

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO JA 94 / 98

In the matter between:-

JON B TULLY

Appellant

and

MLS BANK LIMITED

Respondent

JUDGMENT

MOGOENG AJA

[1] This is an appeal against the determination made by the Industrial Court, per Bernhardt (AM), which is to the effect that the termination of the Appellant's employment does not amount to a constructive dismissal.

[2] What follows are the allegations on which Appellant relies for the contention that the termination of his employment constitutes an unfair labour practice on the basis that he was constructively dismissed.

[3] He was employed as the financial manager of Akasia Clinic when Mr Gerard Cloete, the executive director of the Respondent, asked him in to take up employment with the Respondent. Cloete told him that he could either become a director of Adjoes Tyres or carve out a career with the Respondent. This culminated in his resignation and his employment by

the Respondent on 1 July 1996. His manager was Mr Christopher Smith.

[4] One of the Appellant's responsibilities was to complete credit applications. At some stage he drew up a contract of loan which involved a certain Dr Labuschagne. On 26 September 1996, Smith told him that Cloete had refused to sign that credit agreement on the basis that it was of substandard quality. Appellant was unhappy about the fact that Smith and Cloete had not discussed their dissatisfaction about the agreement with him. In response, Smith advised him to think about whether banking was the right career for him and whether the Respondent, in particular, was the right employer for him. Appellant said he was devastated by these utterances.

[5] On the next day, Smith asked the Appellant if he had thought about what he said the day before. Appellant replied that if he had a problem he would discuss it with Cloete.

[6] On 4 October 1996 the Respondent held a celebratory function to mark the success of Smith who had clinched an apparently important deal with a certain eye clinic. It was at that function that Eugene van den Berg was introduced to the Appellant by Cloete. Cloete told Appellant that van den Berg would soon be employed by the Respondent. He assured the Appellant that he had no reason to feel threatened by the arrival of a newcomer.

[7] Van den Berg did assume duty thereafter and took over some of the credit applications. After a few weeks or about month thereafter, Appellant was told to split the portfolio of clients with Smith. This did not happen but what ultimately happened was that van den Berg took over all the credit applications and he (Appellant) had to do the administrative work.

[8] Sometime before the day of Appellant's resignation, he drove Cloete to the airport. Cloete asked whether he was happy with his job. He told Cloete that he was unhappy because he was not delegated enough work. He complained that he sat in the office doing nothing for the better part of the day. On another occasion, Cloete called Appellant's former boss and enquired whether Appellant would leave his job if he was unhappy about it or whether he would resign. On yet another occasion Cloete invited Appellant to have a beer with him so that they could discuss his situation at work. Cloete then proposed that Appellant should perhaps take over some of his administrative responsibilities. Appellant again expressed dissatisfaction about the fact that he was not delegated enough work and that he was not given a chance to do credit applications.

[9] On 17 October 1996, a Mr van Niekerk informed Appellant that Cloete wanted to see him on 18 October 1996. That meeting did take place. Cloete told Appellant that he thought Appellant would readily fit in in the new job and that he obviously did not fit in. Cloete also told Appellant that he could see that he was very unhappy and advised him to go and think about whether he wanted to remain in the employ of the Respondent or not. He then told Appellant that he had a choice either to resign or to stay on until he found alternative employment. Cloete also told the Appellant that he and Mr Croucamp, the chairman of the Respondent's board, had considered the possibility of offering him another job but none could be found. He then decided to resign.

[10] As a result of this decision, both Cloete and Appellant negotiated the terms on which

their employment relationship would be terminated. Appellant told Cloete that the prospects of finding another job might be diminished if his work record reflected that he was unemployed. Cloete then proposed that if Appellant's letter of resignation stated that he was acting as a consultant for the Respondent, this would enhance his prospects of securing employment. This was accepted by the Appellant. The severance package was also discussed. All these issues were agreed upon on 18 October 1996.

[11] On 21 October 1996 Cloete spoke to the Appellant by telephone and told him to bring the resignation letter. They met on 22 October 1996. Appellant told him that he was not even sure of what he should say in that letter. Cloete then helped him to phrase the terms of the resignation relating to the package and the consultancy. Appellant left, caused the letter to be typed and delivered it to the Respondent.

