THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. JS 32/07

In the matter between:

JOHN CORNELIS WALLIS **Applicant**

And

RODNEY THORPE & ROGER ZEEMAN **Respondents**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This matter has a sorry history – one that at almost every stage of the statutory dispute resolution process illustrates how the process of expeditious and efficient dispute resolution contemplated by the Labour Relations Act, for various reasons, did not materialise. The applicant claims that he was summarily dismissed by the respondents with effect from 31 May 2003. On 27 June 2003, the applicant referred a dispute to the CCMA. More than three years later, on 23 November 2006, a certificate of outcome was issued, recording that the dispute referred on 27 June 2003 remained unresolved. The certificate characterised the dispute as "alleged constructive dismissal". (The reason for the long period that elapsed between the date of referral and the date of the certificate is by and large explained by an intervening process of litigation that is not material to the present proceedings). The applicant later referred the dispute to arbitration, describing the dispute in his referral as one concerning "constructive dismissal and deferred compensation." The applicant thereafter successfully applied to have the matter referred to this Court for adjudication, on the basis that the

reason for dismissal was one that is listed in s 187 as automatically unfair (the applicant contended that his dismissal amounted to an act of unfair discrimination). After the granting and subsequent rescission of a default judgment and various other interlocutory applications, the matter commenced on 2 November 2009.

[2] In his statement of claim (which the applicant mistakenly set out in affidavit form), the applicant sets out various claims relating to his employment and the consequences of the termination of that employment. These can be summarised briefly as follows:

(a) Summary dismissal (here the applicant states "The argument between Constructive Dismissal and Automatically Unfair Dismissal was meant to be considered, interpreted and classified by the CCMA. At that time I had no knowledge of such technical labour law terminology, but saw it is a "Constructed" scenario. The LRA states that the Commissioner must ensure the heading to be correct and rectify the heading where incorrect");
(b) Underpayment;
(c) Discrimination (here the applicant makes certain factual averments that he contends amount to acts of discrimination); and
(d) Prejudice (here the applicant refers to irreversible bodily harm that he contends he has suffered).

[3] On these grounds, the applicant seeks payment of various amounts in respect of deferred salary, leave pay, deferred compensation for his industrial assets, compensation for the theft of his equipment, loss of earnings, compensation for unfair dismissal, severance pay, compensation for loss of return on investment and opportunity cost, compensation for dividends not received, settlement for a 10% shareholding in Ngomi Timbers cc, medical and disability related

claims, claims for medico-legal costs incurred, interest and costs. The total sum claimed by the applicant exceeds R20 million. Given the nature of the dispute referred to this Court for adjudication (i.e. a dismissal alleged to be automatically unfair), the only competent remedy to which the applicant is entitled is compensation (the applicant does not seek reinstatement). In terms of s 194, that remedy is limited to a maximum amount equivalent to 24 months' remuneration. The balance of the applicant's claims are entirely misconceived; this Court does not have the power to entertain any of them, let alone make any of the orders that the applicant seeks.[1] I appreciate that the applicant is a lay person, and that in these proceedings, he has acted without the benefit of professional legal advice. I fail to appreciate though, how the applicant, a business person with many years of experience, thought it unnecessary to obtain advice prior to commencing these proceedings. At best for the applicant, his conduct of this case displays a level of gross ignorance on his part; at worst, it is indicative of an attitude toward these proceedings and to this Court that can only be described as cavalier.

[4] After a number of abortive attempts at holding a proper pre-trial conference, the parties agreed ultimately that the matter would proceed on the basis that the Court would be required to determine two of the points *in limine* raised by the respondent: The first is the assertion that the respondents never employed the applicant; the second the assertion that the applicant was never dismissed.

[5] The applicant gave evidence in support of his contentions that the respondents employed him, and that he had been dismissed by them. After the completion of the applicant's testimony, the respondents applied for absolution from the instance, and it is in respect of this application that this judgment is delivered.

[1] The Court is of course entitled to grant an order for the payment of severance pay, but the dispute referred to the Court does not concern a dismissal effected for a reason referred to in s 189.

