THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1952/2017

In the matter between:

GABRIELLA LA FOY **Applicant**

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **First Respondent**

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND CORRECTIONAL SERVICES AND OTHERS **Second Respondent**

THE DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Respondent**

Heard: **28 April 2023**

Delivered: **02 May 2023**

Summary: Interlocutory ruling – absolution from the instance – test not met. The principle of *audi alteram partem* and the provisions of section 34 of the Constitution of the Republic of South Africa, 1996 conflicted.

Held: (1) Absolution from the instance refused

JUDGMENT-*ABSOLUTION FROM THE INSTANCE*

MOSHOANA, J

Introduction

[1] In terms of section 165 (1) of the Constitution of the Republic of South Africa, 1996 (Constitution), the judicial authority of the Republic is vested in the Courts. It remains the duty of a Court of law to resolve concrete disputes between litigants. In terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. Section 2 of the Constitution provides that the Constitution is the supreme law and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[2] It is by now rested law that interpretation of any law, practice or conduct must be done within the prism of the Constitution. In my view, consideration of an application for absolution from the instance, it being a rule of practice must be through the lens of the constitutional obligations. Inasmuch as the rule – absolution from the instance - still serves a useful procedural purpose, it is doubted that regard being had to the constitutional imperatives outlined above, it is one that must still be considered by Courts of law. This issue may arrest the attention of a Court at some stage when same is sharply raised. Other than raising it, this Court shall not determine the issue.

[3] Howbeit, the first respondent in the present referral is seeking an order absolving it from the instance – of unfair discrimination at this stage of the proceedings – after the applicant closed her case. In other words, the first respondent does not wish to place its version before Court. It requires the Court to give it an early release from the instance brought by the applicant on the basis that no *prima facie* case was made.

Background facts

[4] Given the view this Court takes at the end, a detailed summation of the facts of this matter is obsolete. Briefly, for the purposes of the present interlocutory application, the essential facts are that the applicant Dr Gabriella La Foy (La Foy) was effective 1 July 2016 appointed as a Deputy Director General: Constitutional Development in the first respondent, the Department of Justice and Constitutional Development and Correctional Services (Department).

[5] On La Foy's version from as early as August 2016 until around May 2017, the Department had continually subjected her to various acts of harassment. Faced with such perennial harassment, on or about 9 May 2017, she referred a dispute to the Commission of Conciliation Mediation and Arbitration (CCMA) and alleged unfair discrimination prohibited on arbitrary grounds. The CCMA failed to resolve the dispute so referred. On 15 June 2017, the CCMA issued a certificate, certifying that the referred dispute remains unresolved. In terms of section 10 of the Employment Equity Act, 1998 (EEA) the unresolved dispute must be referred to this Court for adjudication. Indeed, La Foy referred the unresolved dispute to this Court for adjudication.

[6] After listening to the evidence of La Foy and closure of her case, the Department sought an absolution from the instance. The granting of such an absolution from the instance was opposed by La Foy. After listening to oral submissions, this Court retired to consider those submissions. Accordingly, this judgment relates to the absolution from the instance application only.

Evaluation

[7] In simple terms, an absolution from the instance implies insufficiency or absence of testimony. It is akin to a section 174 of the Criminal Procedure Act, 1977, application. Section 174 provides the following:

> "If, at the close of the case for the prosecution at any trial, the Court is of the opinion that ***there is no evidence*** that the accused committed

the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty".

[8] The rule of absolution from the instance owes its origin from the English law, where the civil courts required the plaintiff to show that there was a *scintilla of evidence* against the defendant to avoid his or her claim from being dismissed[1]. Grammatically, the word 'absolution' means an act of freeing from blame and releasing from consequences. The term 'instance' refers to a particular case. Thus, what the department seeks at this stage of the proceedings is to be freed from blame in relation to the unfair discrimination claim. In South African law, the decree of absolution from the instance equates an order granted to dismiss the plaintiff's claim on the basis that no order can be made.