[13] There is a dispute regarding the circumstances surrounding the employment of van den Berg and the remarks attributed to Mr Cloete in this connection. Another dispute relates to what actually transpired between Appellant and Mr Cloete before Appellant announced his decision to resign. Be that as it may, I will assume in the Appellant's favour that his aforestated version is true for the reasons set out herender.

[14] Mr Cloete said a few things which lend credence to some of the allegations made by the Appellant. Firstly, he said that Smith complained to him about the length of time the Appellant spent on a task before its completion and of his poor performance in general. Secondly, Cloete had the perception that Appellant did not recognise Smith's authority over him, he viewed Smith as being inferior and did not want to report to him. This perception finds support in Appellant's statement to Smith on 27 September 1996 that if he were unhappy he would approach Cloete. Thirdly, Cloete repeatedly told the Appellant that he was not trying to solicit his resignation when nothing seemed to warrant such a comment.

[15] On the probabilities, all these facts indicate that the Respondent, through Smith and Cloete, held the opinion that Appellant's performance was unsatisfactory, and that Appellant did not fit in the operations of the Respondent. As a result, Cloete advised the Appellant to resign. Counsel for the Respondent conceded the correctness of the version of the Appellant that Cloete gave him two options.

[16] Smith did not testify and the utterances attributed to him by the Appellant are uncontroverted. I have no choice but to accept Appellant's version in this regard. Van den Berg is, however, in a different category. Cloete denied all the allegations relating to this aspect. Furthermore, those allegations were intended to support a suspicion rather than a fact. Clearly, Appellant did not know what the Respondent's staff requirements were at the time. It may well be that van den Berg would have been employed even if no need arose for the termination of Appellant's employment. He suspected that the Respondent had already decided to dismiss him when van den Berg was employed. No facts were given to support this suspicion.

[17] Mr Wessels, for the Appellant, relied primarily on the case of *Unilong Freight*

Distributors (Pty) Ltd v Muller (1998) 19 ILJ 229 (SCA) as authority for the contention that

Appellant was constructively dismissed. There are in fact striking similarities between the facts relevant to the resignation of Muller (the employee in the *Unilong* case) and the Appellant in the present case. They are that:

- a) Muller had no experience in the transport field. Similarly Appellant had no experience in the banking industry.
- b) Muller's work performance was poor and so was the Appellant's performance.
- c) Muller just like the Appellant, was not given any :
 - (i) prior warning that failure to improve his performance could lead to dismissal;
 - (ii) opportunity to improve his performance;
- (iii) reasonable and explicit ultimatum.
- d) In both cases the employer had explored the possibility of offering the employee a different position but could not think of any vacant position he could be moved to.

[18] These similarities do not, however, dispose of the enquiry. The following are the material differences between the two cases:

- a) Muller was not even aware that his performance was poor. He thought that he was doing a good job. On the contrary, the Appellant in this matter knew that his performance was sub-standard.
- b) Muller was happy with his working environment and with his job in particular. Appellant was not. He had for some time been unhappy about his job-content, the fact that he spent most of the day doing nothing and the inadequate delegation of authority to him.

- c) Muller's resignation was not preceded by any meaningful negotiations with the employer. On the other hand, Appellant and Cloete discussed all the material issues in a very friendly atmosphere.
- d) Muller was unwilling to resign. In the present case the parties agreed to an amicable termination of the employment relationship, a very generous severance package and an undertaking by Cloete to secure temporary employment for the Appellant in some hospitals in case of desperation.
- e) Muller was told by the employer that it had been decided that he should be summarily dismissed, the only other option being to sign a letter requesting his voluntary retrenchment. He was virtually forced to sign a letter of resignation which was already prepared before he met van Staaden. He was not even given a chance to reflect on the employer's decision. In the matter before me, the Appellant had at least four days to reflect on the matter and to even seek advice if he chose to.
- f) Muller was very unhappy and was opposed to the termination of employment. Appellant was not necessarily thrilled, but he resigned on a cordial note and went so far as to express his gratitude to the Respondent for the time it spent on him.

[19] I am therefore of the view that the effect of the striking similarities between the two matters is watered down by the fact that in the instant case, there was a consensual termination of employment. The material dissimilarities also distinguish the *Unilong* case from the present one.

