of the mineral water should be done at the source.

[12] The appellant adduced the evidence of one of its employees, viz Mr Hlongwane, who testified that Ms Memela was alone on the day when she was denied access into the leased premises. I will return later to Mr Hlongwane's evidence.

[13] The appellant presented clocking documents which recorded the respondent's last working day as 9 April 2008. The appellant contended that as the respondent was not at the gate on 14 April 2008, she could therefore not have been dismissed in the manner that she alleged. Given that the respondent's version was that she was denied access into the premises on 14 April 2008, it is not surprising that the clocking documents showed that she did not report for work on 14 April 2008. Clearly, the clocking documents did not take the appellant's case any further.

[14] It is clear from the above summary of evidence that the parties presented two mutually destructive versions. Having considered all the evidence, the court a quo found that the respondent was, indeed, with Ms Memela at the gate of the leased premises on 14 April 2008; that she was refused entry to the workplace by the Mission's security guards; that Mr Bosman refused to intervene when the security guards denied the respondent entry to the workplace; that the appellant had, by virtue of the employment contract, an obligation to receive the respondent into the workplace; that Mr Bosman's refusal to intervene when so requested amounted to a termination of the employment by the appellant and was therefore a dismissal; that Mr Hlongwane could not identify the day in April 2008 on which he witnessed the denial of access and was not in a position to observe all the discussions that Mr Bosman had with his subordinates on the day he allegedly saw Ms Memela for the last time at work; that Mr Hlongwane's evidence was inconsistent with the appellant's pleaded case; that the clocking documents were inconsistent with the Appellant's response; that the appellant's version was a fabrication; that the respondent was unfairly dismissed for her pregnancy; the employer was ordered to pay compensation.

The issues in the appeal

[15] The main questions to be answered in the appeal are firstly, whether the factual findings made by the court a *quo,* i.e. that the respondent discharged the onus to prove that she had been dismissed by the appellant on 14 April 2008, were correct and, secondly, whether an employer has an obligation to intervene where an employee has contravened the employer's landlord's code of conduct resulting in the employee being denied access to the landlord's premises on which the employer's business is situated.

[16] The appellant contended that the respondent had not shown on a balance of probabilities that the appellant had dismissed her and it should have been found that she was not present at the Mission's gate on 14 April 2014. It was further contended that even if her version that she was at the gate on the date in question was accepted, on her own version she was not dismissed as Mr Bosman did not tell her that she was dismissed but merely indicated that he was not going to intervene in the dispute she had with the Mission, that she had to resolve her own issues with the Mission and that the appellant was under no obligation to intervene on behalf of its employees with its landlord in the event that the employees contravene the landlord's code of conduct. The appellant argued that if the respondent had an issue with the Mission's code of conduct, she could have approached the Equality Court or the Constitutional Court for relief against the landlord.

[17] One of the reasons why the court a *quo* rejected the appellant's version was on account of the fact that it was not consistent with the pleadings. Clause 11.3 of the appellant's Statement of Response provides as follows:-

> "11.3 The Respondent denies that the services of the 1st and 2nd Applicants were terminated by the Respondent and places the 1st and 2nd Applicants to the proof thereof."

Clause 12 of the Statement of Response provides as follows:-

"STATEMENT OF MATERIAL FACTS:

12.1 The respondent operates its business on the premises of the KwaSizabantu mission;

12.2 Both the 1st and 2nd Applicants performed their duties at the Respondent's operation and stayed on the premises of the KwaSizabantu mission;

12.3 In terms of the KwaSizabantu mission's code unmarried women staying and working on the premises are not allowed to fall pregnant;

12.4 Any breach of this code of conduct will result in a person being refused entry to the premises;

12.5 At all material times both the 1st and 2nd Applicants were aware of the code of conduct and specifically the clause relating to the prohibition of unwed women falling pregnant;

12.6 At all material times both the 1st and the 2nd Applicants were unwed women;

12.7 During on or about the latter part of 2007 / the early part of 2008 the 1st and 2nd Applicants fell pregnant;

12.8 Because they had breached the code of conduct of KwaSizabantu Mission by being pregnant while unmarried the 1st and 2nd Applicants were denied entry to the premises by the security of KwaSizabantu Mission during April 2008;

12.9 The 1st and 2nd Applicants have since not returned to their workplace and have terminated their employment with the Respondent out of their own accord, which termination had been accepted by the Respondent."

Paragraph 14 of the Statement of Response provides as follows:-

"STATEMENT OF LEGAL ISSUES:

14 The termination of the 1st and 2nd Applicants' employment with the Respondent was not due to the Respondent's conduct but due to the 1st and

> 2nd Applicants resigning which resignation had been accepted by the Respondent."

Significantly, paragraph 6.6 of the parties' pre-trial minutes provides as follows: "The respondent [employer] contends that in terms of the code of conduct of KwaSizabantu Mission unmarried women staying and/or working on the premises are not allowed to fall pregnant."