[6] I do not intend to summarise the evidence presented by the applicant. Most of it concerned the history and the terms of his engagement as what he described as an "in-house consultant" (but not an independent contractor) with a brief to improve business processes and efficiencies in the respondents' business operations, including Ngomi Timbers cc. The respondents contended that the applicant was in fact employed by Ngomi Timbers cc as its general manager, a contention that the applicant denied. For reasons that will become apparent, it is not necessary for me to make any finding in this regard. The applicant's evidence concerning his termination of employment centered on a letter that he wrote to the respondents on 21 April 2003. In that letter, the applicant summarised his view of the position in which he then found himself. Specifically, the applicant recorded his dissatisfaction with the state of affairs concerning his engagement, and at Ngomi Timbers cc. He proposed that regular meetings be held, with a 30-point agenda that he proposed, and for something "tangible" to enable him to achieve a work-life balance. The letter must be read in the context of the applicant's claim that he had been invited by the respondents to become a future partner and shareholder in their enterprise (and specifically that he would acquire 10% of the interest in Ngomi Mills) and that he was concerned that the respondents were unjustifiably protracting the formalisation of an agreement between the parties, or worse still, that they were intent on reneging on the verbal agreement already reached.

[7] The letter dated 21 April 2003 concludes with the following:

> *"The option scenario is simple and straight-forward:-*
>
> 1. *Should the above be accepted, I will buy a house in Newcastle, rent out my house and keep my cottage in JHB for whatever period required and for whatever the reason. I have always found it difficult, if not impossible to stay outside "My own place", when needing to work and live there.*

2. *In the event you are either unwilling or unable to meaningfully address my concerns by the end of April 2003, you force me in the position to interpret such as your summary dismissal with a one month notice period.*[2]

3. *It should specifically be noted that I sincerely feel that I have patiently waited until well into the start of this new financial year, following my letters of the last financial year, to facilitate you to meaningfully address my personal objectives in alignment with Ngomi's objectives; None of which are based on the reduction of my efforts, but seen to improve the unacceptable lopsidedness between my work and my family life."*

[8] The applicant stated that in addressing this letter to the respondents, he intended to give them an ultimatum – they should accede to his demands, or he would regard himself as having been summarily dismissed by them. The applicant's attitude is possibly best captured by his letter to the respondents on 13 June 2003, where he states:

> *"After long and protracted negotiations it was agreed that I would be given an employment package including a salary of R 25 000 salary, together with a 10% shareholding in Ngomi Timbers. The shareholding was to be reserved pending my rehabilitation; however, as to date I have not received the letter confirming the foregoing as promised. This is what eventually led to my constructive dismissal"*

The applicant attempted to dismiss this letter as irony, but on the face of it, the letter probably discloses better than any other document why the applicant chose to sever ties with the respondents in the way that

[2] Sic- a summary dismissal on one months' notice is a contradiction in terms.

he did. In any event, the respondents regarded the applicant's letter as a letter of resignation, and said as much to him in a letter dated 10 June 2003.

The test to be applied

[9] This Court recently reaffirmed that it is empowered to grant absolution from the instance in appropriate circumstances. The test is whether at the close of a plaintiff's case, there is evidence upon which a court, applying its mind reasonably to that evidence, could or might find for the plaintiff (see: *Minister of Safety and Security v Madisha & others* (2009) 30 ILJ 591 (LC), referring to *Claude Neon Lights (Pty) Ltd v Daniel* 1976 (4) SA 403 (A)).

[10] I turn first to consider the evidence adduced by the applicant in relation to the issue of the existence of a dismissal. Section 186 (1) of the LRA defines a dismissal to include circumstances where:

> *"(a) an employer has terminated a contract of employment with or without notice;*
>
> *…*
>
> *(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee."*

[11] Paragraph (a) has been interpreted to mean that it is incumbent on an employee claiming to have been dismissed to establish, on a balance of probabilities, some overt act by the employer that is the proximate cause of the termination of employment (see *Ouwehand v Hout Bay Fishing Industries* (2004) 25 *ILJ* 731 (LC). Paragraph (e) has been interpreted to require the following:

1. The termination of the contract by the employee, by resigning or otherwise;

2. the employee must objectively establish that the situation has become so unbearable that he or she cannot be expected to work any longer;
3. the employee must show that he or she would have carried on working indefinitely, but for the unbearable circumstances created by the employer; and
4. the employee must exhaust all possible remedies before resigning. [3]

The evidence adduced thus far must be assessed against these criteria.

Analysis

[12] The applicant testified that he used the term "constructive dismissal" in his correspondence with the respondents during June 2003 (he used the term in a letter to them dated 1 June 2003) in the sense that he considered his dismissal to have been "engineered". He had been advised by the persons at the CCMA that he should not describe the dispute in this way, but that is the nature of the dispute referred to this Court, and to which the applicant refers in his statement of claim.

