

IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Cape Town)

Case Number:

C 295/98

In the matter between:

Applicant

and

CC

Respondent

JUDGEMENT

Revelas J :

[1] The respondent in this matter is a closed corporation, duly registered with the Department of Manpower and on the evidence before me, it regularly paid its dues thereto as an employer. The respondent is also a well-known restaurant situated in the picturesque town of Stellenbosh.

[2] The applicant's wife, a Mrs Louise Obertüfer, had a

hundred percent membership interest in the respondent. The applicant had none.

[3] The respondent's erstwhile accountant, Mr B Ankers testified that, he discussed with the applicant and his wife, the possibility of the applicant taking over a forty percent interest in the respondent. A twenty percent interest would be sold to another employee of the respondent at the time, namely the chef, Mr Phillipe Moro. Mrs Obertüfer would retain only a forty percent interest in the respondent. This however never transpired and the applicant never acquired a forty percent interest or any other percent.

[4] The applicant was the manager of the respondent restaurant.

[5] According to the applicant, he was entitled to a salary from the respondent in an amount of R 11 000-00 per month, which he himself effectively took from the till every month this was confirmed

by Mr Ankers.

[6] On 1 November 1997, the Doornbosch Restaurant CC was sold as a going concern by the applicant's wife when she sold her one hundred percent membership interest in the respondent, to the new owners of the respondent namely Mr Axel Zerrouk and Anna Marie France Zerrouk.

[7] It was undisputed evidence before me, that the applicant's wife never told him that she was going to sell the restaurant. Mr Zerrouk, who was the only witness for the respondent, and who appeared in person on behalf of the respondent testified that he was never told that the applicant was an employee of the respondent.

[8] According to Mr Zerrouk's evidence he was given a list of the employees that would, in terms of the agreement between himself and the applicant's wife, be employed as employees. The applicant is not mentioned in the list. Mr Zerrouk disputes

strongly that the applicant is an employee of the respondent. The applicant's wife was to become one of the respondent's employees herself. Her services were however terminated three months after the respondent took over the business, according to Mr Zerrouk's evidence.

[9] The applicant testified that on the night of 1 November 1997 he arrived at the restaurant and noticed Mr Zerrouk whom he did not know busy lighting the candles. He asked Mr Zerrouk what he was doing and Mr Zerrouk informed him that he now owned the restaurant. There was a slight altercation where upon the applicant left, upon learning that the business was sold to Mr Zerrouk. He found his wife in the parking area of the respondent, where she confirmed that she had sold the business to him.

[10] The applicant was highly upset when his wife told him that the business interest in the respondent was sold for approximately R 580 000-00. The

applicant testified that some time prior to the sale, a prospective Dutch buyer was interested in purchasing the respondent for approximately R 750 000-00. He could therefore not understand why his wife would want to sell the business for such a low amount, when a greater purchase price could have been fixed. After the sale, the applicant and his wife were separated.

[11] It is common cause before me, that no one attempted to discuss with the applicant the sale of the respondent or what his position would be thereafter. He was clearly no longer welcome on the premises and had to leave. Mr Zerrouk disputed that he asked the applicant to leave. However, considering that an argument took place, a fact which is common cause, it is highly probable, that Mr Zerrouk, being the owner at that time asked the applicant to leave, particularly if it was during a heated argument. In any event I have no reason to disbelieve the applicant. He made a good impression on me. He appears to be a very honest

person. It was never the case for the respondent that the applicant could remain as a manager.

[12] The applicant who regarded himself as dismissed in the circumstances, decided to challenge the fairness of his dismissal on both procedural and substantive grounds and consequently referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") on 22 December 1997. The certificate of outcome reflects that the dispute which was conciliated was an "alleged unfair dismissal for operational reasons" and the certificate is dated 18 February 1998.

[13] The applicant consequently, on 17 March 1998 referred the dispute between himself and the respondent for arbitration. At the time the applicant was represented by labour consultants, who had a problem as to how to frame the dispute to determine of whether it should go to arbitration at the CCMA or for adjudication by the Labour Court.

[14] The labour consultant acting on behalf of the applicant, consequently wrote to the CCMA presenting the applicant's problem with regard to jurisdiction. A senior commissioner of the CCMA, Ms Sarah Christie informed the labour consultant that she was of the view that the dispute was about the termination of the applicant's employment in consequence of the sale of business. She did however caution that, although she was of the view (correctly in my opinion) that the CCMA did not have jurisdiction, only disputes which were included in the LR 7.11 form, requesting conciliation and issues which were in fact ventilated during that process, may be used to found arbitration jurisdiction or adjudication jurisdiction in the Labour Court.

