

**IN THE LABOUR COURT OF SOUTH AFRICA HELD AT CAPE TOWN
CASE NO C704/2002**

In the matter between

VIRGIN ACTIVE SA (PTY) LTD

Applicant

and

BHANA, S N O

First Respondent

**THE COMMISSIONER FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

TELADIA, HAROUN

Third Respondent

JUDGMENT

JAMMY AJ

1. The Applicant in this matter seeks an order reviewing and setting aside an arbitration award made by the First Respondent on 24 May 2002 in which the First Respondent found that the Third Respondent's dismissal by the Applicant was both procedurally and substantively unfair and awarded the Third Respondent an amount equivalent to 6.5 months remuneration as compensation, to be paid within thirty

days of the award. It is common cause in the light of this pending review, that payment has not as yet been made.

2. The salient background facts of the matter are the following:

2.1 The Third Respondent was employed by a company Leisurenets Limited which operated a string of fitness centres under the style Health and Racquet Clubs.

2.2 Those clubs were purchased by the Applicant from the liquidators of Leisurenets on 1 March 2001, at which time the Third Respondent held the position of membership manager.

2.3 The Applicant determined that the terms and conditions of the membership managers required amendment and in May 2001 commenced discussions with them in that regard. The Third Respondent and other managers retained attorneys to represent them in those negotiations.

2.4 The Applicant embarked on a significant restructuring programme and all persons who were former employees of Leisurenets were required to sign new letters of employment. The Third Respondent, to whom aspects of the new conditions were unacceptable, declined to do so.

2.5 In September 2001 the Third Respondent approached certain Espach, a Regional Manager of the Applicant, with whom he discussed the possibility of the termination of his employment with a severance package. This was confirmed by him in an e-mail message to Espach on 25 September 2001 in which he confirmed his reasons for requesting “a separation agreement”.

2.6 The Third Respondent then fell ill, was absent from work for a period and returned on 1 October 2001 when he was called to a meeting with Espach and

certain Collie, a Club General Manager. The Third Respondent's evidence before the First Respondent was that Espach informed him that for various reasons, including what the Third Respondent conceded was the poor performance of his club, the Applicant wished him to leave its service. He was asked to tender a letter of resignation which, at the meeting, he refused to do, requesting that that requirement be put in writing.

2.7 That was done and later that afternoon he received a letter recording the company's rejection of his reasons for refusing to sign a new letter of appointment, the fact that he was the only one of the previous employees of Leisurennet who refused to do so, and stating that /*this was an operational requirement and that in the circumstances the company "proposes to enter into a consultation process with you regarding termination of your services based on the company's operational requirements". The company's proposal, he was told, was to terminate his services on 31 October 2001. He was however "invited to make representations initially in writing" within three working days.

2.8 Discussions between the Third Respondent and Collie then ensued regarding the leave pay due to him and, subsequent thereto, the Third Respondent met again with Collie and Espach. On that occasion, according to the Third Respondent, Espach enquired whether he was resigning and was told that he was not. Reference was made to his discussions with Collie, the Third Respondent recording that the only discussion had related to payment for October. Espach mentioned that his wife worked in Gauteng and that he might in that context be able to assist the Third Respondent in finding another position. The Third Respondent contributed nothing further to the discussion and when Espach left, saying that it was nice knowing him and shaking his hand, he in turn left Espach's office.

- 2.9 In the course of his evidence however Espach testified that he believed that an agreement had been reached with the Third Respondent.
- 2.10 In subsequent discussions with his senior management team and sales consultants on 3 October 2001, the Third Respondent advised them that the Applicant wished him to leave immediately. He made no reference to any dismissal or to the conclusion of any agreement nor to the effect that he had been compelled in any way to go.
- 2.11 The same day, 3 October 2001, Collie went to the Third Respondent's club with a prepared letter of resignation which the Third Respondent indicated that he was too emotional to sign. He asked Collie when he should go and was advised to do so immediately. Later that day he sent an e-mail to his colleagues in the employ of the Applicant in which he bade them farewell and recorded his "need to move on and pursue the greener" pastures.
- 2.12 In the light of the fact that the Third Respondent had not signed the letter of resignation and, as from 3 October 2001, did not tender his services to the Applicant, Collie telephoned him on 4 October 2001 again requesting a letter of resignation and when told that the Third Respondent had received legal advice not to sign this, Collie called upon him to return to work. The Third Respondent refused to do so.
- 2.13 On 4 October 2001 the Third Respondent's attorneys wrote to the Applicant contending that the Third Respondent had been dismissed on 3 October 2001 "for refusing to accept substantial changes to his terms and conditions of employment".
- 2.14 That contention was rejected by a letter dated 8 October 2001 in which, denying that the Third Respondent had been dismissed, he was again called upon, through his attorneys, to return to work immediately. It is common

cause that he did not do so.