[9] The test for determining whether absolution from the instance should be granted at the close of the plaintiff's case was developed and perfected in the case of *Claude Neon Lights v Daniel*[2]. The Court held:

> "When an absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the 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 find for the plaintiff." [3]

[10] The approach to the available evidence in matters of this nature is that the available evidence should be accepted as being true. The logical reason behind that approach is that, it is that evidence that a Court must ponder on in order to establish whether it could or might find for the plaintiff. At this stage,

---

[1] *Ferrand v Bingley Township District Local Board* (8 T.LR) 71.
[2] 1974 (4) SA 403 (A).
[3] This test received an imprimatur *from Gordon Lloyd Page & Associates v Rivera and another (Gordon)* 2002 (1) SA 88 (SCA) as well as *Carmichele v Minister of Safety and Security 2001* (10) BCLR 995 (CC).

there is no room for credibility findings. Therefore, in this judgment, I depart from the premise that the testimony of La Foy is true.

What is La Foy required to establish in order to succeed vis-a-vis the evidence tendered by La Foy?

[11] The claim brought by La Foy is a statutory one. It is predicated on section 6 of the EEA. Section 6 (1) prohibits unfair discrimination whether directly or indirectly against any employee in any employment policy or practice on any of the listed or arbitrary grounds. Amongst the listed employment policy and practice lay, transfer; disciplinary measures; and demotion. However; the case pleaded by La Foy is one of harassment. In terms of section 6 (3) harassment of an employee is a form of unfair discrimination and is prohibited on any listed or arbitrary grounds. La Foy in this case places no reliance on any of the listed grounds but specifically rely on arbitrary grounds. An action is arbitrary if it is whimsical or based on random choice or personal whim rather than any reason or system.

[12] The term harassment has not been afforded any technical meaning in the EEA. However, section 54 of the EEA avails discretionary powers to the Minister as advised by the Commission for Employment Equity (CEE) to issue any code of good practice. On 18 March 2022, the Minister exercising his discretionary powers issued a *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace* (Code)[4]. In terms of the Code, harassment is generally understood to be (a) unwanted conduct, which impairs dignity; (b) which creates a hostile or intimidating work environment for employees or has the effect of inducing submission by actual or threatened adverse consequences; and (c) is related to the listed or arbitrary grounds. In order for a hostile work environment to be present, the conduct related to arbitrary grounds, in this specific case, impacts on the dignity of an employee.

[4] Published in GG NO. R. 1890 dated 18 March 2022.

[13] That conduct ought to have a negative impact on the employee's ability to work and or personal well-being. Such conduct may arise from peers or superiors. Harassment may be direct or indirect. It is indirect if it has the effect of undermining dignity. There are various types of harassment, and they include (i) ostracizing, boycotting, or excluding the employee from work or work-related activities; (ii) use of disciplinary or administrative sanctions without objective cause, explanation, or efforts to problem solving; (iii) demotion without justification; (iv) abuse, or selective use of, disciplinary proceedings; (v) pressurizing an employee to engage in illegal activities or not exercise legal rights; and (vi) pressurizing an employee to resign.

[14] Counsel for the Department Mr. M Gwala SC appearing with Ms. M Lekoane placed heavy reliance on the decision of this Court *per* Acting Justice Kroon in *Tshazibane v Montego Pet Nutrition and others* (*Montego*).[5] Sadly, *Montego* is, in my view, distinguishable. It dealt with a review of an arbitration award. Additionally, it dealt with section 6 (1) of the EEA as opposed to section 6 (3). The views expressed by the erudite Acting Justice are applicable at the end of the trial as opposed to the stage of absolution from the instance. Mr. Gwala SC forcefully submitted that because La Foy does not rely on any of the specified grounds, she was required to tender evidence that demonstrates the attributes of or is analogous to the specified grounds. In his submission, La Foy did not, simply because on the question from the bench, La Foy testified that she does not know the reason why she was subjected to the conduct she laboriously testified about.

[15] To my mind, the fact that an employee does not know the reason for a particular conduct does not suggest that no recognizable ground of an arbitrary nature may be deciphered by a Court hearing a case of unfair discrimination predicated on arbitrary grounds. At this stage of the proceedings, it is not the task of this Court, in my view, to fully interpret the particular conduct against the barometer of arbitrariness. However, given the meaning of the word arbitrariness, anyone treated whimsically has reason to

[5] (2022) 43 ILJ 2610 (LC).

believe that his or her dignity is impaired. By way of an example, La Foy testified that as a DDG, she was made to report to her junior and she felt humiliated thereby. For the purposes of the present application, such testimony is enough to find that the conduct, unless justified, is pejorative. Comparably to be subjected to racial discrimination is conduct that impairs a dignity of a person. Equally, a pejorative treatment affects one's dignity and it is humiliating in nature.