[18] It is evident from the Statement of Response that the appellant was quite elaborate regarding why the two employees were denied access to its premises. While the Statement of Response did not expressly state that the two employees were denied access on 14 April 2008, it is clear from paragraph 12 of the pleadings that the appellant was raising the same defence in respect of both Ms Memela and the respondent and that the material facts as related by the appellant were applicable to both employees. It is also clear from the statement of response that the basis for the appellant's assertion that it did not dismiss the two employees was that it was the Mission that had denied them access due to their contravention of its code of conduct's provision prohibiting unwed pregnant employees from entering its premises. The appellant merely took the stance that after the two employees were denied access into the workplace premises by the Mission's security guards, they (the two employees) never showed up at the workplace again and were thus regarded as having resigned.

[19] At the hearing, Mr Bosman opportunistically claimed that the respondent was not denied access on 14 April 2008 simply because she was not at the workplace on that day and was therefore not dismissed. He clearly deviated from the pleaded case. This defence seems to have been an afterthought, as it was not canvassed in the pleadings. The court *a quo* correctly rejected the evidence that was inconsistent with the pleadings. It is thus evident that the quibble about whether the appellant actually expressly dismissed the respondent on 14 April 2008 is a red herring. The incontrovertible fact is that the respondent's employment ceased due to her pregnancy despite the fact that she wanted to work.

[20] A perusal of the record shows that Mr Hlongwane was not a satisfactory witness and his evidence was not reliable. At the very initial stages of his testimony, after he had already indicated that he knew both Ms Memela and the respondent, the appellant's counsel, while leading Mr Hlongwane, posed the following question:

> 'When was the last time that you saw Miss Memela at Ekhamanzi Springs?'
> His response was:
> 'I don't remember seeing her, I don't remember the last time I saw her'.

He then later on changed his response to say that he last saw her in April 2008. He could not remember the exact date.

[21] Furthermore, under cross-examination, Mr Hlongwane was asked how many times he had seen Ms Memela talking to Mr Bosman during the month of April 2008. At p100, line 22- p101 line 1, he responded as follows:

> 'The only time was the day when I saw her speaking to Mr Bosman when she was stopped at the gate. **And I am not sure of the other times where she could have spoken to him**, because I am not always there at the gate. I was performing other functions'. (My emphasis).

[22] The above extracts of Mr Hlongwane's evidence reveal that his evidence pertaining to what he allegedly observed at the gate cannot conclusively be attributed to the events of 14 April 2008 as the appellant would have us believe. The court a *quo* correctly rejected his evidence as unreliable.

Legal framework applied to the facts

[23] The right to equality contained in section 9 of the Constitution Act 108 of 1996 is in compliance with various international law obligations. The content of this right to equality in the employment sphere has been elaborated on by virtue of legislation such as the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998. Both statutes are modelled on the International Labour Organisations' Discrimination (Employment and Occupation) Convention of 1958[1] as well as the Termination of Employment

[1] Discrimination (Employment and Occupation) Convention of 1958 was ratified by South Africa in 1995.

Convention 158.[2] The serious light in which the constitutional imperative of equality is viewed in the employment sphere is illustrated by the fact that sections 187(1)(e) and 187(1)(f) of the LRA specifically proscribe dismissals predicated on discrimination and puts them in the category of "automatically unfair dismissals", while section 194(3) entitles the victims of such dismissals to up to double the maximum amount of compensation if the remedy of re-instatement is not granted.

[24] Employers are under an obligation to observe the afore-mentioned anti-discriminatory provisions. This obligation, properly construed, includes not circumventing the obligation by indirect means. Employees are entitled to a workplace that is free from discrimination. The protection granted by the LRA to female employees against dismissal on grounds of their pregnancy applies to all females irrespective of their marital status. The court *a quo* correctly observed that protection from dismissal for reasons related to pregnancy is not a preserve of married women. A provision in any agreement which has the effect of denying female employees access to their workplace on account of their pregnancy is discriminatory and is thus *prima facie* unenforceable unless it can be justified on grounds consistent with constitutional norms.

[25] It is clear that the Mission's code of conduct clearly contemplated interfering in employment relationships. In clause 1, reference is made to the 'unique nature of the work environment'. Elsewhere, the code provides that no visitors are allowed during working hours. Bullet no 4 prohibits 'amorous relationships between any two persons outside of marriage'. Bullet no 7 prohibits "assaulting a fellow employee or deliberate incitement of employees against each other. Bullet 11 prohibits "gross insolence to fellow workers or supervisors". The code concludes with a clause stating that "a breach of this agreement may lead to dismissal". These clauses in effect blur the dividing lines between the appellant's own terms and conditions of employment and the Mission's code of conduct.

[26] A key consideration in this case is that the respondent was not even a signatory to the Mission's code of conduct. This is what was pleaded in her

[2] The Termination of Employment Convention 158 has not yet been ratified by South Africa.

statement of case. According to her, it was imposed on her during the course of her employment. It was not binding on her. Mr Bosman was asked many times whether the respondent had signed the code of conduct in question. He stated that he was unsure. The code of conduct handed in by the appellant as part of the bundle of documents is an unsigned copy. Under the circumstances, I agree with the respondent that the code of conduct in question, the lawfulness of which we need not decide upon, was not binding on her.

