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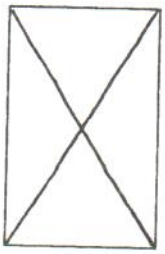


INDUSTRIAL COURT VERDICT

HELD AT **PRETORIA**

CASE NUMBER **NH13/2/7711**

LABOUR APPEAL COURT VERDICT

DIVISION

CASE NUMBER

SUPREME COURT - APPELLATE DIVISION

CASE NUMBER

AGRICULTURAL COURT VERDICT

HELD AT

CASE NUMBER

9.15

CASE NO NH 13/2/7711

IN THE INDUSTRIAL COURT OF SOUTH AFRICA
HELD AT PRETORIA

In the matter between:

VAN DER MERWE, MARIé Applicant

and

DIE BRONBERG APTEKERS EN DROGISTE (EDMS) BEPERK Respondent

JUDGMENT

On behalf of the Applicant: **Mr P Marais**

On behalf of the Respondent: **Mr W W Geyser**

Before: **L F Shear, Additional Member**

This is an application in terms of section 43 of the Labour Relations Act, 28 of 1956, as amended. The applicant resigned from her employment with the respondent on 3 May 1993. The applicant contends that her resignation constituted constructive dismissal, and that such constructive dismissal was an unfair labour practice. The papers in this application are fairly voluminous and I shall attempt to simplify the facts as much as possible. The crisp question which this court has to answer is whether in fact the applicant's resignation amounted to constructive dismissal, and if so, whether in fact such dismissal may be considered an unfair labour practice. It is trite that this court only has jurisdiction over unfair labour practice disputes: the issues occupying most of the time of this court are unfair labour practices resultant upon dismissals; this court will not have jurisdiction if no act has been committed resulting in the perpetration of an unfair labour practice. Thus, a voluntary resignation cannot ground an application for any relief in this court.

The facts of this matter may be summarised as follows.

The applicant commenced employment with the respondent on 1 December 1971 in terms of an oral agreement. The applicant is a qualified pharmacist and commenced employment with the respondent at Bronberg Apteek, Sunnyside, Pretoria.

During the 1970's the applicant married and had a child. Due to her changed circumstances the applicant found it impossible to work a full day and, by virtue

of an agreement entered into between the applicant and the respondent, the applicant began working a 6-hour day. She continued working a 6-hour day for 12 years until her employment terminated in May 1993. During the early 1990's the business of the respondent changed somewhat in that certain retail stores were closed and the applicant was transferred from one pharmacy to another.

There is much evidence concerning other persons employed by the respondent, such as a Mr Murdoch, a Mr Botha and a Mr van der Bergh, and information in the papers concerning the duties carried out by such persons is extensive. However, I do not believe it necessary to consider such extraneous matters as to do so would be to sidetrack from the real issue before this court, ie did the applicant's resignation constitute constructive dismissal and, if so, was such constructive dismissal an unfair labour practice?

During April 1993, Mr van der Berg, a manager employed by the respondent, called the applicant in to his office and advised her that, as of 1 May 1993, her position would once again become a full-day job and that she would not, from that time forth, be entitled to work a 6-hour day. The applicant advised van der Berg that she was not able to work a full day and that she in fact had an agreement with the respondent entitling her to work a 6-hour day. It must be borne in mind that the aforesaid agreement had been in force for 12 years. It appears that the applicant's position had not changed since the inception of the said agreement. In fact, her position had worsened in that by 1993 she had 4 children. When the agreement was implemented she had only one child. When the applicant asked Mr van der

Berg what her choices were she was advised that they were two-fold: (i) she either accepted the 8-hour day, or (ii) she had to resign from the respondent's employ. The applicant states that, as the respondent was aware, she was unable to comply with it's demands and that, as a result of such inability to comply, she was obliged to resign on 1 May 1993.

She states further that subsequent to her resignation she was given the opportunity to consider her position and she decided that the decision to resign was not correct and therefore approached the respondent in an effort to withdraw her resignation. Mr van der Berg refused to allow her to withdraw the resignation.

The respondent contends that the applicant was not obliged to resign, nor was she under any pressure to resign and that the resignation was a voluntary act. The respondent relies on the fact that after having written the letter of resignation, annexure "A" to the respondent's papers, the applicant completed the customary form at the request of the respondent's accounts department. This, with due respect, does not take the respondent's case any further.

