

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO.: CA3/99

In the matter between:

GAL MARINE (PTY) LTD

Appellant

and

BAREND CRONJE

1st

Respondent

D.I.K. WILSON N.O.

2nd Respondent

JUDGMENT

CONRADIE JA

[1] Following upon the termination of the first respondent's employment with the appellant, he alleged before a commissioner of the commission for conciliation mediation and arbitration (>the CCMA=) that

the termination had been substantively and procedurally unfair. The commissioner found in his favour and awarded him compensation of R 103 827.46. Being dissatisfied with this award, the appellant brought it on review before the labour court which declined to interfere. Still dissatisfied, the appellant is now before us where the contention is that the court a quo erred in failing to find that the commissioner had so grievously misconstrued the evidence before him that the award should be set aside.

[2] The first respondent had for personal reasons resigned from the appellant=s employ in December 1995. He had been employed as a mining engineer in the appellant=s business of recovering marine diamonds. During September 1996 the appellant=s managing director, Mr Ben-Tovim, approached the first respondent to become a unit manager in overall charge of one of the appellant=s diamond mining vessels. The first respondent accepted the offer and rejoined the appellant in this capacity from 1 October 1996.

[3] On 18 December 1996 an incident occurred which lead to the termination of the first respondent=s employment. There is a massive dispute of fact about what precisely happened. The first respondent testified that he had for some time been working under such great strain that it began taking its toll on his health. On the morning of 18 December he woke up ill. During

the course of the day he decided that he had better consult a medical practitioner. This was awkward because he had the previous day been requested to travel to the Namibian port of Luderitz to meet his employer=s diamond mining vessel, Shelf Explorer. He advised the appellant=s human relations manager, Ms Barbara Stewart- Roberts, that he was too ill to fulfil this duty. She refused to believe him and instructed him to proceed to Luderitz. He, in turn, refused to do so. He had arranged to see his doctor the next day and did not believe that it was all that important for him to meet the ship on that day, rather than the next day, which had been the earlier instruction given to him. He regarded the later instruction as unreasonable.

[4] Ms Stewart-Roberts=s version, on the other hand, was that - surprisingly, since he was a hardworking employee who took his work seriously - the first respondent on this occasion said that he would not carry out her instruction since if he did so he would not be back in Cape Town for the week-end or for Christmas, she was not sure which.

[5] Ms Stewart-Roberts reported her discussion with the first respondent to Mrs Ben-Tovim, the wife of Mr Ben-Tovim. She was also a director of the appellant. A heated discussion between her and the first respondent ensued, during the course of which the latter said things to her that might

as well have remained unsaid. This discussion, as well as the information given to her by Ms Stewart-Roberts, was conveyed by Mrs Ben-Tovim to her husband when he returned from a business journey later that evening. There can be little doubt that what was conveyed by Mrs Ben-Tovim to her husband was the material which he used for writing a letter to the first respondent in which the latter was informed that he had been relieved of his duties as unit manager.

[6] The appellant disputed both that the first respondent had been dismissed and that he had not been afforded a fair opportunity of stating his case. The first contention was based on the proposition that the first respondent had repudiated his employment obligations, that the appellant had accepted the repudiation and that it was in these circumstances not required to afford the first respondent a hearing of any kind.

[7] I agree with the court a quo that there was a clear dismissal. There was, even on the appellant=s version, not that unequivocal expression of an intention not to comply with a contractual obligation which is the essence of a repudiation. A repudiation can only be said to occur in cases of aggravated breach of contract such as desertion. I do not support the proposition that insubordination would normally amount to a repudiation of contract. For although it is a breach of contract the employee who refuses

to obey a lawful instruction does not, by his conduct, usually mean to indicate that he will never again perform any of his contractual obligations.

[8] The dismissal letter had been written without any input from the first respondent. It was before the commissioner, before the judge a quo and before us his principal complaint that he had been dismissed without having been heard. The dispute of fact about what had occurred between Ms Stewart-Roberts and the first respondent could not properly have been resolved by the decision maker, Mr Ben-Tovim, without having had the version of both participants to the quarrel before him. He was not entitled to make up his mind, as he did, on the one version alone. Indeed, he could not even have decided whether there had been a repudiation without having investigated the circumstances from both sides.

[9] Mr Elliot for the appellant argued that the first respondent had had an adequate opportunity of being heard when he was, in the course of the discussion between him and Ms Ben-Tovim, in a position to explain why he refused to comply with the instruction to meet the ship on 19 December. The argument may have been acceptable if the initial discussion had been with the decision-maker himself. But once the discussion was reported to the decision-maker, he had only the reporter=s version before him. He was not entitled to assume that the report was

infallible. As I pointed out earlier, there were huge disputes of fact about the content of the discussion. Mr Ben-Tovim had no opportunity of exercising his mind on this. He should have given himself that opportunity. Not to have done so was unfair. The commissioner=s decision that it was, was not reviewable under s145 of the Labour Relations Act 66 of 1995

[10] The compensation which was awarded does not exceed that to which the first respondent would have been entitled for a procedurally unfair dismissal. There is accordingly no point in coming to a firm conclusion on the commissioner=s decision that the dismissal had also been substantively unfair. I am inclined to think that it was but that is by the way.

The appeal is dismissed with costs.

CONRADIE JA

I agree

NICHOLSON JA

I agree

MOGOENG AJA

Date of Hearing:

2 September 1999

Date of Judgment:

16 September 1999

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Appearance for Appellant:

Adv.

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