[20] Mr Wessels also submitted that the Appellant was driven to resign by some kind of duress which resulted from the cumulative effect of the abovementioned incident with Smith, the employment of van den Berg and what Cloete said about it as well as the two options presented to him by Cloete on 18 October 1996 as well as the generous package the Appellant was given. Duress was relied on for two reasons. The one was to add substance to the allegation that the Appellant was constructively dismissed and the other was to vitiate his consent to the termination of his employment. Ramsbottom J set out the requirements of duress as follows in *Broodryk v Smuts NO 1942 TPD 47 at 51-52*:

- “1. Actual violence or reasonable fear.
 2. The fear must be caused by the threat of some considerable evil to the party or his family.
 3. It must be the threat of an imminent or inevitable evil.
 4. The threat or intimidation must be *contra bonos mores*.
 5. The moral pressure used must have caused damage.”
- (See also *Machanick Steel & Fencing v Transvaal Cold Rolling 1979 (1) SA 265 (T)* at 271; *Poragon Business Forms (Pty) Ltd v Du Preez 1994 (1) SA 434 (SOK)* at 439F; *Van den Berg & Kie Rekenkundige Beampstes v Boomprops 102 BK 1999 (1) SA 780 (T)* at 784.)

Clearly the facts relied on by the Appellant do not satisfy any of these requirements.

[21] There are two other defences of duress left to be considered. They are ‘duress of goods’ and ‘economic duress’, both of which entitle a party to avoid an agreement provided that the pressure amounts to a coercion of the will which vitiates consent. It had been accepted that the English law concept of ‘duress of goods’ was in harmony with South African law, whereas the principle of ‘economic duress’ in English law was not part of South

African law. (*Van der Berg supra at 792 F-G and 792 I-J*) In any event the facts of this case do not support the notion that these principles are applicable.

[22] It follows therefore that no form of duress, in respect of which the onus of proof was on the Appellant, has been proved to have had anything to do with the Appellant's resignation.

[23] The fact of the matter is that the Appellant had been unhappy for quite some time as at 18 October 1996. He was unhappy as a result of the negative remarks made by Smith about his performance, about the inadequate delegation of duties and his undisputed poor work performance. On the probabilities, he must have been just as unhappy when he saw the realisation of his ambition or dream, to become a director of Adjoes Tyres or to have a meaningful career in the bank, fading away. Nothing had happened prior to 18 October to alleviate his unhappiness.

[24] It is noteworthy that the discussions which resulted in his resignation were not held with the somewhat unfriendly Smith but with Cloete. It was the same Cloete who had recruited him, promised him a bright future during the interview and whom he considered to be more approachable if regard is had to Appellant's response to Smith was on 27 September 1996. Having discussed Appellant's unhappiness on at least three occasions, Cloete again engaged him on the subject. It was in this context that and in view of Appellant's persistent unhappiness that Cloete advised him to either resign or stay on until he found alternative employment. A very friendly atmosphere pervaded the ensuing discussions which culminated in an agreement, in a loose sense, to terminate the employment relationship. The terms on which Appellant resigned were not disclosed for the first time on 22 October 1996. They had been discussed on 18 October 1996. Therefore Mr Wessels' contention that Cloete dictated the contents of the resignation letter therefore loses whatever substance it might otherwise have had. Appellant had sufficient time to reflect on those terms, he could have refused to resign but he did not. He wanted to leave and found the severance package and Cloete's undertaking to find him temporary employment in case of need, far too generous to resist. The consensual nature of the resignation is fortified by Appellant's unsolicited expression of gratitude to the Respondent.

[26] I am satisfied, therefore, that the Respondent did nothing to render Appellant's continued employment unbearable or intolerable.

In the result, the appeal is dismissed with costs and the order made by the Industrial Court is confirmed.

MOGOENG AJA

I agree

CONRADIE JA

I agree

NICHOLSON JA

Appearances:

Appearing for the Appellant:
Attorneys.

Adv E Wessels instructed by Mendelow- Jacobs

Appearing for the Respondent:
Company inc.

Adv E S J Van Graan instructed by Tim Du Toit &

Date of hearing:

12 August 1999

Date of judgment:

28 September 1999