The respondent contends further that the applicant has conceded that she was unable or unwilling to work a full day and that there was therefore no reason for the respondent to accept the withdrawal of the letter of resignation. The respondent contends, therefore, that the attempt to withdraw the resignation was not *bona fide* because, in any event, due to her refusal or inability, the applicant was not in a position to comply with the respondent's demand that she work a full

day. The respondent states further that it was not its intention to force the applicant out of its employ, but rather that its decision to alter the terms of the applicant's employment to a full day was based on commercial factors. The respondent states (at the bottom of numbered page 21), that the applicant well knew that the respondent could certainly not have held open the half-day position and that it was the applicant's own case that she was not available for a full-time position.

However, this brings me to consider the next point, namely is respondent entitled to unilaterally convert the terms and conditions of the applicant's employment and, even if such conversion was based on commercial factors, was the respondent entitled to so convert and to rely on such economic reasons without first consulting with the applicant regarding the need to convert the terms and conditions of her employment and in fact to properly advise her of the changed economic conditions prevailing in the respondent's business? The respondent contended that the 6-hour working day was merely a temporary situation which could be changed by the respondent when it chose so to do. The suggestion that a 12-year old condition of employment is merely temporary and may be changed at the whim of the respondent is rejected. In both **National Union of Metalworkers of SA v Atlantis Diesel Engines (Pty) Ltd** (1993) 14 ILJ 642 LAC, and **Mohamedys v Commercial Catering and Allied Workers' Union of SA** (1992) 13 ILJ 1174 LAC, the notion that consultation in its own right was important, was accepted by the Labour Appeal Court. Granted, the matter was considered from the perspective of the decision to retrench. However, I believe that the notion that consultation

is critical to the very underlying philosophy of the Labour Relations Act, namely to prevent industrial unrest and to attempt to resolve industrial disputes, may be extended to the present case. At no stage was there a *bona fide* attempt to consult with the applicant and to take her into the respondent's confidence concerning the respondent's changed economic circumstances. It is baldly stated that the applicant was aware of the respondent's circumstances. However, the applicant was not invited to make recommendations or suggestions as to how the matter might be resolved, eg. by possibly working 2 full days per week and three 6-hour days, or by working over weekends, etc. This attempt to unilaterally convert the conditions of the applicant's terms of service and the failure to properly consult might on its own constitute an unfair labour practice. I shall come back to this issue at a later stage.

With regard to the question of constructive dismissal, because it is constructive dismissal with which we are concerned in this matter, it can be stated that there is very little case law or writing on the subject. I have had the opportunity of perusing the judgment of Jacobs, AM in the matter of **Franswa Adriaan Jooste v South African Airways,** unreported, case number NH 11/2/13129. In that matter, Jacobs, AM carried out a thorough analysis of the law of constructive dismissal at the present time. Jacobs, AM considers various cases as well as an article by Landman, P in "Contemporary Labour Law", v 2, no 9 (April 1993). **Professor Landman** states that constructive dismissal means the termination of a contract of employment by an employee under circumstances which make the termination tantamount to, or virtually or in substance, the termination of employment by the

employer. Jacobs, AM, quoting Landman, P, at page 10 of the written judgment, reinforces the point that this court has no jurisdiction to determine a dispute brought by an employee who has freely and voluntarily resigned from the services of his employer. Landman, P adds that an employee who has apparently voluntarily resigned, may prove that he or she is an employee by showing that the resignation was not freely made. Landman, P goes on to state:

> "Duress, ie actual compulsion or threat of compulsion by the employer will mean that the resignation was not freely made. However, duress is not always required on the part of the employer, something less will suffice."

Jacobs, AM, in his judgment referred to the matter of **Schana v Control Instruments (Pty) Ltd** (1991) 12 ILJ 637, a judgment of Bulbulia, DP. In that case, Bulbulia, DP cited the test set out in **Wille & Milne**, "Mercantile Law of South Africa", 18 ed, concerning the elements necessary to set aside a contract on grounds of coercion or duress. However, with great respect to the learned Deputy President, I am not convinced that this court should take undue cognisance of the tests postulated in a purely contractual relationship. This court is a court of equity and has to look beyond the terms of the contract and contractual principles.

In **Ferrant v Key Delta** (1993) 14 ILJ 464, Brand, SM, stated at 463:

> "It would appear that the court should only determine whether the actions of the employer had driven the employee to leave. If the answer is in the affirmative, then such actions will amount to a constructive dismissal."

With due respect, I am not convinced of the correctness of this conclusion. It appears to me that Jacobs, AM has based his conclusion on contractual principles, similar to Bulbulia, DP in **Schana v Control Instruments (Pty) Ltd** *(supra),* and not on principles of equity, fairness and flexibility that this court has employed in so many cases. I am not suggesting, of course, that any employee may merely claim that a voluntary resignation is a constructive dismissal. To do so would be disastrous and against public policy. However, I do suggest that fairness dictates that one must look beyond pure contractual principles to the merits of the case in question. I believe, with due respect, that the emphasis on duress and coercion of the sort required to vitiate a contract has been overstated in certain cases. I do not believe that it is necessary for an employer to hold a gun to an employee's head before the test of constructive dismissal has been complied with. Landman, P, in his article, states:

> "However, duress is not always required on the part of the employer, something less will suffice."

