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IN THE INDUSTRIAL COURT

Case No. NHN 13/2/241.

In the matter between :

V.S. GOVENDER — First Applicant.

M. GOVENDER — Second Applicant.

and

M.A. MOTALA LADS HOSTEL — Respondent.

CONSTITUTION OF THE COURT : Advocate M.P. Freemantle (Additional Member)

APPEARANCES

ON BEHALF OF :

Applicant : L.C.A. Winchester
Instructed by Chennells Albertyn.

Respondent : M. Pillemer
Instructed by Romer, Robinson & Catterall.

PLACE AND DATE OF PROCEEDINGS : Durban. 18, 19 May 1987.

JUDGMENT :

The voluminous papers in this matter contain a mass of detail. In spite of that, however, the basic facts relevant to my decision are not all that complex. The first applicant is V.S. GOVENDER, an adult male and the second applicant, M. GOVENDER, is his wife. The first and second applicants were appointed Principal and Matron respectively of the institution called M.A. MOTALA LADS HOSTEL, which is the respondent in this application for status quo relief in terms of Section 43 (4) of the Labour Relations Act 28 of 1956, as amended ("the Act"). This application followed the dismissal of the applicants from their posts and the submission by them of an application for the establishment of a Conciliation Board. The applicants contend that their dismissal was unlawful and that it constituted an unfair labour practice.

The applicants were appointed to their posts by letter dated 18 November 1985 and the appointment took effect on 1 December 1985. That letter contained terms of the contract of employment, of which the only one relevant to this application is this :

> "6. Notice of Termination :
>
> Thirty (30) Days Notice will be valid on either side."

It is perhaps germane to mention that the hostel cited as the

respondent operates under a charitable Trust which, according to the papers in the application, has as one of its objects the care and maintenance of Indian boys who have been committed to the hostel by a Magistrate under powers granted to him by law or by the relevant Minister entrusted with the administration of matters pertaining to the welfare and care of children. In a nutshell, the hostel appears to be a home for children who have been declared to be in need of care.

From the papers it is apparent that a necessary concomitant of the contract of employment between the applicants and the respondent, was that the applicants and their children were provided with free accommodation in the hostel premises.

On 1 March 1987 there was a meeting of the Management Committee of the hotel. The first applicant was present at the meeting. A letter was tabled in which certain unspecified allegations were made against the first applicant. He was asked to leave the meeting while the letter was discussed. There was a further meeting of the Committee on 6 March 1987. Once again, the first applicant was asked to leave the meeting (and it is clear from the respondent's representations that there was to be discussion about the first applicant).

Thereafter, in a letter dated 9 March 1987 addressed to the first

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applicant, there was reference to the two meetings and it was stated that it had been unanimously decided that the first applicant's services and those of the Matron (i.e. the second applicant) be terminated. The notice was expressed to have effect from 1 April 1987 to 30 April 1987. It was said that the appointment of a new Principal and Matron would take effect from 15 March 1987 and that the necessary hand over should be completed by 30 March 1987.

There was yet another meeting on 15 March 1987 and it may be that the letter dated 9 March 1987 was handed to the first applicant at that stage because the copy is put up in the context of this meeting. At all events, he was called in to that meeting and informed of the decision to give notice. The first applicant says that he asked for, but was not given reasons for his dismissal. The respondent does not deny that allegation and says in its representations that the decision to terminate the applicants' employment -

> "was not based principally upon the truth of the allegations which had been made against the first applicant but rather upon the fact that the relationship between him and the members of the Management Committee has deteriorated and there was no longer a feeling of trust."

There is no dispute between the parties concerning the foregoing course of events during March 1987.

The respondent contends that because the applicants were engaged

simultaneously/...

simultaneously, if one were to be dismissed, the other had to go also. This, it says, was an implied term of the contract. The contention is probably correct, but it is not necessary for me to decide that.

With regard to the meeting on 6 March 1987, the respondent is to the effect that the general tenor of the discussion in the Committee was that it was unseemly to accuse the first applicant of dishonesty and of dereliction of duty, but this statement, together with the one to the effect that the decision was "not based principally upon the truth of the allegations", to my mind makes it clear that whatever deterioration there had been in relationships, the allegations in the letter did influence the decision.

Mr. Pillemer, for the respondent, emphasised what he contended was an important feature, namely the position of the first applicant and his relationship with the Committee, and especially its President. He advanced the contention raised in the respondent's representations, namely that it is not as though the applicants were two employees on a production line. He raised the question how contracts of employment are to be brought to an end when trust no longer exists, in the absence of features such as to justify summary dismissal or a finding that there has been some transgression which merits dismissal on notice.

He submitted that there was no unfairness, because the dismissal was

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one in terms of the employment contract. It would be wrong, he said, to hold an enquiry, if the employment was terminated in terms of the contract and on the basis that the relationship between employer and employee has broken down. As to that, this is what appears in the respondent's representations concerning the meeting on 6 March 1987 :

> "The general consensus of the meeting was that irrespective of the merits or demerits of the various accusations it was clear that the Management Committee had lost confidence in his performing his work satisfactorily, that a large number of those people dislike him and had personality differences with him and could not work with him. It was accordingly felt best, in view of the nature of the work he was required to do in caring for the children and the need for him to work closely with the Management Committee, that his services should be terminated."