[13] To the extent that the applicant relies on paragraph (e) of the definition, sometimes referred to colloquially as a 'constructive dismissal', on his own version, he did not terminate his contract of employment. The applicant was adamant that he did not resign, that his letter dated 21 April 2003 was not a letter of resignation, and that it was the respondents who had dismissed him. The applicant has therefore failed to adduce sufficient evidence to clear the first hurdle presented by paragraph (e) i.e. that he terminated his employment.

[14] Mr. Rossouw, who represented the respondents, submitted that that was the end of the matter. I put to him that on a broader interpretation

[3] See Van Niekerk (et al) *Law@work* (Lexis Nexis, 2008) at 212-4.

of the dispute referred to this Court for adjudication, it might be one that concerned an unfair dismissal, and that the Court might be entitled to look beyond paragraph (e) of the definition. Mr. Rossouw then submitted that to the extent that the applicant relies on paragraph (a) of the definition (the only other possible provision on which the applicant could rely), it cannot be suggested, on the evidence adduced by him, that either or both of the respondents dismissed him, at least not in the sense that they engaged in any overt act that was the proximate cause of the termination of the applicant's employment. In my view, this submission is correct. In effect, the applicant put the respondents on terms to meet his demands, failing which he would "interpret" that failure as his summary dismissal. This is a legal nonsense. There is no such construction at common law (which requires an employer to accept any repudiation of a contract of employment and to cancel it before the contract terminates), nor is any such construction contemplated as a dismissal by s 186 (1) (a). An employee is not permitted to hold an employer to ransom, however reprehensible the employer's conduct might be or however unreasonable the employer's refusal to meet a demand might be, by saying, in effect, "If you fail to meet my terms, that failure constitutes a summary termination by you of my employment contract." Paragraph (a) of the definition, as stated above, requires that the employer terminates the contract – i.e. some overt act by the employer that has the consequence of terminating the employment contract.

[15] In summary: The evidence adduced by the applicant is insufficient for the Court, applying its mind reasonably to that evidence, to establish that the applicant could or might have established that he was dismissed. That being so, it is not necessary for me to make any finding in relation to the identity of the applicant's employer, and I expressly refrain for making any such finding.

[16] In relation to costs, this court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and

fairness. The ordinary rule i.e. that costs follow the result, is a factor to be taken into account, but it is not a determinative factor. Mr. Rossouw submitted that costs should be awarded on a punitive scale, since the litigation initiated by the applicant was nothing less than frivolous. While there is some merit to Mr. Rossouw's submission having regard particularly to the casual and careless attitude with which the applicant has conducted these proceedings since their inception, I intend to make an order for costs only on the ordinary scale. This litigation was ill-considered from the start. The applicant's misconception of the applicable legal principles is apparent from the very start – his letter dated 21 April 2003 and the ultimatum put to the respondents had no legal basis. The references to constructive dismissal equally were ill-conceived. The applicant sought to blame various third parties, including CCMA officials, for the characterisation of his dispute and the formulation of his claim. Ultimately, the applicant is the author of his own misfortune. This Court encounters many indigent and illiterate litigants who seek to enforce what they perceive to be their rights. The Court is often wary of the effect of a costs order on persons such as these, who more often than not sincerely but misguidedly institute ill-conceived proceedings. The applicant in these proceedings is neither indigent, nor is he illiterate. On the contrary, he is an articulate, experienced business person, who was quite capable of considering the consequences of his decision to put the respondents on terms and to sever his relationship with them should they refuse to accede to his demands. My strong sense is that the applicant's motive in instituting these proceedings and claiming amounts that can only be described as outrageous was to place pressure on the respondents to enter into settlement negotiations with him and conclude a mutually satisfactory agreement. The respondents chose to call the applicant's bluff, and having successfully done so, the applicant must carry the responsibility for his own costs (such as they are) and that part of the respondents' costs to which they are entitled on a party and party basis.

I accordingly make the following order:

1. Absolution from the instance is granted, with costs, such costs to include the costs of the proceedings on 21 May 2008, when costs were reserved.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 2 – 5 November 2009
Date of Judgment: 10 November 2009

Appearances:

For the applicant: in person

For the respondent: Adv Rossouw
Instructed by: Civin-Alexander Attorneys