[27] Due regard has been paid to the fact that the landlord was a church mission and as such a religious organisation, but this does not detract from the fact that its lessee, (the appellant) was a private company conducting business on the Mission's premises. It can be accepted that the appellant was, like any other lessee, entitled in law to the undisturbed use and enjoyment of the leased property for the purpose for which it was let. The appellant employed about 150 employees. Naturally, these employees had to have access to the workplace. This access is, no doubt, part of the appellant's beneficial use and enjoyment of the leased property, given the nature of its business.

[28] It is settled law that a lessee that is deprived of an opportunity to make beneficial use of the leased property for the purpose it was leased for is not without a remedy. See *Sishen Hotel (Edms) Bpk v Suid Afrikaanse Yster en Staal Industriele Korporasie Bpk*[3]. It simply cannot be right that an employer owes its employees no duty to facilitate their access to the workplace to enable them to carry out their duties in terms of the employment contract when the employer, in its capacity as a lessee, has remedies in law against the person that is hindering the employee from fulfilling his/her contractual obligations.

[29] The appellant asserted that the code of conduct was a private matter between the Mission and the signatories of the code of conduct in question. Through the evidence of Mr Bosman, the appellant somewhat hinted at an operational justification for its acquiescence in the landlord's discriminatory code of conduct by asserting that it could not use any other premises for its enterprise

[3] 1987(2) SA 932 (A).

but the landlord's premises due to statutory provisions that require that bottling of spring mineral water be done at the source. However, in circumstances such as the present, where the appellant has clearly failed to exercise any of its lessee rights against the Mission (as the landlord) to come to the aid of its pregnant employees, it cannot be found that the existence of any such operational justification has been shown.

[30] Acceptance of an employee into an employer's service has long been recognized by many authors as one of the common law duties of an employer, non-fulfilment of which would amount to a breach of the employment contract. In *Kinemas Ltd v Berman*[4] the court confirmed the court a *quo*'s finding that the employer's refusal to accept an employee's tender for services constituted a repudiation of the employment contract entitling the employee to damages for breach of contract. The same approach seems to have been endorsed by this Court in the unreported case of *National Electronic Media Institute of South Africa v Buthelezi*[5], where the Court dismissed an appeal against an order of the Labour Court declaring an employer's refusal to allow an employee to tender his service (and to perform his duties in terms of the employment contract) as a repudiation of the employment contract. As was the case in the afore-stated cases, in this matter the respondent tendered to work. The tender was made impossible to carry out by the conduct of the Mission, which the appellant associated itself with by virtue of its acquiescence in the Mission's denial of access.

[31] In my view, the appellant's acquiescence in the landlord's discriminatory practice of barring unwed pregnant women from the leased premises is in violation of an employer's constitutional obligation of acting fairly in making decisions affecting its employees. See *Old Mutual Life Assurance Co SA Ltd v Gumbi*[6]. It is clear from the evidence and the pleadings that the appellant was fully aware of the reasons why the two female employees were denied access into the premises. It was also aware that the respondent had not signed a code of conduct with the appellant but took the view that she was aware of its

[4] 1932 AD 246.
[5] Case no JA 19/2003 at par 9.
[6] (2007) 28 ILJ 1499 (SCA) at par 5.

provisions and was bound by them. In my view, conduct that has the effect of circumventing important provisions like the constitution must be seen for what it really is and its true character, i.e. the substance, must be evaluated.

[32] Despite the appellant's awareness of its pregnant employees' plight, the appellant simply acquiesced and did not take any steps whatsoever to seek some redress against its landlord in order to facilitate its employees' unhindered access to the workplace despite its rights that have already been alluded to above. In the circumstances, the inertia on the appellant's part did not only amount to unfair treatment of the employees in question but also amounted to a breach of its common law duty to accept its employees' service.

[33] Having noted that the head of the Mission is also a director of the appellant and that the general manager of the appellant (Mr Bosman) is the son-in-law of the head of the Mission (Mr Stegen, it would seem that the closeness of relationship or an association of interest between the appellant and its landlord is what led to the appellant's acquiescence in the landlord's code of conduct. It is not surprising that the appellant failed to intervene when the landlord denied access to its employees. The conduct of the appellant in the circumstances amounts to a repudiation of the employment contract. The repudiation was clearly related to the respondent's pregnancy on account of her marital status.

[34] I agree with the court a quo's reasoning that the respondent was dismissed and that her dismissal fell within the category of automatically unfair dismissals as contemplated in section 187(1)(e) of the LRA. The appeal thus falls to be dismissed. There is no reason why the costs should not follow the result.

[35] WHEREFORE the following order is made:

The appeal is dismissed with costs.

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Molemela AJA

I concur

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Ndlovu JA

I concur

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Sutherland AJA

APPEARANCES

FOR THE APPELLANT:	Clarinda Kugel Attorneys c/o Norton Rose South Africa
FOR THE RESPONDENT:	Ponoane Attorneys.