2.15 Eventually, in these circumstances, the Third Respondent was charged with having deserted his workplace and was given written notification to attend a disciplinary enquiry in that regard on 17 October 2001. He did not do so, the enquiry was held in his absence, he was found guilty and was dismissed.

2.16 The previous day, 16 October 2001, after he had received notice to attend the enquiry but before it had been held, the Third Respondent referred a dispute to the Second Respondent alleging that he had been dismissed on 3 October 2001 “for an unknown reason, but presumably for refusing to accept changes to my contract of employment”.

2.17 Following the consequent arbitration, the First Respondent in making his award, found that “Teladia had been told to leave and this amounted to a dismissal on 3 October 2001”.

3. The grounds for review submitted by the Applicant in these unopposed proceedings are in essence that the First Respondent’s findings are irreconcilable with the evidence led during the arbitration. I do not propose to review that evidence in unnecessary detail but what emerges from the record of those proceedings, and as the Applicant validly submits, it is clear that the First Respondent failed to attach sufficient weight to material documentary evidence presented to him, to the fact that on 25 September 2001 the Third Respondent had himself raised with the Applicant the question of leaving with a severance package, thereby initiating discussions in that direction, that he had been told by letter dated 1 October 2001 that if he persisted in his refusal to resign, a process of consultation with him would be initiated towards terminating his services for operational reasons in due course, to the fact that some forty-eight hours later the Applicant was alleged to have deviated from that course of conduct and dismissed him and finally, that in his

communications with his colleagues, the Third Respondent made no reference in any form to the fact that he was leaving other than voluntarily or that he had been dismissed. His explanation that he had not done so because he did not wish to “antagonise people” is manifestly without substance.

4. What is immediately apparent from the *conspectus* of the evidence adduced in the arbitration, is that the Third Respondent failed to discharge the onus upon him of proving that he had been dismissed on 3 October 2001 as alleged by his attorneys. The First Respondent’s finding to the contrary can only be defined as irrational, illogical and in complete disregard of the material documentary and oral evidence before him.
5. Significantly, in that regard, and with reference to a number of decided cases purportedly supporting his view, the First Respondent variously records that –

“Section 192(1) of the Act requires an Applicant in a dispute of this nature to prove the existence of a dismissal. However this does not absolve an employer from having to prove anything”.

“I am of the view that the Respondent did not discharge the onus that Teladia had resigned verbally or intended to terminate the employment relationship”.

6. It is a trite element of employment law that the primary onus was on the Third Respondent to prove his dismissal. Clearly, evidence from the Applicant could be used to do so but manifestly there was no overriding onus, in the perception of the First Respondent, on the Applicant to prove the Third Respondent’s resignation or intention to terminate his employment. The cases cited by the First Respondent moreover in support of his conclusions, and more particularly **Jooste v Transnet Ltd t/a SA Airways (1995) 16ILJ 629 (LAC)**, which is the leading case on the subject, relate to allegations of constructive dismissal. Manifestly, the First Respondent, in finding that the Third Respondent had not resigned but had been dismissed, confuses that situation with one of constructive dismissal, a concept never at any stage alleged to have been the case by the Third

Respondent, nor pleaded on his behalf in the arbitration proceedings.

7. The Applicant's evidence in the arbitration was unambiguous in relation to its requirement, in the face of his refusal to resign, that the Third Respondent returned to work immediately. That was an unconditional demand and there is compelling authority that an employee who deserts his workplace and, having left it, refuses to return to work when required by his employer to do so, has breached his contract of employment.

See **SACTWU v Dyasi (2001) 7BLLR 731 (LAC); South African Broadcasting Corporation v CCMA and Others (2001) 4BLLR 449 (LC)**

8. I am satisfied, on the well-established line of Labour Appeal Court cases now defining that principle, that the First Respondent's finding in the light of the evidence before him was irregular and devoid of rational or objective validity in relation thereto. It cannot, for these reasons, be sustained and in these circumstances the order that I make in this matter is the following.

- 8.1 The Third Respondent's award dated 24 May 2002 in his capacity as a Commissioner of the Second Respondent is reviewed and set aside.

- 8.2 The application being unopposed, there is no order as to costs

B M JAMMY

Acting Judge of the Labour Court

Date of hearing: 22 August 2003

Date of Judgment: September 2003

Representation:

For the Applicant:

Attorney G Higgins