There is a disputed allegation that the first applicant had been spoken to about his conduct in the past, but even if he had, the issue between the parties is whether, in relation to both the first applicant and the second applicant, the dismissal was both substantively and procedurally fair. See Pillay v. C.G. Smith Sugar Ltd. (1985) 6 ILJ 530 (IC).

Despite the general consensus in the Management Committee as referred to above, there is nothing of any consequence in the Minutes of previous Committee meetings to suggest significant dissatisfaction with the first applicant's performance, or even the sort of disharmony

referred/...

referred to in the papers. Yet the respondent, in its representations in this application, set out to air an extensive list of specific complaints against the first applicant. There are substantial disputes of fact concerning the respondent's allegations in that regard, disputes which it is quite impossible to resolve on the papers.

It is not at this stage necessary to decide whether, as a fact, substantive and procedural fairness attended the applicants' dismissal. Suffice it to say that I consider the applicants to have made a sufficient case for me to have to consider whether my discretion should be exercised in favour of a Reinstatement Order. I doubt whether there were any circumstances which excused the respondent from observing the ordinary concept of fairness or equity as it relates to the fundamental right to be heard in the field of labour relations, and this not only on the merits, but on the sanction as well. See National Automobile and Allied Workers Union v. Pretoria Precision Castings (Pty) Ltd., (1985) 6 ILJ 369 (IC) at 378 F. Mr. Winchester, for the applicants, submitted that in the situation that action against the first applicant necessarily involved the second applicant (against whom there was no complaint), it was incumbent upon the respondent to exercise particular care to avoid any sort of unfairness, and I think that there is much to be said for that submission. The second applicant's position adds a further dimension which must be taken into account in considering whether the termination of the employment was justified, reasonable and correct, having regard to the equities

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of the case. Those requirements are additional to any consideration whether the dismissal was in accordance with the employment contract. See Larcombe v. Natal Nylon Industries (Pty) Ltd. (1986) 7 ILJ 326 (IC) at 329 G-H.

I did not understand Mr. Pillemer to contend that there were no prospects of successful conciliation between the parties. I shall return to this presently. He submitted that this is not a case where, in effect, specific performance should be ordered. He said that despite the significant changes in labour law which have been brought about in recent times, full account must be taken of the common law approach which was adopted in Schierhout v. Minister of Justice 1926 A.D. 99. He contended that there is an unusual situation here, in that the respondent would be compelled to resort to Section 43 (7) of the Act, because both posts have been filled. That may be so, but one of the objects of a status quo Order is to avoid the disadvantage to an applicant of negotiating against the background of a fait accompli, per Nicholas, A.J.A. in Consolidated Frame Cotton Corporation Ltd. v. President of the Industrial Court (1986) 7 ILJ 489 (AD) at 494 H. In this context, it was said in the judgment that having regard to this object, it does not matter in a case falling under Section 43 (4) (b) (i), that the applicants' "post" had ceased to exist, or that the employer has no work available for him. This was a retrenchment case, but in my view, it applies equally in the situation that the post is no longer available because it has been filled.

Mr. Winchester submitted that the circumstances and the balance of convenience favour the granting of status quo relief. He contended that the respondent had adopted a particular course of action and that the consequences were its own problem, if it had filled the positions. I must say that I have some difficulty with the notion that an employer can rely, in resisting an application, upon a state of affairs which it has unilaterally brought about. After all, another of the objects of status quo relief is to delay the resort to unilateral action. See, for example, Nodlele v. Mount Nelson Hotel and Another (1984) 5 ILJ 216 (IC) at 224 H.

Mr. Pillemer suggested that in the end the dispute between the parties can only be a monetary one. That is so, he says, not only because of the poor relationships referred to in the respondent's papers, but also because the relationship has deteriorated further as a result of events in the course of this application, details of which it is not necessary to mention. A status quo Order, he submitted, would serve no purpose other than to alter the respective bargaining positions to the advantage of the applicants. I do not agree. In the situation that it is virtually impossible, at the interim stage, to redress imbalances perfectly, I consider that the effect of an Order would be to eliminate disadvantage rather than to create advantage.

In my opinion, there should, in all the circumstances, be a Reinstatement Order. Mr. Pillemer submitted that in such case, the Order should make

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it clear how the respondent is to resort to Section 43 (7), in view of Mr. Winchester's submission that the respondent would be obliged to provide accommodation. As to that, it seems to me that the scope of an Order under Section 43 (4) (b) is circumscribed and that it is not incumbent on this Court to interpret the provisions of the Act in advance.

The applicants, notwithstanding the allegations concerning an unfair labour practice, have asked for the relief appropriate to a dispute concerning termination of employment, that is to say, relief under Section 43 (4) (b) (i) of the Act. Notwithstanding a prayer for costs in the Notice of Application, no submissions were made in that regard, and I therefore make the following Order :

1. The respondent is required to reinstate the first applicant and the second applicant in its employ on terms and conditions not less favourable to each of them than those which governed their respective employment prior to such termination.

2. Paragraph 1 hereof is to have effect retrospectively to 1 May 1987.

DATED at DURBAN this 1st day of JULY 1987.

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ADV. M.P. FREEMANTLE : ADDITIONAL MEMBER, INDUSTRIAL COURT.

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