[15] The applicant thereupon referred the matter to the Labour Court where the question of jurisdiction of the Labour Court was not raised. I believe I should deal with it.

[16] On the evidence, this is a matter which should have been adjudicated, since it appears that the termination was clearly in consequence of a change in ownership of the respondent therefore of an operational nature.

[17] In my view, the dismissal can also be construed as a constructive dismissal in that Mr Zerrouk did not make it possible, by his conduct, for the applicant to remain in the respondent's employ and did not offer him employment.

[18] On Mr Zerrouk's own version, he did not expect to have the applicant in his employ and all the other evidence also seems to suggest that there was much animosity between the applicant and Mr Zerrouk.

[19] I have to decide two issues in this case. The one is whether the applicant was an employee and the other is whether the applicant was dismissed.

[20] An employee is defined by section 213 of the

Labour Relations Act, No 66 of 1995 (“the Act”) as :

“any person, excluding an independent contractor, who works for another person or for the State and who receives, or who is entitled to receive, any *remuneration*” and also as,

“any other person who in any manner assists in carrying on or conducting the business of an employer.”

[21] The applicant worked for the respondent. He was not the owner of the business and even if he was a manager he was still an employee because he received remuneration from the respondent and he assisted in carrying on the business of the respondent. There are no facts to suggest that he was an independent contractor.

[22] The fact that Mrs Obertüfer did not discuss the matter with the applicant or inform Mr Zerrouk of the applicant’s presence, is of no consequence in determining the issue before me. I find it unlikely that a businessman who wishes to buy a

restaurant, omits to find out who the manager thereof is, and what is to become of such a manager after the sale, as managers are employees.

[23] If Mr Zerrouk feels that the applicant's wife had misrepresented certain facts about the respondent restaurant to him, then it is open to him to take whatever legal steps he deems necessary against her.

[24] No consultation took place between the respondent and the applicant in terms of section 189 of the Act.

[25] The respondent was the employer of the applicant. The new owners of the respondent, as well as the previous owner made it impossible for the applicant to remain in the service of the respondent. Consequently the applicant was dismissed by the respondent as a result of the sale of the business to Mr Zerrouk and his wife.

[26] The respondent is not able to show any fair reason for dismissing the applicant and no fair procedure was followed. This situation is clearly borne out by the facts. Consequently, the application must succeed.

[27] According to section 193(2) of the Act the Labour Court must require the employer to reinstate an employee when there is no fair reason for the employee's dismissal unless the employee does not wish to be reinstated or re-employed which is the case with the applicant. Therefore he must be compensated.

[28] The applicant was dismissed on 1 November 1997 and in terms of section 194 of the Act the compensation awarded to the applicant must be just and equitable in all the circumstances but not less than an amount specified by section 194(1) of the Act where the compensation for procedural unfairness must be equal to the remuneration that the applicant would have been paid between the

date of his dismissal and the last day of the hearing, but not more than twelve months. Consequently, I must compensate the applicant for twelve months remuneration calculated at his rate of remuneration at the date of his dismissal which was R 11 000-00 per month.

[29] In so far as costs are concerned, there are no special circumstances which exist which could persuade me that costs should not follow the result. In the circumstances the respondent should pay the applicant his costs.

[30] Accordingly I make the following order:

1. The applicant was an employee of the respondent on 1 November 1997 which is the date of his dismissal
2. The applicant was not dismissed for a fair reason by the respondent. His dismissal was substantively and procedurally unfair.
3. The respondent is to pay the applicant compensation in the amount of R 132 000-00

which is the equivalent of twelve months' remuneration calculated at the applicant's rate of remuneration on the date of his dismissal, which was R 11 000-00 per month.

4. Interest is payable by the respondent on the aforesaid amount of R 132 000-00, at the rate of 15.5% per annum, from the date of judgement to date of payment.
5. The respondent is to pay the costs of this application on the High Court scale, as between party and party.

E REVELAS

Applicant : Mr Whyte of CHENNELLS ALBERTYN

Respondent : Mr Zerrouk (In person)

Judgement : 25 February 1999

This Judgement is also available on the Internet
at the following Website:

<http://www.law.wits.ac.za/labourcrt>