I am in respectful agreement with that statement. There is one omission from the cases referred to by Jacobs, AM in the **Jooste v South Africa Airways** case *(supra).* That is the matter of **Amalgamated Beverages Industries (Pty) Ltd v Jonker** (1993) 14 ILJ 1232 (LAC), judgment of Stafford, J in the Labour Appeal Court. There, the learned judge, quoting the learned member of the court *a quo* with approval, stated the test of constructive dismissal to be as follows:

> "The fact that the applicant handed in his written resignation is not, by itself, a bar to relief as the employee may, despite his resignation, have been 'constructively dismissed'. In short, unlike an actual dismissal, a constructive dismissal consists in the termination of the employment contract by reason of the employee's rather than the employer's own immediate act. However, such act of the employee is precipitated by earlier conduct on the part of the employer, which conduct may or may not be justified, thus, like an actual dismissal, a constructive dismissal may or may not be unlawful (in the sense of constituting a breach of the employment contract) and may or may not be unfair. It is not, as is sometimes mistakenly thought, either inherently unlawful or unfair."

As the learned judge stated at 1248 E, the employer's conduct had left the employee with.

> "the choice of the lesser of two evils, he chose, as he stated, the best deal he could obtain. Hence his resignation."

There is no reference in the passage quoted to duress or coercion. The test postulated here, with respect, is whether the conduct of the employer left the employee with no choice but to resign. The facts of each case have to be studied and applied, but in their own context.

In the present case, the applicant was left with a simple choice. She could either work a full day or she could resign. That is, with due respect, not a choice. The respondent knew that the applicant could not comply with the demand as the respondent was well aware of the applicant's personal circumstances. On the basis that I have held that duress in its strict contractual sense is not a requirement for constructive dismissal, I am satisfied that where an employer gives to an

employee as the only alternative to resignation the option of accepting an alteration of her terms of employment which the employer seeks to impose unilaterally and without prior negotiation and in breach of the employer's contract of employment, such conduct amounts to constructive dismissal. An alternative which is not a real or viable alternative could in itself give ground to base a claim for constructive dismissal. I do not believe, further, that it is strictly necessary for an applicant to merely wait like a sitting duck to be dismissed. I therefore hold that the applicant's resignation, tendered in May 1993, constitutes constructive dismissal.

I now must consider whether the constructive dismissal in itself amounted to an unfair labour practice. I have previously, in this judgment, referred to the respondent's failure to consult with the applicant and take her into its confidence concerning the changed economic circumstances. I have also referred to the respondent's unilateral amendment of the applicant's terms and conditions of employment. I am satisfied, for the reasons set out above, that the failure to consult and the unilateral change of the terms of employment in themselves amounted to an unfair labour practice. Accordingly, I hold that the dismissal of the applicant in May 1993 constituted an unfair labour practice. Accordingly, the application in terms of section 43 is granted.

I make the following order:

(1) The application in terms of section 43 is granted.

(2) The applicant is to be reinstated on terms no less favourable than those which applied at the date of her dismissal, namely May 1993.

(3) The applicant is to be compensated retrospectively in an amount equivalent to two months' income with immediate effect.

(4) No order is made as to costs.

L F SHEAR

Additional Member

Industrial Court

Pretoria

29 March 1994

IN DIE NYWERHEIDSHOF VAN SUID-AFRIKA
GEHOU TE PRETORIA

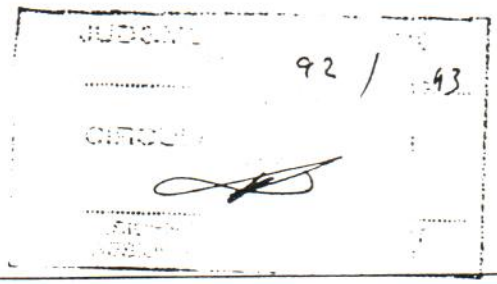
SAAK NO: NH 12/3/753

In die saak tussen:

SATU — Applikant

en

CITY RUBBER STAMP — Respondent



KONSTITUSIE VAN DIE HOF:

Mnr Arthur de Kock — Senior Lid

NAMENS:

APPLIKANT:

Mnr J A Venter — gelas deur Couzyn Hertzog & Horak Ing

RESPONDENT:

Mnr H H Dinkelmann

DATUM VAN VERRIGTINGE

27 Mei 1993

SAAK NO: NH 12/3/753

SA TIPOGRAFIESE UNIE Applikant

CITY RUBBER STAMP AND
PRINTING CO (EDMS) BEPERK Respondent

UITSPRAAK

Hierdie is 'n aansoek kragtens reël 6 van die hofreëls vir regshulp kragtens artile 17(11)(h) van die Wet op Arbeidsverhoudinge No 28 van 1956 (die Wet).Die bevel wat aangevra word is dat die Respondent gelas word om die geouditeerde state van die Respondent vir die 1991/92 en 1992/3 finansiële jare tot die Applikant beskikbaar te stel of die Applikant insae daarin te gee.

Die Applikant, 'n geregistreerde vakvereniging is verteenwoordigend van Respondent se werknemers om kollektief namens hulle te beding. Sedert Oktober 1992 het die Applikant namens sy lede met Respondent onderhandel vir salarisverhogings. Die Respondent het aangedui dat hy nie enige verhoging kan oorweeg nie aangesien die finansiële posisie en toestand van die Respondent nie gesond is nie.

Die Applikant het op 3 November 1992 die Respondent versoek om 'n afskrif van die maatskappy se balansstate beskikbaar te stel om die beweerde swak finansiële posisie te staaf. Die Respondent het geweier om dit te doen aangesien die balansstate, na die Respondent se mening, gepriviligeerd is. Die onderhandelinge het op 'n dooipunt uitgeloop.

Die Applikant maak ook staat op die weiering van sy lede om verhoogde bydraes tot sekere mediese, pensioen en voordelefondse te betaal omdat hulle nie salarisverhogings gekry het nie. Hierdie probleem is na my mening nie relevant nie.

Die vraag wat ek moet beslis is in die eerste plek of die hof die bevoegdheid het om 'n bevel soos aangevra toe te staan. Artikel 17(11)(h) bepaal dat een van die werksaamhede van die nywerheidshof is om oor die algemeen met alle aangeleenthede te handel wat noodsaaklik is vir of in verband staan met die verrigting van sy werksaamhede kragtens hierdie wet.

Daardie artikel van die wet gee die Nywerheidshof, na my mening, nie breë algemene bevoegdhede nie. Dit is 'n voorvereiste dat die hof 'n ander werksaamheid wat die wet aan hom toevertrou moet uitoefen. Die hof se bevoegdhede word uitgebrei sodat die hof, in die uitoefening van daardie ander werksaamheid ook dit kan doen

wat noodsaaklik is vir of in verband staan met daardie ander werksaamheid.

Die Nywerheidshof het slegs sodanige bevoegdhede of werksaamhede (die Engelse teks verwys na "functions") as wat die Wet aan hom toevertrou. Die bevoegdhede word uiteengesit in artikel 17(11)(a) tot (g). Dit is slegs wanneer die hof een van daardie werksaamhede uitoefen dat hy die bevoegdhede verkry wat art 17(11)(h) aan hom verleen.

Die hof is in hierdie saak, nie besig om enige werksaamheid na verwys in art 17(11)(a) tot (g) uit te oefen nie. Die voorvereiste vir die bevoegdhede wat art. 17(11)(h) aan die hof verleen is afwesig. Die hof het gevolglik nie die bevoegdheid om die regshulp toe te staan wat die Applikant aanvra nie.

'n Bespreking van die werkgewer se plig om finansiële inligting te openbaar en die algemene plig om kollektief te beding is dus onvanpas.

Die Applikant het aangevoer dat die hof wel jurisdiksie het om die gevraagde regshulp toe te staan omdat die hof 'n plig het om bedinging te goeie trou af te dwing. Ek is verwys na die aanhef van die Wet; The new Labour Law deur Brassey et al; MAWU v Transvaal Pressed Nuts Bolts and Rivetts (Pty) Ltd (1988) 9 ILJ 696, MAWU v HART

(1985) 6 ILJ 478 en die Hooggeregshof se "Anton Piller" bevele. Die gesag waarna die Applikant verwys ondersteun nie sy betoog nie. Die Nywerheidshof moet deur die werksaamhede aan hom toevertrou kollektiewe bedinging afdwing. Dit beteken nie dat die afdwing van kollektiewe bedinging 'n gemagtigde werksaamheid is nie.

Die aansoek word gevolglik van die hand gewys. Daar is geen bevel vir koste nie.

GETEKEN te PRETORIA op hierdie 20ste dag van JULIE 1993.

MNR ARTHUR DE KOCK

SENIOR LID : NYWERHEIDSHOF