[16] To sum it up, in order for an employee to succeed, he or she must show any type of harassment as outlined above and also show that the said harassment happened for the listed or whimsical grounds. Most importantly, if reliance is placed on hostile work environment, an impairment of dignity must be demonstrated. Additionally, section 11 (2) of the EEA burdens an employee relying on arbitrary grounds to prove (a) that the conduct is not rational; (b) it amounts to discrimination, as in differentiation; and (c) that the differentiation is unfair. Having said that, this summed up test applies to success in the claim and is not an applicable test at this stage of the proceedings. Unfairness is not dependent on the say-so of a party, but it calls upon the Court to pass a value judgment based on the conspectus of the evidence placed before it. At this stage it is impossible for a Court to pass such a value judgment. However, La Foy had *ad nauseam* lamented unfairness in her testimony. If the trial were to be terminated at this stage this Court may find such unfairness[6] as testified to by La Foy, that being the applicable test.

[17] La Foy testified at length and was equally cross-examined at length. For the purposes of the present application, her true evidence is that she has been subjected to (a) ostracizing in a form of not being capacitated. She asked for resources and same were not provided; (b) she has been excluded from work related activities – when she was excluded from international travels related to her branch; (c) she was subjected to selective discipline and to disciplinary and administrative sanctions without an objective cause – when she was placed on precautionary transfer, which had the effect of her functions been

[6] See *Minister of Correctional Services & others v Duma* (2017) 30 ILJ 2487 (LAC).

taken away (an equivalent of demotion) and when she was 'bombarded' with disciplinary steps. She, on countless occasions, testified that she felt humiliated and victimized by such conducts. On countless occasions she testified that she considered the conduct to be unfair to her. At the tail end of her testimony, the Court asked her as to what, in her mind, accounts for the actions she testified about and she retorted "I don't know". Reasonably considered this evidence at this stage of the proceedings suggests irrationality and erraticism. In a rather pronounced manner she testified that the Deputy Minister was improperly interfering with operational matters of the department, in a manner suggestive of abuse of power. When reasonably considered the above evidence relates to the elements of the claim launched by La Foy[7].

[18] Faced with such evidence, at this stage, the veritable question is whether a Court bringing its mental faculties to bear could or might find for La Foy? The mind involved herein is not of a *bonus pater familias* – reasonable person, but that of a judge who heard the evidence[8].

[19] As I conclude, as indicated above, granting of an absolution from an instance is an act that ostensibly conflicts with the *audi alteram partem* rule[9] and the principle in section 34 of the Constitution. Managay Reddy, in relation to section 174 of the CPA, stated the following[10]:

> "Equally compelling, however, is the argument that the section 174 process has no regard for a victim's rights, and also the interest of the public in full and fair trial being held."

[20] Same sentiments are expressible in relation to absolution from the instance. Perhaps a similar question must be asked – Is it time for abolition of the rule of absolution from the instance? in view of the fact that section 34 requires a Court to resolve a dispute by application of law in a fair manner. Fairness

---

[7] See *Factcrown Ltd v NBC* 2014 (2) NR 447 (SC).
[8] *Gordon supra* at 92E-93A.
[9] See D Smit and Madikizela: *A critical analysis of "absolution from the instance" in South African law with specific reference to the CCMA* 2016 (79) THRHR 87.
[10] Managay Reddy: *Section 174 of the Criminal P rocedure Act: Is it time for its abolition? De Jure* (Pretoria) Vol51 n.2 Pretoria 2018.

always implies equitability and a balancing act. When absolution from the instance is granted there is potentially no equitability or balancing of issues. Therefore, a Court must generally speaking be shy, frigid, or cautious in granting such an application and must do so sparingly[11].

Conclusions

[21] In summary, on application of the hackneyed test, this Court reaches an irresistible conclusion that there is evidence related to the elements of a claim of unfair discrimination upon which this Court could or might find for La Foy. That being the applicable test, quintessentially the application is bound to fail.

[22] *Apropos* the issue of costs, such shall stand over to be determined at the conclusion of the trial.

[23] In the results the following order is made:

Order

1. Absolution from the instance is refused.

GN Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr HVR Woudstra SC

Instructed by: Maphalla Mokate Conradie Inc.

For the Respondent: Mr M Gwala SC with Ms M Lekoane

[11] See *Kutumbeni v SF Auto CC* (I 178-2016) [2019] NAHCNLD 106 (03 October 2019).

Instructed by: The State Attorney, Pretoria.